IN THE FEDERAL COURT OF MALAYSIA
(APPELLATE JURISDICTION)
[CIVIL APPEAL NO: 01(f)-2-01/2020(B)]

BETWEEN

ROSLIZA IBRAHIM ... APPELLANT

AND

1. KERAJAAN NEGERI SELANGOR

2. MAJLIS AGAMA ISLAM SELANGOR ... RESPONDENTS

[In The Matter of Court of Appeal of Malaysia (Appellate Jurisdiction)
Civil Appeal No. B-01(A)-264-08/2017

Between

Rosliza Ibrahim ... Appellant

And

1. Kerajaan Negeri Selangor

2. Majlis Agama Islam Selangor ... Respondents]

[In the Matter of High Court of Malaya at Shah Alam, Selangor
Originating Summons Application No. 24-1314-11/2015

Between

Rosliza Ibrahim ... Plaintiff

And

Kerajaan Negeri Selangor ... Defendant

And

Majlis Agama Islam Selangor ... Intervener]

Coram: TENGKU MAIMUN TUAN MAT, CJ
ROHANA YUSUF, PCA
AZAHAR MOHAMED, CJM
NALLINI PATHMANATHAN, FCJ
ABDUL RAHMAN SEBLI, FCJ
ZABARIAH MOHD. YUSOF, FCJ
HASNAH MOHAMMED HASHIM, FCJ
MARY LIM THIAM SUAN, FCJ
RHODZARIAH BUJANG, FCJ

GROUNDS OF JUDGMENT

Introduction

[1] The dispute between Rosliza binti Ibrahim ('the appellant/plaintiff'), who was raised as a Buddhist by her Buddhist mother (as averred to by the mother with no averment to the contrary by the father), and Kerajaan Negeri Selangor and Majlis Agama Islam Negeri Selangor, ('the respondents/defendants'), as aptly stated by the 2nd respondent in its written submission dated 15.9.2020, pertains to whether an illegitimate child whose mother is not a person professing the religion of Islam, is not subject to 'Muslim law' (and hence not subject to the jurisdiction of Syariah Courts).

[2] The issue herein is similar to *Azmi bin Mohammad Azam v. Director of Jabatan Agama Islam Sarawak & Ors* [2016] 6 CLJ 562 ('*Azmi*'). *Azmi* will be referred to in detail in the later part of this judgment. Suffice to state at this juncture that *Azmi*'s case was ultimately resolved by consent, where the National Registration Department ('NRD') removed the word 'Islam' from his National Registration Identity Card ('identity card').

[3] The appellant/plaintiff failed in the Courts below in her bid to seek recourse from the civil court. On 20.1.2020, this Court granted the appellant/plaintiff leave to appeal on the following two questions of law:

> "**1.** Where the subject matter of a cause or matter requires a determination of "whether a person is or is not a Muslim under the law rather than "whether a person is no longer a Muslim" whether the High Court has the exclusive jurisdiction to hear and determine the said subject matter on a proper interpretation of Article 121 and Item 1 of the State List of the Federal Constitution ('FC')?; and
>
> **2.** In light of regulation 24(1) of the National Registration Regulations 1990 and where the truth of the contents of any written application for registration of an identity card or the contents of an identity card is not proven by affidavit or at trial, whether the said contents can be considered facts proved for a declaration of status under section 41 of the Specific Relief Act 1950?".

Background Facts

[4] The narration of the backgrounds facts herein is adopted from the judgments of the High Court and the Court of Appeal. For convenience, in this judgment, parties will be referred to as they were in the High Court.

[5] The plaintiff filed an Originating Summons ('OS') in the High Court at Shah Alam seeking the following declarations:

(i) that the plaintiff is an illegitimate person and that one Yap Ah Mooi, a Buddhist, is her natural mother;

(ii) that the word 'parents' in paragraph (b) of the interpretation of 'Muslim' in section 2 of the Administration of the Religion of Islam (State of Selangor Enactment) 2003 ('ARIE 2003') does not include the putative father of an illegitimate child; and

(iii) that the plaintiff is not a person professing the religion of Islam, and that:

(a) all laws made by the Legislative Assembly of the State of Selangor under the Ninth Schedule, List II, Item 1 of the Federal Constitution ('FC') are of no effect on, and are inapplicable to, the plaintiff; and

(b) all Syariah Courts within the State of Selangor do not have jurisdiction over the plaintiff.

[6] The facts upon which the OS and the reliefs sought are as follows.

[7] The plaintiff's birth certificate states that she was born at the Chinese Maternity Hospital Kuala Lumpur on 19.11.1981 to one Yap Ah Mooi and one Ibrahim bin Hassan ('Ibrahim'). Yap Ah Mooi's residential address was recorded as 38B, Jalan Pasar, Pudu, Kuala Lumpur. There was no column for Ibrahim's address in the birth certificate. Nevertheless, Ibrahim's application for an identity card on 22.6.1982 recorded the same residential address.

[8] On 13.1.1994, Ibrahim submitted an application for an identity card on behalf of the plaintiff. In that application, Ibrahim stated the plaintiff's religion to be 'Islam'. The residential address recorded was 37, Jalan Bunga Matahari 3, Taman Maju Jaya, Kuala Lumpur. Ibrahim also recorded Yap Ah Mooi's descent (*keturunan*) as Malay (*Melayu*).

[9] A year later, on 14.1.1995, Ibrahim submitted an application for his new identity card where, this time, his address was recorded as 37, Jalan Bunga Matahari 3, Taman Maju Jaya, Kuala Lumpur, the same as the plaintiff's in the written application for her identity card. Ibrahim recorded his religion as 'Islam' and that he was married (*berkahwin*). Exactly a month later, that is on 14.2.1995, Yap Ah Mooi submitted her application for identity card recording the same address as Ibrahim's and the

plaintiff's, her religion as 'Buddha', her descent as Chinese (*Cina*) and her marital status as 'married' (*berkahwin*).

[10] On 8.10.2008, Yap Ah Mooi affirmed a Statutory Declaration ('Yap Ah Mooi's SD') to state the fact that the plaintiff is her daughter, that Ibrahim and herself are the plaintiff's parents, that Ibrahim and her were unmarried, and lastly, that the plaintiff was not brought up as a Muslim. Yap Ah Mooi passed away on 7.2.2009.

[11] As the facts stand, it is undisputed that Ibrahim is the plaintiff's biological father and that he was at all material times a person professing the religion of Islam. The plaintiff admits both these facts in her Statutory Declaration affirmed on 8.10.2008 ('Plaintiff's SD'). Further, none of the defendants appear to dispute that as the record stands, both Ibrahim and Yap Ah Mooi are the plaintiff's biological parents.

[12] Yap Ah Mooi's SD is a short one and it states as follows (as translated into English from the National Language):

> "I, YAP AH MOOI (NRIC No. 440310-10-5406/7809914) a permanent resident of Malaysia of full age and with an address at M2-13 Sunrise Park Apartment, Jalan 3, Kampung Baru Ampang, 68000 Ampang, Selangor hereby affirm as follows:
>
> 1. Rosliza binti Ibrahim [NRIC No. 811119-14-5856] is my child.
>
> 2. Ibrahim bin Hassan and I are the parents of Rosliza binti Ibrahim and we were not married at the time she was born and the plaintiff was not raised as a Muslim…".

[13] It is to be noted that the address stated in Yap Ah Mooi's SD is the same as the one affirmed by Rosliza in her affidavit in support of her OS but different from the last known address of Ibrahim.

[14] From these facts, the main assertions by the plaintiff are as follows. She claims that despite what Ibrahim's documents may have shown, Ibrahim and Yap Ah Mooi were not married at the time of the plaintiff's birth and that she is accordingly an illegitimate child. Thus, she argues that the religious status of her putative father cannot be regarded in the determination of her own religion. As such, the plaintiff asserts that because she does not adopt the religion of her father and that she was never raised as a Muslim, she is not a person 'professing the religion of Islam' as per Item 1, List II, Ninth Schedule of the FC ('State List'). The defendants categorically rejected each and every one of these assertions.

[15] In light of the above, the decisions of the High Court and the Court of Appeal warrant examination.

Decision of the High Court

[16] The learned Judicial Commissioner dismissed the plaintiff's application on the grounds that she failed to prove her claim on a balance of probabilities. The following is a summary of the decision:

(i) There was conflicting evidence as to Yap Ah Mooi's religious status. Ibrahim listed her as Malay but in her own application for an identity card submitted on 14.2.1995, she identified herself as Buddhist. Her descent per se was not an issue. Instead, the conflict lies in her initial application for a new identity card where she stated she was 'married' at the time of the plaintiff's birth but in her SD she denies this. Premised on these inconsistencies, it would seem that the Judicial Commissioner was disinclined to believe Yap Ah Mooi's evidence generally.

(ii) The plaintiff submitted letters from Jabatan Agama Islam Selangor, Jabatan Agama Islam Wilayah Persekutuan, Jabatan Agama Islam Johor, Jabatan Hal Ehwal Agama Islam Kedah,

Jabatan Hal Ehwal Agama Islam Kelantan, Jabatan Agama Islam Melaka, Jabatan Hal Ehwal Agama Islam Negeri Sembilan, Jabatan Agama Islam Pahang, Jabatan Hal Ehwal Agama Islam Pulau Pinang, Jabatan Agama Islam Perak, Jabatan Hal Ehwal Agama Islam Perlis and Jabatan Hal Ehwal Agama Terengganu stating that the institutions could not locate any record of marriage between Ibrahim and Yap Ah Mooi (collectively 'Religious Authorities' Letters').

(iii) According to the High Court, the Religious Authorities' Letters though unable to confirm that Yap Ah Mooi and Ibrahim were married, did not lead to the conclusion that a marriage never took place. The Judicial Commissioner strongly inferred, based on Ibrahim and Yap Ah Mooi's respective residential addresses and from their respective applications for their new identity cards stating 'married', that the two were married to each other.

(iv) As the High Court found that a marriage did subsist between her parents, the plaintiff was a legitimate child and under the law of Selangor she was a Muslim by virtue of her father's status as a Muslim.

(v) Further, there was no evidence to suggest that the plaintiff was not raised as a Muslim for the 4-year period during which her mother and father lived together. Accordingly, there was proof that the plaintiff was a Muslim and hence, her application to the High Court for the said declarations was tantamount to her seeking to renounce Islam – a matter which is for the Syariah Courts.

Decision of the Court of Appeal

[17] The Court of Appeal agreed with the High Court that the plaintiff's

entire case turned on the marital status of Ibrahim and Yap Ah Mooi. It accepted the factual finding of the existence of their marriage and held that the plaintiff is a legitimate child of the marriage. The fact that the Court of Appeal was satisfied with the High Court's finding of fact is gleaned from the following paragraphs of the Court of Appeal's judgment:

> "[12] We had carefully considered the evidence on the appeal record and the grounds of the learned JC's written judgment. We were not persuaded that the findings of the learned JC that En. Ibrahim and Mdm Yap were married, that the plaintiff is a child of the marriage and that the plaintiff is a Muslim, is plainly wrong. We also agreed with the submission of learned counsel for the intervener that the plaintiff is in law and in fact a Muslim pursuant to s. 2 of the 2003 Enactment which provides that a 'Muslim' means 'a person *either or both* of whose parents were at the time of the person's birth, a Muslim'; this is especially clear in the light of the undisputed fact that the plaintiff's father En Ibrahim is a Malay and a Muslim.
>
> [13] At any rate, we also observed that prayer (ii) of the plaintiff's originating summons is for a declaration that the plaintiff is not a person professing the religion of Islam. Given the findings that the plaintiff is a Muslim, the effect of the declaration sought is to enable the plaintiff to renounce Islam as her religion; which in effect amounts to a declaration that the plaintiff is no longer a Muslim. The jurisdiction to determine this issue is vested in the Syariah Court pursuant to s. 61(3)(b)(x) of the 2003 Enactment. It is therefore plain that the plaintiff's avenue for the declaration sought is within the jurisdiction of the Syariah Court and not the civil court (art 121(1A) of the FC)."

[18] The Court of Appeal dismissed the appeal on a further ground that it was bound by the decision of the Federal Court in *Lina Joy lwn Majlis Agama Islam Wilayah Persekutuan dan lain-lain* [2007] 4 MLJ 585 ('*Lina*

Joy'). This is as regards the argument that any bid to renounce the religion of Islam is a matter within the jurisdiction of the Syariah Court.

[19] In short, the Court of Appeal affirmed the High Court judgment *in toto*.

Decision

Question 2

[20] Given the case and decisions of the Courts below, it would be more appropriate to first determine Question 2 which gives rise to several other collateral questions. These are: firstly, whether the plaintiff's biological parents were married to each other at the time of her birth; secondly, whether Yap Ah Mooi is a 'Malay' or a 'Muslim' and thirdly, whether the legal construction accorded to section 2 of the ARIE 2003 by the Courts below is correct, which is, only one parent that is the father, Ibrahim needs to be a Muslim for the child, the plaintiff to be regarded as a Muslim.

Whether Ibrahim and Yap Ah Mooi were married at the time of the plaintiff's birth

[21] Regulation 24 of the National Registration Regulations 1990 ('NRR 1990') provides as follows:

> "(1) The burden of proving the truth of the contents of any written application for registration under these Regulations, or the contents of an identity card, shall be on the applicant, or on the person to whom such identity has been issued, or on any other person alleging the truth of such contents.
>
> (2) Where any person claims that he is an exempted person the burden of proving such fact shall lie upon him.".

[22] Pursuant to Regulation 24, the contents of an identity card and of any written application are respectively evidence before a Court of law. That

being so, any person seeking to establish a fact which is disputed is not allowed to rely solely on his identity card or the contents of his written application of his identity card as evidence of the truth of the fact he alleges. The burden remains on him to prove the truth of that fact and he must do so through other means.

[23] The decision of the Singapore High Court in *Lim Ying v. Hiok Kian Ming Eric* [1991] 2 SLR(R) 538 ('*Eric*') is instructive. In *Eric*, the wife sought to annul her marriage to her purported husband on the basis that parties were not respectively male and female. The evidence showed that the purported husband had surgically reassigned his sex from female to male. The purported husband argued, *inter alia*, that his sex change was accepted by the Government when it accepted his application to change his sex from female to male, in his Singapore national identity registration card. He therefore maintained that his status as a male was legally established.

[24] Due to the provision of section 11 of the Singapore National Registration Act 1991 (Cap 201) which is *in pari materia* with our regulation 24 of the NRR 1990, the purported husband's argument did not find favour with VK Rajah JC (as he then was). His Lordship held as follows:

> "[51] A person issued with an identity card must, under the National Registration Regulations 1991, report a change in his name or other particulars which are to his knowledge incorrect to the nearest registration office and apply for a replacement identity card.
>
> [52] Section 11 of the National Registration Act (Cap 201) places the onus of proving the truth of the contents of an identity card on the person to whom the identity card was issued or on any other person alleging the truth of its contents. **The particulars on the identity card are not conclusive evidence** to establish the sex of a person for purposes of contracting a valid marriage under the

Charter. **The fact that the sex of the respondent was stated as a male on the identity card does not make her a male in law for purposes of marriage under the Charter**.". [Emphasis added]

[25] To accord legal recognition to sex changes in an identity card, the Singapore Parliament, after the outcome of *Eric*, amended section 12 of its Women's Charter to insert the following provision:

"(3) For the purpose of this section —

(a) **the sex of any party to a marriage as stated at the time of the marriage in his or her identity card issued under the National Registration Act (Cap. 201) shall be prima facie evidence of the sex of the party**; and

(b) a person who has undergone a sex re-assignment procedure shall be identified as being of the sex to which the person has been re-assigned.". [Emphasis added]

[26] That the amendment was introduced due to *Eric* is apparent from the Singapore Parliamentary Hansard dated 2.5.1996, at Column 64, where the Honourable Minister Mr Abdullah Tarmugi said:

"In June 1991, things changed for this group of trans-sexuals who had married when the High Court ruled in the case of Lim v. Hiok that the Women's Charter did not permit marriage between two persons of the same biological sex. Until the ruling, the Registry of Marriages had all along accepted the identity card as documentary proof of the identity and sex of a person. Those who had undergone sex reassignment procedure were able to marry using their identity cards which reflected their new sex. Following the 1991 court ruling, the Registry of Marriages stopped allowing the use of identity cards and began to require applicants to bring their birth certificates as evidence of their sex instead. For those who got married before the

ruling, the court's decision meant that their marriages are now void. And if they have adopted children, the status of these children is now uncertain.".

[27] Singapore did not amend their equivalent of our regulation 24. Instead, they inserted a specific provision to allow an identity card to be used as proof of one's sex. Therefore, apart from the specific amendment to section 12 of the Women's Charter, the ratio of *Eric* as regards our regulation 24 of the NRR 1990 is still good law.

[28] It is not necessary to discuss in detail the purpose for which identity cards exist. Suffice to state that they exist for security purposes to allow the Government and its departments, law enforcement agencies and the general public, a means to identify others. The contents of one's identity card and written applications made for such cards do have some degree of force in identification. They allow those who need identification or proof of citizenship to fall back on the identity card to determine identity. Regulation 24 of the NRR 1990, however, applies in cases where the contents of an identity card are disputed. In those circumstances, the entry in the identity card or a written application made pursuant thereto cannot be taken as conclusive proof of the truth of their contents.

[29] The rule makes sense if we consider that a person who falsifies a fact or whose fact was made or registered by mistake, as the case may be, cannot be allowed to benefit by converting the fraud or the mistake into a false truth. The same is true of outdated information. A more common and simple illustration of this is circumstances in which a person may be required to prove his or her current residential address by furnishing a recent electric bill or water bill instead of using the residential address stated in such person's identity card.

[30] It follows that I agree and adopt the following observations of Dr Badariah JCA in *Ketua Pegawai Penguatkuasa Agama & Ors v. Maqsood Ahmad & Ors and another appeal* [2021] 1 MLJ 120 ('*Maqsood*'):

> "[136] … we are of the view a MyKad is not conclusive evidence of religious identity. Just because a MyKad states 'Islam' does not *ipso facto* mean that the given person is to be taken as a person 'professing the religion of Islam'. Firstly, our reading of Lina Joy (*supra*) suggests that the Federal Court, strictly considering administrative law, held that the NRD was not incorrect to require an order from the Syariah Courts before removing the word 'Islam' from the applicant's MyKad. The Federal Court did not venture to say that a MyKad was in fact conclusive of her status as a person 'professing the religion of Islam'. We are fortified in our view by comparing the decision in Lina Joy (*supra*) to the decision in Azmi (*supra*).
>
> [137] But for the sake of caution, we hasten to add that if a person's MyKad clearly does not state that he or she is a Muslim, given the unique circumstances adjudicated in Lina Joy (supra), there would be no reason to investigate such a person for a Syariah offence because it is clear that he or she is not a Muslim. However, if his/her MyKad says he/she is 'Islam', then that is where the ambiguity lies, because the religious identity as stated in the MyKad is not conclusive proof of what is stated if that fact is disputed. Thus, any person alleging a fact in the MyKad to be true still bears the burden of proving its truth.".

[31] That said, it is now appropriate to re-examine the factual matrix of the present case. Reverting to the decision of the Court of Appeal, it held that it was satisfied with the finding of fact by the High Court that the plaintiff's biological parents were married at the time of her birth.

Examining the judgment of the High Court, the Judicial Commissioner appeared to have ignored Yap Ah Mooi's averment in her SD that she was never married to Ibrahim. The Judicial Commissioner instead placed more reliance on Ibrahim's and Yap Ah Mooi's written applications for their identity cards stating that they were married by concluding as follows:

> "24. Oleh itu berdasarkan **keterangan-keterangan** di atas saya berpendapat satu inferensi yang kuat boleh dibuat bahawa Ibrahim menikahi Yap dan Plaintif dilahirkan hasil pernikahan tersebut.". [Emphasis added]

[32] It is trite law that an appellate Court will not interfere with findings of fact by lower Courts unless they are perverse (see for example, this Court's decision in *Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd* [2015] 2 MLJ 441, at [89]).

[33] The High Court accepted Ibrahim's written application as evidence of marriage against the express dictate of regulation 24(1) of the NRR 1990. With respect, that finding, being made contrary to law, is therefore legally perverse. The Court of Appeal in accepting such finding of fact without regard to the said regulation, made the same error. This finding is therefore liable to be set aside.

[34] Given the concurrent perverse finding of fact, there is now a twofold duty on this Court.

[35] Firstly, this Court will have to ascertain on whom the burden of proof lies in respect of the plaintiff's claim that she is an illegitimate child. Secondly, this Court must thereafter re-evaluate the evidence on record to ascertain whether the plaintiff's claim is made out.

[36] Section 101 of the Evidence Act 1950 provides that the burden of proof lies on the person desiring any court to give judgment as to any legal right or liability on the existence of the facts he asserts. Section 102 further clarifies that the burden of proof lies on the person who would fail if no evidence was given on either side. The same rule applies in respect of declarations, the reliefs which form the entire basis of the plaintiff's suit. This is as apparent from section 41 of the Specific Relief Act 1950, which provides:

> "Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to the character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in that suit ask for any further relief…".

[37] Applying sections 101 and 102 of the Evidence Act 1950 and section 41 of the Specific Relief Act 1950 squarely to this case, as it is the plaintiff who seeks to establish that she is illegitimate, she fails if she cannot prove evidence to that effect.

[38] However, the peculiar point in this case is that to meet the legal burden of her claim, the plaintiff bears the task of proving a negative fact. In other words, she is required to prove that a marriage between her biological parents does not exist. Legitimacy and marriage are constructs of the law, meaning, they do not exist unless the law says they do. It is rather illogical and onerous to expect the plaintiff to prove that something does not exist especially a thing which can only exist if in the first place it was created by law. Speaking rhetorically, assuming that the plaintiff cannot prove that her biological parents were unmarried at the time of her birth, does that automatically entitle the court to assume that they were married? That appears to be an incoherent application of the law.

[39] In this context, section 103 of the Evidence Act 1950 is relevant. It provides as follows:

> "The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.".

[40] The rival contention by the defendants is that the plaintiff's parents were married at the time of her birth. That is in essence the 'particular fact' the defendants expect this Court to believe. And taking what was said earlier that marriage is a legal construct, it appears more legally coherent

to expect the defendants to bear the burden to prove affirmatively the marriage than to expect the plaintiff to disprove it. Therefore, to resolve the burden of proof issue, reading sections 101, 102 and 103 of the Evidence Act 1950 together, the legal burden remains on the plaintiff to prove to some degree that there is merit in her claim that she is illegitimate. She does this by adducing evidence of doubt, on a balance of probabilities, as to whether Ibrahim and Yap Ah Mooi were married. Once sufficient evidence is established to that effect, the legal burden shifts to the defendants to establish affirmatively that the said persons were married as that is a fact which they assert in rebuttal.

[41] The above result drawn from construing sections 101, 102 and 103 of the Evidence Act 1950 together, conforms to and is consistent with the language of regulation 24 of the NRR 1990. The defendants and the Judicial Commissioner in the High Court relied on Ibrahim and Yap Ah Mooi's respective written applications stating their status as '*Berkahwin*' as a basis to believe that they were married. Reading section 103 with regulation 24(1), clearly the burden to prove that that assertion is true lies on the defendants since it is the defendants who rely on that statement for the truth of its contents.

[42] With that, it is pertinent to turn our attention to the plaintiff's documentary evidence. To cast doubt on her legitimacy, the plaintiff adduced the following pieces of evidence:

(i) the Plaintiff's SD where in paragraph 3 she attests that her parents were not married at the time she was born.

(ii) Yap Ah Mooi's SD where in paragraph 2 she affirms that she and Ibrahim were not married at the time the plaintiff was born.

(iii) as corroborative evidence, the Religious Authorities' Letters which state that they are unable to locate any record of a marriage between the plaintiff's parents.

[43] The evidence, when strung together, sufficiently casts doubt on the existence of Ibrahim and Yap Ah Mooi's purported marriage. The Religious Authorities' Letters are especially compelling as they represent independent acknowledgments of lack of proof of the marriage's existence. The Judicial Commissioner concluded that the lack of proof of a marriage certificate does not in itself mean that there was no marriage. But was this inference drawn correctly? The inference is logical if there was more compelling evidence to support it but in the present case, the only documents purporting to establish proof of marriage are Ibrahim and Yap Ah Mooi's written applications for their identity cards stating they were married. As stated earlier, in light of regulation 24(1) of the NRR 1990, they are not proof and accordingly, the inference drawn by the Judicial Commissioner from them is, with respect, erroneous.

[44] In terms of actual proof, the defendants though they are the Government of Selangor and Majlis Agama Islam Selangor (an instrument of the 1st defendant no less), cannot in their respective records locate any proof of the marriage. The fact of marriage between Ibrahim and Yap Ah Mooi is especially within the knowledge of Ibrahim but there is neither a single affidavit from Ibrahim nor from any other relevant person to contradict the plaintiff's case.

[45] Accordingly, in the face of doubt, how is this Court, or any court for that matter, to deem that Yap Ah Mooi and Ibrahim were married absent believable proof? Surely, where there is no proof of a fact, the more logical conclusion is to believe in its non-existence. In this regard, the aforementioned section 102 of the Evidence Act 1950 is apposite because 'the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.' The conclusion is also fortified by the definition of the word 'prove' in section 3 of the Evidence Act 1950 which provides:

> "a fact is said to be "proved" when, after considering the matters

before it, the court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists…".

[46] Also relevant is the definition of the phrase 'not proved' in the said section 3, as follows:

"a fact is said to be "not proved" when it is neither proved nor disproved…".

[47] As the evidence stands, in spite of what they had stated in their said written applications for their identity cards, there is no proof that Ibrahim and Yap Ah Mooi were married. The natural conclusion is that they were not married. This conclusion is fortified by the averment of Yap Ah Mooi that she and Ibrahim were not married at the time the plaintiff was born. Accordingly, the plaintiff ought to have succeeded in her claim in the Courts below ie, that her parents being unmarried at the time of her birth renders her an illegitimate child.

Whether Yap Ah Mooi is a Muslim or a Malay

[48] The next question is whether Yap Ah Mooi is a Muslim. The issue whether this Court has jurisdiction to make that assessment is addressed in greater detail when I deal with Question 1. In relation to Question 2, the issue of Yap Ah Mooi's religion is only relevant to the assessment whether the plaintiff is also rendered a Muslim by virtue of the ARIE 2003.

[49] Section 2(b) of the ARIE 2003 defines 'Muslim' as follows:

"Muslim" means —

…

(b) a person either or **both** of whose parents were at the time of the person's birth, a Muslim;". [Emphasis added]

[50] For the present purpose, only the interpretation of the word 'both' is attracted. We have the plaintiff's evidence which seeks to prove that Yap Ah Mooi was never a Muslim to begin with, as follows:

(i) the Plaintiff's SD where in paragraph 2 she states that her mother is a Buddhist;

(ii) next, we have the affidavit affirmed by one Chan Sew Fan dated 7.12.2015 where in paragraph 4.3 she also states that Yap Ah Mooi was of the Buddhist faith. Chan Sew Fan claims to have been the plaintiff's and Yap Ah Mooi's neighbour and that she knew the plaintiff when the plaintiff was four years old; and

(iii) finally, we have letters from the Religious Authorities in the Federal Territory of Kuala Lumpur, Selangor, Johor, Kedah, Kelantan, Melaka, Negeri Sembilan, Pahang, Pulau Pinang, Perak, Perlis and Terengganu admitting having no knowledge and record of Yap Ah Mooi's conversion to the religion of Islam.

[51] Taking the evidence collectively and assuming the plaintiff's evidence is credible (as there is no challenge to the contrary), there is no proof that Yap Ah Mooi professed the religion of Islam at the time the plaintiff was born.

[52] Of course, the letters from the Religious Authorities on the lack of a record of Yap Ah Mooi's conversion to Islam do not necessarily mean that she never independently, in her own mind and belief, profess Islam.

[53] That said, mere suppositions on the plaintiff's parents' marital status cannot displace the actual evidence on record. Here, we have the plaintiff testifying to that which is in her personal knowledge, ie, that her mother never professed the religion of Islam. There is also other contemporaneous

documentary evidence supporting the plaintiff's aforementioned evidence. Yap Ah Mooi in her written application for her new identity card claimed she was a Chinese Buddhist. While her written application *per se* is not conclusive proof of that, Yap Ah Mooi's act of completing the written application form as far back as 1995 may be viewed as establishing her state of mind at that point in time. Such evidence of conduct corroborates the assertions made in the affidavits and SDs adduced by the plaintiff (see generally: section 8(2) of the Evidence Act 1950 (*Explanation 1*)).

[54] In short, Yap Ah Mooi considered herself a Buddhist in 1995 and in 2008 when she affirmed her SD. This is further attested to by Chan Sew Fan. There is therefore consistency in the assertion, on a balance of probabilities, that Yap Ah Mooi was actually a Buddhist at the time the plaintiff was born.

[55] The fact that Ibrahim stated Yap Ah Mooi's race to be Malay is a misnomer. Firstly, under Article 160 of the FC, a 'Malay' is defined as follows:

> "Malay" means a person who professes the religion of Islam, habitually speaks the Malay language, conforms to Malay custom and-
>
> (a) was before Merdeka Day born in the Federation or in Singapore or born of parents one of whom was born in the Federation or in Singapore, or is on that day domiciled in the Federation or in Singapore; or
>
> (b) is the issue of such a person;".

[56] As there is hardly any proof that Yap Ah Mooi professed Islam, there is *a fortiori*, no evidence that she was ever a 'Malay' in the FC's definition of the term. Further, another element to qualify as a 'Malay' is absent. As apparent from the jurat, Yap Ah Mooi's SD was interpreted to the Malay

language from Cantonese. These facts, collectively assessed, cast serious doubt as to whether Yap Ah Mooi 'habitually speaks the Malay language'. In the face of such evidence, any assertion that Yap Ah Mooi is 'Malay' amounts to no more than an erroneous assumption.

[57] Further compounding the doubt are the following facts. Firstly, Yap Ah Mooi in an application for her own identity card identified herself as Chinese. Secondly, in the plaintiff's birth certificate, Yap Ah Mooi's race is stated as Chinese. Also, Yap Ah Mooi's '*keturunan*' or race in her death certificate states her race as being Chinese. The plaintiff in her SD too also states that her mother is of Chinese descent.

[58] The High Court appeared to believe Ibrahim's written application for the plaintiff's identity card where he stated Yap Ah Mooi is Malay. Given the consistency of the record of Yap Ah Mooi's descent as Chinese, this single entry by Ibrahim is an anomaly. In fact, Ibrahim's statement itself materially conflicts with all other independent evidence on record and there is no other contemporary evidence against which the veracity of the plaintiff's evidence may be measured, much less assailed. Further casting doubt on the veracity of Ibrahim's written application is the curious observation by the plaintiff in paragraph 1 of her SD where she states that her father though stated as being Malay in her birth certificate, is actually a Chinese Muslim convert.

[59] Given all the evidence on record, and without making a definitive finding as to Ibrahim's actual or real identity, the totality of the plaintiff's evidence is certainly more consistent and more worthy of credit. On a balance of probabilities, the facts and circumstances seem to suggest that Yap Ah Mooi was neither a Muslim nor a Malay.

[60] As there is no evidence that Yap Ah Mooi was a Muslim (and certainly not a Malay) at the time of the plaintiff's birth, it cannot be said that the plaintiff is legally a person professing the religion of Islam simply by virtue of the fact that both her parents were Muslims at the time of her

birth.

[61] Having established that, it is to be noted that the way the High Court and Court of Appeal approached the issue was by essentially relying on the word 'either' in section 2(b) of the ARIE 2003. They found that because there was a valid marriage between Ibrahim and Yap Ah Mooi, the plaintiff is a legitimate child and she accordingly inherits her father's religious identity. The High Court for example, used the word '*dinasabkan*' (see paragraph 9, High Court judgment).

[62] The question which arises here is whether the plaintiff is a Muslim by virtue of the fact that 'either' one of her parents, more specifically, her father, is a Muslim. Further, does the plaintiff's status as an illegitimate child affect the ascription of her father's religion to the plaintiff?

[63] Section 111 of the Islamic Family Law (State of Selangor) Enactment 2003 ('IFLE 2003') provides as follows:

> "Where a child is born to a woman who is married to a man more than six *qamariah* months from the date of the marriage or within four qamariah years after dissolution of the marriage either by the death of the man or by divorce, and the woman not having remarried, the *nasab* or paternity of the child is established in the man, but the man may, by way of li'an or imprecation, disavow or disclaim the child before the Court.".

[64] Under section 111, which relates to the ascription of paternity, a child may only be ascribed the paternity of the father if he or she is born to a woman who is married to the man for a period of more than six *qamariah* months. And the father may only disavow or disclaim paternity under the provisions of that section. It follows that a child born less than six *qamariah* months or born to a woman not married to the man who fathered the child is illegitimate and the *nasab* or paternity of the child could not be established in the father. A simple application of the section

to the facts of the instant case results in the conclusion that the plaintiff is an illegitimate child and while her status as a Muslim is disputed, it remains undisputed that Ibrahim is a Muslim. And as a Muslim, the said section 111 applies to Ibrahim to remove him, in law, of any ascription of paternity to the plaintiff.

[65] The necessary implication upon a holistic construction of IFLE 2003 against section 2 of the ARIE 2003 therefore suggests that 'parents', in section 2 of the ARIE 2003, refers only to the parents of legitimate children. Reason being, if section 111 of the IFLE 2003 not only renders a child illegitimate but also bars the ascription of paternity to the said child, then it stands to reason that the putative father cannot, in law, be considered the child's father. This is the first reason why the plaintiff cannot be considered a Muslim simply by virtue of section 2(b) of the ARIE 2003.

[66] For completeness, the other question warranting an answer is this. Even if under Islamic law or the IFLE 2003 Ibrahim cannot ascribe paternity to the plaintiff, could he nonetheless, under secular law, have the right to decide his then infant daughter's religion as he did for her in 1994 in her written application for an identity card? The short answer is no. The authority for this is the judgment of this Court in *Indira Gandhi a/p Mutho v. Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545 ('*Indira Gandhi'*).

[67] The facts of the case for purposes of the present discussion are shortly these. The father of non-Muslim children purported to convert his minor children to the religion of Islam without the knowledge of their mother. The question before this Court was whether consent of only one parent is sufficient to effect the conversion. The provision in question in that case was section 106 of the Administration of the Religion of Islam (Perak) Enactment 2004 which provides:

"For the purpose of this Part, a person who is not a Muslim may

convert to the religion of Islam if he is of mind and –

(a) has attained the age of eighteen years; or

(b) if he has not attained the age of eighteen years, his parent or guardian consents in writing to his conversion.".

[68] In the interpretation of the above provision, this Court was mindful of Article 12(4) of the FC where it construed the singular word 'parent' to mean both parents. Accordingly, it was held that a single parent had no right in law to convert his minor children to another religion without the benefit of consent of the other parent. Zainun Ali FCJ observed as follows:

"[150] Applying the guide to interpretation to art 12(4), the position is fairly clear: the singular word 'parent' includes the plural 'parents'. The religion of the minor child is to be decided by his 'parent' or 'parents' as the case may be…

…

[163] What can be discerned from the above is that, the law has come a long way from the days when one parent's claim could be considered superior to the other. Where the child's religion or religious upbringing is in issue, the paramount consideration for the court is to safeguard the welfare of the child, having regard to all the circumstances of the case. In so doing the court does not pass judgment on the tenets of either parent's belief. Conversion to another religion is a momentous decision affecting the life of a child, imposing on him a new and different set of personal laws. Where a decision of such significance as the conversion of a child is made, it is undoubtedly in the best interests of the child that the consent of both parents must be sought. The contrary approach of allowing the child to be converted on the consent of only one parent would give rise to practical conundrums.".

[69] It is therefore clear that where even if Ibrahim had the secular paternal right to decide the plaintiff's religion, the right is not his to exercise alone. There is no evidence that Yap Ah Mooi jointly consented to recognise the plaintiff as a Muslim. Indeed, the evidence points in the opposite direction in that in the plaintiff's birth certificate, the column for her religion reads: 'Maklumat Tidak Diperolehi' (*Information Not Obtained*).

[70] In conclusion, the following issues in respect of Question 2 are clear. Firstly, the plaintiff is an illegitimate child. There is no proof of marriage of her parents at the time she was born. The plaintiff cannot be deemed a Muslim simply by virtue of section 2(b) ARIE 2003 on the premise that 'either' or 'both' of her parents are Muslim. For the reasons aforementioned, although Ibrahim had stated certain particulars in his application for an identity card on behalf of the plaintiff or even in his own application for a new identity card, those particulars are not proof. Even if they are, they appear to materially conflict with the evidence on record.

[71] For the foregoing reasons, Question 2 is answered in the negative.

Question 1

[72] Is this Court, in the first place, allowed to make a finding that the plaintiff or Yap Ah Mooi, or both "were never Muslims" as opposed to the finding that they are "no longer Muslims". It will be explained later that there is a fundamental difference between the two questions.

[73] This is what the High Court held in respect of the matter:

> "[36] Oleh yang demikian saya berpendapat Plaintif beragama Islam apabila dilahirkan. Saya dapati tiada keterangan menidakkan fakta agama Plaintif ketika dia tinggal bersama kedua-dua ibubapanya sekitar tahun 1994-1995 di Taman Maju Jaya, Cheras. Dan tiada keterangan menidakkan fakta bahawa Plaintif beragama Islam seperti

yang dinyatakan oleh bapanya di dalam permohonan kad pengenalan Plaintif pada Januari 1994. Oleh itu fakta bahawa Plaintif mendapat didikan ajaran Buddha sekitar 1985-1990 tidak mencacatkan status agama Islamnya sewaktu dilahirkan.

[37] Berikutan itu saya berpendapat deklarasi yang boleh dipohon oleh Plaintif ialah – bahawa dia bukan lagi seorang Islam dan bukannya dia bukan seorang Islam sejak dilahirkan. Maka dengan itu, bidang kuasa untuk membuat deklarasi ini adalah terletak di bawah Mahkamah Syariah sebagaimana yang diperuntukkan di bawah seksyen 61(3)(b)(x) Enakmen dan mahkamah ini tidak mempunyai bidang kuasa untuk mendengar permohonan ini dan tidak mempunyai kuasa untuk memberi deklarasi yang dipohon.".

[74] And to reiterate the passage cited earlier in respect of the Court of Appeal's conclusion, it held that:

"At any rate, we also observed that prayer (ii) of the plaintiff's originating summons is for a declaration that the plaintiff is not a person professing the religion of Islam. Given the findings that the plaintiff is a Muslim, the effect of the declaration sought is to enable the plaintiff to renounce Islam as her religion; which in effect amounts to a declaration that the plaintiff is no longer a Muslim.

The jurisdiction to determine this issue is vested in the Syariah Court pursuant to s. 61(3)(b)(x) of the 2003 Enactment. It is therefore plain that the plaintiff's avenue for the declaration sought is within the jurisdiction of the Syariah Court and not the civil court (art 121(1A) of the FC).".

[75] In short, the Courts below concurrently held that the declaration sought by the plaintiff is of the nature that she is "no longer a Muslim" and hence a matter which falls within the jurisdiction of the Syariah Court by virtue of Article 121(1A) of the FC.

[76] Article 121(1A) of the FC stipulates:

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

[77] Clause (1) refers to the secular/civil superior and subordinate courts throughout Malaysia. Article 121(1A) must be construed in light of Item 1 of the State List which provides as follows:

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

[78] To summarise, Syariah Courts may only exercise jurisdiction over a person or persons on two conditions. Firstly, the person shall profess the

religion of Islam. This can generally be classified as jurisdiction *ratione personae* – where the jurisdiction of the tribunal or court is contingent on the litigant's legal persona. The phrase is most commonly used in disputes where one party is a sovereign, a foreign State, or one who enjoys diplomatic immunity and privileges cloaking him with immunity from legal process.

[79] Secondly, even if Syariah Courts may exercise jurisdiction *ratione personae*, they must still ensure that they have jurisdiction over the subject-matter as expressly enumerated in the said Item 1. This may be classified as jurisdiction *ratione materiae* – or subject-matter jurisdiction.

[80] Unlike the superior courts in Part IX of the FC which are constitutionally established and in whom the judicial power of the Federation inherently vests, the Syariah Courts are creatures of statute (specifically State enactments) and accordingly, their jurisdiction is strictly circumscribed by the laws which establish them. Absent jurisdictions *ratione personae* and *ratione materiae* over a person, Syariah Courts are not empowered by the FC to exercise any power over that person and if exercised, would be *ultra vires* the FC.

[81] Such is the structure designed by the drafters of our FC. Without delving too deep into the history of such structure, the design was deemed necessary to allow for the continued application of Islamic law exclusively to Muslims and only to a certain degree. In all other instances, the FC vests all judicial jurisdiction and judicial power in the civil courts which interpret laws passed by secular institutions such as Parliament or the State Legislatures within their powers prescribed by the Ninth Schedule. (see generally for example *Che Omar bin Che Soh v. Public Prosecutor* [1988] 2 MLJ 55). This includes the interpretation of State Enactments promulgated to address issues of Islamic law but only insofar as they relate to secular matters, for example, constitutional issues. The earlier interpretation and application of section 111 of the IFLE 2003 in respect

of whether the plaintiff is in the first place a Muslim by virtue of the fact that Ibrahim is a Muslim, is an example of this.

[82] The issue that concerns us in this dispute is whether the Syariah Court has jurisdiction *ratione personae* over the plaintiff. To understand the answer to the question, it must first be understood that the word "Muslim" is not only a label to describe a person's personal beliefs in the religion of Islam but it is also a legal term upon which the Syariah Court's *ratione personae* jurisdiction is built.

[83] Article 11(1) of the FC guarantees the right to profess and practice one's religion. The conjunction 'and' in Article 11(1) suggests that it governs more than mere professing. It extends to how one identifies oneself or how one may be identified with a specific religion and the right to also determine one's own level of devotion to his or her belief. However, Item 1 of the State List singularly uses the word 'professing'. Contrasting Article 11(1) with Item 1 of the State List, it is plain that the latter was deliberately more narrowly worded to exclude the requirement of 'practice'. Thus, so long as one is a Muslim by identification whether he practises or not, or whether he continues to believe in the faith or not, he is no less legally identified as a 'person professing the religion of Islam'.

[84] Taken in this context, there is a notable difference between 'profess' on the one side and 'profess and practice' on the other. The former is a constitutional term and is justiciable before the civil courts. The latter phrase is a question of faith and dogma and therefore falls within the jurisdiction of the Syariah Courts by virtue of Article 121(1A) of the FC.

[85] The dispute before us relates to the question of one's constitutional identity. It therefore necessitates constitutional interpretation of something which only the superior courts of this country have the right to address. It is only when one's faith is the main subject-matter of the dispute does such dispute fall within the jurisdiction of the Syariah Courts. In this regard, there is a significant distinction between 'one who no longer professes the

religion of Islam' on the one side, and 'one who never professes the religion of Islam', on the other. This will be further elaborated later.

[86] One matter upon which the Syariah Courts have jurisdiction is 'offences against the precepts of Islam'. One example of such an offence is 'apostasy' or as it is more commonly known: '*murtad*'. In Selangor, the offence manifests in section 5 of the Syariah Criminal Offences (Selangor) Enactment 1995 ('SCO 1995') which provides as follows:

> "Any person who declares himself to be a non-Muslim so as to avoid any action from being taken against him under this Enactment or any other Enactment in force in this State shall be guilty of an offence and shall be liable on conviction to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding three years or to both.".

[87] Administratively, once one becomes a Muslim, and becomes subject to the jurisdiction of the Syariah Courts, the procedure to 'leave' the religion also becomes subject to Islamic law. In this context, almost all States in Malaysia have a presumption provision and in Selangor it is section 74(2) of the ARIE 2003 which provides:

> "For the avoidance of doubt, it is hereby declared that a Muslim shall at all times be acknowledged and treated as a Muslim unless a declaration has been made by a Syariah Court that he is no longer a Muslim.".

[88] Summarising the above, one cannot unilaterally on his own accord renounce the religion of Islam. Doing so would amount to an offence against the precepts of Islam. In such an instance, the Syariah Court would have both jurisdictions *ratione personae* and *ratione materiae*. This has long been canvassed and explained by the Federal Court in *Kamariah bte Ali dan Lain-lain lwn Kerajaan Kelantan dan Satu Lagi* [2005] 1 MLJ 197.

[89] The High Court and the Court of Appeal are therefore correct in principle. If the plaintiff is a Muslim seeking to renounce her faith in Islam, then the matter being 'an offence against the precepts' of Islam, is within the jurisdiction of the Syariah Court due to Article 121(1A) of the FC. The Court of Appeal further confirmed this by following this Court's decision in *Lina Joy (supra).* However, the conclusion of the Courts below that the plaintiff is a Muslim was based solely on the erroneous finding of fact that the plaintiff's parents were married during her birth and thus resulting in the erroneous application of section 2(b) of the ARIE 2003. Premised on the earlier findings that the plaintiff is an illegitimate child, the conclusion formed on the said section 2(b) is unsustainable.

[90] At this juncture, a very fundamental distinction identified earlier, emerges. There is a critical distinction between 'no longer a Muslim' on the one side, and 'never was a Muslim', on the other. The former refers to renunciation cases which as explained, fall within the jurisdiction of the Syariah Courts. The latter, which may be loosely described as *ab initio* cases, cannot, on a coherent application of the law, fall within the jurisdiction of the Syariah Courts. To understand this, it would perhaps be useful to distinguish *Lina Joy* (*supra*).

[91] *Lina Joy* involved a case where a self-admitted Malay Muslim woman filed a suit to remove the word Islam from her identity card. She wanted this because she purported to convert to Christianity to marry her betrothed who was of that religion. Originally, the case concerned both constitutional and administrative law questions. The constitutional aspect of the case concerned the appellant's (Azlina's) right to determine her own religion. The appeal however only dealt with the administrative law aspect as to whether the NRD was correct in law to require Azlina, to furnish an order from the Syariah Court before the word 'Islam' could be removed from her identity card. The discussion on the administrative law aspect is not relevant to the instant case and accordingly does not warrant comment. But the *ratio* of *Lina Joy*, appears to be that because Azlina was always a

Muslim, it was necessary that any attempt by her to change her religion required the approval of the Syariah Court. In this context, *Lina Joy* is entirely distinguishable from the present case on the basis that the present case is an *ab initio* case and not a renunciation case.

[92] The same result as *Lina Joy* would be achieved if someone who was originally a non-Muslim sometime in his or her life converted to Islam but later chose to renounce Islam. An example of this is the case of *Majlis Agama Pulau Pinang lwn. Siti Fatimah Tan Abdullah* [2009] 1 CLJ (Sya)162. In that case, a lady had converted to Islam from Buddhism to marry her Malay Muslim husband. The couple subsequently divorced and the woman applied to re-convert to Buddhism. The case again, is a renunciation case where someone claims to no longer be a Muslim.

[93] *Ab initio* cases are unique and peculiar where the person claims never to have been a Muslim in the first place but for some reason or another he or she is designated as a person who 'professes the religion of Islam'. Logically, any legal presumption as to their Muslim status cannot apply because they were never identified as Muslim to begin with. Here, *Lina Joy (supra)* and like cases may be distinguished by referring to the decision of Yew Jen Kie J (as she then was) in *Azmi* (supra).

[94] According to the applicant in *Azmi*, he was raised in a Bidayuh Christian community. However, when he was younger the religion of Islam was chosen for him by his parents upon their conversion although his upbringing never matched that description. He claimed that when he attained the age of majority, he chose Christianity as his religion. Accordingly, he applied to the Sarawak branch of the NRD to remove Islam from his identity card and to change his name from 'Azmi bin Mohamed Azam Shah @ Rooney' to 'Roneey anak Rebit'. Most of the parties to the case agreed by consent to grant a letter of no objection on his 'renunciation' but the Chief Syariah Judge claimed that he had no jurisdiction to grant the order of 'renunciation'. Based on this refusal, the

applicant argued that in the first place, the Syariah Court had no jurisdiction to grant him the order because he was not in the first place a Muslim.

[95] This is what Yew Jen Kie J held:

> "[26] In Lina Joy's case, *supra*, the appellant was a Malay woman brought up as a Muslim. She applied for the removal of "Islam" and her name "Azlina bte Jailani" to "Lina Joy" in her replacement identity card, which application was considered incomplete without an order of the Syariah Court stating that she has renounced Islam.
>
> [27] It is to be noted that the applicant in the present case is a Bidayuh by race and had been raised and brought up in a Christian Bidayuh community since birth. The choice of Islam religion was decided for him by his parents following their own conversion to Islamic faith as he was ten years old. He has never practised the Islamic faith and has embraced Christianity. He is not challenging the validity of his minor conversion. In exercise of the constitutional religion freedom, he is seeking a declaration that he is a Christian.".

[96] Most pertinently, her Ladyship continued to observe as follows:

> "[41] Given that the Syariah Court shall have jurisdiction only over persons professing the religion of Islam, it is therefore helpful at this juncture to ascertain the meaning of "professing" or "profess".
>
> [42] In Words and Phrases Judicially Defined, 1990 edn, p. 447, under the word "profess", it is stated:
>
> > Now what is the meaning to be attached to the word "profess"? According to the Shorter Oxford English Dictionary "profess" means "to affirm, or declare one's faith in or allegiance to (a religion, principle, God or Saints etc,)" *Re Mohamed Said Nabi, deceased* [1965] 1 MLJ 121 @ 122 per Chua J.

[43] Longman Dictionary of Contemporary English defined "profess" as "a statement of your belief, opinion, or feeling".

[44] From the definition aforesaid, it conveys the meaning that to profess a religion is making a public statement about the religion you believe in. Thus, a person professing the religion of Islam is a person who has made a public declaration, affirmed his faith in or his allegiance to Islam.

[45] It is a fact that the Islam religion was chosen and decided for the applicant (a minor) by his mother when she converted to be a Muslim; his conversion was not by reason that he professed the religion of Islam. To put it in another way, the conversion of the applicant to Muslim faith was not on his own volition by affirming, declaring his faith in or allegiance to Islam religion but by virtue of his mother's conversion when he was a minor aged ten years old and his mother has determined his religion. In my view, since the applicant, who is a Bidayuh by birth, had not in the first place professed his faith in Islam but his conversion followed that of his mother as he was a minor at the material time, logic dictates that he cannot be considered as a person professing that particular faith. That the applicant has not lived like a person professing Islam is seen in his averment that he was raised and brought up in the Bidayuh Christian community.".

[97] The decision of Yew Jen Kie J in *Azmi (supra*) was appealed against but the appeal was subsequently withdrawn (Court of Appeal Civil Appeal No. Q-01-159-05/2016, the Director General of the National Registration Department v. Azmi bin Muhammad Azam @ Rooney). The NRD adhered to the decision of the High Court. The applicant's name was changed and the word 'Islam' was removed from his identity card.

[98] What can be distilled from *Lina Joy* and like cases on the one side, and *Azmi* and like cases on the other, is that it is a matter of proof that the

person affirmatively professed the religion of Islam at the material time. Absent such proof, the case may be classified as an *ab initio* case.

[99] Reverting to the question: do the civil courts possess jurisdiction to determine the status of persons who claim to 'never have been Muslim' as opposed to 'no longer being a Muslim'? The answer to the question must naturally be in the affirmative as otherwise there would be no legal recourse for persons of the *ab initio* category. When it concerns a renunciation case, the civil courts have consistently held that it was within the jurisdiction of the Syariah Courts conferred under Article 121(1A) of the FC. For the record, learned Senior Federal Counsel appearing for the Attorney General as *amicus curiae*, agreed that it is the civil courts that have jurisdiction over persons of the '*ab initio* category'.

[100] The distinction between *ab initio* and renunciation cases and how the civil courts have always respected the Syariah Courts' jurisdiction in renunciation cases was most recently addressed by the Court of Appeal in *Maqsood (supra)*. Dr Badariah Sahamid JCA pertinently observed as follows:

> "[101] In this respect the civil Courts appear to make a distinction between conversions out of Islam by those who were Muslims by original faith and those who were non-Muslims by original faith. In the former, premised on their original faith, they were subject to the jurisdiction of the Syariah Courts and require a renunciation in the Syariah Court to confirm their non-Muslim status. As for the latter, it is on the premise that they were non-Muslims to begin with and therefore not subject to the jurisdiction of the Syariah Courts, that no such renunciation of Islam was required for any supposed renunciation of their Islamic 'faith'.".

[101] In applying the above principle to the facts of that case, her Ladyship opined as follows:

> "[116] To clarify, if a person was born and raised as an Ahmadiyya, then his original religion is the Ahmadiyya religion. Because the Two Fatwas declare that his faith is not Islam, then in the State of Selangor, an Ahmadiyya is a non- Muslim just as a Christian or a Hindu is a non-Muslim. If however, a person is born and raised as a Muslim (whether he chooses to practise his beliefs or not), he is in law a person 'professing the religion of Islam'. Should he change his religion from Islam to Ahmadiyya, just as if he were to attempt to renounce Islam for any other faith, he cannot in law do so unless by order of the Syariah Court as prescribed by the relevant State law. Thus, any renunciation of the Islamic faith is within the jurisdiction of the Syariah Courts (see for example: *Dalip Kaur v. Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor* [1992] 1 MLJ 1 and *Lina Joy (supra)*. In *Soon Singh (supra),* the Federal Court held that the jurisdiction of the Syariah Court to deal with conversion out of Islam, although not expressly provided for in some State Enactments, can be read into those Enactments by implication.".

[102] Based on the discussion of *Lina Joy (supra)* and *Azmi (supra),* I agree with the articulation of the Court of Appeal in *Maqsood (supra)*, on the difference between *ab initio* cases and renunciation cases and which of the two courts, the civil courts or Syariah Courts have jurisdiction. For the reasons stated earlier in respect of Question 2, I am also minded to think that the Court of Appeal's observations in respect of the legal status of identity cards *vis-à-vis* regulation 24 of the NRR 1990 is correct. Incidentally, at the time of writing this judgment, the applications for leave to appeal against the decision of the Court of Appeal were dismissed by this Court on 21.12.2020 (see Federal Court Civil Applications No. 08(f)-266-09/2020(B) between *Maqsood Ahmad & Ors v. Ketua Pegawai Penguatkuasa Agama & Ors* and 08(f)-272-09/2020 between *Ketua Pegawai Penguatkuasa Agama & Ors v. Maqsood Ahmad & Ors*).

[103] All judicial power vests solely in the civil superior courts as per the basic structure of our FC ingrained in Article 121. However, Article 121(1A) dispossess the civil courts of jurisdiction *ratione materiae* once it is established that the subject-matter of the suit is one which falls within the jurisdiction of the Syariah Courts. Having said that, in *ab initio* cases, the issue before the court is not one of faith. It is a question of one's identity under the FC. In contrast, renunciation cases concern persons who despite being Muslims, no longer have faith or believe in the religion.

[104] The phrase 'professing the religion of Islam' is a provision of the FC. Ascertaining the meaning of any provision of the FC is a judicial power classified broadly under the umbrella of judicial review and accordingly, it is a power vested strictly and only in the civil superior courts. That this is the position of our constitutional jurisprudence is settled in the words of Salleh Abas LP in *Lim Kit Siang v. Dato Seri Dr Mahathir Mohamad* [1987] 1 MLJ 383, at pages 386-387:

> "The courts have a constitutional function to perform and they are the guardians of the constitution within the terms and structure of the Constitution itself; they not only have the power of construction and interpretation of legislation but also the power of judicial review — a concept that pumps through the arteries of every constitutional adjudication and which does not imply the superiority of judges over legislators but of the Constitution over both. The courts are the final arbiter between the individual and the state and between individuals inter se, and in performing their constitutional role they must of necessity and strictly in accordance with the constitution and the law be the ultimate bulwark against unconstitutional legislation or excesses in administrative action.".

[105] The above passage was cited with approval by this Court in *Indira Gandhi (supra)* at [43] and where Zainun Ali FCJ further held as follows:

> "[71] Clearly then, both cll (1) and (1A) of art 121 of the FC illustrate

the respective regimes in which each court operates. Thus issues of jurisdiction and conferment of powers in the civil courts and the syariah courts are clearly drawn. What they (cll (1) and (1A) art 121 of the FC) illustrate is that, both the civil and syariah courts co-exist in their respective spheres, even if they are dissimilar in the extent of their powers and jurisdiction, in that the civil courts are possessed of powers, fundamental and intrinsic, as outlined in the FC.

[72] In this it is emphasised that, if the relief sought by a plaintiff is in the nature of the 'inherent powers' of the civil court (for example judicial review) or if it involves constitutional issues or interpretation of the law, then the civil courts would be seised with jurisdiction to determine the issue, regardless of its subject matter and especially if it comes within the scope and ambit of judicial powers as outlined above.".

[106] To put into perspective the point that although a matter may have religious connotations to it, if it requires constitutional interpretation, only the civil courts have the power to ascertain it, reference is made to the judgment of this Court in *Abdul Kahar bin Ahmad v. Kerajaan Negeri Selangor (Kerajaan Malaysia, intervener) & Anor* [2008] 3 MLJ 617 ('*Abdul Kahar'*).

[107] In *Abdul Kahar*, the accused was charged with five offences before the Syariah Court in Selangor. He challenged those offences as being null and void on the grounds that they did not fall under the banner of offences 'against the precepts of Islam'. The relevant religious authority in the case argued to the effect that the Syariah Courts are empowered under Article 121(1A) to determine whether the offences were within the precepts of Islam. In rejecting the argument, this is what Abdul Hamid Mohamad CJ observed:

"[8] Learned counsel for Majlis Agama Islam concedes, and rightly so, that interpretation of the FC is a matter for this court, and not the

Syariah Court to decide. I have said in *Latifah bte Mat Zin v. Rosmawati bte Sharibun & Anor* [2007] 5 MLJ 101 at p 123:

> "Interpretation of the FC is a matter for this court, not the Syariah Court**.**".

[9] However, the learned counsel argued that he was not saying that it was the Syariah Court that had jurisdiction to interpret the Constitution. Neither was he saying that it was for the Syariah Court to decide whether the said provisions were consistent ('selaras') with the provisions of the Constitution or not. All he was saying was that it was for the Syariah Court to decide whether the said offences were offences against the precepts of Islam or not. Then, it is for this court to decide whether the impugned provisions are void or not. He drew an analogy with what I have said in *Latifah* where a double proceeding is necessary in a distribution petition: the Syariah Court determines the shares of the beneficiaries according to 'faraid' and the civil court makes the distribution order accordingly.

[10] Actually, that is not the case here, nor what was prayed for in the notice of motion. The motion clearly prays for an order that the issue whether the impugned provisions are consistent with precepts of Islam as provided by Paragraph 1, State List, Ninth Schedule of the FC must be decided by the Syariah High Court as provided by art 121(1A) of the FC. That clearly is asking for the interpretation of the provision of the Constitution. Nowhere in the Constitution says that interpretation of the Constitution, Federal or State is a matter within the jurisdiction of the Syariah Court to do. The jurisdiction of Syariah Courts are (*sic*) confined to the limited matters enumerated in the State List and enacted by the respective state enactments.".

[108] The case is no different here. At the risk of repetition, if a matter concerns an *ab initio* case, that is, the question whether a person is in the first place a 'person professing the religion of Islam' it necessarily

concerns a question regarding one's identity under the FC which in turn necessitates constitutional interpretation. This is because the phrase 'persons professing the religion of Islam' is a constitutional term. Accordingly, the civil courts are empowered, indeed, duty-bound to adjudicate the matter. It is only in renunciation cases where one already professes or proclaims to profess the religion of Islam (irrespective of whether they actually practise the faith) with the subsequent decision to change what they profess, that the matter is removed to the jurisdiction of the Syariah Court. The distinction drawn from the cases of *Lina Joy (supra)* and *Azmi (supra)* illustrates the difference. Whether it is an *ab initio* case or a renunciation case will require a careful examination of the factual matrix of the case.

[109] On the foregoing analysis, Question 1 is answered in the affirmative.

[110] Apart from what has already been discussed, learned counsel for the appellant Datuk Seri Gopal Sri Ram further submitted the following. Firstly, that the judgments of this Court in *Lina Joy (supra)* and *Letitia Bosman v. Public Prosecutor & other appeals* [2020] 8 CLJ 147 were wrongly decided. Secondly, that the 1988 constitutional amendment to Article 121(1) of the FC was constitutionally invalid. In my view, given the outcome of the discussion above, it is unnecessary to deal with these arguments on the facts of this case.

[111] Learned counsel has also attempted to point out the dichotomy between the two judgments in *Dalip Kaur v. Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor* [1992] 1 MLJ 1 and *Soon Singh a/l Bikar Singh v. Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor* [1999] 1 MLJ 489 for the point that Syariah Courts do not have implied jurisdiction to hear renunciation cases. Given that section 74(2) of ARIE 2003 expressly confers jurisdiction on the Syariah Court in Selangor to hear such cases, likewise I do not consider it necessary to deal with that argument on the facts of this appeal.

[112] The respondents and the *amicus curiae*, the Attorney General, argued that this is a renunciation case and accordingly, this Court has no jurisdiction to determine the religion of the plaintiff under Article 121(1A) of the FC. It is thus necessary to now examine the factual matrix of the case to determine whether the plaintiff is, on the evidence, a Muslim to begin with. If she is not, then in accordance with the principles established earlier, this Court can grant her the declaration she seeks. If she is a Muslim by original faith, then the matter will be for the jurisdiction of the Syariah Court and this Court would not have the jurisdiction to grant her the reliefs sought to the extent that they relate to renunciation.

Factual Analysis

[113] On the evidence, it has been decided that the plaintiff is illegitimate, that her mother was never a Muslim and that under section 111 of the IFLE 2003, the religion of her putative father cannot be ascribed to the plaintiff. Accordingly, the plaintiff cannot be a Muslim by virtue of section 2(b) of the ARIE 2003.

[114] What remains in this analysis is whether the plaintiff is a 'Muslim' under any of the other limbs of section 2 of the ARIE 2003. The provision, minus paragraph (b), provides:

> '"Muslim" means —
>
> (a) a person who professes the religion of Islam;
>
> …
>
> (c) a person whose upbringing was conducted on the basis that he was a Muslim;
>
> (d) a person who is commonly reputed to be a Muslim;
>
> (e) a person who has converted to the religion of Islam in accordance with section 108; or

(f) a person who is shown to have stated, in circumstances in which he was bound by law to state the truth, that he was a Muslim, whether the statement be oral or written;".

[115] Section 2(a) is out of the question for obvious reasons. This is not a conversion case and so section 2(e) clearly does not apply. Section 2(f) is irrelevant because there is nothing on record to suggest that the plaintiff has stated in any document where she is bound to state the truth that she is a Muslim. In fact, in all documents before the Court she consistently asserts that she is not a Muslim. That only leaves us with sections 2(c) and 2(d).

[116] As regards section 2(d), Chan Sew Fan in her affidavit avers that for as long as she has known the plaintiff, she has always been known to profess the Buddhist faith. There is no evidence whatsoever on record to suggest that the plaintiff is reputed as a Muslim.

[117] As for section 2(c), Chan Sew Fan's affidavit, like in the case of section 2(d), appears to refute the fact that the plaintiff was raised as a Muslim. There is nothing in the record to suggest that the defendants have rebutted Chan Sew Fan's averments. The general rule of affidavit evidence is that unrebutted averments are deemed admitted (see generally *Overseas Investment Pte Ltd v. Anthony William O'Brien & Anor* [1988] 3 MLJ 332).

[118] There is also the matter of the Plaintiff's SD wherein she states that she was never a Muslim and that she was raised a Buddhist by her mother. Then we have Yap Ah Mooi's SD where she also states that she never raised the plaintiff as a Muslim. Further, we have the independent evidence in the Religious Authorities' Letters where they found no record of conversion of either the plaintiff or her mother to Islam. An extract of the plaintiff's birth certificate states the following in the column for her religion: 'Maklumat Tidak Diperoleh' (*Information Not Obtained*). Collectively speaking, the evidence on record disclose that there is no proof that the plaintiff ever professed the religion of Islam. The evidence suggests that the plaintiff was raised in the Buddhist faith. There is nothing

in the evidence to prove that the plaintiff was raised a Muslim such that section 2(c) of the ARIE 2003 may apply to her.

[119] The High Court made the following observations:

> "[32] Walaupun Chan Sew Fan di dalam afidavitnya yang diikrarkan pada tahun 2015 memberi keterangan bahawa Plaintif dibesarkan dalam tempoh tahun 1985 hingga 1990 dengan ajaran Buddha perlu diingatkan bahawa Plaintif ketika itu berumur antara 4 hingga 9 tahun. Manakala keterangan yang lebih awal melalui pengisytiharan oleh Ibrahim yang menyatakan Ibrahim beragama Islam dan kemudiannya pada tahun 1994 dia menyatakan Plaintif beragama Islam semasa membuat permohonan untuk kad pengenalan Plaintif. Ini menunjukkan Plaintif seorang Islam ketika dilahirkan pada tahun 1981 dan sewaktu memohon kad pengenalannya pada tahun 1994…
>
> [34] Oleh yang demikian saya berpendapat walau apapun yang berlaku di antara Ibrahim dan Yap di antara 1985 sehingga 1990 apabila Plaintif dan Yap tinggal di Taman Maluri kerana tiada keterangan mengenai kewujudan Ibrahim di dalam hidup mereka ketika itu tetapi apa yang pasti dan jelas mereka kembali tinggal bersama sekitar tahun 1994 sehingga 1995 di Taman Maju Jaya."

[120] Essentially, the High Court opined that Chan Sew Fan's evidence only suggested that the plaintiff was raised as a Buddhist from the years 1985 to 1990, that is, when she was between the ages of 4 and 9 years. On this point, the High Court seemed to opine that there were gaps in the evidence which suggest that Ibrahim was living in the same place as Yap Ah Mooi and the plaintiff. The assumption of the High Court therefore appeared to be that given the presence of Ibrahim, the plaintiff might have been raised as a Muslim.

[121] Again, determining whether the plaintiff is constitutionally a person 'professing the religion of Islam' requires proof. The force of the evidence

on record suggests to the contrary. To assume that Ibrahim may have raised the plaintiff as a Muslim without proof, with respect, is merely a conjecture. The logical conclusion ought to have been that taking the evidence as it stands, section 2(c) of the ARIE 2003 does not apply to the plaintiff.

[122] In the circumstances, as none of the provisions of section 2 of the ARIE 2003 apply to the plaintiff's case, the natural conclusion one is compelled to draw is that the plaintiff is NOT, as a matter of fact, a person 'professing the religion of Islam' as per Item 1 of the State List. This is because there is no proof that she is a Muslim by original faith.

[123] Accordingly, the concurrent decisions of the High Court and the Court of Appeal cannot stand as they were made on the erroneous premise that the plaintiff was originally a Muslim seeking to renounce her faith. This is an *ab initio* case and not a renunciation case.

Conclusion

[124] In all cases, the Superior Courts established under Part IX of the Federal Constitution retain supervisory jurisdiction over all subordinate courts/tribunals by virtue of Articles 4(1) and 121(1) of the Federal Constitution. The Superior Courts are therefore obligated to review all cases that come before them and to make all necessary orders to grant relief in upholding the supremacy of the Federal Constitution. If the Court is satisfied upon a proper appreciation of the evidence that the case before it concerns a matter for the jurisdiction of the Syariah Court then it will be dispossessed to grant any relief in that regard. This conclusion does not diminish the otherwise wide powers of review of the civil courts.

[125] For the reasons aforesaid, the plaintiff has made out her claim on a balance of probabilities. The concurrent categorisation by the Courts below of the plaintiff's case as a renunciation as opposed to an *ab initio* case, is not correct in fact and in law.

[126] The plaintiff's appeal is accordingly allowed and the orders of the High Court and Court of Appeal are hereby set aside. An order is granted in terms of the OS, to wit, the declaratory relief reproduced in paragraph 5 of this judgment. There shall be no order as to costs.

[127] Rohana Yusuf PCA, Nallini Pathmanathan FCJ, Abdul Rahman Sebli FCJ, Zabariah Mohd Yusof FCJ, Mary Lim Thiam Suan FCJ and Rhodzariah Bujang FCJ have read this judgment in draft and have expressed their agreement with it. Azahar Mohamed CJM and Hasnah Mohamed Hashim FCJ agreed with me on the answers to the Leave Questions but depart on the orders/reliefs to be granted to the appellant.

Judgment of Azahar Mohamed, Cjm

[128] There are two questions of law posed to this Court in the present appeal.

[129] The first question of law is: "Where the subject matter of a cause or matter requires a determination of "whether a person is or is not a Muslim under the law" rather than "whether a person is no longer a Muslim", whether the High Court has the exclusive jurisdiction to hear and determine the said subject matter on a proper interpretation of Article 121 and Item 1 of the State List of the Federal Constitution?"

[130] The second question of law is: "In light of Regulation 24(1) of the National Registration Regulations 1990 and where the truth of the contents of any written application for the registration of an identity card or the contents of an identity card is not proven by affidavit or at the trial , whether the said contents can be considered facts proved for a declaration of status under Section 41 of the Specific Relief Act 1950?"

[131] I have had the benefit of reading the learned Chief Justice's judgment in draft. Having considered the reasons given by the learned Chief Justice, I agree that Question 1 is answered in the affirmative and Question 2 is

answered in the negative. However, I respectfully consider that before granting the relevant remedies the Appellant sought , we should first request for the opinion of the Fatwa Committee of the State of Selangor pursuant to section 53 of the Administration of the Religion of Islam (State of Selangor) Enactment 2003 ("the 2003 Enactment") pertaining to the question on Hukum Syarak ("Islamic Law"), namely whether or not the Appellant was a Muslim at the time of birth. Before turning to the discussion on this matter, I would also like to express my own views and add the following reasons why Question 1 should be answered in the affirmative.

[132] This important appeal once again raises the issue of conflict of jurisdiction between the Civil and Syariah Courts, which I shall refer to as the jurisdictional problems. The Courts have faced this issue frequently in recent years. On such occasions, the jurisdictional problems which bring obvious challenges and inherent difficulties, in turn, raise the delicate issues involving the application of Clause (1A) of Article 121 of the Federal Constitution ("FC") and the interpretation of the laws of the State passed by the State Legislature. The opportunity presented itself for this Court in the present appeal to re- examine and clarify this important issue.

[133] In this case, the High Court found that the Appellant's mother and her putative father were married, and that the Appellant is a child of the marriage. The High Court also found that the validity of their marriage fell within the jurisdiction of the Syariah Court and consequently, the question of whether the Appellant was no longer a Muslim also fell within the Syariah Court's jurisdiction.

[134] The Court of Appeal dismissed the Appellant's appeal and held that the Appellant is a Muslim and the effect of the declaration sought by the Appellant was to enable her to renounce Islam as her religion that in effect amounted to a declaration that the Appellant is no longer a Muslim. The Court of Appeal went on to hold that the jurisdiction is thus vested with

the Syariah Court and not the Civil Court. The Court of Appeal held that pursuant to Clause (1A) of Article 121 of the FC, the Appellant 's avenue for the declaration sought was within the jurisdiction of the Syariah Court and not the Civil Court.

[135] It will be helpful to begin the discussion by making some general observations on our court system. The FC demarcates between two distinct legal system, namely the civil legal system, and the Syariah system. As a matter of broad general rule, the Civil Courts which are vested with the judicial power conferred under Article 121 of the FC, being courts of general jurisdiction , administer laws that are of general application, namely the FC, legislations passed by the Federal and State Legislatures, the common laws and rules of equity.

[136] Whereas the Syariah Courts, that operate outside the civil system, administer the Syariah Family and Syariah Criminal Enactments passed by the respective State Legislatures. In other words, in our jurisdiction, the justice delivery system on Islamic matters is done through the Syariah Courts. The Syariah Courts came into existence only when the State Legislatures make law to establish them pursuant to the exercise of powers given under Item 1 of the State List of the FC. More importantly, Syariah Courts have jurisdiction only over persons professing the religion of Islam. When one of the parties is a non-Muslim, the Syariah Courts do not have the jurisdiction over the case even if the subject matter falls within their jurisdiction.

[137] Prior to 1988, the Syariah Courts did not have exclusive jurisdiction over matters under their respective jurisdictions as the Civil Courts had power to review, and quite regularly reviewed, the decisions of the Syariah Courts by way of certiorari, which in the process had overturned the decisions of the Syariah Courts. There were instances where the Civil Courts entertained applications that sought to re-adjudicate matters that the Syariah Courts had determined (see *Myriam v. Mohamed Ariff* [1971] 1

MLJ 265, and *Tengku Mariam binti Tengku Sri Wa Raja & Anor v. Commissioner for Religious Affairs, Trengganu & Ors* [1969] 1 MLJ 110). There was also a case in which the Civil Court had applied laws of general application, which are in conflict with Islamic law (see *Ainan bin Mahamud v. Syed Abu Bakar bin Habib Yusoff and Others* [1939] 1 MLJ 209). Tan Sri Professor Ahmad Ibrahim in his article **The Amendment to Article 121 of the Federal Constitution:** *Its effect on Administration of Islamic Law* [1989] 2 MLJ xvii discussed a number of cases in Civil Courts which had not applied the Islamic law but had applied law which was in conflict with the Islamic law.

[138] An important event took place in 1998. A new clause was added to the FC. The new Clause (1A) of Article 121 of the FC, with effect from 10 June 1988, provides that the Civil Courts shall have no jurisdiction with respect to matters within the jurisdiction of the Syariah Courts. The new Clause has taken away the jurisdiction of the Civil Courts in respect of matters within the jurisdiction of the Syariah Courts. If a matter falls within the jurisdiction of the Syariah Court, the Civil Court has no jurisdiction over it (see *Majlis Agama Islam Pulau Pinang v. lsa Abdul Rahman & 1 yang lain* [1992] 3 CLJ 1675 *"Majlis Agama Islam Pulau Pinang v. lsa Abdul Rahman", Mohd Habibullah bin Mahmood Faridah bt Dato Talib* [1993] 1 CLJ 264 *"Mohamad Habibullah Mahmood" and Soon Singh a/l Bikar Singh v. Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor* [1999] 1 AMR 1211).

[139] It is trite that only the FC is supreme; the Judiciary, the Executive and the Legislature are subject to the FC (see *Letitia Bosman v. Public Prosecutor & other appeals* [2020] 8 CLJ 147). Pursuant to this important principle, the judicial power of the Civil Courts have been excluded by Clause (1A) of Article 121 of the FC resulting in the exclusion of jurisdiction of the Civil Courts over matters within the jurisdiction of the Syariah Courts. The amendment to the FC was made in order to avoid conflict between decisions of the Syariah Courts and the Civil Courts, to

give the Syariah Courts exclusive jurisdiction over matters relating to Islamic law (see *Viran a/l Nagapan v. Deepa a/p Subramaniam and other appeals* [2016] 1 MLJ 585). 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 (see *Dalip Kaur v. District Police Officer, Bukit Mertajam & Anor* [1992] 1 MLJ 1 "Dalip Kaur"). Clause (1A) of Article 121 of the FC does not constitute a blanket exclusion of the jurisdiction of the Civil Courts whenever a matter relating to Islamic law arises (see *Indira Gandhi a/p Mutho v. Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545).

[140] Coming back to the present appeal, as I have indicated earlier both the Courts below concurrently held that the Civil Court was not seized with the jurisdiction to adjudicate on the matter; it falls within the province of the Syariah Court.

[141] In view of the approach taken by the Courts below, it is crucial to appreciate precisely what this case concerns. In 2015, the Appellant filed an Originating Summons at the Shah Alam High Court under section 41 of the Specific Relief Act 1950 seeking the following declaratory orders:

(i) a declaration that the Appellant is an illegitimate person and that one Yap Ah Mooi a Buddhist was her natural mother;

(ii) a declaration that the word "parents" in paragraph *(b)* of the interpretation of "Muslim" in section 2 of the Administration of the Religion of Islam (State of Selangor) Enactment 2003 does not include the putative father of an illegitimate child; and

(iii) a declaration that the Appellant is not a person professing the religion of Islam, and that

(a) all laws made by the Legislative Assembly of the State of Selangor under the Ninth Schedule, List II, Item 1 of

the FC are of no effect on, and are not applicable to, the Appellant; and

(b) all Syariah Courts within the State of Selangor do not have jurisdiction over the Appellant.

[142] It can be seen that the Appellant's case rests on her never having been a Muslim. According to the Appellant, she has never been a Muslim in all her life. What's more, according to the Appellant she was born out of wedlock, raised by a Buddhist mother in the Buddhist faith at all times. She did not dispute that her putative father was at all material times a Muslim. In this regard, I agree with the findings of the learned Chief Justice that as the evidence stands the Appellant ought to have succeeded in her claim in the Courts below ie, that her parents being unmarried at the time of her birth renders her an illegitimate child. I also agree with the learned Chief Justice's findings that the evidence suggests the Appellant was raised in the Buddhist faith and there is nothing in the evidence to prove that the Appellant was raised a Muslim. The Appellant also averred that Muslim Laws are being and will be imposed on her unlawfully. She further averred that there's no legal basis for imposing Islamic law and Islamic morality on her.

[143] In my opinion, both the Courts below erred in failing to appreciate that the Appellant is not claiming that she is "no longer a Muslim". One crucial point needs to be made here. The present case is not a case of renunciation. It is not an "exit case". We are concern here with the question of whether the Appellant was a Muslim at birth, which is a question of law. The Courts below made an erroneous finding that the present case fell outside the Civil Courts' jurisdiction.

[144] Clearly the decision of *Lina Joy v. Majlis Agama Islam Wilayah Persekutuan dan lain-lain* [2007] 4 MLJ 585 "Lina Joy", that was relied on by the Court of Appeal is distinguishable. Lina Joy and the present case could not be more different from each other. The issue in Lina Joy

concerned the original *de facto* status of the Applicant, a Malay who was originally a Muslim, seeking to renounce her Islamic faith. Therefore, the Federal Court found that it was a matter within the Syariah Court's jurisdiction. In my opinion, where the subject matter requires a determination of whether a person is or is not a Muslim under the law, the Civil High Court has the jurisdiction to hear and decide whether the case is properly brought before the Civil Courts by evaluating the factual matrix and circumstances presented before it and also the declaration that is being sought for.

[145] Which brings me to the case of **Dalip Kaur,** where the Supreme Court heard and disposed of Dalip Kaur's appeal on its merits and found that based on evidence, her son died a Muslim. The Court did not decline to hear the appeal for an ostensible lack of jurisdiction or purport that Dalip Kaur's remedy lies elsewhere. **Dalip Kaur** is the authority for the proposition that the Civil Courts have the exclusive jurisdiction to determine whether a person is or is not a Muslim under the law; this is a question with respect to a person's legal status.

[146] On the other hand, with regards to the question of "whether a person is no longer a Muslim", there is no dispute of the person affected having been a Muslim. Under the scheme of the FC, a Muslim in our country shall be governed by Islamic personal and family law (see *Mohd Habibullah Mahmood; and Jabatan Pendaftaran Negara & 2 Ors. v. A Child & 2 Ors* [2020] 4 CLJ 731 "*Jabatan Pendaftaran Negara & 2 Ors. v. A Child & 2 Ors*"). A Muslim also becomes subject to specific offences, namely offences against the precepts of Islam to which non-Muslim is not. Being a Muslim confers one a legal status and changes the entire regime of personal law applicable to them (see *Ketua Pegawai Penguatkuasa Agama & Ors v. Maqsood Ahmad & 38 Lagi* [2020] MLJU 1259). And having been a Muslim, the person might have existing legal obligations under Muslim Laws that require determination owing to his or her apostasy. Renunciation of Islam, therefore carries specific legal consequences. It is for this reason

that where the subject matter of a cause or matter requires a determination of whether a person is no longer a Muslim, the Syariah Court has the exclusive jurisdiction to hear and determine the said subject matter, and under Clause (1A) of Art icle 121 of the FC, the Civil Court has no jurisdiction in respect of the subject matter.

[147] For all the above reasons, on the first question of law posed, I conclude that where the subject matter of a cause or matter requires a determination of "whether a person is or is not a Muslim under the law" rather than "whether a person is no longer a Muslim", the High Court has the exclusive jurisdiction to hear and determine the said subject matter. In consequence, my answer to the question is in the affirmative.

[148] What I have said so far explains why my answers to both the questions posed are in the Appellant's favour. But it does not end there. Still, I have to consider and determine whether the Appellant is entitled to the orders prayed for. First of all, in view of the factual findings made by the learned Chief Justice that I entirely concurred, there can be no issue that the Appellant is entitled to prayer (i), namely a declaration that she is an illegitimate person and that one Yap Ah Mooi a Buddhist was her natural mother. However, in my opinion, prayers (ii) and (iii) sought by the Appellant as reproduced in paragraph 14 of this judgment require further careful deliberation.

[149] Here, I get to the key point. Underlying prayers (ii) and (iii) is a foundational issue that is of critical importance, namely, whether the Appellant was a Muslim at birth. The answer to this question will have a direct bearing on the prayers sought by the Appellant. On this, the learned Chief Justice made an important observation, *"It is thus necessary to now examine the factual matrix of the case to determine whether the plaintiff is, on the evidence, a Muslim to begin with. If she is not, then in accordance with the principles established earlier, this Court can grant her the declaration she seeks. If she is a Muslim by original faith, then the matter*

will be for the exclusive jurisdiction of the Syariah Court and this Court would not have the jurisdiction to grant her the reliefs sought to the extent that they relate to renunciation"

[150] This key question encompasses legal and religious consequence. This question, as I see it, requires the Civil Court to make a decision on a question on Islamic law. The Civil High Court is not prohibited by Clause (1A) of Article 121 of the FC to hear and determine this issue. In the case of *Majlis Agama Islam Pulau Pinang v. lsa Abdul Rahman and The Others* [1992] 2 MLJ 244, three out of four orders prayed for required decisions to be made in accordance with Islamic law, including waqf. Only one, injunction, need not be decided in accordance with Islamic law. The Supreme Court ruled that the High Court has jurisdiction to hear the case. The Civil Court is not prohibited by Clause (1A) of Article 121 of the Federal Constitution to hear and determine any question on Islamic law.

[151] In determining this question, a key point to remember is that the Appellant is an illegitimate child born to a Buddhist mother and her putative father is a person who professes the religion of Islam. I am mindful that section 111 of the 2003 Enactment states that where a child is born to a woman who is married to a man more than six qamariah months from the date of the marriage or within four qamariah months after dissolution of the marriage either by the death of the man or by divorce, and the woman not having remarried , the *nasab* of the child is established in the man, but the man may, by way of *li'an* or imprecation, disavow or disclaim the child before the Court. It cannot be disputed that upon a plain reading of the provision a child born out of wedlock is illegitimate and therefore the *nasab* of the child could not be established in the father.

[152] What then is the meaning of the word *nasab?* It appears the word has specific meaning in the Islamic law context. According to Kamus Dewan Edisi keempat the word *"Nasab" is 'pertalian keluarga, keturunan (terutama daripada sebelah bapa). Contohnya, nasab bapa pertalian*

keluarga di sebelah bapa; nasab ibu pertalian keluarga di sebelah ibu; penasaban hal yang berkaitan dengan nasab: ini berkaitan dengan pewalian, pewansan, dan pergaulan dalam keluarga ". In the case of *A Child & Ors v. Jabatan Pendaftaran Negara & Ors* [2017] 4 MLJ 440, the Court of Appeal at page 452 referred, among others , to a fatwa issued by the *Jawatankuasa Fatwa Majlis Kebangsaan ('the National Fatwa Committee)* in 2003 which provides as follows:

> *'The 2003 Fatwa*
>
> *(ii) Muzakarah Jawatankuasa Fatwa Majlis Kebangsaan bagi Hal Ehwal Ugama Islam Malaysia Kali ke 57 yang bersidang pad* a *10.6.2003 telah membincangkan mengenai Anak Tak Sah Taraf Muzakarah telah memutuskan seperti berikut:*
>
> *1. Anak yang dilahirkan di luar nikah sama ada akibat zina atau rogol dan dia bukan daripada persetubuhan syubhah atau bukan daripada anak perhambaan.*
>
> *2. Anak dilahirkan kurang dari 6 bulan 2 lahzah (saat) mengikut Takwim Qamariah daripada tarikh tamkin (setubuh).*
>
> *b. Anak tak sah tarat tidak boleh dinasabkan kepada lelaki yang menyebabkan kelahirannya atau kepada sesiapa yang mengaku menjadi bapa kepada anak tersebut. 0leh itu, mereka tidak boleh pusaka mempusakai, tidak menjadi mahram dan tidak boleh menjadi wali."* (emphasis added)

[153] It is significant to note that with regard to the term *nasab,* both the Kamus Dewan and the 2003 Fatwa made no reference of the religious status of the illegitimate child. We were not referred to any authority on this point. In my research, I did not find any authority or literature addressing this issue directly to the point. It would appear that in relation to the term

'nasab' it is more generally understood to relate merely to issues of custody, guardianship, legitimacy, succession, inheritance and rights to a putative's title or surname.

[154] I do not think we can extract a principle of Islamic law from the provisions of section 111 of the 2003 Enactment with certainty that the religious status of the illegitimate child born out of wedlock follows the religion of the natural mother at the time of birth and not the religion of the putative father who incidentally is a Muslim. In a matter that has a far-reaching ramification, it is imperative that there must be a degree of certainty in our decision. Granted that section 111 of the 2003 Enactment applies to the Appellant's putative father (it remains undisputed that he's a Muslim) to strip him of *nasab* from the Appellant, still I do not think that it is appropriate for a Civil Court dealing with the religious status of the Appellant at the time of birth to merely decide on the terms of the provision without having an appreciation and understanding of the rules of Islamic jurisprudence .

[155] The question pertaining to the religious status of the Appellant at the time of birth transgresses into the realm of Islamic law, which needs serious consideration, proper scrutiny and proper interpretation of such law. Unquestionably, when the legal question of religious status is concerned, it bears spiritual and theological undertones. In my opinion, the Civil Court on its own is not qualified to determine this issue. It bears emphasizing that Islamic law is derived from the primary sources i.e. the Holy Quran and the Hadith. In addition, there are other secondary sources of Islamic law, for example the consensus of the religious scholars *(ijma)* and the authoritative rulings *(fatwa)* (for a discussion on the sources of Islamic law see the judgment of Mohd Zawawi Salleh FCJ in *JRI Resources Sdn Bhd v. Kuwait Finance House (Malaysia) Bhd; President Of Association Of Islamic Banking Institutions Malaysia & Anor (Interveners)* [2019] 5 CLJ 569 at 626-627 and **The Administration of Islamic Law in Malaysia by Professor Ahmad Mohamed Ibrahim, Institute of Islamic**

Understanding Malaysia at page 37) . Moreover, due to difficult theological doctrinal differences, there are diverse interpretations of Islamic law (see the judgment of Rohana Yusuf PCA in the case of *Jabatan Pendaftaran Negara & 2 Ors. v. A Child & 2 Ors*). Hence, this specific question on Islamic law is outside the ordinary competency of a Civil Court. In my opinion, unless it is an established principle of Islamic law and there is certainty on the matter, judges in the Civil Court should not take upon themselves to decide on this matter without expert opinion, as we are not sufficiently equipped to decide on it.

[156] In a matter so fundamental and important as to the religious status of a person, for this Apex Court to decisively and conclusively determine the issue which is without precedent, I am of the opinion that to remove any doubt it is advisable the Civil Court obtains the opinion of qualified and eminent Islamic scholars who are properly qualified in the field of Islamic jurisprudence to provide opinion in accordance with religious tenets and principles, to assist the Court in determining the issue. Above all else, this is to ensure that our decision is not contrary to Islamic law and it is in conformity with the Islamic law jurisprudence. The point I want to make is this: while we are competent to adjudicate the matter and to rule on this foundational issue, it must not be without the assistance of Islamic jurists after consideration of Islamic law. With this in perspective, in my opinion, the expert opinion given by a Fatwa Committee is relevant evidence to be considered in deciding with certainty the issue before us. In this regard, learned counsel for the Appellant Datuk Seri Gopal Sri Ram in his written submission has brought to our attention the 2003 Enactment that provided an exclusive provision for the Civil Court to avail itself to seek the opinion of the Syariah Committee if any question on Hukum Syarak or Islamic law calls for a decision. Section 53 of the 2003 Enactment reads:

> *"Request for opinion of Fatwa Committee*
>
> *53. If, in any Court other than* a *Syariah Court any question on*

Hukum Syarak calls for a *decision, the Court may request for the opinion of the Fatwa Committee on the question, and the Mufti may certify the opinion of the Fatwa Committee to the requesting Court".*

[157] In addition, Datuk Seri Gopal Sri Ram carefully traced the legal as well the historical background of similar provision even before the Federation of Malaya Agreement 1948 that allowed the Civil Courts to refer questions relating to Islamic law or Malay custom to the State Council for determination [citing Muhammadan Law and Malay Custom (Determination) Enactment 1930 (Cap. 196, Federated Malay States, Muhammadan Law Determination Enactment No. 27/1919 (State of Johore) and Administration of Muslim Law Enactment 1952]. Presently, almost all State Legislatures have made such laws in their respective Administration of Islamic law or Religious Council Enactments (see for example Council of the Religion of Islam and Malay Custom, Kelantan Enactment 1994 (section 36(5)), Administration of the Religion of Islam (State of Malacca) Enactment 2002 (section 41), Administration of the Religion of Islam (Negeri Sembilan) Enactment 2003 (section 53), Administration of the Religion of Islam (Perak) Enactment 2004 (section 42), Sabah Fatwa Enactment 2004 (section 13), Majlis Islam Sarawak Ordinance 2001 (section 38) and Administration of Islamic Religious Affairs (Terengganu) Enactment 2001 (section 53).

[158] The next point that Datuk Seri Gopal Sri Ram made is quite important. He made the point that by availing itself to such laws when deciding disputes where a Hukum Syarak or Islamic law question is raised, the Civil High Courts will promote certainty in the law, prevent additional litigation at the Syariah Courts and preserve access to justice for persons who are not Muslims.

[159] Indeed, such recourse has been made in **Dalip Kaur.** In taking this recourse, the Supreme Court adhered firmly to the State law in Kedah ie, section 37(4) of the Administration of Muslim Law Enactment (Kedah)

1962: that "[i]f in any Civil Court any question of Muslim law falls for decision ...the question shall be referred to the Fetua Committee which shall ...give its opinion thereon and certify such opinion to the requesting court". At the hearing of the appeal the Supreme Court remitted the case to the High Court for the learned Judicial Commissioner to refer certain questions of Islamic law that arose to the Fatwa Committee under section 37 of the Enactment. The expert opinion given by the Fatwa Committee was relevant evidence in deciding whether Dalip Kaur's son's purported conduct amounted to apostasy in Islam. The High Court and the Supreme Court accepted the opinion.

[160] In the same vein, in the case of *Majlis Agama Islam Pulau Pinang v. lsa Abdul Rahman,* the Supreme Court held that when a Civil Court hears a claim for an order (and the order that is applied for did not fall within the jurisdiction of the Syariah Court to issue), the Civil Court should hear the claim and if, in the course of such hearing, a question regarding 'hukum syarak' should arise the parties involved may call in experts in the religion of Islam to give evidence at the hearing; or the Court can refer the questions to the Fatwa Committee concerned for certainty on the matter.

[161] Nevertheless, the opinion does not bind the Civil Court. It is therefore for the Court to decide whether to accept the expert evidence or otherwise. The opinion should be considered and serves as guiding principles. The final decision of the matter remains with the Court. The opinion is relevant only in so far as it can assist the court in forming an opinion upon the issue in this case.

[162] It is with all the above principles in mind that before granting prayers (ii) and (iii) sought by the Appellant, the opinion of the Fatwa Committee should first be obtained. In the interest of justice and in order not to prolong the proceedings any longer than it should, instead of remitting the matter to the High Court, I would request for the opinion of the Fatwa Committee of the State of Selangor pursuant to section 53 of the 2003 Enactment

pertaining to the question whether or not the Appellant was a Muslim at the time of birth.

[163] In conclusion, in view of all the above, the Appellant's appeal is allowed and the orders of the Courts below are hereby set aside. An order is granted in terms of prayer (i), namely a declaration that the Appellant is an illegitimate person and that one Yap Ah Mooi, a Buddhist is her natural mother. However, as I do not have the benefit of the opinion of the Fatwa Committee of the State of Selangor pursuant to section 53 of the 2003 Enactment, it is with deep regret that I am unable to make any orders in respect of prayers (ii) and (iii) sought by the Appellant.

[164] My learner sister Justice Hasnah Mohammed Hashim has read this judgment in draft and has expressed her agreement with it.

DATED : 5 FEBRUARY 2021

(AZAHAR BIN MOHAMED)
Chief Judge of Malaya

COUNSEL:

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For the 2nd respondent/defendant – Abdul Rahim Sinwan, Zainul Rijal Abu Bakar, Azman Marsaleh; M/s Zaimul Rijal

For the amicus curiae (Attorney general's chamber) – Suzana Atan, Shamsul bin Bolhassan, Senior Federal Counsel

For the amicus curiae (SUHAKAM) – Mansoor Saat; M/s Mansoor Saat & Co.

For Malaysian Consultive Counsil of Buddhism, Christianity, Sikhsim and Taosim, MCCBCHST (Watching Brief) – Phillip Koh Tong Ngee; M/s Mah-Kamariah & Philip Koh