
**29 JANUARY 2018**

# PRESS SUMMARY

# FEDERAL COURT OF MALAYSIA

## Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & 2ors
## Civil Appeal No. 01(F)-17-06/2016 (A) (Appeal no. 17)

## Indira Gandhi a/p Mutho v Kementerian Pelajaran Malaysia & anor
## Civil Appeal No. 01(F)-18-06/2016 (A) (Appeal no. 18)

## Indira Gandhi a/p Mutho v Patmanathan a/l Krishnan
## Civil Appeal No. 01(F)-19-06/2016 (A) (Appeal no. 19)

**JUSTICES**: Zulkefli Ahmad Makinudin (PCA), Richard Malanjum (CJSS), Zainun Ali, Abu Samah Nordin, Ramly Ali (FCJJ)

### BACKGROUND FACTS

The Appellant, Indira Gandhi a/p Mutho and the Respondent in Appeal no. 19, Patmanathan a/l Krishnan were married on 10 April 1993. The marriage was registered under the Law Reform (Marriage and Divorce) Act 1976 ('the LRA'). There were three children of the marriage, Tevi Darsiny, aged 12, Karan Dinish, aged 11 and the youngest, Prasana Diksa, who was 11 months old (at the time of filing of the Appellant's application for judicial review dated 9 June 2009).

On 11 March 2009, the 6th Respondent converted to Islam. At the time of the 6th Respondent's conversion, the two elder children were residing with the

Appellant while the youngest child was with the 6th Respondent. Sometime in April 2009, the Appellant received documents from the 6th Respondent showing that her three children had been converted to Islam on 2 April 2009 and that the Pengarah Jabatan Agama Islam Perak had issued three certificates of conversion to Islam on her three children. The documents also showed that the Registrar of Muallafs had registered the children as Muslims.

Aggrieved with the 6th Respondent's action, the Appellant filed an application for Judicial Review in the Ipoh High Court for an order of certiorari to quash the certificates of conversion to Islam of the children. The Appellant contended that the issuance of the certificates of conversion to Islam by the Registrar of Muallafs was ultra vires and illegal. It contravened the provisions of sections 96 and 106(b) of the Administration of the Religion of Islam (Perak) Enactment 2004 *(*the Perak Enactment), sections 5 and 11 of the Guardianship and Infants Act 1961 (the GIA) and Article 12(4) read together with Article 8 (2) of the Federal Constitution.

In her application for judicial review, the Respondent husband was cited as the 6th Respondent (hereinafter referred to as the 6th Respondent) while the Respondents in Appeal no. 17 (Director of the Islamic Religious Affairs Department of Perak, the Registrar of Muallafs and the Perak Government) and the Respondents in Appeal no. 18 (the Ministry of Education and the Government of Malaysia) were respectively cited as the first to the fifth Respondents.

**AT THE HIGH COURT**

The High Court allowed the Appellant's application for judicial review and set aside the certificates of conversion in question. It was held that Article 121(1A) of the Federal Constitution does not confer jurisdiction for constitutional interpretation on the syariah courts to the exclusion of the civil courts. Accordingly, the learned JC found that the High Court had exclusive jurisdiction to hear the application. The learned JC declared that the requirements in sections 96 and 106 of the Perak Enactment must be complied with by the

Registrar of Muallafs in issuing the Certificates of Conversion. Section 101(2), which states that the certificate shall be conclusive proof of the fact stated therein, was held not to oust the jurisdiction of the court where there is patent non-compliance with the statutory requirements.

**AT THE COURT OF APPEAL**

Aggrieved, the Respondents in Appeals no. 17 18 and 19 filed their respective appeals against the decision of the learned JC. The decision of the High Court was reversed by a majority in the Court of Appeal. Having found that the issue of the validity of conversion fell within the jurisdiction of the Syariah Court, the Court of Appeal held that the High Court had no power to question the decision of the Registrar of Muallafs or to consider the Registrar's compliance with the requirements in sections 96 and 106 of the Perak Enactment. Reference was made to the powers of the Registrar in registering Muallafs (Muslim converts) under section 100, and the conclusiveness of the Certificates of Conversion as proof of the facts stated in section 101(2). The Court of Appeal took the position that the fact that a person has been registered in the Register of Muallafs as stated in his Certificate of Conversion is proof that the conversion process had been done to the satisfaction of the Registrar.

**AT THE FEDERAL COURT**

On 19 May 2016, the Appellant was granted leave to appeal to the Federal Court. Three questions were posed to the Federal Court.

**JUDGMENT**

The Federal Court unanimously allows the three appeals with no order as to costs. Zainun Ali (FCJ) delivers the judgment of the Court.

**QUESTION 1**

*Whether the High Court has the exclusive jurisdiction pursuant to section 23, 24 and 25 and the Schedule of the Courts of Judicature Act 1964 (read together with Order 53 of the Rules of Court 2012) and/or its inherent jurisdiction to review the actions of the Registrar of Muallafs or his delegate acting as public authorities in exercising statutory powers vested by the Administration of the Religion of Islam (Perak) Enactment.* **[13]**

In the Question 1, the Appellant is challenging the administrative power exercised by the Registrar of Muallafs under the Perak Enactment with regard to the registration and issuance of the Certificates of Conversion of the three children. It is important that this is emphasized. That the Appellant in the question posed is not questioning the conversion itself but the process and legality thereof. The issue to consider is whether the Registrar acted with fidelity to its empowering statute in arriving at his decision; and in answering this question, is there need to exhort to intensive forensic study of the same, and whether a more nuanced approach can be taken. **[39]**

**Judicial Review**

The inherent judicial power of the civil courts under Article 121 (1) is inextricably intertwined with their constitutional role as a check and balance mechanism. **[36]**

Section 25 and the Schedule of the Courts of Judicature Act 1964 (the CJA) and Order 53 of the Rules of Court 2012 confer jurisdiction on the High Courts to exercise supervisory powers. The Syariah Courts are not conferred with the power to review administrative decisions of the authorities. **[40]**

In particular, the power of judicial review is essential to the constitutional role of the courts, and inherent in the basic structure of the Constitution. It cannot be abrogated or altered by Parliament by way of a constitutional amendment. The

conferment of judicial functions on bodies other than courts, thus understood, is an incursion into the judicial power of the Federation. **[42]**-**[51]**

It would be instructive to now distill the principles as have been illustrated above.

(i) Under Article 121(1) of the Federal Constitution, judicial power is vested exclusively in the civil High Courts. The jurisdiction and powers of the courts cannot be confined to federal law. The courts will continually and inevitably be engaged in the interpretation and enforcement of all laws that operate in this country and any other source of law recognised by our legal system.

(ii) Judicial power in particular the power of judicial review, is an essential feature of the basic structure of the Constitution.

(iii) Features in the basic structure of the Constitution cannot be abrogated by Parliament by way of constitutional amendment.

(iv) Judicial power may not be removed from the High Courts.

(v) Judicial power may not be conferred upon bodies other than the High Courts, unless such bodies comply with the safeguards provided in Part IX of the Constitution to ensure their independence. **[52]**

**Status of Syariah Courts**

The jurisdiction of Syariah Courts must be provided for by the State legislature within the limits of item 1; the courts do not have automatic jurisdiction over all the matters mentioned (see **Latifah Mat Zin v. Rosmawati bt. Shariban & Anor** [2007] 5 MLJ 101 [43]), in that its jurisdiction must be expressly conferred by state legislations. In other words, the State must claim ownership over the subject matters that fall within the jurisdiction of the syariah courts by providing for it expressly in its legislation; because otherwise, the syariah courts could be excluded from deciding on a subject matter which falls within Item 1 of List II (State List) in the Ninth Schedule to the Federal Constitution. This is an important point which in the past had affected the full effect of the Syariah

Court's power when there is no express and clear provision enacted in the State Enactment. **[55]**

Undoubtedly, section 50 of the Perak Enactment is viewed as a specific provision, expressly conferring jurisdiction on the Syariah Courts. It contains a list of subject matter that can be brought before the Syariah Courts. However, our view is that section 50(3)(b)(x) is not applicable to the facts of the present appeals. As is explicit, section 50(3)(b)(x) specifically confers jurisdiction on the Syariah Courts to issue a declaration that "a person is no longer Muslim". This would be applicable in a case where a person renounces his Islamic faith. But the issue in the present appeals concerns the validity of the certificates of conversion issued by the Registrar of Muallaf in respect of the children's conversion to Islam. If a finding is made by a court that a certificate (issued in respect of a person's conversion to Islam) is invalid, it can only mean that the said person has never at any time been a Muslim. Thus the question of him being 'no longer a Muslim' does not arise. It is observed that, save for the determination of the faith of a deceased person (section 50(3)(b)(xi) of the Perak Enactment), nowhere is there any express provision in section 50(3)(b) which confers jurisdiction on the Syariah Court to determine the validity of a person's conversion to Islam. Thus, the majority decision of the Court of Appeal had misdirected itself on the construction of section 50(3)(b) of the Perak Enactment **[60-62]**

It is evident from the marked differences in the establishment and constitution of the civil and Syariah Courts that the two courts operate on a different footing altogether. What they (clauses (1) and (1A) Article 121 of the Federal Constitution) illustrate is that, both the civil and syariah courts co-exist in their respective spheres, even if they are dissimilar in the extent of their powers and jurisdiction, in that the civil courts are possessed of powers, fundamental and intrinsic, as outlined in the Federal Constitution. **[64-65]**

In this it is emphasised that, if the relief sought by a plaintiff is in the nature of the "inherent powers" of the civil court (for example judicial review) or if it involves constitutional issues or interpretation of the law, then the civil courts

would be seised with jurisdiction to determine the issue, regardless of its subject matter and especially if it comes within the scope and ambit of judicial powers as outlined above. **[66]**

**Limits on Jurisdiction of Syariah Court**

The jurisdiction of the Syariah Court is limited by the following:-

(i) It may not exercise the inherent judicial powers of the Civil Courts including the power of Judicial review;

(ii) It is confined to the persons and subject matters listed in the State List; and

(iii) It must be provided for under the relevant state legislation. **[67]**

The effect of Article 121(1A) in the Malaysian context can be outlined as follows:-

1. The Federal Constitution is premised on certain underlying principles. In a Westminster model Constitution, these principles include the separation of powers, the rule of law, and the protection of minorities.
2. These principles are part of the basic structure of the Constitution. Hence, they cannot be abrogated or removed.
3. The role of the civil courts as established by virtue of Article 121 is fundamental to these principles. The judicial power of the civil courts is inherent in the basic structure of the Constitution.
4. Clause (1A) of Article 121 of the Federal Constitution recognises the power of the Syariah Courts when it exercises its power within jurisdiction.
5. Article 121 (1A) must be interpreted against the background of the foundational principles and other provisions in the Constitution.
6. The Canadian two-stage test may be applied to determine whether Article 121 (1A) can have the effect of granting jurisdiction to the Syariah Courts in judicial review applications to the exclusion of the civil courts :-

a. Applying stage 1 of the test, judicial power cannot be vested in the Syariah Courts, because such courts are not constituted as a "superior court" in accordance with the constitutional provisions safeguarding the independence of judges in Part IX.
b. Applying stage 2 of the test, judicial power cannot be removed from the civil courts, because such powers are part of the core or inherent jurisdiction of the civil courts.

7. The present appeal arose from an application for judicial review of the administrative actions of an executive body (the Registrar of Muallafs) in exercise of its statutory powers (under the Perak Enactment). Regardless of the label that may be applied to the subject matter, the power to review the lawfulness of executive action rests solely with the civil courts. **[84**]

Thus the amendment inserting clause (1A) in Article 121 does not oust the jurisdiction of the civil courts nor does it confer judicial power on the Syariah Courts. More importantly, Parliament does not have the power to make any constitutional amendment to give such an effect; it would be invalid, if not downright repugnant, to the notion of judicial power inherent in the basic structure of the constitution. **[86]**

The operation of Article 121 (1A) in practice illustrates this proposition. Clause (1A) does not remove the jurisdiction of civil courts where constitutional interpretation is concerned.. Clause (1A) also does not remove the jurisdiction of civil courts in the interpretation of legislation. This is the case even in relation to legislation enacted for the administration of Muslim law.. Neither does clause (1A) exclude the jurisdiction of civil courts in determining the constitutionality of state legislation for the establishment of Syariah Courts. Further, clause (1A) does not prevent civil courts from continuing to exercise jurisdiction in determining matters under federal law, notwithstanding the conversion of a party to Islam. **[87]- [91]**

Article 121 (1A) does not constitute a blanket exclusion of the jurisdiction of civil courts whenever a matter relating to Islamic law arises. The inherent judicial

power of civil courts in relation to judicial review and questions of constitutional or statutory interpretation is not and cannot be removed by the insertion of clause (1A). **[92]**

The powers of judicial review and of constitutional or statutory interpretation are pivotal constituents of the civil court's judicial power under Article 121(1). Such power is fundamentally inherent in their constitutional role as the bulwark against unlawful legislation and executive action. As part of the basic structure of the Constitution, it cannot be abrogated from the civil courts or conferred upon the Syariah Courts, whether by constitutional amendment, Act of Parliament or state legislation.

We now take a firm stand on this – in that before a Civil Court declines jurisdiction premised on the strength of Article 121(1A), it should first examine or scrutinise the nature of the matter before it. If it involves constitutional issues, it should not decline to hear merely on the basis of no jurisdiction. **[98]-[99]**

It is not disputed that the Registrar of Muallafs was exercising a statutory function as a public authority under the Perak Enactment in issuing the said Certificates. As had been clearly manifested earlier, the jurisdiction to review the actions of public authorities, and the interpretation of the relevant state or federal legislation as well as the Constitution, lie squarely within the jurisdiction of the civil courts. This jurisdiction, which constitutes the judicial power essential in the basic structure of the Constitution, is not and cannot be excluded from the civil courts and conferred upon the Syariah Courts by virtue of Article 121 (1A). **[101]**

In any case, the determination of the present appeals does not involve the interpretation of any Islamic personal law or principles. The yardstick to determine the validity of the conversion is the administrative compliance with the express conditions stated in sections 96 and 106 of the Perak Enactment, namely the utterance of the Affirmation of Faith (the Kalimah Syahadah) and the consent of the parent. The subject matter in the Appellant's application is not concerned with the status of her children as Muslims converts or with the

questions of Islamic personal law and practice, but rather with the more prosaic questions of the legality and constitutionality of administrative action taken by the Registrar in the exercise of his statutory powers. This is the pith of the question at hand. **[102]**

Since the Appellant is a non-Muslim and so has no locus to appear before the Syariah Court for the present application, the matter is now before us, seeing as the Syariah Court does not have the power to expand its own jurisdiction to choose to hear the Appellant's application. [**103]**

In these circumstances and in view of the views expressed, we have no difficulty in concluding that the High Court is seised with jurisdiction, to the exclusion of the Syariah Court, to hear the matter, and has rightly done so. Thus the first question is answered in the affirmative. **[104]**

**QUESTION 2**

> *Whether a child of a marriage registered under the Law Reform (Marriage & Divorce) Act 1976 ('a civil marriage') who has not attained the age of eighteen years must comply with both sections 96(1) and 106(b) of the administration of the Religion of Islam (Perak) Enactment 2004 (or similar provisions in State law throughout the country) before the Registrar of Muallafs or his delegate may register the conversion to Islam of that child [105]*

Section 100 provides for the power of the Registrar in respect of the Registration of Muallafs. In registering an applicant's conversion to Islam, the Registrar must first be satisfied that the requirements of section 96 have been fulfilled (section 101(2) of the Perak Enactment), otherwise the Registrar may permit the applicant to utter the Affirmation of Faith in accordance with the requirements of that section (section 101 (5)) **[112]-[113]**

The Registrar of Muallafs is appointed by the Majlis Agama Islam, a body corporate established pursuant to the Perak Enactment, to maintain the

Register of Muallafs (section 99 of the Perak Enactment). The issuance of Certificates of Conversion by the Registrar is an exercise of a statutory power under the Enactment. At the outset, it is axiomatic that any exercise of legal power, including discretionary power, is subject to legal limits. **[116]**

Thus it is clear to us that the boundaries of the exercise of powers conferred by legislation is solely for the determination by the courts. If an exercise of power under a statute exceeds the four corners of that statute, it would be ultra vires and a court of law must be able to hold it as such. **[118]**

Indeed, the courts have adopted a robust approach in reviewing the legality of decisions by public authorities even in the face of express ouster clauses. **[121]**

The legal limits of the Registrar of Muallaf's statutory power to issue Certificates of Conversion are prescribed in the Perak Enactment. From a plain reading of the relevant sections, the requirements in section 96 and section 106 are cumulative: both must be complied with. Section 96 is phrased in mandatory terms, spelling out the requirements that "shall be complied with for a valid conversion of a person to Islam." Nowhere in that section or anywhere else in the Perak Enactment was it suggested that the section 96 requirement may be dispensed with for any category of applicants; nor does the Enactment confer any discretion upon the Registrar of Muallafs to dispense with the requirement in respect of an applicant under the age of 18. In fact the provisions of section 100 sets out the procedure clearly: if the section 96 requirement is fulfilled in respect of an applicant, he may proceed to register the applicant's conversion; if section 96 is not fulfilled, he may permit the applicant to utter the two clauses of the Affirmation of Faith in his presence or that of his officers, "in accordance with the requirements of that section," i.e. to ensure that section 96 is fulfilled. **[124]**

The undisputed evidence is that the Appellant's children did not utter the two clauses of the Affirmation of Faith and were not present before the Registrar of Muallafs before the Certificate of Conversion was issued. The requirement in section 96(1) has not been fulfilled. The issuance of the Certificate **despite** the

non-fulfilment of the mandatory statutory requirement is an act which the Registrar had no power to do under the Enactment. In so doing, the Registrar had misconstrued the limits of his power and acted beyond its scope. Based on the principles in **Anisminic Ltd v. Foreign Compensation Commission** [1969] 2 AC 147, the lack of jurisdiction by the Registrar renders the Certificates issued a nullity. Section 101(2) cannot have the effect of excluding the court's power of judicial review over the Registrar's issuance of the Certificate. It is settled law that the supervisory jurisdiction of courts to determine the legality of administrative action cannot be excluded even by an express ouster clause. It would be repugnant to the rule of law and the judicial power of the courts if the Registrar's decision is immune from review, even in light of uncontroverted facts that the Registrar had no jurisdiction to make such a decision. **[125]**

In any case, the language of section 101(2) itself does not purport to oust judicial review. The section merely states that a Certificate of Conversion to the religion of Islam shall be conclusive proof of the facts stated therein. The facts stated in the Certificate are that the persons named have been converted to the religion of Islam, and that their names have been registered in the Registrar of Muallafs. In the instant appeal, the **fact** of the conversion or the registration of the Appellant's children are not challenged. What is challenged is the **legality** of the conversion and registration. **[126]**

For the reasons stated above, we answer the second question in the affirmative. **[131]**

**QUESTION 3**

> *Whether the mother and the father (if both are still surviving) of a child of a civil marriage must consent before a Certificate of Conversion to Islam can be issued in respect of that child ? [132]*

The central contention in relation to this question involves around the interpretation of Article 12(4) of the Federal Constitution. **[138]**

Much emphasis has been placed on the literal meaning of the singular noun 'parent' in Article 12(4). The interpretive guide in the Eleventh Schedule aside, it must be recalled that the provisions of the Constitution are not to be interpreted literally or pedantically. This is particularly so in respect of Article 12(4), which falls under the fundamental liberties section in Part II of the Constitution. It is against the backdrop of these principles that we consider the true construction of Article 12(4). **[144-146]**

Where the child's religion or religious upbringing is in issue, the paramount consideration for the court is to safeguard the welfare of the child, having regard to all the circumstances of the case. In so doing the court does not pass judgment on the tenets of either parent's belief. Conversion to another religion is a momentous decision affecting the life of a child, imposing on him a new and different set of personal laws. Where a decision of such significance as the conversion of a child; is made, it is undoubtedly in the best interests of the child that the consent of both parents must be sought. The contrary approach of allowing the child to be converted on the consent of only one parent would give rise to practical conundrums. **[153]**

Since a literal construction of Article 12(4) would give rise to consequences which the legislative could not possibly have intended, the Article should not be construed literally (**Sukma Darmawan Sasmitaat Madja v. Ketua Pengarah Penjara, Malaysia &** Anor [1999] 2 MLJ 241 at 247). A purposive reading of Article 12(4) that promotes the welfare of the child and is consistent with good sense would require the consent of both parents (if both are living) for the conversion of a minor child. [**154]**

Since custody of the children has been granted to the Appellant, it is the Appellant who exercises the dominant influence in their lives. To allow the other spouse to unilaterally convert the children without the consent of the Appellant would amount to a serious interference with the lifestyle of the new family unit which, following the case of **Teh Eng Kim v. Yew Peng Siong** [1977] 1 MLJ 234, would be a "very wrong thing." **[157]**

In our view, in the case of **Teoh Eng Huat v. Kadhi, Pasir Mas & Anor** [1990] 2 MLJ 300 does not stand for the proposition that the word 'parent' in Article 12(4) means a single parent. The issue in that case was whether the right to determine an infant's religion lies with the infant herself or her parent. **[160]**

It is noted that in translating Article 12(4) of the Federal Constitution, it would appear that the real essence of the English version is eluded. It is literally a case of being lost in translation. The reason 'parent' is used in 12(4) is to provide for a situation where indeed there is only one parent of the child – e.g. a single parent situation. But where both parents exist, then the 11th Schedule shall be relied upon. **[162]**

The equality of parental right in respect of an infant is expressly embodied in the Guardianship of Infants Act 1961 (GIA). The question now is whether the application of sections 5 and 11 of the GIA to the present appeals is precluded by section 1(3) thereof, because the Appellant's husband is a Muslim In this regard, parallels may be drawn between the GIA and the LRA. Section 3(3) of the LRA likewise excludes the application of the Act to non-Muslims, except in relation to divorce petitions where one party to a civil marriage has converted to Islam. **[163]-165]**

It is clear that in a situation where one party to a civil marriage has converted to Islam, the ex-spouse (or converting spouse) remains bound by their legal obligation under the LRA and the application thereof is not excluded by virtue of section 3(3). The same principle can be applied in respect of the operation of the GIA in the present appeal. The children in question are children of the Hindu marriage between the Appellant and her husband. **[169]**

Under the GIA, both parents have equal rights in relation to the custody and upbringing of the infant children and the wishes of both are to be taken into consideration. The conversion of the husband to Islam does not alter the antecedent legal position, nor does it bring the children out of the ambit of the GIA. **[170]**

Based on a purposive interpretation of Article 12(4) read with the Eleventh Schedule of the Federal Constitution, and on an application of sections 5 and 11 of the GIA, it is concluded that the consent of both the Appellant and her husband are required before a Certificate of Conversion to Islam can be issued in respect of the children. The third Question is thus answered in the affirmative. **[171]**

**Conclusion**

The present appeals concern the registration of conversion of children in a non-muslim marriage to Islam under the Perak Enactment. **[172]**

We hold that the High Court is seised with jurisdiction to exercise its supervisory power to decide on the complaints made by the Appellant against the administrative act of the Registrar of Muallafs in issuing the certificates of conversion of the Appellant's children to Islam. **[173]**

We find that the Registrar of Muallaf had no jurisdiction to issue the certificates of conversion in respect of the conversion of the children to Islam due to non-compliance of sections 96 and 106(b) of the Perak Enactment. In giving effect to the statutory provisions of the Perak Enactment the Court is not required to inquire into principles of Syariah law or to resolve doctrinal legal issues arising out of the matter. **[174]**

We also find that the certificates of conversion were issued without the consent of the Appellant thus contravening Article 12(4) of the Federal Constitution and sections 5 and 11 of the GIA. The certificates of conversion are void and must be set aside. **[175]**

This decision enables the comprehensive regime of judicial review based on standard concepts of justiciability. **[176]**

For the reasons above stated we allow all the three appeals by the Appellant. The majority decision and the orders of the Court of Appeal are hereby set aside. We affirm the decision and orders of the High Court. There will be no order as to costs. **[177]**

For the avoidance of any doubts, our decision in these appeals is to have prospective effect. The doctrine of prospective overruling will apply here so as not to give retrospective effect to decisions of the courts which had already taken place prior to the date of this judgment. **[178]**

***References in square brackets are to paragraphs in the judgment***

**NOTE**

This summary is provided to assist in understanding the Court's decision. The full judgment of the Court is the only authoritative document.