Shamala Sathiyaseelan v Dr Jeyaganesh C Mogarajah & Anor

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO S8–24–1727 OF 2003
FAIZA TAMBY CHIK J
13 APRIL 2004

Civil Procedure — Jurisdiction — Court — Application by Hindu wife against Muslim husband to declare conversion of minor children to Islam null and void — Whether civil court had jurisdiction to hear application — Whether consent of husband enough to validate conversion of children to Islam — Whether validity of conversion within jurisdiction of Syariah Court — Administration of Islamic Law (Federal Territories) Act 1993 ss 90, 91, 92, 95(b); Federal Constitution arts 12(4), 121(1A); Guardianship of Infants Act 1961 s 5

Constitutional Law — Jurisdiction — Civil court — Application by Hindu wife against Muslim husband to declare conversion of minor children to Islam null and void — Whether civil court had jurisdiction to hear application — Whether consent of husband enough to validate conversion of children to Islam — Whether validity of conversion within jurisdiction of Syariah Court — Administration of Islamic Law (Federal Territories) Act 1993 ss 90, 91, 92, 95(b); Federal Constitution arts 12(4), 121(1A); Guardianship of Infants Act 1961 s 5

Islamic Law — Conversion — Conversion of minor children to Islam — Whether consent of one parent enough to validate conversion of children to Islam — Whether validity of conversion within jurisdiction of Syariah Court — Administration of Islamic Law (Federal Territories) Act 1993 ss 90, 91, 92, 95(b); Federal Constitution arts 12(4), 121(1A); Guardianship of Infants Act 1961 s 5

This was an application by the plaintiff ('the wife') for a declaration that the conversions of her two children ('the minors') to Islam by the defendant ('the husband') without her consent was null and void. The wife and husband were married according to Hindu rites and registered under the Law Reform (Marriage and Divorce) Act 1976 ('Act 1976'). The two children of the marriage, ie the minors were Hindus at the time of birth. The husband had converted to Islam and later converted the minors to Islam without the consent and knowledge of the wife. The wife contended by virtue of an interim order that she had an equal right to decide the religion of the minors. The husband had raised two preliminary objections, the second being of relevance. The issues for determination were: (i) whether this High Court being a civil court had jurisdiction to hear the plaintiff's application; (ii) whether consent of a single parent enough to validate the conversion of a minor to Islam; and (iii) whether the capacity of the Muslim father to convert the minors was valid.

Held, dismissing the plaintiff's application and allowing the defendant's second preliminary objection:

(1) The wife's contention that her right to decide the religion of her two minors stemmed from art 12(4) of the Federal Constitution and s 5 of

the Guardianship of Infants Act 1961 ('Act 351') whereby s 5 of Act 351 gives equality of parental rights and art 12(4) provides that the religion of a person under the age of 18 shall be decided by his parent or guardian. She also referred to s 95(b) of the Administration of Islamic Law (Federal Territories) Act 1993 ('Act 505') whereby the phrase used is 'his parent or guardian consents'. Therefore, the use of the singular word 'parent' in both art 12(4) of the Federal Constitution and s 95(b) of Act 505 were clear. The consent of a single parent was enough to validate the conversion of a minor to Islam. Further, s 5 of Act 351 did not apply to the husband in the present case as he was now a Muslim by virtue of s 1(3) of Act 351 (see para 6).

(2) In the present case, the husband was the natural father of the two minors. He was also a Muslim — a muallaf. He had converted into Islam. The wife never questioned the validity of the husband's conversion. Thus, on a construction of art 12(4) of the Federal Constitution read in conjunction with s 95(b) of Act 505, the husband as a natural parent — a Muslim father had the capacity to convert the two minors into Islam (see para 7); *Teoh Eng Huat v Kadhi, Pasir Mas & Anor* [1990] 2 MLJ 300 followed.

(3) The purpose and objective of art 121(1A) of the Federal Constitution is to oust the civil jurisdiction over persons of the Islamic faith. In the present case, the two minors were now Muslims. There were two temporary certificates of conversion issued in respect of them, albeit temporary, were conclusive proof of the facts stated therein (s 90 of Act 505). Section 91 of Act 505 refers to a person whose conversion to Islam has been registered in the Register of Muallafs shall for the purposes of any Federal or State Law, and for all time, be treated as a Muslim. Section 92 of Act 505 is a written law made for the Syariah court for the Federal Territories to determine whether a non-registered person is a muallaf. In the present case, the minors were temporarily registered as muallafs but the wife was not a Muslim. Therefore, she could not take advantage of s 92 and the Syariah Court had no jurisdiction to hear her. It was not for this court to legislate and confer jurisdiction to the civil court but for Parliament to provide the remedy. Since the two minors were now 'saudara baru' or 'muallaf', the wife should take them to Majlis Agama Islam Wilayah Persekutuan for help and advice to resolve the said issue. By virtue of art 121(1A) of the Federal Constitution, the Syariah Court was the qualified forum to determine the status of the two children, ie whether the conversion of the minors was valid or not. Only the Syariah Court had the competency and expertise to determine the said issue (see paras 12–14).

[**Bahasa Malaysia summary**

Ini adalah permohonan oleh plaintif ('isteri') untuk satu deklarasi bahawa penukaran agama kedua-dua anak beliau ('anak-anak di bawah umur')

kepada Islam oleh defendan ('suami') tanpa persetujuan beliau adalah terbatal dan tidak sah. Isteri dan suami telah berkahwin menurut upacara Hindu dan didaftarkan di bawah Akta Membaharui Undang-Undang (Perkahwinan dan Perceraian) 1976 ('Akta 176'). Kedua-dua anak hasil perkahwinan tersebut, iaitu anak-anak di bawah umur beragama Hindu semasa dilahirkan. Suami telah menukar agama Islam dan kemudian menukar agama anak-anak di bawah umur tersebut kepada Islam tanpa persetujuan dan pengetahuan isteri. Isteri telah berhujah berdasarkan perintah interim bahawa beliau mempunyai hak yang sama untuk menentukan agama anak-anak di bawah umur tersebut. Suami telah menimbulkan dua bantahan awal, yang keduanya lebih relevan. Persoalan-persoalan untuk ditentukan adalah: (i) sama ada Mahkamah Tinggi ini yang merupakan mahkamah sivil mempunyai bidang kuasa untuk mendengar permohonan plaintif; (ii) sama ada persetujuan salah seorang daripada ibu bapa mencukupi untuk mengesahkan penukaran agama seorang anak di bawah umur kepada agama Islam; dan (iii) sama ada kapasiti bapa Muslim untuk menukar agama anak-anak bawah umur adalah sah.

Diputuskan, menolak permohonan plaintif dan membenarkan bantahan awal kedua defendan:

(1) Hujah isteri bahawa beliau mempunyai hak untuk menentukan agama kedua-dua anak-anak di bawah umur beliau adalah berdasarkan perkara 12(4) Perlembagaan Persekutuan dan s 5 Akta Penjagaan Budak 1961 ('Akta 351') di mana s 5 Akta 351 memberikan kesaksamaan hak ibubapa dan perkara 12(4) memperuntukkan bahawa agama seseorang di bawah umur 18 tahun hendaklah ditentukan oleh seorang ibu/bapa atau penjaga beliau. Beliau juga merujuk kepada s 95(b) Akta Pentadbiran Undang-Undang Islam (Wilayah-Wilayah Persekutuan) 1993 ('Akta 505') di mana ungkapan yang digunakan adalah 'his parent or guardian consents'. Oleh itu, penggunaan perkataan mufrad 'parent' dalam kedua-dua perkara 12(4) Perlembagaan Persekutuan dan s 95(b) Akta 505 adalah jelas. Persetujuan seorang ibu/bapa adalah mencukupi untuk mengesahkan penukaran agama seorang yang di bawah umur kepada Islam. Tambahan pula, s 5 Akta 351 tidak terpakai ke atas suami dalam kes semasa kerana beliau sekarang seorang Muslim menurut s 1(3) Akta 351 (lihat perenggan 6).

(2) Dalam kes semasa, suami merupakan bapa kandung kedua-dua anak-anak di bawah umur tersebut. Beliau juga seorang Muslim — seorang muallaf. Beliau telah bertukar ke agama Islam. Isteri tidak pernah menyoal tentang kesahihan penukaran agama suami. Oleh itu, berdasarkan pembentukan perkara 12(4) Perlembagaan Persekutuan dibaca bersama s 95(b) Akta 505, suami sebagai seorang bapa kandung – seorang bapa Muslim mempunyai kapasiti untuk menukar agama kedua-dua anak-anak di bawah umur kepada Islam (lihat perenggan 7); *Teoh Eng Huat v Kadhi, Pasir Mas & Anor* [1990] 2 MLJ 300 diikut.

(3) Tujuan dan objektif perkara 121(1A) Perlembagaan Persekutuan adalah untuk menyingkirkan bidang kuasa sivil ke atas mereka yang beragama Islam. Dalam kes semasa, kedua-dua anak-anak di bawah umur sekarang adalah Muslim. Terdapat dua sijil sementara pengislaman yang dikeluarkan berkiatan mereka, walaupun sementara, adalah bukti kukuh tentang fakta-fakta yang dinyatakan (s90 Akta 505). Seksyen 91 Akta 505 merujuk kepada seseorang yang mana penukaran agama kepada Islam telah didaftarkan di Pejabat Pendaftaran Mualaf hendaklah bagi tujuan mana-mana Undang-Undang Persekutuan atau Negeri, dan pada setiap masa, dianggap sebagai seorang Muslim. Seksyen 92 Akta 505 adalah undang-undang bertulis yang digubak untuk Mahkamah Syariah untuk Wilayah-Wilayah Persekutuan bagi menentukan sama ada seorang yang tidak didaftarkan adalah mualaf. Dalam kes semasa, anak-anak di bawah umur tersebut telah didaftarkan sementara sebagai mualaf tetapi isteri bukan seorang Muslim. Oleh itu, beliau tidak boleh menggunakan s92 dan Mahkamah Syariah tidak mempunyai bidang kuasa untuk mendengar beliau. Ia bukan untuk mahkamah ini untuk menggubal dan memberikan bidang kuasa kepada mahkamah sivil tetapi untuk Parliamen memberikan remedi. Memandangkan kedua-dua anak-anak di bawah umur tersebut sekarang adalah 'saudara baru' atau 'muallaf', iateri sepatutnya membawa mereka ke Majlis Agama Islam Wilayah Persekutuan untuk mendapat bantuan dan nasihat bagi menyelesaikan persoalan ini. Menurut perkara 121(1A) Perlembagaan Persekutuan, Mahkamah Syariah adalah korum yang berkelayakan untuk menentukan kedudukan kedua-dua kanak-kanak tersebut, iaitu sama ada penukaran agama anak-anak di bawah umur tersebut adalah sah atau tidak. Hanya Mahkamah Syariah kompeten dan pakar untuk menentukan persoalan ini (lihat perenggan-perenggan 12–14).]

Notes

For cases on conversion under Islamic Law generally, see 8(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 453–456.

For cases on jurisdiction of courts under Constitutional Law, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1684–1692.

For cases on jurisdiction of courts under Civil Procedure, see 2(3) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 3670–3681.

Cases referred to

Azizah Shaik Ismail & Anor v Fatimah Shaik Ismail & Anor [2004] 2 MLJ 529 (refd)

Chang Ah Mee v Jabatan Hal Ehwal Agama Islam, Majlis Ugama Islam Sabah & Ors [2003] 5 MLJ 106 (refd)

Eeswari Visuvalingam v Government of Malaysia [1990] 1 MLJ 86 (refd)

Lee Lee Cheng (f) v Seow Peng Kwang [1960] MLJ 1 (refd)

Majlis Ugama Islam Pulau Pinang dan Seberang Perai v Shaik Zolkaffily bin Shaik Natar & Ors [2003] 3 MLJ 705 (refd)

Majlis Agama Islam Pulau Pinang lwn Isa Abdul Rahman dan satu ang lain [1992] 2 MLJ 244 (refd)
Majlis Agama Islam Negeri Sembilan lwn Hun Mun Meng [1992] 2 MLJ 676 (refd)
Ng Wan Chan v Majlis Ugama Islam Wilayah Persekutuan & Anor (No 2) [1991] 3 MLJ 487 (refd)
Pedley v Majlis Agama Islam, Pulau Pinang & Anor [1990] 2 MLJ 307 (refd)
Teoh Eng Huat v Kadhi, Pasir Mas & Anor [1990] 2 MLJ 300 (folld)

Legislation referred to

Administration of Islamic Law (Federal Territories) Act 1993 ss 85, 90, 91, 92, 95(b)
Administration of Islamic Law Enactment 1992 (Sabah) s 68
Courts Ordinance s 47, Second Schedule
Federal Constitution arts 3(1), 12(4), 74(2), 77, 121(1A)
Guardianship of Infants Act 1961 s 5
Law Reform (Marriage and Divorce) Act 1976 ss 4, 8, 51

Revi Nekoo (Parameswary and R Sivarasa with him) (Nekoo Parames & Tung) for the plaintiff.
M Menon (Jaffar & Menon) for the first defendant.
Azmi Mohd Rais (Zulkifli Yong with him) (Zulkifli Yong Azmi & Co) for the second defendant.

Faiza Tamby Chik J:

[1] Originating Summons No S8–24–1727 of 2003 in encl (1) is an application by the plaintiff non-Muslim wife ('the wife') for a declaration that the conversions of her two children, Saktiswaran, 3 1/2 and Theiviswaran 2 1/2 years old ('the minors') by the first defendant Muslim husband ('the husband') is null and void on the following grounds:

(i) that the conversions were made without the knowledge and the consent of the wife, the natural mother of the minors;

(ii) that the wife, as the natural mother of the minors has the right to determine the religion of the minors under art 12(4) of the Federal Constitution;

(iii) that the wife, who obtained an interim order dated 17 April 2003 from this court has the equal right to determine the religion of the minors under s 5 of the Guardianship of Infant Act 1961 ('Act 351').

[2] The two minors were converted to Islam by the husband on 25November 2002 (see the temporary statutory conversion to Islam certificates under registration Nos 683/2002 and 684/2002 both dated 28December 2002 respectively). The husband converted to Islam on 19November 2002 and as a muallaf he is known as Muhammad Ridzwan bin Mogarajah. At the outset, let me explain what is the meaning of the terms 'custody and guardianship'. An order for custody of a child in the

Family Court gives the custodian the right to have the daily care and control of the child and the right and responsibility to make decision about such daily care and control. A custody order ceases to have effect when a child turns 18 years of age or marries. Guardianship means that a parent has the responsibility for a child's long term welfare. This includes involvement in major decisions such as a child's health, education and religion. Unless a court orders otherwise, both parents are joint guardians of a child. In the present case, the wife has obtained the interim order and the two minors are living with her in Alor Star.

[3] There are two preliminary objections raised by the husband. Firstly, the originating summons in encl (1) is defective and the intitulement is not described with sufficient particularity. The second preliminary objection is that this court being a civil court does not have the jurisdiction to hear this application as it falls, so contended the husband within the jurisdiction of the Syariah Court. I will deal with the second preliminary objection first.

[4] The facts of the case were simple and straightforward. The wife and husband were married according to Hindu rites at the Dewi Sri Karumariaman Temple in Alor Star on 5 November 1998. The said marriage was registered under the Law Reform (Marriage and Divorce) Act 1976 ('Act 164'). At that time, they were Hindus. There are two children of the marriage, ie the two minors. At the time of birth both these two minors were Hindus. On or about 19 November 2002, the husband converted to Islam. On or about 25 November 2002, the husband converted the two minors to Islam. On 31 December 2002, the wife filed an originating summons seeking an order for custody, care and control of the two minors. On 17 April 2003, the court gave an interim order to the wife who due to her two children are living with her in Alor Star gave the husband access on Saturday from 1–2pm to Sunday 1–2 pm, and the husband is prohibited from taking the two children out of Alor Star and the husband is to pay RM250 a month to each of the child. On 7 January 2003, the husband filed an ex parte application in Mahkamah Tinggi Syariah Selangor for hadanah (custody) of the two minors and obtained the said custody order on 8 May 2003. The two minors are now living with their mother in Alor Star with weekend visits granted to the father by the civil court. And these two minors have been converted to Islam by the husband. Hence, the application by the wife in this court seeking a declaration that the conversion of the two minors to Islam is null and void.

[5] What is the legal status of the husband and the wife viz-a-viz the two minors. Pursuant to the various applications made by the wife in this court, I have on 11 September 2003 made, inter alia, the following decisions. The fact that the husband had converted to Islam did not change the status of their civil marriage contracted on 5 November 1998. The husband's obligation under the Hindu marriage could not be extinguished or avoided by his conversion to Islam. By his conversion to Islam, s 51 of Act 164 has given the wife the right to petition for divorce. However, the wife does not do so, therefore she remains his wife although a non-Muslim. The husband

could not apply for divorce under the Islamic family law as the Syariah Court has no jurisdiction to deal with cases where one of the parties is a non-Muslim, ie the wife is a non-Muslim. Their civil marriage is being registered under Act 164. The dissolution can only be done in accordance with ss 4 and 8 of Act 164. Therefore, the legal position of both the wife and the husband is that they are still married to each other. The marriage by Hindu rites on 5 November 1998 is still subsisting and valid (s 4 of Act 164 refers to subsisting valid marriage, dissoluble only under the Act and s 8 of the Act refers to continuance of marriage). In other words, their marriage still continue until dissolved: (a) by the death of either wife or husband; (b)by order of a court of competence jurisdiction; (c) by a decree of nullity made by a court of competent jurisdiction. I am fortified in my opinion and conclusion by the case of *Pedley v Majlis Agama Islam, Pulau Pinang & Anor* [1990] 2 MLJ 307, where Wan Adnan J (as he then was) held, '(a) non-Muslim marriage is not dissolved upon one of the parties converting to Islam. It only provides a ground for the other party who has not so converted to petition for divorce.' The husband by converting into the Islamic faith is in effect converting his marital status from a monogamous marriage to a polygamous marriage. In fact, the wife is still his lawful wife under the civil law. He cannot dissolve his civil law marriage himself because the said marriage can only be dissolved under Act 164 by his wife. And the wife is not and has not done so. The husband cannot bring a petition for divorce of his civil law marriage in the Syariah Court because the Syariah Court has no jurisdiction to deal with cases where one of the parties is a non-Muslim. His wife is a non-Muslim. Article 3 cl (1) of the Federal Constitution provides that Islam is the religion of the Federation; but other religions may be practised in peace and harmony in any part of the Federation. I think Islam must not be used as an escapism by non-Muslim men to run away from their legal obligations which they contracted when they were non-Muslims by merely changing their religion to Islam. This is the purpose of s 51 of Act 164 which states that where one party to a marriage has converted to Islam, the other party who has not so converted may petition for divorce. The objective of s 51 of Act 164 is to protect the rights of non-Muslim women who have been left by their husbands, who have converted to Islam. I am fortified in my opinion by the Supreme Court case of *Eeswari Visuvalingam v Government of Malaysia* [1990] 1 MLJ 86, a five member coram where it held that a non-Muslim wife (a widow of the deceased) was a dependent under the pension laws and was entitled to a derivative pension.

[6] The wife moves this court to make a declaration that the conversion of the two minors to Islam as being null and void. She contended that the conversion of her two minors was done without her knowledge and consent. She further contended that by virtue of the interim order dated 17 April 2003 she has equal right with the husband to determine the religion of her two minors. She contended that her right to decide the religion of her two minors stems from art 12(4) of the Federal Constitution and s 5 of Act 351. It is to be observed that s 5 of Act 351 gives equality of parental rights and art 12(4) provides that the religion of a person under the age of 18 shall be decided by his parent or guardian. The wife argued that the husband cannot

unilaterally convert the two minors to Islam without her consent. In support of her argument she quoted the case of *Chang Ah Mee v Jabatan Hal Ehwal Agama Islam, Majlis Ugama Islam Sabah & Ors* [2003] 5 MLJ 106 where it is held; '(2) The Federal Constitution does not discriminate against the sexes and since the father and the mother have equal rights over the person and property of an infant, the term 'parent' in art 12(4) must necessarily mean both the father and mother if both are living. To allow just the father or mother to choose the religion would invariably mean depriving the other of the constitutional right under art 12(4). Thus the term 'parents' in s 68 of the Enactment (ie the Sabah Administration of Islamic Law Enactment 1992) does not conflict with art 12(4) as art. 12(4) confers the right on both the father and the mother'. With respect, I do not agree with such an interpretation on art. 12(4) made by my learned brother colleague. It is to be noted that s 68 of the Sabah Administration of Islamic Laws Enactment 1992 uses the word 'parents'. It is spelt 'p-a-r-e-n-t-s' in the plural sense, whereas art 12(4) of the Federal Constitution uses the word 'parent'. It is spelt 'p-a-r-e-n-t' without the alphabet 's'. It is used in the singular sense. In the first place the said interpretation is not consistent with normal rules which govern the reading and interpretation of an Act of Parliament. Let me explain. Consider s 95(b) of the Administration of Islamic Law (Federal Territories) Act 1993 ('Act 505') and art 12(4) of the Federal Constitution. In the present case, the wife in fact referred to s 95(b) arguing that this section requires her consent for the conversion of her two minors into Islam. Section 95(b) of Act 505 provides for the purpose of capacity to convert into Islam, and states that a person who is not a Muslim may convert into Islam if he is of sound mind and if he has not attained the age of 18 years, his parent or guardian consents to his conversion. It is noteworthy that the phrase used is 'his parent or guardian consents'. Article 12(4) used the phrase 'be decided by his parent or guardian'. The determiner used is 'his'. This word 'his' that comes before the noun 'parent or guardian' limits its meaning. *Black's Law Dictionary Abridged* (6th Ed) (Centennial Edition 1891–1991) defines the word 'parent' as 'the lawful father or mother of a person' and the word 'guardian' as 'a person lawfully invested with the power and responsibility for the care and management of the person or the estate or both of a child during its minority'. It is instructive to note that the noun 'parent' or 'guardian' is defined in the singular. Parent is either a 'father or a mother' and 'guardian is a person lawfully invested with ...'. The term 'determiner' is used frequently in modern grammars. The noun in the phrase here is singular. Therefore the singular verb 'consents' in s 95(b) is used since both nouns 'parent' and 'guardian' are singular. The two nouns that share a singular verb are linked by 'or' and grammatically the verb agrees with whichever part is closest to it. In the phrase under discussion, both subjects are singular. Hence, the present tense singular verb 'consents' is used. It is also true of art 12(4). Both nouns 'parent' and 'guardian' are singular and the determiner used is 'his'. Either his parent or his guardian consents to his conversion. The meaning of the words is plain, the plain meaning rule is applied. My interpretation of the words 'parent and guardian' gains strength when it is considered in the light of Act 351.

Section 6(1) of Act 351 states 'on the death of a parent of an infant, the surviving parent, ... shall be guardian to the infant either alone or jointly with any guardian appointed ...'. It is to be noted that the legislature uses the terms 'parent and guardian' in the singular sense since both nouns are singular. The determiner 'a' (parent) is used. I must stress here this involves vested rights. 'Statutes should be interpreted, if possible, so as to respect vested rights.' Indeed: 'If a vested right is to be defeated, the section must plainly say so. This rule has been stated by the courts over and over again' (see the book entitled *How to Understand an Act of Parliament* (6th Ed) by Kenneth HG Gifford and DJ Gifford, p 143). In s 5 of Act 351 where it refers to equality of parental rights, sub-s (1) plainly states ... a mother shall have the same rights and authority as the law allows to a father ... . And such a provision I think is to be strictly construed and applied. The plain meaning rule is a very simple rule. It means what it says. If the meaning of the Act is plain, it is to be given that plain meaning. Where the language of an Act is clear and explicit, we must give effect to it, whatever may be the consequences, for in that case the words of the statute speak the intention of the legislature. Its words must be given the plain and ordinary meaning of the word applying to them the appropriate grammatical rules (Chap 21 ibid/ib). The words used in s 95(b) of Act 505 are clear. The consent of a single parent is enough to validate the conversion of a minor. Any other interpretation would give an unjust result. It may lead into adopting a forced meaning that s 95(b) does not bear and the plain meaning rule will not allow. Notwithstanding what I said earlier about s 5 of Act 351, I am of the opinion that the said section is not applicable to the husband in the circumstances of the present case because he is a Muslim — a muallaf now and s 1(3) of Act 351 provides:

> (3) Nothing in this Act shall apply in any State to persons profession the religion of Islam until this Act has been adopted by a law made by the Legislature of that State; and any such law may provide that:
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> (a) nothing in this Act which is contrary to the religion of Islam or the custom of the Malays shall apply to any person under the age of eighteen years who professes the religion of Islam and whose father professes or professed at the date of his death that religion or, in the case of an illegitimate child, whose mother so professes or professed that religion; and
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> (b) in the case of any other person, this Act, so far as they are contrary to the religion of Islam, shall cease to apply to such person upon his professing the religion of Islam, if at the date of such professing he has completed his age of eighteen years or, if not having completed such age, he professes the religion of Islam with the consent of the person who under this Act is the guardian of the person of the infant.

[7] In the present case, the husband is the natural father of the two minors. He is also a Muslim — a muallaf. He has converted into Islam. The wife never questioned the validity of the husband's conversion. In my view, on a construction of art 12(4) of the Federal Constitution, read in conjunction with s 95(b) of Act 505, the husband as a natural parent — a Muslim father has the capacity to convert the two minors into Islam. This is consonant with the decision of the Supreme Court, a five member coram

in the case of *Teoh Eng Huat v Kadhi, Pasir Mas & Anor* [1990] 2 MLJ 300 where Abdul Hamid LP said, 'In all the circumstances, we are of the view that in the wider interests of the nation, no infant shall have the automatic right to receive instruction relating to any other religion than his own without the permission of the parent or guardian.' Further down, Abdul Hamid LP further said, 'We would observe that the appellant would have been entitled to the declaration he had asked for. However, we decline to make such declaration as the subject is no longer an infant.'

[8] The fact of the matter in the present case is that the husband is already a Muslim — a muallaf. And I have been shown a letter written by the Mufti Wilayah Persekutuan Prof Dr Mohammed Yusoff bin Hussain dated 2 January 2004 which states:

> (2) Sukacita dimaklumkan bahawa di dalam hukum syarak, sekiranya salah seorang daripada ibu/bapa telah memeluk agama Islam, maka anak-anak dari kedua-dua ibu/bapa berkenaan adalah menjadi Islam.
> (3) Ini bermakna, anak-anak berkenaan secara automatik menjadi Islam walaupun salah seorang daripada ibu/bapa mereka tidak mengizinkannya.

[9] However, the opinion of the learned Mufti in the said letter has not been published in the Gazette, making it a fatwa or ruling pursuant to s 34(1) of Act 505 so that under s 34(4) a fatwa shall be recognized by all courts in the Federal Territories as authoritative of all matters laid down therein. Although the Mufti's said letter is not as a result of a request for his opinion by this court, all the same it is a request made by the second defendant in the present case and the learned said Mufti has certified his opinion in the said letter under s 38. I am minded of the authority of the learned Mufti under s 33 which states that the Mufti shall aid and advise the Yang di-Pertuan Agong in respect of all matters of Islamic law and in all such matters shall be the chief authority in the Federal Territorities after the Yang di-Pertuan Agong. Therefore, although I am very much persuaded by the opinion of the learned Mufti that the husband in the present case being a muallaf can unilaterally convert the two minors into Islam without the consent of the wife, his letter is not a fatwa under s 34(4) to be recognized by courts as authoritative of all matters laid down therein.

[10] The purpose and objective of art 121(1A) of the Federal Constitution is to oust the civil jurisdiction over persons professing the Islamic faith. In this context, I am of the view that the distribution of legislative power between Parliament and the State legislative assemblies has to be understood in order to comprehend the issue of jurisdictional conflict. Jurisdiction upon a matter in which a judge had power to adjudicate ought to be distinguished from the powers given to the judge under the law. This is the view of the Court of Appeal in *Lee Lee Cheng (f) v Seow Peng Kwang* [1960] MLJ 1 in which Thomson CJ in discussing s 47 of the Courts Ordinance and the Second Schedule thereto said (at p 3):

> It is axiomatic that when different words are used in a statute they refer to different things and this is particularly so where the different words are, as here, used repeatedly. This leads to the view that in the Ordinance there is a distinction between the jurisdiction of a Court and its powers, and this suggests that the

word 'jurisdiction' is used to denote the types of subject matter which the Court may deal with and in relation to which it may exercise its powers. It cannot exercise its powers in matters over which, by reason of their nature or by reason of extra-territoriality, it has no jurisdiction. On the other hand, in dealing with matters over which it has jurisdiction, it cannot exceed its powers.

[11] In the present case, the jurisdiction upon a matter in which a Syariah judge had power to adjudicate is found in art 121(1A). Article 74(2) refers to the power of a legislative of a State to make laws with respect to any of matters enumerated in the State List. Article 77 refers to the residual power of a State Legislative to make laws to any matter not enumerated in any of the lists set out in the Ninth Schedule, not being a matter in respect of which Parliament has powers to make laws. Item 4(b) of the Ninth Schedule List I refers to civil and criminal law and procedure and the administration of justice, including jurisdiction and powers of all such courts. This indicates the legislative intention of Parliament to use the terms jurisdiction and power distinctly. This means even though a court is given certain powers it does not mean that the court could use the powers if it has no jurisdiction. If a court has jurisdiction over a matter it could not exceed its power in that matter. Therefore, I am of the opinion that when referring to art 121(1A), the civil court should not take into account the question of which the Syariah Court has the capacity or power to grant the relief prayed. Indetermining the jurisdiction of the Syariah Court, the question of its power to grant the relief prayed is irrelevant. This is because the meaning of the terms jurisdiction and powers as ascribed in the Federal Constitution by the Court of Appeal case of Lee Lee Chang are different. Support for this view can be found in the case of *Majlis Ugama Islam Pulau Pinang dan Seberang Perai v Shaik Zolkaffily bin Shaik Natar & Ors* [2003] 3 MLJ 705 where Haidar CJ (Malaya) delivering the judgment of the Federal Court held in (3a). The judgment in *Majlis Agama Islam Pulau Pinang lwn Isa Abdul Rahman* dan satu ang lain [1992] 2 MLJ 244 could also give rise to undesirable effect, as a party may, by inclusion of a prayer for remedy not provided in the law applicable to the Syariah Court, remove a matter, the subject matter of which is within the jurisdiction of the Syariah Court, to the civil court. The learned judge hence, ought to have adopted the subject matter approach rather than the 'remedy prayed for approach'. In *Azizah Shaik Ismail & Anor v Fatimah Shaik Ismail & Anor* [2004] 2 MLJ 529, Abdul Hamid Mohamad FCJ held, '(1) … it is now beyond question that in determining the jurisdiction of the Syariah Court the subject matter approach is preferred.'

[12] As I stated earlier, the purpose and objective of art 121(1A) of the Federal Constitution is to oust the civil jurisdiction over persons of the Islamic faith. In the present case, the two minors are now Muslim. There are two Sijil Sementara Pengislaman (No 683/2002 & No 684/2002 dated 28 December 2002 respectively) in respect of them. These temporary statutory conversion certificates albeit temporary shall be conclusive proof of the facts stated therein (s 90 of Act 505). Section 91 of Act 505 refers to a person whose conversion to Islam has been registered in the Register of Muallafs shall for the purposes of any Federal or State Law, and for all time,

be treated as a Muslim. However, in the present case, the wife is contesting the legality of her two minors' conversion. She contended that this court has got the jurisdiction to hear her application. In support of her contention, she quoted the case of *Ng Wan Chan v Majlis Ugama Islam Wilayah Persekutuan & Anor (No 2)* [1991] 3 MLJ 487 where Eusoff Chin J (as he then was) held, '(4) Since there is nothing to show that the Syariah Court has the jurisdiction conferred on it by any written law to determine the issue of whether a person was or was not a Muslim at the time of his death, the High Court is not precluded from determining the issue.' But in the present case, there is a written law made for the Syariah Court for the Federal Territories to determine that said issue. It is found in s 92 of Act 505 which refers to determining whether a non-registered person is a muallaf. It states that if any question within the Federal Territories as to whether a person is a muallaf, and the person is not registered in the Registrar of Muallafs (in our case the minors are temporarily registered as a mualaff) that question shall be decided on the merits of the case in accordance with s 85. Section 85 refers to requirements for conversion. However, in the present case, the wife is not a Muslim. Being a non-Muslim, she could not take advantage of s 92. Being a non-Muslim, the Syariah Court has no jurisdiction to hear her. What then is for her to do? The answer to that is, it is not for this court to legislate and confer jurisdiction to the civil court but for Parliament to provide the remedy. As rightly pointed out by Haidar CJ (Malaya) in *Majlis Ugama Islam Pulau Pinang dan Seberang Perai v Shaik Zolkaffily bin Shaik Natar & Ors* [2003] 3 MLJ 705 at p 719:

> The question that may flow from the judgment of Abdul Kadir Sulaiman J, which we agree, would be what happens when a party may not have his remedy expressly stated in the state law pertaining to Muslims? The answer, in our view, is not for the courts to legislate and confer jurisdiction to the civil courts but the state legislature to provide the remedy. The role of the courts is to interpret the laws and whenever necessary to give effect to the purpose or object of the laws enacted by the legislatures, (see *United Malacca Bhd v Pentadbir Tanah Daerah Alor Gajah and other applications* [2003] 1 MLJ 465; Chor Phaik Har v Farlim Properties Sdn Bhd [1994] 3 MLJ 345). We need therefore to give effect to the purpose stated by Abdul Kadir Sulaiman J for which we agree, we requote what his Lordship said at p 689 — 'The fact that the plaintiff may not have his remedy in the syariah court would not make the jurisdiction exercisable by the civil court'.

[13] For the moments as the law stands today, I think the only way open for the wife is to seek the help of Majlis Agama Islam Wilayah Persekutuan as I pointed out in the case of *Majlis Agama Islam Negeri Sembilan lwn Hun Mun Meng* [1992] 2 MLJ 676 at p 680 where I said, 'Oleh kerana mahkamah sivil tidak mempunyai bidang kuasa berkenaan dengan apa-apa perkara dalam bidang kuasa Mahkamah Syariah selepas berkuatkuasa Akta Perlembagaan (Pindaan) 1988 (Akta A704) maka soal akidah atau kepercayaan dan keyakinan Cik Nurul Ain Hun terhadap agama Islam selepas menjadi seorang muallaf atau saudara baru, hanya boleh ditentukan oleh pemohon sendiri dan bukan mahkamah ini.' In that case, I decided, 'seseorang yang berhasrat untuk meninggalkan ugama Islam tidak dianggap keluar daripada Islam melainkan beliau telah melaporkan keputusannya

(kepada Majlis Agama Islam Negeri Sembilan) dan keputusan tersebut telah didaftarkan (oleh Majlis tersebut)'. In the present case, since the two minors are now 'saudara baru' or 'muallaf', the wife can take them to Majlis Agama Islam Wilayah Persekutuan for help and advice to resolve the said issue.

[14] Upon careful consideration of all evidence and of the surrounding circumstances, I have come to the conclusion that by virtue of art 121(1A) of the Federal Constitution, the Syariah Court is the qualified forum to determine the status of the two minors. Only the Syariah Court has the legal expertise in hukum syarak to determine whether the conversion of the two minors is valid or not. Only the Syariah Court has the competency and expertise to determine the said issue.

[15] I am indebted to counsels on both sides including Dato' Azhar bin Mohamed from the Attorney General Chambers and En Harris Mohd Ibrahim, both of whom appeared as amicus curiae, for the assistance which they all have rendered to the court in this matter. I note that Encik Harris is holding brief for the following women organizations: (1) Women Centre for Change; (2) Women's Aid Organisation; (3) Sisters in Islam; and (4) All Women Action Society. Ms Rasamani Kandiah is holding brief for all Women Lawyers' Association.

[16] For the reasons I have stated above, the husband's second preliminary objection on a point of law must necessarily succeed. It follows that the wife's prayer for the said declaration in the present case should be dismissed with costs. As I have allowed the second preliminary objection there is no necessity for me to decide on the first preliminary objection.

Plaintiff's application dismissed. Defendant's second preliminary objection allowed.

Reported by Ezatul Zuria Azhari