Rosliza binti Ibrahim v Kerajaan Negeri Selangor and Another

Summary of the Grounds of Judgment of
Chief Justice Tengku Maimun binti Tuan Mat

[1] The dispute between Rosliza binti Ibrahim ('the appellant/plaintiff'), who was raised as a Buddhist by her Buddhist mother (as averred to by the mother with no averment to the contrary by the father), and Kerajaan Negeri Selangor and Majlis Agama Islam Negeri Selangor, ('the respondents/defendants') pertains to whether an illegitimate child whose mother is not a person professing the religion of Islam, is not subject to 'Muslim law' (and hence not subject to the jurisdiction of Syariah Courts).

[2] The issue is similar to *Azmi bin Mohammad Azam v Director of Jabatan Agama Islam Sarawak & Ors* [2016] 6 CLJ 562 ('*Azmi*'). *Azmi*'s case was ultimately resolved by consent, where the National Registration Department ('NRD') removed the word 'Islam' from his National Registration Identity Card ('identity card').

[3] The appellant/plaintiff failed in the Courts below in her bid to seek recourse from the civil court. On 20.1.2020, this Court granted the appellant/plaintiff leave to appeal on the following two questions of law:

> "**1.** 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" whether the High Court has the exclusive jurisdiction to hear and determine the said subject matter on a proper interpretation of Article 121 and Item 1 of the State List of the Federal Constitution ('FC')?; and
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> **2.** In light of regulation 24(1) of the National Registration Regulations 1990 and where the truth of the contents of any written application for registration of an

identity card or the contents of an identity card is not proven by affidavit or at trial, whether the said contents can be considered facts proved for a declaration of status under section 41 of the Specific Relief Act 1950?".

Background Facts

[4] The plaintiff filed an Originating Summons ('OS') in the High Court at Shah Alam seeking the following declarations:

(i) that the plaintiff is an illegitimate person and that one Yap Ah Mooi, a Buddhist, is her natural mother;

(ii) that the word 'parents' in paragraph (b) of the interpretation of 'Muslim' in section 2 of the Administration of the Religion of Islam (State of Selangor Enactment) 2003 ('ARIE 2003') does not include the putative father of an illegitimate child; and

(iii) that the plaintiff is not a person professing the religion of Islam, and that:

(a) all laws made by the Legislative Assembly of the State of Selangor under the Ninth Schedule, List II, Item 1 of the Federal Constitution ('FC') are of no effect on, and are inapplicable to, the plaintiff; and

(b) all Syariah Courts within the State of Selangor do not have jurisdiction over the plaintiff.

[5] The facts upon which the OS and the reliefs sought are as follows.

[6] The plaintiff's birth certificate states that she was born at the Chinese Maternity Hospital Kuala Lumpur on 19.11.1981 to one Yap Ah Mooi and one Ibrahim bin Hassan ('Ibrahim').

[7] On 13.1.1994, Ibrahim submitted an application for an identity card on behalf of the plaintiff. In that application, Ibrahim stated the plaintiff's religion to be 'Islam'. Ibrahim also recorded Yap Ah Mooi's descent as Malay.

[8] A year later, on 14.1.1995, Ibrahim submitted an application for his new identity card. Ibrahim recorded his religion as 'Islam' and that he was married. Exactly a month later, that is on 14.2.1995, Yap Ah Mooi submitted her application for identity card recording her religion as 'Buddha', her descent as Chinese and her marital status as 'married'. In all the applications for the identity cards, Ibrahim's address was the same as Yap Ah Mooi's address.

[9] On 8.10.2008, Yap Ah Mooi affirmed a statutory declaration ('Yap Ah Mooi's SD') to the fact that the plaintiff is her daughter, that Ibrahim and herself are the plaintiff's parents, that Ibrahim and her were unmarried at the time the plaintiff was born and lastly, that the plaintiff was not brought up as a Muslim. Yap Ah Mooi passed away on 7.2.2009.

[10] From these facts, the plaintiff claims that she is an illegitimate child. Thus, she argues that the religious status of her putative father cannot be regarded in the determination of her own religion. And because she does not adopt the religion of her father and that she was never raised as a Muslim, she is not a person 'professing the religion of Islam' as per Item 1, List II, Ninth Schedule of the FC ('State List').

[11] The learned Judicial Commissioner dismissed the plaintiff's application on the grounds that she failed to prove her claim on a balance of probabilities. His Lordship strongly inferred, based on Ibrahim and Yap Ah Mooi's respective residential addresses and from their respective applications for their new identity cards stating 'married', that the two were married to each other. Accordingly, there was proof that the plaintiff was a Muslim and hence, her application to the High Court for the said declarations was tantamount to her seeking to renounce Islam – a matter which is for the Syariah Courts.

[12] The Court of Appeal agreed with the High Court. The Court of Appeal dismissed the appeal on a further ground that it was bound by the decision of the Federal Court in *Lina Joy lwn Majlis Agama Islam Wilayah Persekutuan dan lain-lain* [2007] 4 MLJ 585 ('*Lina Joy*').

Decision

Question 2

[13] It would be more appropriate to first determine Question 2 which gives rise to the following collateral questions: firstly, whether the plaintiff's biological parents were married to each other at the time of her birth; secondly, whether Yap Ah Mooi is a 'Malay' or a 'Muslim' and thirdly, whether the legal construction accorded to section 2 of the ARIE 2003 by the Courts below is correct, which is, only one parent that is the father, Ibrahim needs to be a Muslim for the child, the plaintiff to be regarded as a Muslim.

Whether Ibrahim and Yap Ah Mooi were married at the time of the plaintiff's birth

[14] Regulation 24 of the National Registration Regulations 1990 ('NRR 1990') provides as follows:

> "(1) The burden of proving the truth of the contents of any written application for registration under these Regulations, or the contents of an identity card, shall be on the applicant, or on the person to whom such identity has been issued, or on any other person alleging the truth of such contents.
>
> (2) Where any person claims that he is an exempted person the burden of proving such fact shall lie upon him.".

[15] Pursuant to Regulation 24, any person seeking to establish a fact which is disputed is not allowed to rely solely on his identity card or the contents of his written application of his identity card as evidence of the truth of the fact he alleges. The burden remains on him to prove the truth of that fact and he must do so through other means.

[16] It follows that I agree and adopt the observations of Dr Badariah JCA in *Ketua Pegawai Penguatkuasa Agama & Ors v Maqsood Ahmad & Ors and another appeal* [2021] 1 MLJ 120 ('*Maqsood*') that a MyKad is not conclusive evidence of religious identity.

[17] Reverting to the instant appeal, the Judicial Commissioner appeared to have ignored Yap Ah Mooi's averment in her SD that she was never married to Ibrahim. His Lordship instead placed more reliance on Ibrahim's and Yap Ah Mooi's written applications for their identity cards stating that they were married by concluding as follows:

> "24. Oleh itu berdasarkan **keterangan-keterangan** di atas saya berpendapat satu inferensi yang kuat boleh dibuat bahawa Ibrahim menikahi Yap dan Plaintif dilahirkan hasil pernikahan tersebut.".

[18] It is trite law that an appellate Court will not interfere with findings of fact by lower Courts unless they are perverse.

[19] The High Court accepted Ibrahim's written application as evidence of marriage against the express dictate of regulation 24(1) of the NRR 1990. With respect, that finding, being made contrary to law, is therefore legally perverse. The Court of Appeal in accepting such finding of fact without regard to the said regulation, made the same error. This finding is therefore liable to be set aside.

[20] Applying sections 101 and 102 of the Evidence Act 1950 and section 41 of the Specific Relief Act 1950 to this case, as it is the plaintiff who seeks to establish that she is illegitimate, she fails if she cannot prove evidence to that effect.

[21] However, the peculiar point in this case is that to meet the legal burden of her claim, the plaintiff bears the task of proving a negative fact. In other words, she is required to prove that a marriage between her biological parents does not exist. Legitimacy and marriage are constructs of the law, meaning, they do not exist unless the law says they do. It is rather illogical and onerous to expect the plaintiff to prove that something does not exist especially a thing which can only exist if in the first place it was created by law.

[22] In this context, section 103 of the Evidence Act 1950 which provides inter alia that the burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, is relevant.

[23] The rival contention by the defendants is that the plaintiff's parents were married at the time of her birth. That is in essence the 'particular fact' the defendants expect this Court to believe. And taking what was said earlier that marriage is a legal construct, it appears more legally coherent to expect the defendants to bear the burden to prove affirmatively the marriage than to expect the plaintiff to disprove it.

[24] The defendants and the Judicial Commissioner in the High Court relied on Ibrahim and Yap Ah Mooi's respective written applications stating their status as '*Berkahwin*' as a basis to believe that they were married. Reading section 103 with regulation 24(1), clearly the burden to prove that that assertion is true lies on the defendants since it is the defendants who rely on that statement for the truth of its contents.

[25] The plaintiff adduced the following pieces of evidence:

(i) the Plaintiff's SD where in paragraph 3 she attests that her parents were not married at the time she was born.

(ii) Yap Ah Mooi's SD where in paragraph 2 she affirms that she and Ibrahim were not married at the time the plaintiff was born.

(iii) as corroborative evidence, the Religious Authorities' Letters which state that they are unable to locate any record of a marriage between the plaintiff's parents.

[26] The evidence, when strung together, sufficiently casts doubt on the existence of Ibrahim and Yap Ah Mooi's purported marriage. In terms of actual proof, the defendants cannot in their respective records locate any proof of the marriage. Neither is there a single affidavit from Ibrahim or from any other relevant person to contradict the plaintiff's case.

[27] Absent any evidence from Ibrahim, the religious authorities or any other relevant person, of the marriage between Ibrahim and Yap Ah Mooi, the more logical conclusion is to believe in its non-existence. This conclusion is fortified by the averment by Yap Ah Mooi that she and Ibrahim were not married when the plaintiff was born. Accordingly, the plaintiff 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.

Whether Yap Ah Mooi is a Muslim or a Malay

[28] The next question is whether Yap Ah Mooi is a Muslim. The issue whether this Court has jurisdiction to make that assessment is addressed in greater detail when we deal with Question 1. In relation to Question 2, the issue of Yap Ah Mooi's religion is only relevant to the assessment whether the plaintiff is also rendered a Muslim by virtue of the ARIE 2003.

[29] Section 2(b) of the ARIE 2003 defines 'Muslim' as follows:

> ""Muslim" means —
>
> …
>
> (b) a person either or **both** of whose parents were at the time of the person's birth, a Muslim;". [Emphasis added]

[30] For the present purpose, only the interpretation of the word 'both' is attracted. We have the plaintiff's evidence which seeks to prove that Yap Ah Mooi was never a Muslim to begin with, as follows:

(i) the Plaintiff's SD where in paragraph 2 she states that her mother is a Buddhist;

(ii) next, we have the affidavit affirmed by one Chan Sew Fan dated 7.12.2015 where in paragraph 4.3 she also states that Yap Ah Mooi was of the Buddhist faith. Chan Sew Fan claims to have been the plaintiff's and Yap Ah Mooi's neighbour and that she knew the plaintiff when the plaintiff was four years old; and

(iii) finally, we have letters from the Religious Authorities in the Federal Territory of Kuala Lumpur, Selangor, Johor, Kedah, Kelantan, Melaka, Negeri Sembilan, Pahang, Pulau Pinang, Perak, Perlis and Terengganu admitting having no knowledge and record of Yap Ah Mooi's conversion to the religion of Islam.

[31] Taking the evidence collectively, there is no proof that Yap Ah Mooi professed the religion of Islam at the time the plaintiff was born.

[32] Of course, the letters from the Religious Authorities on the lack of a record of Yap Ah Mooi's conversion to Islam do not necessarily mean that she never independently, in her own mind and belief, professed Islam.

[33] That said, mere suppositions on the plaintiff's parents' marital status cannot displace the actual evidence on record. Here, we have the plaintiff testifying to that which is in her personal knowledge, *i.e.* that her mother

never professed the religion of Islam. There is also other contemporaneous documentary evidence supporting the plaintiff's aforementioned evidence. Yap Ah Mooi in her written application for her new identity card claimed she was a Chinese Buddhist. While her written application *per se* is not conclusive proof of that, Yap Ah Mooi's act of completing the written application form as far back as 1995 may be viewed as establishing her state of mind at that point in time. Such evidence of conduct corroborates the assertions made in the affidavits and SDs adduced by the plaintiff (see generally: section 8(2) of the Evidence Act 1950 (*Explanation 1*)).

[34] In short, Yap Ah Mooi considered herself a Buddhist in 1995 and in 2008 when she affirmed her SD. This is further attested to by Chan Sew Fan. There is therefore consistency in the assertion, on a balance of probabilities, that Yap Ah Mooi was actually a Buddhist at the time the plaintiff was born.

[35] The fact that Ibrahim stated Yap Ah Mooi's race to be Malay is a misnomer. Under Article 160 of the FC, a 'Malay' is defined as "a person who professes the religion of Islam, habitually speaks the Malay language, conforms to Malay custom …"

[36] As there is hardly any proof that Yap Ah Mooi professed Islam, there is *a fortiori*, no evidence that she was ever a 'Malay' in the FC's definition of the term. Further, as apparent from the jurat, Yap Ah Mooi's SD was interpreted to the Malay language from Cantonese. This raises serious doubt as to whether Yap Ah Mooi 'habitually speaks the Malay language'. In the face of such evidence, any assertion that Yap Ah Mooi is 'Malay' amounts to no more than an erroneous assumption.

[37] Further compounding the doubt are the following facts. Firstly, Yap Ah Mooi in an application for her own identity card identified herself as Chinese. Secondly, in the plaintiff's birth certificate, Yap Ah Mooi's race is stated as Chinese. Also, Yap Ah Mooi's death certificate states her race as being Chinese. The plaintiff in her SD also states that her mother is of Chinese descent.

[38] The High Court appeared to believe Ibrahim's written application for the plaintiff's identity card where he stated Yap Ah Mooi is Malay. Given the consistency of the record of Yap Ah Mooi's descent as Chinese, this single entry by Ibrahim is an anomaly.

[39] Given all the evidence on record, the totality of the plaintiff's evidence is certainly more consistent and more worthy of credit. On a balance of probabilities, the facts and circumstances seem to suggest that Yap Ah Mooi was neither a Muslim nor a Malay.

[40] As there is no evidence that Yap Ah Mooi was a Muslim (and certainly not a Malay) at the time of the plaintiff's birth, it cannot be said that the plaintiff is legally a person professing the religion of Islam simply by virtue of the fact that both her parents were Muslims at the time of her birth.

[41] The way the High Court and Court of Appeal approached the issue was by essentially relying on the word 'either' in section 2(b) of the ARIE 2003. They found that because there was a valid marriage between Ibrahim and Yap Ah Mooi, the plaintiff is a legitimate child and she accordingly inherits her father's religious identity.

[42] Section 111 of the Islamic Family Law (State of Selangor) Enactment 2003 ('IFLE 2003') provides as follows:

> "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 years after dissolution of the marriage either by the death of the man or by divorce, and the woman not having remarried, the *nasab* or paternity of the child is established in the man, but the man may, by way of li'an or imprecation, disavow or disclaim the child before the Court.".

[43] Under section 111, which relates to the ascription of paternity, a child may only be ascribed the paternity of the father if he or she is born to a woman who is married to the man for a period of more than six *qamariah* months. It follows that a child born less than six *qamariah* months or born to a woman not married to the man who fathered the child is illegitimate and the *nasab* or paternity of the child could not be established in the father. Applying section 111 to the facts of the instant case results in the conclusion that the plaintiff is an illegitimate child and while her status as a Muslim is disputed, it remains undisputed that Ibrahim is a Muslim. As a Muslim, the said section 111 applies to Ibrahim to remove him, in law, of any ascription of paternity to the plaintiff.

[44] The necessary implication upon a holistic construction of IFLE 2003 against section 2 of the ARIE 2003 therefore suggests that the word 'parents', in section 2 of the ARIE 2003, refers only to the parents of legitimate children.

[48] Even if under Islamic law or the IFLE 2003 Ibrahim cannot ascribe paternity to the plaintiff, could he nonetheless, under secular law, have the right to decide his then infant daughter's religion as he did for her in 1994 in her written application for an identity card? The short answer is

no. The authority for this is the judgment of this Court in *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545 (‘*Indira Gandhi*’).

[49] There is no evidence that Yap Ah Mooi jointly consented to recognise the plaintiff as a Muslim. Indeed, the evidence points in the opposite direction in that in the plaintiff’s birth certificate, the column for her religion reads: ‘Maklumat Tidak Diperolehi’ (*Information Not Obtained*).

[50] For the foregoing reasons, Question 2 is answered in the negative.

Question 1

[51] Is this Court, in the first place, allowed to make a finding that the plaintiff or Yap Ah Mooi, or both “were never Muslims” as opposed to the finding that they are “no longer Muslims”. It will be explained later that there is a fundamental difference between the two questions.

[52] The Courts below concurrently held that the declaration sought by the plaintiff is of the nature that she is “no longer a Muslim” and hence a matter which falls within the exclusive jurisdiction of the Syariah Court by virtue of Article 121(1A) of the FC.

[53] Under Article 121(1A) of the FC, the Syariah Courts may only exercise jurisdiction over a person or persons on two conditions. Firstly, the person shall profess the religion of Islam. This can generally be classified as jurisdiction *ratione personae* – where the jurisdiction of the court or tribunal is contingent on the litigant’s legal persona.

[54] Secondly, even if Syariah Courts may exercise jurisdiction *ratione personae*, they must still ensure that they have jurisdiction over the subject-matter as expressly enumerated in the said Item 1 of the State List. This may be classified as jurisdiction *ratione materiae* – or subject-matter jurisdiction.

[55] Such is the structure designed by the drafters of our FC. Without delving too deep into the history of such structure, the design was deemed necessary to allow for the continued application of Islamic law exclusively to Muslims and only to a certain degree. In all other instances, the FC vests all judicial jurisdiction and judicial power in the civil courts which interpret laws passed by secular institutions such as Parliament or the State Legislatures within their powers prescribed by the Ninth Schedule. (See generally for example *Che Omar bin Che Soh v Public Prosecutor* [1988] 2 MLJ 55). This includes the interpretation of State Enactments promulgated to address issues of Islamic law but only insofar as they relate to secular matters, for example, constitutional issues. The earlier interpretation and application of section 111 of the IFLE 2003 in respect of whether the plaintiff is in the first place a Muslim by virtue of the fact that Ibrahim is a Muslim, is an example of this.

[56] The issue that concerns us in this dispute is whether the Syariah Court has jurisdiction *ratione personae* over the plaintiff. To understand the answer to the question, it must first be understood that the word “Muslim” is not only a label to describe a person’s personal beliefs in the religion of Islam but it is also a legal term upon which the Syariah Court’s *ratione personae* jurisdiction is built.

[57] Article 11(1) of the FC guarantees the right to profess and practice one’s religion. However, Item 1 of the State List singularly uses the word

'professing'. Contrasting Article 11(1) with Item 1 of the State List, it is plain that the latter was deliberately more narrowly worded to exclude the requirement of 'practice'. Thus, so long as one is a Muslim by identification whether he practises or not, or whether he continues to believe in the faith or not, he is no less legally identified as a 'person professing the religion of Islam'.

[58] Taken in this context, there is a notable difference between 'profess' on the one side and 'profess and practice' on the other. The former is a constitutional term and is justiciable before the civil courts. The latter phrase is a question of faith and dogma and therefore falls within the exclusive jurisdiction of the Syariah Courts by virtue of Article 121(1A) of the FC.

[59] One matter upon which the Syariah Courts have jurisdiction is 'offences against the precepts of Islam'. One example of such an offence is 'apostasy' or as it is more commonly known: '*murtad*'.

[60] Administratively, once one becomes a Muslim, and becomes subject to the jurisdiction of the Syariah Courts, the procedure to 'leave' the religion also becomes subject to Islamic law.

[61] In other words, one cannot unilaterally on his own accord 'renounce' the religion of Islam. Doing so would amount to an offence against the precepts of Islam. In such an instance, the Syariah Court would have both jurisdictions *ratione personae* and *ratione materiae*. This has long been canvassed and explained by the Federal Court in *Kamariah bte Ali dan Lain-lain lwn Kerajaan Kelantan dan Satu Lagi* [2005] 1 MLJ 197.

[62] The High Court and the Court of Appeal are therefore correct in principle. If the plaintiff is a Muslim seeking to renounce her faith in Islam, then the matter being 'an offence against the precepts' of Islam, is within the jurisdiction of the Syariah Court due to Article 121(1A) of the FC. However, the conclusion of the Courts below that the plaintiff is a Muslim was based solely on the erroneous finding of fact that the plaintiff's parents were married during her birth and thus resulting in the erroneous application of section 2(b) of the ARIE 2003. Premised on the earlier findings that the plaintiff is an illegitimate child, the conclusion formed on the said section 2(b) is unsustainable.

[63] There is a critical distinction between 'no longer a Muslim' on the one side, and 'never was a Muslim', on the other. The former refers to renunciation cases which as explained, falls within the jurisdiction of the Syariah Courts. The latter, which may be loosely described as *ab initio* cases, cannot, on a coherent application of the law, fall within the jurisdiction of the Syariah Courts. To understand this, it would perhaps be useful to distinguish *Lina Joy* (supra).

[64] The *ratio* of *Lina Joy*, appears to be that because Azlina/Lina Joy was always a Muslim, it was necessary that any attempt by her to change her religion required the approval of the Syariah Court. The same result as *Lina Joy* would be achieved if someone who was originally a non-Muslim sometime in his or her life converted to Islam but later chose to renounce Islam. In this context, *Lina Joy* is entirely distinguishable from the present case as the present case is an *ab initio* case and not a renunciation case.

[65] *Ab initio* cases are unique and peculiar where the person claims never to have been a Muslim in the first place but for some reason or

another he or she is designated as a person who 'professes the religion of Islam'. Logically, any legal presumption as to their Muslim status cannot apply because they were never identified as Muslim to begin with. Here, *Lina Joy* (supra) and like cases may be distinguished by referring to the decision of Yew Jen Kie J (as she then was) in *Azmi* (supra).

[66] According to the applicant in *Azmi*, he was raised in a Bidayuh Christian community. However, when he was younger the religion of Islam was chosen for him by his parents upon their conversion although his upbringing never matched that description. He claimed that when he attained the age of majority, he chose Christianity as his religion. Accordingly, he applied to the Sarawak branch of the NRD to remove Islam from his identity card and to change his name from 'Azmi bin Mohamed Azam Shah @ Rooney' to 'Roneey anak Rebit'. Most of the parties to the case agreed by consent to grant a letter of no objection on his 'renunciation' but the Chief Syariah Judge claimed that he had no jurisdiction to grant the order of 'renunciation'. Based on this refusal, the applicant argued that in the first place, the Syariah Court had no jurisdiction to grant him the order because he was not in the first place a Muslim.

[67] Yew Jen Kie J held that since the applicant, who is a Bidayuh by birth, had not in the first place professed his faith in Islam but his conversion followed that of his mother as he was a minor at the material time, logic dictates that he cannot be considered as a person professing that particular faith. Further, the applicant has not lived like a person professing Islam as seen in his averment that he was raised and brought up in the Bidayuh Christian community.

[68] The decision of Yew Jen Kie J in *Azmi* (supra) was appealed against but the appeal was subsequently withdrawn (Court of Appeal Civil Appeal No. Q-01-159-05/2016, the Director General of the National Registration Department v Azmi bin Muhammad Azam @ Rooney). The NRD adhered to the decision of the High Court. The applicant's name was changed and the word 'Islam' was removed from his identity card.

[69] What can be distilled from *Lina Joy* (supra) and like cases on the one side, and *Azmi* and like cases on the other, is that it is a matter of proof that the person affirmatively professed the religion of Islam at the material time. Absent such proof, the case may be classified as an *ab initio* case.

[70] Reverting to the question: do the civil courts possess jurisdiction to determine the status of persons who claim to 'never have been a Muslim' as opposed to 'no longer being a Muslim'? The answer to the question must naturally be in the affirmative as otherwise there would be no legal recourse for persons of the *ab initio* category.

[71] The distinction between *ab initio* and renunciation cases and how civil courts have always respected the Syariah Courts' jurisdiction in renunciation cases was most recently addressed by the Court of Appeal in *Maqsood* (supra).

[72] Based on the discussion of *Lina Joy* and *Azmi*, I agree with the articulation of the Court of Appeal in *Maqsood*, on the difference between *ab initio* cases and renunciation cases and which of the two courts, the civil courts or Syariah Courts have jurisdiction. For the reasons stated earlier in respect of Question 2, I am also minded to think that the Court of Appeal's observations in respect of the legal status of identity cards vis-

à-vis regulation 24 of the NRR 1990 is correct. Incidentally, at the time of writing this judgment, the applications for leave to appeal against the decision of the Court of Appeal was dismissed by this Court on 21.12.2020.

[73] The phrase 'professing the religion of Islam' is a provision of the FC. Ascertaining the meaning of any provision of the FC is a judicial power classified broadly under the umbrella of judicial review and accordingly, it is a power vested strictly and only in the civil superior courts.

[75] To put into perspective the point that although a matter may have religious connotations to it, if it requires constitutional interpretation, only the civil courts have the power to ascertain it, reference is made to the judgment of this Court in *Abdul Kahar bin Ahmad v Kerajaan Negeri Selangor (Kerajaan Malaysia, intervener) & Anor* [2008] 3 MLJ 617 ('*Abdul Kahar'*), where Abdul Hamid Mohamad CJ observed:

> "… Nowhere in the Constitution says that interpretation of the Constitution, Federal or State is a matter within the jurisdiction of the Syariah Court to do. The jurisdiction of Syariah Courts are (*sic*) confined to the limited matters enumerated in the State List and enacted by the respective state enactments.".

[76] The phrase 'persons professing the religion of Islam' is a constitutional term. Accordingly, the civil courts are exclusively empowered, indeed, duty-bound to adjudicate the matter. It is only in 'renunciation' cases where one already professes or proclaims to profess the religion of Islam (irrespective of whether they actually practise the faith) with the subsequent decision to change what they profess, that the matter is removed to the jurisdiction of the Syariah Court. Whether it is an

ab initio case or a renunciation case will require a careful examination of the factual matrix of the case.

[77] On the foregoing analysis, Question 1 is answered in the affirmative.

[78] The respondents and the *amicus curiae*, the Attorney General, argued that this is a renunciation case and accordingly, this Court has no jurisdiction to determine the religion of the plaintiff under Article 121(1A) of the FC. It is thus necessary to now examine the factual matrix of the case to determine whether the plaintiff is, on the evidence, a Muslim to begin with.

Factual Analysis

[79] On the evidence, it has been decided that the plaintiff is illegitimate, that her mother was never a Muslim and that under section 111 of the IFLE 2003, the religion of her putative father cannot be ascribed to the plaintiff. Accordingly, the plaintiff cannot be a Muslim by virtue of section 2(b) of the ARIE 2003.

[80] What remains in this analysis is whether the plaintiff is a 'Muslim' under any of the other limbs of section 2 of the ARIE 2003. The provision, minus paragraph (b), provides:

> ""Muslim" means —
>
> (a) a person who professes the religion of Islam;
>
> …
>
> (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

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

[81] Section 2(a) is out of the question for obvious reasons. This is not a conversion case and so section 2(e) clearly does not apply. Section 2(f) is irrelevant because there is nothing on record to suggest that the plaintiff has stated in any document where she is bound to state the truth that she is a Muslim. In fact, in all documents before the Court she consistently asserts that she is not a Muslim. That only leaves us with sections 2(c) and 2(d).

[82] As regards section 2(d), Chan Sew Fan in her affidavit avers that for as long as she has known the plaintiff, she has always been known to profess the Buddhist faith. There is no evidence whatsoever on record to suggest that the plaintiff is reputed as a Muslim.

[83] As for section 2(c), Chan Sew Fan's affidavit, like in the case of section 2(d), appears to refute the fact that the plaintiff was raised as a Muslim. There is nothing in the record to suggest that the defendants have rebutted Chan Sew Fan's averments. The general rule of affidavit evidence is that unrebutted averments are deemed admitted (see generally *Overseas Investment Pte Ltd v Anthony William O'Brien & Anor* [1988] 3 MLJ 332).

[84] There is also the matter of the Plaintiff's SD wherein she states that she was never a Muslim and that she was raised a Buddhist by her mother. Then we have Yap Ah Mooi's SD where she also states that she never raised the plaintiff as a Muslim. Further, we have the independent evidence in the Religious Authorities' Letters where they found no record of conversion of either the plaintiff or her mother to Islam. An extract of the plaintiff's birth certificate (RR, 4(1), at page 244) states in the column for her religion: 'Maklumat Tidak Diperoleh' (*Information Not Obtained*). There is nothing in the evidence to prove that the plaintiff was raised a Muslim such that section 2(c) of the ARIE 2003 may apply to her.

[85] The High Court seemed to opine that there were gaps in the evidence which suggest that Ibrahim was living in the same place as Yap Ah Mooi and the plaintiff. The assumption of the High Court therefore appeared to be that given the presence of Ibrahim, the plaintiff might have been raised as a Muslim.

[86] Determining whether the plaintiff is constitutionally a person 'professing the religion of Islam' requires proof. The force of the evidence on record suggests to the contrary. To assume that Ibrahim may have raised the plaintiff as a Muslim without proof, with respect, is merely a conjecture.

[87] In the circumstances, as none of the provisions of section 2 of the ARIE 2003 apply to the plaintiff's case, the natural conclusion one is compelled to draw is that the plaintiff is NOT, as a matter of fact, a person 'professing the religion of Islam' as per Item 1 of the State List. This is because there is no proof that she is a Muslim by original faith.

Conclusion

[88] For the reasons aforesaid, the plaintiff has made out her claim on a balance of probabilities. The concurrent categorisation by the Courts below of the plaintiff's case as a renunciation case is not correct in fact and in law. This is an *ab initio* case.

[89] The plaintiff's appeal is accordingly allowed and the orders of the High Court and Court of Appeal are set aside. An order is granted in terms of the OS. There shall be no order as to costs.

[90] Rohana Yusuf PCA, Nallini Pathmanathan FCJ, Abdul Rahman Sebli FCJ, Zabariah Mohd Yusof FCJ, Mary Lim Thiam Suan FCJ and Rhodzariah Bujang FCJ have read this judgment in draft and have expressed their agreement with it. Azahar Mohamed CJM and Hasnah Mohamed Hashim FCJ agreed with me on the answers to the Leave Questions but depart on the orders/reliefs to be granted to the appellant.

Dated: 5 February, 2021.

(TENGKU MAIMUN BINTI TUAN MAT)
Chief Justice,
Federal Court of Malaysia.

Note: This summary is merely to assist in the understanding of the grounds of judgment. The grounds of judgment comprise the final authoritative text.