IN THE FEDERAL COURT OF MALAYSIA
(APPELLATE JURISDICTION)
CIVIL APPEAL NO. 01(f)-2-01/2020 (B)

BETWEEN

ROSLIZA BINTI IBRAHIM … APPELLANT

AND

1. KERAJAAN NEGERI SELANGOR
2. MAJLIS AGAMA ISLAM SELANGOR … RESPONDENTS

SUMMARY OF JUDGMENT

[1] I have had the benefit of reading the learned Chief Justice's judgment in draft. Having considered the reasons given by the learned Chief Justice, I agree that Question 1 is answered in the affirmative and Question 2 is answered in the negative. I would also like to express my own views and add the following reasons why Question 1 should be answered in the affirmative.

[2] This important appeal once again raises the issue of conflict of jurisdiction between the Civil and Syariah Courts, which I shall refer to as the jurisdictional problems. The Courts have faced this issue frequently in recent years. On such occasions, the jurisdictional problems which bring obvious challenges and inherent

difficulties, in turn, raise the delicate issues involving the application of Clause (1A) of Article 121 of the Federal Constitution ("FC") and the interpretation of the laws of the State passed by the State Legislature.

[3] It will be helpful to begin the discussion by making some general observations on our court system. The FC demarcates between two distinct legal systems, namely the civil legal system, and the Syariah system. As a matter of broad general rule, the Civil Courts which are vested with the judicial power conferred under Article 121 of the FC, being courts of general jurisdiction, administer laws that are of general application, namely the FC, legislations passed by the Federal and State Legislatures, the common laws and rules of equity.

[4] Whereas the Syariah Courts, that operate outside the civil system, administer the Syariah Family and Syariah Criminal Enactments passed by the respective State Legislatures. In other words, in our jurisdiction, the justice delivery system on Islamic matters is done through the Syariah Courts.

[5] In the present case, both the Courts below concurrently held that the Civil Court has not seized with the jurisdiction to adjudicate on the matter; it falls within the province of the Syariah Court.

[6] It is crucial to appreciate precisely what this case concerns. The Appellant's case rests on her never having been a Muslim. According to the Appellant, she has never been a Muslim in all her life. What's more, according to the Appellant she was born out of wedlock, raised by a Buddhist mother in the Buddhist faith at all times. She did not dispute that her putative father was at all material times a Muslim. In this regard, I agree with the findings of the learned Chief Justice that as the evidence stands the Appellant ought to have succeeded in her claim in the Courts below i.e. that her parents being unmarried at the time of her birth renders her an illegitimate child. The Appellant also averred that Muslim Laws are being and will be imposed on her unlawfully. She further averred that there's no legal basis for imposing Islamic law and Islamic morality on her.

[7] In my opinion, both the Courts below erred in failing to appreciate that the Appellant is not claiming that she is "no longer a Muslim". One crucial point needs to be made here. The present case is not a case of renunciation. It is not an "exit case". We are concern here with the question of whether the Appellant was a Muslim at birth, which is a question of law.

[8] Clearly the decision of **Lina Joy v. Majlis Agama Islam Wilayah Persekutuan dan lain-lain [2007] 4 MLJ 585 "Lina Joy"**, that was relied on by the Court of Appeal is distinguishable. Lina Joy and the present case could not be more different form each other. The issue in Lina Joy concerned the original *de facto* status of the Applicant, Malay who was originally a Muslim, seeking to renounce her Islamic faith. Therefore, the Federal Court found that it was a matter within the Syariah Court's jurisdiction.

[9] In my opinion, where the subject matter requires a determination of whether a person is or is not a Muslim under the law, the Civil High Court has the jurisdiction to hear and decide whether the case is properly brought before the Civil Courts by evaluating the factual matrix and circumstances presented before it and also the declaration that is being sought for.

[10] Which brings me to the case of **Dalip Kaur**, where the Supreme Court heard and disposed of Dalip Kaur's appeal on its merits and found that based on evidence, her son died a Muslim. The Court did not decline to hear the appeal for an ostensible lack of jurisdiction or purport that Dalip Kaur's remedy lies elsewhere. **Dalip Kaur** is the authority for the proposition that the Civil Courts have the exclusive jurisdiction to determine whether a person is or

is not a Muslim under the law; this is a question with respect to a person's legal status.

[11] On the other hand, with regards to the question of "whether a person is no longer a Muslim", there is no dispute of the person affected having been a Muslim. To reiterate, this is not what the present case is about. Under the scheme of the FC, Islamic personal and family law shall govern a Muslim in our country. A Muslim also becomes subject to specific offences, namely offences against the precepts of Islam to which non-Muslim is not. Being a Muslim confers one a legal status and changes the entire regime of personal law applicable to them. And having been a Muslim, the person might have existing legal obligations under Muslim Laws that require determination owing to his or her apostasy. Renunciation of Islam therefore carries specific legal consequences. It is for this reason that where the subject matter of a cause or matter requires a determination of whether a person is no longer a Muslim, the Syariah Court has the exclusive jurisdiction to hear and determine the said subject matter, and under Clause (1A) of Article 121 of the FC, the Civil Court has no jurisdiction in respect of the subject matter.

[12] For all the above reasons, on the first question of law posed, I conclude that where the subject matter of a cause or matter requires a determination of "whether a person is or is not a Muslim under the law" rather than "whether a person is no longer a Muslim", the High Court has the exclusive jurisdiction to hear and determine the said subject matter. In consequence, my answer to the question is in the affirmative.

[13] What I have said so far explains why my answers to both the questions posed are in the Appellant's favour. But it does not end there. Still, I have to consider and determine whether the Appellant is entitled to the orders prayed for. First of all, in view of the factual findings made by the learned Chief Justice that I entirely concurred, there can be no issue that the Appellant is entitled to prayer (i), namely a declaration that she is an illegitimate person and that one Yap Ah Mooi a Buddhist was her natural mother. However, in my opinion, prayers (ii) and (iii) sought by the Appellant require further careful deliberation.

[14] Underlying prayers (ii) and (iii) is a foundational issue that is of critical importance, namely, whether the Appellant was a Muslim at birth. The answer to this question will have a direct bearing on the prayers sought by the Appellant.

[15] This key question encompasses legal and religious consequence. This question, as I see it, requires the Civil Court to make a decision on a question on Islamic law. The Civil High Court is not prohibited by Clause (1A) of Article 121 of the FC to hear and determine this issue. In the case of **Majlis Agama Islam Pulau Pinang v. Isa Abdul Rahman and The Others [1992] 2 MLJ 244**, three out of four orders prayed for required decisions to be made in accordance with Islamic law, including waqf. The Supreme Court ruled that the High Court has jurisdiction to hear the case. The Civil Court is not prohibited by Clause (1A) of Article 121 of the Federal Constitution to hear and determine any question on Islamic law.

[16] In determining this question, a key point to remember is that the Appellant is an illegitimate child born to a Buddhist mother and her putative father is a person who professes the religion of Islam. I am mindful that section 111 of the 2003 Enactment states that where a child is born to a woman who is married to a man more than six qamariah months from the date of the marriage or within four qamariah months after dissolution of the marriage either by the death of the man or by divorce, and the woman not having remarried, the *nasab* of the child is established in the man. It cannot be disputed that upon a reading of the provision, a child born out of

wedlock is illegitimate and therefore the *nasab* of the child could not be established in the father.

[17] What then is the meaning of the word *nasab*? It appears the word has specific meaning in the Islamic law context. It would appear that in relation to the term '*nasab'* it is more generally understood to relate merely to issues of custody, guardianship, legitimacy, succession, inheritance and rights to a putative's title or surname. We were not referred to any authority on this point. In my research, I did not find any authority or literature addressing this issue directly to the point that the term *nasab* also refers to the religious status of the illegitimate child.

[18] I do not think we can extract a principle of Islamic law of general application from the provisions of section 111 of the 2003 Enactment that the religious status of the illegitimate child born out of wedlock follows the religion of the natural mother at the time of birth and not the religion of the putative father who incidentally is a Muslim. Granted that section 111 of the 2003 Enactment applies to the Appellant's putative father (it remains undisputed that he's a Muslim) to strip him of *nasab* from the Appellant, still I do not think that it is appropriate for a Civil Court dealing with the religious status of the Appellant at the time of birth to merely decide on the terms of

the provision without having an appreciation and understanding of the rules of Islamic jurisprudence.

[19] The question pertaining to the religious status of the Appellant at the time of birth transgresses into the realm of Islamic law, which needs serious consideration, proper scrutiny and proper interpretation of such law. Unquestionably, when the legal question of religious status is concerned, it bears spiritual and theological undertones. It bears emphasizing that Islamic law is derived from the primary sources i.e. the Holy Quran and the Hadith. In addition, there are other secondary sources of Islamic law, for example the consensus of the religious scholars (*ijma*) and the authoritative rulings (*fatwas*). Moreover, due to difficult theological doctrinal differences, there are diverse interpretations of Islamic law. Hence, this specific question on Islamic law is outside the ordinary competency of a Civil Court. In my opinion, unless it is an established principle of Islamic law and there is certainty on the matter, judges in the Civil Court should not take upon themselves to decide on this matter without expert opinion, as we are not sufficiently equipped to decide on it.

[20] In a matter so fundamental as to the religious status of a person, for this Apex Court to decisively and conclusively determine

the issue which is without precedent, I am of the opinion that to remove any doubt it is advisable the Civil Court obtains the opinion of qualified and eminent Islamic scholars who are properly qualified in the field of Islamic jurisprudence to provide opinion in accordance with religious tenets and principles, to assist the Court in determining the issue. Above all else, this is to ensure that our decision is not contrary to Islamic law and it is in conformity with the Islamic law jurisprudence.

[21] The point I want to make is this: while we are competent to adjudicate the matter and to rule on this foundational issue, it must not be without the assistance of Islamic jurists after consideration of Islamic law. With this in perspective, in my opinion, the expert opinion given by a Fatwa Committee is relevant evidence to be considered in deciding with certainty the issue before us.

[22] In this regard, learned counsel for the Appellant in his written submission has brought to our attention the 2003 Enactment that provided an exclusive provision for the Civil Court to avail itself to seek the opinion of the Syariah Committee if any question on Hukum Syarak or Islamic law calls for a decision. In essence, section 53 provides that if, in any Court other than a Syariah Court any question on Hukum Syarak calls for a decision, the Court may request for the

opinion of the Fatwa Committee on the question, and the Mufti may certify the opinion of the Fatwa Committee to the requesting Court.

[23] In addition, he carefully traced the legal as well the historical background of similar provision even before the Federation of Malaya Agreement 1948 that allowed the Civil Courts to refer questions relating to Islamic law or Malay custom to the State Council for determination. Presently, almost all State Legislatures have made such laws in their respective Administration of Islamic law or Religious Council Enactments.

[24] The next point that learned counsel made is quite important. He made the point that by availing itself to such laws when deciding disputes where a Hukum Syarak or Islamic law question is raised, the Civil High Courts will promote certainty in the law, prevent additional litigation at the Syariah Courts and preserve access to justice for persons who are not Muslims.

[25] Indeed, such recourse has been made in **Dalip Kaur**. In the same vein, in the case of **Majlis Agama Islam Pulau Pinang v. Isa Abdul Rahman**, the Supreme Court held that when a Civil Court hears a claim for an order (and the order that is applied for did not fall within the jurisdiction of the Syariah Court to issue), the Civil

Court should hear the claim and if, in the course of such hearing, a question regarding 'hukum syarak' should arise, the Court can refer the questions to the Fatwa Committee concerned for certainty on the matter.

[26] The opinion does not bind the Civil Court. It is therefore for the Court to decide whether to accept the expert evidence or otherwise. The opinion should be considered and serves as guiding principles. The final decision of the matter remains with the Court. The opinion is relevant only in so far as it can assist the court in forming an opinion upon the issue in this case.

[27] It is with all the above principles in mind that before granting prayers (ii) and (iii) sought by the Appellant, the opinion of the Fatwa Committee should first be obtained in understanding Islamic law on this matter. In the interest of justice and in order not to prolong the proceedings any longer than it should, instead of remitting the matter to the High Court, I would request for the opinion of the Fatwa Committee of the State of Selangor pursuant to section 53 of the 2003 Enactment pertaining to the question whether or not the Appellant was a Muslim at the time of birth.

[28] In conclusion, in view of all the above, the Appellant's appeal is allowed and the orders of the Courts below are hereby set aside.

An order is granted in terms of prayer (i), namely a declaration that the Appellant is an illegitimate person and that one Yap Ah Mooi, a Buddhist is her natural mother. However, as I do not have the benefit of the opinion of the Fatwa Committee, it is with deep regret that I am unable to make any order in respect of prayers (ii) and (iii) sought by the Appellant.

[29] My learner sister Justice Hasnah Mohammed Hashim has read this judgment in draft and has expressed her agreement with it.

(AZAHAR BIN MOHAMED)
Chief Judge of Malaya

5 February 2021

Note: This summary is merely to assist in the understanding of the grounds of judgment.