Soon Singh a/l Bikar Singh v Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor

FEDERAL COURT (KUALA LUMPUR) — SUPREME COURT CIVIL APPEAL NO 01–61 OF 1993

EUSOFF CHIN CHIEF JUSTICE, LAMIN PCA AND MOHAMED DZAIDDIN FCJ

5 MARCH 1999

Islamic Law *— Apostasy — Jurisdiction of syariah court — States' Administration of Islamic Law Enactment not expressly conferring jurisdiction on syariah court to deal with conversion out of Islam — Whether syariah court had implied jurisdiction — Whether implied jurisdiction could be read into Enactment*

Islamic Law *— Jurisdiction — Syariah court — Renunciation of Islam by appellant — Application for declaration that appellant no longer a Muslim — Whether jurisdiction to determine application with High Court or syariah court — Federal Constitution art 121(1A)*

The appellant — who was brought up as a Sikh — converted to Islam without the knowledge and consent of his widowed mother while he was still a minor. Upon reaching 21 years of age, he went through a baptism ceremony into the Sikh faith, thereby renouncing Islam. He then executed a deed poll in which he declared unequivocally that he was a Sikh. Subsequently, he filed an originating summons in the Kuala Lumpur High Court seeking a declaration that he was no longer a Muslim. Counsel for the Jabatan Agama Islam Kedah raised a preliminary objection against the application contending that the High Court had no jurisdiction as the matter came under the jurisdiction of the syariah courts. The learned High Court judge upheld the objection and dismissed the application. The appellant appealed. At the Federal Court, counsel submitted that: (i) since there was no express provision in the Kedah Administration of Muslim Law Enactment 1962 conferring jurisdiction on the syariah court, the High Court had jurisdiction to hear the appellant's application; (ii) the appellant's conversion to Islam while a minor and without the knowledge of his mother was invalid; and (iii) by virtue of art 11(1) of the Federal Constitution, the appellant had an unfettered constitutional right to choose his religion and to practise it and such right could not be disputed or infringed.

Held, dismissing the appeal with costs:

(1) The question of whether the appellant's conversion to Islam while a minor was valid or not was not a relevant issue in the appeal. There was no evidence that the appellant ever challenged his conversion to Islam after he reached 18 years of age. In the circumstances, the conclusion that the appellant's conversion to Islam was made voluntarily was amply justified (see p 495B–D).

(2) Since the High Court judge had not made any ruling or declaration to the effect that the appellant was still a Muslim, the

question of an infringement of art 11(1) of the Federal Constitution did not arise. The appellant had to wait for the decision of his principal application before he could raise the constitutional issue under art 11(1) of the Federal Constitution. Alternatively, the appellant could file a separate action seeking a declaration that his conversion to Islam infringed art 11(1) (see p 496E–F).

(3) The jurisdiction of the syariah courts to deal with conversions out of Islam, although not expressly provided for in some State Enactments, can be read into those enactments by implication derived from the provisions concerning conversion into Islam. It is inevitable that since matters on conversion to Islam come under the jurisdiction of the syariah courts, by implication, conversion out of Islam should also fall under the jurisdiction of the same courts. Thus, the appellant's application for a declaration that he was no longer a Muslim came within the jurisdiction of the syariah court and not that of the High Court (see pp 502A, G and 503B); *Lim Chan Seng v Pengarah Jabatan Agama Islam Pulau Pinang* [1996] 3 CLJ 231 not followed.

[Bahasa Malaysia summary

Perayu — yang dibesarkan sebagai seorang penganut agama Sikh — telah memeluk agama Islam tanpa pengetahuan dan izin ibunya, seorang balu, semasa ia masih di bawah umur. Setelah mencapai umur 21 tahun, ia telah menjalani suatu upacara pembaptism ke dalam agama Sikh, dengan itu meninggalkan agama Islam. Ia kemudiannya melaksanakan suatu suratikatan pol dalam mana ia mengisytiharkan secara jelas bahawa ia merupakan seorang penganut agama Sikh. Berikutnya, ia telah memfailkan satu saman pemula di Mahkamah Tinggi Kuala Lumpur meminta satu perisytiharan bahawa ia tidak lagi merupakan seorang penganut agama Islam. Peguam Jabatan Agama Islam Kedah membangkitkan bantahan permulaan terhadap permohonan dengan menghujahkan bahawa Mahkamah Tinggi tidak mempunyai bidang kuasa kerana hal tersebut diliputi oleh bidang kuasa mahkamah-mahkamah syariah. Hakim Mahkamah Tinggi yang arif membenarkan bantahan tersebut dan menolak permohonan. Perayu kemudiannya merayu. Di Mahkamah Persekutuan, peguam berhujah bahawa: (i) memandangkan tidak terdapat sebarang peruntukan nyata dalam Enakmen Pentadbiran Undang-Undang Islam Kedah 1962 yang mengurniakan bidang kuasa ke atas mahkamah syariah, Mahkamah Tinggi mempunyai bidang kuasa untuk mendengar permohonan perayu; (ii) penukaran agama perayu kepada agama Islam semasa di bawah umur dan tanpa pengetahuan ibunya adalah tak sah; dan (iii) mengikut perkara 11(1) Perlembagaan Persekutuan, perayu mempunyai hak perlembagaan yang tidak terhad untuk memilih agamanya dan mengamalkannya dan hak demikian tidak boleh dipertikaikan atau dilanggar.

Diputuskan, menolak rayuan dengan kos:

(1) Persoalan mengenai sama ada penukaran agama perayu kepada agama Islam semasa masih di bawah umur adalah sah atau tidak bukanlah satu isu yang relevan dalam rayuan. Tidak terdapat keterangan bahawa perayu pernah mencabar penukarannya kepada agama Islam setelah mencapai umur 18 tahun. Dalam keadaan begitu, kesimpulan bahawa penukaran perayu kepada agama Islam dibuat secara sukarela berjustifikasi sememangnya (lihat ms 495B–D).

(2) Oleh kerana hakim Mahkamah Tinggi tidak membuat sebarang keputusan atau perisytiharan bahawa perayu masih seorang penganut agama Islam, persoalan mengenai perlanggaran perkara 11(1) Perlembagaan Persekutuan tidak timbul. Perayu terpaksa menunggu keputusan atas permohonan utamanya sebelum ia boleh membangkitkan isu perlembagaan di bawah perkara 11(1) Perlembagaan Persekutuan. Secara alternatif, perayu boleh memfailkan tindakan berasingan meminta perisytiharan bahawa penukarannya kepada agama Islam melanggar perkara 11(1) (lihat ms 496E–F).

(3) Bidang kuasa mahkamah-mahkamah syariah untuk menguruskan penukaran agama ke luar daripada agama Islam, walaupun tidak diperuntukkan secara nyata dalam beberapa Enakmen Negeri, boleh dibaca ke dalam enakmen tersebut secara tersirat yang didapati daripada peruntukan berkenaan dengan penukaran kepada agama Islam. Adalah tidak boleh dielakkan bahawa oleh kerana hal-hal tentang penukaran ke agama Islam diliputi oleh bidang kuasa mahkamah-mahkamah syariah, secara tersirat, penukaran ke luar daripada agama Islam juga haruslah diliputi oleh bidang kuasa mahkamah-mahkamah yang sama. Justeru itu, permohonan perayu untuk satu perisytiharan bahawa ia bukan lagi seorang penganut agama Islam diliputi oleh bidang kuasa mahkamah syariah dan bukan bidang kuasa Mahkamah Tinggi (lihat ms 502A, G dan 503B); *Lim Chan Seng v Pengarah Jabatan Agama Islam Pulau Pinang* [1996] 3 CLJ 231 tidak diikut.]

Notes

For a case on apostasy, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) para 332.

For cases on jurisdiction of a syariah court, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 384–391.

Cases referred to

Albon v Pyke (1842) 4 M & G 421 (refd)

Dalip Kaur v Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor [1992] 1 MLJ 1 (refd)

Jamaluddin bin Othman v Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor [1989] 1 MLJ 368 (refd)

Lim Chan Seng v Pengarah Jabatan Agama Islam Pulau Pinang [1996] 3 CLJ 231 (not folld) A
Majlis Agama Islam Negeri Sembilan v Hun Mun Meng [1992] 2 MLJ 676 (refd)
Md Hakim Lee v Majlis Agama Islam Wilayah Persekutuan, Kuala Lumpur [1998] 1 MLJ 681 (refd)
Mohamed Habibullah bin Mahmood v Faridah bte Dato Talib [1992] 2 MLJ 793 (refd) B
Ng Wan Chan v Majlis Ugama Islam Wilayah Persekutuan & Anor [1991] 3 MLJ 174 (refd)
Susie Teoh; Re; Teoh Eng Huat v Kadhi of Pasir Mas, Kelantan & Majlis Ugama Islam dan Adat Istiadat Melayu, Kelantan [1986] 2 MLJ 228 (refd) C
Teoh Eng Huat v Kadhi, Pasir Mas & Anor [1990] 2 MLJ 300 (refd)

Legislation referred to

Administration of the Religion of Islam and the Malay Custom of (Pahang) Enactment 1982 Pt VI D
Administration of Islamic Law (Federal Territories) Act 1993 s 87, Pt IX
Administration of Muslim Law Enactment 1962 (Kedah) ss 37, 139, 140, 141
Administration of Muslim Law Enactment 1991 (Negeri Sembilan) s 90(3) E
Administration of Muslim Law Enactment 1993 (Penang) Pt VIII
Administration of Muslim Law Enactment 1952 (Selangor) s 45(2), (3)
Federal Constitution arts 11, (1), 12(4), 74, (2), 77, 121(1A), Ninth Schedule (State List) para 1, (Federal List) item 6(e) F
Islamic Family Act 1984 ss 107, 127
Mahkamah Syariah Enactment 1983 (Kedah) s 25
Kelantan Enactment No 4 of 1994 s 102
Married Women Ordinance 1957 s 9(2)
Syariah Court Enactment 1993 (Kedah) G

Appeal from: Originating Summons No R2–24–76 of 1992 (Kuala Lumpur)

Balwant Singh Sidhu (*Balwant Singh Sidhu & Co*) for the appellant.
Mohd Shakri bin Abdul Razak (*Nawal bte Harun @ Abdul Rahman* with him) (*Shakri & Co*) for the respondents. H

Cur Adv Vult

Mohamed Dzaiddin FCJ (delivering the judgment of the court): This appeal arose from the decision of Wan Adnan J (as he then was) who on 2 February 1994 upheld a preliminary objection raised on behalf of the second respondent that the High Court had no jurisdiction to hear the appellant's originating summons for a declaration that he was not a Muslim. I

A The appeal raises a question of law of public importance in view of conflicting judicial decisions on the question which court — the High Court or the syariah court — has jurisdiction to hear apostasy (murtad) cases

Factual background

B The appellant was born on 3 January 1971 in Butterworth to Sikh parents and brought up as a Sikh. From 1984 he attended school in Perlis. On 14 May 1988, apparently without the knowledge and consent of his widowed mother, he converted to Islam at Perkim office in Alor Setar, Kedah and assumed the Muslim name of Salman bin Abdullah. He was then a minor. The conversion was duly registered at the Syariah Court Kota C Setar, Kedah under s 139 of the Kedah Administration of Muslim Law Enactment 1962 ('the Kedah Enactment'). On 16 July 1992 (by which time he was over 21 years of age), he went through a Baptism ceremony into the Sikh faith at Sikh Gurdwara in Kuala Lumpur, thereby renouncing the religion of Islam. Following this, on 27 July 1992, he executed a deed poll D in which he declared unequivocally that he was a Sikh, that he had abandoned the name of Salman bin Abdullah and that he had reverted to his original name of Soon Singh a/l Bikar Singh. On 2 September 1992, he filed the originating summons in the Kuala Lumpur High Court seeking a declaration that he was no longer a Muslim and was supported by an affidavit which he affirmed on even date.

E At the hearing before the learned judge on 11 November 1993, counsel for Jabatan Agama Islam Kedah raised a preliminary objection against the application contending that the High Court had no jurisdiction as the matter came under the jurisdiction of the syariah courts. After hearing the submissions of counsel, on 2 February 1994, his Lordship upheld the F objection and dismissed the application. In his judgment, the subject matter in the application was a matter within the jurisdiction of the syariah courts. The civil courts had no jurisdiction.

The learned judge's reasons

G In dismissing the appellant's application for the High Court to hear the originating summons, the learned judge relied on the Supreme Court decision in *Dalip Kaur v Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor* [1992] 1 MLJ 1, and the separate judgment of Mohamed Yusoff SCJ in the same case. Relying on the fatwa issued by the Fatwa Committee of the Majlis Agama Islam Negeri Kedah in *Dalip Kaur*, his H Lordship held that a Muslim who renounced Islam by a deed poll or who went through baptism ceremony to reconvert to Sikhism continued to remain in Islam until a declaration had been made in a syariah court that he was a 'murtad'. His Lordship found the fatwa clearly showed that only a syariah court has the exclusive jurisdiction to determine whether or not a person has ceased to be a Muslim. In accordance with the fatwa, the I appellant was still a Muslim. Whether or not his conversion is invalid was a matter for the syariah court to determine in accordance with Hukum Syarak. Article 11 of the Federal Constitution had no application.

According to him, the fatwa was not found or contained in the Kedah Enactment. Nor was it provided for in the Kedah Mahkamah Syariah Enactment 1983 (now replaced by Syariah Court Enactment 1993). It was however based on hukum syarak. His Lordship then referred to s 25 of Enactment 1983 which states:

> (1) Any provision or interpretation of any provision in the Enactment which is inconsistent with Hukum Syarak shall be void to the extent of the inconsistency.
>
> (2) In the event of a lacuna or in the absence of any matter not expressly provided for by this Enactment the Court shall apply Hukum Syarak.

He concluded that the syariah court must necessarily have the jurisdiction as it could assume the jurisdiction under sub-s (2) above.

His Lordship also found support for his view when he relied on the judgment of Mohamed Yusoff SCJ in *Dalip Kaur* (at p 10):

> Such a serious issue would, to my mind, need consideration by eminent jurists who are properly qualified in the field of Islamic jurisprudence.
>
> On this view, it is imperative that the determination of the question in issue requires consideration of the Islamic law by relevant jurists qualified to do so. The only forum qualified to do so is the syariah court.

His Lordship concluded thuswise (at p 694):

> It is my view that the subject matter in this application is in respect of a matter which comes within the jurisdiction of the syariah courts. The civil courts have no jurisdiction. Article 121(1A) of the Federal Constitution provides:
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> 'The Courts referred to in Clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah Courts. '
>
> The application is dismissed with costs.

The appeal

At the outset, it must be noted that in this appeal, we are dealing with the question of the jurisdiction of the syariah courts under art 121(1A) of the Federal Constitution ('the Constitution'). Before us, learned counsel for the appellant however challenged the learned judge's decision on two other grounds. First, En Balwant submitted that his Lordship erred in failing to give due regard and consideration to the fact that the appellant's purported conversion to Islam was invalid. It is common ground that the appellant converted to Islam when he was under the age of 18 years. The conversion was without the knowledge and consent of his widowed mother. Counsel referred to art 12(4) of the Constitution which states that the religion of a person under 18 years of age shall be decided by his parent or guardian. Relying on *Teoh Eng Huat v Kadhi, Pasir Mas & Anor* [1990] 2 MLJ 300 (SC) which held, inter alia, that the right of religious practice of an infant should be exercised by his guardian on his behalf until he reached the age of majority, counsel submitted that this case is an authority for the proposition that the appellant's conversion to Islam while a minor and without the knowledge and consent of his mother was invalid. Therefore,

A on the facts of the present case, the minor's conversion to Islam was invalid and the civil law applicable to him before his purported conversion continued to apply. Counsel reasoned that since the appellant's conversion to Islam was invalid, the question of jurisdiction under art 121(1A) of the Constitution did not come into play.

B In our view, the question whether the appellant's conversion to Islam while a minor was valid or not is not a relevant issue in this appeal. We are here to decide on the jurisdictional question of which court a Muslim convert can apply for a declaration that he had converted out of Islam. In any event, it should be noted that four years had elapsed between the time of the appellant's conversion to Islam (at the age of 17 years and 4 months) C and the time of his purported reconversion to Sikhism (21 years 6 months old). Throughout this period of about four years, he remained a Muslim and practised the religion of Islam and continued even after he attained majority. There is no evidence that he ever challenged his conversion to Islam after he reached 18 years of age. In the circumstances, these factors amply justify the conclusion that the appellant's conversion to Islam was D made voluntarily.

The second submission of En Balwant pertains to the appellant's fundamental right guaranteed by art 11(1) of the Constitution. The article states:

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

Counsel submitted that the learned judge erred in failing to consider art 11(1) and in this context failed to appreciate the fundamental difference between determining the religion of a deceased person and the religion professed by a living person. This is how he articulated the argument. In F *Dalip Kaur*, the opinion of the fatwa committee was in respect of a deceased person who was a Muslim at the time of his death. In *Ng Wan Chan v Majlis Ugama Islam Wilayah Persekutuan & Anor* [1991] 3 MLJ 174, the question before the High Court was whether the deceased person, a Buddhist, was properly converted to Islam before he died. Based on secondary evidence, G the court was satisfied that the conversion was not made in accordance with the requirements of Islamic law. Counsel pointed out that in both cases, the court made a finding on the legal status of a deceased person relying on secondary evidence. On the other hand, in the instant case, the appellant is alive and he is no doubt in the best position to state his religious conviction. Counsel contended that in the latter case, the appellant has unfettered right H to choose his religion and to practise it. No one should dispute his constitutional right, especially when there is a clear and express declaration by such a person of the religion that he professes. He submitted it is settled law that there is no restriction on the right of any person to profess and practise his religion which is guaranteed by art 11 of the Constitution. He relied on the following authorities: (1) *Jamaluddin bin Othman v Menteri Hal* I *Ehwal Dalam Negeri, Malaysia & Anor* [1989] 1 MLJ 368; (2) *Indian Constitutional Law* by MP Jain (4th Ed, 1993) p 635; (3) *Fundamental Rights and Constitutional Remedies in Pakistan* by Sharifuddin Pirzada, pp 305, 306, 326.

We pause to observe that we have allowed counsel to submit on this constitutional point at some length, not realizing that this issue is not properly before the courts here and below. In our view, this question of an infringement of art 11(1) is quite misplaced. It is clear from Originating Summons No R2–24–76 of 1992 that the application of the appellant is simply for the following order:

> (1) A declaration that the plaintiff, having renounced the religion of Islam and re-embraced the Sikh faith, is no longer a Muslim; ... .

The supporting affidavit is also quite straight-forward and made no prayer for a declaration under art 11 of the Constitution.

It is also clear to us that at that stage, the learned judge had not made any order prayed for in the originating summons, but stayed the hearing of the above application in order to hear counsel and decide on the preliminary question raised on behalf of the respondents. It is unclear from the record of appeal whether this constitutional point was raised before the learned judge when considering the preliminary issue of jurisdiction. However, from the written judgment he did state that whether or not the conversion was invalid was also a matter for the syariah court to determine in accordance with hukum syarak. His Lordship followed by stating that art 11 of the Constitution had no application. From the above statement, we can conclude that the learned judge was merely expressing an opinion and did not make any ruling that the appellant was still a Muslim despite his purported renunciation of Islam. Therefore, since no ruling or declaration was made to the effect that the appellant was still a Muslim, the question of an infringement of art 11(1) of the Constitution did not arise. We venture to suggest that the appellant might have to wait for the decision of his principal application before he could raise this constitutional issue under art 11(1) of the Constitution. Alternatively, he could file a separate action seeking a declaration, that his conversion to Islam infringed art 11(1). See *Re Susie Teoh; Teoh Eng Huat v Kadhi of Pasir Mas, Kelantan & Majlis Ugama Islam dan Adat Istiadat Melayu, Kelantan* [1986] 2 MLJ 228; *Jamaluddin bin Othman.*

Turning to the principal ground on jurisdiction, En Balwant contended that there must be express jurisdiction conferred on the syariah courts by the States' Administration of Islamic Law Enactments ('the State Enactments'). In the instant case, he submitted that the learned judge erred in law in following *Dalip Kaur* and held under hukum syarak and by implication that the syariah court had exclusive jurisdiction to deal with the application. Counsel submitted that since there was no express provision in the Kedah Enactment conferring jurisdiction on the syariah court, the High Court has jurisdiction to hear the appellant's application.

In support of his proposition that where no express jurisdiction has been conferred on the syariah courts by the State Enactments, the jurisdiction remains with the civil courts, counsel referred us to some authorities which we shall deal shortly. We would like first to examine the ratio decidendi in *Dalip Kaur.* Briefly, one Gurdev Singh had converted to Islam because he wanted to marry a Muslim girl. However, before the

A marriage could be solemnized, he died. His mother, Dalip Kaur applied to the High Court Penang for a declaration that the deceased was at the time of his death not a Muslim and/or that he had renounced Islam and prayed that she was entitled to the deceased's body for burial. At the trial, Dalip Kaur led evidence that the son had renounced Islam by a deed poll and also he had rebaptised into Sikhism. The learned judicial commissioner found B that the signature on the deed poll was not that of the deceased. He also rejected the evidence regarding rebaptism and the congregation at the Sikh temple. He held that the deceased was a Muslim at the time of his death. Dalip Kaur appealed. At the hearing of the appeal, the Supreme Court remitted the case to the High Court for the judge to refer certain questions C of Islamic law that arose therein to the fatwa committee under s 37 of the Kedah Enactment. The High Court sat again for the purpose of referring the questions. The fatwa committee was of the opinion that the deceased was a Muslim at the time of his death. After receiving the fatwa, the learned judicial commissioner confirmed his earlier findings and decision.

D In dismissing the appeal, the Supreme Court held that the learned judicial commissioner was entitled to accept the answers of the fatwa committee to the questions which were referred to it and which were agreed to by the parties. The fatwa committee was of the opinion that the deceased was a Muslim as he had been duly converted to Islam and there was no decision of a syariah court which decided that he had renounced Islam.

E In his judgment, Hashim Yeop A Sani CJ (Malaya) stated that the deed poll was crucial to determine whether the deceased died a Muslim. The relevant part of the fatwa on this point stated in effect that if a Muslim executed a deed poll renouncing Islam, he became a 'murtad' (apostate). On the conversion out of Islam, his Lordship noted there were no provisions in the Kedah Enactment. On the other hand, there were three provisions, F namely, ss 139, 140 and 141, which dealt with conversion into Islam. He continued (at p 7):

> We are of the view that clear provisions should be incorporated in all the state Enactments to avoid difficulties of interpretation by the civil courts. This is particularly important in view of the amendment to art 121 of the Federal G Constitution made by Act A704 of 1988. The new cl (1A) of art 121 of the Constitution 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. But that clause does not take away the jurisdiction of the civil court to interpret any written laws of the states enacted for the administration of Muslim law. One of the opinions given in the fatwa of the fatwa committee in H this case was that a convert who executes a deed poll renouncing Islam is a murtad (apostate). Of course, this opinion is valid only for the state of Kedah. If there are clear provisions in the State Enactment, the task of the civil court is made easier when it is asked to make a declaration relating to the status of a person whether such person is or is not a Muslim under the Enactment. A clear provision can, for example, be in the form of a provision imposing I obligation on the relevant authority to keep and maintain a register of converts who have executed a deed poll renouncing Islam.

Mohamed Yusoff SCJ, in a separate judgment, stressed that the determination of the question in issue (whether a person was a Muslim or

had renounced Islam before death) required consideration of the Islamic law by relevant jurists qualified to do so. His Lordship stated (at pp 9–10):

> The present question, in my view, cannot be determined by a simple application of facts as has been found by the learned judicial commissioner on the basis of veracity and relevancy of evidence according to civil law. Such a serious issue would, to my mind, need consideration by eminent jurists who are properly qualified in the field of Islamic jurisprudence.
>
> On this view, it is imperative that the determination of the question in issue requires substantial consideration of the Islamic law by relevant jurists qualified to do so. The only forum qualified to do so is the syariah court.

Indeed, it is the above statement of Mohamed Yusoff SCJ which found support for the learned judge's decision in the present case.

We must now turn to examine the authorities relied by counsel for the proposition that there must be express provisions in the State Enactments before the syariah court can assume jurisdiction on a given matter.

In *Ng Wan Chan v Majlis Ugama Islam Wilayah Persekutuan & Anor (No 2)* [1991] 3 MLJ 487, there was a preliminary objection challenging the jurisdiction of the High Court to hear the plaintiff's application for a declaration that her deceased husband was a Buddhist at the time of his death. After considering s 45(2) and (3) of the Selangor Administration of Muslim Law Enactment 1952 dealing with the jurisdiction of the syariah court, the learned judge dismissed the objection and held that if the State law did not confer on the syariah court any jurisdiction to deal with any matter stated in the State List, the syariah court was precluded from dealing with the matter. Jurisdiction could not be derived by implication.

In *Lim Chan Seng v Pengarah Jabatan Agama Islam Pulau Pinang* [1996] 3 CLJ 231, Abdul Hamid J considered the issue of jurisdiction under art 121(1A) of the Constitution in the light of the Penang Administration of Muslim Law Enactment 1993 and held that the High Court Penang had jurisdiction to declare that the plaintiff had renounced Islam. His Lordship stated that by itself, art 121(1A) did not automatically confer jurisdiction on the syariah court, even in respect of matters that fell under the State List of the Ninth Schedule. He reasoned that the state legislature must first act upon the power given it by arts 74 and 77 of the Constitution and the State List and accordingly enact laws conferring the jurisdiction. After examining the Penang Enactment, the learned judge concluded that there were no provisions empowering the syariah court to hear and decide on the issue of 'murtad'. It followed that there was no impediments for the civil court (High Court) to hear and dispose of the matter. His Lordship observed that to enable the syariah courts in Penang to have jurisdiction over 'murtad' cases, the state legislature must first amend its 1993 Enactment and incorporate appropriate provisions to that effect, as was done by the Negeri Sembilan Legislature in Negeri Sembilan Administration of Muslim Law Enactment 1991 (see *Majlis Agama Islam Negeri Sembilan v Hun Mun Meng* [1992] 2 MLJ 676).

It will be seen that in both cases, the approach taken by the learned judges was to examine the relevant State Enactments to see under its civil jurisdiction whether an express jurisdiction is conferred on the syariah court

A to deal with a particular matter. In adopting this approach, Abdul Hamid J in *Lim Chan Seng*, in particular, followed Harun Hashim SCJ in *Mohamed Habibullah bin Mahmood v Faridah bte Dato Talib* [1992] 2 MLJ 793, who stated (at p 800):

> ... I am therefore of the opinion that when there is a challenge to jurisdiction, as here, the correct approach is to firstly see whether the syariah court has jurisdiction and not whether the state legislature has power to enact the law conferring jurisdiction on the syariah court.

In *Mohamed Habibullah*, the issues before the High Court were:

(1) whether the court had jurisdiction to adjudicate on the plaintiff's action claiming damages for and an injunction to restrain the defendant from assaulting, harrassing or molesting her and members of her family since the action involved a matter which fell within the express jurisdiction of the syariah court; and

(2) whether the plaintiff could institute the present action against the defendant when s 9(2) of the Married Women Ordinance 1957 prohibited a wife from suing her husband in tort.

The learned trial judge held he had jurisdiction to hear the case and that the Married Women Ordinance 1957 did not apply. The defendant appealed. Allowing the appeal, the Supreme Court held that the intention of Parliament by art 121(1A) of the Constitution was to take away the jurisdiction of the High Courts in respect of any matter within the jurisdiction of the syariah court (*Dalip Kaur*). The parties in the case were Muslims and husband and wife. The allegations of assault and battery by the plaintiff fell within s 127 of the Islamic Family Act 1984 and the syariah court had also power to grant an injunction under s 107 of the Act. There could not therefore be any doubt that the syariah court in the case had been conferred jurisdiction on the matter.

Harun Hashim SCJ was of the opinion that when there was a challenge to jurisdiction, the correct approach was to firstly see whether the syariah court has jurisdiction and not whether the state legislature has power to enact the law conferring jurisdiction on the syariah court. Gunn Chit Tuan SCJ (as he then was) appeared to disagree with the approach adopted by Harun Hashim. Mohd Azmi SCJ, on the other hand, felt that the intention of the new cl (1A) to art 121 was clearly to confer exclusive jurisdiction on the syariah courts to adjudicate on any matter which has been lawfully vested by law within the jurisdiction of the syariah court. He added that any jurisdiction lawfully vested in the syariah court is now exclusively within the jurisdiction of that court. Perhaps his Lordship should have gone further and asked: what are matters within the exclusive jurisdiction of the syariah court? At any rate, his Lordship agreed with the view of Mohamed Yusoff SCJ in *Dalip Kaur* that the determination of the question of apostasy required consideration of the Islamic law by eminent jurists who are qualified to do so. And Gunn Chit Tuan SCJ in agreeing with Mohamed Yusoff SCJ's view stated that the only forum qualified to answer the question was the syariah court.

In *Md Hakim Lee v Majlis Agama Islam Wilayah Persekutuan, Kuala Lumpur* [1998] 1 MLJ 681, the plaintiff sought declarations from the Kuala Lumpur High Court that his renunciation of Islam by a deed poll was in accordance with the law and valid; and that he was not required to obtain the consent of MAIWP to renounce the religion of Islam. A preliminary argument arose on the question of the jurisdiction of the High Court to adjudicate on the matter. Abdul Kadir Sulaiman J dismissed the plaintiff's application. On the facts of the case, the plaintiff embraced Islam on 30 March 1978 and on that date he professed the religion of Islam and no longer a Buddhist. The learned judge held that by virtue of para 1 of the State List, the court having jurisdiction over him in respect of matters sought in his application must be the syariah court because it fell within the category of persons professing the religion of Islam. He reasoned that by virtue of para 1 of the State List of the Ninth Schedule to the Constitution, the jurisdiction lay with the syariah court on its wider jurisdiction over a person professing the religion of Islam even if no express provisions were provided in the Administration of Islamic Law (Federal Territories) Act 1993 because, under art 74 of the Constitution, it was within the competency of the state legislature to legislate on the matter. The fact that the legislature did not as yet do so would not detract from the fact that the matters came within the jurisdiction of the syariah courts within the contemplation of para 1 of the State List. Therefore, when the matters are in issue, the jurisdiction is clothed in the syariah courts and not in the courts mentioned in art 121(1), notwithstanding the absence of express provisions in the State Enactments at the time the issues arise.

It is clear that the reasoning of Abdul Kadir Sulaiman J is that the jurisdiction conferred on the syariah court need not necessarily be expressed in the State Enactments, but taking the wider jurisdiction approach, such jurisdiction can be assumed as being inherent in the syariah court itself as provided in para 1 of the State List.

Similarly, in the instant case, there are no express provisions in the Kedah Enactment conferring jurisdiction on the syariah court to deal with the question of apostasy. The learned judge however based his conclusion that the syariah court has jurisdiction to hear the appellant's application by implication, relying on the fatwa in *Dalip Kaur*. His Lordship stated (at p 693):

> ... According to the fatwa, a Muslim who renounced the Islamic faith continues to remain in Islam until a syariah court makes a declaration that he has become a 'murtad'. The syariah court must necessarily have the jurisdiction. The court can assume that jurisdiction under s 25(2) quoted above ...
>
> In accordance with the fatwa, the plaintiff here is still a Muslim. He should go to a syariah court for the declaration.

After reviewing the authorities cited by counsel, the dominant and wider question in this appeal is whether the jurisdiction of the syariah court to hear an application concerning apostasy must be expressly provided in the State Enactments, and in the case of the Federal Territories, the Act, or whether

such jurisdiction can be taken as having been vested in the syariah court by implication.

It cannot be disputed that the syariah court derives its jurisdiction under a state law enacted pursuant to art 74(2) of the Constitution following para 1, State List of the Ninth Schedule of the Constitution and in the case of the Federal Territories by virtue of item 6(e) Federal List. Thus, on a matter relating to conversion to Islam, *all* State Enactments and the Act expressly vest the syariah courts jurisdiction to deal with the matter. See, for example, ss 139, 140, 141 of the Kedah Enactment; Part IX (ss 85–95) of the Administration of Islamic Law (Federal Territories) Act 1993; and Part VIII (ss 77–89) the Penang Administration of Muslim Law Enactment 1993. The sections referred to deal with capacity, requirements of a valid conversion, registration, certificate of conversion and recognition of a convert as a Muslim. It is interesting to note that s 87 of the Federal Territories Act provides that from the moment of his conversion, a convert becomes subject to the same duties and obligations as any other Muslim.

With respect to conversion out of Islam, only some State Enactments contain express provisions on the matter. For example, the Administration of the Religion of Islam and the Malay Custom of Pahang Enactment 1982 under Part VI states that where any person who has embraced the religion of Islam in accordance with the Part, apostasises from the religion, he shall report to the court of a kadi of his decision and the Yang di-Pertua shall register it. Before his decision is reported and registered, he shall be presumed to be still a Muslim. The Negeri Sembilan Administration of Islamic Law Enactment 1991 s 90(3) provides that a Muslim, or a *saudara baru* who has converted to Islam and later decides to renounce the same shall report the said decision to the Registrar of Saudara Baru, who shall register the said decision in the prescribed form. Before the said decision is reported and registered, he shall still be treated as a Muslim. The Kelantan Enactment No 4 of 1994, s 102 also provides that no person who has confessed that he is a Muslim by religion may declare that he is no longer a Muslim until a court has given its approval to that effect. Before the court gives its approval, the person shall be presumed to be a Muslim and any matter which is connected with the Religion of Islam shall be applied to him.

Conclusion

From the analysis of the State Enactments, it is clear that all State Enactments and the Federal Territories Act contain express provisions vesting the syariah courts with jurisdiction to deal with conversion to Islam. On the other hand, only some State Enactments expressly confer jurisdiction on the syariah courts to deal with conversion out of Islam. In this regard, we share the view of Hashim Yeop A Sani CJ (Malaya) in *Dalip Kaur* p 7 that 'clear provisions should be incorporated in all State Enactments to avoid difficulties of interpretation by the civil courts,' particularly in view of the new cl (1A) of art 121 of the Constitution which as from 10 June 1988 had taken away the jurisdiction of the civil courts in respect of matters within the jurisdiction of the syariah courts. Be that as it may, in our opinion, the

jurisdiction of the syariah courts to deal with the conversion out of Islam, although not expressly provided in the State Enactments, can be read into them by implication derived from the provisions concerning conversion into Islam. It is a general rule of construction that if the meaning of a statute is not plain, it is permissible in certain cases to have recourse to a construction by implication and the court may draw inferences or supply the obvious omissions. *Craies on Statute Law* (7th Ed) p 112, states that an express and unambiguous language appears to be absolutely indispensable in statutes passed for the following purposes: imposing tax; conferring or taking away legal rights; excepting from the operation of or altering clear principles of law; altering the jurisdiction of courts of law, which in the words of Tindal CJ in *Albon v Pyke* (1842) 4 M & G 421 at p 424: 'the general rule undoubtedly is, that the jurisdiction of the superior courts is not taken away, except by express words or necessary implication'. In the instant case, in our opinion, the general rule of construction applies and the court can have recourse to a construction by implication. Implication may arise from the language used, from the context, or from the application of some external rule. They are of equal force, whatever their derivation (*Bennion's Statutory Interpretation* (2nd Ed) p 362). It is quite clear to us that the legislative purpose of the State Enactments and the Act is to provide a law concerning the enforcement and administration of Islamic law, the constitution and organization of the syariah courts and related matters. Therefore, when jurisdiction is expressly conferred on the syariah courts to adjudicate on matters relating to conversion to Islam, in our opinion, it is logical that matters concerning conversion out of Islam (apostasy) could be read as necessarily implied in and falling within the jurisdiction of the syariah courts. One reason we can think of is that the determination of a Muslim convert's conversion out of Islam involves inquiring into the validity of his purported renunciation of Islam under Islamic law in accordance with hukum syarak (*Dalip Kaur*). As in the case of conversion to Islam, certain requirements must be complied with under hukum syarak for a conversion out of Islam to be valid, which only the syariah courts are the experts and appropriate to adjudicate. In short, it does seem inevitable that since matters on conversion to Islam come under the jurisdiction of the syariah courts, by implication conversion out of Islam should also fall under the jurisdiction of the same courts.

We hasten to add that both the learned judge in the instant case and Abdul Kadir Sulaiman J in *Md Hakim Lee*, for different reasons, also had recourse to a construction by implication to found the jurisdiction of the syariah court to deal with the question of conversion out of Islam. Abdul Kadir Sulaiman J, in particular, adopted a liberal interpretation of the Wilayah Act. On the other hand, Abdul Hamid J in *Lim Chan Seng* applied a strict interpretation by confining the meaning of the word 'jurisdiction' to the express jurisdiction of the syariah courts enacted in the State Enactments, where in that case he found no express provisions in the Penang State Enactment. Whilst we agree with the approach adopted by Abdul Hamid J following *Habibullah*, that when there is a challenge to jurisdiction the correct approach is to look at the State Enactments to see

whether or not the syariah courts have been expressly conferred jurisdiction on a given matter, with respect, we do not agree with his Lordship's conclusion that since the Penang Enactment did not expressly confer jurisdiction on the syariah court over the matter raised, there was no impediment for the civil court to hear and dispose of the matter.

For the reasons we have given above, we agree with the conclusion of the learned judge that the appellant's application for a declaration that he is no longer a Muslim comes within the jurisdiction of the syariah court and not the High Court. Accordingly, we dismiss this appeal with costs. Deposit to the respondents to account of taxed costs.

Appeal dismissed with costs.

Reported by Andrew Christopher Simon