A

Lina Joy lwn Majlis Agama Islam Wilayah Persekutuan dan lain-lain

B

MAHKAMAH PERSEKUTUAN (PUTRAJAYA) — RAYUAN SIVIL NO 01–2 TAHUN 2006 (W)
AHMAD FAIRUZ KETUA HAKIM NEGARA, RICHARD MALANJUM HB (SABAH & SARAWAK) DAN ALAUDDIN HMP
30 MAY 2007

C

Undang-Undang Islam — Keluar Islam (murtad) — Prosedur — Permohonan untuk mengeluarkan perkataan 'Islam' dalam kad pengenalan — Sama ada perayu mesti memperolehi perakuan pihak berkuasa agama lslam sebelum boleh dikatakan telah keluar Islam

D

Undang-Undang Islam — Keluar Islam (murtad) — Sama ada isu murtad adalah dalam bidang kuasa mahkamah syariah atau mahkamah sivil — Perlembagaan Persekutuan Jadual 9, Senarai 2; perkara 11 & 121(1A)

E

Undang-Undang Pentadbiran — Penggunaan kuasa pentadbiran — Keputusan atau perintah — Permohonan memadamkan perkataan 'Islam' dalam kad pengenalan — Isu kemurtadan — Sama ada Jabatan Pendaftaran Negara berhak menghendaki perakuan pihak berkuasa agama lslam bahawa perayu telah keluar Islam — Sama ada keperluan ini adalah tidak munasabah, tidak mematuhi undang-undang dan tidak rasional — Kaedah-Kaedah Pendaftaran Negara 1990 kaedah 4 & 14

F

Undang-Undang Perlembagaan — Kebebasan asasi — Kesamaan di sisi undang-undang — Prosedur tambahan atas pemohon Islam bagi kad pengenalan ganti untuk mengatakan agamanya — Sama ada prosedur ini adalah diskriminasi terhadap orang Islam — Perlembagaan Persekutuan perkara 8

G

Undang-Undang Perlembagaan — Kebebasan asasi — Kebebasan beragama — Permohonan mengeluarkan perkataan 'Islam' dalam kad pengenalan — Sama ada Jabatan Pendaftaran Negara berhak menghendaki perakuan pihak berkuasa agama lslam bahawa perayu telah keluar Islam — Sama ada keperluan ini menyekat hak pemohon untuk keluar Islam dan tidak berperlembagaan — Perlembagaan Persekutuan perkara 8

H

I

Perayu adalah wanita Melayu yang dilahirkan pada 8 Januari 1964. Beliau telah dibesarkan sebagai seorang yang beragama Islam oleh keluarganya dan nama yang diberikan kepadanya adalah Azalina bte Jailani. Pada 21 Februari 1997 beliau telah memohon kepada Jabatan Pendaftaran Negara ('JPN') ('permohonan pertama') untuk menukarkan namanya kepada Lina Lelani. Sebab yang diberikan di dalam

akuan berkanunnya untuk menyokong permohonan tersebut adalah beliau telah meninggalkan Islam bagi menganuti agama Kristian dan beliau berniat untuk mengahwini seseorang yang beragama Kristian. Permohonan beliau untuk menukar nama telah ditolak oleh JPN tanpa memberikan sebab pada 11 Ogos 1997. Tetapi, beliau telah membuat permohonan kedua untuk menukar nama tetapi kali ini kepada Lina Joy pada 15 Mac 1999 ('permohonan kedua'). Berdasarkan dengan sub peraturan (1) peraturan 14 Peraturan-Peraturan Pendaftaran Negara 1990 ('Peraturan-Peraturan'), beliau sekali lagi menghantar satu akuan berkanun dan menyatakan bahawa sebab untuk menukar nama adalah pertukaran agama beliau kepada Kristian. Menurut beliau, beliau tidak menerima balasan dan apabila beliau pergi untuk bertanyakan berkenaan dengan permohonan keduanya pada Julai 1999 beliau telah diberitahu oleh pegawai di pejabat JPN Petaling Jaya bahawa oleh kerana kad pengenalannya tidak menyatakan agamanya, untuk mengelakkan kesukaran dalam memproses permohonannya, beliau seharusnya tidak menyatakan pertukaran agama sebagai sebab untuk menukar nama. Perayu menyatakan bahawa pada ketika itu adalah tidak diketahui oleh perayu bila atau beliau diberitahu oleh JPN bahawa Peraturan-Peraturan akan dipinda tidak lama lagi dan pertukaran nama beliau sahaja tidak mencukupi untuk tujuan beliau. Pindaan yang diperkenalkan tidak lama selepas itu adalah untuk membuatkannya satu keperluan bahawa dalam kad pengenalan orang Islam, agama mestilah dinyatakan. Di dalam afidavit sokongan beliau bagi saman pemulanya di Mahkamah Tinggi, perayu menyatakan bahawa ianya adalah 'helah' atau 'muslihat' oleh JPN dan perayua adalah terkilan dengan perkara ini. Perayu menghantar semula permohonan yang bertarikh 15 Mac 1999 dengan akuan berkanun yang baru yang diikrarkan pada 2 Ogos 1999. Pada 22 Oktober 1999, JPN telah menulis kepada beliau menyatakan bahawa permohonan beliau untuk menukarkan nama daripada 'Azlina bte Jailani' kepada 'Lina Joy' telah diluluskan dan beliau telah diminta untuk memohon untuk kad pengenalan gantian yang baru. Ini telah dilakukan oleh beluai pada 25 Oktober 1999. Tetapi, pada ketika beliau memohon untuk menggantikan kad perayu menyatakan bahawa tidak diketahui oleh beliau, Peraturan-Peraturan telah dipinda (melalui PU (A)70/2000) yang dikuatkuasakan secara kebelakangan pada 1 Oktober 1999) bagi memerlukan kad pengenalan mestilah menyatakan butiran agama untuk orang Islam. Walaubagaimanapun, di dalam borang permohonan yang meminta beliau menyatakan agamanya, perayu menyatakan bakal agama beliau adalah Kristian. Permohonan oleh perayu untuk menggantikan kad pengenalan telah ditolak. Perayu kemudiannya membuat permohonan ketiga pada 3 Januari 2000 ('permohonan ketiga') kepada pejabat JPN di Petaling Jaya. Beliau memohon untuk mengeluarkan perkataan 'Islam' dan nama asal daripada kad pengenalan gantian beliau. Beliau mengemukakan permohonan berkanun untuk menyokong permohonan beliau. Kerani kaunter, walaubagaimanapun telah menolak untuk menerima permohonan beliau atas alasan bahawa ianya tidak lengkap tanpa perintah Mahkamah Syariah yang mengesahkan beliau telah meninggalkan Islam. Melalui saman pemula, perayu memohon relif di Mahkamah Tinggi memohon antara lainnya, untuk beberapa perintah deklarasi terhadap Majlis Agama Islam Wilayah Persekutuan ('Majlis') dan Kerajaan Malaysia berkenaan dengan hak beliau kepada kebebasan beragama, keperlembagaan s 2 Akta Pentadbiran Undang-Undang Islam (Wilayah Persekutuan) 1993, keterterapan Enakmen Syariah kepada beliau yang menganut agama Kristian dan keperlembagaan undang-undang negeri dan persekutuan yang melarang keluar daripada Islam. Sebagai tambahan beliau

A memohon untuk perintah bahawa nama beliau dimasukkan di dalam Buku Pendaftaran sebagai terkeluar daripada Islam. Perayu telah melibatkan sama Majlis dan memohon perintah deklarasi kerana beliau menyatakan bahawa beliau dilayani ketakutan bahawa tindakan akan diambil terhadap beliau oleh pihak berkuasa agama. Responden-responden telah memfailkan permohonan membatalkan permohonan. B Hakim Mahkamah Tinggi telah mendengar saman pemula dan menolak secara keseluruhan tanpa memberikan apa-apa remedi yang diminta perayu (lihat [2004] 2 MLJ 199). Beliau merayu. Di Mahkamah Rayuan, pihak-pihak melalui persetujuan mengehadkan isu-isu dan relief-relief yang dipohon dengan nyata sekali. Isu-isu perlembagaan digugurkan dan rayuan difokuskan hanya atas isu undang-undang pentadbiran, ianya adalah, sama ada Ketua Pengarah JPN dengan C sebenarnya melaksanakan budi bicara yang diletakkan hak kepadanya di bawah undang-undang. Secara majoriti, Mahkamah Rayuan menjawab dengan mengesahkannya (lihat [2005] 6 MLJ 193). Plaintif merayu. Isu-isu di hadapan mahkamah ini adalah: (1) sama ada JPN berhak dalam undang-undang untuk mengenakan sebagai keperluan bagi memadamkan kemasukan Islam di dalam kad D pengenalan perayu ('KP') untuk perayu mengemukakan perakuan atau deklarasi atau perintah daripada Mahkamah Syariah bahawa beliau telah murtad; (2) sama ada JPN dengan sebenarnya mentafsir kuasanya di bawah Peraturan-Peraturan terutama peraturan 4 dan 14, untuk mengenakan keperluan yang dinyatakan di atas apabila ianya tidak dinyatakan dengan jelas dalam Peraturan-Peraturan; dan (3) sama ada, *Soon Singh a/l Bikar Singh lwn Pertubuhan Kebajikan Islam Malaysia (PERKIM)* E *Kedah & Anor* [1999] 1 MLJ 489 telah diputuskan dengan benar apabila ianya menggunakan teori bidang kuasa tersirat yang dikemukakan di dalam *Md Hakim Lee v Majlis Agama* [1998] 1 MLJ 681 *Ng Wan Chan v Majlis Agama (No 2)* [1991] 3 MLJ 487 dan *Lim Chang Seng v Pengarah Jabatan Agama Islam* [1996] 3 CLJ 231 yang telah mengisytiharkan bahawa melainkan bidang kuasa yang jelas telah F dikurniakan ke atas Mahkamah Syariah, mahkamah sivil akan mengekalkan bidang kuasa mereka.

Diputuskan, dengan majoriti menolak rayuan:

G (1) (oleh **Ahmad Fairuz Ketua Hakim Negara**, **Alauddin HMP** bersetuju) Kes perayu jatuh di bawah butir-butir yang tidak betul mengikut kaedah 14 perenggan (c). Kaedah 14(1) sememangnya memerlukan perayu untuk melaporkan fakta mengenai butiran-butiran yang tidak betul kepada Pejabat Pendaftaran yang terdekat sekali dan untuk memohon suatu KP ganti yang H mengandungi butir-butir yang betul. Sehubungan dengan ini kaedah 4 menjadi relevan kerana kaedah itu dengan jelasnya menyatakan bahawa sesiapa yang memohon untuk suatu KP ganti di bawah kaedah 13 atau 14 hendaklah mematuhi kaedah 4 itu. Oleh demikian JPN mempunyai justifikasi di bawah kaedah 4(c)(x) untuk memerlukan penentuan dari penguasa agama Islam mengenai kemurtadan perayu atau keluarnya perayu daripada agama Islam. I Maka, JPN boleh, mengikut kaedah 4(c)(x), memerlukan perayu mengemukakan keterangan dokumentari bagi menyokong ketepatan penegasannya bahawa beliau bukan lagi seorang Muslim (lihat perenggan 6).

(2) (oleh **Ahmad Fairuz Ketua Hakim Negara**, **Alauddin HMP** bersetuju) Rujukan kepada sesuatu pihak yang berkuasa atas perkara undang-undang

Islam adalah diperuntukkan oleh undang-undang dan justeru demikian ianya tidaklah bersalahan dengan undang-undang seperti mana yang dihujahkan oleh perayu. Rujukan bukanlah bermakna bahawa Mahkamah Syariah diminta untuk memutuskan sama ada meluluskan ataupun tidak permohonan memadamkan perkataan 'Islam' itu. Mahkamah Syariah cuma diminta untuk mengesahkan bahawa perayu adalah beragama Islam atau tidak berdasarkan undang-undang Islam. Berpandukan dari keputusan ini nanti, adalah dalam budibicara JPN untuk memutuskan sama ada kebenaran boleh diberi untuk memadamkan atau tidak perkataan 'Islam' (lihat perenggan 8).

(3) (oleh **Ahmad Fairuz Ketua Hakim Negara**, **Alauddin HMP** bersetuju) Ketidakrelaan JPN bertindak tanpa perakuan pihak berkuasa agama Islam adalah munasabah. Persoalan sama ada seseorang muslim itu murtad atau tidak adalah satu persoalan yang berkaitan dengan undang-undang Islam. Jika mahkamah memutuskan bahawa ketidakrelaan JPN adalah tidak munasabah, maka itu akan membawa erti bahawa mahkamah menghendaki JPN menerima fakta bahawa mengikut undang-undang Islam seseorang Muslim boleh dianggap oleh dunia sebagai telah keluar dari agama Islam dan bukan lagi seorang Muslim apabila orang itu kata dia telah keluar dari agama Islam (lihat perenggan 10).

(4) (oleh **Ahmad Fairuz Ketua Hakim Negara**, **Alauddin HMP** bersetuju) Adalah munasabah bagi JPN mengenakan syarat-syarat tersebut kerana perkara murtad ini, adalah satu persoalan yang berkaitan dengan undang-undang Islam dan jawapan kepada persoalan sama ada seseorang itu adalah seorang Muslim atau telah keluar dari agama Islam adalah termasuk dalam dunia undang-undang Syariah yang memerlukan pertimbangan-pertimbangan serius dan tafsiran wajar atas undang-undang itu. Syarat supaya suatu sijil atau perisytiharan atau perintah daripada Mahkamah Syariah bahawa perayu telah jadi murtad bukanlah suatu keputusan yang tidak munasabah sehinggakan sebegitu melampau dalam keingkaran terhadap logik atau standard moral yang diterima hingga tiada seorang yang waras yang telah menumpukan pemikirannya kepada persoalan yang perlu diputuskan itu boleh mencapai keputusan itu (lihat perenggan 10.1).

(5) (oleh **Ahmad Fairuz Ketua Hakim Negara**, **Alauddin HMP** bersetuju) Pindaan-pindaan kepada Kaedah-Kaedah 1990, kecuali untuk kaedah 19, hendaklah dianggap telah mula berkuatkuasa pada 1 Oktober 1990. Justeru itu pindaan-pindaan kepada kaedah 4, kaedah 5 dan Jadual Pertama adalah berkuatkuasa secara kebelakangan. Oleh itu tindakan JPN mengeluarkan KP dengan penambahan perkataan 'Islam' adalah sah di sisi undang-undang (lihat perenggan 11.1).

(6) (oleh **Ahmad Fairuz Ketua Hakim Negara**, **Alauddin HMP** bersetuju) Tiada ketentuan muktamad bahawa perayu tidak lagi menganuti agama Islam. Maka, kenyataan bahawa perayu tidak boleh lagi berada di bawah bidang kuasa Mahkamah Syariah kerana Mahkamah Syariah hanya ada bidang kuasa terhadap seseorang yang menganuti agama Islam (profess) tidak wajar ditekankan. Cara seseorang keluar dari sesuatu agama adalah semestinya mengikut kaedah atau undang-undang atau amalan (practice) yang ditentukan atau ditetapkan oleh agama itu sendiri. Perayu tidak dihalang dari berkahwin.

A Kebebasan beragama di bawah perkara 11 Perlembagaan Persekutuan memerlukan perayu mematuhi amalan-amalan atau undang-undang agama Islam khususnya mengenai keluar dari agama itu. Apabila ketentuan-ketentuan agama Islam dipatuhi dan pihak berkuasa agama Islam memperakukan kemurtadannya barulah perayu dapat menganuti agama Kristian (lihat B perenggan 14).

(7) (oleh **Ahmad Fairuz Ketua Hakim Negara**, **Alauddin HMP** bersetuju) Kes *Soon Singh* ketara menunjukkan bahawa hal murtad adalah dalam bidang kuasa Mahkamah Syariah. Item 1, Senarai 2, Jadual 9 Perlembagaan Persekutuan menunjukkan bahawa 'Islamic Law' adalah salah satu daripada C 'matters' yang terdapat dalam item 1 dan apabila dibaca pula berlatarbelakangkan kes *Dalip Kaur*, maka amat ketara sekali bahawa sesungguhnya perkara murtad itu adalah perkara yang berhubungkait dengan undang-undang Islam (Islamic Law) dan nyatalah oleh itu ianya adalah di dalam bidangkuasa Mahkamah Syariah dan kerana perkara 121(1A) D Perlembagaan Persekutuan, maka mahkamah-mahkamah sivil tidak boleh campur tangan dalam hal itu (lihat perenggan 16).

(8) (oleh **Ahmad Fairuz Ketua Hakim Negara**, **Alauddin HMP** bersetuju) Apa yang jelas dalam perkara 11 itu ialah penggunaan perkataan-perkataan '…..right to profess and practice his religion….' Kata-kata 'has the right' itu E terpakai kepada 'profess' dan juga 'practise': *Kamariah bte Ali lwn Kerajaan Negeri Kelantan, Malaysia* [2002] 3 MLJ 657; *Che Omar bin Che Soh v Public Prosecutor* [1988] 2 MLJ 55 diikut. Islam itu bukan sahaja suatu himpunan dogma-dogma dan ritual-ritual tetapi ianya adalah juga suatu cara hidup yang lengkap merangkumi semua bidang aktiviti manusia, persendirian atau awam, F perundangan, politik, ekonomi, sosial, budaya, moral atau kehakiman. Dan jika diteliti perkara-perkara 11(1), 74(2) dan item 1 di senarai 2 dalam Jadual 9 Perlembagaan Persekutuan akan ketara bahawa Islam itu meliputi antara lainnya undang-undang Islam. Justeru itu, jika seseorang Muslim ingin keluar dari agama Islam, dia sebenarnya menggunakan haknya di dalam konteks undang-undang syariah yang mempunyai jurisprudennya sendiri G mengenai isu murtad. Apa yang telah dilakukan oleh pegawai JPN adalah hanya semata-mata untuk menentukan perayu bukan lagi beragama Islam secara yang ditetapkan oleh Islam. Justeru itu, tindakan itu tidak boleh dikatakan bertentangan dengan perkara 11(1) yang dengan sendirinya memperuntukkan keperluan mematuhi kehendak-kehendak agama itu H sebelum dia keluar dari agama Islam (lihat perenggan 17.2).

(9) (oleh **Richard Malanjum HB (Sabah & Sarawak)** menentang) Peraturan 4, terutama sub peraturan 4(c)(iva), telah memilih orang Islam bagi beban pertambahan prosedur dan halangan-halangan yang mana adalah tidak bersangkutan dengan undang-undang diri. Ianya memerlukan bahawa I mana-mana pendaftar atau pemohon yang mana adalah Islam perlu untuk menyatakan agamanya. Keperluan tidak terpakai kepada orang bukan Islam. Oleh yang demikian perbezaan layanan kepada orang Islam. Oleh itu, ini sama seperti ketidaksamaan layanan di bawah undang-undang dan dalam ketiadaan mana-mana pengecualian didapati untuk menjustifikasikan perbezaan, sub peraturan telah melanggar art 8(1) Perlembagaan. Dalam erti kata lain, ianya

adalah berdiskriminasi dan tidak berpelembagaan dan seharusnya di tolak. Atas sebab ini sahaja bahawa relis yang dipohon oleh perayu seharusnya dibenarkan iaitu, untuk deklarasi bahawa beliau berhak mendapatkan NRIC ('Kad Pengenalan') yang mana perkataan 'Islam' tidak dipaparkan (lihat perenggan 65).

(10) (oleh **Richard Malanjum HB (Sabah & Sarawak)** menentang) Peraturan 4 dan 14 menyediakan selok-belok oleh seseorang boleh memohon untuk menggantikan kad pengenalan, ianya, pemohon perlu membekalkan butiran-butiran sebagaimana ditetapkan dan butiran-butiran penting yang lain untuk tujuan pengenalan dan untuk mengemukakan bukti dokumentari bagi menyokong ketepatan mana-mana butiran yang dikemukakan. Tetapi, JPN telah mendesak, berdasarkan kepada polisinya apabila tiadanya secara jelas di dalam dua peraturan, untuk pengeluaran perakuan murtad oleh perayu daripada Mahkamah Syariah Wilayah Persekutuan atau pihak berkuasa Islam sebelum permohonan ketiganya boleh diproses. JPN telah terlepas pandang satu perkara bahawa permohonan perayu perlu dipertimbangkan dalam kontek keperluan peraturan 4 dan 14 sahaja dan tidak seharusnya membawa masuk mana-mana faktor tambahan seperti mendapatkan maklumat daripada rekodnya. Di dalam borang yang dihantar oleh perayu beluai menyatakan bakal agamanya adalah Kristian. Fakta ini adalah diketahui oleh JPN seawal 21 Februari 1997. Oleh itu permohonan ketiga perlulah diproses dan dipertimbangkan hanya atas dasar tersebut dan mentafsirkan siri permohonan oleh perayu sebagai episod yang bersambungan. Jika perayu telah memenuhi keperluan peraturan 4 dan 14, JPN tidak mempunyai pilihan tepati dengan membenarkan permohonan beliau. Ianya bukanlah fungsi JPN untuk menambah lanjutan keperluan yang tidak ditetapkan dalam peraturan tersebut. Dalam membuat keputusannya untuk menolak permohonan perayu atas sebab tidak mengemukakan perintah atau pengesahan murtad daripada Mahkamah Syariah Wilayah Persekutuan atau pihak berkuasa Islam, JPN telah menanyakan dirinya soalan yang salah dan telah mengambil kira faktor sah yang tidak relevan dan tidak memasukkan faktor sah yang relevan. Juga, dalam perlu mengemukakan dokumen, ianya tidak terdapat atau diberi kuasa oleh Peraturan-Peraturan, JPN telah bertindak secara *ultra vires* kuasanya di bawah Peraturan-Peraturan dan oleh itu bertindak secara tidak sah (lihat perenggan 67–68 & 74–75).

(11) (oleh **Richard Malanjum HB (Sabah & Sarawak)** menentang) Desakan oleh JPN untuk pengesahan murtad adalah tidak selaras dengan kehendak peraturan 4(c)(x) kerana 'permintaan untuk bukti meninggalkan agama tidak termasuk di dalam maksud perkataan 'butiran-butiran yang dikemukakan'. Hanya 'butiran-butiran yang dikemukakan' oleh perayu adalah status beliau sebagai seorang Kristian atau penukaran beluai kepada Kristian. JPN hanya diberi kuasa untuk meminta bukti dokumentari tersebut bahawa ianya dipertimbangkan 'penting untuk menyokong ketepatan mana-mana butiran yang dikemukakan'. Oleh itu, JPN tidak boleh meminta untuk bukti dokumentari bahawa perayu adalah atau bukan lagi seorang Islam. Ini adalah kerana perayu tidak mengemukakan mana-mana butiran bahawa beliau adalah seorang Islam (lihat perenggan 77).

A (12) (oleh **Richard Malanjum HB (Sabah & Sarawak)** menentang) Penghakiman majoriti Mahkamah Rayuan keseluruhannya tidak mengambil kira fakta bahawa perayu telah membuat beberapa permohonan untuk menukar nama. Sudah tentu permohonan-permohonan tersebut seharusnya diambil kira sebagai sebahagian daripada satu tindakan bersambungan atas pihak perayu. B Untuk membataskan perkara tersebut kepada hanya permohonan ketiga adalah tidak menghiraukan secara keseluruhannya sejarah pahit perayu dalam urusannya dengan JPN. Jika JPN telah bertindak sewajarnya ke atas pilihan agama perayu untuk IC gantian pada Oktober 1999, dan tidak menolaknya atas alasan bahawa beliau tidak mengemukakan perintah murtad, tidak terdapatnya keperluan untuk permohonan ketiga untuk membetulkan C butiran-butiran berkenaan dengan kemasukan 'agama' (lihat perenggan 79).

(13) (oleh **Richard Malanjum HB (Sabah & Sarawak)** menentang) Terdapatnya penyalah gunaan kuasa pada pihak JPN apabila ianya gagal untuk mempertimbangkan faktor sah yang relevan, iaitu akuan berkanun dan dokumen-dokumen yang dikemukakan oleh perayu, lebih suka polisinya D memerlukan pengesahan murtad daripada Mahkamah Syariah Wilayah Persekutuan yang mana peringkat awal tidak dinyatakan di dalam peraturan 4 dan 14 dan dengan itu mempertimbangkan faktor sah yang tidak relevan dalam membuat satu keputusan. Selanjutnya, kesimpulan di dalam penghakiman majoriti adalah mempersoalkan polisi yang diguna pakai oleh E JPN adalah munasabah dalam ujian *Wednesbury Corporation v Ministry of Housing* [1966] 2 QB 275 adalah malangnya terlepas satu prinsip *cardinal*. Perlaksanaan polisi adalah menuju kepada hak asasi perlembagaan perayu kepada kebebasan beragama di bawah perkara 11 Perlembagaan. Menjadi satu isu Perlembagaan mestilah diberikan keutamaan dan kebebasan daripada ketetapan *Wednesbury* yang munasabah. Oleh itu, sebelum ianya boleh F dikatakan bahawa satu-satu polisi adalah munasabah di dalam ujian *Wednesbury* keperlembagaannya mestilah dipertimbangkan dahulu. Penghakiman majoriti gagal melaksanakan penggunaan tersebut sebelum tiba kepada kesimpulan berkenaan dengan polisi JPN (lihat perenggan 81 & 84).

G (14) (oleh **Richard Malanjum HB (Sabah & Sarawak)** menentang) Murtad melibatkan persoalan yang kompleks berkenaan dengan kepentingan perlembagaan terutamanya apabila sebahagian negeri di Malaysia telah menggubal undang-undang untuk menjadikannya satu jenayah yang mana ianya menimbulkan persoalan yang melibatkan kuada perundangan bahagian negeri persekutuan. Oleh itu ianya melibatkan pertimbangan perkara 5(1), H 3(4), 11(1), 8(2), 10(1)(a), 10(1)(e), 12(3) dan Jadual Kesembilan Perlembagaan. Oleh kerana melibatkan isu perlembagaan terutamanya atas persoalan hak asasi seperti mana yang terdapat di dalam Perlembagaan ianya adalah kepentingannya adalah kritikal bahawa mahkamah sivil yang lebih tinggi seharusnya tidak menolak bidang kuasa dengan hanya memetik Perkara I 121(1A). Artikel hanya melindungi Mahkamah Syariah dalam perkara-perkara di dalam bidang kuasa mereka yang mana tidak termasuk pentafsiran peruntukan Perlembagaan. Oleh itu apabila timbulnya isu bidang kuasa mahkamh sivil adalah tidak perlu untuk melepaskan fungsi perlembagaan mereka. Undang-undang yang menjadikan murtad satu jenayah atau menghadkan skop peruntukan kebebasan asasi yang diperuntukkan di dalam

Perlembagaan adalah bersifat isu berpelembagaan yang hanya mahkamah sivil yang mempunyai bidang kuasa untuk menentukannya (lihat perenggan 85).

(15) (oleh **Richard Malanjum HB (Sabah & Sarawak)** menentang) Dengan melepaskan kuasa budi bicaranya secara suka rela di bawah undang-undang persekutuan kepada badan keagamaan luar, JPN telah bertindak secara tidak rasional. JPN telah secara tidak sah bersetuju kepada tindakan di bawah perencanaan yang lain. Ianya adalah diterima baik di dalam undang-undang pentadbiran bahawa pembuat keputusan atau badan yang berhak di rujuk dan mendapatkan nasihat daripada mana-mana sumber, jika ia mengekalkan kuasa muktamad untuk membuat keputusan akhir. Ia mestilah mengekalkan kuasanya untuk bertindak secara bebas menurut tujuan statutori perundangan. Sudah tentu pihak berkuasa awam adalah berkewajipan untuk untuk membuat keputusannya sendiri dan bukannya bertindak atas perencanaan pihak lain (lihat perenggan 88).

(16) (oleh **Richard Malanjum HB (Sabah & Sarawak)** menentang) Desakan oleh JPN untuk pengesahan murtad daripada Mahkamah Syariah Wilayah Persekutuan atau mana-mana pihak berkuasa Islam bukan hanya tidak sah tetapi tidak munasabah. Ini adalah kerana di bawah undang-undang sedia ada, Mahkamah Syariah di Wilayah Persekutuan tidak mempunyai kuasa statutori untuk mengadili isu murtad. Adalah undang-undang yang mantap bahawa bidang kuasa mestilah datang daripada unang-undang dan tidak boleh di andaikan. Oleh itu desakan tersebut adalah tidak munasabah untuk ianya berkehendakkan kepada pelaksanaan satu tindakan yang mana hampir mustahil untuk dilaksanakan (lihat perenggan 89).

(17) (oleh **Richard Malanjum HB (Sabah & Sarawak)** menentang) Bidang kuasa mestilah jelas dan bukannya tersirat. Doktrin kuasa tersirat mestilah dihadkan kepada perkara-perkara yang sampingan kepada kuasa yang telah pun dikurniakan atau perkara-perkara yang penting untuk perlaksanaan memenuhi undang-undang. Dan dalam perkara-perkara hak-hak asasi mestilah terdapatnya sejauh yang mungkin pemberian kuasa yang jelas untuk menghadkan atau perlanggaran kebebasan asasi. Tiada mahkamah atau pihak berkuasa seharusnya dengan senang dibenarkan memiliki kuasa tersirat untuk menghadkan hak-hak perlembagaan yang telah diberikan. Oleh yang demikian pertimbangan di dalam kes *Soon Singh* seharusnya tidak diikuti. Jawapan untuk persoalan 3 oleh itu adalah negatif (lihat perenggan 104 & 106).

[English summary

The appellant was a Malay woman born on 8 January 1964. She was brought up as Muslim by her family and her given name was Azlina bte Jailani. On 21 February 1997 she applied to the National Registration Department ('NRD') ('the first application') to change her name to Lina Lelani. The reason she gave in her statutory declaration to support the application was that she had renounced Islam for Christianity and that she intended to marry a Christian. Her application for name change was rejected by the NRD without any reason being given on 11 August 1997. However, she made a second application for name change but this time to Lina Joy on 15 March 1999 ('the second application'). In accordance with sub-reg (1) of

A reg 14 of the National Registration Regulations 1990 ('the Regulations'), she again submitted a statutory declaration and stated that the reason for name change was her conversion to Christianity. According to her, she received no reply and when she went to enquire about her second application in July 1999 she was told by an officer at the NRD office in Petaling Jaya that since her identity card did not state her religion, to B avoid any difficulty in processing her application she should not mention conversion as the reason for name change. The appellant asserted that at that time it was not known to the appellant then nor was she informed by NRD that the Regulations would shortly be amended and that her change of name alone would be insufficient for her purposes. The amendment that was introduced shortly was to make it a requirement that in the identity cards of Muslims the religion must be stated. In her C affidavit in support of her originating summons in the High Court the appellant asserted that it was a 'trick' or 'muslihat' by NRD and the appellant was aggrieved over this. The appellant resubmitted the application dated 15 March 1999 with a new statutory declaration sworn on 2 August 1999. On 22 October 1999, NRD wrote to her saying that her application for name change from 'Azlina bte Jailani' to D 'Lina Joy' was approved and she was asked to apply for a new replacement identity card. This she did on 25 October 1999. However, by the time she applied for the replacement card the appellant asserted that unknown to her, the Regulations had been amended (vide PU (A)70/2000) which came into force retrospectively on 1 October 1999) to require that the identity card should state the particulars of religion for Muslims. Anyway, in the application form which asked her to state her E religion the appellant stated her religion to be Christianity. The application by the appellant for replacement identity card was rejected. The appellant then made a third application on 3 January 2000 ('the third application') to NRD office in Petaling Jaya. She applied to remove the word 'Islam' and her original name from her replacement identity card. She tendered a statutory application to support her F application. The counter clerk however refused to accept her application on the ground that it was incomplete without an order of the Syariah Court to the effect that she had renounced Islam. By way of originating summons the appellant sought relief in the High Court praying, inter alia, for several declaratory orders against the Majlis Agama Islam Wilayah Persekutuan ('Majlis') and the Government of Malaysia in G respect of her right to freedom of religion, the constitutionality of s 2 of the Administration of Islamic Law (Federal Territories) Act 1993, the applicability of Syariah Enactments to her who professed the religion of Christianity and the constitutionality of the state and federal legislations that forbade conversion out of Islam. In addition she sought for an order that her name be entered in the Registry Book as having converted out of Islam. The appellant had joined the Majlis and H sought the declaratory orders because she said that she entertained fear that action would be taken against her by the religious authorities. The respondents filed a striking out application. The learned High Court judge heard the originating summons and dismissed it completely without granting any of the remedies the appellant sought (see [2004] 2 MLJ 119). She appealed. In the Court of Appeal, the I parties by consent narrowed down the issues and the relief sought for significantly. The constitutional issues were abandoned and the appeal focused purely on an issue of administrative law, that is, whether the Director General of NRD correctly exercised the discretion vested in him under the law. By majority, the Court of Appeal answered in the affirmative (see [2005] 6 MLJ 193). The appellant appealed. The issues before this court were: (1) whether the NRD was entitled in law to impose

as a requirement for deleting the entry of Islam in the appellant's identity card ('IC') that she produce a certificate or a declaration or an order from the Syariah Court that she had apostatized; (2) whether the NRD had correctly construed its power under the Regulations in particular regs 4 and 14, to impose the requirement as stated above when it is not expressly provided for in the Regulations; and (3) whether *Soon Singh a/l Bikar Singh lawan Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor* [1999] 1 MLJ 489 was rightly decided when it adopted the implied jurisdiction theory propounded in *Md Hakim Lee v Majlis Agama* [1998] 1 MLJ 681 in preference to *Ng Wan Chan v Majlis Agama (No 2)* [1991] 3 MLJ 487 and *Lim Chang Seng v Pengarah Jabatan Agama Islam* [1996] 3 CLJ 231 which declared that unless an express jurisdiction was conferred on the Syariah Court, the civil courts will retain their jurisdiction.

Held, by majority dismissing the appeal:

(1) (per **Ahmad Fairuz Chief Justice**, **Alauddin FCJ** concurring) The appellant's case fell under the incorrect information according to reg 14 para (c). Regulation 14(1) obviously required the appellant to report the facts of the incorrect information to the nearest Registry Office and to apply for a replacement of the ID containing the correct information. Accordingly reg 4 was relevant as the regulation clearly states that whoever applies for an ID replacement under reg 13 or 14 should comply with reg 4. Therefore the NRD is justified under reg 4(c)(x) to require a determination from the administrator of the Islamic religion in relation to the apostasy of the appellant or the renunciation of the appellant from Islam. Therefore, the NRD can, according to reg 4(c)(x), require that the appellant provide documentary evidence to support the accuracy of her contention that she was no longer a Muslim (see para 6).

(2) (per **Ahmad Fairuz Chief Justice**, **Alauddin FCJ** concurring) The reference to an authoritative body regarding Islamic law matters is provided by the law and therefore it is not against the law as submitted by the appellant. Reference does not mean that the Syariah Court is required to determine whether or not to approve the application to delete the word 'Islam'. The Syariah Court is only required to confirm that the appellant professed the religion Islam or not according to the Islamic law. Based on this decision then, it is the discretion of the NRD to decide whether approval could be given to delete or not the word 'Islam' (see para 8).

(3) (per **Ahmad Fairuz Chief Justice**, **Alauddin FCJ** concurring) The involuntariness of the NRD to act without the approval of the religious Islamic authority was reasonable. The issue whether a Muslim had renounced or not was a question relating to Islamic law. If the court decided that the involuntariness of the NRD was not reasonable, therefore it would mean that the court required that the NRD accepted the fact that according to Islamic law a Muslim could be regarded as having renounced from the religion and no longer a Muslim when the person had stated that he has renounced from Islam (see para 10).

A (4) (per **Ahmad Fairuz Chief Justice**, **Alauddin FCJ** concurring) It was reasonable of the NRD to impose the conditions as the apostasy matter, was an issue relating to Islamic law and the answer to the issue was whether a person was a Muslim or had renounced from the religion of Islam was included in the Syariah law that required serious consideration and interpretation of the law. The condition that a certificate or declaration or order from the Syariah Court that the appellant had renounced from Islam was not such an unreasonable decision that it was beyond logic or moral standard accepted that no reasonable man who has directed his mind to the question to be decided could come to such a decision (see para 10.1).

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C (5) (per **Ahmad Fairuz Chief Justice**, **Alauddin FCJ** concurring) The amendments to Regulation 1990 except reg 19 should be considered to have been enforced on 1 October 1990. Hence the amendments to reg 4, reg 5 and First Schedule was to be in force retrospectively. Therefore the NRD's action issuing the ID with the addition of the word 'Islam' was valid according to the law (see para 11.1).

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(6) (per **Ahmad Fairuz Chief Justice**, **Alauddin FCJ** concurring) There was no final decision that the appellant had no longer professed Islam. Thus, the statement that the appellant could no longer be under the jurisdiction of the Syariah Court because the Syariah Court had only jurisdiction on persons professing Islam should not be emphasised accordingly. The way a person renounced from a religion should be in accordance of the regulation or law or practice determined or stipulated by the religion itself. The appellant was not prevented from marrying. The freedom of religion under art 11 of the Federal Constitution required that the appellant complied with the rituals or law of the Islamic religion specifically regarding renunciation of the religion. Once the decision of the religion of Islam had been complied and the religious Islamic authority admit her apostasy then only could the appellant profess Christianity (see para 14).

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(7) (per **Ahmad Fairuz Chief Justice**, **Alauddin FCJ** concurring) The case of *Soon Singh* clearly showed that the apostast matter was within the jurisdiction of the Syariah Court. Item 1, Second List, Ninth Schedule of the Federal Constitution showed that the Islamic law was on of the matters that was in item 1 and when read together with the case of *Dalip Kaur* thus it was obvious that the apostasy matter was a matter relating to Islamic law and it was clear that it was within the jurisdiction of the Syariah Court and due to art 11 of the Federal Constitution the civil courts could not interfere in this matter (see para 16).

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H

(8) (per **Ahmad Fairuz Chief Justice**, **Alauddin FCJ** concurring) It was clear that in art 11 there was usage of the words '…..right to profess and practice his religion….' The words 'has the right' was applicable to 'profess' and also 'practise': *Kamariah bte Ali lwn Kerajaan Negeri Kelantan, Malaysia* [2002] 3 MLJ 657; *Che Omar bin Che Soh v Public Prosecutor* [1988] 2 MLJ 55 followed. Islam is not only a collection of dogma and rituals but it is also a complete way of life comprising of all kinds of human, individual or public, legal, political, economic, social, cultural or judicial activities. And when reading arts 11(1), 74(2) and item 1 in second list of the Ninth Schedule of the

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Federal Constitution it was obvious that Islam among others included of Islamic law. Hence, if a Muslim intends to renounce from Islam, he is actually exercising his rights in the syariah law context which has it own jurisprudence relating to apostasy. The conduct of the NRD officer was only to determine that the appellant was no longer Islam as specified in Islam. Hence, such act could not be said to be contrary to art 11(1) which itself provides the requirement to comply with the conditions of the religion before she had renounce Islam (see para 17.2).

(9) (**Richard Malanjum CJ (Sabah & Sarawak)** dissenting) Regulation 4, in particular sub-reg 4(c)(iva), has singled out Muslims for additional procedural burdens and impediments which are not connected to personal law. It requires that any registrant or person applying who is a Muslim has to state his or her religion. The requirement does not apply to non-Muslims. There is therefore a differential treatment for Muslims. Hence, this tantamount to unequal treatment under the law and in the absence of any exception found to justify the discrimination the sub-regulation has infringed art 8(1) of the Constitution. In other words it was discriminatory and unconstitutional and should therefore be struck down. For this reason alone that the relief sought for by the appellant should be granted namely, for a declaration that she was entitled to have an NRIC ('Identity Card') in which the word 'Islam' does not appear (see para 65).

(10) (**Richard Malanjum CJ (Sabah & Sarawak)** dissenting) Regulations 4 and 14 provide the mechanics by which a person can apply for replacement identity card, that is, the applicant has to supply particulars as stipulated and such other particulars necessary for the purpose of identification and to produce documentary evidence to support the accuracy of any particulars submitted. However, NRD had insisted, based on its policy when there was nothing expressed in the two regulations, for the production of an apostasy certificate by the appellant from the Federal Territory Syariah Court or some Islamic authority before her third application could be processed. NRD overlooked the point that the application of the appellant should be considered within the context of the requirements of regs 4 and 14 only and should not bring in any extraneous factor such as retrieving information from its record. In the form submitted by the appellant she stated her religion to be Christianity. This fact was known by NRD as early as 21 February 1997. Hence the third application should have been processed and considered only on that basis and to construe the series applications by the appellant as one continuous episode. If the appellant had satisfied the requirements of regs 4 and 14, NRD had no option but to allow her application. It was not the function of NRD to add in further requirements which have not been stipulated in those regulations. In coming to its decision to reject the application of the appellant on account of non-production of an order or a certificate of apostasy from the Federal Territory Syariah Court or Islamic authorities NRD had asked itself the wrong question and had taken legally irrelevant factor into account and excluded legally relevant factor. Also, in requiring production of a document that is not provided for nor authorised by the Regulations, NRD had acted *ultra vires* its powers under the Regulations and hence acted illegally (see paras 67–68 & 74–75).

A (11) (**Richard Malanjum CJ (Sabah & Sarawak)** dissenting) The insistence by NRD for a certificate of apostasy was not consonant with the requirement of reg 4(c)(x) because 'the call for proof of renunciation of religion does not fall within the meaning of the words 'particulars submitted'. The only 'particulars submitted' by the appellant was her status as a Christian or of her conversion to Christianity. NRD was only empowered to call for such documentary evidence that it considered 'necessary to support the accuracy of any particulars submitted'. Thus the NRD could not call for documentary evidence that the appellant was or was not a Muslim. This was because the appellant had not submitted any particular that she was a Muslim (see para 77).

C (12) (**Richard Malanjum CJ (Sabah & Sarawak)** dissenting) The majority judgment of the Court of Appeal completely disregarded the fact that the appellant made several applications for a change of name. Surely those applications should be regarded as part of a continuing act on the part of the appellant. To confine the matter to the third application only was completely ignoring the history of the plight of the appellant in her dealings with NRD. If the NRD had correctly acted on the appellant's choice of religion for the replacement IC in October 1999, and had not rejected it on the ground that she had not produced an apostatisation order, there would have been no necessity for the third application to correct the particulars as regards entry of 'religion' (see para 79).

E (13) (**Richard Malanjum CJ (Sabah & Sarawak)** dissenting) There was an abuse of power on the part of NRD when it failed to take into consideration a legally relevant factor, namely the statutory declaration and the documents submitted by the appellant, preferring its policy of requiring a certificate of apostasy from the Federal Territory Syariah Court which in the first place was not stipulated in the regs 4 and 14 thereby taking legally irrelevant factor into consideration in making a decision. Further, the conclusion in the majority judgment that the impugned policy adopted by NRD was reasonable within the test of *Wednesbury Corporation v Ministry of Housing* [1966] 2 QB 275 has unfortunately missed one cardinal principle. The implementation of the policy had a bearing on the appellant's fundamental constitutional right to freedom of religion under art 11 of the Constitution. Being a constitutional issue it must be given priority and independent of any determination of the *Wednesbury* reasonableness. Hence, before it can be said that a policy is reasonable within the test of *Wednesbury* its constitutionality must be first considered. The majority judgment failed to carry out such an exercise before coming to its conclusion on the NRD policy (see paras 81 & 84).

I (14) (**Richard Malanjum CJ (Sabah & Sarawak)** dissenting) Apostasy involves complex questions of constitutional importance especially when some States in Malaysia have enacted legislations to criminalize it which in turn raises the question involving federal state division of legislative powers. It therefore entails consideration of arts 5(1), 3(4), 11(1), 8(2), 10(1)(a), 10(1)(e), 12(3) and the Ninth Schedule of the Constitution. Since constitutional issues are involved especially on the question of fundamental rights as enshrined in the Constitution it is of critical importance that the civil superior courts should not decline jurisdiction by merely citing art 121(1A). The article only protects

the Syariah Court in matters within their jurisdiction which does not include the interpretation of the provisions of the Constitution. Hence when jurisdictional issues arise civil courts are not required to abdicate their constitutional function. Legislations criminalizing apostasy or limiting the scope of the provisions of the fundamental liberties as enshrined in the Constitution are constitutional issues in nature which only the civil courts have jurisdiction to determine (see para 85).

(15) (**Richard Malanjum CJ (Sabah & Sarawak)** dissenting) By voluntarily abdicating its discretionary power under a federal law to an outside religious body NRD had acted with irrationality. The NRD had unlawfully agreed to act under the dictation of another. It is well accepted in administrative law that a decision maker or body is entitled to consult and seek advice from any source, provided it retains the ultimate authority to make the final decision. It must retain its power to act independently in pursuance of the statutory purpose of the law. Indeed a public authority is obliged to make its own decision and not act on the dictates of another (see para 88).

(16) (**Richard Malanjum CJ (Sabah & Sarawak)** dissenting) The insistence by NRD for a certificate of apostasy from the Federal Territory Syariah Court or any Islamic Authority was not only illegal but unreasonable. This was because under the applicable law, the Syariah Court in the Federal Territory has no statutory power to adjudicate on the issue of apostasy. It is trite law that jurisdiction must come from the law and cannot be assumed. Thus the insistence was unreasonable for it required the performance of an act that was almost impossible to perform (see para 89).

(17) (**Richard Malanjum CJ (Sabah & Sarawak)** dissenting) Jurisdiction must be express and not implied. The doctrine of implied powers must be limited to those matters that are incidental to a power already conferred or matters that are necessary for the performance of a legal grant. And in the matters of fundamental rights there must be as far as possible be express authorization for curtailment or violation of fundamental freedoms. No court or authority should be easily allowed to have implied powers to curtail rights constitutionally granted. Therefore the reasoning in *Soon Singh* case ought not be followed. The answer to Question 3 is therefore in the negative (see paras 104 & 106).]

Nota-nota

Untuk kes-kes mengenai keluar Islam (murtad), lihat 8(2) *Mallal's Digest* (4th Ed, 2006 Reissue) perenggan 479–482.

Untuk kes-kes mengenai keputusan atau perintah, lihat 1 *Mallal's Digest* (4th Ed, 2005 Reissue) perenggan 15–16.

Kes-kes yang dirujuk

Albon v Pyke [1842] 4 M&G 421 (dirujuk)

Aminah v Supt Of Prisons [1968] 1 MLJ 92 (dirujuk)

Anisminic Ltd v Foreign Compensation Tribunal [1969] 1 All ER 208 (dirujuk)

Associated Provincial Picture Houses Ltd v Wednesbury Corp [1948] 1 KB 223 (dirujuk)

Attorney General v Bernazar [1960] 3 AII ER 97 (dirujuk)

A *Azizah bte Shaik Ismail v Fatimah bte Shaik Ismail* [2004] 2 MLJ 529 (dirujuk)
Bread Manufacturer of New South Wales v Evans [1986] 56 ALJR 89 (dirujuk)
Breen v Amalgamated Engineering Union [1971] 1 QB 175 (dirujuk)
CCSU v Minister for the Civil Service [1984] 3 All ER 935 (dirujuk)
Calcutta Gas Co v State of Weat Bengal AIR 1962 SC 1044 (dirujuk)
B *Che Omar bin Che Soh v Public Prosecutor* [1988] 2 MLJ 55 (diikut)
City Council of George Town v Govt of Penang [1967] 1 MLJ 169 (dirujuk)
Commissioner of Police v Gordhandas Banji AIR 1952 SC 16 (dirujuk)
Dalip Kaur v Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor [1992] 1 MLJ 1 (dirujuk)
Datuk Haji Harun Idris v PP [1977] 2 MLJ 155 (dirujuk)
C *Ghazali v PP* [1964] 30 MLJ 159 (dirujuk)
Ismail bin Suppiah v Ketua Pengarah Pendaftaran Negara (unreported) (dirujuk)
Isman bin Osman v Govt of Malaysia [1973] 2 MLJ 143 (dirujuk)
JP Berthelsen v Director General Immigration [1987] 1 MLJ 134 (dirujuk)
Jackson Stanfield v Butterworth [1948] 2 All ER 358 (dirujuk)
D *Kamariah bte Ali lwn Kerajaan negeri Kelantan, Malaysia* [2002] 3 MLJ 657 (diikut)
Lachmandas v State of Bombay [1952] SCR 710 (dirujuk)
Lavender v Minister of Housing [1970] 3 All ER 871 (dirujuk)
Lim Chan Seng v Pengarah Jabatan Agama Islam Pulau Pinang dan 1 kes yang lain [1996] 3 CLJ 231 (dirujuk)
E *Lim Phin Khian v Kho Su Ming* [1996] 1 MLJ 1 (dirujuk)
Madhavan Nair v PP [1975] MLJ 264 (dirujuk)
Majlis Agama Islam Pulau Pinang v Shaik Zolkaffily [2003] 3 MLJ 705 (diikut)
Md Hakim Lee lawan Majlis Agama Islam Wilayah Persekutuan, Kuala Lumpur [1998] 1 MLJ 681 (diikut)
F *Mohamed Habibullah bin Mahmood v Faridah bte Dato Talib* [1992] 2 MLJ 793 (dirujuk)
Mohamed Said Nabi, deceased, Re [1965] 3 MLJ 121 (dirujuk)
Ng Wan Chan lawan Majlis Agama Islam Wilayah Persekutuan & Anor (No 2) [1991] 3 MLJ 487 (dirujuk)
Nordin Salleh v Dewan Undangan Kelantan [1992] 1 MLJ 697 (dirujuk)
G *Oriental Insurance Co Ltd & Anor v Minister of Finance* [1992] 2 MLJ 776 (dirujuk)
PP v Mohamed Ismail [1984] 2 MLJ 219 (dirujuk)
PP v Su Liang Yu [1978] 2 MLJ 79 (dirujuk)
P Patto v Chief Police Officer, Perak & Ors [1986] 2 MLJ 204 (dirujuk)
Padfield v Minister of Agriculture [1968] 1 All ER 694 (dirujuk)
H *Pathumma v State of Kerala* AIR [1978] SC 771 (dirujuk)
Pengarah Tanah Dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd [1979] 1 MLJ 135 (dirujuk)
Persatuan Aliran Kesederaran Negara v Minister of Home Affairs [1988] 1 MLJ 442 (dirujuk)
Pyx Granite v Ministry of Housing [1959] 3 All ER 1 (dirujuk)
I *R v Inner London Education Authority ex parte Westminster City Council* [1986] 1 All ER 19 (dirujuk)
R v Secretary for Health ex parte United States Tobacco International Inc [1991] 3 WLR 529 (dirujuk)
R v Windsor Licensing ex parte Hodes [1983] 2 All ER 551 (dirujuk)

Sim Seoh Beng @ Sin Sai Beng & Anor lwn Koperasi Tunas Muda Sungai Ara Bhd [1995] 1 MLJ 292 (dirujuk)
Soon Singh a/l Bikar Singh lawan Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor [1999] 1 MLJ 489 (diikut)
Surinder Singh Kanda v Govt of the Federation of Malaya [1962] 28 MLJ 169 (dirujuk)
Wednesbury Corporation v Ministry of Housing [1966] 2 QB 275 (dirujuk)
Yew Bon Teow v Kenderaan Bas Mara [1983] 1 MLJ 1 (dirujuk)

Undang-undang yang dirujuk
Administration of Islamic Law (Federal Territory) Act 1993 s 2, 7, 10, 24, 46(2)(b), 85–95
Administration of Islamic Law Enactment 1978 (Johor) s 141(2)
Constitution [Indian] art 246
Federal Constitution arts 5(1), 8, 11(1), 74(4), 121(1A)
Interpretation Acts 1948 and 1967 s 19
Interpretation and General Clauses Act 1967 s 67
National Registration Act 1959
National Registration Regulations 1990 regs 4, 5, 13, 14, 19

Cyrus Das (Benjamin Dawson, Yapp Hock Swee & Steven Thiru with him) (Benjamin Dawson) for the appellant.
Sulaiman Abdullah (Halimatunsa'diah Abu Ahmad, Norhusniah Husin & Nursaliza Samsudin) (Zain & Co) for the first respondent.
Umi Kalthum Abdul Majid (Azizah Nawawi with her)(Senior Federal Counsel) for the second & third respondents.

Ahmad Fairuz Chief Justice (delivering majority judgment):

[1] Perayu telah diberi kebenaran merayu ke mahkamah ini atas soalan-soalan berikut:

(a) Adakah Jabatan Pendaftaran Negara (JPN) berhak, mengikut undang-undang, mengenakan syarat supaya Perayu mengemukakan suatu sijil atau suatu pengisytiharan atau perintah daripada mahkamah syariah yang memperakukan bahawa beliau adalah murtad sebelum perkataan 'Islam' di dalam Kad Pengenalan (KP) Perayu dipadamkan (deleted)?

(b) Adakah JPN telah dengan betulnya mentafsirkan kuasanya di bawah Kaedah-Kaedah Pendaftaran Negara 1990 (Kaedah-Kaedah 1990) khususnya Kaedah 4 dan Kaedah 14, untuk mengenakan syarat seperti yang tersebut di atas manakala ianya tidak diperuntukkan dengan secara jelasnya di dalam Kaedah-Kaedah 1990 itu?

(c) Adakah kes *Soon Singh a/l Bikar Singh lwn Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor* [1999] 1 MLJ 489 telah diputuskan dengan betulnya apabila ia mengguna pakai teori bidang kuasa tersirat yang dikemukakan di dalam kes *Md Hakim Lee lwn Majlis Agama Islam Wilayah Persekutuan, Kuala Lumpur* [1998] 1 MLJ 681 dan tidak mengikut kes *Ng Wan Chan lwn Majlis Agama Islam Wilayah Persekutuan & Anor (No 2)* [1991] 3

A MLJ 487 dan *Lim Chan Seng lwn Pengarah Jabatan Agama Islam Pulau Pinang dan 1 kes yang lain* [1996] 3 CLJ 231 yang mengisytiharkan bahawa sekiranya tidak ada bidang kuasa yang jelas yang diberikan kepada mahkamah syariah, maka mahkamah-mahkamah sivil hendaklah mengekalkan bidangkuasa mereka?

B

[2] Perayu telah dilahirkan sebagai seorang Muslim. Oleh kerana beliau berhasrat untuk mengahwini seorang lelaki Kristian, perayu membuat permohonan kepada JPN pada 21 Februari 1997 untuk menukarkan namanya daripada Azlina bte Jailani kepada Lina Lelani atas alasan bahawa beliau telah menganuti agama Kristian. Permohonan ini tidak diluluskan oleh responden ketiga (Ketua Pengarah Pendaftaran Negara). Pada 15 Mac 1999 perayu memohon sekali lagi untuk menukarkan namanya tetapi kali ini daripada Azlina bte Jailani kepada Lina Joy. Di dalam akuan statutorinya, perayu sekali lagi menyatakan bahawa beliau mahu namanya itu ditukar kerana beliau telah menganut agama Kristian. Pada 2 Ogos 1999, perayu, bertindak atas nasihat seorang pegawai JPN, membuat suatu lagi akuan statutori di dalam mana beliau memberi sebab ingin menukarkan namanya sebagai sengaja memilih nama itu dan bukannya kerana beliau menukar agama. Pada bulan November 1999, perayu telah diberi KPnya yang baru tetapi JPN telah memasukkan perkataan 'Islam' di ahagian depan KPnya dan namanya terdahulu di belakang kad itu. Pada 3 Januari 2000, perayu memohon kepada JPN untuk perkataan 'Islam' dipadamkan (deleted). Permohonan ini ditolak dan perayu dimaklumkan bahawa permohonannya itu tidak sempurna tanpa suatu perintah daripada mahkamah syariah yang menyatakan bahawa beliau telah keluar dari agama Islam. Perayu kemudiannya membuat permohonan di mahkamah tinggi untuk beberapa deklarasi terhadap Majlis Agama Islam Wilayah Persekutuan dan Kerajaan Malaysia. Deklarasi-deklarasi yang dipohon itu adalah berasaskan pencabulan hak asasinya kepada kebebasan beragama seperti yang dijaminkan oleh perkara 11(1) Perlembagaan Persekutuan (Perlembagaan). Walau bagaimanapun mahkamah tinggi telah menolak permohonannya itu. Perayu kemudiannya merayu ke Mahkamah Rayuan. Mahkamah Rayuan secara majoriti telah menolak rayuannya itu. Perayu kemudiannya membuat permohonan untuk kebenaran merayu di mahkamah ini dan permohonanannya itu telah dibenarkan atas soalan-soalan yang disebutkan pada permulaan penghakiman ini.

[3] Di Mahkamah Rayuan pihak-pihak bersetuju (dan ini adalah jelas daripada alasan-alasan penghakiman majoriti dan penghakiman menentang) bahawa satu isu sahaja yang perlu dipertimbangkan oleh mahkamah — iaitu, sama ada JPN betul, mengikut undang-undang, apabila menolak permohonan perayu supaya perkataan 'Islam' dipadamkan daripada KPnya dan dengan memerlukan suatu sijil atau perintah murtad daripada mahkamah syariah terlebih dahulu. Penghakiman majoriti mahkamah itu telah memutuskan bahawa JPN tidak bersalah dari sudut undang-undang pentadbiran apabila menolak permohonan perayu ([2005] 6 MLJ di ms 213). Perayu dalam permohonannya kepada JPN menyatakan adanya kesilapan dalam KPnya dan kesilapan itu ialah agamanya disebut sebagai agama 'Islam'. Justeru itu penghakiman majoriti berpendapat bahawa kenyataan perayu itu dengan secara tidak langsung membawa erti bahawa perayu mengatakan yang beliau telah keluar dari agama Islam. Oleh yang demikian, JPN bolehlah memerlukan perayu, di bawah kaedah 4 (c)(x) Kaedah-Kaedah 1990, mengemukakan keterangan

dokumentari bagi menyokong ketepatan hujahnya bahawa beliau bukan lagi seorang Muslim. Penghakiman majoriti juga memutuskan bahawa keluar atau tidaknya seseorang itu dari agama Islam adalah suatu persoalan yang berkaitan dengan undang-undang Islam. Dan persoalan itu bukanlah dalam bidang kuasa JPN yang tidak dilengkapi atau berkelayakan untuk memutuskan perkara itu. Kerana itu, JPN telah mengamalkan satu dasar untuk memerlukan penentuan oleh pihak berkuasa agama sebelum JPN bertindak untuk memadamkan perkataan 'Islam' daripada KP seseorang Muslim. Dasar ini, mengikut penghakiman majoriti adalah dengan sempurnanya munasabah ([2005] 6 MLJ di ms 209).

[4] Dalam mahkamah ini, peguam terpelajar perayu telah menghujahkan bahawa hanya Kaedah-Kaedah 1990 sahaja yang menjadi sumber bertulis mengenai kuasa di bawah mana JPN boleh memerlukan perintah murtad. Mengikut peguam terpelajar itu Kaedah-Kaedah 1990 tidak mengandungi peruntukan yang mengizinkan JPN memerlukan dokumen berkenaan dari Perayu. Peguam terpelajar seterusnya menekankan bahawa dokumen yang diiktiraf di bawah kaedah 14 adalah suatu akuan berkanun sahaja. Oleh itu dengan meminta suatu dokumen dikeluarkan dan dokumen itu tidak pula diperuntukkan atau dibenarkan oleh kaedah 14, JPN telah bertindak *ultra vires* kuasa-kuasanya di bawah Kaedah-Kaedah 1990. Ini, hujah peguam terpelajar itu, adalah tidak sah di sisi undang-undang pentadbiran. Peguam itu seterusnya berhujah bahawa penghakiman majoriti sepatutnya memutuskan sedemikian dan kegagalannya berbuat begitu sewajarnyalah dijadikan alasan-alasan atas mana mahkamah ini, sebagai sebuah Mahkamah Rayuan, semestinya mengenepikan penghakiman itu.

[5] Peguam terpelajar responden-responden kedua dan ketiga menekankan bahawa permohonan perayu adalah untuk memadamkan perkataan 'Islam' daripada KPnya. Oleh itu permohonan itu tergolong di bawah kaedah 14(1)(c) iaitu untuk membetulkan butir-butir mengenai agamanya. Kaedah 14(1) berbunyi:

> (1) A person registered under these Regulations who —
>
> (a) changes his name;
>
> (b) acquires the citizenship of Malaysia or is deprived of his citizenship of Malaysia; or
>
> (c) has in his possession an identity card containing any particular, other than his address, which is to his knowledge incorrect,
>
> shall forthwith report the fact to the nearest registration office and apply for a replacement identity card with the correct particulars

Peguam terpelajar kemudiannya merujuk kepada kaedah 4 yang berbunyi:

> 4 — Any person who is required to register under reg 3 (1) or 3(2) or to re-register under reg 18 or 28 or who applies for a replacement identity card under reg 13 or 14, shall
>
> (a) ...;
>
> (b) ...;
>
> (c) give the following particulars to the registration officer as aforesaid, namely:

A

(i) his name as appearing in his Certificate of Birth or such other document or, if he is known by different name, each of such names, in full; (ii) his previous identity card number, if any;

(ii) the full address of his place of residence within Malaysia;

(iii) his race;

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(iv) his religion (only for Muslims);

(v) his place of birth;

(vi) his date of birth and sex;

(vii) his physical abnormalities, if any;

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(viii) his status as a citizen of Malaysia or other citizenship status;

(ix) such other particulars as the registration officer may generally or in any particular case consider necessary; and

(x) produce such documentary evidences the registration officer may consider necessary to support the accuracy of any particulars submitted.

D

Peguam terpelajar itu kemudiannya menekankan bahawa kaedah 4(c)(ix) dan (x) adalah kuasa yang menjustifikasikan JPN mengenakan syarat keperluan sijil murtad.

[6] Mengenai penghujahan-penghujahan ini, saya bersependapat dengan penghakiman majoriti bahawasanya kaedah 14(1) adalah berkenaan:

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(a) penukaran nama di bawah perenggan (a); dan

(b) membetulkan butir-butir yang tidak betul di bawah perenggan (c).

Kes Perayu terjatuh di bawah butir-butir yang tidak betul mengikut perenggan (c). Bagaimanapun kaedah 14 tidak menyatakan apakah yang patut diberi dalam kes-kes butiran-butiran yang tidak betul tetapi kaedah 14 (1) sememangnya memerlukan perayu untuk melaporkan fakta mengenai butiran-butiran yang tidak betul, kepada Pejabat Pendaftaran yang terdekat sekali dan untuk memohon suatu KP ganti yang mengandungi butir-butir yang betul. Sehubungan dengan ini kaedah 4 menjadi relevan kerana kaedah itu dengan jelasnya menyatakan bahawa sesiapa yang memohon untuk suatu KP ganti di bawah kaedah 13 atau 14 hendaklah mematuhi kaedah 4 itu. Oleh demikian saya bersetuju dengan peguam terpelajar responden-responden kedua dan ketiga bahawasanya JPN mempunyai justifikasi di bawah kaedah 4(c)(x) untuk memerlukan penentuan dari penguasa agama Islam mengenai kemurtadan perayu atau keluarnya perayu daripada agama Islam. Oleh demikian saya bersetuju dengan penghakiman majoriti yang mengatakan bahawa perayu dalam permohonannya yang ketiga menyatakan kesilapan dalam KPnya ialah mengenai kenyataan agamanya sebagai 'Islam' dan perayu mahu kesilapan itu diperbetulkan dengan mengeluarkan perkataan 'Islam' dari KP itu. Ini samalah seperti perayu mengatakan bahawa beliau telah keluar dari agama Islam. Oleh itu, JPN boleh, mengikut kaedah 4(c)(x), memerlukan perayu mengemukakan keterangan dokumentari bagi menyokong ketepatan penegasannya bahawa beliau bukan lagi seorang Muslim. Saya juga bersetuju jika JPN terima pengakuan seseorang bahawa dia telah keluar dari agama Islam berasaskan perisytiharan yang dibuat olehnya maka JPN mengambil risiko apabila mengecapkan, secara silap, seseorang sebagai bukan Muslim manakala mengikut undang-undang Islam orang itu masih belum lagi keluar dari agama Islam. Ini juga akan menyenangkan mereka yang telah

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dilahir dan dididik sebagai seorang Muslim tetapi bersikap acuh tak acuh atau tidak peduli kepada agama Islam diklasifikasikan sebagai bukan Muslim hanya semata-mata untuk mengelak dari dihukum atas kesalahan-kesalahan di bawah undang-undang Islam. Ini semua akan mengakibatkan celaan dari masyarakat Muslim. Atas sebab-sebab inilah, sama seperti pandangan penghakiman majoriti, saya percaya, JPN telah menggunapakai dasar bahawa akuan statutori sahaja adalah tidak cukup untuk membolehkan perkataan 'Islam' dikeluarkan dari KP seseorang Muslim. Ini adalah kerana hal keluar dari agama Islam itu adalah suatu perkara yang berkaitan dengan undang-undang Islam dan kerana itu JPN menggunapakai dasar yang memerlukan penentuan oleh pihak berkuasa agama Islam sebelum JPN boleh bertindak untuk memadamkan perkataan 'Islam' daripada KP seseorang Muslim. Atas pertimbangan-pertimbangan seperti dihuraikan di atas saya setuju dengan penghakiman majoriti bahawa sesungguhnya dasar JPN itu adalah sesuatu yang sesempurnanya munasabah.

[7] Mengenai dasar JPN ini, perayu juga menghujahkan bahawa dengan memerlukan sijil murtad itu, JPN telah menurunkan kuasa dan tugasnya di bawah kaedah 14 kepada pihak ketiga agar pihak ketiga itu memutuskan sama ada meluluskan ataupun tidak permohonan memadamkan perkataan 'Islam' itu. Ini, mengikut perayu, tidak boleh dilakukan kecuali diizinkan oleh undang-undang yang relevan. Justeru itu dasar JPN tanpa kebenaran di bawah kaedah 14 itu adalah bercanggahan dengan undang-undang. Seterusnya peguam terpelajar perayu menghujahkan bahawa tugas mahkamah bukanlah untuk mengesahkan sesuatu dasar sebagai sesuatu yang munasabah; malah apa yang mahkamah telah gagal untuk menghayati ialah bahawa perkara-perkara sedemikian adalah untuk pihak legislator dan bukannya untuk pihak mahkamah memutuskan sama ada sepatutnya atau tidak rujukan dibuat kepada sesuatu badan agama yang lain.

[8] Atas hujah perayu ini, saya berpendapat, seperti yang dihujahkan oleh peguam terpelajar pihak-pihak responden-responden kedua dan ketiga, bahawa kaedah 4(c)(x) dengan jelasnya memberi kuasa kepada Pegawai Pendaftaran untuk memerlukan keterangan-keterangan dokumentari yang difikirnya mustahak bagi menyokong ketepatan mana-mana butiran yang telah dikemukakan. Oleh itu rujukan kepada sesuatu pihak yang berkuasa atas perkara undang-undang Islam adalah diperuntukkan oleh undang-undang dan justeru demikian ianya tidaklah bersalahan dengan undang-undang seperti mana yang dihujahkan oleh perayu. Rujukan bukanlah bermakna bahawa Mahkamah Syariah diminta untuk memutuskan sama ada meluluskan ataupun tidak permohonan memadamkan perkataan 'Islam' itu. Mahkamah Syariah cuma diminta untuk mengesahkan bahawa perayu adalah beragama Islam atau tidak berdasarkan undang-undang Islam. Berpandukan dari keputusan ini nanti, adalah dalam budi bicara JPN untuk memutuskan sama ada kebenaran boleh diberi untuk memadamkan atau tidak perkataan 'Islam'.

[9] Peguam terpelajar perayu telah juga merujukkan kepada mahkamah ini kes *Ismail bin Suppiah lwn Ketua Pengarah Pendaftaran Negara* (R1–24–31 tahun 1995).

A Mengikut peguam terpelajar itu, kedua-dua kes Ismail dan kes rayuan di mahkamah ini adalah mengenai:

(a) pertukaran nama kerana pertukaran agama;

(b) kuasa-kuasa JPN di bawah Kaedah 14;

B (c) suatu sijil daripada Majlis Agama sebagai suatu pra-syarat sebelum JPN boleh menimbangkan permohonan di bawah Kaedah 14;

(d) kebebasan memilih agama oleh seseorang dijamin di bawah Perkara 11 PP;

(e) pihak ketiga tidak boleh memutuskan mengenai agama mana seseorang itu wajar pilih; dan

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(f) kaedah 14 tidak mengenakan suatu syarat bahawa satu sijil diperolehi daripada Majlis Agama.

Peguam terpelajar itu seterusnya menunjukkan bahawa saya adalah Hakim dalam kes *Ismail* itu dan saya telah membatalkan keputusan JPN yang memerlukan satu sijil daripada Majlis Agama sebagai *ultra vires* kaedah 14.

D

9.1. Plaintif dalam kes Ismail adalah seorang Muslim semenjak ianya dilahirkan. Plaintif memohon supaya nama Muslimnya seperti yang di dalam KPnya itu ditukar ke nama Hindu atas alasan, seperti yang disebut dalam akuan statutorinya, beliau telah keluar dari agama Islam dan memeluk agama Hindu. JPN berkeras menghendaki kelulusan Jabatan Agama Islam Johor atau Kadi Besar Johor atas tindakan plaintif keluar dari agama Islam. JPN masih enggan meluluskan permohonan plaintif walaupun peguam plaintif telah melaporkan kepada Kadi Besar Johor perihal plaintif telah keluar dari agama Islam. Malah JPN telah merujuk hal ini kepada dan untuk tindakan Jabatan Agama Islam Johor. Kerana itu plaintif memohon dan memperolehi dari Mahkamah Tinggi Kuala Lumpur suatu perisytiharan bahawa kelulusan Jabatan Agama Islam Johor itu adalah tidak perlu dan bahawasanya sebarang rujukan oleh JPN kepada Jabatan itu adalah *ultra vires* kaedah 14, Kaedah-Kaedah 1990, s 141(2) Enakmen Pentadbiran Undang-Undang Islam Negeri Johor 1978 (Administration of Islamic Law Enactment 1978 Negeri Johor), dan Perkara 11(1) PP. Plaintif juga pohon dan perolehi perintah agar JPN mengeluarkan KP sementara atas nama plaintif yang baru.

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9.2. Mengenai hujah perayu bahawa JPN tidak membuat rayuan atas keputusan Mahkamah Tinggi di dalam kes Ismail itu dan kerana itu JPN tidaklah boleh di dalam rayuan ini mengambil pendirian yang bercanggahan dengan keputusan Mahkamah Tinggi itu.

H

9.3. Penghakiman majoriti menegaskan bahawa kes Ismail adalah suatu kes yang melibatkan permohonan untuk menukar nama di dalam KP manakala rayuan perayu dalam mahkamah ini ialah untuk memadamkan perkataan 'Islam' daripada KPnya. Kerana tiada alasan-alasan penghakiman dalam kes Ismail itu, sebab-sebab Mahkamah Tinggi membuat keputusan sedemikian tidaklah dapat diketahui. Justeru itu Mahkamah Rayuan hanya mampu membuat beberapa tekaan mengenai kenapa saya telah memutuskan demikian dalam kes Ismail itu. Tekaan-tekaan itu berpunca dari saya dikatakan telah melihat kes Ismail itu dari sudut ianya perlu diputuskan dalam konteks undang-undang Johor.

I

Saya telah dikatakan mungkin berpendapat bahawa JPN salah apabila JPN memerlukan persetujuan Jabatan Agama Islam Johor sebelum plaintif keluar dari agama Islam manakala mengikut Enakmen Johor pihak berkuasa yang betul ialah Kadi di bawah s 141(2). Seksyen 141 Enakmen Johor itu berbunyi:

Seksyen 141

(1) Sesiapa yang memasukkan sebarang orang memeluk agama Islam hendaklah dengan serta-merta melaporkan perkara itu kepada Kadi dengan memberi keterangan-keterangan yang perlu untuk pendaftaran.

(2) Sesiapa mendapati bahawa seseorang Islam telah keluar daripada Agama Islam hendaklah dengan serta merta melaporkan kepada Kadi mengenai keputusannya keluar daripada Islam dengan memberi keterangan-keterangan yang perlu dan Kadi hendaklah mengisytiharkan bahawa orang itu telah keluar daripada Agama Islam, dan hendaklah didaftarkan.

9.4. Adalah juga menjadi tekaan penghakiman majoriti bahawa saya mungkin telah berpendapat yang JPN telah salah faham s 141 kerana di para 10 affidavit JPN bertarikh 28 Julai 1995, pegawai JPN nampaknya menyatakan bahawa sub-seksyen (2) hanya terpakai atas seseorang yang dahulunya telah memeluk agama Islam di bawah subseksyen (1), manakala sebenarnya subseksyen (2) itu adalah bebas dari subseksyen (1). Penghakiman majoriti juga menekankan bahawa saya mungkin berpendapat, dari kejelasan perkataan-perkataan dalam subseksyen (2), bahawa di Johor, Kadi sendiri pun tidak mempunyai hak untuk memberi atau tidak memberi persetujuan kepada seseorang Muslim keluar daripada agama Islam. Hal itu terserah semata-mata kepada orang yang berkenaan. Tugas Kadi adalah hanya untuk mengumumkan fakta keluarnya seseorang dari agama Islam dan kemudiannya mendaftarkannya. Tugas itu hanyalah mekanikal. Bertitik-tolak dari ini, saya ditekakan telah berpendapat bahawa:

(a) di Johor seseorang Muslim adalah bebas untuk keluar dari agama Islam dan ia melakukannya dengan hanya menyatakan demikian;

(b) tiada kelulusan atau penentuan oleh mana-mana pihak berkuasa agama diperlukan;

(c) JPN sepatutnya menerima akuan statutori plaintif yang menyatakan bahawa plaintif telah keluar dari agama Islam sebagai bukti bahawa plaintif bukan lagi seorang Muslim; dan

(d) JPN sepatutnya meluluskan permohonan plaintif untuk tukar namanya.

9.5. Dari tekaan-tekaan seperti dihuraikan di atas, ketaralah bahawa kes *Ismail* itu semestinyalah diteliti dalam konteks undang-undang Johor. Seksyen 141(2) Enakmen Pentadbiran Undang-Undang Islam Johor 1978 dengan jelasnya menunjukkan bahawa Kadi pun tidak mempunyai hak untuk memberi atau tidak memberi persetujuan untuk keluar dari agama Islam. Justeru itu tekaan penghakiman majoriti itu adalah betul apabila dikatakan kerana kejelasan perkataan-perkataan dalam s 141(2), JPN sepatutnya hendaklah terima akuan statutori plaintif yang menyatakan Plaintif telah keluar dari agama Islam sebagai bukti bahawa plaintif bukan lagi seorang Muslim dan JPN sepatutnyalah meluluskan permohonan plaintif untuk tukar namanya.

A Wajar ditekankan di peringkat ini bahawa penghuraian di atas menunjukkan Perkara 121(1A) dan item 1, senarai 2, Jadual 9 PP tidak timbul dalam kes *Ismail* itu.

[10] Isu berikutnya yang dihujahkan oleh perayu ialah sama ada Mahkamah B Syariah Wilayah Persekutuan mempunyai bidang kuasa penentuan murtad. Perayu menghujahkan bahawa JPN telah selama ini mengambil pendirian yang sama mengenai pelbagai permohonan perayu iaitu perayu mesti pertamanya mendapatkan suatu perintah murtad daripada Mahkamah Syariah atau, seperti yang kemudiannya dikatakan oleh Ketua Pengarah dalam afidavitnya, daripada mana-mana pihak berkuasa agama Islam yang lain. Perayu juga menghujahkan bahawa Akta C Pentadbiran Undang-Undang Islam (Wilayah Persekutuan) 1993 (Akta 505) tidak mempunyai peruntukan mengenai murtad. Mahkamah Syariah atau mana-mana Badan Islam yang lain tidak diberi bidangkuasa dalam hal murtad dan tidak ada kuasa juga diberi kepada mana-mana pihak berkuasa di bawah Akta tersebut untuk mengeluarkan perintah murtad. Inilah kedudukannya pada semua masa yang D material di dalam kes perayu antara bulan Februari 1997 hingga Januari 2000 dan hingga ke hari ini. Mengikut pihak perayu lagi, s 46(2)(b) Akta 505, seperti yang terdapat sekarang, menyenaraikan perkara-perkara dalam mana Mahkamah Syariah boleh melaksanakan bidangkuasa sivilnya dan di bawah seksyen ini perkara murtad tidak terdapat di dalam senarai itu. Penghakiman majoriti akur bahawa Akta 505 E tidak mengandungi sebarang peruntukan mengenai murtad. Penghakiman itu seterusnya mempertimbangkan hujah perayu bahawa keputusan Mahkamah Persekutuan di dalam kes Soon Singh telah membentukkan prosedur yang diikuti oleh JPN dalam memerlukan perakuan daripada Mahkamah Syariah sebelum jabatan itu menerima fakta bahawa seseorang Muslim telah keluar dari agama Islam. Keputusan di dalam kes Soon Singh, mengikut penghakiman majoriti, telah dan F masih sahih (authoritative) dan dalam undang-undang pentadbiran, dari sudut keputusan itu, JPN telah bertindak dengan betul apabila menamakan Mahkamah Syariah sebagai pihak berkuasa yang boleh mengeluarkan perakuan murtad dan JPN akan terima perakuan itu sebagai bukti perayu bukan lagi seorang Muslim. Penghakiman majoriti, bagaimanapun, berpendapat bahawa persoalan mengenai G betul atau tidaknya keputusan *Soon Singh* adalah tidak penting lagi kerana rayuan di hadapannya telah dipersetujui oleh pihak-pihak kepada rayuan itu dikira sebagai mengenai kesahihan keputusan JPN mengikut undang-undang pentadbiran dan bukan lagi mengikut persoalan-persoalan perlembagaan. Oleh itu perayu berhujah dalam Mahkamah Rayuan bahawa tindakan JPN mengenakan syarat supaya diperolehi perintah Mahkamah Syariah adalah tindakan yang tidak munasabah H mengikut kes *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223. Ini adalah kerana, mengikut perayu, perintah itu mustahil diperolehi disebabkan ketiadaan peruntukan mengenai murtad dalam Akta 505. Di peringkat ini, adalah wajar bagi saya untuk menyatakan persetujuan saya dengan bahagian penghakiman majoriti yang menyatakan bahawa apa yang JPN mahu ialah suatu I perakuan dari seseorang yang mempunyai kuasa untuk membuatnya dan jika JPN bertindak mengikut perakuan itu, maka JPN adalah bebas dari sebarang kesilapan atau disalahkan oleh awam dalam perkara yang sebegitu mustahak dan sensitif. Justeru itu penghakiman majoriti memutuskan bahawa ketidakrelaan JPN bertindak tanpa perakuan pihak berkuasa agama lslam adalah munasabah. Penghakiman itu juga memutuskan bahawa persoalan sama ada seseorang muslim itu murtad atau

tidak adalah satu persoalan yang berkaitan dengan undang-undang Islam. Dan jika mahkamah memutuskan bahawa ketidakrelaan JPN adalah tidak munasabah, maka itu akan membawa erti bahawa mahkamah menghendaki JPN menerima fakta bahawa mengikut undang-undang Islam seseorang Muslim boleh dianggap oleh dunia sebagai telah keluar dari agama Islam dan bukan lagi seorang Muslim apabila orang itu kata dia telah keluar dari agama Islam.

10.1 Mengenai penghakiman majoriti bahawa tindakan JPN adalah munasabah bila JPN perlukan suatu sijil/deklarasi/perintah daripada Mahkamah Syariah yang menyatakan perayu adalah murtad, saya ingin menambah dengan menekankan bahawa item 1 senarai 2 dalam Jadual kesembilan PP memperuntukkan, antara lainnya, bahawa Mahkamah-Mahkamah Syariah hendaklah mempunyai bidang kuasa hanya atas orang-orang yang menganuti agama Islam dan hanya mengenai mana-mana perkara yang termasuk dalam perenggan itu (item 1) dan salah satu daripada perkara-perkara dalam perenggan tersebut ialah 'undang-undang Islam'. Sehubungan dengan ini, perkara 74(4) PP menegaskan bahawa keluasan ungkapan-ungkapan am dalam Jadual kesembilan tidak boleh dikira sebagai dihadkan oleh ungkapan-ungkapan khusus yang terdapat dalam Jadual 9 itu. Perkara 74(4) PP adalah seperti berikut:

> Perkara 74
>
> (4) Where general as well as specific expressions are used in describing any of the matter enumerated in the Lists set out in the Ninth Schedule the generality of the former shall not be taken to be limited by the latter

Oleh demikian adalah munasabah bagi JPN mengenakan syarat-syarat tersebut kerana perkara murtad ini, mengikut penghakiman majoriti (dan saya bersetuju dengannya), adalah satu persoalan yang berkaitan dengan undang-undang Islam dan seperti yang telah dinyatakan oleh Mahkamah Agong dalam kes*Dalip Kaur lwn Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor* [1992] 1 MLJ 1 bahawa jawapan kepada persoalan sama ada seseorang itu adalah seorang Muslim atau telah keluar dari agama Islam sebelum dia meninggal dunia, adalah termasuk dalam dunia undang-undang Syariah yang memerlukan pertimbangan-pertimbangan serius dan tafsiran wajar atas undang-undang itu. Dalam hal keadaan sedemikian, saya bersetuju dengan penghujahan peguam terpelajar responden-responden kedua dan ketiga bahawa syarat supaya suatu sijil atau perisytiharan atau perintah daripada Mahkamah Syariah bahawa perayu telah jadi murtad bukanlah suatu keputusan yang tidak munasabah sehinggakan sebegitu melampau dalam keingkaran terhadap logik atau standard moral yang diterima hingga tiada seorang yang waras yang telah menumpukan pemikirannya kepada persoalan yang perlu diputuskan itu boleh mencapai keputusan itu.

[11] Mengenai hujah responden-responden kedua dan ketiga bahawasanya JPN berhak untuk memasukkan perkataan 'Islam' di muka hadapan KP perayu dalam bulan November 1999 kerana pindaan-pindaan kepada Kaedah 4 (c) (iva) dan Kaedah 5 (2) telah dibuat berkuatkuasa kebelakangan kepada 1 Oktober 1999 dan kuatkuasa kebelakangan ini telah dibenarkan kerana pindaan-pindaan itu adalah berbentuk prosedur, perayu menghujahkan bahawa selagi pindaan itu tidak

A diwartakan pihak eksekutif (misalnya JPN) tidak boleh menggunakan pindaan itu dan bertindak atasnya. Perayu menarik perhatian kepada fakta bahawa permohonannya untuk KP telah dibuat pada 25 Oktober 1999 manakala pada 1 Oktober 1999 pindaan itu belum diwartakan. Perayu menekankan bahawa kedudukan sebenar undang-undang semasa itu ialah bahawa perayu adalah berhak untuk suatu KP baru di atas nama Lina Joy tanpa apa-apa kenyataan mengenai B agama diletakkan dalam KP itu. Pindaan itu mengikut perayu tidak boleh dibuat berkuatkuasa kebelakangan kerana ianya menjejaskan hak perayu yang sedia ada itu.

11.1 Atas isu kuatkuasa kebelakangan ini saya ingin merujuk kepada kes *Sim Seoh Beng @ Sin Sai Beng & Anor v Koperasi Tunas Muda Sungai Ara Bhd* [1995] 1 MLJ 292 yang menyatakan bahawa ujian yang betul untuk digunapakai bagi C menentukan sama ada sesuatu undang-undang bertulis adalah berkuatkuasa secara prospektif atau kebelakangan ialah untuk pertamanya memastikan sama ada undang-undang itu akan menyentuh hak-hak substantif jika dikuatkuasakan secara kebelakangan. Jika ia, maka, prima facie undang-undang itu hendaklah ditafsirkan sebagai mempunyai kesan prospektif D sahaja, kecuali terdapat arahan yang jelas dalam enakmen itu bahawa ianya hendaklah berkuatkuasa kebelakangan.

> In our judgment, the correct test to be applied to determine whether a written law is prospective or retrospective is to first ascertain whether it would affect substantive rights if applied retrospectively. If it would, then, prima facie that law must be E construed as having prospective effect only, unless there is a clear indication in the enactment that it is in any event to have retrospectivity (bahasa asal penghakiman).

Mahkamah Persekutuan dalam kes *Lim Phin Khian v Kho Su Ming* [1996] 1 MLJ 1 telah menyatakan bahawa persoalan dalam kes itu ialah sama ada F anggapan prima facie tiadanya kuatkuasa kebelakangan telah diganti dengan maksud Parlimen yang bertentangan dan jika betul, sejauh mana.

> Thus, in any given case, the task to be undertaken by a court is to examine the particular statute that has fallen for interpretation and to ascertain what Parliament intended. In the context of the present case, the question that falls for determination G is whether the prima facie presumption against retrospectivity has been displaced by contrary Parliament intention, and if so, to what extent (bahasa asal penghakiman).

Kes *Attorney General v Bernazar* [1960] 3 AII ER 97 pula menyatakan bahawa keadaan adalah berlainan apabila statut itu berkuatkuasa kebelakangan sama ada kerana statut itu mengandungi perkataan-perkataan yang jelas H menunjukkan demikian atau kerana statut itu adalah hanya mengenai perkara-perkara prosedur; oleh itu Parlimen telah menunjukkan tujuannya bahawa Akta itu hendaklah terpakai atas prosiding-prosiding yang tergantung, dan Mahkamah Rayuan adalah berhak untuk memberi kesan kepada tujuan kebelakangan ini sama seperti mahkamah di peringkat pertama (first instance)

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> But it is different when the statute is retrospective either because it contains clear words to that effect or because it deals with matters of procedures only; for then Parliament has shown an intention that the Act should operate on pending proceedings, and the Court of Appeal are entitled to give effect to this retrospective intent as well as a court of first instance (bahasa asal penghakiman)

Dalam kes *Yew Bon Teow v Kenderaan Bas Mara* [1983] 1 MLJ 1, Majlis Privy telah menyatakan bahawa persoalan sama ada sesuatu statut itu hendaklah ditafsirkan secara berkuatkuasa kebelakangan, dan jika demikian sejauh mana, adalah terletak pada maksud/tujuan legislator seperti yang dilafazkannya melalui perkataan-perkataan yang digunakan dalam statut itu, di samping mengambil kira kaedah tafsiran biasa dan peruntukan-peruntukan relevan dalam mana-mana statut tafsiran.

> Whether a statute is to be construed in a retrospective sense, and if so to what extent, depends on the intention of the legislature as expressed in the wording of the statute, having regard to the normal canons of construction and to the relevant provisions of any interpretation statute' (bahasa asal penghakiman)

Saya ingin juga merujuk kepada s 19 Intepretation Acts 1948 & 1967 yang menyatakan

> Section 19
>
> (1) The commencement of an Act or subsidiary legislation shall be the date provided in or under the Act or subsidiary legislation or, where no date is so provided, the date immediately following the date of its publication in pursuance of s 18.
>
> (2) Acts and subsidiary legislation shall come into operation immediately on the expiration of the day preceding their commencement.
>
> (3) Notwithstanding s 2(1) and (2) and s 65(2), subsections (1) and (2) shall apply —
>
> (a) to all Acts enacted after the 31 December 1968 including Acts which amend laws enacted before the commencement of Part I of this Act; and (b) to all subsidiary legislation made after the 31 December 1968, whether made under a law enacted before or after the commencement of Part I of this Act whether or not that law has been revised under the Revision of Laws Act 1968.

Di dalam rayuan di mahkamah ini terdapat dengan jelasnya suatu arahan (seperti tersebut dalam kes *Sim Seoh Beng*) bahawa pindaan-pindaan kepada Kaedah-Kaedah 1990, kecuali untuk kaedah 19, hendaklah dianggap telah mula berkuatkuasa pada 1 Oktober 1990 (shall be deemed to have come into operation on 1 October 1990). Justeru itu pindaan-pindaan kepada kaedah 4, kaedah 5 dan jadual pertama adalah berkuatkuasa secara kebelakangan. Oleh itu tindakan JPN mengeluarkan KP dengan penambahan perkataan 'Islam' adalah sah di sisi undang-undang.

[12] Majlis Peguam, HAKAM, dan Malaysian Consultative Council of Buddhism, Christianity, Hinduism and Sikhism, sebagai pemerhati di arah (watching brief) telah turut memberi pandangan-pandangan mereka masing-masing yang secara ringkasnya adalah seperti berikut:

(a) jika seseorang tidak lagi menganuti (profess) agama Islam, maka dianya tidak boleh lagi berada di bawah bidang kuasa Mahkamah Syariah. Jika dia dikatakan masih lagi di bawah bidang kuasa Mahkamah Syariah maka perbuatan itu adalah suatu pencabulan hak kemanusiaannya di bawah Perkara 11(1) dan Perkara 8, Perlembagaan Persekutuan;

A (b) perkara murtad (apostasy) tidak dimasukkan ke dalam item 1 senarai 2 kepada Jadual Sembilan PP;

(c) perakuan murtad adalah ketara bertentangan dengan peruntukan kebebasan asasi di bawah perkara 11;

B (d) perisytiharan (declaration) oleh perayu bahawa beliau adalah seorang Kristian bererti bahawa beliau menganuti agama Kristian dan ini bererti bahawa beliau tidak boleh lagi dianggap sebagai seorang Muslim atau seorang yang menganuti agama Islam;

(e) Chua H dalam kes *Re Mohamed Said Nabi, deceased* [1965] 3 MLJ 121) telah merujuk kepada *Shorter Oxford English Dictionary* untuk pengertian 'profess'. Kamus itu berkata:

C

> 'profess' means 'to affirm one's faith in or allegiance to (a religion, principles, God or Saint etc)'.

D Ini bererti JPN tidak berhak untuk mengenakan syarat agar perayu kemukakan suatu sijil kerana mahkamah-mahkamah syariah tiada bidang kuasa atas perayu yang tidak lagi menganut agama Islam. perayu masih hidup dan telah membuat akuan statutori dan affidavit-afidavit yang menunjukkan bahawa beliau menganuti agama Kristian. Justeru itu, tidak perlulah untuk mana-mana pihak berkuasa Islam memutuskan sama ada beliau murtad atau tidak;

E

(f) Kerajaan Malaysia telah menggambarkan (represented) di peringkat antarabangsa dan kepada warganegaranya, bahawa ianya berpegang (subscribe) kepada norma-norma kebebasan kepercayaan (faith) yang komprehensif, pemikiran (thought) dan suara hati (conscience) seperti diisytiharkan (declared) dalam perkara 18 Perisytiharan Sejagat Hak-hak Manusia (Universal Declarations of Human Rights). Justeru itu perayu mempunyai harapan yang sah (legitimate expectation) bahawa Kerajaan Malaysia dan agensi-agensinya tidak akan bertindak bercanggahan dengan gambarannya itu;

F

(g) Perayu telah, kerana permohonannya untuk memadamkan (delete) perkataan 'Islam' itu tidak dibenarkan, dinafikan haknya untuk mengahwini seorang yang menganut agama Kristian atau mengahwini seseorang mengikut kehendaknya. Ini adalah suatu penafian kepada haknya di bawah perkara 5(1) Perlembagaan Persekutuan;

G

H **[13]** ABIM, Muslim Lawyers Association dan Persatuan Peguam Syarie Malaysia, juga sebagai pemerhati diarah (watching brief), telah turut memberi pandangan-pendangan mereka masing-masing yang secara ringkasnya adalah seperti berikut:

(a) Perkara 11 Perlembagaan Persekutuan menggunakan perkataan-perkataan 'profess and practice'. Justeru itu perkara keluar dari agama Islam hendaklah mengikut perundangan berkaitan dengannya. Seseorang boleh keluar dari agama Islam tetapi hendaklah ikut tatacaranya. Kalau ikut kehendak atau sesuka hati seseorang maka akan huru-haralah keadaan umat dan agama Islam. Oleh demikian penentuan oleh mahkamah syariah adalah mengikut kehendak perundangan syariah dan justeru itu tidaklah berlawanan dengan perkara 11;

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(b) Mengenai hak sama rata (equal rights) di bawah Perkara 8 Perlembagaan Persekutuan, Perkara 8 itu adalah tertakluk kepada peruntukan-peruntukan yang kawal selia (regulate) undang-undang keluarga (personal law).

[14] Mengenai pandangan-pandangan di perenggan-perenggan (12) dan (13) diatas saya bersetuju dengan pendapat-pendapat di dalam perenggan (13). Di dalam rayuan di hadapan mahkamah sekarang, tiada ketentuan muktamad bahawa perayu tidak lagi menganuti agama Islam. Maka, kenyataan bahawa perayu tidak boleh lagi berada di bawah bidang kuasa Mahkamah Syariah kerana Mahkamah Syariah hanya ada bidang kuasa terhadap seseorang yang menganuti agama Islam (profess) tidak boleh/wajar ditekankan. Cara seseorang keluar dari sesuatu agama adalah semestinya mengikut kaedah atau undang-undang atau amalan (practice) yang ditentukan atau ditetapkan oleh agama itu sendiri. Perayu tidak dihalang dari berkahwin. Kebebasan beragama di bawah Perkara 11 Perlembagaan memerlukan perayu mematuhi amalan-amalan atau undang-undang agama Islam khususnya mengenai keluar dari agama itu. Apabila ketentuan-ketentuan agama Islam dipatuhi dan pihak berkuasa agama Islam memperakukan kemurtadannya barulah perayu dapat menganuti agama Kristian. Dengan lain perkataan seseorang tidak boleh sesuka hatinya keluar dan masuk agama. Apabila ia menganuti sesuatu agama, akal budi (common sense) sendiri memerlukan dia mematuhi amalan-amalan dan undang-undang dalam agama itu.

[15] Perayu seterusnya menghujahkan bahawa, JPN tidak boleh bertindak secara memperkosakan hak-hak kebebasan beragama setiap warganegara di bawah perkara 11 PP atau secara diskriminasi mencabuli jaminan-jaminan di bawah perkara 8(2) Perlembagaan yang melarang sebarang diskriminasi atas alasan agama. Perayu menegaskan bahawa perkara 11 itu memberinya kebebasan mutlak untuk keluar dari agama Islam dan menjadi seorang Kristian. Mengikutnya kebebasan itu tidak boleh dengan sahnya dihadkan atau dikawal oleh mana-mana undang-undang seperti Akta Pentadbiran Undang-Undang Islam (Wilayah Persekutuan) 1993 (Administration of Islamic Law (Federal Territory) Act 1993) oleh Mahkamah Syariah, atau oleh mana-mana pihak berkuasa lain. Justeru itu pihak perayu memohon agar mahkamah tinggi memperakukan bahawa tindakannya keluar dari agama Islam adalah teratur (proper) dan sah (valid) di bawah perkara 11 Perlembagaan. Ini, tegas peguam terpelajar Persatuan Peguam-Peguam Muslim Malaysia, mengandaikan bahawa mahkamah sivil mempunyai bidang kuasa untuk membuat deklarasi yang dipohon oleh perayu itu. (Justeru itulah timbulnya soalan ketiga).

15.1 Peguam terpelajar perayu menarik perhatian mahkamah ini kepada keputusan-keputusan Mahkamah Tinggi yang berkonflik. Kes-kes seperti *Ng Wan Chan v Majlis Agama Wilayah Persekutuan (No2)* dan *Lim Chan Seng v Pengarah Jabatan Agama Islam* memutuskan bahawa tanpa bidang kuasa yang dengan jelasnya diberi kepada Mahkamah Syariah atas sesuatu perkara tertentu, maka mahkamah sivil hendaklah mengekalkan bidang kuasanya atas perkara itu. Pula, kes *Md Hakim Lee v Majlis Agama Islam Wilayah Persekutuan* menganjurkan teori bidang kuasa tersirat. Mengikut teori itu, adalah memadai jika perkara itu telah dikhususkan untuk Mahkamah Syariah di dalam item 1, senarai 2, dalam Jadual 9 PP. Mengikut peguam terpelajar itu lagi, kes Soon

A Singh telah menyelesaikan konflik itu dengan menggunapakai teori bidang kuasa tersirat seperti yang dianjurkan oleh kes *Md Hakim Lee*. Peguam terpelajar perayu seterusnya merujuk kepada keputusan-keputusan Mahkamah Persekutuan dalam kes-kes *Majlis Agama Islam Pulau Pinang v Shaik Zolkaffily* [2003] 3 MLJ 705 dan *Azizah bte Shaik Ismail v Fatimah binti Shaik Ismail* B [2004] 2 MLJ 529) yang mengikut keputusan kes *Soon Singh*. Sungguhpun demikian, peguam terpelajar itu tetap menghujahkan bahawa keputusan kes *Soon Singh* itu adalah salah disisi undang-undang kerana:

(a) keputusan itu gagal mengambil kira bahawa semua enakmen undang-undang Islam negeri mewujudkan dua entiti yang berbeza, iaitu C Majlis Agama dan Mahkamah Syariah. Dalam enakmen-enakmen, itu Majlis Agama memainkan peranan pentadbiran manakala Mahkamah Syariah adalah badan kehakiman. Peguam terpelajar itu kemudiannya telah merujuk kepada Akta 505 yang melalui ss 24, 7 dan 10 memperuntukkan hal-hal mengenai penubuhan, keanggotaan, fungsi, tugas dan aktiviti D Majlis Agama manakala s 46 memperuntukkan bidangkuasa Mahkamah Syariah. Kes *Soon Singh*, ujar peguam terpelajar itu, membuat satu kesilapan kerana tidak membezakan antara Majlis dan Mahkamah Syariah. Akibat dari kesilapan tersebut di atas kes *Soon Singh* telah turut silap apabila ianya menganggap bahawa Mahkamah Syariah di mana-mana E adalah pihak berkuasa yang mengurus dan mengendalikan hal-hal pemelukan agama Islam. Seksyen-seksyen 139–141 Enakmen di negeri Kedah merujuk kepada Majlis sebagai pihak berkuasa yang mengendalikan hal-hal pemelukan agama Islam. Begitu juga dengan ss 77–89 Enakmen di Pulau Pinang yang merujuk kepada Pendaftar Pemelukan Agama Islam dan s 82 menunjukkan Majis yang menyimpankan rekod pemeluk agama F Islam. Sama juga dengan Akta 505 yang melalui ss 85–95 menjelaskan bahawa Majlis yang mengendalikan hal-hal pemelukan agama Islam. Justeru itu, tekan peguam terpelajar itu, kenyataan oleh kes Soon Singh bahawasanya semua enakmen-enakmen negeri memberi bidang kuasa kepada mahkamah-mahkamah syariah dalam hal-hal berkenaan pemelukan G agama Islam itu adalah ketara salah.

(b) Otoriti-otoriti yang diguna pakai oleh kes *Soon Singh* bagi mengasaskan teori bidang kuasa tersiratnya itu tidak menyokong keputusannya. Jika otoriti-otoriti itu ditelitikan, otoriti *Craies on Statute Law*, 7th Ed muka surat 112 sebenarnya menyatakan bahawa bahasa yang jelas dan H tidak kabur (express and unambiguous language) adalah diperlukan untuk mengubahkan bidang kuasa mahkamah-mahkamah undang-undang (altering the jurisdiction of courts of law). Otoriti kes *Albon v Pyke* [1842] 4 M & G 421) menunjukkan Tindal CJ di para 424 mengatakan yang kaedah umum, tidak syak lagi, ialah bahawa bidang kuasa mahkamah-mahkamah atasan tidak diambil atau hilang kecuali melalui I perkataan-perkataan yang jelas atau implikasi perlu.

> the general rule undoubtedly is that the jurisdiction of the superior courts is not taken away, except by express words or necessary implication' (bahasa asal penghakiman)

(c) Kesalahan-kesalahan kes *Soon Singh* seperti dihuraikan di perenggan-perenggan 15(a) – (b) di atas telah menyebabkan kes *Soon Singh* merumuskan bahawa bidangkuasa Mahkamah Syariah tidak perlu diberi oleh undang-undang tetapi memadai dengan hanya merujuk kepada senarai negeri dalam Jadual ke 9 seperti dilakukan oleh kes *Md Hakim Lee*. Ini, kata peguam terpelajar itu, mencanggahi prinsip penggubalan undang-undang oleh legislator dan kaedah bahawa sesuatu undang-undang bertulis mestilah dibuat oleh legislator dan ianya tidak boleh berkuatkuasa sehinggalah undang-undang itu diberitahu melalui warta. Mengikut peguam terpelajar itu lagi, kesan keputusan kes *Soon Singh* itu ialah bahawasanya sesuatu undang-undang itu dianggap telah wujud walaupun perkara itu hanya terdapat dalam item 1 senarai 2 Jadual 9 PP dan legislator belum membuat undang-undang atas perkara itu. Kes *Soon Singh* telah gagal mengenal pasti perbezaan antara kuasa untuk membuat undang-undang atas sesuatu perkara dan pembuatan undang-undang itu sendiri. Peguam terpelajar itu kemudiannya memetik apa yang Mahkamah Agong India kata dalam kes *Calcutta Gas Co v State of Weat Bengal* AIR 1962 SC 1044 di 1049 iaitu kuasa untuk membuat undang-undang adalah diberi kepada Legislator-Legislator yang berkenaan oleh Perkara 246 Perlembagaan India. Peruntukan-peruntukan dalam ketiga-tiga senarai adalah hanya kepala-kepala atau bidang-bidang untuk pembuatan undang-undang: senarai-senarai itu menyempadankan daerah dalam mana legislator-legislator yang berkenaan boleh beroperasi.

> The power to legislate is given to the appropriate Legislatures by art 246 of the Constitution. The entries in the three Lists are only legislative heads or fields of legislation: they demarcate the area over which the oppropriate Legislatures can operate' (bahasa asal penghakiman)

Justeru itu, tegas peguam terpelajar perayu, keputusan *Soon Singh* bahawa hak untuk membuat undang-undang atas sesuatu perkara adalah sama dengan membuat undang-undang itu sendiri wajarlah ditolak sebagai duluan buruk (bad precedent).

(d) Seksyen 67 Interpretation and General Clauses Act 1967 mengisytiharkan bahawa setiap akta Parlimen atau enakmen negeri adalah akta atau enakmen untuk umum dan ianya boleh diberi notis kehakiman. Kes *Soon Singh* telah mengecualikan keperluan menyiarkan undang-undang atau proses pembuatan undang-undang melalui peringkat rang undang-undang dan berakhir dengan perkenanan Raja. Justeru itu kes *Soon Singh* ini hendaklah diperbetulkan segera, demikian ditekankan oleh peguam terpelajar perayu. Dalam meneruskan penghujahannya mengenai kes *Soon Singh* ini, peguam terpelajar perayu memetik pemerhatian oleh Hashim Yeop Sani dalam kes *Dalip Kaur a/p Gurbox Singh v Pegawai Polis Daerah (OCPD) Bukit Mertajam & Anor* yang antara lainnya, menyatakan bahawa perkara 121(1A) yang baru itu, yang berkuat kuasa mulai 10 Jun 1988, telah melucutkan bidang kuasa mahkamah-mahkamah sivil atas perkara-perkara yang di dalam bidang kuasa mahkamah-mahkamah syariah. Walau bagaimanapun klausa itu tidak melucutkan bidang kuasa

A mahkamah sivil untuk menafsirkan mana-mana undang-undang bertulis negeri yang diluluskan untuk pentadbiran undang-undang Islam.

> ... the new clause (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 way the jurisdiction of the civil court to interpret any written laws of the states enacted for the administration of Muslim law' (bahasa asal penghakiman)

B

Bagi peguam terpelajar itu, pemerhatian itu dengan jelasnya menunjukkan bahawa mahkamah sivil hendaklah memutuskan sama ada sesuatu perkara itu terjatuh dalam bidangkuasanya atau bidangkuasa Mahkamah Syariah.

C

15.2 Peguam terpelajar responden-responden kedua dan ketiga pula berpendirian bahawa kes *Md Hakim Lee* telah diputuskan dengan betul. Justeru itu beliau berpendapat kes-kes *Soon Singh* dan *Shaik Zolkaffily* adalah mengandungi prinsip-prinsip yang betul mengenai bidang kuasa Mahkamah Syariah.

D

15.3 Peguam terpelajar responden pertama merujuk kepada perkataan implikasi (implication) seperti terdapat dalam *Bernion's Statutory Interpretation* (2nd Ed) di ms 362 iaitu: Implikasi boleh muncul daripada bahasa yang digunakan, daripada konteks, atau daripada pemakaian sesetengah kaedah luaran.

E

Seterusnya peguam terpelajar itu menekankan bahawa oleh kerana Akta 505 itu mengandungi peruntukan-peruntukan mengenai perkara-perkara berhubung dengan pemelukan agama Islam sebagai di bawah bidangkuasa Mahkamah Syariah (s 87 dan s 91 dibaca dengan s 46(2) (b) Akta 505) maka secara implikasi, perkara-perkara mengenai murtad dan keluar dari agama Islam adalah juga di dalam bidang kuasa Mahkamah Syariah.

F

> Implication may arise from the language used, from the context, or from the application of some external rule' (bahasa asal report)

15.4 Di dalam kes *Soon Singh*, perayu memohon agar mahkamah tinggi mengeluarkan deklarasi yang beliau bukan seorang Muslim. Peguam terpelajar Jabatan Agama Islam Kedah (JAIK) membuat bantahan awal memohon agar permohonan perayu ditolak kerana mahkamah tinggi tiada bidang kuasa atas perkara seseorang itu bukan Muslim. Perkara itu adalah di bawah bidang kuasa mahkamah syariah. Mahkamah Tinggi bersetuju dengan hujah peguam terpelajar JAIK dan menolak permohonan perayu yang kemudiannya merayu ke Mahkamah Persekutuan. Dalam penghakimannya Mahkamah Persekutuan menyatakan bahawa persoalan di hadapannya ialah mengenai bidang kuasa Mahkamah-Mahkamah Syariah di bawah Perkara 121(1A) Perlembagaan. Mahkamah Persekutuan juga akui tiadanya peruntukan-peruntukan khusus (express provisions) di dalam Enakmen Kedah yang memberikan bidang kuasa kepada Mahkamah Syariah untuk mengendalikan (deal) persoalan murtad. Selepas itu Mahkamah Persekutuan merujuk kepada *Craies on Statute Law, kes Albon v Pyke, Bennion's Statutory Interpretation* and kes *Dalip Kaur.*

G

H

I

15.5 Mengenai kritikan peguam terpelajar perayu atas rujukan yang dibuat oleh Mahkamah Persekutuan kepada *Craies on Statute Law* dan kes *Albon v Pyke*, saya hanya perlu tekankan bahawa Tindal CJ juga gunakan

perkataan-perkataan implikasi perlu (necessary implication). Justeru itu Mahkamah Persekutuan berpendapat bahawa adalah sejajar dengan logik untuk Mahkamah Syariah, yang telah dengan jelasnya diberi bidang kuasa untuk mengadili perkara-perkara yang berkaitan dengan pemelukan agama Islam adalah, secara implikasi perlu, juga mempunyai bidang kuasa untuk mengadili perkara-perkara yang berkaitan dengan keluarnya seorang Muslim dari agama Islam atau kemurtadan. Saya tidak nampak sebarang kecacatan dalam taakulan penghakiman Mahkamah Persekutuan itu. Oleh demikian saya tiada lain pilihan melainkan menjawab soalan ketiga itu dengan mengatakan bahawa kes *Soon Singh* telah diputuskan dengan betul.

[16] Seperti yang telah dihuraikan di perenggan sebelum ini, kes *Soon Singh* ketara menunjukkan bahawa hal murtad adalah dalam bidang kuasa Mahkamah Syariah. Di perenggan (10) saya juga telah merujuk kepada item 1, senarai 2, Jadual 9 Perlembagaan bagi menunjukkan bahawa perkataan penting yang digunakan di situ ialah 'matters' dan kerana 'Islamic Law' adalah salah satu daripada 'matters' yang terdapat dalam item 1 itu dan apabila dibaca pula berlatarbelakangkan kes *Dalip Kaur*, maka amat ketara sekali bahawa sesungguhnya perkara murtad itu adalah perkara yang berhubung-kait dengan undang-undang Islam (Islamic Law) dan nyatalah oleh itu ianya adalah di dalam bidangkuasa Mahkamah Syariah dan kerana Perkara 121(1A) Perlembagaan, maka mahkamah-mahkamah sivil tidak boleh campur tangan dalam hal itu.

[17] Beberapa hujah juga telah diketengahkan mengenai beberapa hak-hak Perayu di bawah Perlembagaan. Telah juga diperhujahkan bahawa keperluan mengemukakan sijil/perakuan dari mahkamah syariah/pihak berkuasa bagi mengesahkan perayu murtad adalah bercanggah dengan kebebasan di bawah Perkara 11 Perlembagaan. Mengikut hujah itu Perkara 11 Perlembagaan memberi kebebasan kepada perayu untuk menganut mana-mana agama dan untuk keluar daripada sesuatu agama. Tiada siapa atau apa pun boleh menghalangnya dari berbuat demikian. Sebarang tindakan menghalang perayu dari membuat sesukanya dalam pemilihan agama atau keluar dari mana-mana agama adalah bercanggah dengan Perkara 11 Perlembagaan.

17.1 Perkara 11 Perlembagaan adalah seperti berikut:

> (1) Every person has the right to profess and practise his religion and, subject to cl (4), to propagate it. (2) No person shall be compelled to pay any tax the proceeds of which are specially allocated in whole or in part for the purposes of a religion other than his own. (3) Every religious group has the right —
>
> (a) to manage its own religious affairs;
>
> (b) to establish and maintain institutions for religious or charitable purposes; and
>
> (c) to acquire and own property and hold and administer it in accordance with law.
>
> (4) State law and in respect of the Federal Territories of Kuala Lumpur, Labuan and Putrajaya, federal law may control or restrict the propagation of any religious doctrine or belief among persons professing the religion of Islam. (5) This Article does not authorize any act contrary to any general law relating to public order, public health or morality.

A 17.2 Apa yang jelas dalam Perkara 11 itu ialah penggunaan perkataan-perkataan '… right to profess and practice his religion …' Seperti yang dikatakan oleh Abdul Hamid Mohamad HMR (ketika itu) dalam kes *Kamariah bte Ali lawan Kerajaan negeri Kelantan, Malaysia* [2002] 3 MLJ 657 di ms 665): 'kata-kata 'has the right' itu terpakai kepada 'profess' dan juga 'practise". Mengikut kes *Che Omar bin Che Soh v Public Prosecutor* [1988] 2 MLJ 55), Islam itu bukan sahaja suatu himpunan dogma-dogma dan ritual-ritual tetapi ianya adalah juga suatu cara hidup yang lengkap merangkumi semua bidang aktiviti manusia, persendirian atau awam, perundangan, politik, ekonomi, sosial, budaya, moral atau kehakiman. Dan jika diteliti perkara-perkara 11(1), 74(2) dan item 1 di senarai 2 dalam Jadual 9 Perlembagaan akan ketara bahawa Islam itu meliputi antara lainnya undang-undang Islam. Justeru itu, seperti yang dihujahkan oleh peguam terpelajar Malaysian Muslim Lawyers Association pemerhati diarah (watching brief), jika seseorang Muslim ingin keluar dari agama Islam, dia sebenarnya menggunakan haknya di dalam konteks undang-undang syariah yang mempunyai jurisprudennya sendiri mengenai isu murtad. Jika seseorang menganuti dan mengamalkan agama Islam, sudah tentulah itu bererti dianya hendaklah mengikuti undang-undang Islam yang menetapkan cara memasuki Islam dan juga cara keluar dari agama Islam. Itulah ertinya menganuti dan mengamal Islam. Dan apa yang telah dilakukan oleh pegawai JPN adalah hanya semata-mata untuk menentukan perayu bukan lagi beragama Islam secara yang ditetapkan oleh Islam. Justeru itu, saya tidak nampak bagaimana tindakan itu boleh dikatakan bertentangan dengan Perkara 11(1) yang dengan sendirinya memperuntukkan keperluan mematuhi kehendak-kehendak agama itu sebelum dia keluar dari agama Islam. Menganuti dan mengamalkan agama Islam sudah tentu bererti mengamalkan bukan saja aspek teologi dalam agama itu tapi juga undang-undang agama itu.

17.3 Perayu dalam kes *Kamariah* menghujahkan bahawa perkara 11 itu bukan sahaja memberinya kebebasan untuk menganuti mana-mana agama, tetapi juga untuk keluar dari mana-mana agama. Perayu menyatakan bahawa undang-undang tidak boleh menghalangnya berbuat demikian. Undang-undang mengikut perayu, tidak boleh memerlukan dia mengikut sesuatu peraturan sama ada untuk memeluk atau keluar dari sesuatu agama. Undang-undang seperti itu, ujar perayu, adalah bercanggah dengan perkara 11 dan oleh itu tidak sah dan batal. Seksyen 102 Enakmen 1994 Kelantan, kata perayu, menghalang seorang Muslim mengakui bahawa dia bukan Islam melainkan dia telah dapat pengesahan Mahkamah. Ini, kata perayu, adalah bercanggah dengan perkara 11 dan kerana itu tidak sah dan batal.

17.4 Atas hujah perayu ini, Abdul Hamid Mohamad HMR dalam kes *Kamariah* kata:

> Jika itulah makna peruntukan itu maka bukan sahaja undang-undang yang menetapkan cara untuk seseorang itu memeluk agama Islam dan keluar dari agama Islam tidak sah malah undang-undang yang menjadikan suatu kesalahan jika seorang Islam itu berzina, berkhalwat, tidak membayar zakat dan lain-lain itu juga semuanya tidak sah. Sebab, mengikut hujah itu, perkara 11 memberi hak kepada seseorang itu untuk mengamalkan agamanya, maka terserahlah kepadanya sama ada dia hendak mengamal mana-mana suruhan yang dia hendak amalkan dan mana yang tidak, mematuhi mana-mana larangan yang dia hendak patuhi dan mana yang tidak.

Oleh itu, mengikut hujah itu, sebarang undang-undang yang menghendaki seseorang itu melakukan sesuatu perkara atau meninggalkan sesuatu perkara adalah bercanggah dengan kebebasan yang diberi oleh perkara 11 dan oleh itu tidak sah semuanya.

Pada pandangan saya, berkaitan dengan agama Islam (saya tidak memutuskan mengenai agama-agama lain), perkara 11 tidaklah boleh ditafsirkan sebegitu luas sehingga ia membatalkan semua undang-undang yang menghendaki seseorang Islam itu mengerjakan sesuatu kewajipan agama Islam atau melarang mereka melakukan sesuatu perkara yang dilarang oleh agama Islam atau yang menetapkan acara bagi melakukan sesuatu perkara yang berkaitan dengan agama Islam.

Ini kerana kedudukan Islam dalam Perlembagaan Persekutuan adalah berlainan daripada kedudukan agama-agama lain. Pertama, hanya Islam, sebagai satu agama, yang disebut dengan namanya dalam Perlembagaan Persekutuan, iaitu sebagai 'agama bagi Persekutuan' ('the religion of the Federation') perkara 3(1).

Kedua, Perlembagaan itu sendiri memberi kuasa kepada Badan Perundangan Negeri (bagi negeri-negeri) untuk mengkanunkan Hukum Syarak dalam perkara-perkara yang disebut dalam Senarai II, Senarai Negeri, Jadual Kesembilan, Perlembagaan Persekutuan ('Senarai II'). Selaras dengan kehendak Senarai II itu, Akta Mahkamah Syariah (Bidang Kuasa Jenayah) 1965 ('Syariah Courts (Criminal Jurisdiction) Act 1965') ('Akta 355/1965') dan berbagai-bagai enakmen (untuk Negeri-Negeri) termasuk yang disebut dalam penghakiman ini, telah dikanunkan.

Maka, jika undang-undang itu, termasuk s 102 Enakmen 4/1994, tidak bercanggah dengan peruntukan Senarai II, dan tidak bercanggah pula dengan peruntukan-peruntukan Akta 355/1965, maka ia adalah undang-undang yang sah.

Peruntukan ini bolehlah dibandingkan dengan peruntukan-peruntukan mengenai nikah dan cerai. Hukum Syarak menghendaki seorang lelaki dan seorang perempuan yang hendak bersekedudukan supaya bernikah mengikut syarat-syarat dan peraturan-peraturan tertentu. Keperluan semasa memerlukan undang-undang dibuat mengenainya, termasuk, antara lain, menghendaki nikah itu didaftarkan dan permohonan untuk bercerai dibuat di Mahkamah Syariah dan perintah yang diberi, jika diberi, didaftarkan (bagi saya undang-undang yang terakhir disebut ini yang kerapkali dipanggil 'undang-undang pentadbiran' itu, adalah sebahagian daripada pembangunan (development) Hukum Syarak juga). Adakah undang-undang itu juga tidak sah dan batal atas alasan ia bercanggah dengan perkara 11 kerana, mengikut hujah itu, ia menghalang kebebasan beragama yang dijamin oleh perkara 11? Pada pandangan saya tidak.

17.5 Berasaskan otoriti-otoriti tersebut di atas ketara sekali bahawa:

(a) Isu pertukaran agama ini adalah secara langsungnya berkait dengan hak-hak dan kewajipan-kewajipan perayu sebagai seorang Muslim sebelum pertukaran itu berlaku;

(b) Perkara 11(1) tidak wajar dihujahkan sebagai peruntukan yang memberi hak kebebasan yang tiada berbatas;

A (c) Hak untuk menganut dan mengamalkan sesuatu agama hendaklah selalunya tertakluk kepada prinsip-prinsip dan amalan-amalan yang ditentukan oleh agama itu.

[18] Berasaskan taakulan-taakulan yang dihuraikan di atas jawapan-jawapan saya B kepada soalan-soalan tersebut di perenggan (1) di atas adalah seperti berikut:

(a) JPN berhak;

(b) JPN betul; dan

(c) Kes *Soon Singh* telah diputuskan dengan betulnya.

C

[19] Dalam keadaan sedemikian, rayuan ini adalah ditolak tanpa perintah atas kos.

Alauddin HMP (bersetuju):

D

[20] Saya telah berpeluang meneliti penghakiman-penghakiman YAA Ketua Hakim Negara dan YAA Hakim Besar Sabah dan Sarawak dan saya bersetuju dengan alasan-alasan dan keputusan yang telah dikemukakan oleh YAA Ketua Hakim Negara.

E

Richard Malanjum CJ (Sabah & Sarawak) delivering dissenting judgment):

PRELIMINARY

F

[21] I had the privilege of deliberating with their Lordships the learned Chief Justice and Mr Justice Dato' Alauddin FCJ on the draft judgment for this appeal.

[22] With the greatest respect I am unable to concur with them on the final G decision of this appeal. Hence, it is thus my task to express my views and reasons on what I think should be the outcome of this appeal.

[23] Sworn to uphold the Federal Constitution (the Constitution), it is my task to ensure that it is upheld at all times by giving effects to what I think the founding H Fathers of this great nation had in mind when they framed this sacred document.

[24] It is therefore my view that when considering an issue of constitutional importance it is vital to bear in mind that all other interests and feelings, personal or otherwise, should give way and assume only a secondary role if at all. The wise words of Salleh Abas LP in *Che Omar bin Che Soh v Public Prosecutor* [1988] 2 MLJ 55 are I thus worthy of recall when he said this at p 57:

> ... we have to set aside our personal feelings because the law in this country is still what it is today, secular law, where morality not accepted by the law is not enjoying the status of law.

[25] I would also say that the appeal before us is indeed not easy to resolve for it involves issues of critical importance in the hearts and minds of the people in this country. Cursory handling may result in unnecessary anxieties to the general public. Thus, intensive discussions and research works had to be done with great patience and sincerity before any conclusion could be made.

[26] In order to understand the real issues at hand I think it is necessary to state and understand the important chronological facts of this appeal.

BACKGROUND FACTS

[27] It is common ground that the appellant is a Malay woman born on 8 January 1964. She was brought up as Muslim by her family and her given name is Azlina bte Jailani.

[28] On 21 February 1997 she applied to the National Registration Department (NRD) (the first application) to change her name to Lina Lelani. The reason she gave in her statutory declaration to support the application was that she had renounced Islam for Christianity and that she intended to marry a Christian.

[29] Her application for name change was rejected by the NRD without any reason being given on 11 August 1997.

[30] However, she made a second application for name change but this time to Lina Joy on 15 March 1999 (second application). In accordance with sub-reg (1) of reg 14 of the National Regulations 1990 (the Regulations), she again submitted a statutory declaration and stated that the reason for name change was her conversion to Christianity.

[31] According to her, she received no reply and when she went to enquire about her second application in July 1999 she was told by an officer at the NRD office in Petaling Jaya that since her identity card did not state her religion, to avoid any difficulty in processing her application she should not mention conversion as the reason for name change.

[32] The appellant asserted that at that time it was not known to the appellant then nor was she informed by NRD that the Regulations would shortly be amended and that her change of name alone would be insufficient for her purposes. The amendment that was introduced shortly was to make it a requirement that in the Identity Cards of Muslims the religion must be stated. In her affidavit in support of her originating summons in the high court the appellant asserted that it was a 'trick' or 'muslihat' by NRD and the appellant was aggrieved over this.

[33] Such advice led the appellant to submit a further statutory declaration on 2 August 1999. In the new statutory declaration there was no mention that the reason for the change of name was due to conversion of religion but stated her reason

A for change of name as a matter of mere choice. The appellant resubmitted the application dated 15 March 1999 with a new statutory declaration sworn on 2 August 1999.

[34] On 22 October 1999, NRD wrote to her saying that her application for name B change from 'Azlina bte Jailani' to 'Lina Joy' was approved and she was asked to apply for a new replacement identity card. This she did on 25 October 1999. However, by the time she applied for the replacement card the appellant asserted that unknown to her, the Regulations had been amended (vide PU(A)70/2000) which came into force retrospectively on 1 October 1999) to require that the identity card should state the C particular of religion for Muslims. Anyway, in the application form which asked her to state her religion the appellant stated her religion to be Christianity.

[35] The application by the appellant for replacement identity card was rejected. The form as processed by NRD carried a departmental entry by unnamed officer D who wrote thus:

> Arahan En Rahim agama pemohon dikekalkan kepada Islam (Translation: Mr Rahim instructed that the religion of the applicant be retained as Islam).

E

[36] On the notation it was later explained by the Director General of NRD in this manner:

> This notation was made because the information contained in the National Registration Department's record showed that the applicant is a Muslim and the applicant had not F forwarded any documentation from the Syariah Court nor any Islamic Authority concerned to prove her statement that she had renounced her Islamic faith.

[37] Consequently, her replacement identity card stated her religion as Islam although the name change to Lina Joy was effected. Her original name of Azlina bte G Jailani was also stated on the reverse side of the replacement identity card. This was also as a result of the amendments introduced vide PU(A)70/2000.

[38] The appellant then made a third application on 3 January 2000 (third application) to NRD office in Petaling Jaya. She applied to remove the word 'Islam' H and her original name from her replacement identity card. She tendered a statutory application to support her application. The counter clerk however refused to accept her application on the ground that it was incomplete without an order of the Syariah Court to the effect that she had renounced Islam. The Director General attempted to deny that the application was rejected at the counter. However the Court of I Appeal accepted the version of the appellant.

[39] That is where the position of the appellant in her quest to change her name completely and drop the reference to her original religion in the identity card came to a standstill.

PROCEEDINGS IN THE COURTS BELOW

[40] By way of Originating Summons the appellant decided to seek relief in the High Court praying, inter alia, for several declaratory orders against the Majlis Agama Islam Wilayah Perseketuan (Majlis) and the Government of Malaysia in respect of her right to freedom of religion, the constitutionality of s 2 of the Administration of Islamic Law (Federal Territories) Act 1993, the applicability of Syariah Enactments to her who professed the religion of Christianity and the constitutionality of the state and federal legislations that forbade conversion out of Islam.

[41] In addition she sought for an order that her name be entered in the Registry Book as having converted out of Islam. The appellant had joined the Majlis and sought the said declaratory orders because she said that she entertained fear that action would be taken against her by the religious authorities.

[42] The respondents filed a striking out application. However, the learned High Court Judge heard Originating Summons itself and dismissed it completely without granting any of the remedies the appellant sought. She appealed.

[43] In the Court of Appeal, the parties by consent narrowed down the issues and the relief sought for significantly. The constitutional issues were abandoned and the appeal focused purely on an issue of administrative law, that is, whether the Director General of NRD correctly exercised the discretion vested in him under the law.

[44] With the consent of the Court of Appeal, the Director General was added as a respondent. The questions that were posed to the Court of Appeal stated as follows:

(i) whether reg 14 of the 1990 Regulations required only a statutory declaration and nothing else, and therefore the Director General, in asking for the Syariah Court order or certificate, was imposing additional requirement to the regulation; if so,

(ii) whether the imposition of such additional requirement amounted to *Wednesbury* unreasonableness on the part of the Director General or the National Registration Department.

[45] However these questions were subsequently summarized thus:

> whether the NRD was right in law in rejecting the appellant's application under reg 14 of the National Registration Regulations 1990 ('the 1990 Regulations') to have the statement of her religion as 'Islam' deleted from her NRIC and in requiring a certificate and/or order from the Syariah Court.

[46] By majority the Court of Appeal answered the summarized question in the affirmative.

PROCEEDING BEFORE THIS COURT

[47] Arising from the answer by majority of the Court of Appeal the appellant sought for leave to appeal to this court.

A **[48]** On 13 April 2006 after hearing the respective submissions of counsel for the parties leave to appeal was granted on three questions for consideration by this court. The questions are:

(a) Whether the National Registration Department (NRD) is entitled in law to impose as a requirement for deleting the entry of Islam in the applicant's Identity Card (IC) that she produce a certificate or a declaration or an order from the Syariah Court that she has apostatized?

B

(b) Whether the NRD has correctly construed its power under the National Registration Regulations 1990, in particular regs 4 and 14, to impose the requirement as stated above when it is not expressly provided for in the 1990 Regulations?

C

(c) Whether *Soon Singh* was rightly decided when it adopted the implied jurisdiction theory propounded in *Md Hakim Lee lawan Majlis Agama Islam Wilayah Persekutuan, Kuala Lumpur* [1998] 1 MLJ 681 in preference to *Ng Wan Chan lawan Majlis Agama Islam Wilayah Persekutuan & Anor (No 2)* [1991] 3 MLJ 487 and *Lim Chan Seng v Pengarah Jabatan Agama Islam Pulau Pinang dan 1 kes yang lain* [1996] 3 CLJ 231 which declared that unless an express jurisdiction is conferred on the Syariah Court, the civil courts will retain their jurisdiction?

D

E **[49]** When hearing of the appeal proper began learned counsel for the parties herein initially agreed to approach the matter purely from the administrative law aspect. However, upon being allowed to express their views during the hearing proper learned counsel for the various interested non-governmental bodies appearing on watching brief raised some constitutional issues which the Appellant and Respondents agreed to skip earlier on. Hence, in fairness to the appellant and respondents this court allowed their learned counsel to submit on those constitutional issues in reply.

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[50] I propose to deal with the first two questions together and deal with the third question separately.

G

QUESTIONS 1 AND 2:

[51] These questions appear to be substantially an administrative law issue. However beneath it lurks fundamental constitutional issues involving fundamental liberties and in the context of the constitutional arrangement in Malaysia the division of powers between the State and Federal authorities.

H

FUNDAMENTAL LEGAL PRINCIPLES

I **[52]** I therefore begin by restating some well-entrenched legal principles which may seem obvious to many yet often overlooked.

[53] Article 3(1) of the Constitution placed Islam to a special position in this country. However, art 3(4) clearly provides that nothing in the Article derogates from

any other provision of the Constitution thereby implying that art 3(1) was never intended to override any right, privilege or power explicitly conferred by the Constitution (see *Che Omar bin Che Soh v Public Prosecutor*). Indeed this is in consonant with art 4 of the Constitution which places beyond doubt that the Constitution is the supreme law of this country. Article 4 thereof is abundantly clear. It follows that to be valid all laws whether federal or state legislations of any kind and whether they are pre or post merdeka must be in conformity with the provisions of the Constitution including those dealing with fundamental liberties (see *Surinder Singh Kanda v Govt of the Federation of Malaya* [1962] 28 MLJ 169; *Aminah v Supt Of Prisons* [1968] 1 MLJ 92; *City Council of George Town v Govt of Penang* [1967] 1 MLJ 169; *Nordin Salleh v Dewan Undangan Kelantan* [1992] 1 MLJ 697).

[54] Legislative bodies, whether Parliament and State Assemblies do not therefore have independent and sovereign legislative power merely on the basis of the Legislative Lists in Schedule 9 of the Constitution. In fact such legislative powers are derived from the Constitution itself. Hence, one is not wrong to say that the Legislative Lists are subordinate to the fundamental liberties provisions enshrined in the Constitution (see: *Public Prosecutor v Mohamed Ismail* [1984] 2 MLJ 219).

[55] Just as any legislation or any part thereof will be struck down if it fails to conform with any of the provisions of the Constitution so too with administrative, departmental and executive discretions, policies and decisions. In other words they too must not infringe any of the provisions of the Constitution (see *Public Prosecutor v Su Liang Yu* [1978] 2 MLJ 79; *Madhavan Nair v Public Prosecutor* [1975] MLJ 264). In addition, administrative, departmental and executive discretions, policies and decisions must also be within the ambit of the enabling legislations otherwise they too will be struck down for being ultra vires the legislations (see *Ghazali v Public Prosecutor* [1964] 30 MLJ 159). Of course it goes without saying that the enabling legislation must also be in conformity with the provisions of the Constitution (see: *Public Prosecutor v Mohamed Ismail*).

[56] In order to supervise and monitor the exercise of administrative, departmental or executive discretions our courts have followed with modifications where necessary the legal principles pronounced by the courts in other common law jurisdictions. For instance, to be valid administrative, departmental or executive discretions must not suffer any of the three categories of legal infirmities, namely, illegality, irrationality and procedural impropriety (see: *CCSU v Minister for the Civil Service* [1984] 3 All ER 935; *Persatuan Aliran Kesederaran Negara v Minister of Home Affairs* [1988] 1 MLJ 442).

[57] Indeed check on the exercise of administrative, departmental or executive discretions in this country is critical otherwise the acclaimed observance to the rule of law will just be a hollowed statement. A clear caution and advice on the danger was given by none other than his Lordship Raja Azlan Shah CJ (as His Majesty then was) in *Pengarah Tanah Dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135 where his Lordship said this at p 148:

> Every legal power must have legal limits, otherwise there is dictatorship. In particular, it is a stringent requirement that a discretion should be exercised for a proper purpose, and that

A it should not be exercised unreasonably. In other words, every discretion cannot be free from legal restraint; where it is wrongly exercised, it becomes the duty of the courts to intervene. The courts are the only defence of the liberty of the subject against departmental aggression. In these days when government departments and public authorities have such great powers and influence, this is a most important safeguard for the ordinary citizen: so that the courts can see that these great powers and influence are exercised in accordance with law. I would B once again emphasise what has often been said before, that 'public bodies must be compelled to observe the law and it is essential that bureaucracy should be kept in its place'.

[58] It is thus with the salutary caution and advice by His Majesty in mind that I proceed to consider the thorny and sensitive legal problems presented to this Court C for judicial determination in the form of questions 1 and 2.

THE SCOPE OF REGULATIONS 4 AND 14 OF THE NATIONAL REGISTRATION REGULATIONS 1990 AND THEIR IMPLEMENTATION

D **[59]** The relevant portions of reg 4 of the National Registration Regulations 1990 as amended reads:

Any person who is required to register under reg 3(1) or 3(2) or to re-register under reg 18 or 28 or who applies for a replacement identity card under reg 13 or 14 shall —

E (a) ...;

(b) ...;

(c) give the following particulars to the registration officer as aforesaid, namely:

(i) his name as appearing in his Certificate of Birth or such other document or, if he is mown by different names, each of such names, in full;

F (ii) his previous identity card number, if any;

(iii) the full address of his place of residence within Malaysia;

(iv) his race;

(iva) his religion (only for Muslims); wef, 1.10.1999;

G (v) his place of birth;

(vi) his date of birth and sex;

(vii) his physical abnormalities, if any;

(viii) his status as a citizen of Malaysia other citizenship status;

H (ix) such other particulars as the registration officer may generally or in any particular case consider necessary for the purpose of identification, and

(x) produce such documentary evidence as the registration officer may consider necessary to support the accuracy of any particulars submitted.

I **[60]** For reg 14 of the National Registration Regulations 1990 the un-amended version is relevant and it reads:

14. (1) A person registered under these Regulations who —

(a) changes his name;

(b) acquires the citizenship of Malaysia or is deprived of his citizenship of Malaysia; or

(c) has in his possession an identity card containing any particular, other than his address, which is to his knowledge incorrect, shall forthwith report the fact to the nearest registration office and apply for a replacement identity card with the correct particulars.

(2) Any person registered under these Regulations who apply for a change of name under subregulation (1) shall furnish the registration officer with a statutory declaration to the effect that he has absolutely renounced and abandoned the use of his former name and in lieu thereof has assumed a new name and the reason for such change of name shall also be stated in the statutory declaration.

[61] Thus, reg 4(c) stipulates, inter alia, when any person applies for a replacement identity card the Registration officer has to be supplied with the particulars stated therein and *such other particulars as the registration officer may generally or in any particular case consider necessary for the purpose of identification…' and 'produce such documentary evidence as the registration officer may consider necessary to support the accuracy of any particulars submitted.*

[62] Besides supplying the required particulars under reg 4 a person applying for change of name is also required under reg 14 to furnish a statutory declaration declaring *to the effect that he has absolutely renounced and abandoned the use of his former name and in lieu thereof has assumed a new name and the reason for such change of name*.

[63] Having considered therefore regs 4 and 14 in their entirety *vis-à-vis* the adopted policy or the requirement imposed by NRD and having the Constitution in the forefront of my mind and having considered the submissions of learned counsel for the parties and those allowed by this Court to address, I think some pertinent conclusions can be derived in relation to the two questions.

[64] First, relevant in considering the foregoing regulations is art 8(1) of the Constitution which proclaims that *all persons are equal before the law and entitled to the equal protection of the law*. Simply put it means that it requires all persons in like circumstances should be treated alike. It applies to both legislative powers and administrative discretion as well as to substantive and procedural rights and duties (see: *Lachmandas v State of Bombay* [1952] SCR 710), and art 8(2) prohibits any form of discrimination against citizens unless expressly authorized by the Constitution itself on the ground only of religion, race, descent or place of birth or gender in any law. In other words all forms of discrimination are forbidden unless it is explicitly permitted by the Constitution and that classification of people is permitted provided it is reasonable classification and not based on constitutionally forbidden grounds or on arbitrary or irrational differences. Hence, classification must be based on intelligible differentia which distinguishes those that are grouped together from the others that are left out (see *Datuk Haji Harun Idris v Public Prosecutor* [1977] 2 MLJ 155; *Pathumma v State of Kerala* AIR [1978] SC 771). Only art 8(5) provides that art 8 does not invalidate or prohibit any provision regulating personal law which generally means domestic relations, family matters,

A succession, marriage, divorce and so forth. With respect the registration and identity card regulations are not provisions governing or regulating personal law.

[65] Regulation 4, in particular sub-regulation 4(c)(iva), has, however, singled out Muslims for additional procedural burdens and impediments which are not B connected to personal law. It requires that any registrant or person applying who is a Muslim has to state his or her religion. The requirement does not apply to non-Muslims. There is therefore a differential treatment for Muslims. Hence, in my view this tantamount to unequal treatment under the law and in the absence of any exception found to justify the discrimination the said sub-regulation has infringed art C 8(1) of the Constitution. In other words it is discriminatory and unconstitutional and should therefore be struck down. For this reason alone that the relief sought for by the appellant should be granted namely, for a declaration that she is entitled to have an NRIC (Identity Card) in which the word 'Islam' does not appear.

D **[66]** I am also unable to accede to any suggestion that the sub-regulation is covered by art 8(5) of the Constitution. The Regulation has nothing to do with regulating personal law of a Muslim.

[67] Second, regs 4 and 14 provide the mechanics by which a person can apply for E replacement identity card, that is, the applicant has to supply particulars as stipulated and such other particulars necessary for the purpose of *identification* and to produce documentary evidence to support the accuracy of *any particulars submitted.* (Emphasis added).

F **[68]** However, in the matter before us it is not in dispute that NRD insisted, based on its policy when there is nothing expressed in the two Regulations, for the production of an apostasy certificate by the appellant from the Federal Territory Syariah court or some Islamic authority before her third application could be processed.

G **[69]** Learned Senior Federal counsel appearing for the second and third respondents had the same view on the point when it was submitted 'that para (c)(ix) and (x) of reg 4 empowers the registration officer to call for additional information as well as documentary evidence from the appellant when she applied to correct her particulars pertaining to the word 'Islam' in her IC under reg 14(1)(c). Therefore, H there was nothing illegal in the NRD requesting the appellant to produce a certificate and/or order from the Syariah Court or any other relevant Islamic authority.

[70] Learned Senior Federal counsel also relied on an implied power of NRD officers duly appointed by virtue of the National Registration Act 1959 the authority to enforce certain conditions which they consider reasonably necessary in performing I their duties and functions under the National Registration Act 1959 and the regulations made there under.

[71] Such submission however can only be sustained if the third application of the appellant is considered in isolation for it is true that in her identity card issued after

the second application the word 'Islam' appeared consequent to the amendment PU(A)70/2000) which came into force retrospectively on 1 October 1999.

[72] The majority judgment of the Court of Appeal agreed with the approach taken by NRD when it said this:

> … I believe that the NRD adopts the policy that a mere statutory declaration is insufficient for it toremove the word 'Islam' from the identity card of a Muslim. It is because the renunciation of Islam is a matter of Islamic law on which the NRD is not an authority that it adopts the policy of requiring the determination of some Islamic religious authority before it can act to remove the word 'Islam' from a Muslim's identity card. The policy of the NRD is stated in paragraph 14 of the Director General's affidavit dated 27 January 2005. In view of the considerations that I have set out I am of the view that the policy is a perfectly reasonable one.

[73] With respect, I am unable to agree with the majority judgment of the Court of Appeal and the submission of the learned Senior Federal counsel. I think the minority judgment of the Court of Appeal took the correct approach in the construction of those Regulations when it said this:

> In her statutory declaration dated February 21, 1997 stated, among other matters: (i) that she had never professed or practiced Islam as her religion since birth; (ii) that she had embraced Christianity in 1990; and (iii) that she intended to marry a Christian. Her later statutory declaration dated March 15, 1999 affirmed in support of her application dated January 3, 2000 adds little to what she had previously declared. The form she attempted to submit on January 3, 2000 makes it clear in column 31 that she no longer wished to be a Muslim. In these circumstances, an order from the Syariah Court does nothing to support the accuracy of the particular that the appellant is a Christian. However, the baptismal certificate dated May 11, 1998 produced by the appellant in evidence amply supports the accuracy of the particular that the appellant is a Christian. This conclusion is amply supported by examining the way in which reg 14(2) is constructed. That sub-reg requires the applicant to state in his or her statutory declaration the reason for the change of name. In the appellant's case, she stated that her reason for the change of name was that she was now a Christian. Accordingly, there is nothing in reg 4(cc) (xiii) (sic) (to read reg 4(c)(x)) that supports the action of the Director General in this case. It follows from what I have said thus far that an order or certificate from the Syariah Court is not a relevant document for the processing of the appellant's application. It is not a document prescribed by the 1990 Regulations. Nor is it a particular that a registration officer is entitled to call for as a particular under reg 4(cc) (xiii)' (sic) (to read reg 4(c)(x)).

[74] I would add that NRD overlooked the point that the application of the appellant should be considered within the context of the requirements of regs 4 and 14 only and should not bring in any extraneous factor such as retrieving information from its record. In the form submitted by the appellant she stated her religion to be Christianity. This fact was known by NRD as early as 21 February 1997. Hence the third application should have been processed and considered only on that basis and to construe the series applications by the appellant as one continuous episode. And to my mind if the appellant has satisfied the requirements of regs 4 and 14 NRD has no option but to allow her application. It is not the function of NRD to add in further requirements which have not been stipulated in those Regulations. It is also not the function of NRD to ensure that the appellant has properly apostatized.

A Such matter should be left to the relevant religious authorities to take up any action deemed necessary or appropriate. NRD has not shown that one of its statutory duties is to ensure that a person has properly renounced the Islamic faith in accordance with the requirements by the Islamic authorities. I would therefore think that in coming to its decision to reject the application of the appellant on account of non-production of an order or a certificate of apostasy from the Federal Territory Syariah Court or B Islamic authorities NRD had asked itself the wrong question and had taken legally irrelevant factor into account and excluded legally relevant factor.

[75] Accordingly, I am inclined to agree with the submission of learned counsel for the appellant that 'in requiring production of a document that is not provided for nor C authorised by the Regulation NRD had acted ultra vires its powers under the Regulations' and hence acted 'illegally' in the context of principle enunciated in *CCSU v Minister for the Civil Service* because it has not understood correctly 'the law that regulates (its) decision making power'.

D **[76]** Lord Diplock in the *CCSU* case said this:

> By 'illegality' as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is E exercisable.

[77] Third, there is merit in the contention by learned counsel for the appellant that the insistence by NRD for a certificate of apostasy is not consonant with the requirement of reg 4 (c) (x) because 'the call for proof of renunciation of religion does F not fall within the meaning of the words 'particulars submitted'. The only 'particulars submitted' by the appellant was her status as a Christian or of her conversion to Christianity … NRD was only empowered to call for such documentary evidence that it considered 'necessary to support the accuracy of any particulars submitted'. The relevant 'particulars submitted' was that the appellant was a 'Kristian'. Thus the NRD could call for documentary evidence to support the accuracy of that particular G ('Kristian') which the appellant had submitted. However, the NRD could not call for documentary evidence that the appellant was or was not a Muslim. This is because the appellant had not submitted any particular that she was a Muslim.

H **[78]** The majority judgment of the Court of Appeal circumvented the above contention by holding thus:

> The appellant's misfortune lay in the fact that by the time the NRD approved her application, the retrospective requirement of law that the identity card of a Muslim should state his religion had started to be implemented, so that the religion 'Islam' had to be stated in the appellant's replacement identity card. I bear in mind that the appellant in her I application for the replacement identity card after the approval of her change of name did state her religion as Christianity. Dato' Cyrus Das in his oral submission said that it was unreasonable for the officer concerned to direct, as stated under item 37 of the application form, that the appellant's religion remain as Islam, seeing that the change of name, which was approved, was due to change of religion. But with the substitution of the statutory declaration, the change of name was no longer sought on the basis of change of religion and

was not considered and approved on that basis. According to the records of the NRD the appellant was a Muslim. The question of change of religion did not arise for the NRD at that stage. It was therefore not unreasonable for the officer concerned to direct that the appellant's religion remain as Islam. I may mention that in para 13.3 of the appellant's affidavit in support of her originating summons she said that the advice that she should submit another statutory declaration was a trick or tactic (muslihat) and there seems to be a suggestion in para 13.4 that the NRD deliberately delayed approving her application until after the implementation of the new requirement so that when the replacement identity card came to be issued it would, while bearing the new name that the appellant desired, nevertheless show her to be a Muslim, but this allegation of trickery or tactic has not been followed up in the appellant's submission in this appeal. In any case, as I said, since the administrative law question that has been framed for this appeal is concerned with the appellant's third application, and is not concerned with the second application, any criticism of the NRD's manner of handling the second application is irrelevant. In the appellant's third application in Form JPN 5/2, under items 29, 30 and 31 she in effect stated that the error in her identity card was in the statement of her religion as 'Islam', which therefore she wanted removed. It amounted to her saying that she had renounced Islam. The NRD could therefore, under para (x), require her to produce documentary evidence to support the accuracy of her contention that she was no longer a Muslim.

[79] With respect, the holding in the majority judgment of the Court of Appeal completely disregarded the fact that the appellant made several applications for a change of name. Surely those applications should be regarded as part of a continuing act on the part of the appellant. To confine the matter to the third application only is completely ignoring the history of the plight of the appellant in her dealings with NRD. I am inclined to agree with the submission that 'if the NRD had correctly acted on the appellant's choice of religion for the replacement IC in October 1999, and had not rejected it on the ground that she had not produced an apostatisation order, there would have been no necessity for the third application to correct the particulars as regards entry of 'religion'.

[80] In fact the 'compartmentalized approach' adopted by the majority judgment of the Court of Appeal led it to distinguish the present appeal from the unreported case of *Ismail bin Suppiah v Ketua Pengarah Pendaftaran Negara (R–1–24–31 of 1995).* In the majority judgment the case of *Ismail bin Suppiah* was ruled to be only concerned with change of name whereas in the present appeal the central issue relates to removal of the word 'Islam' from the identity card of the appellant. With respect I am unable to agree with the distinction made. Such an approach could only be correct if the history of the present appeal is omitted. Otherwise both cases are premised on the same reason.

[81] Fourth, there is justification to say that NRD being the decision-maker had misunderstood the provision under which he had to act and denied relief to the appellant. The decision-maker cannot by misconstruing the provision decide on something that is not provided for. The decision-maker is confined to the matters prescribed for in the statute and not to *base their decision on some matter which is not prescribed for* (see *Anisminic Ltd v Foreign Compensation Tribunal* [1969] 1 All ER 208). I would say that there was an abuse of power on the part of NRD when it failed to take into consideration a legally relevant factor, namely the statutory declaration and the documents submitted by the appellant, preferring its policy of requiring a

A certificate of apostasy from the Federal Territory Syariah Court which in the first place is not stipulated in the regs 4 and 14 thereby taking legally irrelevant factor into consideration in making a decision (see also *R v Inner London Education Authority ex parte Westminster City Council* [1986] 1 All ER 19; *Breen v Amalgamated Engineering Union* [1971] 1 QB 175; *Pengarah Tanah Dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd*).

B

[82] In the majority judgment it was said that the policy adopted by NRD was reasonable and that it was justified for NRD to request for a certificate of apostasy since *renunciation of Islam is a question of Islamic law* and that it *is not within the jurisdiction of the NRD and that the NRD is not equipped or qualified to decide.*

C

[83] With respect I would say that the majority judgment erred in considering an issue which should not have been there in the first place, namely affirming the insistence by NRD for a certificate of apostasy when the appellant had in fact met all the requirements stipulated in regs 4 and 14.

D

[84] Further, the conclusion in the majority judgment that the impugned policy adopted by NRD was reasonable within the test of *Wednesbury Corporation v Ministry of Housing* [1966] 2 QB 275 has unfortunately missed one cardinal principle. The implementation of the policy has a bearing on the appellant's fundamental constitutional right to freedom of religion under art 11 of the Constitution. Being a constitutional issue it must be given priority and independent of any determination of the *Wednesbury* reasonableness. A perceived reasonable policy could well infringe a constitutional right. Hence, before it can be said that a policy is reasonable within the test of *Wednesbury* its constitutionality must be first considered. The majority judgment failed to carry out such an exercise before coming to its conclusion on the NRD policy.

E

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[85] Another aspect of the majority judgment which, with respect, I am inclined to disagree is its holding that the Director General of NRD was right in stating that apostasy is exclusively within the realm of the Syariah Court. In my view apostasy involves complex questions of constitutional importance especially when some States in Malaysia have enacted legislations to criminalize it which in turn raises the question involving federal-state division of legislative powers. It therefore entails consideration of arts 5(1), 3(4), 11(1), 8(2), 10(1)(a), 10(1)(e), 12(3) and the Ninth Schedule of the Constitution. Since constitutional issues are involved especially on the question of fundamental rights as enshrined in the Constitution it is of critical importance that the civil superior courts should not decline jurisdiction by merely citing art 121(1A). In my view the said article only protects the Syariah Court in matters within their jurisdiction which does not include the interpretation of the provisions of the Constitution. Hence when jurisdictional issues arise civil courts are not required to abdicate their constitutional function. Legislations criminalizing apostasy or limiting the scope of the provisions of the fundamental liberties as enshrined in the Constitution are constitutional issues in nature which only the civil courts have jurisdiction to determine.

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[86] Fifth, it is worthy to note that while a public authority is allowed to adopt departmental policies and to broadcast them to all concerned, it must not allow its policies to override its statutory duty to act in the public interest. A public authority must also have the legal authority when it wishes to impose a substantive or procedural requirement to those who come before it. Administrative powers cannot be utilized to achieve collateral or unauthorized purposes no matter how noble or well-intended these purposes or policies might be (see *Pyx Granite v Ministry of Housing* [1959] 3 All ER 1; *Padfield v Minister of Agriculture* [1968] 1 All ER 694).

[87] The consequence of the approval by the majority judgment of the Court of Appeal to the policy adopted by NRD is to condone the unlawful delegation of authority by NRD to some other third body when it is not sanctioned by the law (see *Jackson Stanfield v Butterworth* [1948] 2 All ER 358; *Lavender v Minister of Housing* [1970] 3 All ER 871; *Isman bin Osman v Govt of Malaysia* [1973] 2 MLJ 143). In fact I think the majority judgment has permitted NRD to extinguish its statutory discretion by a self-imposed fetter.

[88] Sixth, by voluntarily abdicating its discretionary power under a federal law to an outside religious body NRD had acted with irrationality in the sense as described in *CCSU* case. I would say that NRD had unlawfully agreed to act under the dictation of another. It is well accepted in administrative law that a decision maker or body is entitled to consult and seek advice from any source, provided it retains the ultimate authority to make the final decision. It must retain its power to act independently in pursuance of the statutory purpose of the law (see: De Smith, *Judicial Review of Administrative Action*, 4th Ed at p 309). Indeed a public authority is obliged to make its own decision and not act on the dictates of another (see: *Bread Manufacturer of New South Wales v Evans* [1986] 56 ALJR 89; *Commissioner of Police v Gordhandas Banji* AIR 1952 SC 16; *P Patto v Chief Police Officer, Perak & Ors* [1986] 2 MLJ 204).

[89] Seventh, in the present appeal the insistence by NRD for a certificate of apostasy from the Federal Territory Syariah Court or any Islamic Authority was not only illegal but unreasonable. This is because under the applicable law, the Syariah Court in the Federal Territory has no statutory power to adjudicate on the issue of apostasy. It is trite law that jurisdiction must come from the law and cannot be assumed. Thus the insistence was unreasonable for it required the performance of an act that was almost impossible to perform (see *Wednesbury Corporation v Ministry of Housing*; *Oriental Insurance Co Ltd & Anor v Minister of Finance* [1992] 2 MLJ 776).

[90] Another aspect of the unreasonableness of the policy of NRD is in its consequence if followed. In some States in Malaysia apostasy is a criminal offence. Hence, to expect the appellant to apply for a certificate of apostasy when to do so would likely expose her to a range of offences under the Islamic law is in my view unreasonable for its means the appellant is made to self-incriminate.

[91] Eighth, it is a settled principle in administrative law that a public authority must not act mechanically. It must consider each case on its own merits. It must retain the discretion to depart from its policy whenever public interest so demands

A (see *R v Windsor Licensing ex parte Hodes* [1983] 2 All ER 551). However in the present appeal it was shown by the appellant that her repeated applications were rejected across the counter in a mechanical way by giving effect to the extra-legal policy.

B **[92]** Ninth, I would also say that in rejecting the application of the appellant without giving her a fair hearing and assigning reasons for the decision, NRD had failed to observe the principles of natural justice, a procedural impropriety that could be a basis to nullify any judicial, administrative, departmental or executive decision (see: *JP Berthelsen v Director General Immigration* [1987] 1 MLJ 134). The need becomes critical when the constitutional right of the appellant under art 11(1) is C involved, that her legitimate expectations were raised when her name change was allowed, that she had spent many years to try to resolve her problem with NRD including her compliance with an advice given by a staff of NRD and that it was the inclusion of the word 'Islam' in her new identity card that led her to seek for judicial review.

D

[93] Tenth, there is also the duty of NRD to act fairly towards the appellant. In appropriate cases there may be a duty to act fairly prior to the making of delegated legislations (see: *R v Secretary for Health ex parte United States Tobacco International Inc* [1991] 3 WLR 529). In the case of the appellant there was no challenge to her E assertion that at the time she was advised to make the third application she was not informed or given any notice that reg 4 would be amended. In my view there is therefore a reasonable suspicion that reg 4, although formulated in 2000, was deliberately amended retrospectively to 1 October 1999 in order to target and to prejudice the third application of the appellant made on 23 October 1999. The duty to act fairly and thus observing the rules of natural justice was not done by NRD. F The least that NRD could have done was to notify the appellant of the impending amendment when advising her to submit the third application as only NRD would have known of the impending amendment which had definite impact to the third application of the appellant. In my view NRD had failed to comply with one aspect of the rules of natural justice.

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[94] Thus, for the foregoing reasons my answers to the first two questions are therefore in the negative.

QUESTION 3

H

[95] This third question is focused on this court's decision in *Soon Singh a/l Bikar Singh v Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor* [1999] 1 MLJ 489 where this court was of the opinion that '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 I 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… 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.

[96] But the final conclusion in the above case was preceded by this statement:

> In this regard, we share the view of Hashim Yeop A Sani CJ (Malaya) in *Dalip Kaur* 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.

[97] I am aware that *Soon Singh* case was also decided by this court. I also noted that their Lordships in that case were well aware of the views expressed in at least two other cases by the learned judges of this court (see: *Dalip Kaur v Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor* [1992] 1 MLJ 1 and *Mohamed Habibullah bin Mahmood v Faridah bte Dato Talib* [1992] 2 MLJ 793). But their Lordships preferred to follow the reasoning of the High Court in *Md Hakim Lee v Majlis Agama Islam Wilayah Persekutuan, Kuala Lumpur* [1998] 1 MLJ 681.

[98] In view of the approach taken by their Lordships in *Soon Singh* case I think there is nothing to prevent this court hearing this present appeal to reconsider the views expressed in those cases referred to above and the cases in the High Courts.

A **[99]** In *Ng Wan Chan v Majlis Ugama Islam Wilayah Persekutuan & Anor (No 2)* [1991] 3 MLJ 487 Eusof Chin J (as he then was) who incidentally was also in the panel that decided Soon Singh case said this at p 489:

> The Federal Constitution, Ninth Schedule List II — State List, specifically gives powers to state legislatures to constitute Muslim courts and when constituted, 'shall have jurisdiction only over persons professing the Muslim religion and in respect only of any of the matter included in this paragraph.
>
> Therefore, a syariah court derives its jurisdiction under a state law, (for Federal Territories — Act of Parliament) over any matter specified in the State List under the Ninth Schedule of the Federal Constitution.
>
> If state law does not confer on the syariah court any jurisdiction to deal with any matter stated in the State List, the syariah court is precluded from dealing with the matter. Jurisdiction cannot be derived by implication.

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[100] And in *Lim Chan Seng v Pengarah Jabatan Agama Islam Pulau Pinang* [1996] 3 CLJ 231 the learned High Court Judge was of the view that art 121(1A) by itself did not automatically confer jurisdiction on the syariah court, even on matters that fell under the State List of the Ninth Schedule. It was the view of the learned Judge 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 thus enact laws conferring the jurisdiction.

E

[101] In *Dalip Kaur* case his Lordship Hashim Yeop A Sani CJ (Malaya) expressed his view thus:

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> 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 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 … 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 obligation on the relevant authority to keep and maintain a register of converts who have executed a deed poll renouncing Islam.

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[102] His Lordship Harun Hashim SCJ in *Mohamed Habibullah bin Mahmood v Faridah bte Dato Talib* at p 800 stated this:

> 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.

I

[103] The views expressed in the last two cases decided by the apex court of this country came from eminent judges of our time which should therefore be given the

weight they deserved. And I can appreciate the approach adopted by the learned High Court Judges in *Ng Wan Chan* and *Lim Chan Seng.*

[104] Hence, I am in agreement with those views in that jurisdiction must be express and not implied. The doctrine of implied powers must be limited to those matters that are incidental to a power already conferred or matters that are necessary for the performance of a legal grant. And in the matters of fundamental rights there must be as far as possible be express authorization for curtailment or violation of fundamental freedoms. No court or authority should be easily allowed to have implied powers to curtail rights constitutionally granted.

[105] In my view to rely on implied power as a source of jurisdiction would set an unhealthy trend. For instance under List 1, Item 15 Schedule 9 of the Constitution, Parliament is authorized to pass laws relating to 'social security'. To date no law has been passed governing minimum wages in this country. If the implied jurisdiction doctrine is adopted there is nothing to prevent the Industrial Court from assuming jurisdiction relying on Item 15 and thus adjudicating on matters pertaining to minimum wages. If that were to occur then all that is required will be a list of what Parliament or the State Assembly can enact and that will entitle the courts to have jurisdiction on such matters irrespective of whether there is any specific legislation enacted.

[106] I am therefore inclined not to follow the reasoning in *Soon Singh* case. My answer to question 3 is therefore in the negative.

OTHER ISSUES

[107] I have indicated earlier on in this judgment that learned counsel who submitted before us during the hearing were given the opportunity to submit on other issues other then those agreed upon by the appellant and the respondents.

[108] I have given those points due consideration. However, I am of the view that on the facts and circumstances of this appeal particularly in the manner in which it was argued by the parties earlier on I need not have to make any definite findings on them in order to come to my final conclusion. Perhaps they can be deliberated on another occasion.

CONCLUSION

[109] For the reasons that I have given above my answers to the three questions are all in the negative. Accordingly, I am satisfied that the appellant has succeeded in establishing the merits of her appeal. I would therefore allow her appeal and grant her the declaration on those terms as she prayed for in that she is entitled to have an NRIC (Identity Card) in which the word 'Islam' does not appear. I would therefore

A direct the Director General to forthwith comply with the terms of the said declaration. Costs to the appellant here and below.

Appeal dismissed by majority with costs.

B Reported by Loo Lai Mee

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