IN THE HIGH COURT OF MALAYA IN IPOH

IN THE STATE OF PERAK DARUL RIDZUAN

JUDICIAL REVIEW NO.: 25-10-2009

In the matter of the Certificate of Conversion to Islam (JAPK/DWH/02/78 Jld 3 [37] dated 2 April 2009 concerning Tevi Darsiny (Birth Certificate No: AA 70160); Certificate of Conversion to Islam (JAPK/DWH/02/78 Jld 3 [35] dated 2 April 2009 concerning Karan Dinish (Birth Certificate No: AJ 27146) and Certificate of Conversion to Islam (JAPK/DWH/02/78 Jld 3 [36] dated 2 April 2009 concerning Prasana Diksa (Birth Certificate No: BJ 14511)("the children")

And

In the matter of Part IX and in particular Section 106 of the Administration of the Religion of Islam (Perak) Enactment 2004

And

In the matter of Sections 5 dan 11 of the Guardianship of Infants Act 1961

And

In the matter of Article 8, 11 and 12(4) of the Federal Constitution and the decision of the Supreme Court in **Teoh Eng Huat v Kadhi, Pasir Mas & Anor** [1990] 2 MLJ 300, SC

And

In the matter of the Convention against the Elimination of All Forms of Discrimination Against Women (CEDAW), Convention on the Rights of the Child (CRC), the Universal Declaration of Human Rights 1948 dan Section 4(4) of the Human Rights Commission of Malaysia Act 1999

And

In the matter of Paragraph 1 of the Schedule to the Courts of Judicature Act 1964 and Order 53 of the Rules of the High Court 1980

And an application for certiorari and/or declaratory reliefs.

BETWEEN

INDIRA GANDHI A/P MUTHO
(No. KP 750110-08-5002)

… APPLICANT

AND

1. **PENGARAH JABATAN AGAMA ISLAM PERAK**
2. **PENDAFTAR MUALLAF**
3. **KERAJAAN NEGERI PERAK**
4. **KEMENTERIAN PELAJARAN MALAYSIA**
5. **KERAJAAN MALAYSIA**
6. **PATMANATHAN A/L KRISHNAN**
   (also known as Muhammad Riduan bin Abdullah
   (No. K/P: 690526-08-5987)

… RESPONDENTS

THE JUDGMENT OF JUDICIAL COMMISSIONER

YA TUAN LEE SWEE SENG

The Applicant Indira Gandhi married Pathmanathan (the 6th Respondent) in a civil marriage on 10 April 1993. Their love blossomed and they were blessed with 3 children. The first is Tevi Darshiny and she was 12 years old at the time of filing of this application for judicial review. The second is Karan Dinesh, 11 years old then. The youngest, Prasana Diksa was hardly 11 months old then.

What was once love and blessings has become a legal battlefield. She recounted that in the beginning of 2009 there were many quarrels and altercations that culminated in the husband forcibly whisking the youngest child from her on 31 March 2009. The baby was still nursing at her breast. She lodged a police report.

Problem

Things happened in quick succession. She was told by the police that her husband had converted to Islam. His new name is Muhammad Riduan bin Abdullah. She was fearful that he might forcibly convert the 3 children as well. She ran to Court for an ex-parte application in Ipoh High Court OS

MT1-24-513-2009 for an interim custody order of the 3 children and an injunction to restrain the husband from forcibly removing the 3 children. She also asked for an order that the husband or whoever was having custody of her baby to hand back the baby to her.

Before the inter-parte hearing on 30 April 2009 she read with anguish from the documents served on her by her husband that her 3 children have been converted to Islam and that the first Respondent has registered the conversion. She saw for herself the exhibits attached to the affidavit of the husband showing the Certificates of Conversion to Islam for the 3 children and also the new names given them.

She also learned that on 3 April 2009 the Syariah High Court had given care, control and custody of the 3 children to the husband. She worked feverishly with her solicitors and counsel to file this application. She has not seen her youngest child from then to this day. No mother can ever forget her nursing child.

Prayers

The relevant reliefs prayed for are as follows:

Take notice that the Court will be moved on 6th day of August 2009, by the Applicant above-named for leave to apply for judicial review of the conversion to Islam of Tevi Darsiny (Birth Certificate No: AA 70160), Karan Dinish (Birth Certificate No: AJ 27146) and Prasana Diksa (Birth Certificate No: BZ 14511) ("the Children") and of the 1st Respondent's decision to issue the Certificate(s) of Conversion to Islam (JAPK/DWH/02/78 Jld 3 [37]), (JAPK/DWH/02/78 Jld 3 [35]) and (JAPK/DWH/02/78 Jld 3 [36]0, all three dated 2nd April 2009 in respect of the Children ("the Certificates") and asks for an order granting leave to apply for judicial review for the following orders:

a) an Order of *certiorari* pursuant to Order 53, Rule 8(2) to remove the Certificates into the High Court to be quashed owing to non-compliance with Section 99, 100 and 101 of the Administration of the Religion of Islam (Perak) Enactment 2004 ("the Perak Enactment");

b) an Order of *prohibition* pursuant to Order 53, Rule 1 restraining the Second Respondent and his servants, officers and/or agents from howsoever registering or causing to be registered the children and each of them as "Muslims" or *"Muallaf*" pursuant to the Perak Enactment;

c) further or in the alternative, a declaration that the Certificates and each of them are null and void and of no effect as they are *ultra vires* and/or contrary to and/or inconsistent with

(i) the provisions of Part IX and in particular section 106(b) of the Perak Enactment, and/or

(ii) sections 5 and 11 of the Guardianship of Infants Act 1961 (Act 351), and/or

(iii) Article 12(4) read together with Article 8(2) of the Federal Constitution

d) further or in the alternative, a declaration that the Infants and each of them have not been converted to Islam in accordance with the law

e) the costs of this application

f) such further or other relief as this Honourable Court deems fit."

Leave was duly given by his Lordship Zainal Adzam J and there was no appeal on the leave granted. This is the hearing of the substantive application for judicial review.

The 1st Respondent is the Pengarah Jabatan Agama Islam Perak. The 2nd is the Pendaftar Muallaf. The 3rd, 4th, 5th and 6th Respondents are the Perak State Government, the Ministry of Education, the Government of Malaysia and the husband respectively.

Principles

To put the problem in its proper perspective it must be stated at the outset that her Ladyship Wan Afrah J in awarding custody of the three children to the wife in a separate application filed under the Law Reform (Marriage and Divorce) Act 1976 observed as follows:

> "Having decided that I have jurisdiction to hear the matter, the next question would be who should have custody of the children. With respect the Defendant in their written submission did not really address the court on this issue. Anyway after taking into consideration the evidence before this court the order of custody are as follows:
>
> (i) The youngest daughter, Prasana Diksa, is an infant. I invoke Section 88(3) of the Law Reform (Marriage and Divorce) Act 1976 that a child below the age of 7 years to be with his or her mother.

(ii) Also based on the evidence before me, two elder children are girls and both girls are currently residing with the mother. The eldest girl is reaching the age of puberty and in reference to the criterias as set out in the case referred by the applicant/Plaintiff's counsel, i.e. *Sivajothi a/p K Suppiah v Kunathasan a/l Chelliah* [2006] 6 MLJ 48, the paramount consideration in deciding who gets custody of the children is the welfare of the children, I am of the opinion the mother will provide and care for the young girls better than the father.

(iii) The facts show the father moves around due to his job and I am of the opinion it does not provide for stability for the children. The children are best placed in the care of the mother."

The Respondent husband has not appealed successfully against the said order. His record of appeal was filed way out of time and the Court of Appeal had struck out his appeal. Further appeal had not been granted by the Federal Court.

Whether the High Court has jurisdiction to hear a case where a parent of a child is challenging the constitutionality and validity of the conversion of the children to a civil marriage to Islam by the other

parent who has converted to Islam (converted parent) without the consent of the non-converting parent.

The core of the challenge is the constitutional construct on the fundamental liberties provisions of the Constitution. The Syariah Court is a creature of State law and does not have jurisdiction to decide on the constitutionality of matters said to be within its exclusive purview and province. Only the superior civil Courts being a creature of the Constitution can.

The Federal Court in **Latifah bte Mat Zin v Rosmawati bte Sharibun & Anor** [2007] 5 MLJ 101 has dealt quite exhaustively with the question of when the Syariah Courts and Civil Superior Courts have jurisdiction over a matter. As was stated by his Lordship Abdul Hamid Mohamed FCJ (as he then was) at pages 116-117:

> "[45] The point to note here is that both courts, civil and syariah, are creatures of statutes. Both owe their existence to statutes, the Federal Constitution, the Acts of Parliament and the State Enactments. Both get their jurisdictions from statutes i.e. Constitution, federal law or State law, as the case may be. So, it is to the relevant statutes that they should look to determine whether they have jurisdiction or not. Even if the syariah court does not exist, the civil court will still have to look at the statutes to see whether it has

jurisdiction over a matter or not. Similarly, even if the civil court does not exist, the syariah court will still have to look at the statute to see whether it has jurisdiction over a matter or not. Each court must determine for itself first whether it has jurisdiction over a particular matter in the first place, in the case of the syariah courts in the States, by referring to the relevant State laws and in the case of the syariah court in the Federal Territory, the relevant Federal laws. Just because the other court does not have jurisdiction over a matter does not mean that it has jurisdiction over it. So, to take the example given earlier, **if one of the parties is a non-Muslim, the syariah court does not have jurisdiction over the case, even if the subject matter falls within its jurisdiction.** On the other hand, just because one of the parties is a non-Muslim does not mean that the civil court has jurisdiction over the case if the subject matter is not within its jurisdiction."

On the status, standing and scope of jurisdiction of the Civil Superior Courts as opposed to the Syariah Court, his Lordship made this incisive observation:

"[29] The first point that must be reemphasized is that, like the Federal List, it is a legislative list and nothing more. It contains

matters that the Legislature of a State may make laws for their respective States. [The Federal Territories are an exception]. So, to give an example, when it talks about 'the constitution, organization and procedure of Syariah courts', what it means is that the Legislature of a State may make law to set up or constitute the syariah courts in the State. Until such law is made such courts do not exist. The position is different from the case of the civil High Courts, the Court of Appeal and the Federal Court. In the case of those civil courts, there is a whole Part in the Constitution (Part IX) with the title 'the Judiciary'.

[30] Article 121(1) begins with the words **'There shall be** two High Courts of co-ordinate jurisdiction and status,' namely the High Court in Malaya and the High Court in Sabah and Sarawak. (Emphasis added.)

[31] Article 121(1B) begins with the words **'There shall be** a court which shall be known as the Mahkamah Rayuan (Court of Appeal) …' (Emphasis added.)

[32] Article 121 (2) begins with the words **'There shall be** a court which shall be known as the Mahkamah Persekutuan (Federal Court) ….' (Emphasis added.)

[33] **So, the civil High Courts, the Court of Appeal and the Federal Court are established by the Constitution itself.** But, that is not the case with the syariah courts. A **syariah court in a State is established or comes into being only when the Legislature of the State makes law to establish it, pursuant to the powers given to it by item 1 of the State List.** In fact, the position of the syariah courts, in this respect, is similar to the Session Courts and the Magistrates' Courts. In respect of the last two mentioned courts, which the Constitution call 'inferior courts', Article 121(1) merely says, omitting the irrelevant parts:

121(1) There shall be … such inferior courts as may be provided by federal law… In fact, the position of the syariah courts, in this respect, is similar to the Session Courts and the Magistrates' Courts. In respect of the last two mentioned courts, which the Constitution call 'inferior courts', Article 121(1) merely says, omitting the irrelevant parts:

> 121(1) There shall be … such inferior courts as may be provided by federal law…" (emphasis added)

The fact that the Syariah Court does not have jurisdiction over a non-Muslim is clear as stated below:

"[49] Until the problem is solved by the Legislature, it appears that the only way out now is, if in a case in the civil court, an Islamic law issue arises, which is within the jurisdiction of the syariah court, the party raising the issue should file a case in the syariah court solely for the determination of that issue and the decision of the syariah court on that issue should then be applied by the civil court in the determination of the case. But, this is only possible if both parties are Muslims. **If one of the parties is not a Muslim such an application to the syariah court cannot be made. If the non-Muslim party is the would-be Plaintiff, he is unable even to commence proceedings in the syariah court. If the non-Muslim party is the would-be defendant, he would not be able to appear to put up his defence.** The problem persists. Similarly, if in a case in the syariah court, a civil law issue e.g. land law or companies law arises, the party raising the issue should file a case in the civil court for the determination of that issue which decision should be applied by the syariah court in deciding the case." (emphasis added)

Item 1 of List II State List in the Ninth Schedule to the Federal Constitution provides the matters within the legislative powers of the states as follows:

"List II—State List

1. Except with respect to the Federal Territories of Kuala Lumpur, Labuan and Putrajaya, **Islamic law and personal and family law of persons professing the religion of Islam**, including the Islamic law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trusts; Wakafs and the definition and regulation of charitable and religious trusts, the appointment of trustees and the incorporation of persons in respect of Islamic religious and charitable endowments, institutions, trusts, charities and charitable institutions operating wholly within the State; Malay customs; Zakat, Fitrah and Baitulmal or similar Islamic religious revenue; mosques or any Islamic public places of worship, creation and punishment of offences by persons professing the religion of Islam against precepts of that religion, except in regard to matters included in the Federal List; the constitution, organization and procedure of **Syariah courts**, which shall have **jurisdiction only over persons professing the religion of Islam** and in respect only of any of the matters included in this paragraph, but shall not have jurisdiction in respect of offences except in so far as conferred by federal law, the control of propagating doctrines and beliefs among

persons professing the religion of Islam; the determination of matters of Islamic law and doctrine and Malay custom." (emphasis added)

As can be seen above, the jurisdiction of the Syariah courts is expressed not as "jurisdiction over persons profession the religion of Islam" but as "jurisdiction **only over persons** profession the religion of Islam." In other words non-Muslims cannot come ever under the jurisdiction of the Syariah courts and its orders cannot bind a non-Muslim, be he or she a parent, spouse, child or person. See the case of **Shamala a/p Sathiyaseelan v Dr Jeyaganesh a/l C Mogarajah** [2004] 5 AMR 75, a decision of his Lordship Faiza Thamby Chik J.

When one looks at the Perak Enactment, it provides in section 50(3)(b) that in its civil jurisdiction, the Syariah High Court shall hear and determine all actions and proceedings if all the parties to the actions or proceedings are Muslims and if it relates to the specific matters set out from (i) to (xii) as follows:

"50.(1)A Syariah High Court shall have jurisdiction throughout the State of Perak Darul Ridzuan and shall be presided over by a Syariah High Court Judge.

(2)Notwithstanding subsection (1), the Chief Syariah Judge may sit as a Syariah High Court Judge and preside over such Court.

(3)The Syariah High Court shall –

(a)in its criminal jurisdiction, try any offence committed by a Muslim and punishable under the Islamic Family Law (Perak) Enactment 2004 [Enactment No. 6 Of 2004] or under any other written law prescribing offences against precepts of the religion of Islam for the time being in force, and may impose any punishment provided therefor; and

(b)in its civil jurisdiction, hear and determine all actions and proceedings **if all the parties to the actions or proceedings are Muslims** and the actions or proceedings relate to –

(i) betrothal, marriage, ruju', divoce, annulment of marriage (fasakh), nusyuz, or judicial separation (faraq) or any other matter relating to the relationship between husband and wife;

(ii) any disposition of or claim to property arising out of any of the matters set out in subparagraph (i);

(iii) the maintenance of dependants, legitimacy, or guardianship or custody (hadhanah) of infants;

(iv) the division of, or claims to, harta sepencarian;

(v) wills or gifts made while in a state of marad-al-maut;

(vi) gifts inter vivos, or settlements made without adequate consideration in money or money's worth by a Muslim;

(vii) wakaf or nazr;

(viii) division and inheritance of testate or intestate property;

(ix) the determination of the persons entitled to share in the estate of a deceased Muslim or the shares to which such persons are respectively entitled;

(x) a declaration that a person is no longer a Muslim;

(xi) a declaration that a deceased person was a Muslim or otherwise at the time of his death; and

(xii) other matters in respect of which jurisdiction is conferred by any written law."

On the contrary the civil High Court would have jurisdiction as what the Applicant is challenging is the constitutionality of the various actions of the Respondents in converting the children to a civil marraige to Islam as well as asserting her rights under the Fundamental Liberties provisions in Part II of the Federal Constitution as well as under the Guardianship of Infants Act 1961. Under the Schedule referred to in section 25(2) of the Courts of Judicature Act 1964 it is provided as follows:

"ADDITIONAL POWERS OF HIGH COURT

Prerogative writs

1. Power to issue to any person or authority directions, orders or writs, including writs of the nature of habeas corpus, mandamus, prohibition, quo warranto and **certiorari**, **or any others, for the enforcement of the rights conferred by Part II of the Constitution, or any of them, or for any purpose."** (emphasis added)

The recent Court of Appeal case in **Manoharan a/l Malayalam & Anor v Dato' Seri Mohd Najib bin Tun Haji Abdul Razak & 2 Ors** [2013] 4 AMR 309 is both illuminating and insightful with respect to the locus that a citizen has to come to the civil High Court to challenge the constitutionality of a particular act of a government agency or of the government. His Lordship Mohd Hishamudin Mohd Yunus JCA observed as follows and I must quote *in extenso:*

"[17] On our part, in the context of the present case, we prefer to adopt the approach as taken by David Wong J (as he then was) in *Robert Linggi v The Government of Malaysia* [2011] 6 AMR 458; [2011] 2 MLJ 741 that, in a case where the complaint of the plaintiff is that the federal government or its agent has violated the Federal Constitution by its action or legislation, he has the locus to bring an

action to declare the action of the federal government or its agent as being unconstitutional, without the necessity of showing that his personal interest or some special interest of his has been adversely affected. **The approach that we now take is essential if the constitutional principles that the Constitution is the supreme law of the Federation and that the courts are the protectors of the Constitution are to have any effective meaning.** In other words, what we are ruling is to the effect that in a case where the complaint of the plaintiff is that there has been a violation of the Constitution by the federal government or its agency, the *Lim Kit Siang* principles on locus standi do not apply.

[18] In *Robert Linggi*, the plaintiff was a Sabahan. He complained of a breach by the federal government of the constitutional provisions entrenched in Article 161E(2)(b) of the Federal Constitution. This Article provides:

(2) No amendment shall be made to the Constitution without the concurrence of the Yang di-Pertua Negeri of the State of Sabah and Sarawak or each of the States of Sabah and Sarawak concerned, if the amendment is such as to affect the operation of the Constitution as regards any of the following matters:

(b) the constitution and jurisdiction of the High Court in Sabah and Sarawak and the appointment, removal and suspension of judges of that court; ...

[19] He sought, among others, for a declaration that the removal of the power of appointment of judicial commissioners to the High Court of Sabah and Sarawak by the respective Yang di-Pertua Negeri and the setting up of the judicial appointment commission under the Judicial Appointment Commission Act 2009 were unconstitutional and thus null and void.

[20] Before David Wong J, the learned senior federal counsel, for the Government of Malaysia (the defendant), raised the issue of the locus of the plaintiff, citing the judgment of Buckley J in *Boyce v Paddington Borough Council* [1903] 1 Ch 109, and the judgment of Bowen CJ in *Rickards v The Medical Benefit Fund of Australia Ltd* (unreported, 18 April 1975, referred to in Declaratory Orders (2nd edn) PW Young QC). David Wong J, however, rejected the argument of the learned senior federal counsel. The learned judge of the High Court of Kota Kinabalu ruled (at p 464 (AMR); p 749 (MLJ)):

[6] With respect to counsel for the defendant, to adopt her contention would be taking a retro step in the law on “locus standi” in public law

especially when there is a challenge to legislations made in contravention to the Federal Constitution. The Federal Constitution is the supreme law of the country and was drafted by the founding fathers of the country after taking into consideration the interests of all relevant parties prior to the formation of Malaysia. It is a document which belongs to all Malaysians irrespective of their race and standing in society and starting from that base, **it must logically follow that all Malaysians had an entrenched right to litigate their grievance in court when there was a perceived breach of the Constitution by the Legislature.**

And, at a later part of his judgment, the learned judge said (at p 465–466 (AMR); p 751 (MLJ)):

[11] The plaintiff, as a Sabahan, in my view is genuinely concerned with the erosion of the rights of Sabah in so far as "the constitution and jurisdiction of the High Court in Sabah and Sarawak and the appointment, removal and suspension of judges of that court" and since it concerns an attempt to uphold the Federal Constitution, I have no hesitation in finding that the plaintiff has the "locus standi" to bring this action. I am fully aware of the argument that this may encourage litigation but in my view when there is a challenge

concerning any dismantling of the supreme law of the country, litigation should be encouraged. In any event, all Malaysians have a duty to protect our Constitution.

[21] David Wong J found support in his judgment in the Tanzania High Court case of *Rev Christopher Mtikila v The Attorney-General* Civil Case No. 5 of 1993 where it was held:

The notion of personal interest, personal injury or sufficient interest over and above the interest of the general public has more to do with private law as distinct from public law. In matters of public interest litigation this court will not deny standing to a genuine and bona fide litigant even where he has no personal interest in the matter ... Given all these and other circumstances, if there should spring up a public-spirited individual and seek the courts intervention against legislation or actions that prevent the Constitution, the court's, as guardian and trustee of the government and what it stands for, is under an obligation to rise up to the occasion and grant him standing. The present petitioner is such an individual.

[22] Another case relied upon by David Wong J is the judgment of the Supreme Court of Ireland in *The Society for the Protection of the Unborn Children (Ireland) Limited v Diarmuid Coogan & Ors,*

Defendants [1988] IR 734. Here, in this case, the Supreme Court of Ireland held:

Every member of the public has an interest in seeing that the fundamental law of the state is not defeated, and although the courts are the ultimate guardian of the Constitution, such protection is possible only where their powers are invoked. Since breaches of constitutional rights may on occasion be threatened by the government itself or its agents, it would be intolerable if access to the courts to defend and vindicate such constitutional rights were confined to the attorney general as the very officer of state instructed to defend the government's position.

[23] With respect, we wholeheartedly adopt the above passages as quoted by David Wong J in the Tanzanian case of *Rev Christopher Mtikila* and in the Irish case of *The Society for the Protection of Unborn Children.* Lest we be misunderstood, we wish to stress here that the principle that we are enunciating in this judgment on the issue of locus standi concerned purely a situation where there is a bona fide complaint by a concerned citizen of a violation of the Constitution by the government or its agent."

Laws must be interpreted in consonant with the intention of the framers and the framers could not have intended any class of its citizens to be without remedy when it comes to a thing so important as the conversion of one's child to a religion different from that of his parents to a civil marriage. Here the Applicant is the very parent of the children and is directly affected by the decision of the husband in converting the children unilaterally without her consent and the consent of her children.

The Constitution is supreme and Parliament cannot take away the judicial powers of the Court to hear the genuine grievance of any of its citizens. Article 4 (1) declares that the Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void. The High Courts not only have the general powers referred to in section 23 of the Courts of Judicature Act 1964 and the additional powers referred to in the Schedule to the Act but would always have a residual or reserve powers to hear a complaint from any citizen who claims that his or her constitutional rights or legal rights have been violated whether under a Federal law or a State Enactment.

Indeed when there is an apparent conflict in jurisdiction, his Lordship Hishamudin Yunus J (as he then was) has given the following approach to

follow which I find most appropriate in **Dato' Kadar Shah Tun Sulaiman v Datin Fauziah Haron** [2008] 4 CLJ 504:

> "[15] In my judgment, **where there is an issue of competing jurisdiction between the civil court and the Syariah court, the proceedings before the High Court of Malaya or the High Court of Sabah and Sarawak must take precedence over the Syariah courts** as the High Court of Malaya and the High Court of Sabah and Sarawak are superior civil courts, being High Courts duly constituted under the Federal Constitution. Syariah courts are mere State courts established by State law, and under the Federal Constitution these State courts do not enjoy the same status and powers as the High Courts established under the Courts of Judicature Act 1964. Indeed, **the High Courts have supervisory powers over Syariah Courts** just as the High Courts have supervisory powers over other inferior tribunals like, for instance, the Industrial Court.
>
> [16] Of course, I am constantly conscious of (and, perhaps, troubled by) cls. (1) and (1A) of art. 121 of the Federal Constitution. But these provisions cannot be interpreted literally or rigidly. At times common sense must prevail. In interpreting them the purposive approach must be adopted."

Article 121(1) and (1A) are reproduced below:

"Article 121. Judicial power of the Federation.

(1) There shall be two High Courts of co-ordinate jurisdiction and status, namely—

(a) one in the States of Malaya, which shall be known as the High Court in Malaya and shall have its principal registry at such place in the States of Malaya as the Yang di-Pertuan Agong may determine; and

(b) one in the States of Sabah and Sarawak, which shall be known as the High Court in Sabah and Sarawak and shall have its principal registry at such place in the States of Sabah and Sarawak as the Yang di-Pertuan Agong may determine;

(c) (Repealed).

and such inferior courts as may be provided by federal law and the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law.

(1A) The courts referred to in Clause (1) **shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts.**" (emphasis added)

Article 121(1A) of the Federal Constitution does not take away the powers of the civil High Courts the moment a matter comes within the jurisdiction of the Syariah courts. Not only must the **subject matter** alluded to be purely within the province of the Syariah courts but that the **subject** appearing before it must be Muslims. Both the **powers** and the **parties** must come within the purview and province of the Syariah courts. Then and only then would the civil High Court not have jurisdiction. It was further held by the Federal Court in **Abdul Kahar bin Ahmad v Kerajaan Negeri Selangor (Kerajaan Malaysia, Intervener) & Anor** [2008] 4 CLJ 309 that Article 121(1A) of the Constitution does not confer jurisdiction on Syariah Courts to interpret the Constitution to the exclusion of the civil High Courts.

Contrary to the submission of all the learned counsel for the Defendants, the non-Muslim wife here has no *locus* to appear in the Syariah courts as a party even if the Syariah courts were to allow. In **Federal Hotel Sdn Bhd v National Union of Hotel, Bar and Restaurant Workers** [1963] 1 MLJ 175, the Federal Court said at page 178G (left): "It is a fundamental principle that no consent or acquiescence can confer on a court or tribunal with limited statutory jurisdiction any power to act beyond that jurisdiction … ".

Parliament in its wisdom has anticipated such a conflict and has made provision for it in section 4 of the Courts of Judicature Act 1964 as follows:

"Provision to prevent conflict of laws

4. In the event of inconsistency or **conflict between this Act and any other written law other than the Constitution** in force at the commencement of this Act, the provisions of **this Act shall prevail.**"

I therefore dismiss the preliminary objection on lack of jurisdiction of this Court to hear the current application for judicial review.

Whether the conversion of a child to a civil marriage to Islam by a converted parent without the consent of the other non-converting parent violates Article 12 of the Federal Constitution

Article 12 reads:

"Article 12. Rights in respect of education.

(1) Without prejudice to the generality of Article 8, there shall be no discrimination against any citizen on the grounds only of religion, race, descent or place of birth—

(a) in the administration of any educational institution maintained by a public authority, and, in particular, the admission of pupils or students or the payment of fees; or

(b) in providing out of the funds of a public authority financial aid for

the maintenance or education of pupils or students in any educational institution (whether or not maintained by a public authority and whether within or outside the Federation).

(2) Every religious group has the right to establish and maintain institutions for the education of children in its own religion, and there shall be no discrimination on the ground only of religion in any law relating to such institutions or in the administration of any such law; but it shall be lawful for the Federation or a State to establish or maintain or assist in establishing or maintaining Islamic institutions or provide or assist in providing instruction in the religion of Islam and incur such expenditure as may be necessary for the purpose.

(3) No person shall be required to receive instruction in or to take part in any ceremony or act of worship of a religion other than his own.

(4) For the purposes of Clause (3) **the religion of a person under the age of eighteen years shall be decided by his parent or guardian.**" (emphasis added)

The relevant part of Article 12 is really Article 12(4) which has been the subject of much debate and discussion. That Article 12(4) answers the question who may decide the religion of a child for the purpose of receiving

instruction in or to taking part in any ceremony or act of worship of a religion other than his own. The Supreme Court in **Teoh Eng Huat v The Kadhi of Pasir Mas, Kelantan & Anor** [1990] 1 CLJ 277 at p 280-281 has decided as follows:

> "Reverting to the issue before this Court, the crucial question remains whether the subject, an infant at the time of conversion, had legal capacity according to law applicable to her. It is our considered view that the law applicable to her immediately prior to her conversion is civil law. **We do not agree with the learned Judge's decision that the subject although below 18 had capacity to choose her own religion. As the law applicable to the infant at the time of conversion is the civil law, the right of religious practice of the infant shall therefore be the guardian on her behalf until she becomes a major.** In short, **we hold that a person under 18 does not have that right and in the case of non-Muslims the parent or guardian normally have the choice of the minor's religion**." (emphasis added)

It is therefore too late in the day to argue that Article 12(4) is confined only to the limited purpose of a child receiving religious education or

participating in a religious ceremony other than his own. It is now taken to cover the choice of the religion of the minor as well. Therefore the answer to the question as to who may convert the minor child is this: It is the "parent" and not the maid or the teacher or the kadhi or the temple priest or the pastor. It does not answer the question "whether it is either parent or both parents?".

If the framers had wanted the decision of a single parent to be all-sufficient in any and every situation, they could have used the expression "...decided by either of his parents..." or "....decided by any one of his parents..." or even "...decided by his father or mother..." as is the current translation used in the Bahasa Malaysia translation done by the Attorney General's Chambers. It seems that before 2002 the Bahasa Malaysia translation of the Constitution as printed by the Government Printers had used the words "ibu bapa" instead of "ibu atau bapa" in Article 12(4). The translation of "parent" into "ibu bapa" is a direct translation whereas the translation "ibu atau bapa" is an interpretative translation. The official version remains the English version under Article 160a as the relevant prescription of the national language version under Article 160b has not been effected. The

learned Senior Federal Counsel (SFC) Encik Noorhisham has not submitted otherwise.

There would of course be situations where one parent has passed away or could not be located. It would be extremely burdensome then if the framers had used the expression "....decided by his parents..." They would well be cases where one parent is not interested in matters of religion and would be quite content to leave it to the other parent to decide where religion of the child is concerned.

We have no problem understanding the noun "parent". It covers both the father and mother of the child. The father is the parent of the child and so is the mother. It envisages and enjoins parents to act as a united whole in unison. It can be said that the two persons of father and mother are found in the word "parent". The Malay language captures this especially well in the translation for "parent" as the word "ibu bapa".

By and large there is no problem where the religion of a child is concerned in the nature of educational, social and spiritual upbringing. Problems may arise as it does here where one parent converts to another religion and want the minor child to follow and the other parent does not convert and does not want the child to follow the new-found religion of the converted

parent. If by "parent" is meant either parent then we would have a situation where one day the converted parent converts the child to his religion and the next day the other parent realising this would convert the child back to her religion. The same can then be repeated *ad nauseam.* Surely the framers could not have intended that. While guardianship rights would include the right to decide on the type of education including religious education and in our context the religious upbringing including conversion of the minor child, where parents cannot agree they are of course expected to allow sense and sensibility to prevail and to maintain the status quo until the minor child reaches 18 years old and then the child would be able to choose for his own. The interpretation as stating that the consent or choice of a single parent would suffice would be to create conflict and chaos for the family unit. Parents then may apply to the Courts to decide which is to prevail and the Court would have to consider what is in the best interest of the child.

The above illustration is used to show that it makes more sense to invoke the principle of interpretation as set out in Article 160(1) of the Constitution which refers to the Eleventh Schedule with respect to the provisions of the

Interpretation and General Clauses Act 1948 with respect to section 2(95) as follows:

> "Construction of singular or plural -
>
> **words in the singular include the plural**, and words in the plural include the singular." (emphasis added)

Thus the expression in Article 12(4) can be read as "....decided by his parents..." The same should then apply evenly and equally to all kinds of conversion where both parents cannot be of one mind. The framers did not countenance a situation where for any religion other than Islam the consent of both parents are required where they cannot agree on the religion of the minor child but that for conversion to Islam only the consent of the converted parent would suffice.

The Administration of the Religion of Islam Enactments in several states recognise this and so they have the words "ibu dan bapa" in their Bahasa Malaysia version of the Enactment when it comes to the words "parent" or "parents". Most states have the equivalent of section 106(b) of the Enakmen Pentadbiran Agama Islam (Perak) 2004 which reads:

"Seksyen 106. Keupayaan untuk memeluk agama Islam.

Bagi maksud Bahagian ini, seseorang yang tidak beragama Islam boleh memeluk agama Islam jika dia sempurna akal dan--

(a) sudah mencapai umur lapan belas tahun; atau

(b) jika dia belum mencapai umur lapan belas tahun, **ibu atau bapa atau penjaganya** mengizinkan secara bertulis pemelukan agama Islam olehnya." (emphasis added)

Learned counsel K Shanmuga for the Applicant had made a helpful comparison of the various Enactments in Enclosure 51A. Penang, Perlis, Selangor and Terengganu in their respective Enactments (section 117(b) of the Enakmen Pentadbiran Agama Islam (Negeri Pulau Pinang) 2004, section 117(b) of the Enakmen Pentadbiran Agama Islam (Negeri Perlis) 2006, section 117(b) of the Enakmen Pentadbiran Agama Islam (Negeri Selangor) 2003 and section 101(b) of the Enakmen Pentadbiran Hal Ehwal Agama Islam (Terengganu) 2001; have all used the words "ibu dan bapa".

The states that have used the word "ibubapa" are Johor and Sabah. The Federal Territories and 5 states namely Perak, Kedah, Melaka, Negeri Sembilan and Sarawak have used the words "ibu atau bapa".

Pahang and Kelantan have a differently worded section on conversion and its effect on the minor child and as it does not employ the use of the words "ibu dan bapa" , "ibubapa" or "ibu atau bapa" it shall not be discussed here.

Are we saying then that these various Enactments in Penang, Perlis, Selangor and Terengganu are unconstitutional because they require both parents' consent for a valid conversion when one alone is required or more perhaps they have understood the constitutional requirement better in that for such an important decision as the conversion of a child of a non-Muslim marriage to Islam, the consent of both parents in writing is required?

What is even more interesting is that the English version of the respective Enactments in Penang, Selangor and Terengganu have used the word "parent" as corresponding to the Bahasa Malaysia words "ibu dan bapa". The Bahasa Malaysia version being the authoritative text for State Enactments at least, it shall prevail over the English text.

Merely accepting the consent of one parent knowing that the other parent had objected would lead to a less than desirable state, to say the least, of repeated conversions of one parent of the child against the conversion of the other parent. Or as in the case of a conversion of the minor child to Islam by the converted parent, the non-converting parent is said to have no

locus to challenged the validity of the Certificate of Conversion which final and binding and that once converted into Islam no one can convert the minor child out of Islam.

Both sense and sensibility must hold sway and if the parents cannot arrive at or achieve an agreement then they must agree to disagree and allow the *status quo* to prevail both for domestic peace and national harmony.

It has been argued for the Respondents that the Federal Court in **Subashini Rajasingam v Saravanan Thangathoray & Other Appeals** [2008] 2 CLJ 1 has put beyond a pale of doubt that the word "parent" in Article 12(4) means a single parent. Therefore either the husband or wife has the right to convert a child to the marriage to Islam. It would of course be binding on me if that is the *ratio* of the case. The appeal of the wife in the case was on whether her application for an inter-parte injunction should have been allowed. The Federal Court had dismissed her appeal on ground that her divorce petition was filed prematurely. At page 28 the majority speaking through his Lordship Nik Hashim FCJ had held as follows:

> "[12] In the present case, it is clear from the evidence that the husband converted himself and the elder son to Islam on May 18,

2006. The certificates of conversion to Islam issued to them under s 112 of the Administration of the Religion of Islam (State of Selangor) Enactment 2003 conclusively proved the fact that their conversion took place on May 18, 2006. Thus, I respectfully agree with Hassan Lah JCA that the wife's petition was filed in contravention of the requirement under the proviso to s 51(1) of the 1976 Act in that it was filed 2 months and 18 days short of 3 months after the husband's conversion to Islam. It follows therefore that the petition was premature and invalid and the summons in chambers, ex parte and inter parte based on the petition which were filed therein were also invalid.

[13] Learned counsel for the wife also submitted that notwithstanding the finding that the petition for divorce was invalid for failure to comply with the proviso to s 51(1) of the 1976 Act, the wife is still entitled to proceed with the application regarding custody pursuant to s 88 and ancillary reliefs under ss 77 and 93 of the 1976 Act. In my view, the wife is entitled to proceed with the rest of the application but it would be most appropriate if she files her petition for divorce afresh under s

51 coupled with an application for ancillary reliefs as the court would grant the reliefs under s 51(2) upon dissolution of the marriage.

[14] **On finding that the wife's petition for divorce was invalid, is it still necessary for this court to answer the questions posed? I would answer the questions nevertheless as the questions are questions of importance upon which a decision of the Federal Court would be to public advantage."** (emphasis added)

As can be seen it was strictly speaking not necessary to answer the other questions posed for the Federal Court to decide. However the Federal Court proceeded to answer those questions as they were of importance upon which a decision of the Federal Court would be to public advantage. Such a decision even if it be *obiter* is of course to be treated with the utmost respect. Recently the Federal Court had so stated in **AmBank (M) Bhd (formerly known as AmFinance Bhd) v Tan Tem Som and another appeal** [2013] 3 MLJ 179 at p 208 as follows:

"In our view, that statement albeit, being a judicial pronouncement emanating from the highest court in the country, deserves utmost respect."

According it the utmost respect, I am prepared to go on the basis that though I am confident of my own position, I must concede that I might well be wrong and that based on the doctrine of *stare decisis* I must of necessity follow the decision of the Federal Court irrespective of my own understanding.

Whether the conversion of a child to a civil marriage to Islam by a converted parent without the consent of the other non-converting parent violates Article 8 of the Federal Constitution.

Article 8 is the Equality provision of the Federal Constitution. It reads:

> "Article 8. Equality.
>
> (1) All persons are **equal before the law** and entitled to **the equal protection of the law**.
>
> (2) Except as expressly authorized by this Constitution, there shall be no discrimination against citizens on the ground only of **religion, race**, descent, place of birth or **gender in any law** or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or

disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment." (emphasis added)

A constitutional provision has to be interpreted to be consistent with the other constitutional provisions of a Constitution. More than that the various provisions of the fundamental liberties provisions of the Constitution must be interpreted to be consistent with one another. If either the father or mother can decide on the religion of the minor child, then both their decisions must be given effect to when they are at variance to each other. However the argument of the Respondents is that once the child has been converted to Islam then the non-converting parent loses his or her right to decide on the religious upbringing of the child. The learned SFC Encik Noorhisham, submitted that once a child has been converted to Islam the non-converting parent cannot teach the child any religion other than Islam. If that be true, than all the more reason why such a conversion would violate Article 8.

The equal rights of guardianship of both parents to a civil marriage are clearly spelt out under the Guardianship of Infants Act 1961. Section 5 was amended by the Guardianship of Infants (Amendment) Act 1999 to provide for equality of parental rights. It reads:

""5. Equality of parental rights.

(1) In relation to **the custody or upbringing of an infant** or the administration of any property belonging to or held in trust for an infant or the application of the income of any such property, **a mother shall have the same rights and authority as the law allows to a father, and the rights and authority of mother and father shall be equal.**

(2) The mother of an infant shall have the like powers of applying to the Court in respect of any matter affecting the infant as are possessed by the father." (emphasis added)

Section 11 further requires the High Court to consider the following:

"The Court or a Judge, in exercising the powers conferred by this Act, shall have regard primarily to the welfare of the infant and shall, where the infant has a parent or parents, consider the wishes of such parent or both of them."

The father and mother here have equal rights where the upbringing of the child to the civil marriage is concerned. Section 3 when speaking of the duties of guardian of person states that "The guardian of the person of an infant shall have the custody of the infant, and shall be responsible for his support, health and education." Upbringing and education of the infant

would include religious upbringing and education as well. If by conversion, the converted parent can denude and deprive the non-converting parent of his or her guardianship rights then that would be in conflict with Article 8 for the non-converting parent has a right to equal protection under the law. There is a further inequality that the non-converting parent would have to face. The non-converting parent cannot go to the Syariah Court to contest the validity of the child's conversion to Islam. Neither can the non-converting parent who is not a Muslim go to the Syariah Court to be heard on matters of custody. Section 50(3)(b) of the Perak Enactment is clear as the jurisdiction of the Syariah High Court is to hear and determine all actions and proceedings if **all the parties to the action or proceedings are Muslims.** Both the Administration of the Religion of Islam Enactment in Perak and in other states prohibit a non-Muslim from appearing as a party in a matter before the Syariah Court. The Supreme Court in **Tan Sung Mooi v Too Miew Kim** [1994] 3 MLJ 117 at page 126 held that a Syariah Court does not have jurisdiction over a non-Muslim.

How is the non-converting parent to get justice when he or she would not be heard? As stated before, Parliament could not have intended the non-

converting parent to be without his or her legal remedies and reliefs especially in a matter so important as the conversion of the child.

The Equality protection must be interpreted purposively to prevent inequality. Here one is not talking about equality in the sense of the converted parent can be either a father or a mother. Here the equality that has been taken away is the equal rights with respect to the upbringing and education of a minor child.

Where there are two possible interpretations, the one that is consistent with the other constitutional provisions and in particular the other fundamental liberties provisions of the Constitution should prevail. It cannot be gainsaid that by interpreting Article 12(4) as requiring a single parent's consent with respect to the minor child's conversion to Islam such that the rights of the non-converting parent can be effectively disregarded would fall foul of Article 8 unless one justify it on the narrow ground that it applies evenly to either a man or woman converting to Islam. Even if it can be so applied, it will still be an inequality when one considers the religion and race of the non-converting parent.

Both on ground of religion, race and gender, there has been a violation of Article 8 where the actions of the converted parent and the other

Respondents are concerned in converting the minor children without the consent of the other non-converting parent. Under Article 160 of the Federal Constitution, the definition of "Malay" is a religion-based definition for it means a person who professes the religion of Islam, habitually speaks the Malay language and conforms to Malay custom.

However as the Federal Court in **Subashini's** case has decided that Article 8 is not violated in a conversion by the converted parent of a minor child to Islam, I have to defer to that decision based on the doctrine of *stare decisis*. This I do on an abundance of caution though it may not be the *ratio* of the case but only *obiter* as discussed above when considering Article 12(4).

Whether the conversion of a child to a civil marriage to Islam by a converted parent without the consent of the other non-converting parent violates Article 11 with respect to the practice of one's religion under the Federal Constitution

Article 11 of the Federal Constitution is on freedom of religion.

> Article 11. Freedom of religion.

(1) Every person has the right to profess and practise his religion and, subject to Clause (4), to propagate it.

The practice of one's religion would include the teaching of the tenets of faith to one's children. It would include bringing one's children to attend the place of one's worship and to participate in religious ceremony. One's faith is wrapped up with one's children and cannot be confined or restricted to one's relationship with the Divine. Little wonder that when it comes to deciding what instructions in or what ceremony or act of worship of a religion a child is required to participate in, that choice is the choice given to the parent or guardian of the child. In most cases there are no problems but where a parent has a new-found faith, he or she must not exercise it in such a way as to deny or denude the rights of the other parent to practise his or her faith and to deprive the other parent of his or her rights altogether.

Indeed Article 11 is inextricably tied up with Article 5(1) of the Federal Constitution where no person shall be deprived of his life or personal liberty save in accordance with the law. "Life" has been understood to be more that just mere existence. It is not just physical life sustained by food but emotional, intellectual and spiritual as well for man does not live by bread

alone. The human person is not just mere body, but soul and spirit as well. It includes the right to choose one's religious beliefs and to teach one's religious beliefs to one's children. It encompasses life in all its fullness where the spiritual and religious aspects of one's life is concerned. After all the first tenet of the Rukunegara declares "Belief in God." If the right to life extends to the right to livelihood as eloquently expressed his Lordship Gopal Sri Ram JCA (as he then was) in **Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor** [1996] 2 CLJ 771, then it surely must be extended to encompass the spiritual and religious aspects of life as well. As is captured in the creed of Junior Chamber International, a worldwide youth and leadership voluntary organization, "Faith in God gives meaning and purpose to human life." The right to find meaning and purpose to human life in things spiritual or in religion, which might well be a life-long journey, must certainly be an integral part of the right to life guaranteed under Article 5(1) of the Federal Constitution. It includes a parent nurturing and nourishing the children with spiritual milk and later meat, teaching line upon line and precept upon precept from a babe to an adult.

"Liberty" too would include the freedom to bring one's children to a place of worship or religious instruction. At the appointed time when the child

reaches 18, the child can then decide what religion he wants to embrace or by default follow in his parents' religion or religions until perhaps some defining divine moments in his life when he is transformed beyond measure by a spiritual encounter.

It might be opportune at this juncture to remind ourselves of the preamble to the declaration of our national philosophy in the Rukunegara which must be given less of a lip service and more of a life-sustaining commitment. It reads:

"OUR NATION MALAYSIA is dedicated to:

· **Achieving a greater unity for her people;**

· Maintaining a democratic way of life;

· Creating a just society in which the wealth of the nation shall be equitably distributed;

· **Ensuring a liberal approach to her rich and diverse cultural traditions;**

· Building a progressive society, oriented towards modern science and technology.

WE, Malaysians, as one, pledge to strive to attain these goals guided by the following principles:-

Belief in God

Loyalty to King and Country

Supremacy of the Constitution

The Rule of Law

Good Behaviour and Morality" (emphasis added)

Article 3(1) of the Federal Constitution proclaims that Islam is the religion of the Federation; but other religions may be practised in peace and harmony in any part of the Federation. It does not confine other religions to the part of mere personal profession of faith but covers the practice of the faith with its attendant religious education, acts of worship and religious ceremony. By stating as a preface that Islam is the religion of the Federation that does not in any way prohibit the practices of other faiths.

In **Che Omar Bin Che Soh v Public Prosecutor** [1988] 2 MLJ 55 the Supreme Court held that by the word "Islam" in Article 3(1) in the context means only such acts as relate to rituals and ceremonies and that the law in this country is still what it is today, secular law.

In **Teoh Eng Huat's** case (supra) his Lordship Abdul Hamid Omar LP quoted from the Reid Commission Report as follows at pages 279-280:

> "The Malaysian Constitution was not the product of an overnight thought but the brainchild of Constitutional and administrative experts from UK, Australia, India and West Pakistan, known commonly as the Reid Commission following the name of the Rt. Hon. Lord Reid, LLD., FRSE., a Lord of Appeal in the ordinary. Prior to the finding of the commission there were negotiations, discussions and consensus between the British Government, the Malay Rulers and the Alliance party representing various racial and religious groups. On religion the commission submitted:
>
> > 169. We have considered the question whether there should be any statement in the Constitution to the effect that Islam should be the State religion. **There was universal agreement that if any such provision were inserted it must be made clear that it would not in any way affect the civil rights of non-Muslims.** In the memorandum submitted by the alliance it was stated:

‘the religion of Malaysia shall be Islam. **The observance of this principle shall not impose any disability on non-Muslim nationals professing and practising their own religions and shall not imply the State is not a secular State.**’ There is nothing in the draft Constitution to affect the continuance of the present position in the States with regard to recognition of Islam or to prevent the recognition of Islam in the federation by legislation or otherwise in any respect which does not prejudice the civil rights of individual non-Muslims. The majority of us think that it is best to leave the matter on this basis, looking to the fact that council for the rulers said to us - “it is Their Highnesses’ considered view that it would not be desirable to insert some declaration such as has been suggested that the Muslim Faith or Islamic Faith be the established religion of the federation. Their Highnesses are not in favour of such a declaration being inserted ..." (emphasis added)

For a parent, and in this case a non-Muslim parent, not to be able to teach his or her children the tenets of his or her faith would be to deprive that

parent of his or her constitutional rights not just under Article 11 but also Article 5(1) and Article 3(1) of the Federal Constitution. How is the non-converting parent to practise his religion in peace and harmony when he cannot even teach his minor child the tenets of his faith and be at liberty to bring the child along for worship and religious ceremony? See the case of **Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri & Anor** [2010] 2 MLJ 78. Worse still is the fear that if she does so, as in this case, she runs the risk of being arrested by the State Islamic Affairs enforcement officers.

I bear in mind the test to be used in interpreting constitutionally guaranteed rights as spelt out in **Sivarasa Rasiah v Badan Peguam Malaysia & Anor** [2010] 3 CLJ 507 at page 515 by his Lordship Gopal Sri Ram FCJ as follows:

> ".....the test that should be applied in determining whether a constitutionally guaranteed right has been violated. The test is that laid down by an unusually strong Supreme Court in the case of *Dewan Undangan Negeri Kelantan v. Nordin bin Salleh* [1992] 1 CLJ 72 (Rep); [1992] 2 CLJ 1125; [1992] 1 MLJ 709, as per the following extract from the headnote to the report:

In testing the validity of the state action with regard to fundamental rights, what the court must consider is whether it directly affects the fundamental rights or its inevitable effect or **consequence on the fundamental rights is such that it makes their exercise ineffective or illusory.**" (emphasis added)

Therefore the acts of the converted parent in the 6th Respondent and that of the other Respondents in authorising, affirming and confirming the conversion of the minor children to Islam without the consent of the non-converting parent in the person of the Applicant is unconstitutional, illegal, null and void and of no effect.

Whether the conversion of a child to a civil marriage to Islam by a converted parent without the consent of the other non-converting parent and in the absence of the children before the converting authority violates the Administration of the Religion of Islam (Perak) Enactment 2004

Section 96 of the Perak Enactment provides as follows:

"Requirements for conversion to the religion of Islam.

96. (1) The following requirements shall be complied with for a valid conversion of a person to Islam:

(a) the person must **utter in reasonably intelligible Arabic** the two clauses of the Affirmation of Faith;

(b) at the time of uttering the **two clauses of the Affirmation of Faith** the person must be aware that they mean “I bear witness that there is no god but Allah and I bear witness that the Prophet Muhammad S.A.W. is the Messenger of Allah”; and

(c) **the utterance must be made of the person’s own free will.**

(2) A person who is incapable of speech may, for the purpose of fulfilling the requirement of paragraph (1)(a), utter the 2 clauses of the Affirmation of Faith by means of signs that convey the meaning specified in paragraph (b) of that subsection." (emphasis added)

It is not in dispute that the children were not present, and in any case, did not utter the 2 clauses of the Affirmation of Faith. It was submitted by the Applicant that this failure to comply with a basic requirement for a valid conversion under the Perak Enactment must surely render the conversion void.

Learned counsel for the 6th Respondent Encik Hatim Musa informed the Court that this is the section that has always been used by the 1st and 2nd Respondents for the conversion of minor children to Islam even without their presence to utter the 2 clauses in the Affirmations of Faith and even as babies still unable to utter the said Affirmation, let alone doing it on one's own free will.

If a section of an Act or Enactment has been wrongly invoked and applied, then its repeated use does not make a non-compliance into a proper compliance. The fact that the utterance must be made voluntarily of one's free will underscores the fact that in Islam as in other religions, there should be no compulsion for as is often said, it is with the heart that one believes and with the mouth one confesses.

In fact section 106 of the Perak Enactment should be read together with section 96(1). Section 106 reads as follows:

> "For the purpose of the Part, **a person who is not a Muslim may convert to the religion of Islam** if he is of sound mind and -
>
> (a) has attained the age of eighteen years; and
>
> (b) if he has not attained the age of eighteen years, his parent or guardian consents in writing to his conversion." (emphasis added)

As can be seen from the opening words of section 106, it starts of with the desire of the person to convert to Islam. If he has attained 18 years old then he does not need the consent of his parent and may proceed to comply with section 96. If he has not attained 18 years old then he must nevertheless come within the meaning of "a person who is not a Muslim may convert to the religion of Islam"; in other words there must be a desire from within his heart. In such a case the consent of his parent must be given in writing and more than that the requirements of section 96 must be complied with for it says "The following requirements shall be complied with for a valid conversion of a person to Islam."

The power of the civil High Court to interpret the provisions of a State Enactment even with respect to administration of Muslim law was clearly set out by the Court of Appeal in **Zaina Abidin bin Ahmad @ S Maniam & Ors v Kerajaaan Malaysia & Ors** [2009] 6 MLJ 863 where his Lordship Low Hop Bing JCA said as follows:

> "[11] It is abundantly clear to us that the declarations sought by the plaintiffs in the OS revolve around the interpretation concerning the constitutionality of legislation enacted by Parliament and the State Legislative Assembly of Selangor Darul Ehsan. While art 121(1A), effective from 10 June 1988, has taken away the jurisdiction of the

civil courts in respect of matters within the jurisdiction of the Syariah courts, **it does not take away the jurisdiction of the civil courts to interpret written laws of the state enacted for the administration of muslim law**: per Hashim Yeop A Sani CJ (Malaya) (as he then was) in *Dalip Kaur v Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor* [1992] 1 MLJ 1 (SC). Our civil courts are entrusted with the responsibility of determining the issue of constitutionality of legislation: per Dzaiddin SCJ (later CJ (Malaya)) in *Soon Singh a/l Bikar Singh v Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor* [1999] 1 MLJ 489 (FC). Interpretation of the Federal Constitution vis-à-vis other written laws is a matter for the civil courts: per Abdul Hamid Mohamad FCJ (later Chief Justice) in *Latifah bte Mat Zin v Rosmawati bte Sharibun & Anor* [2007] 5 MLJ 101 at p 123; [2007] 5 CLJ 253 (FC) para [76]at p 288 para [76], and also in *Abdul Kahar bin Ahmad v Kerajaan Negeri Selangor (Kerajaan Malaysia, intervener) & Anor* [2008] 3 MLJ 617; [2008] 4 CLJ 309 (FC)." (emphasis added)

Encik Hatim for the 6th Respondent husband argued that under section 101(2) of the Perak Enactment, such a Certificate of Conversion to the Religion of Islam shall be conclusive proof of the facts stated in the

Certificate. Such a clause cannot oust the jurisdiction of the Court and more so when there is a patent non-compliance with the provision of the Perak Enactment itself in section 98 and 106. It is only an evidentiary tool and where no one is disputing that the children were not before the converting authority and as such could not have uttered the 2 clauses of Affirmation of Faith, then the very conclusiveness of the said Certificate is open to challenge.

Therefore the said Certificates of Conversion to the Religion of Islam are null and void and of no effect for non-compliance with section 96 of the Perak Enactment.

Whether the conversion of a child to a civil marriage to Islam by a converted parent without the consent of and without hearing the other non-converting parent as well as without hearing the children violates the principle of natural justice

Even if the consent of a single parent would suffice under section 106(b) of the Perak Enactment, there is nevertheless a need to give the non-converting parent the right to be heard. This is even more necessary for the said parent as in this case the Applicant would be deprived of her rights

altogether where the decision regarding the religious upbringing of the child is concerned. It was not in dispute that the children were not before the Pendaftar Muallaf to be heard before they are asked to make the utterance of the 2 clauses in the Affirmation of Faith. In fact they did not make the utterance of Affirmation of Faith before the Pendaftar Muallaf as they were not there before him. They were with the mother at that material time. The youngest at that time was just 11 months old and still nursing at the mother's breast and has not learned to speak or tell the right hand from the left hand.

The conversion without the consent of the child would impose on the child a set of personal laws which he must obey and which is enforceable against the child. Learned Assistant State Legal Adviser Encik Hamzah Ismail takes the view that as the decision of the converted father to convert the children cannot be faulted, the child can upon reaching 18 years old, apply to the Muallaf office or apply to the Syariah Court for a declaration that he is no longer a Muslim under section 50(3)(b)(x) of the Perak Enactment. The question is why should a child be put through the Syariah Court's process when in the first place he is not heard before his conversion?

With the Certificate of Conversion to the Religion of Islam, his identification card will state the child to be a Muslim. With that he becomes identified with and imbibe a new set of personal and family laws enforceable by the Syariah Courts. With respect to marriage he can only marry another Muslim. With respect to education he would have to attend 'agama' classes and sit for the exam. The difficulty of getting his identification card changed can be seen in the case of **Lina Joy v Majlis Agama Islam Wilayah Persekutuan & Anor** [2007] 3 CLJ 557, a decision of the Federal Court. If he fails at the Syariah High Court his remedy is to appeal to the Syariah Appeal Court. In between he can be subject to counselling and other education programme. If he fails at the Syariah Appeal Court, that would be the end of the matter for him. It makes more sense for such a defining decision as conversion, for the child to opt in when he is 18 years old if he is minded to do so rather than to opt out at 18 years old with the attendant legal process that he has to go through which outcome is uncertain to him.

The statistics on applications for conversion out of Islam or "murtad" is revealing. To a question raised in Parliament on 14 June 2011, the then Minister in the Prime Minister's Department, Senator Mejar Jeneral Dato' Seri Jamil Khir Bin Haji Baharom (B) disclosed that from 2000-2010, there

were 864 such applications to the Syariah courts and out of that only 168 have been granted. (See Tab 14 of Enclosure 53).

The Federal Court in **Datuk Haji Mohammad Tufail bin Mahmud v Dato' Ting Check Sii** [2009] MLJU 403 at [2] stated that the 'right to be heard is an integral part of the rules of natural justice.' Failure to observe natural justice renders a decision void as observed by the Privy Council decision from Malaysia in **Surinder Singh Kanda v Government of the Federation of Malaya** [1962] MLJ 169. Here both the mother and the children have not been heard and the Certificate of Conversion cannot be sustained for breach of natural justice and ought to be quashed.

Whether the conversion of a child to a civil marriage to Islam by a converting parent without the consent of the other non-converting parent and the child violates international norms and conventions

As a member of the international community, Malaysia cannot ignore our commitments to the various conventions that we have adopted and indeed we have amended our laws to more clearly reflect our commitments. To begin with the Universal Declaration of Human Rights (UDHR) is already part of the *corpus* of our law. The importance of the fundamental liberties provision of the Federal Constitution is underscored by the fact that section

2 of the Human Rights Commission of Malaysia Act 1999 in defining "human rights" said it refers to fundamental liberties as enshrined in Part II of the Federal Constitution. The word 'enshrined' is a powerful word properly placed to protect that which is innate and inviolable, sacrosanct and sacred.

The fundamental liberties in Part II of the Federal Constitution are the human rights referred to in the Human Rights Commission of Malaysia Act 1999. In carrying out the purpose of the Act, the Commission shall have regard to the Universal Declaration of Human Rights 1948 (UDHR) to the extent that it is not inconsistent with the Federal Constitution. See section 4(4) of the Act. It would not be incorrect to say that we have given the principles of the UDHR a statutory status and a primal place in our legal landscape. The UDHR is part and parcel of our jurisprudence as the international norms in the UDHR are binding on all Member countries unless they are inconsistent with the Member countries' constitutions. Indeed there is the persuasive argument that the principles enunciated in the UDHR have attained the status of international customary law.

Article 3 of the UDHR states that everyone has the right to life, liberty and security of person.

Article 18 of the UDHR provides that:

"Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."

Article 26 of the UDHR reads:

"3. Parents have a prior right to choose the kind of education that shall be given to their children."

Article 29 of the UDHR says:

"1. Everyone has duties to the community in which alone the free and full development of his personality is possible.

2. In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society."

Taking all the above declaration of rights into consideration and none have been shown to be against the Federal Constitution, an interpretation of the Fundamental Liberties provisions that best promote our commitments to the international community is to be enjoined. An interpretaion of Article

12(4) and Article 8(1)and (2) of the Federal Constitution vesting equal rights in both the parents to decide on a minor child's religious upbringing and religion would be falling in tandem with such international human rights principle and would place beyond a pale of doubt that there is no discrimination on ground of race, religion or gender. To that extent as provided for in Article 75 of the Federal Constitution any State law that is inconsistent with any Federal legislation is void to the extent of the inconsistency.

Then there are the Convention on the Rights of the Child (CRC) and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) both of which were ratified by Malaysia on 17 February 1995 and 5 July 1996 respectively. The principles propounded in these conventions are highly persuasive and should provide that guiding light to help us interpret the Fundamental Liberties enshrined in our Constitution taking into consideration accepted norms of international law in these international conventions that have been widely accepted and ratified by countries across the world.

The CRC to date has 193 parties. It incorporates the full range of human rights of all children based on a set of 4 “guiding principles”:

(i) non-discrimination

(ii) best interests of the child

(iii) survival and development

(iv) participation.

Article 8(1) CRC requires States parties to “undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference”. Article 8(2) states that “Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity”.

I agree with Mr Shanmuga for the Applicant that as a non-Muslim in a majority-Muslim country, the Applicant and her children must be allowed to profess and practise their religion within their family. No one is quibbling nor indeed can question let alone quarrel with the husband's conversion to Islam. It is his constitutional right to decide to embrace a new religion from that which he was born into. However he is not to exercise that right with respect to the children of the civil marriage in the manner as to denude and deprive the wife with respect to her rights as a guardian of the children nor to deprive the children of their rights to decide which religions of their parents to embrace in the fullness of time when they reach 18 years old. If

the law allows the children's original religion to be changed without the consent of their mother, this would fundamentally negate the requirements of the CRC.

Article 18 of the CRC which Article Malaysia has not made any reservations enjoins the following:

> "1. States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern."

Article 30 of the CRC which Article Malaysia has not made any reservation at all provides that:

> "In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language".

Even though “Islam is the religion of the Federation” under Article 3 of the Federal Constitution, the same Article provides that “other religions may be practised in peace and harmony”. Article 3(4) provides that nothing in Article 3 should derogate from any other provision of the Federal Constitution.

CEDAW to date has 187 parties. Malaysia has an obligation to “take all appropriate measures” to eliminate discrimination against women and ensure that women are able to develop and advance in all areas: civil, political, economic, social and/or cultural, including the private sphere of the home. CEDAW is based on 3 main principles: substantive equality, non-discrimination, and state obligation. The State must ensure women their equal rights in a number of areas, including equal rights in marriage and family life.

Article 16(1), which focuses on family life, obligates the State to:

> “....take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:

(d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;…"

Article 5(b) of the Convention requires States parties to take all appropriate measures to "ensure that family education includes … the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases".

Articles 16(1) and 5 of CEDAW stress that both parents – the father and mother – must have the same rights and common responsibilities in all matters relating to their children, including their upbringing and development.

There is no indication that Malaysia has made its reservations on the above Articles of CEDAW. When Malaysia reported to the Committee on the Elimination of Discrimination Against Women (CEDAW Committee), the treaty body overseeing compliance with CEDAW, the Committee asked a number of written and oral questions relating to the dual legal system and the way women are affected by this system.

In its concluding comments, the CEDAW Committee stated in its 35th session 15 May - 2 June 2006 as follows:

> "The Committee is concerned about the existence of the dual legal system of civil law and multiple versions of Syariah law, which results in continuing discrimination against women, particularly in the field of marriage and family relations… The Committee is further concerned about the lack of clarity in the legal system, particularly as to whether civil or Syariah law applies to the marriages of non-Muslim women whose husbands convert to Islam?

The Committee went on to recommend that Malaysia

> "… undertake a process of law reform to remove inconsistencies between civil law and Syariah law, including by ensuring that any conflict of law with regard to women's rights to equality and non-discrimination is resolved in full compliance with the Constitution and the provisions of the Convention and the Committee's general recommendations, particularly general recommendation 21 on equality in marriage and family relations".

Mr Shanmuga draws the Court's attention to the High Court of Australia case of **Ministry for Immigration and Ethnic Affairs v Teoh** (1995) 183 CLR 273 where it was held that:

"… Ratification of a convention is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the Convention. That positive statement is an adequate foundation for a legitimate expectation, absent statutory or executive indications to the contrary, that administrative decision-makers will act in accordance with the Convention…"

As the President of the Court of Appeal of New South Wales (as he then was), Justice Michael Kirby, in his article '*The Australian Use of International Human Rights Norms: From Bangalore to Balliol – A View from the Antipodes'* (1993) 16 UNSWLJ 363 at 366, explained regarding what has now come to be popularly referred to as the 'Bangalore Principles on the Domestic Application of International Human Rights Norms':

"But the truly important principles enunciated at Bangalore asserted that fundamental human rights were inherent in human kind and that they provide "important guidance" in cases concerning basic rights and freedoms from which judges and lawyers could draw for jurisprudence of practical relevance and value.

The Bangalore Principles acknowledged that in most countries of the common law such international rules are not directly enforceable

unless expressly incorporated into domestic law by legislation. But they went on to make these important statements:

- '[T]here is a growing tendency for national courts to have regard to these international norms for the purpose of deciding cases where the domestic law – whether constitutional, statute or common law – is uncertain or incomplete;'
- 'It is within the proper nature of the judicial process and well-established judicial functions for national courts to have regard to international obligations which a country undertakes – whether or not they been incorporated into domestic law – for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or common law'."

In **Chung Chi Cheung v The King** [1939] AC 160 at 168 Lord Atkin speaking for the Privy Council said this:

"…It must be always remembered that so far at any rate as the Courts of this country are concerned international law has no validity save in so far as its principles are accepted and adopted by our own domestic law. There is no external power that imposes its rules upon our own code of substantive law or procedure. The Courts acknowledge the existence of a body of rules which nations accept

amongst themselves. On any judicial issue they seek to ascertain what the relevant rule is, and having found it they will treat it as incorporated into the domestic law, so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals."

Writing in connection with this comment in his article mentioned above, Kirby P delicately distilled the principles of the above Privy Council case at pages 373-374 as follows:

"…What [Lord Atkin] said [when delivering the Privy Council's advice in *Chung Chi Cheung*] is guidance for us today in approaching the Bangalore Principles. The rules are simple:

"1. International law (whether human rights or otherwise) is not, as such, part of domestic law in most common law countries;

2. It does not become part of such law until Parliament so enacts or the judges (as another source of lawmaking) declare the norms thereby established to be part of domestic law;

3. The judges will not do so automatically, simply because the norm is part of international law or is mentioned in a treaty – even one ratified by their own country;

4. But if an issue of **uncertainty arises** (as by a *lacuna* in the common law, **obscurity in its meaning or ambiguity in a**

relevant statute) **a judge may seek guidance in the general principles of international law, as accepted by the community of nations**; and

5. From this source of material, **the judge may ascertain what the relevant rule is**. **It is the action of the judge, incorporating that rule into domestic law, which makes it part of domestic law.**

There is nothing revolutionary in this, as a reference to Lord Atkin's judgment demonstrates. It is a well established principle of English law in which most Commonwealth countries have inherited and will follow. But **it is an approach that takes on an urgency and a greater significance in the world today.**" (emphasis added)

There are times when a robust approach is required in finding and applying the rule when the rubber hits the road where religious sensitivities on the issues of conversion, culture and creed are concerned. I agree with the Applicant that the approach recently taken by the High Court in **Noorfadilla bt Ahmad Saikin v Chayed bin Basiran & Ors** [2012] 1 MLJ 832 is the correct approach in considering the applicability of international human rights norms. There the High Court found that the ratification of CEDAW

and the various public statements made by Government ministers, coupled with the principles of the Bangalore declaration (amongst others) imposed on Malaysia a legal obligation to give effect to the rights set out in CEDAW in relation to the rights of a pregnant woman not to be gender discriminated. Her Ladyship Zaleha Yusof J observed as follows:

> "[18] Now back to the main issue; art 8(2) of the Federal Constitution provides, inter alia, that there shall be no discrimination on the ground only of gender in the appointment of any office or employment under a public authority. The word 'gender' was added to art 8(2) by the Constitution (Amendment) (No 2) Act 2001 (Act A 1130), which came into force on 28 September 2001; to comply with Malaysia's obligation under the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).....
>
> [24] CEDAW is not a mere declaration. It is a convention. Hence, following the decision of the Federal Court in *Mohamad Ezam's* case, it has the force of law and binding on members states, including Malaysia. More so that Malaysia has pledged its continued commitments to ensure that Malaysian practices are compatible with the provision and principles of CEDAW as evidenced in the letter

from the Permanent Mission of Malaysia to the Permanent Missions of the Members States of the United Nations dated 9 March 2010.....

[28] To me, in interpreting art 8(2) of the Federal Constitution, it is the court's duty to take into account the government commitment and obligation at international level especially under an international convention, like CEDAW, to which Malaysia is a party. The court has no choice but to refer to CEDAW in clarifying the term 'equality' and gender discrimination under art 8(2) of the Federal Constitution."

Where there are two possible interpretations of the word "parent" in Article 12(4) of the Federal Constitution, the interpretation that best promotes our commitment to international norms and enhance basic human rights and human dignity is to be preferred. Where a particular interpretation makes the right of the equal rights of the mother with the father where guardianship is concerned under the Guardianship of Infants Act 1961, illusory and infirm, then an interpretation that is consistent with international human rights principle must be invoked to infuse life into it. The same would apply with equal force to the interpretation of section 96 and 106 of the Perak Enactment.

Pronouncement

For all the reasons given above, I would grant an order to quash the 3 Certificates of Conversion to the Religion of Islam issued by the 1st Respondent. The said Certificates are null and void and of no effect. All the three children to the marriage have not been converted to Islam in accordance with the law and I so grant a declaration to that effect.

As this is a matter of public interest and importance with constitutional ramifications there shall be no order as to costs so that any party dissatisfied with this decision may appeal right up to the apex court.

Postscript

This decision is not a victory for anyone but a page in the continuing struggle of all citizens to find that dynamic equilibrium in a country of such diverse ethnicities; pursuing peace in less than a homogeneous society, giving space to one another where religious sensitivities are concerned, tolerance and respect to our neighbours in pursuit of the Truth and Reality. Let God be God and let him work sovereignly in the lives of our children; let our children be our children and the adults they will soon become in the fullness of time. Let them take responsibility for their actions in seeking and finding him though as the poets say, he is not far from each one of us. Whilst we may be confident of the journey we have taken, for faith is the assurance of things hoped for and the conviction of things not seen, yet we

must appreciate that others may take a different path. That aside love, peace and harmony should reign supreme in our hearts and in our homes knowing that our differences need not divide us and that in seeking the divine, we must also seek to understand our neighbours better, confident of the fact that there is no compulsion in religion and that whatever faith we belong to, we shall always have the highest regard for one another and desire their greatest good.

Sgd

Y.A. TUAN LEE SWEE SENG

Judicial Commissioner

High Court Ipoh

Perak Darul Ridzuan

For the Applicant:	Mr K Shanmuga, M Kulasegaran, En Fahri Azzat and Selvam Nadarajah (T/N Kula & Assoc.)
For the 1st – 3rd Respondents:	En Hamzah Ismail, Assistant State Legal Adviser, Perak

For the 4th and 5th Respondents: En Noorhisham Ismail, SFC of Attorney General's Chambers

For the 6th Respondent: Tn Hj Hatim bin Musa

(T/N Hatim Musa & Co.)

5

Date of Decision: 25 July 2013.