

DALAM MAHKAMAH PERSEKUTUAN MALAYSIA
BIDANGKUASA ASAL GUAMAN NO: 2/2011

ANTARA

- 1. ZAINA ABDIN BIN HAMID @ S. MANIAM**
- 2. SURINDRAN A/L ZAINA ABDIN**
(melalui plaintif pertama sebagai ayah dan sahabat wakilnya)
- 3. MOHANASUBASH A/L ZAINA ABDIN**
(melalui plaintif pertama sebagai ayah dan sahabat wakilnya)
- 4. CHANDRIKA A/P ZAINA ABDIN**
(melalui plaintif pertama sebagai ayah dan sahabat wakilnya)

...PERAYU-PERAYU

DAN

- 1. KERAJAAN MALAYSIA**
- 2. KERAJAAN NEGERI SELANGOR**
- 3. MAJLIS AGAMA ISLAM SELANGOR**
- 4. MAJLIS PERUNDINGAN MALAYSIA UGAMA BUDDHA, KRISTIAN, HINDU DAN SIKH**

...RESPONDEN-RESPONDEN

.....
SUBMISSION OF THE 1ST RESPONDENT
.....

1. Introduction

1.1 This is a reference by the High Court Shah Alam pursuant to section 84(1) of the Courts of Judicature Act 1964. The questions posed read (page 9 and 9A of Rekod Kes Khas):

"1. Are the following paragraphs containing the definitions of "a Muslim" in section 2 of the Administration of the Religion of Islam (State of Selangor) Enactment 2003 inconsistent with Article 11 (read with Articles 3, 5, 8, 153 and Item 1, List II, 9th Schedule) of the Federal Constitution:

1.1 paragraphs (b), (c), (e) and (f), and

1.2 paragraph (d) read together with section 153?

2. Do the parents of a child under the age of 18 have the right to determine the religion of that child for all public and private purposes pursuant to Article 11 and 12(4) of the Federal Constitution?

3. Is the application of Islamic law on a person who professes himself to be a hindu but is considered a Muslim under the Islamic law inconsistent with Article 11 (read with Articles 3, 5, 8, 153 and Item 1, List II, 9th Schedule) of the Federal Constitution?

4. Does the condition that a person must first get a declaration from the State Religious Council ("Majlis Agama Islam") or the Syariah Court that he or she is no longer "a Muslim" before he or she is recognized by the relevant authorities as a person who does not

profess Islam his or her right under Article 11 (read together with Articles 5, 8, 153 and Item 1, List II, 9th Schedule) of the Federal Constitution illusory and therefore unconstitutional?

5. Is regulation 14(2) of the National Registration Regulations 1990 inconsistent with Article 11 (read together with Articles 5, 8, 153 and Item 1, List II, 9th Schedule) of the Federal Constitution and is therefore unconstitutional?"

2. Brief Facts

- 2.1 The 1st Appellant is a Malaysian of Indian origin. The 1st Appellant's father converted to Islam when he married the 1st Appellant's mother, an Indian Muslim. The 1st Appellant was born to Muslim parents.
- 2.2 The 1st Appellant is the natural and lawful father of the 2nd to 4th Appellants. The marriage of the 1st Appellant to his Hindu wife, the mother of the 2nd to 4th Appellants, was registered under the Law Reform (Marriage and Divorce) Act 1976.
- 2.3 By a Saman Pemula ("OS") dated 25.2.2002, the Appellants seek reliefs from the Shah Alam High Court for certain declarations principally that they are Hindus and henceforth shall not be caused to be identified in any manner whatsoever as Muslims or having at one time been Muslims [the full reliefs as pleaded in the Saman Pemula are at page 28-33 of Rekod Kes Khas).

3. Questions 1

3.1 Question 1 reads:

"1. Are the following paragraphs containing the definitions of "a Muslim" in section 2 of the Administration of the Religion of Islam (State of Selangor) Enactment 2003 inconsistent with Article 11 (read with Articles 3, 5, 8, 153 and Item 1, List II, 9th Schedule) of the Federal Constitution:

1.1 paragraphs (b), (c), (e) and (f), and

1.2 paragraph (d) read together with section 153?"

3.2 The only issue in Questions 1 is whether the definition of a Muslim in section 2(b), (c), (d), (e) and (f) of the Administration of the Religion of Islam (State of Selangor) Enactment 2003 is inconsistent with Article 11 (read with Articles 3, 5, 8, 153 and Item 1, List II, 9th Schedule) of the Federal Constitution.

3.3 It is the Appellant's case that because Item 1, State List, Ninth Schedule uses the words "persons professing the religion of Islam", therefore, the definition of a Muslim under section 2 of the Selangor Enactment must only be limited to the definition in paragraph (a) only, that is, "a person who professes the religion".

Section 2 of the Selangor Enactment is made pursuant to Item 1, State List, Ninth Schedule – section 2 is Intra vires Article 74(2) Federal Constitution

- 3.4 It is common ground that the word '**Muslim**' is not defined in the Federal Constitution. The definition is found in the State Enactments and federal laws for the federal territories. Section 2 of the Selangor Enactment 2003 [TAB 2, 1st Respondent Bundle of Authorities (IA(R1))] is enacted pursuant to Article 74(2) and Item 1, State List, Ninth Schedule [TAB 1, IA(R1)].
- 3.5 The Federal Court in **Latifah Mat Zin v Rosmawati Sharibun & Anor** [2007] 5 CLJ 253 [TAB 6, IA(R1)] held that Item 1, State List of the Ninth Schedule is the empowering provision for the States to enact laws on subject matters specified in Item 1 itself.
- 3.6 Item 1, State List, Ninth Schedule allows the legislation of Islamic personal law for Muslims. In **Mohamad Habibullah v. Faridah** [1992] 2 MLJ 793 [TAB 7, IA(R1)], Justice Harun Hashim said at page 803;

"Taking an objective view of the Constitution, it is obvious from the very beginning that **the makers of the Constitution clearly intended that the Muslims of this country shall be governed by Islamic family law as evident from the Ninth Schedule to the Constitution, Item 1 of the State List**-Muslim Law and personal and family law of persons professing the Muslim religion-the constitution, organisation and procedure of Muslim Courts-the determination of matters of Muslim law and doctrine and Malay custom. Indeed, Muslims in this country are governed by Islamic personal and family laws which have been in existence since the coming of Islam to this country in the 15th Century. Such laws have been administered not only by the Syariah Courts but also by the Civil Courts. What Article

121(1A) has done is to grant exclusive jurisdiction to the Syariah Courts in the administration of such Islamic laws.”

- 3.7 It is also common ground that the Syariah law is only applicable to Muslims as reflected by the limitation in Item 1 itself, to persons professing the religion Islam. ***The issue of whether one is a Muslim is significant in ascertaining whether the Syariah courts have jurisdiction over the person. This is because Item 1, List II, Ninth Schedule provides that the Syariah Courts shall have jurisdiction over persons professing the religion Islam and not over non-Muslim.***

Meaning of ‘profess’ or ‘professing the religion Islam in Item 1, State List, Ninth Schedule

- 3.8 The next issue is the meaning of profess in Item 1, State List, Ninth Schedule. In the “***Kamus Dwibahasa***” Dewan Bahasa dan Pustaka [TAB 8, IA(R1)], the word “profess” is defined in Bahasa Malaysia as “***menganut; memeluk*** (agama) – a Muslim faith, menganut agama Islam”.
- 3.9 In the ***Kamus Dewan***, Edisi Ketiga, Dewan Bahasa dan Pustaka dan ***Kamus Dwibahasa***, Oxford Fajar [TAB 9, IA(R1)], the word “***menganut***” is defined as “***menerima sesuatu ajaran*** (aliran, fahaman dsb) sebagai pegangan yang teguh, ***mengikut, menurut, memeluk*** (agama)”. Therefore, profess (“menganut”) the religion Islam means received/acquired/accepted (“menerima”), follow (“mengikut”), partake/participate (“menurut”) and embrace (“memeluk”) the religion of Islam.

3.10 The word "**menganut**" is also used in the Bahasa Malaysia text of the Federal Constitution. This can be seen clearly from the Bahasa Malaysia version of Item 1, State List [TAB 1, IA(R1)]:

"Senarai II - Senarai Negeri

1. Kecuali mengenai Wilayah Persekutuan Kuala Lumpur, Labuan dan Putrajaya, hukum Syarak dan undang-undang diri dan keluarga bagi **orang yang menganut agama Islam**, termasuk hukum Syarak yang berhubungan dengan pewarisan, berwasiat dan tidak berwasiat, pertunangan, perkahwinan, perceraian, mas kahwin, nafkah, pengangkutan, kesahatarafan, penjagaan, alang, pecah milik dan amanah bukan khairat, Wakaf dan takrif serta pengawalseliaan amanah khairat dan agama, pelantikan pemegang amanah dan pemerbadanan orang berkenaan dengan derma kekal agama dan khairat, institusi, amanah, khairat dan institusi khairat Islam yang beroperasi keseluruhannya di dalam Negeri; adat Melayu; Zakat; Fitrah dan Baitulmal atau hasil agama Islam yang seumpamanya; masjid atau mana-mana tempat sembahyang awam untuk orang Islam, pewujudan dan penghukuman kesalahan yang dilakukan oleh **orang yang menganut agama Islam** terhadap perintah agama itu, kecuali berkenaan dengan perkara yang termasuk dalam Senarai Persekutuan; keanggotaan, susunan dan tatacara mahkamah Syariah, yang hendaklah mempunyai bidang kuasa hanya ke atas **orang yang menganut agama Islam** dan hanya berkenaan dengan mana-mana perkara yang termasuk dalam perenggan ini, tetapi tidak mempunyai bidang kuasa berkenaan dengan kesalahan kecuali setakat yang diberikan oleh undang-undang persekutuan, mengawal pengembangan doktrin dan kepercayaan di kalangan **orang yang menganut agama Islam**; penentuan perkara mengenai hukum dan doktrin Syarak dan adat Melayu".

3.11 Therefore, the words ***'persons professing the religion Islam'*** in Item 1, State List, Ninth Schedule is merely a description of the category of person who professes the religion Islam and falls within the ambit of Item 1. Any other persons who do not profess (*menganut*) the religion of Islam do not fall within Item 1 and are therefore outside the jurisdiction of the Syariah Court. Therefore, the usage of the words "professing the religion of Islam" is simply to make a distinction between the Muslims and the non-Muslims as the limitation of application of the Syariah laws is only to persons professing the religion Islam. The distinction between Muslim and non-Muslim by the usage of the words "persons professing the religion Islam" is ***simply to exclude the application of the Syariah laws on persons not professing the religion Islam.***

3.12 Therefore, the word "profess" in ***'persons professing the religion of Islam'*** in the context of Item 1 **does limit the definition of a Muslim.** The definition of a Muslim is provided by section 2 of the Selangor Enactment which is made pursuant to Item 1, State List, Ninth Schedule.

3.13 ***Since section 2 is made pursuant to Item 1, State List, Ninth Schedule, it is not ultra vires Article 74.*** Justice Faiza held in *Lina Joy v Majlis Agama Islam Wilayah Persekutuan* [2004] 6 CLJ 242 [TAB 10, IA(R1)] , as follows:

"I am of the view that s 2 of the 1993 Act is enacted pursuant to art 74(2) of the FC. The enabling art 74(2) confers wide jurisdiction to the Federal Government to enact syariah law to the same extent as provided in item 1 in the State List (see para 6€ list 1, Ninth Schedule). Section 2 of the 1993 Act is directly designed for the purpose of implementing syariah laws on the Muslim and it is not in any way designed to curtail the freedom of religion under art 11(1)."

Purpose of Section 2 of the Selangor Enactment

3.14 The Selangor Enactment No. 1 of 2003 [TAB 2, IA(R1)] is an ***“Enactment to make new provisions on the administration of the religion Islam, the establishment and jurisdiction of the Syariah Courts, the establishment and functions of the Majlis Agama Islam Selangor, and other matters related thereto.”***

3.15 The legislative purpose in the Long Title of the Selangor Enactment sets out the purpose of the Enactment, which is to make laws on:

- (i) the administration of the religion Islam;
- (ii) the establishment and jurisdiction of the Syariah Courts;
- (iii) the establishment and functions of the Majlis Agama Islam Selangor; and
- (iv) other related matter on (i), (ii) and (iii) above.

3.16 Since the Enactment is only pertaining to any matters on the religion of Islam, the Enactment must also define the person who falls within the ambit of the Enactment. According to Thornton in his ***Legislative Drafting (Fourth Edition)*** at page 144-145 [TAB 11, IA(R1)] , it is said that in legislation, definition performs two functions:

- (i) The avoidance of ambiguities; and
- (ii) The avoidance, by means of abbreviation, of tedious repetition.

3.17 The author also said as follows:

“The kind of definition commonly found in legislation explicitly assigns a meaning to a word, phrase or other symbol and stipulates that throughout the law, or some specified part of the law, that

symbol is to be construed as bearing the meaning assigned to it. Definition of this kind may be classified as a stipulative definition and contrasts with lexical definition which is concerned with actual usage at some time in the past by some group of people. Stipulative definition is not bound by past usage or the limits which conventional usage has placed on the term defined. It stipulates for the future, free from the restrictions of the past.”

- 3.18 Therefore the purpose of the definition in section 2 is to avoid any ambiguities as to the persons who profess the religion Islam. It is very important simply because the Syariah law applies only to Muslim and the Syariah Courts only have jurisdiction over Muslim. Therefore, the definition section is merely to define the person who falls within the ambit of the Enactment. The High Court in **Lina Joy v Majlis Agama Islam Wilayah Persekutuan** [2004] 6 CLJ 242 [TAB 10, IA(R1)], with regards to the definition of a Muslim under section 2 of the Administration of Islamic Law Act (Federal Territories) 1993 (equivalent to section 2 of the Selangor Enactment), Justice Faiza had held that:

*The purpose of s.2 of the 1993 Act is merely to define a Muslim since the Constitution did not provide such a definition. **This is important because Syariah law is only applicable to Muslims. Without a definition provision, there would be confusion in relation to the application of the syariah law.** Without a definition section (s 2 of the 1993 Act), only then could the 1993 Act be said to be ultra vires art 11(1) since it imposes syariah law on everyone regardless of religion. Therefore, s 2 of the 1993 Act complements art 11(1) by limiting the application of the syariah law to Muslims only”*

3.19 This is crucial as section 61 of the Enactment [TAB 2, IA(R1)] provides that the jurisdiction of the Syariah High Court is over Muslims, whether in its criminal or civil jurisdiction. Without a definition section, the application of the Syariah laws may be too wide.

~~Is the definition of a Muslim in Section 2 of the Selangor Enactment in line with Islam Syarak?~~

3.20 The Appellant's case in paragraph (16) of their submission ask this question - *"The 1st Question before this Court thus asks if those additional paragraphs (b) to (f) are consistent with the phrase "person professing the religion of Islam".*

3.21 Since the word *"profess"* means *"menganut"* and the word *"menganut"* is very wide and includes received/acquired/accepted ("menerima"), follow ("mengikut"), partake/participate ("menurut") and embrace ("memeluk") the religion of Islam, it is respectfully submitted that the paragraphs (b) to (f) of section 2 Selangor Enactment is consistent with the phrase "persons professing the religion of Islam", that is *"orang yang menganut agama Islam"* in Item 1, State List, Ninth Schedule.

3.22 This is the finding of the learned trial Judge in *Lim Yoke Khoo v Pendaftaran Muallaf, Majlis Agama Islam Selangor & Yang Lain* [2006] 4 CLJ 513 [TAB 12, IA(R1)], where the present impugned provision was challenged. Although the case concerns with a Muallaf – a Muslim convert, it is submitted that the learned Judge had approached the issue correctly when her ladyship held that –

'Bagaimanapun sukar untuk saya menerima hujah ini kerana pada pendapat saya Muallaf adalah seorang yang menganut agama Islam.

Oleh itu, apabila plaintif memeluk agama Islam pada 27 Oktober 1992 untuk berkahwin dengan suaminya ketika itu, beliau telah menjadi seorang yang menganut agama Islam. **Sebenarnya tidak ada bezanya mereka di kategori (a) dengan mereka dikategori (b) hingga (f) di dalam definisi Muslim di s. 2 tersebut kerana mereka semuanya adalah penganut agama Islam'.**

3.23 In paragraphs 30 – 38 of the Appellant's submission, the Appellant submits that paragraph (b) to (f) of section 2 of the Selangor Enactment is inconsistent with the Federal Constitution.

3.24 However, before we submit that paragraphs (b) to (f) of section 2 are consistent with the Federal Constitution, we would also like to submit that these definitions are in line with *Hukum Syarak*.

(b) **A person either or both of whose parents were, at the time of the persons' birth, Muslims**

(i) In a hadith narrated by Imam al-Bukhari, according to Abu Hurairah, the Prophet SAW says as follows –

“All children are born with *fitrah*. Their parents who determined whether they are Jew, Christian or Zoroastrian,.....”

(ii) In Surah Ar-Rum, verse 30, the word “*fitrah*” (natural inclination) refers to the religion of Allah and the religion of *tawhid* (unity of God). It is a natural inclination towards the religion of Islam.

- Refer *Tafsir al-Maraghiy*, Ahmad Mustafa al-Maraghiy, Penterjemah: Muhammad Thalib, Jilid 11, Dewan Bahasa dan Pustaka, Kuala Lumpur, 2001, pages 5321- 5323) [TAB 14, IA(R1)]

(iii) On the status of a minor when one of the parents converts to Islam, the 87th Muzakarah (Conference) of the Fatwa Committee National Council of Islamic Religious Affairs Malaysia held on 23rd-25th June 2009 decided that:

“(a) When one of the parents converts to Islam, the religion of the under-aged children is also Islam and the children will be put under the care of the Muslim parent.

(b) Therefore, when one of the parents (either the mother or the father) converts to Islam, the religion of the minors is Islam.

- Refer Keputusan Muzakarah Jawatankuasa Fatwa Majlis Kebangsaan Bagi Hal Ehwal Ugama Islam Malaysia Kali Ke-87 yang bersidang pada 23 - 25 Jun 2009 Mengenai Status Agama Anak Bawah Umur Selepas Salah Seorang Pasangan Memeluk Islam [TAB 15, IA(R1)]

(c) A person whose upbringing was conducted on the basis that he was a Muslim

(i) In a hadith narrated by Imam al-Bukhari, according to Abu Hurairah, the Prophet SAW says as follows –

“All children are born with *fitrah*. Their parents who determined whether they are Jew, Christian or Zoroastrian,.....”

- (ii) The said hadith emphasized on the role of parents in upbringing and educating their children. It is the obligation of parents to protect and determine the religion of their children. This hadith is in line with Surah At-Tahrim, verse 6 which reads as follows -

“O ye who believe! save yourselves and your families from a Fire whose fuel is Men and Stones,”

- Refer *Tafsir Fi Zilalil Quran*, Asy-Syahid Sayyid Qutb, Terjemahan: Yusoff Zaki Haji Yacob, Jilid 16, Pustaka Aman Press Sdn. Bhd., Kelantan, 2000, pages 205 - 207) [TAB 16, IA(R1)]

- (iii) In a hadith narrated by Abu Daud, An-Nasai and confirmed by al-Hakim, the Prophet SAW says as follows –

“Daripada Rafi’ bin Sinan bahawasanya dia telah memeluk agama Islam tetapi isterinya enggan. Lalu Nabi SAW menyuruh kedua mereka duduk bersebelahan sementara anak tersebut duduk di tengah-tengah antara keduanya. Nabi SAW menyuruh anak tersebut memilih salah seorang antara keduanya dan anak tersebut memilih ibunya. Lantas Rasulullah SAW berdoa kepada Allah SWT, akhirnya anak tersebut memilih bapanya lalu bapa tersebut mengambil anaknya.”.

- Refer Artikel - Kedudukan Kebajikan dan Hak Anak Bukan Islam Apabila Ibu Atau Bapa Memeluk Islam: Pendekatan Perundangan Syariah dan Perlembagaan Malaysia, Zainul Rijal & Nurhidayah Muhd Hashim [2009] 3 ShLR 1) [TAB 17, IA(R1)]

(d) **A person who has converted to Islam in accordance with the requirements of section 85;**

- (i) In a hadith narrated by Imam al-Bukhari, according to Ibnu Umar, Rasulullah SAW says as follows -

“Islam is built on five pillars, believing in and professing faith in the unity of God and the Prophethood of Muhammad (pbuh), performing the prayers, alms giving, performing *hajj* in *Baitullah* and fasting in the month of Ramadhan”.

- Refer *Fath al-Bari Bi Syarhi Sahih al-Bukhari*, Al-Imam Al-Hafiz Ahmad bin Ali bin Hajar Al-'Asqolani, *Kitab al-Janaiz*, Juzu' 1, Darul Hadis, Kaherah, 1998, page 63 [TAB 18, IA(R1)]

(e) **A person who is commonly reputed to be a Muslim**

- (i) Based on the Islamic legal maxim “**Al-'Adah Muhakammah**” the Muslim scholars recognized that the recurring practices which are acceptable among the societies (*Urf / custom*) constitutes a valid basis for legal decisions in the absence of any definitive principles of law (*nas*) as long as the recurring practices are not against hukum Syarak.

(ii) As example a person who goes to the mosque for his prayers is reputed to be a Muslim

- Refer Perbahasan Kaedah-Kaedah Fiqh, Ustaz Ab. Latif Muda & Ustaz Rosmawati Ali @ Mat Zin, Ilham Abati Enterprise, Selangor, 2000, pages 196 – 199) [TAB 19, IA(R1)]

(iii) Apart from the above legal maxim, there is another legal maxim known as “Al-Ma’rufu ‘Urfan Kal Masyruti Syarthan” that recognized the recurring practices acceptable among the societies as a valid basis for legal decisions.

(iv) In this respect, reference is made to a book “*Perbahasan Kaedah-Kaedah Fiqh*” which mentioned as follows –

“Kaedah itu membawa maksud apabila sesuatu perkara itu berlangsung secara meluas dan terkenal di kalangan orang ramai serta mereka laksanakan terhadapnya tanpa mengenakan apa-apa syarat secara jelas atau nyata, justeru itu ia hendaklah diraikan sebagaimana suatu syarat secara jelas juga.

Apa yang berlangsung dari sudut adat kebiasaan dan ‘uruf itu dibataskan dengan apa yang berlaku ata berlangsung secara meluas di kalangan masyarakat. Untuk itu, perkara yang tidak terkenal, tidak diiktibar.”

- Refer Perbahasan Kaedah-Kaedah Fiqh, Ustaz Abd. Latif Muda & Ustazah Rosmawati Ali @ Mat Zin, Ilham Abati Enterprise, Selangor, 2000, muka surat 232-233) [TAB 19, IA(R1)]

3.25 It is respectfully submitted that the definition in paragraph (b) to (f) falls within the term "*menganut*" that is, received/acquired/accepted, follow, partake/participate and embrace the religion of Islam.

- (i) With regards to definition 2(b), it is submitted that this falls within the term "received/acquired/accepted" as the Muslim parents (either/both) can decide on the religion of the infant.
- (ii) With regards to definition 2(c), it is submitted that this falls within the term "received/acquired/accepted, follow and partake/participate" the religion of Islam.
- (iii) With regards to definition 2(d), it is submitted that this falls within the term "received/acquired/accepted, follow and partake/participate" and more specifically "embrace" the religion of Islam.
- (iv) With regards to definition 2(e), it is submitted that this falls within the term follow and "partake/participate" the religion of Islam.
- (v) With regards to definition 2(f), it is submitted that this falls within the term "received/acquired/accepted, follow and partake/participate" the religion of Islam.

3.26 Based on the submission above, we respectfully submit that the definitions in paragraphs (b) to (f) **are consistent** with the phrase “persons professing the religion of Islam”, that is “***orang yang menganut agama Islam***” in ***Item 1, State List, Ninth Schedule***.

Whether section 2 of the Selangor Enactment is ultra vires article 11(1) of the Federal Constitution

3.27 The Appellant’s stand is that the word “***profess***” is “***what the person says he is***” and to “***declare openly and freely***” (see paragraphs 20 and 28). Based on our submission above, the word “profess” is not restricted only to what the person declares openly and freely. The word “profess” in Article 11(1) must also bear the same meaning as in Item 1, State List, Ninth Schedule. Therefore, the word “profess” or “menganut” in Article 11(1) is very wide and includes **received/acquired/accepted** (“menerima”), **follow** (“mengikut”), **partake/participate** (“menurut”) and **embrace** (“memeluk”) the religion of Islam. Indeed the Bahasa Malaysia text of Article 11(1) uses the word “menganuti”, and it reads:

“11. (1) Tiap-tiap orang berhak **menganuti** dan mengamalkan agamanya dan, tertakluk kepada Fasal (4), mengembangkannya.”

3.28 In paragraph (21.2) of their submission, the Appellants referred to an Indian case which held that “***a public declaration of belief in Buddhism was sufficient to hold that a person had ceased to profess Hinduism...***”. Reference to the judgment at page 26 reveal the extent of the principle in the context of the Indian Constitution:

“.. Therefore, ***if a public declaration is made by a person that he has ceased to belong to his old religion and has accepted another***

religion, he will be taken as professing the other religion. In the fact of such an open declaration it would be idle to enquire further as to whether the conversion to another religion was efficacious..

3.29 It is respectfully submitted that reference to the Indian cases on the word "profess" in article 25 of the Indian Constitution is misconceived as the wordings is significantly different from our article 11(1) Federal Constitution. Article 25(1) Indian Constitution reads [TAB 5, IA(R1)] :

"25. (1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right to freely profess, practice and propagate religion."

3.30 The words "equally entitled to freedom of conscience and the right to freely" in Article 25(2) of the Indian Constitution cannot be found in article 11(1) of our Federal Constitution. **Raja Azlan Shah FCJ in Loh Kool Choon v Government of Malaysia [1977] 2 MLJ 187 at pages 188/1 – 189/ A stated [TAB 20, IA(R1)]:**

"Whatever may be said of other Constitution, they are ultimately of little assistance to us because our Constitution now stand on its own right and it is in the end the wording of our Constitution itself that is to be interpreted and applied, and this wording 'can never be overridden by the strenuous principles of other Constitution' –see Adegbenro v Akintola & Anor. Each country frames its constitution according to its genius and for the good of its own society".

3.31 Article 11(1) gives every person the freedom to profess and practice his religion. Under article 11(1), any person may profess his religion, whether it is Islam, Hinduism, Buddhism or Christianity.

3.32 So if we are to accept the Appellant's literal interpretation of the word "profess" by restricting it to only a simple a public declaration, it simply means this – today he professes religion A, tomorrow he declares that he professes religion B, and may even declare that he professes religion C the following day. And it goes on and on. On this score, the person can simply change his religion once he professes another religion. ***So he can simply profess and change his religion at his whims and fancy. Bearing in mind that when he professes religion B, it also means that he no longer professes religion A.***

3.33 This line of argument was **submitted and rejected** by the Court of Appeal in ***Kamariah Ali Iwn. Kerajaan Negeri Kelantan, Malaysia & Satu lagi*** [2002] 3 CLJ 766 [TAB 21, IA(R1)]. At page 773, Justice Abdul Hamid Mohamad said:

"Dalam konteks kes ini, hujah peguam-peguam perayu ialah bahawa per. 11 ini bukan sahaja memberi kebebasan kepada seseorang untuk menganut mana-mana agama, tetapi juga untuk keluar daripada sesuatu agama. Terserahlah kepada seseorang itu sama ada dia hendak menganuti mana-mana agama atau tidak menganuti mana-mana agama. Kedudukannya di sisi agama terletak kepada apa yang dia sendiri menetapkan pada sesuatu masa...

Hujah ini, jika betul, patut terpakai bagi perkataan "***practice***" (mengamalkan) kerana peruntukan itu mengatakan, "every person has the right to profess and practice his religion...". Kata-kata "has the right" itu

terpakai kepada "profess" dan juga "practice". Jika itulah makna peruntukan itu maka bukan sahaja undang-undang yang menetapkan cara untuk seorang itu memeluk agama Islam dan keluar dai agama Islam tak sah, malah undang-undang yang menjadikan suatu kesalahan jika seorang Islam itu berzina, berkhawat, tidak membayar zakat dan lain-lain itu juga tidak sah. Sebab, mengikut hujah itu, per. 11 memberi hak kepada seseorang itu untuk mengamalkan agamanya, maka terserahlah kepadanya sama ada dia hendak mengamal mana-mana suruhan yang dia hendak amalkan dan mana yang tidak, mematuhi mana-mana larangan yang dia hendak patuhi dan mana yang tidak. Oleh itu, mengikut hujah itu, sebarang undang-undang yang mengkehendaki seseorang itu melakukan sesuatu perkara atau meninggalkan sesuatu perkara adalah bercanggah dengan kebebasan yang diberi oleh per. 11 dan oleh itu tak sah semuanya.

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

3.34 The Federal Court in **Lina Joy v Majlis Agama Islam, Wilayah Persekutuan** [2007] 3 CLJ 557 [TAB 22, IA(R1)] similarly rejected this view. The Court held that the freedom of religion under Article 11 requires a Muslim to comply with the practices or law of the Islamic religion, including laws on apostasy, *before he professes another religion*. At page 587/paragraph 14, Ahmad Fairuz KHN said:

“Kebebasan beragama di bawah Perkara 11 PP memerlukan perayu mematuhi amalan-amalan atau undang-undang agama Islam khususnya mengenai keluar dari agama itu. ***Apabila ketentuan-ketentuan agama Islam dipatuhi dan pihak berkuasa agama Islam memperakukan kemurtadannya barulah perayu boleh menganuti agama Kristian.*** Dengan lain perkara, seseorang tidak boleh sesuka hatinya keluar dan masuk agama. Apabila menganuti sesuatu agama, budi akal (common sense) sendiri memerlukan dia mematuhi amalan-amalan dan undang-undang agama itu.”

3.35 Justice Ahmad Falruz in *Lina Joy* concluded at pages 596/597 as follows:

- (i) The issue of religious conversion is directly connected with the rights and obligations of the Appellant as a Muslim before the conversion.
- (ii) Article 11(1) should not be argued as a provision that provides unrestricted right of freedom.
- (iii) The right to profess and practice a religion should always be subject to the principles and practices prescribed by the said religion.

3.36 Furthermore, it is respectfully submitted the Appellants interpretation of the word “***profess***” in Article 11(1) is repugnant to Article 74(2) read with Item 1, State List, Ninth Schedule. The Federal Court in ***Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd (2004) 1 CLJ 701*** held at page 718 d - g [TAB 23, IA(R1)];

“It is a recognized cannon of construction that a court should proceed on the assumption that no conflict or repugnancy between different parts of the Constitution was intended by its framers.. In this

regard, Raja Azlan Shah FJ said in *Loh Kooi Choon v. Government of Malaysia* (1977) 2 MLJ 187 at p 190:

"This reasoning, in my view, is based on the premise that the Constitution as the supreme law, unchangeable by ordinary means, is distinct from ordinary law and as such cannot be inconsistent with itself."

It was in that spirit that Suffian LP said in *Phang Chin Hock v. Public Prosecutor* (1980) 1 MLJ 70 at p 72:

" In our judgment, in construing Article 4(1) and Article 159, the rule of harmonious construction requires us to give effect to both provisions..."

Thus if two provisions are in apparent conflict, a construction which will reconcile the conflict must be adopted."

3.37 The Appellants interpretation of the word "profess", that is, a *Muslim can openly and freely declare his religion without any restriction, that he can then openly and freely declare his new religion (not Islam) without restriction*; this interpretation **is repugnant** to Article 74(2) read with Item 1, State List, Ninth Schedule which provides for the legislating of the Selangor Enactment which stipulates the procedures of leaving the religion and the jurisdiction of the Syariah bodies and the Syariah courts to decide on the issues of the renunciation of Islam.

3.38 Therefore, by applying the principle of harmonious construction, Art. 11(1) should be interpreted so as 'to give effect to all the other provisions' in the Constitution. Art. 11(1) is to be read harmoniously with Art. 3(1), 74 and 121(1A) so as to give effect to the intentions of the framers of our

Constitution and to do justice to each and every provision in the Constitution itself. When read together, the word "profess" in Article 11(1) cannot mean "the right to profess a new religion by a Muslim, and thereby freely renouncing the religion Islam" without recourse to the procedures provided by the Enactment itself on renouncing Islam.

1.33 Based on the submission above, it is respectfully submitted that the **answer to Question 1 must be in the negative.**

4. Question 2

4.1 Question 2 reads as follows:

"Do the parents of a child under the age of 18 have the right to determine the religion of that child for all public and private purposes pursuant to Article 11 and 12(4) of the Federal Constitution?"

4.2 It is respectfully submitted that this Question is already academic as all the 2nd to 4th Applicants have already reach the age of majority.

- (i) Appellant 2 was born on 7.6.1987 (24years old)[see exhibit 'ZA-7' at page 219-221 RR]
- (ii) Appellant 3 was born on 26.1.1989 (22 yrs old) [see exhibit ZA-8 at page 222-224 RR]
- (iii) Appellant 4 was born on 18.10.1992 (19 yrs old) [see exhibit ZA-9 at page 225-226 RR]

- **Sri Kelangkota – Rakan Engineering JV Sdn Bhd & Anor v Arab Malaysian Prima Realty Sdn Bhd & Ors [2003] 3 CLJ 349 [TAB 27, IA(R1)]**

5 Question 3

5.1 Question 3 reads:

“Is the application of Islamic law on a person who professes himself to be a Hindu but is considered a Muslim under the Islamic law inconsistent with Article 11 (read with Articles 3, 5, 8, 153 and Item 1, List II, 9th Schedule) of the Federal Constitution?”

5.2 It is respectfully submitted that several cases of this court have established that the application of Islamic law is only on Muslims and that the Syariah Courts, enforcing the syariah laws, only have jurisdiction over Muslims.

- **Mohamad Habibullah v. Faridah Dato’ Talib[1993] 1 CLJ 264 [TAB 7, IA(R1)]**
- **Soon Singh v Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor [1999] 2 CLJ 5 [TAB 26, IA(R1)]**
- **Kamariah Ali v Kerajaan Negeri Kelantan & Satu lagi [2002] 3 CLJ 766 [TAB 21, IA(R1)]**

Question 4

6.1 Question 4 reads as follows:

“Does the condition that a person must first get a declaration from the State Religious Council (“Majlis Agama Islam”) or the Syariah Court that he or she is no longer “a Muslim” before he or she is recognized by the relevant authorities as a person who does not profess Islam his or her right under Article 11 (read together with Articles 5, 8, 153 and Item 1, List II, 9th Schedule) of the Federal Constitution illusory and therefore unconstitutional?”

6.2 There is absolutely no necessity to answer this Question as it has already been established by several decisions of this court.

- **Soon Singh v Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor [1999] 2 CLJ 5 [TAB 26, IA(R1)]**
- **Dalip Kaur v Pegawai Polis Daerah Bukit Mertajam & Anor [1992] 1 MLJ 1 [TAB 24, IA(R1)]**

Question 5

7.1 Question 5 reads:

“Is regulation 14(2) of the National Registration Regulations 1990 inconsistent with Article 11 (read together with Articles 5, 8, 153 and Item 1, List II, 9th Schedule) of the Federal Constitution and is therefore unconstitutional?”

7.2 There is absolutely no necessity to answer this Question as it has already been established by the decisions of this court in **Lina Joy v Majlis Agama Islam Wilayah Persekutuan**.

- **Lina Joy v Majlis Agama Islam Wilayah Persekutuan & Ors**
[2007] 3 CLJ 557 [TAB 22, IA(R1)]

Dated this 2nd day of February 2012



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Senior Federal Counsel
For and On Behalf of the 1st Respondent

The Submission of the 1st Respondent is filed by the Senior Federal Counsel for and on behalf of the 1st Respondent whose address for service is at Attorney General's Chambers, Civil Division, Aras 3, Blok C3, Pusat Pentadbiran Kerajaan Persekutuan, **62600 Putrajaya**