**DALAM MAHKAMAH RAYUAN MALAYSIA**

**(BIDANGKUASA RAYUAN)**

**CIVIL APPEAL NO. A-02-1826-08/2013**

**BETWEEN**

**PATHMANATHAN A/L KRISHNAN**
**(juga dikenali sebagai Muhammad Riduan bin Abdullah)** … **APPELLANT**

**AND**

**INDIRA GANDHI A/P MUTHO** … **RESPONDENT**

**CIVIL APPEAL NO. A-01-304-08/2013**

**BETWEEN**

**PENGARAH JABATAN AGAMA ISLAM NEGERI PERAK & ORS** … **APPELLANTS**

**AND**

**INDIRA GANDHI A/P MUTHO** … **RESPONDENT**

**CIVIL APPEAL NO. A-01-316-09/2013**

**BETWEEN**

**KEMENTERIAN PELAJARAN MALAYSIA & ANOR** … **APPELLANTS**

**AND**

**INDIRA GANDHI A/P MUTHO** … **RESPONDENT**

**(Dalam Perkara Semakan Kehakiman No:25-10-2009**

**Di Mahkamah Tinggi Malaya Di Ipoh)**

**Antara**

| | | |
|---|---|---|
| **INDIRA GANDHI A/P MUTHO** | **…** | **PEMOHON** |
| **DAN** | | |
| **PENGARAH JABATAN AGAMA ISLAM PERAK & 5 ORS** | **…** | **RESPONDEN-RESPONDEN** |

**CORAM**

**Balia Yusof bin Hj. Wahi, JCA**
**Hamid Sultan bin Abu Backer, JCA**
**Badariah binti Sahamid, JCA**

**JUDGMENT**

**Background**

**[1]** Pathmanathan (husband) and Indira Ghandi (wife) were married on 10 April 1993. The marriage was registered under the Law Reform (Marriage and Divorce) Act 1976 (ñthe Actò). There were three children of the marriage, Tevi Darsiny, aged 12, Karan Dinish, aged 11 and the youngest, Prasana Diksa, who was 11 months old at the time of filing of the wifeøs application for judicial review.

**[2]** On 11.3.2009, the husband converted to Islam and on 8.4.2009, he obtained an ex-parte interim custody order for all the three children.

He later obtained a permanent custody order from the Shariah Court on 29.9.2009.

**[3]** At the time of the husbandôs conversion, the two elder children were residing with the wife while the youngest child was with the husband.

**[4]** Sometime in April 2009, the wife received documents from the husband showing that her three children had been converted to Islam on 2.4.2009 and that the Pengarah Jabatan Agama Islam Perak had issued three Certificates of Conversion to Islam on her three children. The documents also showed that the Pendaftar Muallaf had registered the children as Muslims.

**[5]** Feeling distraught and being dissatisfied with the husbandôs action, the wife then filed an application for Judicial Review in the Ipoh High Court vide Semakan Kehakiman no. 25-10-2009 seeking for the following orders and/or reliefs:

> ñ(a) an Order of certiorari pursuant to Order 53 Rule 8(2) to remove the Certificates into the High Court to be quashed owing to non-compliance with section 99, 100 and 101 of

the Administration of the Religion of Islam (Perak) Enactment 2004;

(b) an order of prohibition pursuant to Order 53, Rule 1 restraining Pendaftar Muallaf and his servants, officers and/or agents from howsoever registering or causing to be registered the children and each of them as õMuslimsòor õmuallafòpursuant to the Administration Enactment;

(c) further or in the alternative, a declaration that the Certificates and each of them are null and void and of no effect as they are ultra vires and/or contrary to and/or inconsistent with

i. the provisions of Part IX and in particular section 106(b) of the Administration Enactment, and/or

ii. Sections 5 and 11 of the Guardianship of Infants Act 1961 (Act 351), and/or

iii. Article 12(4) read together with Article 8(2) of the Federal Constitution.

(d) Further or in the alternative, a declaration that the infants and each of them have not been converted to Islam in accordance with the law;

(e) The costs of the application; and

(f) Such further or other relief as the Honourable Court deems fit.ò

**[6]** In the said application, the husband was cited as the sixth respondent while the Pengarah Jabatan Agama Islam Perak, The Pendaftar Mualaf, Kerajaan Negeri Perak, Kementerian Pelajaran Malaysia and Kerajaan Malaysia were respectively cited as the first to the fifth respondents.

**[7]** On 25.7.2013, the learned Judicial Commissioner (JC) allowed the wifeôs judicial review application in the terms as prayed. The three Certificates of Conversion to Islam issued by the Pengarah Jabatan Agama Islam Perak were quashed. The learned JC further declared that the said Certificates to be null and void and of no effect.

**[8]** This is an appeal by the husband against the said decision of the High Court which was registered as Civil Appeal No. A-02-1826-08/2013.

**[9]** Alongside the husbandôs appeal, the Pengarah Jabatan Agama Islam Perak, the Pendaftar Mualaf and Kerajaan Negeri Perak also filed an appeal to this court which was registered as Civil Appeal No. A-01-304-08/2013. Kementerian Pelajaran Malaysia and Kerajaan Malaysia also filed their appeal which was registered as Civil Appeal No. A-01-316-09/2013.

**[10]** We heard the three appeals together on 26.5.2015 and we reserved judgment.

**[11]** We now give our judgment.

**The High Court Decision**

**[12]** The order pronounced by the learned JC at page 100 of the Rekod Rayuan states that the three certificates of conversion to the religion of Islam issued by the Pengarah Jabatan Agama Islam Perak be quashed. The said certificates were declared to be null and void and of no effect. All the three children had not been converted to Islam in accordance with the law.

**[13]** In dealing with the application before him, the learned JC had formulated various issues which were listed as follows.

1. Whether the High Court has jurisdiction to hear the case.

2. Whether the conversion of the children without the consent of the non converting parent violates Articles 8,11 and 12 of the Federal Constitution.

3. Whether the conversion of the children without the consent of thenon converting parent and in the absence of the children before the converting authority violates the Administration of the Religion of Islam (Perak) Enactment 2004.

4. Whether the conversion without the consent and without hearing the other non converting parent as well as without hearing the children violates the principles of natural justice.

5. Whether the conversion without the consent of the non converting parent and the children violate international norms and conventions.

**[14]** On the issue of jurisdiction, the learned JC was of the view that since the core of the challenge by the wife is the constitutional construct on the fundamental liberties provision of the Federal Constitution, the

Shariah Court lacks the jurisdiction to decide on the constitutionality of the matter.

**[15]** On Article 12 of the Federal Constitution, emphasis was made on clause 4 of the same which provides:

> (4) For the purposes of clause (3) the religion of a person under the age of eighteen years shall be decided by the parent or guardian.

**[16]** The Federal Court in **Subashini Rajalingam v. Saravanan Thangathoray & Other Appeal [2008] 2 CLJ** 1 has put beyond doubt that the word parent in Article 12(4) means a single parent.

**[17]** The learned judge being bound by the said decision had rightly concluded that the conversion by the husband do not violate Article 12(4).

**[18]** Article 8 of the Federal Constitution, in the learned JCôs view had been violated. The wife had not been accorded the equal protection of the law. Section 5 of the Guardianship of Infants Act 1961 gives equal rights to both parents while section 11 of the same requires the Court or a Judge in exercising his powers under the Act to consider the wishes of such parent or both of them. The wife being a non muslim can never be

heard before the Shariah Court and thus had been denied of the equality protection as enshrined under Article 8 of the Federal Constitution. However, in deference to the decision of the Federal Court in **Subashini's case** (supra) and based on the doctrine of stare decisis , the learned JC admittedly had to concede that the conversion by the single parent had not violated Article 8.

**[19]** Article 11 of the Federal Constitution guaranties the freedom of religion where it is declared that every person has the right to profess and practice his religion. The learned JC was of the view that the practice of one's religion would include the teaching of the tenets of faith to one's religion. His Lordship ruled that for the non muslim wife not to be able to teach her children the tenets of her faith would be to deprive her constitutional rights not just under Article 11 but also Articles 5(1) and 3(1) of the Federal Constitution.

**[20]** In dealing with the issue of whether the conversion contravenes the provisions of the Administration of the Religion of Islam (Perak) Enactment 2004,(the Perak Enactment) the learned JC had dealt with the provision of section 96 and 106 of the same. These two provisions are contained under Part IX which relates to conversion to the religion of Islam.

**[21]** Section 96 reads:

> ñ96. (1) The following requirements shall be complied with for a valid conversion of a person to Islam:
>
> (a) the person must utter in reasonably intelligible Arabic the two clauses of the Affirmation of Faith;
>
> (b) at time of uttering the two clauses of the Affirmation of Faith the person must be aware that they mean ñI bear witness that there is no god but Allah and I bear witness that the Prophet Muhammad S.A.W. is the Messenger of Allahò; and
>
> (c) the utterance must be made of the personôs own free will.
>
> (2) A person who is incapable of speech may, for the purpose of fulfilling the requirement of paragraph (1)(a), utter the 2 clauses of the Affirmation of Faith by means of signs that convey the meaning specified in paragraph (b) of the subsection.ò

And section 106 reads:

> 106. ñFor the purpose of the Part, a person who is not a Muslim may convert to the religion of Islam if he is of sound mind and ï
>
> (a) has attained the age of eighteen years; and
>
> (b) if he has not attained the age of eighteen years, his parent or guardian consents in writing to his conversion.ò

**[22]** Reading the two aforesaid provisions together, the learned JC concluded that the imperative words in s.96 ñthe following requirements shall be complied with for a valid conversion of a person to Islamòmeans that the consent by the parent must be in writing and that the absence of the children to utter the two clauses of the Affirmation of Faith rendered the conversion to be void. His Lordship concluded that ñthe said certificates of conversion to the religion of Islam are null and void and of no effect for non compliance with s.96 of the Perak Enactment.ò

**[23]** Moving further, the learned JC held that even if the consent of a single parent would suffice under section 106(b) of the Perak Enactment, there is nevertheless a need to give the non converting parent the right to be heard. As it happened in this case, as both the mother and the children have not been heard, the certificate of conversion cannot be sustained and ought to be quashed. His Lordship cited **Datuk Haji Muhammad Taufail b. Mahmud v. Dato Ting Check Sii [2009] MLJU 403** and **Surinder Singh Kanda v. Government of the Federation of Malaya [1962] MLJ 169** upholding the principle that the right to be heard is an integral part of the rules of natural justice and failure to observe rules of natural justice renders a decision to be void.

**[24]** The other issue formulated by the learned JC was whether the conversion without the consent of the non converting parent and the three children violates international norms and conventions.

**[25]** In dealing with the said issue, the learned JC had opined that Malaysia had accorded the Universal Declaration of Human Rights 1948 a statutory status and given a primal place in our legal landscape. It is a part and parcel of our jurisprudence. As such an interpretation of Articles 12(4) and 8(1) and (2) of the Federal Constitution vesting equal rights to both parents to decide on a minor childôs religious upbringing and religion would be falling in tandem with such international human rights principles. His Lordship also considered the convention on the Rights of the Child (CRC) and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) which has been ratified by the Government and further opined that an interpretation which promotes the granting of equal rights to the children, the mother and the father where guardianship is concerned under the Guardianship of Infants Act 1961 ought to be adopted inline and consistent with international norms. Likewise, the same approach of interpretation should also be applied with equal force to the provision of sections 96 and 106 of the Perak Enactment.

**The Appeal**

**[26]** At the outset, we were informed that the eldest child has, at the time of hearing of this appeal reached the age of majority and above 18 years old. Puan Rohana, the state Legal Advisor of Perak, representing the Appellant in Appeal No. A-01-304-08/2013 submitted that the issue of her conversion is still very much alive and this court ought to make a pronouncement. Encik Fahri Azzat, learned counsel for the Respondent submitted otherwise. Relying on the authority of the Supreme Court decision in **Teoh Eng Huat v. Kadhi, Pasir Mas & Anor [1990] 2MLJ 300** he submitted that the matter has become academic. Being an adult, she has her own right to decide her religion.

**[27]** We agree with the submissions of learned counsel for the Respondent. We make no order in respect of her conversion to the religion of Islam.

**[28]** In pursuing these three appeals, the common issue raised by all the Appellants is centred on the issue of jurisdiction of the High Court in determining the matter. We are of the view and have taken the approach that the issue of jurisdiction ought to be answered first. In our view, if the High Court lacked the jurisdiction to deal with the issue of conversion to

the religion of Islam, that will be the end of the matter under appeal and on that ground alone the three appeals ought to be allowed, and to go and venture into the other issues will be purely academic and will not affect the decision of these appeals.

**[29]** The learned State Legal Advisor of Perak cited a list of authorities touching on the issue of jurisdiction of the civil courts on matters relating to conversion to the religion of Islam. She started by stressing that the approach to be taken by the courts would be the ñsubject matterò approach and cited **Azizah bte Shaik Ismail & Anor v. Fatimah bt Shaik Ismail [2003] 3 CLJ 289, Majlis Agama Islam Pulau Pinang v. Shaik Zolkeply Shaik Natar [2003] 3 CLJ 289, Soon Sigh Bika Singh v. Pertubuhan Kebajikan Islam Malaysia (Perkim) Kedah & Anor [1999] 2 CLJ 5, FC, Nedunchelian v Uthiradam v. Nurshafiqah Mah Singgai Annal & Ors [2005] 2 CLJ 306, Haji Raimi b. Abdullah v. Siti Hasnah Vangarama b. Abdullah & another appeal [2014] 3 MLJ 757,** in support of her contention.

**[30]** The learned Senior Federal Counsel representing the Government of Malaysia and the Kementerian Pelajaran Malaysia in appeal No. A-01-316-09/2013 and En. Hatim Musa learned counsel for

the Appellant in appeal No. A-01-1826-08/2013 echoed a similar view and adopted the same line of argument as above.

**[31]** Learned counsel for the Respondent, Mr. Fahri Azzat submitted that the conversion was not done by the Shariah Court but by the Pendaftar Muallaf who is under the Jabatan Agama Islam Negeri Perak. Jabatan Agama Islam Negeri Perak is a state body and not a Shariah Court under Article 121A of the Federal Constitution. He further submitted that s.96 and 106 of the Perak Enactment do not confer powers to the Shariah Court on the issue of conversion. The powers are conferred on the Registrar of Muallaf. Such power is purely administrative in nature and therefore its exercise is amenable to judicial review. There was no right of being heard given before the Registrar of Muallaf and the certificate was not issued by the Registrar of Muallaf.

**[32]** Learned counsel further submitted that the conversion without the consent of the wife is ultra vires the provisions of the Perak Enactment and against international norms which requires the wife's consent. There is a breach of the rules of natural justice. Learned co-counsel, Mr. Kulasegaran submitted along the same line.

**[33]** Having heard the submissions of all parties, and having considered the rich plethora of cases submitted before us, we are of the view that taking the õsubject matter approachò, it is beyond a shadow of doubt the issue of whether a person is a Muslim or not is a matter falling under the exclusive jurisdiction of the Shariah Court. The determination of the validity of the conversion of any person to the religion if Islam is strictly a religious issue and it falls within the exclusive jurisdiction of the Shariah Court.

**[34] In Haji Raimi b. Abdullah v. Siti Hasnah Vangarama bt. Abdullah** (supra) the two questions posed before the Federal Court were:

(1) Whether the civil or the Shariah Court has the jurisdiction to determine whether a person professes Islam or not.

(2) Whether the civil court has the jurisdiction to determine the validity of the conversion to Islam of a minor.

**[35]** The Federal Court held that the Shariah Court shall have the exclusive jurisdiction to determine whether a person professes Islam or not and further decided that on the facts of the case the validity of the

plaintiffôs conversion falls within the exclusive jurisdiction of the Shariah Court too. In allowing the appeal, the Federal Court held:

> (1) Article 121 of the Federal Constitution (ñthe Constitutionò) clearly provided that the civil court shall have no jurisdiction on any matter falling within the jurisdiction of the Shariah Court. The matters that fall within the jurisdiction of the Shariah Court were as provided under art 74 of the Constitution, inter alia, matters falling within the State List in the Ninth Schedule which were Islamic law, personal and family law of person professing the religion of Islam. Whether a person was a Muslim or not was a matter falling under the exclusive jurisdiction of the Shariah Court. It would be highly inappropriate for the civil court, which lacks jurisdiction pursuant to art 121, to determine the validity of the conversion of any person to the religion of Islam as this is strictly a religious issue. Therefore, the question of the plaintiffôs conversion in 1983 fell within the exclusive jurisdiction of the Shariah Court.

**[36]** On those authorities we are left in no doubt that the learned JC had erred on the very first issue of jurisdiction which was taken by way of a preliminary objection in the judicial review proceedings before him.

**[37]** Deliberating further on the issue of the jurisdiction of the Shariah Court, one has to look in the provisions of section 50 of the Perak Enactment. Specifically, subsections (3)(b)(x) and (xi) of section 50 confers jurisdiction on the Shariah High Court. It reads:

> (3) The Shariah High Court shall ï
>
> (a) é é é é ..

(b) in its civil jurisdiction, hear and determine all actions and proceedings of all the parties to the actions or proceedings are Muslims and the actions and proceedings relate to ï

é é é é é é é é é é .;

é é é é é é é é é é .;

(x) a declaration that a person is no longer a Muslim;

(xi) a declaration that a deceased person was a Muslim or otherwise at the time of his death; and

(xii) é é é é é é é é ..

**[38]** A plain reading of the aforesaid provisions puts it beyond doubt that the power to declare the status of a Muslim person is within the exclusive jurisdiction of the Shariah High Court. The order of the High Court declaring that the conversion is null and void is a transgression of section 50(3)(b(x) of the abovesaid provision.

**[39]** The learned Senior Federal Counsel, appearing for the Appellants in Appeal No. A-01-316-09/2013 further added to the submissions of the learned State Legal Advisor Perak saying that the approach taken by the learned JC in deciding on the issue of the jurisdiction of the High Court was the ñremedyòapproach. In determining whether the High Court had jurisdiction on the matter, His Lordship had stated at page 10 of his grounds of judgment:

ñThe core of the challenge is the constitutional construct of the fundamental liberties provisions of the Constitution. The Shariah Court is a creature of State law and does not have jurisdiction to decide on the constitutionality of matters said to be within its exclusive purview and province. Only the superior civil Courts being a creature of the Constitution can.ò

And continuing at page 18 of the same:

ñOn the contrary the civil High Court would have jurisdiction as what the Applicant is challenging is the constitutionality of the various actions of the Respondents in converting the children to a civil marriage to Islam as well as asserting her rights under the Fundamental Liberties provisions in Part II of the Federal Constitution as well as under the Guardianship of Infants Act 1961.ò

**[40]** Encik Hatim b. Musa, learned counsel for the Appellant/husband in Appeal No. A-01-1826-08/2013 adopted in full the submissions of the learned State Legal Advisor Perak and the Senior Federal Counsel on the issue of the jurisdiction of the High Court echoing that the learned JC had erroneously approached the issue before the court by venturing into the constitutional construct of the fundamental liberties provisions of the Federal Constitution.

**[41]** We agree with the aforesaid submissions. The learned JC had erred in his approach of dealing with the subject matter before him. His Lordship had decided on the constitutionality of the conversion process

instead. His approach was solely on the constitutional interpretation of the various provisions in the Federal Constitution. The hearing before him was simply on the constitutionality of the conversion process which was challenged by way of a judicial review application.

**[42]** We are of the view that on this ground alone these appeals ought to be allowed and for the judgment of the High Court to be set aside. To allow the high court to review decisions on matters which are within the exclusive province of the Shariah court is in contravention of Article 121 of the Federal Constitution and inconsistent with the principles of judicial review.

**[43]** The argument that only the Shariah Courts have exclusive jurisdiction, but not the Majlis Agama Islam or officers is not a pivotal issue. The pivotal issue is whether the High Court has jurisdiction, irrespective of whether or not the Majlis Agama Islam has jurisdiction. The subject matter of the suit is clearly outside the legal competency of the High Court. In addition, the lack of remedy for the Respondent cannot *ipso facto* confer jurisdiction on the High Court.

**[44]** We wish to further add that the learned JC in exercising his judicial review powers must do so with utmost care and circumspection

taking into consideration the subject matter of the case. As succinctly observed by Eddgar Joseph Jr FCJ in **R. Ramachandran v. The Industrial Court of Malaysia [1997] 1MLJ 145** at page 191:

> ñé the decision whether to exercise it, and if so, in what manner, are matters which call for the utmost care and circumspection, strict regard being had to the subject matter, the nature of the impugned decision and other relevant discretionary factors.ò

**[45]** Be that as it may, we feel impelled to deal with all the other issues formulated by the learned JC and we begin with the issue of whether the conversion of the children has contravened the provisions of the Perak Enactment, namely, sections 96 and 106. We have reproduced the said two provisions in the earlier part of this judgment.

**[46]** In so doing, we have to consider two other provisions of the Perak Enactment namely sections 100 and 101.

**[47]** In interpreting the said two sections 96 and 106 and in declaring the certificates of conversion to be null and void and of no effect and further declaring that the three children had not been converted to the religion of Islam, the learned JC had overlooked and failed to consider the provision of section 101 of the Perak Enactment.

**[48]** Section 101 reads:

> Certificate of Conversion to the Religion of Islam
>
> 101.(1) The Registrar shall furnish every person whose conversion to the religion of Islam has been registered a Certificate of Conversion to the Religion of Islam in the prescribed form.
>
> (2) A certificate of Conversion to Religion of Islam shall be conclusive proof of the facts stated in the Certificate.

**[49]** In our considered view, ss 2 of the said provision clearly declares the certificate of conversion to be conclusive proof of the facts stated in the certificate. The certificates of conversion of the children are shown at pages 445, 448 & 451 of Rekod Rayuan Jld 2 Bahagian C in appeal no. A-01-316-09/2013. It is titled Perakuan Memeluk Islam. It states the fact of the conversion of the person named therein.

**[50]** We further observed that the Perakuan Memeluk Islam issued by the Ketua Penolong Pengarah Bahagian Dakwah, b/p Pengarah Jabatan Agama Islam Perak Darul Ridzuan stated the fact that the persons named therein has been registered in the Registrar of Muallafs.

**[51]** The view taken by the Respondent is quite simplistic in that the Registrar of Muallafûs action of issuing the certificate of conversion is an administrative act and thus amenable to judicial review. In our view, in the absence of any evidence to the contrary and in the absence of any

challenge to the said certificates which must be done or taken in the Shariah Court, the said certificates remain good.

**[52]** The conclusiveness of a certificate of conversion was dealt with by this court in **Saravanan Thangatoray v. Subashini Rajasingam & Another Appeal [2007] 2 CLJ 451.** In dealing with an equipollent provision of section 112 of the Administration of the Religion of Islam (State of Selangor) Enactment 2003, Suriyadi Halim Omar (as he then was) observed at page 503:

> ñ[74] The husband also has exhibited the ñKad Perakuan Memeluk Agama Islamò which was issued by Registrar of Muallafs who was appointed by Majlis Agama Islam Selangor under s. 110 of the Administration of the Religion of Islam (State of Selangor) Enactment 2003. It is written at the back of the said card that:
>
> > Kad in dikeluarkan kepada orang yang memeluk Agama Islam dan didaftarkan dalam Pendaftaran Muallaf Negeri Selangor berdasarkan seksyen 111 & 112 Bhg IX Enakmen Pentadbiran Agama Islam (Negeri Selangor) Tahun 2003 sebagai sijil pemelukan ke agama Islam.
>
> What it means is that this card is a Certificate of Conversion to Religion of Islam issued to the husband under s.112 of the Administration of the Religion of Islam (State of Selangor) Enactment 2003. That s. 112 reads:
>
> > 112.(1) The Registrar shall furnish every person whose conversion to the religion of Islam has been registered a Certificate of Conversion to the Religion of Islam in the prescribed form.
> >
> > (2) A certificate of Conversion to Religion of Islam shall be conclusive proof of the facts stated in the Certificate.

It is to be observed that s 112(2) clearly provides that that Certificate of Conversion to Religion of Islam shall be conclusive proof of the facts stated therein. In the instant case it was stated in the husbandôs certificate that his date of conversion to Islam was on 18 May 2006. Under that s 112(2) that fact is therefore conclusive.ò

**[53]** This finding was endorsed in the majority decision of the Federal Court where His Lordship Nik Hashim FCJ at page 166 stated:

ñ[12] In the present case, it is clear from the evidence that the husband converted himself and the elder son to Islam on 18 May 2006. The certificates of conversion to Islam issued to them under s 112 of the Administration of the Religion of Islam (State of Selangor) Enactment 2003 conclusively proved the fact that their conversion took place on 18 May 2006. Thus, I respectfully agree with Hassan Lah JCA that the wifeôs petition was filed in contravention of the requirement under the proviso to s 51(1) of the 1976 Act in that it was filed 2 months and 18 days short of 3 months after the husbandôs conversion to Islam. It follows therefore that the petition was premature and invalid and the summons-in-chambers, ex parte and inter parte based on the petition which were filed therein were also invalid.ò

**[54]** Section 100 of the Perak Enactment sets out the powers of the Registrar of Muallaf in determining whether a person may be registered as a muallaf. Section 100 reads:

Registration of Muallafs

100. (1) A person who has converted to the religion of Islam may apply to the Registrar in the prescribed form for registration as a muallaf.

(2) If the Registrar is satisfied that the requirements of section 96 have been fulfilled in respect of the applicant, the Registrar may

register the applicantõs conversion to the religion of Islam by entering in the Register of Muallafs the name of the applicant and other particulars as indicated in the Register of Muallafs.

(3) The Registrar shall also determine the date of the applicantõs conversion to the religion of Islam and enter the date in the Register of Muallafs.

(4) In order to satisfy himself of the fact and date of conversion to the religion of Islam by the applicant and the other particulars to be entered in the Register of Muallafs, the Registrar may make such inquiries and call for such evidence as he considers necessary; but this subsection shall not be construed as precluding the Registrar from relying solely on the words of the applicant as far as the fact and date of conversion are concerned.

(5) If the Registrar is not satisfied that the requirements of section 96 have been fulfilled in respect of the applicant, he may permit the applicant to utter, in his presence or in the presence of any of his officers, the two clauses of the Affirmation of Faith in accordance with the requirements of that section.

**[55]** In our view, the issuance of the Perakuan Memeluk Islam stating that the persons named therein has been registered in the Register of Muallafs merely indicates that the issue of conversion has been satisfied and the fact that the persons named therein has been so registered, the process of conversion must have been done to the satisfaction of the Registrar. The three impugned certificates state the person named therein ñadalah disahkan telah memeluk Islamòò and ñsurat ini membuktikan bahawa beliau adalah seorang Islam mengikut rekod pendaftaran jabatan ini.ò As such, we are of the view that the High Court

has to accept the facts stated therein and it is beyond the powers of the learned JC to question the same.

**[56]** On the same token, we are further of the view that it was not the business of the learned JC to consider whether the provisions of sections 96 and 106 of the Perak Enactment had been violated. To dwell into the issue of whether the said provisions had been violated or otherwise is in effect transgressing into the issue of the validity of the conversion which jurisdiction he had not. We reiterate that the issue of the validity of the conversion is a matter within the exclusive jurisdiction of the Shariah Court.

**[57]** Thus, the pronouncements by the learned JC on the non compliance of the two provisions of the Perak Enactment is a misdirection which must be corrected.

**[58]** The issue on the right of a single parent to convert a child or children to the marriage without the consent of the wife was dealt with by the Federal Court in the case of **Subashini a/p Rajasingam v. Saravanan a/l Thangathoray and other appeals (supra)**. There, the wife complained that the husband who had converted to Islam had no right to convert either child of the marriage to Islam without her consent.

She contended that the choice of religion is a right vested in both parents by virtue of Articles 12(4) and 8 of the Federal Constitution and section 5 of the Guardianship of Infants Act 1961.

**[59]** Likewise, the wife in the instant appeal had a similar complaint and the learned JC had formulated the issues accordingly as we have narrated earlier with a further additional question of whether Article 11 of the Federal Constitution had been violated.

**[60]** The Federal Court in **Subashini's case** had at page 171 ï 172 of the report stated:

> CONVERSION
> [25] The Wife complained that the husband had no right to convert either child of the marriage to Islam without the consent of the wife. She said the choice of religion is a right vested in both parents by virtues of arts 12(4) and 8 of the FC and s 5 of the Guardianship of Infants Act 1961.
>
> [26] After a careful study of the authorities, I am of the opinion that the complaint is misconceived. Either husband or wife has the right to convert a child of the marriage to Islam. The word ópârentôin art 12(4) of the FC, which states that the religion of a person under the age of 18 years shall be decided by his parent or guardian, means a single parent. In Teoh Eng Huat v Kadhi, Pasir Mas & Abor [1990] 2 MLJ 300, Abdul Hamid Omar LP, delivering the judgment of the Supreme Court, said at p 302:

> In all the circumstances, we are of the view that in the wider interests of the nation, no infants shall have the automatic right to receive instructions relating to any other religion than his own without the permission of the parent or guardian.
>
> Further down, His Lordship continued:
>
> We would observe that the appellant (the father) would have been entitled to the declaration he has asked for. However, we decline to make such declaration as the subject is no longer an infant. (Emphasis added.)

Therefore, art 12(4) must not be read as entrenching the right to choice of religion in both parents. That being so, art 8 is not violated as the right for the parent to convert the child to Islam applies in a situation where the converting spouse is the wife as in Nedunchelian and as such, the argument that both parents are vested with the equal right to choose is misplaced. Hence the conversion of the elder son to Islam by the husband albeit under the Selangor Enactment did not violate the FC. Also reliance cannot be placed on s 5 of the Guardianship of Infants Act 1961 which provides for equality of parental rights since s 1(3) of the same Act has prohibited the application of the Act to such person like the husband who is now a Muslim (see Shamala a/p Sathiyaseelan v Dr. Jeyaganesh a/l C Mogarajah & Anor [2004] 2 MLJ 241).

**[61]** The learned JC had found that for the non muslim parent in this appeal not being able to teach her children the tenets of her faith would be to deprive her of her constitutional rights under Article 11 of the Federal Constitution. That cannot be so.

**[62]** The Federal Court had, in **Subashini's case** held that Article 12(4) must not be read as entrenching the right to choice of religion in both parents. In so holding that Article 11 has been violated because of her being deprived of the opportunity to teach the children the tenets of her religion, the learned JC in the instant appeal had run foul of the Federal Courtôs pronouncement that Article 12(4) of the Federal Constitution does not confer the right to choice of religion of children under the age of 18 in both parents. The exercise of the right of one parent under Article 12(4) cannot and shall not be taken to mean a deprivation of another parentôs right to profess and practice his or her religion and to propagate it under Article 11 (1) of the Federal Constitution.

**[63]** The learned JC had erred in finding that Article 11 of the Federal Constitution had been violated resulting in the conversion of the children to be unconstitutional, illegal, null and void and of no effect.

**[64]** We will now deal with the issue of whether the conversion of the children in the instant appeals violate international norms and conventions. The learned JC had found that in interpreting and assigning a meaning to the word ñparentsò in Article 12(4) of the Federal Constitution, ñthe interpretation that best promotes our commitment to

international norms and enhance basic human rights and human dignity is to be preferred.ò A similar approach must also be made in dealing with the provisions of the Guardianship of Infants Act 1961 and Articles 8(1) and (2) of the Federal Constitution. International norms meant by His Lordship refers to the Universal Declaration of Human Rights 1948 (UDHR), The Convention on the Rights of the Child (CRC) and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).

**[65]** To start with, we wish to reiterate what the eminent judge Eusoffe Abdoolcadeer had stated about the UDHR in **Merdeka University Bhd v. Government of Malaysia [1981] CLJ(Rep) 191** at page 209 as õmerely a statement of principles devoid of any obligatory character and is not part of our municipal law. It is not a legally binding instrument as such and some of its provisions depart from existing and generally accepted rules.ò

**[66]** It is trite that international treaties do not form part of our law unless those provisions have been incorporated into our laws. The Federal Court in **Bato Bagi & Ors v. Kerajaan Negeri Sarawak and another appeal [2011] 8 CLJ 766** at page 828 had stated:

ñWe should not use international norms as a guide to interpret our Federal Constitution. Regarding the issue of determining the constitutionality of a statute, Abdul Hamid Mohamad PCA (as he then was) in PP v. Kok Wah Kuan [2007] 6 CLJ 341 at p. 355 had this to say:

> So, in determining the constitutionality or otherwise of a statute under our constitution by the court of law, it is the provision of our Constitution that matters, not a political theory by some thinkers. As Raja Azlan Shah FJ (as his Royal Highness then was) quoting Frankfurter J said in Loh Kooi Choon v. Government of Malaysia [1977] 2 MLJ 187 (FC) said: ñThe ultimate touchstone of constitutionality is the Constitution itself and not any general principle outside it.ò

**[67]** Speaking in a similar tone, the House of Lords in **Regina v. Secretary of State for the Home Department, Ex parte Brind and Ors. [1991] IAC 696** in its judgment delivered by Lord Ackner at pg 762 said:

> ñAs was recently stated by Lord Oliver of Aylmerton in J.H. Rayner (Mincing Lane) Ltd. v. Department of Trade and Industry (the ñInternational Tin Council caseò) [1990] 2 A.C. 418, 500:
> Treaties, as it is sometimes expressed, are not self-executing. Quite simply, a treaty is not part of English law unless and until it has been incorporated into the law by legislation. So far as individuals are concerned, it is res inter alios acta from which they cannot derive rights and by which they cannot be deprived of rights or subjected to obligations; and it is outside the purview of the court not only because it is made in the conduct of foreign relations, which are a prerogative of the Crown, but also because, as a source of rights and obligations, it is irrelevant.ò

**[68]** This court had expressed its view in **Air Asia Bhd v. Rafizah Shima bt. Mohamed Aris [2014] MLJU 606** that CEDAW does not have the force of law in this country because the same has not been enacted into the local legislation. For a treaty to be operative in Malaysia, Parliament must legislate.

**[69]** We must add that while the constitution is not to be construed in any narrow or pedantic sense but this does not mean that this court is at liberty to stretch or pervert the language of the Constitution in the interest of any legal or constitutional theory. Neither we are a tribunal sitting to decide whether an Act of the Legislature is ultra vires as in contravention of generally acknowledged principles of international law. For us, the Federal Constitution is supreme and we are duty bound to give effect to its terms.

**[70]** As a word of caution, perhaps it would be a good reminder to refer to the words of Lord Bridge of Norwich in **Regina v. Secretary of State for the Home Department, Ex parte Brind & Ors (supra)** on judicial usurpation of the legislative function. As page 748 of the report, His Lordship expressed:

ñWhen confronted with a simple choice between two possible interpretation of some specific statutory provision, the presumption whereby the courts prefer that which avoids conflict between our domestic legislation and our international treaty obligations is a mere canon of construction which involves no importation of international law into the domestic field. But where Parliament has conferred on the executive and administrative discretion without indicating the precise limits within which it must be exercised, to presume that it must be exercised within Convention limits would be to go far beyond the resolution of an ambiguity. It would be to impute to Parliament an intention not only that the executive should exercise the discretion in conformity with the Convention, but also that the domestic courts should enforce that conformity by the importation into domestic administrative law of the text of the Convention and the jurisprudence of the European Court of Human Rights in the interpretation and application of it. If such a presumption is to apply to the statutory discretion exercised by the Secretary of State under section 29(3) of the Act of 1981 in the instant case, it must also apply to any other statutory discretion exercised by the executive which is capable of involving an infringement of Convention rights. When Parliament has been content for so long to leave those who complain that their Convention rights have been infringed to seek their remedy in Strasbourg, it would be surprising suddenly to find that the judiciary had, without Parliamentôs aid, the means to incorporate the Convention into such an important area of domestic law and I cannot escape the conclusion that this would be a judicial usurpation of the legislative function.ò

**[71]** In our view, the approach taken by the learned JC in imposing upon himself the burden of sticking very closely to the standard of international norms in interpreting the Federal Constitution is not in tandem with the accepted principles of constitutional interpretation.

**[72]** In conclusion, for the reasons we have stated above, the appeals are hereby allowed and the order of the High Court is set aside. We make no order as to cost and further order that the deposit to be refunded.

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**BALIA YUSOF BIN HJ. WAHI**
Judge, Court of Appeal Malaysia

Dated: 30 December 2015

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