Daud bin Mamat & Ors v Majlis Agama Islam & Anor

HIGH COURT (KOTA BHARU) — ORIGINATING SUMMONS NO 24–319, 320, 321 AND 322 OF 2000
SURIYADI J
25 FEBRUARY 2001

Civil Procedure *— Declaration — Application for — Declaration for right to profess and practise religion of choice*

Constitutional Law *— Fundamental liberties — Freedom of religion — Plaintiffs voluntarily declared themselves as having left the Islamic faith — Whether the act of exiting from a religion may be equated with the right 'to profess and practise' one's religion — Federal Constitution art 11(1)*

Islamic Law *— Apotasy — Jurisdiction of Syariah Court — Whether State's administration of Islamic Law Enactment conferred jurisdiction on Syariah Court to deal with conversion out of Islam — Whether matters affecting the plaintiff's right fell within the jurisdiction of the High Court or Syariah Court*

The plaintiffs who are of Kelantanese descent, of Malay parentage were at the initial stages convicted and sentenced to jail for heresay. Appeals were filed but to no avail, except that the Religious Court of Appeal (Mahkamah Rayuan Syariah) had modified the sentences, in that the imprisonment orders were set aside and the plaintiffs were required to appear at the kadi's office every month for three years, whereupon they were required to declare their regrets in line with Islamic tenets. The plaintiffs had failed to adhere to these new instructions, resulting in fresh charges being preferred against them ('the first charges'). The matter culminated in their convictions and imprisonment. The plaintiffs did not file any appeals. On 12 November 2000, the plaintiffs informed the court that with effect from 16 August 1998, they had already apostatized. Founded upon this confession, they were charged for offences pursuant to s 102(3) of the Enakmen Majlis Agama Islam dan Adat Istiadat Melayu Kelantan 1994 ('the second charges'). The second charges were still pending. The plaintiffs then filed four originating summons in the High Court of Malaya at Kelantan praying for several declarations, inter alia, the right to profess and practise their religion of choice. The premise of their prayers, inter alia, was art 11(1) of the Federal Constitution. They also alleged that as they had apostatized, the Enakmen Majlis Agama Islam dan Adat Istiadat Melayu Kelantan 1994 which provided the powers for the Syariah Court, to decide whether they had indeed left the religion of Islam, was henceforth inapplicable to them. The issues for determination were whether: (i) the plaintiffs or the matter affecting the rights of the plaintiffs fell within the jurisdiction of the High Court of Malaya or the Syariah Court; (ii) art 11(1) of the Federal Constitution, adverted to was applicable in the circumstances of the case; and (iii) in the circumstances of the case, even though the court has the discretionary powers pursuant to s 41 of the Specific

Relief Act 1950, the declaratory orders sought ought to be entertained.

Held, dismissing the originating summons were with costs:

(1) The plaintiffs lacked actual 'grievances' upon which to found the declaration applications. It would have been improbable that the grievances could have been connected to the conviction and imprisonment orders of the first charges as no appeals were filed against them. Similarly, the second charges could not have been the basis either, as those charges were and are still awaiting trial. To advert to the second charges would be unacceptably premature. The relevant question that really need to be answered beforehand, for the purpose of this case, is whether at the time of filing the orginating summons the plaintiffs were muslims or not? This is a question of fact and law. As the plaintiffs had alleged that they had renounced their Muslim faith, from their point of view they had expected themselves to be safely outside the ambit of the Syariah Court and the relevant religious enactments. To answer this pertinent question of their religious status, an appreciation of the relevant laws, read together with the above facts is unavoidable (see pp 399C–E, 400G–H).

(2) The correct approach in the face of a challenge to jurisdiction, is to look at the State Enactments to see whether or not the Syariah Courts have been expressly conferred jurisdiction on a given matter; *Soon Singh Bikar Singh v Pertubuhan Islam Malaysia (Perkim) Kedah & Anor* [1999] 1 MLJ 489 followed. The said s 102(1) of the Enakmen Majlis Agama Islam dan Adat Istiadat Melayu Kelantan 1994 provides for a finding of fact exercise, for purposes of ascertaining whether a Muslim respondent, and in this case, the plaintiffs, had indeed apostatized. Section 102(2) provides that a person is still deemed a Muslim until confirmed by the Syariah Court as having apostatized. The matter of apostasy has been dealt with by the Enakmen Majlis Agama Islam dan Adat Istiadat Melayu Kelantan 1994. As the plaintiffs were yet to be found guilty of the second charges of apostasy, what with the deeming provision available, for all intents and purposes, the plaintiffs were still Muslims. That being so, the plaintiffs being legally Muslims would still remain within the jurisdiction of the Syariah Court, and thus outside the High Court jurisdictional purview (see p 401A–C, E, 401I–402A).

(3) The issue of the plaintiffs having been prevented from practising their religion of choice, really did not exist here. In fact the complaints actually revolved around the issue of their right to apostate. It was undisputed that the plaintiffs had voluntarily declared themselves as having left the Islamic faith. How could their constitutional rights to profess and practise their supposed religion of choice have been compromised or infringed, when their actions indicated otherwise? The act of exiting from a

religion was certainly not a religion, or could be equated with the right 'to profess and practise' their religion. To seriously accept that exiting from a religion may be equated to the latter two interpretations, would stretch the scope of art 11(1) of the Federal Constitution to ridiculous heights, and rebel against the cannon of construction. Hence, the contention of the plaintiffs that their rights pursuant to art 11(1) of the Federal Constitution had been infringed was rejected (see p 402C–E).

[**Bahasa Malaysia summary**

Plaintif-plaintif adalah keturunan Kelantan, beribubapakan orang Melayu telah pada peringkat awal disabitkan dan dihukum penjara kerana dengar cakap. Rayuan-rayuan telah difailkan tetapi sia-sia sahaja, kecuali di mana Mahkamah Rayuan Syariah telah mengubah hukuman-hukuman tersebut, di mana perintah-perintah pemenjaraan diketepikan dan plaintif-plaintif dikehendaki hadir di pejabat kadi setiap bulan selama tiga tahun, di mana mereka dikehendaki membuat pengakuan tentang rasa sesal mereka sejajar dengan rukun Islam. Plaintif-plaintif telah gagal mematuhi arahan-arahan baru ini, akibatnya tuduhan-tuduhan baru dibuat terhadap mereka ('tuduhan-tuduhan tersebut'). Perkara tersebut berakhir dengan sabitan-sabitan dan pemenjaraan mereka. Plaintif-plaintif tidak memfailkan apa-apa rayuan. Pada 12 November 2000, plaintif-plaintif memberitahu mahkamah bahawa mula berkuat kuasa daripada 16 Ogos 1998, mereka telahpun murtad. Berdasarkan pengakuan ini, mereka telah dituduh kerana kesalahan-kesalahan menurut s 102(3) Enakmen Majlis Agama Islam dan Adat Istiadat Melayu Kelantan 1994 ('tuduhan-tuduhan kedua'). Tuduhan-tuduhan kedua tersebut masih belum selesai. Plaintif-plaintif kemudiannya telah memfailkan saman-saman pemula mereka di Mahkamah Tinggi Malaya di Kelantan memohon beberapa deklarasi, antara lain, hak untuk menganut dan mengamal agama pilihan mereka. Permohonan-permohonan mereka adalah berdasarkan, antara lain, perkara 11(1) Perlembagaan Persekutuan. Mereka juga mendakwa bahawa memandangkan mereka telah murtad, Enakmen Majlis Agama Islam dan Adat Istiadat Melayu Kelantan 1994 yang memperuntukkan kuasa-kuasa bagi Mahkamah Syariah, untuk memutuskan sama ada mereka telah sememangnya keluar daripada agama Islam, adalah mulai dari saat itu tidak terpakai ke atas mereka. Persoalan-persoalan untuk ditentukan adalah sama ada: (i) plaintif-plaintif atau perkara yang menjejaskan hak-hak plaintif-plaintif jatuh di dalam bidang kuasa Mahkamah Tinggi Malaya atau Mahkamah Syariah; (ii) perkara 11(1) Perlembagaan Persekutuan, yang telah dirujuk adalah terpakai di dalam keadaan-keadaan kes ini; dan (iii) di dalam keadaan-keadaan kes ini, walaupun mahkamah mempunyai kuasa budi bicara menurut s 41 Akta Relif Spesifik 1950, perintah-perintah deklarasi tersebut yang dipohon sepatutnya dilayan.

Diputuskan, menolak saman-saman pemula tersebut dengan kos:

(1) Plaintif-plaintif kekurangan 'kekilanan' yang sebenar di mana ditemui pada permohonan-permohonan deklarasi tersebut. Ia tidak berapa munasabah jika kekilanan tersebut dikaitkan dengan sabitan dan perintah-perintah pemenjaraan tuduhan-tuduhan pertama kerana tiada rayuan difailkan terhadap mereka. Begitu juga, tuduhan-tuduhan kedua tidak boleh menjadi dasar juga, kerana tuduhan-tuduhan tersebut sedang dan measih menunggu perbicaraan. Di dalam merujuk tuduhan-tuduhan kedua ia tidak boleh diterima pra masa. Persoalan relevan yang perlu dijawab terlebih dahulu, bagi tujuan kes ini, adalah sama ada pada masa pemfailan saman pemula plaintif-plaintif masih muslim atau tidak? Ini merupakan persoalan fakta dan undang-undang. Memandangkan plaintif-plaintif telah mendakwa bahawa mereka telah meninggalkan kepercayaan muslim mereka, daripada pandangan mereka, mereka menjangkakan mereka telah selamat di luar bidang Mahkamah Syariah dan enakmen-enakmen agama berkaitan. Bagi menjawab persoalan penting ini tentang status agama mereka, satu kesedaran berhubung undang-undang berkaitan, dibaca bersama dengan fakta-fakta di atas tidak boleh dielakkan (lihat ms 399C–E, 400G–H).

(2) Pendekatan yang betul apabila berhadapan dengan cabaran keadilan, adalah untuk melihat Enakmen-enakmen Negeri untuk melihat sama ada Mahkamah Syariah dengan jelas mempunyai bidang kuasa ke atas perkara tersebut; *Soon Singh Bikar Singh v Pertubuhan Islam Malaysia (Perkim) Kedah & Anor* [1999] 1 MLJ 489 diikut. Seksyen 102(1) Enakmen Majlis Agama Islam dan Adat Istiadat Melayu Kelantan 1994 memperuntukkan satu ujian penemuan fakta, bagi tujuan menentukan sama ada seorang responden Muslim, dan di dalam kes ini, plaintif-plaintif, sememangnya murtad. Seksyen 102(2) memperuntukkan bahawa seseorang masih dianggap seorang Muslim sehingga disahkan oleh Mahkamah Syariah sebagai telah murtad. Perkara murtad telahpun dinyatakan di dalam Enakmen Majlis Agama Islam dan Adat Istiadat Melayu Kelantan 1994. Memandangkan plaintif-plaintif masih belum didapati bersalah terhadap tuduhan-tuduhan kedua mengenai murtad tersebut, apa lagi dengan peruntukan yang ada, bagi semua niat dan tujuan, plaintif-plaintif masih Muslim. Jika begitu, plaintif-plaintif yang masih secara sah Muslim akan kekal berada dalam bidang kuasa Mahkamah Syariah, dan oleh itu di luar skop bidang kuasa Mahkamah Tinggi (lihat ms 401A–C, E, 401I–402A).

(3) Tiada isu bahawa plaintif-plaintif tidak dibenarkan menganuti agama pilihan mereka. Aduan mereka sebenarnya adalah mengenai isu hak mereka untuk meninggalkan agama mereka. Ia tidak dipertikaikan bahawa plaintif-plaintif telah mengisytiharkan yang mereka telah meninggalkan agama Islam. Bagaimanakah hak-hak perlembagaan mereka untuk menganuti dan mengamal

agama pilihan mereka boleh dijejaskan ataupun dilanggar sedangkan tindakan mereka menunjukkan sebaliknya? Peninggalan sesuatu agama bukan merupakan suatu agama ataupun boleh disamakan dengan hak 'untuk menganuti dan mengamalkan' agama mereka. Untuk menerima bahawa meninggalkan sesuatu agama adalah sama dengan tafsiran-tafsiran tersebut akan terlalu meluaskan skop perkara 11(1) Perlembagaan Persekutuan dan menyalahgunakan undang-undang. Dengan itu, perbalahan plaintif-plaintif bahawa hak-hak mereka mengikut perkara 11(1) Perlembagaan Persekutuan telah dilanggar telah ditolak (lihat ms 402C–E).]

Notes

For cases on declaration generally, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1497–1536.

For a case on apotasy, see 8 Mallal's Digest (4th Ed, 1999 Reissue) para 380.

For cases on freedom of religion, see 3(1) *Mallal's Digest* (4th Ed, 2000 Reissue) paras 1536-1544.

Cases referred to

Dalip Kaur v Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor [1992] 2 MLJ 425 (refd)

Gouriet v Union of Post Office Workers and Ors [1977] 3 All ER 70 (refd)

Government of Malaysia v Lim Kit Siang [1988] MLJ 12 (refd)

Kuluwante v Government of Malaysia & Anor [1978)]1 MLJ 92 (refd)

Ng Siew Pian v Abd Wahid bin Abu Hassan, Kadi Daerah Bukit Mertajam & satu yang lain [1992] 2 MLJ 425 (refd)

Mohamed Habibullah bin Mahmood v Faridah bte Dato' Talib [1992] 2 MLJ 793 (refd)

Pedley v Majlis Ugama Islam Pulau Pinang & Anor [1990] 2 MLJ 307 (refd)

Ramah bte Taat v Laton bte Malim Sutan [1927] 6 FMSLR 128 (refd)

Soon Singh Bikar Singh v Pertubuhan Kebajikan Islam Malaysia (Perkim) Kedah & Anor [1999] 1 MLJ 489 (folld)

Tan Sri Othman Saat v Mohamed bin Ismail [1982] MLJ 177 (refd)

Legislation referred to

Enakmen Majlis Agama Islam dan Adat Istiadat Melayu Kelantan 1994 s 102(1), (2)

Enakmen Majlis Ugama dan Adat Istiadat Melayu Kelantan 1966 s 69

Enakmen Prosedur Jenayah Syariah 1983 s 132(5)

Federal Constitution arts 4, 11(1), 74, 95B(1)(a), 121(1A)

Rules of the High Court 1980 O 15 r l6

Specific Relief Act 1950 s 41

Undang-Undang Majlis Ugama Islam Kelantan dan Adat Istiadat Melayu bil 2/66

Haris bin Mohamed Ibrahim (*Jahaberdeen bin Mohd Yunus* and *Mohana Kumar* with him) for the plaintiffs.

Jalaldin bin Hussain (*Nik Ahmad Marzuki bin Nik Mohamed, Azhar bin Mohamed, Abdul Rasid bin Sudin* and *Wan Abdullah Thani bin Wan Yusof* with him) for the respondents.

Suriyadi J. : On 25 February 2001, I dismissed the above four originating summons. As the order when pronounced was in Malay, for practical purposes of the current judgment, I herewith reproduce the interpreted version:

> Four separate originating summons were filed by Daud bin Mamat, Kamariah bte Ali, Mohamed bin Ya and Mad Yaacob bin Ismail ('the plaintiffs') at the Kota Bharu (Kelantan) registry of the High Court of Malaya, praying for several declarations. Among them was the right to profess and practise their religion of choice. The premise of their prayers, inter alia, was art 11(1) of the Federal Constitution. In brief they alleged that as they had apostatized, the Enakmen Majlis Agama Islam dan Adat Istiadat Melayu Kelantan 1994 which provided the powers for the Syariah Court, to decide whether they had indeed left the religion of Islam, was thenceforth inapplicable to them.
>
> The affidavits confirmed that the plaintiffs at the initial stages had been convicted and sentenced to jail for heresy. Appeals were filed but to no avail, except that the Religious Court of Appeal (Mahkamah Rayuan Syariah) had modified the sentences, in that the imprisonment orders were set aside. The Syariah High Court substituted the orders whereby under the varied orders they were required to appear at the Kadi's office every month for three years, whereupon they were required to repent (melafazkan taubat). To cut the story short, the plaintiffs had failed to adhere to these new instructions, resulting in fresh charges being preferred against them ('first charges'). The matter culminated in their convictions and imprisonment. This time the plaintiffs did not file any appeals.
>
> On 12 November 2000, the plaintiffs informed the court that with effect from 16 August 1998, they had already apostatized. Founded upon this confession, they were charged for offences pursuant to s 102(3) of the Enakmen Majlis Agama Islam dan Adat Istiadat Melayu Kelantan 1994 ('the second charges'). To date the second charges are still pending. To wind up this sub-issue, matters that are connected to s 102(2), among them substantive points of fact and law pertaining to the confirmation of their apostasy, therefore are still at large and premature. That being so, as they had not appealed against the first charges, what with the second charges still pending, what then are their grievances or reasons to pray for the declarations before me? For certain there are none.
>
> Apart from the above legal posers, notably on the ground that the plaintiffs have not been confirmed as having apostatized, in accordance with procedures laid down by the Enakmen Majlis Agama Islam dan Adat Istiadat Melayu Kelantan 1994, they thus are deemed to be Muslims and hence constitutionally and statutorily subject to the jurisdiction of the Syariah Court (s 102(2)). That being so, the High Court of Malaya will be powerless to adjudge on the matters brought by them (see art 121(1A) of the Federal Constitution).

Article 11, in brief reads that every person has the right to profess and practise his religion, and subject to cl (4), to propagate it. Having scrutinized the facts and the latter article, I am of the opinion that the allegation of their rights having been compromised or infringed, supposedly guaranteed by the Federal Constitution, had no nexus with art II. It was undisputed that the plaintiffs had voluntarily declared themselves as having left the Islamic faith. How could their constitutional rights to profess and practise their religion of choice have been compromised when their actions indicated otherwise? What was certain was that they did not wish to profess and practise the Muslim religion. The act of exiting from a religion is not a religion, and hence could not be equated with the right 'to profess and practise' their religion. On that score, the law alluded to by the plaintiffs was off the mark, and irrelevant to their grievances.

On the above grounds, and without any hesitation I hereby dismiss the originating summons with costs.

The backdrop of this decision originated from four originating summons, which were respectively filed by the above plaintiffs. As the prayers sought for were similar in nature, I decided to undertake some case management exercise, whereupon after having extricated the consent of all parties, I decided that all the four originating summons be dealt with simultaneously. As they were quite similar in every aspect, I decided to launch off with the case of *Daud bin Mohamed*, ie Originating Summons No 24–319–2000 as a test case, with the outcome being applicable on the rest.

In brief the eight prayers or declarations sought were that:

1 the plaintiffs had the constitutional right to profess and practise the religion of their choice under art 11(1) of the Federal Constitution;

2 art 11(1) of the Federal Constitution holds sway over any other laws, be they Federal or State as regards the choice and practise of the religion;

3 the absolute right and freedom of the plaintiffs under the said article to profess and practise their religion of choice, could only be decided by themselves alone and not subject to the declaration or confirmation of anybody else, be they individual or otherwise;

4 any provision in the law, be they Federal or State, that does provide for the definition of a Muslim but does not recognize art 11(1) of the Federal Constitution is void;

5 any law, be they Federal or State pertaining to the religion of Islam will be inapplicable to the plaintiffs, as they had declared their apostasy and hence protected by art 11(1) of the Federal Constitution;

6 any law that empowers the Syariah court to decide whether they had left the religion of Islam or not, or requires a declaration from such court as a precondition before they are considered as having left the religion of Islam, contravenes art 11(1) of the Federal Constitution;

7 any provision in the law, be they Federal or State that restricts or prevents the right of the plaintiffs to declare themselves not wanting to profess, and practise the religion of Islam contravenes the said article, and hence void; and

8 pursuant to the above anticipated declaratory orders, the defendants or their agents are not entitled to demand or impose any conditions before they are considered as having left the religion of Islam.

Having perused the eight declaratory orders sought, it was clear that the crux of the whole matter relate primarily to their right of professing and practising the religion of their choice. The summons distinctly adverted to s 41 of the Specific Relief Act 1950 and O 15 r l6 of the Rules of the High Court 1980 ('the RHC'). The former reads:

> 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.

Order 15 r 16 of the RHC reads:

> No action or other proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the court may make binding declarations of right, whether or not consequential relief is or could be claimed.

It is my considered opinion that the question of whether the declaration applications should be entertained or not, depends largely on the answers to these questions, viz whether:

1 the plaintiffs or the matter affecting the rights of the plaintiffs fall within the jurisdiction of the High Court of Malaya or the Syariah Court;

2 art 11(1) of the Federal Constitution, adverted to is applicable in the circumstances of the case; and

3 whether in the circumstances of the case, even though the court has the discretionary powers pursuant to the above s 41 of the Specific Relief Act 1950, the declaratory orders sought ought to be entertained?

To answer the above questions, it is necessary for me to trace the history and the actions of Parliament, which eventually culminated in the amendment of parts of the Federal Constitution. In *Ramah bte Taat v Laton bte Malim Sutan* [1927] 6 FMSLR 128, Thorne J had occasion to say:

> Although I have held that the Supreme Court has jurisdiction to deal with such cases as the present, the further question emerges as to whether or not the Supreme Court is the proper tribunal for dealing with these cases and whether it would not be more consonant with the views of those professing the Mohammedan Religion that His Highness the Sultan in Council in each state should establish special courts for dealing with these cases…

Come A704 of 1988, effective on 10 June 1988, the promulgation of art 121(1A) of the Federal Constitution, ousted the High Courts in Malaya and Sabah and Sarawak, over matters which fall within the jurisdiction of the Syariah courts. There is no shortage of cases that have acquiesced to this

provision, among them *Dalip Kaur v Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor* [1992] 2 MLJ 425. Under List II of the State List (arts 74, 95B(1)(a) of the Federal Constitution) has succinctly delineated the powers of the Syariah court, in short over persons professing the religion of Islam. The Supreme Court in *Mohamed Habibullah bin Mahmood v Faridah bte Dato' Talib* [1992] 2 MLJ 793 under held I clearly established that:

> The intention of Parliament by art 121(1A) of the Federal Constitution is to take away the jurisdiction of the High Courts in respect of any matter within the jurisdiction of the Syariah Court.

The legislation of art 4 of the Federal Constitution, which entrenches the supreme position of the Federal Constitution, merely reconfirmed the lofty position of the above art 121(1A) of the Federal Constitution. With the latter article in existence any jurisdictional conflicts, once and for all, between the civil and the Syariah Courts is avoided. Taking the matter a step further and from a different perspective, the religious court's power, in the same vein similarly cannot be invoked against non-Muslims (see *Ng Siew Pian v Abd Wahid bin Abu Hassan, Kadi Daerah Bukit Mertajam & satu yang lain* [1992] 2 MLJ 425).

Before delving into the technical matters, I need to resolve a procedural or 'the sufficiency of interest' factor first. That being so, a perusal of the facts becomes exceedingly necessary. The affidavits clearly revealed that they are of Kelantanese descent, of Malay parentage, and had been born into the faith of Islam. In fact, the supporting affidavits of the plaintiffs had reiterated that they had been brought up within the environment and disciplines of Islam, and had always professed and practised the religion of Islam. The plaintiffs admitted that they had been dragged before the Syariah High Court of Kelantan, to face the charges of having carried out acts and practices that were in contravention of the Islamic law. They were found guilty under s 69 of the Undang-Undang Majlis Ugama Islam Kelantan Dan Adat Istiadat Melayu bil 2/66, and were sentenced to 20 months imprisonment each.

Pursuant to the convictions and sentences, they filed the relevant appeals but were unsuccessful, as in 1996 the Mahkamah Syariah Kelantan confirmed the convictions. Only the imprisonment sentences were disturbed. In substitution of those incarceration orders, they were thenceforth required to appear at the Kadi's office every month for three years, whereupon they were to declare their regrets in line with Islamic tenets. Unfortunately, after sometime they failed to appear at that office, alleging that the text of the 'taubat'' (regret) declarations were yet to be ready for them to utter. For those breaches, charges (referred to as the 'first charges') were preferred against them. Pending the hearing of the latter charges they were released. Taking advantage of their unimpeded movement, the plaintiffs swore under oath on 24 August 1998 that with effect from 16 August 1998, they had apostatized. On 5 October 2000 they were remanded pursuant to s 132(5) Enakmen Prosedur Jenayah Syariah 1983, for non-adherence of certain instructions during the

intervening period of the first charges. One month and seven days later ie on 12 November 2000 when their cases were being mentioned, the plaintiffs informed the court that they had already renounced their Islamic faith. In spite of having being informed of that development, the court still ordered their detention, whereupon much to their chagrin on 19 November 2000 they faced new additional charges of apostasy (referred to as the second charges). On that date too, the court dealt with the first charges, resulting in the plaintiffs being sentenced to three years jail each pursuant to s 69 of the Enakmen Majlis Ugama dan Adat Istiadat Melayu Kelantan 1966, for contravening the Syariah Appeal Court orders. There were no appeals filed as against those conviction and imprisonment orders. No explanation either was proffered in their affidavits as to why none were filed. Until now too the second charges are yet to be heard. Those are the relevant facts for my consideration for purposes of this judgment.

A reading of the originating summons revealed that they lacked actual 'grievances' upon which to found the declaration applications. It would have been improbable that the grievances could have been connected to the conviction and imprisonment orders of 19 November 2000 (first charges), as no appeals were filed against them. This takes care of the alternative remedy factor (*Kuluwante v Government of Malaysia & Anor* [1978)] 1 MLJ 92). Similarly, the second charges could not have been the basis either, as those charges were and are still awaiting trial. To advert to the second charges would be unacceptably premature. Why no clear reasons were supplied, or whether the plaintiffs had mistakenly deduced at the material time that once they had renounced their faith, they would automatically be non-Muslims, is not for the court to speculate on. Based on the available facts, I miserably failed to pinpoint the plaintiffs' discernable reasons for the declaratory actions. If that were so the plaintiffs have simply prayed for a declaration of a mere legal right (*Pedley v Majlis Ugama Islam Pulau Pinang & Anor* [1990] 2 MLJ 307). Regardless of that factual reality, in that the plaintiffs are not clothed with any real grievance, as reflected in its dearth in the originating summons, recent cases have shown that courts are still willing to entertain actions that do not reveal real grievances or injury in them. Abdoolcader J, delivering the decision of the Federal Court in *Tan Sri Othman Saat v Mohamed bin Ismail* [1982] 2 MLJ 177, had occasion to say:

> There are also some recent cases in which the plaintiff was allowed to sue, even though he had no real grievance or injury at all, as they involved matters of particular public concern (*Blackburn v Attorney-General*; *Regina v Greater London Council, Ex parte Blackburn*; *Regina v Metropolitan Police Commissioner, Ex parte Blackburn*, and the reasoning seems to have been that unless the court in its discretion gave the plaintiff a hearing, then no one would bring the matter to court.

We would also refer to the very recent decision of the English Court of Appeal in *Regina v Horsham Justies, Ex parte Farquharson and Anor* where Lord Denning MR, refers (at p 446) to the principle he had endeavored to state in earlier cases which was endorsed by Lord Diplock in the House of

Lords in *Inland Revenue Commissions v National Federation of Self-Employed and Small Businesses Ltd* (at p 737) and again when he said (at p 740):

> it would, in my view, be a grave lacuna in our system of public law if a pressure group, like the Federation, or even a single public-spirited taxpayers, be prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped.

The sensible approach in the matter of locus standi in injunctions and declarations would be that as a matter of jurisdiction, an assertion of an infringement of a contractual or a proprietary right, the commission of a tort, a statutory right or the breach of a statute which affects the plaintiffs interest substantially or where the plaintiff has some genuine interest in having his legal position declared, even though he could get no other relief, should suffice.

The above liberal approach, unfortunately was not favoured by Abdul Hamid CJ in *Government of Malaysia v Lim Kit Siang* [1988] MLJ 12, as at p 31, his Lordship opined:

> In any event, as I have already noted, I would prefer the test of standing propounded by their Lordships in the Gouriet case, that is to say, the same standing rules apply whether the remedy sought is a declaration or an injunction. And, either the plaintiffs 'rights' must be at stake, or when, as in the present case, the matter does not concern private rights, the plaintiff must suffer or about to suffer damage peculiar to himself … Speaking for myself, I would hesitate to say that a mere 'legitimate grievance' or a 'real interest' in the suit will suffice to show standing to sue. Be that as it may, I would say that the decision in Tan Sri Haji Othman Saat's case was correct having regard to the facts of that particular case.

Regardless of whether I pursue the liberal approach of being satisfied based merely on the plaintiffs' legitimate or real interest, or acquiescing to the more stringent requirement of the plaintiffs private rights actually having been infringed, as canvassed by the case of *Gouriet v Union of Post Office Workers and Ors* [1977] 3 All ER 70 (followed by Abdul Hamid CJ), it will not save the plaintiffs' case. This is because, the relevant question that really needs to be answered beforehand, for purposes of this case, is whether at the time of filing the originating summons the plaintiffs were Muslims or not? This is a question of fact and law. As they had alleged that they had renounced their Muslim faith, from their point of view they had expected themselves to be safely outside the ambit of the Syariah Court and the relevant religious enactments. To answer this pertinent question of their religious status, an appreciation of the relevant laws, read together with the above facts, is unavoidable.

As the facts have already been bared above, and to avoid repetition, I now need only to unfold the relevant statutory law of apostasy in Kelantan, ie the Enakmen Majlis Agama Islam dan Adat Istiadat Melayu Kelantan 1994, with particular reference to s 102(1). Why I approach the matter from the point of view of the State Enactment, is because the Federal Court in *Soon Singh Bikar Singh v Pertubuhan Kebajikan Islam Malaysia (Perkim)*

Kedah & Anor [1999] 1 MLJ 489, in no uncertain terms held that (per Mohamed Dzaiddin FCJ (as his Lordship then was), the correct approach in the face of a challenge to jurisdiction, is to look at the state enactments to see whether or not the Syariah courts have been expressly conferred jurisdiction on a given matter. This said s 102(1) provides for a finding of fact exercise, for purposes of ascertaining whether a Muslim respondent, and in this case the plaintiffs have indeed apostatized. The state legislature in their infinite wisdom, perhaps to ensure that the exercise of ascertainment will not be prematurely defeated, had seen it fit to legislate s 102(2). In brief it provides that a person is still deemed a Muslim until confirmed by the Syariah Court as having apostatized. In an awkward way, the matter of apostasy has been dealt with by an enactment in Kelantan, as per the above Enakmen Majlis Agama Islam dan Adat Istiadat Melayu Kelantan 1994. In recognition of this, Mohamed Dzaiddin FCJ in *Soon Singh Bikar Singh* commented the following:

> The Kelantan Enactment No 4 of 1994, s l02 also provides that no person who has confessed that he is a Muslim by religion may declare that he is no longer a Muslim until a court has given its approval to that effect. Before the court gives its approval, the person shall be presumed to be a Muslim and any matter which is connected with the Religion of Islam shall be applied to him.

These provisions and the spirit behind them certainly are in line with the teachings and tenets of Islam, as the Koran is quite explicit in that if one is forced to pronounce something that amounts to apostasy, while his heart remains a Muslim, he will not be charged with it in those circumstances (Quran, ch 16: 106). Returning to the current facts, as the plaintiffs are yet to be found guilty of the second charges of apostasy, what with the deeming provision available, for all intents and purposes I have to conclude that they still are Muslims.

The down to earth legal requirement of imposing a duty upon the Syariah Court to ascertain, and not by any other person or institution, of whether a person had indeed apostatized is not only sound but practical. The jurists in the Syariah Court, apart from being conversant with religious matters, will also be in a more elevated position to make a sound judgment of the status of any would-be apostate, bearing in mind their constant interaction with the Muslim populace, If they are legally qualified that will be a plus factor. Pertaining to this matter Mohamad Yusof SCJ in *Dalip Kaur* had occasion to remark:

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

Indisputably, as the issues before me do not involve matters of interpretation of the written law of the state of Kelantan, enacted for the administration of Muslim law, of which are still within my jurisdictional purview, then by virtue of art 121(1A) of the Federal Constitution, my powers are curtailed. That being so, the plaintiffs being legally Muslims will

still remain within the jurisdiction of the Syariah Court, and thus outside my jurisdictional purview.

Apart from the above jurisdictional flaw, which could not support their applications, the plaintiffs have unwittingly alluded to art 11(1) of the Federal Constitution as the main ground of their grouses. This provision reads that every person has the right to profess and practise his religion and, subject to cl (4), to propagate it. This brief but meaningful article in crystal clear terms guarantees the right and freedom of every citizen, of whatever race or religion to profess and practise his or her beliefs unhindered. Having appreciated the above article , my next course of action is to gauge whether, any individual or institution in this country had infringed the constitutionally guaranteed religious rights of the plaintiffs in any way. After perusing the affidavits, I could not escape the conclusion that the issue of the plaintiffs having been prevented from practising their religion of choice, really did not exist here. In fact the complaints actually revolved around the issue of their right to apostate. It was undisputed that the plaintiffs had voluntarily declared themselves as having left the Islamic faith. How could their constitutional rights to profess and practise their supposed religion of choice have been compromised or infringed, when their actions indicated otherwise? The act of exiting from a religion is certainly not a religion, or could be equated with the right 'to profess and practise' their religion. To seriously accept that exiting from a religion may be equated to the latter two interpretations, would stretch the scope of art 11(1) of the Federal Constitution to ridiculous heights, and rebel against the canon of construction. On that score, I reject the contention of the plaintiffs that their rights pursuant to art 11(1) of the Federal Constitution had been infringed.

Needless to say if art 11(1) of the Federal Constitution were to read, inter alia, that 'everyone has the right to renounce or profess and practise his religion, and subject to cl (4), to propagate it', my conclusion would certainly be steered towards a different course. As it were, as the impugn article does not contain that additional hypothetical ingredient, the plaintiffs' action to resort to that article is surely misdirected and misconceived.

After due consideration, primarily on the two intertwined grounds that the plaintiffs are Muslims, thus ousting my jurisdiction over them as regards the subject matters, and what with art 11(1) of the Federal Constitution being inapplicable in the circumstances of the case, I had no hesitation in dismissing the originating summons with costs.

Originating summons dismissed with costs.

Reported by Moy Saw Han