

IN THE HIGH COURT OF MALAYA AT SHAH ALAM
IN THE STATE OF SELANGOR DARUL EHSAN, MALAYSIA

CIVIL SUIT NO: 21-31-2002

BETWEEN

ZAINA ABDIN BIN HAMID @ S.MANIAM PLAINTIFF
& 3 ORS

AND

KERAJAAN MALAYSIA DEFENDANT
& 3 ORS

GROUND OF JUDGEMENT

APPLICATION

This is plaintiff application under Section 84 of Judicature Act 1964, to refer a list of questions arising from the matter and having effects on provisions of the federal constitution to be referred and determined by the federal court.

HELD

This application is allowed.

FACTS

The 5 questions for referral and determination of the federal court are;

1. Whether the definition of a 'Muslim' in section 2 of the Administration of the Religion of Islam (State of Selangor) Enactment 2003 is inconsistent with Article 11 of the Federal Constitution (FC).
2. Whether the parents of a child under the age of 18 have the right to determine the religion of that child pursuant to Article 11 and 12 (4) of FC.
3. Whether the application of Islamic Law on a person professing himself to be Hindu but is considered a Muslim under the Islamic Law is inconsistent with Article 11 (read together with Article 3, 5, 8, 153 and item 1, List 11 9th schedule) of the FC.
4. Whether the condition that a person must first get 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 is unconstitutional under Article 11(read together with Article 3, 5, 8, 153 and item 1, List 11 9th schedule) of the FC.
5. Whether the National Regulations 1990, in particular regulation 14, to impose the requirement for deleting entry of 'Islam' in the applicant's Identity Card (IC) that he produce a certificate or a declaration or an order from Syariah Court that he has apostatized is consistent with Article 11.

GROUNDS

According to section 84 of the Court of Judicature Act 1964 with regards to the reference of constitutional question by High Court:

1. Where in any proceedings in the High Court a question arises as to the effect of any provision of the Constitution the Judge hearing the proceedings may stay the same on such terms as may be just to await the decision of the question by the Federal Court.
2. An order staying proceedings under this section may be made by the Judge of his own motion or on the application of any party and shall be made at such stage of the proceedings as the Judge may see fit having regard to the decision of such questions of fact as may be necessary to be settled to assist the Federal Court in deciding the question which has arisen and to the speedy and economical final determination of the proceedings.
3. Where an order for stay of proceedings has been made under this section the Judge shall state the question which in his opinion has arisen as to the effect of the Constitution in the form of a special case which so far as may be possible shall state the said question in a form which shall permit of an answer being given in the affirmative or the negative.
4. Where a Judge shall have stated a special case under this section the same shall be transmitted to the Federal Court in accordance with the rules of court of the Federal Court.

The issue in this application is whether the high Court or Federal Court which has jurisdiction to determine whether or not the provisions are ultra vires the Federal Constitution.

Article 11 (1) of the Federal Constitution provides that every person has the right to profess and practice his religion and, subject to Clause (4), to propagate it.

One of the declarations sought by the plaintiffs is that the word "his religion" in Article 11 (1) means the religion which a person chooses to profess and practice as his religion

The right 'to profess and practice his religion' is provided under that part of the Constitution intituled 'Fundamental Liberties' and under that Article bearing the heading 'Freedom of Religion'.

Prima facie, I would give that provision of the Constitution the broadest meaning feasible, unless in so far as the Constitution itself restricts the meaning, or a logical conclusion flowing therefrom prevents or negates such a meaning.

The disputed here lies in what 'his religion' means. Is the phrase 'his religion' restricted to mean that single religion which a person now has, and no other? Or does the phrase 'its religion' means any religion a person may choose to profess or practice? Does Article 11 (1) give no more right to a person other than to 'profess and practice' his pre-existing religion and no other.

The word 'to profess' by its plain dictionary meaning denotes to declare openly, to announce, affirm, to avow, acknowledge, to lay claim to, amongst others. The roots of the word 'profess' may be traced to Latin. The word 'profess' is derived from the Latin 'professes' having the meaning of taken religious vows, and 'profiteri' having the meaning of to declare publicly, to make a public statement, to declare oneself, to acknowledge, confess offer, promise.

I am satisfied that right to 'profess' his religion, entitles a person with full liberty to declare his religion as he chooses, and that unfettered personal freedom is a fundamental right is guaranteed by our constitution.

I also noted Article 11(4) of the Constitution permitting State legislation to 'control or restrict the propagation of any religious doctrine or belief among persons professing the religion of Islam'. That provision contemplates the propagation of religion. Propagation of religion denotes and connotes the situation where a person may be converted from one religion to another. That read together with Article 11(1) means that a person may profess and practice such religion as he chooses.

However, in respect of the declaration sought to declare certain state legislation ultra vires or otherwise void, I note Article 4 (4) of the Constitution which stated Proceedings for a declaration that a law is invalid on the ground mentioned in Clause (3) (not being proceedings falling within paragraph (a) or (b) of the Clause) shall not be commenced without the leave of a judge of the Federal Court; and the Federation shall be entitled to be a party to any such proceedings, and so shall any State that would or might be a party to proceedings brought for the same purpose under paragraph (a) or (b) of the Clause 19.

According to the 3rd defendant the reason of plaintiff's application to refer the case before this court to Federal Court, among others is the discrepancy of the decision by the Federal Court in Lina Joy's case and Latifah Mat Zin's case pertaining to the issue of the conflict of jurisdiction. In the case of **LATIFAH MAT ZIN V ROSMAWATI SHARIBUN & ANOR (2007) 5 CLJ 253**, the Federal Court decided among others;

Both the Civil and Syariah Courts are creatures of statutes and owe their existence to statutes, namely the Federal Constitution, the Acts of Parliament and the State Enactments as the case may be. So it is to relevant statutes that they should look to, determine whether they have jurisdiction or not. However, just because the other court does not have jurisdiction over a matter does not mean that it has jurisdiction over it. Thus, if one of the parties is a non Muslim, the Syariah Court does not have jurisdiction over the case even if the subject matter falls within its jurisdiction. Likewise, just because one of the parties is a non Muslim does not mean that the civil court has jurisdiction over the case if the subject matter is not within its jurisdiction.

Consequently, there may be cases over which neither court has jurisdiction nor in which some of the issues fall within the jurisdiction of the civil court while the rest fall within the jurisdiction of the Syariah Court.

Until the problem is solved by the legislature, it appears that the only way now is, if in a case in the Civil Court, an Islamic Law issue arises which is within the jurisdiction of the syariah court, the party raising the issue should file a case in the syariah court solely for the determination of that issue and the decision of the syariah court on that issue should then be applied by civil court in the determination of the case. But, this is only possible if both parties are Muslim.

However the plaintiff's in this case maintained the facts that they are at all material time Hindus and that the Government of Malaysia and the State Government of Selangor are forcing Islamic Law on them even though they are Hindus.

In **WEE CHOO KEONG V LEE CHONG MENG & ANOR** (1996) 3 CLJ the supreme court had expressed in 2 different ways, both of which it is submitted have been satisfied herein, the test on which Yang Arif is to exercise Yang Arif's discretion in deciding whether or not to refer the matter to the federal court;

1. Here there is 'a constitutional provision that has left room for doubt in the sense that it is vague or ambiguous which necessitates a proper construction of its interpretation from the Federal Court.
2. The dispute is also related to the constitutional question sought to be referred and there are difficult issues posed by the dispute that are irreconcilable with a constitutional provision.

ZAINA ABIDIN HAMID & ORS v KERAJAAN MALAYSIA & ORS [2009] 6 CLJ 683 the court held that it is abundantly clear to us that the declarations sought by the plaintiff's in the OS revolve around the interpretation concerning the constitutionality of legislation enacted by Parliament and the State Legislative Assembly of Selangor Darul Ehsan. While Article 121 (1A), effective from 10 June 1988, has taken away the jurisdiction of the civil courts in respect of matters within the jurisdiction of the syariah courts, it does not take away the jurisdiction of the civil courts to interpret written laws of the State enacted for the administration of Muslim law: per Hashim Yeop A Sani CJ (M) (as he then was) in *Dalip Kaur Gurbuz Singh V Pegawai Polis Daerah, Balai Polis Daerah (OCPD), Bukit Mertajam & Anor* [1991] 3 CLJ 2768; [1991] 1 CLJ (Rep) 77 SC. Our civil courts are entrusted with the responsibility of determining the issues of constitutionality of legislation; per Dzaidin SCJ (later CJ (Malaysia)) in *Soon Singh Bikar Singh v. Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor* [1992] 2 CLJ 5 FC. Interpretation of the Federal Constitution vis-à-vis other written laws is a matter for the civil courts; per Abdul

Hamid Mohamad FCJ (later CJ (Malaysia)) in *Latifah Mat Zin v. Rosmawati Sharibun & Anor* [2007] 5 CLJ 253 FC at 288 para [76], and also in *Abdul Kahar Ahmad v. Kerajaan Negeri Selangor Darul Ehsan; Kerajaan Malaysia & Anor (Interveners)* [2008] 4 CLJ 309 FC.

According to the plaintiff the referral this case to the Federal Court is to enable this case to be disposed of speedily and economically by enabling the Federal Court to interpret constitutional provisions that are vague or ambiguous pertaining to this case and to deal with a difficult issue posed by the case that is irreconcilable with constitutional provisions.

I was of the same opinion as the plaintiff's, with that this application is allowed.



YA DATUK NURCHAYA ARSAD
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SHAH ALAM

02 AUGUST 2011