

DALAM MAHKAMAH PERSEKUTUAN MALAYSIA

KES KHAS NO: 2 /2011

ANTARA

1. ZAINA ABIDIN BIN HAMID @ S.MANIAM
2. SURINDIRAN A/L ZAINA ABIDIN  
(MELALUI PLANTIF PERTAMA SEBAGAI AYAH DAN SAHABAT WAKILNYA)
3. MOHANASUBASH A/L ZAINA ABIDIN
4. (MELALUI PLANTIF PERTAMA SEBAGAI AYAH DAN SAHABAT WAKILNYA)
5. CHANDRIKA A/P ZAINA ABIDIN  
(MELALUI PLANTIF 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

(Dalam perkara Saman Pemula No.MT4-21-31-2002  
di dalam Mahkamah Tinggi Malaya di Shah Alam

ANTARA

1. ZAINA ABIDIN BIN HAMID @ S.MANIAM
2. SURINDIRAN A/L ZAINA ABIDIN  
(MELALUI PLANTIF PERTAMA SEBAGAI AYAH DAN SAHABAT WAKILNYA)
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4. CHANDRIKA A/P ZAINA ABIDIN  
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PLAINTIF-PLAINTIF

DAN

1. KERAJAAN MALAYSIA
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BUDDHA, KRISTIAN, HINDU DAN SIKH

DEFENDAN-DEFENDAN

Yang diputuskan pada 27 haribulan September 2010

.....  
WRITTEN SUBMISSION OF THE SECOND RESPONDENT  
.....

Bertarikh 5 haribulan Oktober 2010

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May it please this Honourable Court,

1. Before proceeding with the submission on the questions referred to this Honourable Court by the trial High Court Judge, the 2<sup>nd</sup> Respondent will raise 2 preliminary objections, namely –

- (i) whether the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> Appellants are rightly represented by 1<sup>st</sup> Appellant as their Representative (“sebagai ayah dan Sahabat Wakil”); and
- (ii) whether the 4<sup>th</sup> Respondent is properly brought in as a necessary party by the Appellants.

**A- FIRST OBJECTION: whether the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> Appellants are rightly represented by 1<sup>st</sup> Appellant as their Representative (“sebagai ayah dan Sahabat Wakil”)**

2. Order 6 Rule 3(1))(a) reads together with Order 7 Rule 3(2) of the Rules of the High Court 1980 (“RHC 1980”) [page 3 to 5 Bundle of Authorities of 3<sup>rd</sup> Respondent (“BOA R2”)] provides that a person may sue in representative capacity.

3. As in this case, the 1<sup>st</sup> Appellant sues the 2<sup>nd</sup> Respondent not only in his own capacity but also on behalf of his 3 children who are at the time of filing the Originating Summon in 2002 still a minor.

4. This can be seen from the intitulement of the Originating Summon itself the words "**melalui plaintiff pertama sebagai ayah dan sahabat wakil**".

5. However, as of to date, the 2<sup>nd</sup> Appellant is 24 years and 6 months old, the 3<sup>rd</sup> Appellant is 23 years and the 3<sup>rd</sup> Appellant is 19 years and 3 months old. They are not minor and cannot and should not be represented by the 1<sup>st</sup> Appellant anymore.

**[Please refer to the dates of birth in the Birth Certificates in Exhibit ZA-7 to ZA-9 at page 219 to 226 Rekod Kes Khas]**

6. Even though this objection was not raised at the High Court, the objection now raised by the 2<sup>nd</sup> Respondent has a great impact on the Appellants' case because legally the 1<sup>st</sup> Appellant cannot anymore represent his children who had attained the age of majority.

7. They have to initiate a separate action in the High Court or to make a necessary application to amend the Originating Summons or to make an application under Rule 71 of Rules of Federal Court 1995 [page 7 BOA R2] so as to make them bringing the action in their own capacity.

**B- SECOND OBJECTION: whether the 4<sup>th</sup> Respondent is properly brought in as a necessary party by the Appellants**

8. The purpose of the Appellants bringing in the 4<sup>th</sup> Respondent is to support their case against the Respondents. This can be seen in **paragraph 45(b) of the Affidavit Pertama Plaintiff** where the 1<sup>st</sup> Appellant avers that –

"b) Saya telah dengan itu meminta peguamcara saya menyatukan Majlis Perundingan Malaysia Agama Buddha, Kristian, Hindu dan Sikh sebagai Defendan ke4 supaya organisasi ini harus juga menerima saya sebagai seorang Hindu dan akan membantu saya (emphasized added) dan supaya ia dapat membantu Mahkamah yang mulia ini di dalam litigasi kepentingan awam ini untuk menentukan apakah itu kepentingan awam."

**[Please refer to page 72 of Rekod Kes Khas]**

9. The 4<sup>th</sup> Respondent is not in any ways affected with the Appellants' prayers as stated in paragraphs 1 to 10 of the Originating Summon. Therefore the 2<sup>nd</sup> Respondent submits that they are not the necessary party to the Appellants' claims.

**[Please refer to page 19 to 22 of Rekod Kes Khas]**

10. And in fact the 4<sup>th</sup> Respondent had supported the Appellants' claims against all other Respondents. This can be seen in **paragraph 9 of the Affidavit Jawapan Defendan Ke-4** where 4<sup>th</sup> Respondent's representative avers that –

“9. Saya mengikrarkan affidavit ini untuk Defendan Ke-4 untuk menjawab isu yang telah dibangkitkan oleh Plaintiff-Plaintif dan untuk menyatakan sokongan penuh Defendan Ke-4 kepada intipati relif-relif yang dipohon oleh Plaintiff-Plaintif (emphasized on the words underlined).”

[Please refer to page 182 of Rekod Kes Khas]

11. The 2<sup>nd</sup> Respondent submits that by bringing the 4<sup>th</sup> Respondent, the Appellants had abused their right to make any party as a party to their action.
12. If at all the 4<sup>th</sup> Respondent is interested with the Appellants' action, they have to apply to intervene and the application will be subjected to justifications and not only that they have to comply with the principles of law regarding intervener.
13. In the nutshell, the Appellants had used the “back-door” to allow the 4<sup>th</sup> Respondent to participate in and to support their claims against the Respondents.

14. Therefore the 2<sup>nd</sup> Respondent submits that the 4<sup>th</sup> Respondent has been improperly made a party by the Appellants.
15. Even though this objection was never raised at the High Court, the 2<sup>nd</sup> Respondent submits that this Honourable Court, under Order 15 Rule 6(2)(a) of the RHC 1980 [page 10 BOA R2], read together with Rule 3 of the Rules of Federal Court 1995 [page 12 BOA R2], has an ample power, if it is just, on the 2<sup>nd</sup> Respondent's application or on its own motion order the 4<sup>th</sup> Respondent, who has been improperly or unnecessarily made a party, to cease to be a party.
16. Under Rule 36(1) 3 of the Rules of Federal Court 1995 [page 14 BOA R2], a special case is regarded as an appeal to the Federal Court, with that the 2<sup>nd</sup> Respondent submits this Honourable Court has all powers as the appellate court to decide on the 2 preliminary objections raised by the 2<sup>nd</sup> Respondent.

#### **C- SUBMISSION ON QUESTIONS REFERRED BY THE TRIAL HIGH COURT JUDGE**

17. We refer this Honourable Court to questions referred by the Trial High Court Judge, YA Datuk Nurchaya binti Haji Arshad at page 8 to 9A of Rekod Kes Khas.
18. However, before the 2<sup>nd</sup> Respondent further proceeds with the submission, we would like to highlight to this Honourable Court the particulars of each Appellant based on their own identification documents.

Appellants	Birth Certificates	Identity Cards
<p><b>1<sup>st</sup> Appellant</b></p>	<p><b>Name:</b> Zaina Abdin bin Hamid</p> <p><b>Father's name:</b> S. Maniam alias Hamid</p> <p><b>Race:</b> Indian Muslim</p> <p><b>Mother's name:</b> Zaharah bt Imbi</p> <p><b>Race:</b> Malay</p> <p>[page 205 Rekod Kes Khas]</p> <p>[refer also to paragraph 4.1 of the Affidavit in Reply of the 1<sup>st</sup> Respondent at page 172 of Rekod Kes Khas]</p>	<p><b>Name:</b> Zaina Abdin bin Hamid alias S. Maniam</p> <p><b>Date Issued:</b> 25 Mac 1996</p> <p>[page 207 Rekod Kes Khas]</p> <p><u>Identity Cards Previously Issued</u></p> <p><b>Name:</b> Zaina Abdin bin Hamid</p> <p><b>Date Issued:</b> 30 July 1964</p> <p><b>Name:</b> Zaina Abdin bin Hamid alias S. Maniam</p> <p><b>Date Issued:</b> 3 August 1972</p>



		[refer to paragraph 4.2 of the Affidavit In Reply of the 1 <sup>st</sup> Respondent at page 172 of Rekod Kes Khas]
<b>2<sup>nd</sup> Appellant</b>	<p><b>Name:</b> Surindiran</p> <p><b>Father's name:</b> Zaina Abdin bin Hamid alias S. Maniam</p> <p><b>Father's race:</b> Indian</p> <p><b>Mother's name:</b> Suselia a/p M. Athiam</p> <p><b>Date of Registration:</b> 7 June 1987</p> <p>[page 220 to 221 Rekod Kes Khas]</p> <p>[refer also to paragraph 4.3 of the Affidavit In Reply of the 1<sup>st</sup> Respondent at page 172</p>	<p><b>Identity Card was not exhibited by the 1<sup>st</sup> Appellant.</b></p> <p>The application was made by his mother on the 21 February 2002 under the name of Surindiran bin Zaina Abdin and the religion was stated in the application as "Islam".</p> <p>[refer to paragraph 4.4 of the Affidavit In Reply of the 1<sup>st</sup> Respondent at page 172 to 173 of Rekod Kes Khas]</p>

	of Rekod Kes Khas]	
<b>3<sup>rd</sup> Appellant</b>	<p><b>Name:</b> Mohanasubash a/l Zaina Abdin</p> <p><b>Father's name:</b> Zaina Abdin bin Hamid alias S. Maniam</p> <p><b>Father's race:</b> Indian</p> <p><b>Mother's name:</b> Suselia a/p M. Athiam</p> <p><b>Date of Registration:</b> 8 February 1989</p> <p>[page 223 to 224 Rekod Kes Khas]</p> <p>[refer also to paragraph 4.5 of the Affidavit In Reply of the 1<sup>st</sup> Respondent at page 173 of Rekod Kes Khas]</p>	<p><b>Identity Card was not exhibited by the 1<sup>st</sup> Appellant.</b></p> <p>The application was made by his mother on the 21 February 2002 under the name of <b>Mohanasubash a/l Zaina Abdin</b> and the religion was stated in the application as "Islam".</p> <p>[refer to paragraph 4.6 of the Affidavit In Reply of the 1<sup>st</sup> Respondent at page 173 of Rekod Kes Khas]</p>

<p><b>4<sup>th</sup> Appellant</b></p>	<p><b>Name:</b> Chandrika a/p Zaina Abdin</p> <p><b>Father's name:</b> Zaina Abdin bin Hamid alias S. Maniam</p> <p><b>Father's race:</b> Indian</p> <p><b>Mother's name:</b> Suselia a/p M. Athiam</p> <p><b>Date of Registration:</b> 19 October 1992</p> <p>[page 226 Rekod Kes Khas]</p> <p>[refer also to paragraph 4.7 of the Affidavit In Reply of the 1<sup>st</sup> Respondent at page 173 of Rekod Kes Khas]</p>	<p><b>Identity Card was not exhibited by the 1<sup>st</sup> Appellant.</b></p> <p>The application was made by her father on the 28 December 2005 under the name of Chandrika a/p Zaina Abdin and the religion was stated in the application as "Hindu".</p> <p>[refer to paragraph 4.8 of the Affidavit In Reply of the 1<sup>st</sup> Respondent at page 173 of Rekod Kes Khas]</p>
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19. Even though the 1<sup>st</sup> Appellant had made a Deed Poll in 16 Mac 1973 to renounce and abandon the use of his former name Zaina Abdin bin Hamid alias S. Maniam and to assume from that date the name Balachandran s/o S. Maniam, the 1<sup>st</sup> Appellant still use his former name which is a Muslim/Malay name until to date.

[page 210 to 211 of Rekod Kes Khas]

#### QUESTION 1

Are the following paragraphs containing 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 Article 3, 5, 8, 153 and Item 1, List 11, 9<sup>th</sup> Schedule) of the Federal Constitution:

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

1.2 paragraph (d) read together with section 113?

20. Section 2 of the Administration of the Religion of Islam (State of Selangor) Enactment 2003 (“ARI 2003”) provides [page 16 BOA R2] –

“Muslim means;

- (a) a person who professes the religion of Islam;

- (b) a person either or both of whose parents were at the time of the person's birth, a Muslim;
- (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

**Note:** Section 108 of ARI 2003 provides [page 17 BOA R2]

—

**"108. Moment of conversion to the religion of Islam**

A person is converted to the religion of Islam and becomes a Muslim as soon as he finished uttering the two clauses of the Affirmation of Faith provided that the requirements of section 107 are fulfilled; and that person shall thereupon be referred to as a muallaf."

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

21. It seems to show that the Appellants do not contend paragraph (a) of the definition to be inconsistent with the Constitution because the word "profess" and "professing" appear in Clause (1) of Article 11 and Item 1, List II, 9<sup>th</sup> Schedule of the Constitution. With that the 2<sup>nd</sup> Respondent rightly infers that the Appellants agree that paragraph (a) is consistent with the Constitution and the 2<sup>nd</sup> Respondent shall not touch the same paragraph in great details in answering Question 1.
22. All paragraphs in the definition will be read disjunctively pursuant to the semi-colon and the word "or" used in the definition. They can also be read "in combination" of two, especially with paragraph (a) because that paragraph is a common feature of a Muslim.
23. Not all paragraphs in the definition will relate to the Appellants especially paragraphs (c) and (e). Therefore, the 2<sup>nd</sup> Respondent does not see any valid reason for the Appellants to contend the validity of those paragraphs. The non-relation can be explained as follows –

Paragraphs in the Definition of a "Muslim"	Basis/Grounds
(c) a person whose upbringing was conducted on the basis that he was a Muslim	The Appellants were brought up as Hindu.
(e) a person who has converted to the religion of Islam in accordance with section 108	The Appellants are not Muallaf.

24. Paragraphs (a), (b), (d) and (f) be said to have related to the Appellants. This can explained as follows –

Paragraphs in the Definition of a "Muslim"	Basis/Grounds
(a) a person who professes the religion of	The Appellants are persons who profess the religion of Islam by virtue of paragraphs (b).

Islam	<p>(d) and (f). See also the decision in the case of <u>Lim Yoke Khoo lwn. Pendaftar Muallaf, Majlis Agama Islam Selangor &amp; Yang Lain [2006] 4 CLJ 513</u> the Court has decided that [page 30 BOA R2] –</p> <p>“Sebenarnya tidak ada bezanya mereka di kategori (a) dengan mereka dikategori (b) hingga (f) didalam definasi Muslim di s. 2 tersebut kerana mereka semuanya adalah penganut agama Islam.”</p> <p>The word “<b>profess</b>” should be read in the context of Malaysian legal position.</p> <p>That word has been translated as “<b>menganuti</b>” (Clause (1) of Article 11) and “<b>menganut</b>” (Item 1, List II, 9<sup>th</sup> Schedule) in Bahasa Malaysia version of the Constitution, which is the authoritative text of the Constitution [page 34 BOA R2].</p> <p>Further, the Bahasa Malaysia version of ARI 2003, also uses the word “<b>menganut</b>” as</p>
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the translation to the word **"professes"**.

The word **"profess"** cannot be equated as **"practice"**. This is the position acknowledged by Clause (1) of Article 11 itself when the word **"profess"** (**menganuti**) is followed by the words **"and practice"** (**dan mengamalkan**). So, there will be a situation where one professes the religion of Islam but does not practice the true teachings and practices of Islamic religion.

Paragraph (a) only states the word **"professes"** without the word **"practices"**, so this paragraph is enacted to cover such condition as stated above. A person will be considered to be a Muslim without him practising the true teachings and practices of Islamic religion. So, by virtue of paragraph (b), (d) and (f), such person can be considered as a **"Muslim"** who professes the religion of Islam without him practicing such practices.

	<p>The Appellants can say they did not profess Islam however under the law, it is not for them to say so, only the Syariah High Court, which is the right forum and which have the right expertise, to declare them to be not a Muslim or persons who did not profess the religion of Islam anymore.</p> <p>In <u>Dalip Kaur Gurbux Singh v. Pegawai Polis Daerah (OCPD), Bukit Mertajam &amp; Anor. [1991] 1 CLJ 77 (Rep)</u> the Supreme Court has decided that [page 45 to 46 BOA R2] –</p> <p>“It is apparent from the observations made by the learned Judicial Commissioner that the determination of the question whether a person was a Muslim or had renounced the faith of Islam before death, transgressed into the realm of syariah law which needs serious considerations and proper interpretation of such law. Without proper authority to support his</p>
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	<p>contention it is not sufficient to say whether there is or there is not a condition precedent for a person to become a Muslim; or that if the deceased were proved to have had said his prayers at a Sikh temple he was definitely an apostate. The issue of whether a person was a Muslim or had renounced the faith of Islam before death, cannot be determined by a simple application of facts as has been found by the learned Judicial Commissioner on the basis of veracity and relevancy of evidence according to civil law. Such a serious issue would need consideration by eminent jurists who are properly qualified in the field of Islamic jurisprudence. The only forum qualified to do so is the Syariah Court."</p>
<p>(b) a person either or both of whose parents were at</p>	<p>In respect of the 1<sup>st</sup> Appellant, both of the parents of the 1<sup>st</sup> Appellant are Muslim.</p>

the time of the person's birth, a Muslim	<p>Father is Indian Muslim while mother is a Malay. The name of the 1<sup>st</sup> Appellant also is a Muslim/Malay name.</p> <p>In respect of the 2<sup>nd</sup> to 4<sup>th</sup> Appellants, following to the above, their father is a Muslim. Therefore they are also a Muslim. This is also known as <b>Muslim by parentage</b>.</p>
(d) a person who is commonly reputed to be a Muslim	By virtue of paragraph (b) and (f), all the Appellants are commonly reputed to be a Muslim.
(f) a person who is shown to have stated, in circumstances in which he is bound by law to state the truth, that he was a Muslim, whether the statement be oral or written	<p>Section 36 of the Births and Deaths Registration Act 1957 (Revised 1983) provides that making false statement or furnishing false information is an offence [page 48 BOA R2].</p> <p>Regulation 25(1)(b) of the National Regulation 1990 also provides the same</p>

offence [page 51 BOA R2].

Therefore the parents of the 1<sup>st</sup> Appellant and the parents of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Appellants are bound by the law to give the truth particulars when registering the births and applying for identity cards of their children.

Both the parents of the 1<sup>st</sup> Appellant has given their true names, Muslim/Malay names and their races to show they are a Muslim when registering the birth of the 1<sup>st</sup> Appellant with the Muslim/Malay name Zaina Abdin bin Hamid without the alias. So, they are a Muslim. no doubt. If, they are a Muslim, the 1<sup>st</sup> Appellant is also a Muslim.

When applying for the 1<sup>st</sup> Appellant identity card, they maintain the 1<sup>st</sup> Appellant Muslim/Malay name.

The 1<sup>st</sup> Appellant himself, even though had made a Deed Poll in 16 Mac 1973 to renounce and abandon the use of his former

name Zaina Abdin bin Hamid alias S. Maniam and to assume from that date the name Balachandran s/o S. Maniam, the 1st Appellant still use his former name which is a Muslim/Malay name in his identity cards until to date. What that shows, if not to show that he is a Muslim.

When the 1<sup>st</sup> Appellant and his wife registering the births and applying the identity cards for their children, they still use the 1<sup>st</sup> Appellant's former name, and in respect of the identity card application for the 2<sup>nd</sup> and 3<sup>rd</sup> Appellant, the mother has stated their religion to be "Islam". Again what that shows, if not to show that they are a Muslim.

Further, it is a cogent principle of law that a person is bound by his pleadings and prayers. In other words, he has to plead the truth and to pray what he actually wants from the Court. In one of the prayers in the Originating Summon, the 1<sup>st</sup> Appellant prayed for a declaration –

	<p><b>"5. Plaintiff Pertama tidak lagi seorang Islam kerana beliau sendiri mengakui dirinya sebagai seorang Hindu dan mengamalkan agama Hindu dan cara hidup Hindu mengikut pilihan beliau sendiri."</b></p> <p><b>[page 21 Rekod Kes Khas]</b></p> <p>With the prayer, the 1<sup>st</sup> Appellant prayed from the High Court, a declaration that he is no longer a Muslim. What does it mean, if not, that the 1<sup>st</sup> Appellant had considered himself to be a Muslim until declared otherwise by the High Court.</p>
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25. Clause (1) of Article 11 of the Constitution provides [page 53 BOA R2] –

**"Every person has the right to profess and practice religion ..."**

26. Clause (1) Article 3 of the Constitution provides [page 54 BOA R2] –

"Islam is the religion of the Federation, but other religions may be practised in peace and harmony in any part of the Federation."

27. Clause (1) of Article 5 of the Constitution provides [page 56 BOA R2] –

"No person shall be deprived of his life or personal liberty save in accordance with law."

28. The words "**save in accordance with law**" denotes an exception to the right to life and personal liberty which is not absolute and can be restricted by law.

29. Clause (1) of Article 8 of the Constitution provides [page 57 BOA R2] –

"All persons are equal before the law and entitled to the equal protection of the law."

30. However Clauses (2) and (5)(a) of Article 8 of the Constitution provide an exception to the above protection. Clause (2) provides [page 57 BOA R2] –

"Except as expressly authorized by the Constitution there shall be no discrimination against citizens on the ground only of religion, ..."



The words **"Except as expressly authorized by the Constitution"** denotes an exception that discrimination can be done if expressly authorized by the Constitution. The Constitution has expressly authorized this through the words **"save in accordance with law"**. Further the Constitution has expressly given the power to make Islamic law, personal and family law and constitution, organisation and procedure of Syariah Courts, the determination of matters of Islamic law and doctrine.

31. While Clause (5)(a) of Article 8 of the Constitution provides [page 57 BOA R2] –  
"This Article does not invalidate or prohibit –

(a) any provision regulating personal law,"

This would mean that Article 8 will not invalidate or prohibit any provisions regulating of personal law. In other words it will not invalidate or prohibit the provisions on Islamic personal law.

32. Article 153 of the Constitution talks about reservation of quotas in aspect of services, permits, etc., for Malays and natives of any of the States of Sabah and Sarawak. Therefore, this Article is not relevant to this present case.
33. Item 1, List II, 9<sup>th</sup> Schedule of the Constitution provides –

"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 person 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 places 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, organisation and procedure of Syariah Courts which shall have jurisdiction only over person 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.**"

34. In the nutshell, Article 11 reads together with the Articles 3, 5, 8 and Item 1, List II, 9<sup>th</sup> Schedule except Article 153 of the Constitution recognize and acknowledge –

- (i) the position of Islam as the religion of the Federation and other religions may be practiced in peace and harmony;
- (ii) all person have the right to life and personal liberty however the right is not absolute and can be restricted by law;
- (iii) all person are equal before the law and there shall be no discrimination against citizens on the ground only of religion unless expressly authorized by the Constitution and no provisions of personal law will be invalidated and prohibited;
- (iv) State Legislative Assembly has the power to make Islamic law, personal and family law and constitution, organisation and procedure of Syariah Courts which shall have jurisdiction over person professing the religion of Islam and in respect of the matters included in Item 1, List II, 9<sup>th</sup> Schedule including the determination of matters of Islamic law and doctrine.

35. Section 113 of ARI 2003 2003 provides –

### **"Recognition of *muallafs* as Muslims**

(1) A person who has converted to the religion of Islam and has been registered in the Register of *Muallafs* shall, for the purposes of any Federal or State law, and for all time, be treated as a Muslim.

(2) A person whose conversion to the religion of Islam has been registered under any law of any State shall, for all purposes in the State of Selangor and for the purposes of implementing the provisions of any law in the State of Selangor, be treated as a Muslim."

This section provides that any person who has converted to Islam shall be treated as a Muslim once his conversion is registered in the Register of *Muallafs*.

36. The 2<sup>nd</sup> Respondent submits that question is whether paragraphs (b), (c), (d), (e) and (f) in the definition of a Muslim is inconsistent with the Constitution should be answered in NEGATIVE. Even though there is no provision in the Constitution which defines the word "Muslim", the Constitution has given power to the State Legislative Assembly to enact Islamic law, personal and family law and constitution, organisation and procedure of Syariah Courts which shall have jurisdiction over person professing the religion of Islam and in respect of the matters included in Item 1, List II, 9<sup>th</sup> Schedule including the determination of matters of Islamic

law and doctrine. With the power given by Clause (2) of Article 74 of the Constitution [page ..... BOA R2], the State Legislative Assembly then have the power to enact provision on the definition of a "Muslim", the person who will be covered by the laws enacted.

37. In the case Lina Joy v Majlis Agama Islam Wilayah Persekutuan & Anor [2004] 6 CLJ 242, the Learned Trial Judge Faiza Tamby Chik made a decision on the issue of definition of a "Muslim" as follows [page 82 BOA R2] –

"I am of the view that s. 2 of the 1993 Act is enacted pursuant to art. 74(2) of the Constitution. The enabling art. 74(2) confers wide jurisdiction to the Federal Government to enact syariah laws to the same extent as provided in item 1 in the State list (see para. 6(e) 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).

.....

The purpose of s. 2 of the 1993 Act is merely to define a Muslim since the Constitution did not provide any definition. This is important because syariah laws are applicable only to Muslim. Without a definition provision, there would be confusion in relation to the application of the syariah laws. 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."

38. In the case of Lim Yoke Khoo Iwn. Pendaftar Muallaf, Majlis Agama Islam Selangor & Yang Lain [2006] 4 CLJ 513 the Court has decided that [page 28 to 30 BOA R2] –

"[20] Muallaf adalah seorang yang telah memeluk agama Islam menurut s. 108 Enakmen Negeri Selangor tersebut. Ini membawa pula kepada persoalan samaada definasi 'Muslim' didalam s. 2 Enakmen Negeri Selangor tersebut selaras dengan Perlembagaan Persekutuan?

[21] Saya sebenarnya berpeluang memutuskan didalam satu kes sebelum ini tentang perkara yang sama, iaitu kes Mahkamah Tinggi Shah Alam Saman Pemula No. MT3-21-126-2004. Didalam kes itu saya telah merujuk kepada keputusan dan pemerhatian yang dibuat berkaitan definasi "Muslim" didalam s. 2 Akta Pentadbiran Undang-Undang Islam (Wilayah Persekutuan) 1993 (yang pari material dengan s. 2 Enakmen Negeri Selangor tersebut) oleh Hakim Faiza Tamby Chik dalam kes *Lina Joy v. Majlis Agama Islam Wilayah Persekutuan & Anor* [2004] 6 CLJ 242. Saya telah memutuskan didalam kes tersebut bahawa definasi 'Muslim' yang terkandung didalam s. 2 Enakmen

tersebut tidak bercanggah dengan Perlembagaan Persekutuan. Setelah menimbang hujah yang dikemukakan oleh peguam plaintif disini, saya mendapati tiada sebab mengapa saya harus mengubah pendirian saya tentang isu ini. Jika definasi "Muslim" tersebut tidak bercanggah dengan Perlembagaan Persekutuan, maka begitu jugalah dengan s. 113 Enakmen Negeri Selangor tersebut.

[23] Dapat dilihat bahawa dibawah s. 2 tersebut terdapat 6 kategori mereka yang didefinisikan sebagai Muslim dan plaintif didalam kes ini tergulung didalam kategori (e), iaitu seorang Muallaf. Apa yang saya faham tentang hujah peguam plaintif ialah State Islamic List di Jadual 9 Senarai Negeri, Perlembagaan Persekutuan hanya merujuk dan menggunakan ungkapan "orang yang menganut agama Islam" atau "person who professes the religion of Islam" dan dengan itu hanya mereka dikategori (a) didalam definasi "Muslim" di s. 2 Enakmen Negeri Selangor tersebut sahaja yang selaras dengan Perlembagaan Persekutuan. Plaintif yang tergulung didalam kategori (e), iaitu seorang Muallaf dengan itu tidak sepatutnya didefinisikan sebagai "Muslim".

[24] Bagaimanapun sukar untuk saya menerima hujah ini kerana pada pendapat saya Muallaf adalah seorang yang menganut agama Islam. Oleh itu apabila plaintif memeluk 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) didalam definasi Muslim di s. 2 tersebut kerana mereka semuanya adalah penganut agama Islam."

39. The decision in the 2 cases above in regard of the definition of a "Muslim" was never disturbed by any Appellate Courts, so the decision remains as a good decision.
40. Below the 2<sup>nd</sup> Respondent further demonstrates that all the paragraphs in the definition of a "Muslim" are not inconsistent with the Constitution –

Paragraphs in the Definition of a "Muslim"	Basis/Grounds
(a) a person who professes the religion of Islam	The act of " <b>professing</b> " involves an act motivated by own free-will. It is an admission of his religion. This is clearly consistent with Clause (1) of Article 11, Clause (1) of Article 5 and Article 8 of the Constitution.
(b) a person either or both of whose parents were at the time	Every child born will follow the religion of the parents. The parents



<p>of the person's birth, a Muslim</p>	<p>will decide the religion of their children. This is also known as Muslim by parentage.</p> <p>This is clearly consistent with Clause (4) of Article 12 of the Constitution which provides [page 89 BOA R2] –</p> <p><b>"... the religion of a person under the age of eighteen years shall be decided by his parent or guardian".</b></p> <p>Further it will not be inconsistent with Clause (1) of Article 5 and Article 8 of the Constitution because section 3 of the Guardianship of Infants Act 1961 provides [page 91 BOA R2] –</p> <p><b>"The guardian of the person of an infant shall have the custody of the infant, and shall be responsible for his support, health and education."</b></p>
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	<p>This is also in line with the decision of the Supreme Court in the case of <u>Teoh Eng Huat v The Kadhi of Pasir Mas, Kelantan &amp; Anor [1990] 1CLJ (Rep) 277</u> [page 92 BOA R2] which held that the right of religious practice of the infant shall be exercised by the guardian on her behalf until he reaches majority.</p>
<p>(c) a person whose upbringing was conducted on the basis that he was a Muslim</p>	<p>A person whose upbringing was conducted on the basis that he was a Muslim would be reasonably known as a Muslim because of the upbringing itself. The upbringing would normally make him practicing the Islamic religion and thus make him a Muslim. This is clearly consistent with Clause (1) of Article 11, Clause (1) of Article 5 and Article 8 of the Constitution.</p>

<p>(d) a person who is commonly reputed to be a Muslim</p>	<p>A person who is commonly reputed to be a Muslim would be reasonably known as a Muslim because of the reputation itself. He himself would want him to be commonly known as a Muslim. <u>This is normally happens in this country (emphasized added)</u> when both of his parents is a Muslim (Muslim by parentage) and/or using the Islamic/Malay names. This is clearly consistent with Clause (1) of Article 11, Clause (1) of Article 5 and Article 8 of the Constitution.</p>
<p>(e) a person who has converted to the religion of Islam in accordance with section 108</p>	<p>The act of conversion to Islam involves an act motivated by own free-will. A person has converted to the religion of Islam as soon as he finished uttering the two clauses of the Affirmation of Faith on his own free-will. He is a Muslim who professes the religion of Islam by</p>

	<p>virtue of his utterance. This is clearly consistent with Clause (1) of Article 11, Clause (1) of Article 5 and Article 8 of the Constitution.</p>
<p>(f) a person who is shown to have stated, in circumstances in which he is bound by law to state the truth, that he was a Muslim, whether the statement be oral or written</p>	<p>A person who upon requirement of provisions of law, has solemnly, truthfully and willfully declared himself to be or to make a statement that he is, oral or in writing, a Muslim would later be legally known as a Muslim.</p> <p>He is a Muslim who professes the religion of Islam by virtue of his legal, solemn and truthful declaration and statement. This is clearly consistent with Clause (1) of Article 11, Clause (1) of Article 5 and Article 8 of the Constitution.</p>

41. However if such person does not want him to be known as a Muslim, there is a way out, Sections 61(3)(b)(x) of ARI 2003 has provided him a way out by applying a declaration in the Syariah High Court that he is no longer a Muslim [page 96 BOA R2].

42. ARI 2003 further provides in subsection 74(2) that [page 100 BOA R2] –

“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”

43. Such requirement for him to make such application will not be inconsistent with Clause (1) of Article 11, Clause (1) of Article 5 or Article 8 of the Constitution because ARI 2003, is a law enacted under the power given by Article 74(2) and Item 1, List II, 9<sup>th</sup> Schedule of the Constitution, provides only the Syariah High Court can declare him to be no longer a Muslim. The position of the Syariah High Court, in this respect is also propounded by Article 121(1A) of the Constitution [page 102 BOA R2].

44. The Constitution has expressly given the power to make Islamic law, personal and family law and constitution, organisation and procedure of Syariah Courts, the determination of matters of Islamic law and doctrine. Therefore all provisions in ARI 2003, including paragraph (d) in the definition of a “Muslim” cannot be unconstitutional or ultra vires the Constitution.

45. A good case to answer Question 1 is the case of Lina Joy vs Majlis Agama Islam Wilayah Persekutuan & Yang Lain [2007] 3 CLJ 557, where Ahmad Fairuz CJ decided that [page 142 BOA R2] –

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

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

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

Kedua, Perlembagaan itu sendiri memberi kuasa kepada Badan Perundangan Negeri (bagi negeri-negeri) untuk mengkanunkan Hukum Syarak dalam perkara-perkara yang disebut dalam Senarai II, Senarai Negeri, Jadual Kesembilan, Perlembagaan Persekutuan ('Senarai II'). Selaras dengan kehendak Senarai II itu, Akta Mahkamah Syariah (Bidang Kuasa Jenayah) 1965 ('Syariah Courts (Criminal Jurisdiction) Act 1965') [666] ('Akta 355/1965') dan berbagai-bagai enakmen (untuk Negeri-Negeri) termasuk yang disebut dalam penghakiman ini, telah dikanunkan.

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

...

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

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

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

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

46. In previous paragraphs in the same case, the Chief Justice decided that [page 134 to 140 BOA R2] –

“[14] ... Kebebasan beragama di bawah Perkara 11 PP memerlukan perayu mematuhi amalan-amalan atau undang-undang agama Islam memperakukan kemurtadannya barulah perayu dapat menganuti sesuatu agama, akal budi (common sense) sendiri memerlukan dia mematuhi amalan-amalan dan undang-undang dalam agama itu.

...

[16] Seperti yang telah diuraikan di perenggan sebelum ini, kes *Soon Singh* ketara menunjukkan bahawa hal murtad adalah dalam bidang kuasa Mahkamah Syariah. Di perenggan (10) saya juga telah merujuk kepada item 1, senarai 2, Jadual 9 PP bagi menunjukkan bahawa perkataan penting yang digunakan di situ ialah “*matters*” dan kerana “*Islamic Law*” adalah salah satu daripada “*matters*” yang terdapat dalam



item 1 itu dan apabila dibaca pula berlatarbelakangkan kes *Dalip Kaur*, maka amat ketara sekali bahawa sesungguhnya perkara murtad itu adalah perkara yang berhubung kait dengan undang-undang Islam (Islamic Law) dan nyatalah oleh itu ia adalah di dalam bidang kuasa Mahkamah Syariah dan kerana Perkara 121(1A) PP, maka Mahkamah-Mahkamah Sivil tidak boleh campur tangan dalam hal itu.

...

17.2 Apa yang jelas dalam Perkara 11 itu ialah penggunaan perkataan-perkataan "... *right to profess and practice his religion* ..." Seperti yang dikatakan oleh Abdul Hamid Mohamad HMR (ketika itu) dalam kes *Kamariah bte Ali lwn Kerajaan Negeri Kelantan, Malaysia* [2002] 3 CLJ 766: "kata-kata 'has the right' itu terpakai kepada 'profess' dan juga 'practice'". Mengikut kes *Che Omar bin Che Soh. Public Prosecutor* [1988] 2 MLJ 55. Islam itu bukan sahaja suatu himpunan dogma-dogma dan ritual-ritual tetapi ia adalah juga suatu cara hidup yang lengkap merangkumi semua bidang aktiviti manusia, persendirian atau awam, perundangan, politik, ekonomi, sosial, budaya, moral atau kehakiman. Dan jika diteliti Perkara-Perkara 11(1), 74(2) dan item 1 di senarai 2 dalam Jadual 9 PP akan ketara bahawa Islam itu meliputi antara lainnya undang-undang Islam. Justeru itu, seperti yang diujahkan oleh peguam terpelajar Malaysian Muslim Lawyers Association pemerhati diarah (watching brief), jika seseorang Muslim ingin keluar dari agama

Islam, dia sebenarnya menggunakan haknya di dalam konteks undang-undang syariah yang mempunyai jurisprudennya sendiri mengenai isu murtad. Jika seseorang menganuti dan mengamalkan agama Islam, sudah tentulah itu bererti dia hendaklah mengikuti undang-undang Islam yang menetapkan cara memasuki Islam dan juga cara keluar dari agama Islam. Dan apa yang telah dilakukan oleh pegawai JPN adalah hanya semata-mata untuk menentukan Perayu bukan lagi beragama Islam secara yang ditetapkan oleh Islam. Justeru itu, saya tidak nampak bagaimana tindakan itu boleh dikatakan bertentangan dengan Perkara 11(1) yang dengan sendirinya memperuntukkan keperluan mematuhi kehendak-kehendak agama itu sebelum dia keluar dari agama Islam. Menganuti dan mengamalkan agama Islam sudah tentu bererti mengamalkan bukan saja aspek teologi dalam agama itu tapi juga undang-undang agama itu."

## **QUESTION 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**

47. The answer to this question is definitely in **POSITIVE**. As submitted above this is line with Clause (4) of Article 12 of the Constitution, section 3 of the Guardianship of Infants Act 1961 and the decision of the Supreme Court in **Teoh Eng Huat's case.**

48. This position is also has been appended in ARI 2003. Section 117 provides that [page 170 BOA R2] –

"A person who is not a Muslim may convert to the religion of Islam if he is sound 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 to his conversion."

While the definition of a "Muslim" in section 2 provides that –

"Muslim means;

(a) ...;

(b) a person either or both of whose parents were at the time of the person's birth, a Muslim;"

### QUESTION 3

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

49. The answer should definitely be in **POSITIVE** if the person does not fall under any of the paragraphs in the definition of a "**Muslim**" in section 2 of ARI 2003 or in other words he is a non-Muslim and never be a Muslim.
50. If he does fall, the answer would definitely be in **NEGATIVE**.
51. As submitted earlier, there is no inconsistency in all the paragraphs in the definition of a "**Muslim**" with Article 11 (read with Article 3, 5, 8, 153 and Item 1,

List 11, 9<sup>th</sup> Schedule) of the Constitution. Therefore such person is a Muslim or can be legally considered as a Muslim.

52. Further as submitted earlier, the word "**profess**" should be read in the context of Malaysian legal position. The word "**profess**" cannot be equated as "**practice**". This position has been acknowledged by Clause (1) of Article 11 itself when the word "**profess**" (*menganut/menganuti*) is followed by the words "**and practice**" (*dan mengamalkan*). The two words are two different things in the Malaysian legal context. So, there will be a situation where one professes the religion of Islam but does not practice the true teachings and practices of Islamic religion.
53. Paragraph (a) in the definition of Muslim only states the word "**professes**" without the word "**practices**", so this paragraph is enacted to cover such condition as stated above. A person will be considered to be a Muslim without him practising the true teachings and practices of Islamic religion. So, by virtue of paragraph (b), (d) and (f), such person can be considered as a "**Muslim**" who professes the religion of Islam without him practicing such practices.
54. In other words he can still be considered as a Muslim even though at the same time he professes himself to be a Hindu.
55. The only thing to be determined is whether he is still a Muslim.

56. The problem in regard of this question is the Appellants had equated the word "profess" to mean "practice", for them. they cannot be considered as a Muslim because they had practised Hindu practices and had never practiced Islamic practices. However, as submitted above, that is not the position in Malaysian context; they can be legally considered as a Muslim even though they had not practised Islamic practices.

57. The Appellants can say they did not profess Islam and therefore they are not a Muslim however, it is not for them to say so, only the Syariah High Court, which is the right forum and which have the right expertise to declare them to be no longer a Muslim or persons who did not profess the religion of Islam anymore.

58. In Dalip Kaur Gurbux Singh v. Pegawai Polis Daerah (OCPD), Bukit Mertajam & Anor. [1991] 1 CLJ 77 (Rep) the Supreme Court has decided that [page 45 BOA R2] –

"It is apparent from the observations made by the learned Judicial Commissioner that the determination of the question whether a person was a Muslim or had renounced the faith of Islam before death, transgressed into the realm of syariah law which needs serious considerations and proper interpretation of such law. Without proper authority to support his contention it is not sufficient to say whether there is or there is not a condition precedent for a person to become

a Muslim; or that if the deceased were proved to have had said his prayers at a Sikh temple he was definitely an apostate.

The issue of whether a person was a Muslim or had renounced the faith of Islam before death, cannot be determined by a simple application of facts as has been found by the learned Judicial Commissioner on the basis of veracity and relevancy of evidence according to civil law. Such a serious issue would need consideration by eminent jurists who are properly qualified in the field of Islamic jurisprudence. The only forum qualified to do so is the Syariah Court."

59. In Lina Joy vs Majlis Agama Islam Wilayah Persekutuan & Yang Lain [2007] 3 CLJ 557, Ahmad Fairuz CJ decided that [page 134 BOA R2] –

"...tiada ketentuan muktamad bahawa perayu tidak lagi menganuti agama Islam. Maka, kenyataan bahawa perayu tidak boleh lagi berada di bawah bidangkuasa Mahkamah Syariah kerana Mahkamah Syariah hanya ada bidangkuasa terhadap seseorang yang menganuti agama Islam (profess) tidak boleh/wajar ditekankan. Cara seseorang keluar dari sesuatu agama adalah semestinya mengikut kaedah atau undang-undang atau amalan (practice) yang ditentukan atau ditetapkan oleh agama itu sendiri".

60. On top of that, the Syariah High Court under section 61(3)(b)(x) of ARI 2003 has the right jurisdiction to make a determination whether such person is still a Muslim or no longer a Muslim.
61. So, the answer to question 3 is in **NEGATIVE**.

#### **QUESTION 4**

**Does the condition that a person must first get a declaration from the state religious council 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 render his or her rights under Article 11 (read together with Article 5, 8, 153 and Item 1, List II, 9<sup>th</sup> Schedule) of the Federal Constitution illusory and therefore unconstitutional?**

62. The answer should definitely be in **POSITIVE** if the person does not fall under any of the paragraphs in the definition of a “Muslim” in section 2 of ARI 2003 or in other words he is a non-Muslim and never be a Muslim.
63. If he does fall, the answer would definitely be in **NEGATIVE**.
64. In the present case, the 1<sup>st</sup> Appellant did apply to the High Court to ask for the same declaration, so in that respect, the 1<sup>st</sup> Appellant himself had acknowledged



the need to get recognition of a higher authority that he is no longer a Muslim. However, why he is not willing to go to the Syariah High Court which clearly has the right jurisdiction to make such declaration, that he needs?

65. The roles of the Syariah Court to make such determination or declaration has been given recognition in many Supreme/Federal Court cases for example Dalip Kaur and Lina Joy, as submitted above.
66. In Soon Bikar Singh v Pertubuhan Kebajikan Islam Malaysia (PERKIM) [1999] 1 MLJ 489, the court decided that [page 184 BOA R2] –

"Therefore, when jurisdiction is expressly conferred on the syariah Courts to adjudicate on the matters to conversion to Islam, in our opinion, it is logical that matters to conversion out of Islam (apostasy) could be read necessarily implied in and falling within the jurisdiction of the Syariah courts. One reason we can think of is that the determination of a Muslim convert's conversion out of Islam involves inquiring into the validity of his purported renunciation of Islam under Islamic Law in accordance with Hukum Syarak".

67. Because of there is no direct or express provision giving the jurisdiction to the Syariah Court, in many cases, the Court had used several approaches, such as, subject matter or purposive approach.

68. For example in the case of Lina Joy, the Administration of Islamic Law (Federal Territories) Act 1993 does not have the similar provision as section 61(3)(b)(x) of ARI 2003. In dissenting grounds by His Lordship Richard Malanjum FCJ in Lina Joy's case where he decided that [page 166 BOA R2] –

"[100] His Lordship Harun Hashim SCJ in *Mohamed Habibullah bin Mahmood v Faridah bte Dato Talib (supra)* at p. 268 stated this:

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

69. However, in the present case, there is an express provision which provides the Syariah High Court with the jurisdiction to declare that a person is no longer a Muslim which can be found in section 61(3)(b)(x) of ARI 2003. If this case is tried before His Lordship Richard Malanjum FCJ, he would differ with his earlier decision in Lina Joy case.

70. So, the answer to Question 4 is in NEGATIVE.

## **QUESTION 5**

**Is regulation 14(2) of the National Registration Regulations 1990 inconsistent with Article 11 (read with Articles 3, 5, 8, 153 and Item 1, List II, 9<sup>th</sup> Schedule) of the Federal Constitution and is therefore unconstitutional?**

71. National Registration Regulations 1990 is a Regulations made pursuant to power given to Minister by section 6 of the National Registration Act 1959 (Revised 1972) [page 189 BOA R2].

72. Regulation 14(2) the Regulations provides [page 192 BOA R2] –

“(2) Any person registered under these Regulations who applies to change his name under subregulation (1) shall submit to the registration officer with a statutory declaration which –

(a) certifies the fact that he has absolutely renounced and abandoned the use of his former name in lieu thereof has assumed a new name; and

(b) contains the reason for such change of name, other than a conversion of religion.”

73. Following the above regulation, one can change his name and he has to give reasons to do so other than a conversion of religion.
74. The above requirement is not at any aspect contravenes Article 11 (read with Articles 3, 5, 8, 153 and Item 1, List II, 9<sup>th</sup> Schedule) of the Constitution on a simple reasons as follows –
- (i) the Minister may make any regulations to regulate the registration process and procedures to be followed by the National Registration Department for administration purposes; and
  - (ii) such regulation is not a substantive provision but only a regulation on process and procedures that best suits the roles of the Department.
75. The determination of whether a person is a Muslim or no longer a Muslim is not the role or within the jurisdiction of the Department. The right forum to make such determination and which has the jurisdiction to do so is the Syariah Court as submitted at great length above.
76. The Federal Court in Lina Joy case is agreeable to the roles played by the Department where Ahmad Fairuz FCJ decided [page 122 BOA R2] –

"...Saya juga bersetuju jika JPN terima pengakuan seseorang bahawa dia telah keluar dari agama Islam berasaskan perisytiharan yang dibuat olehnya maka JPN mengambil risiko apabila mengecapkan, secara silap, seseorang sebagai bukan Muslim manakala mengikut undang-undang Islam orang itu masih belum lagi keluar dari agama Islam. Ini juga akan menyenangkan mereka yang telah dilahir dan dididik sebagai seorang Muslim tetapi bersikap acuh tak acuh atau tidak peduli kepada agama Islam diklasifikasikan sebagai bukan Muslim hanya semata-mata untuk mengelak dari dihukum atas kesalahan-kesalahan di bawah undang-undang Islam.

Ini semua akan mengakibatkan celaan dari masyarakat Muslim. Atas sebab-sebab inilah, sama seperti pandangan penghakiman majoriti, saya percaya, JPN telah menggunakan dasar bahawa akuan statutori sahaja adalah tidak cukup untuk membolehkan perkataan "Islam" dikeluarkan dari KP seseorang Muslim. Ini adalah kerana hal keluar dari agama Islam itu adalah suatu perkara yang berkaitan dengan undang-undang Islam dan kerana itu JPN menggunakan dasar yang memerlukan penentuan oleh pihak berkuasa agama Islam sebelum JPN boleh bertindak untuk memadamkan perkataan "Islam" daripada KP seseorang Muslim.

Atas pertimbangan-pertimbangan seperti diuraikan di atas saya setuju dengan penghakiman majoriti bahawa sesungguhnya dasar JPN itu adalah sesuatu yang sesempurnanya munasabah."

77. Encik Alwi bin Ibrahim, Ketua Pengarah Jabatan Pendaftaran Negara, who affirmed the Affidavit in Reply for the 1<sup>st</sup> Respondent, had clearly stated in that Affidavit paragraphs 8, 9, 12, 13 and 19 that the determination of religion of the Appellants is not within the jurisdiction of the Department.

[page 174, 175 and 176 of Rekod Kes Khas]

78. With that the answer to this last Question 5 is in NEGATIVE.

Dated 19<sup>th</sup> of January 2012.



(DATIN PADUKA ZAUYAH BE BINTI T. LOTH KHAN)

Legal Advisor,  
State of Selangor

This Written Submission is filed by the Kamar Penasihat Undang-Undang, Negeri Selangor for and on behalf of the Second Respondent whose address of service at Tingkat 4, Podium Utara, Bangunan Sultan Salahuddin Abdul Aziz Shah, 40512 Shah Alam, Selangor Darul Ehsan.

(Ref. No.: PU.SEL.PEL.0020/02)