IN THE COURT OF APPEAL OF MALAYSIA

(APPELLATE JURISDICTION)

CIVIL APPEAL NO: Q-01(NCVC)(A)-344-10/2015

BETWEEN

JENNY BINTI PETER @
NUR MUZDHALIFAH ABDULLAH ... APPELLANT

AND

1. **DIRECTOR OF JABATAN AGAMA ISLAM SARAWAK**
2. **MAJLIS AGAMA ISLAM**
3. **DIRECTOR-GENERAL OF NATIONAL REGISTRATION MALAYSIA**
4. **STATE GOVERNMENT OF SARAWAK … RESPONDENTS**

(In the High Court of Sabah and Sarawak at Kuching
Judicial Review No: KCH-13-1/2-2015

Between

Jenny binti Peter @ Nur Muzdhalifah Abdullah .... Applicant

And

1. Director of Jabatan Agama Islam Sarawak
2. Majlis Agama Islam
3. Director-General of National Registration Malaysia
4. State Government of Sarawak …. Respondents

HEARD TOGETHER WITH

CIVIL APPEAL NO: Q-01(NCVC)(A)-345-10/2015

BETWEEN

MOHD SHAFIQ ABDULLAH @
TIONG CHOO TENG ... APPELLANT

AND

1. **DIRECTOR OF JABATAN AGAMA ISLAM SARAWAK**
2. **MAJLIS AGAMA ISLAM**
3. **DIRECTOR-GENERAL OF NATIONAL REGISTRATION MALAYSIA**
4. **STATE GOVERNMENT OF SARAWAK … RESPONDENTS**

(In the High Court of Sabah and Sarawak at Kuching
Judicial Review No: KCH-13NCVC-4/2-2015

Between

Mohd Shafiq Abdullah @ Tiong Choo Teng .... Applicant

And

1. Director of Jabatan Agama Islam Sarawak
2. Majlis Agama Islam
3. Director-General of National Registration Malaysia
4. State Government of Sarawak …. Respondents

HEARD TOGETHER WITH
CIVIL APPEAL NO: Q-01(NCVC)(A)-352-10/2015

BETWEEN

SALINA JAU BINTI ABDULLAH ... APPELLANT

AND

1. **DIRECTOR OF JABATAN AGAMA ISLAM SARAWAK**
2. **MAJLIS AGAMA ISLAM**
3. **DIRECTOR-GENERAL OF NATIONAL REGISTRATION MALAYSIA**
4. **STATE GOVERNMENT OF SARAWAK … RESPONDENTS**

(In the High Court of Sabah and Sarawak at Kuching
Judicial Review No: KCH-13NCVC-1/1-2015

Between

Salina Jau binti Abdullah .... Applicant

And

1. Director of Jabatan Agama Islam Sarawak
2. Majlis Agama Islam
3. Director-General of National Registration Malaysia
4. State Government of Sarawak …. Respondents

CORAM:

TENGKU MAIMUN TUAN MAT, JCA
BADARIAH SAHAMID, JCA
KAMARDIN HASHIM, JCA

JUDGMENT OF THE COURT

[1] These were the appeals by Jenny binti Peter @ Nur Muzdhalifah Abdullah (Jenny), Mohd Syafiq Abdullah @ Tiong Choo Ting (Mohd Syafiq) and Salina Jau binti Abdullah (Salina) against the order of the

High Court at Kuching in dismissing their application for leave to commence judicial review.

Background facts

[2] Jenny's parents were Christians and Jenny was raised as a Christian. On 1.7.2002, she converted to Islam and married a Muslim man named Nazri bin Abdul Rahman. They divorced on 26.7.2006 and since the divorce, Jenny had returned to practice Christianity where thereafter, she married a Christian man.

[3] Mohd Syafiq was born of mixed heritage of Chinese and Bidayuh. He converted to Islam on 24.1.1996 to marry Siti Aishah binti Bahadar. Since the demise of his wife Siti Aishah on 8.9.2007, Mohd Shafiq practiced Christianity.

[4] Salina similarly was not born a Muslim. She converted to Islam on 9.11.1992 before her marriage to a Muslim man, named Shazali bin Saleh on 26.11.1992. They were divorced on 14.10.2010. Since her divorce, Salina decided to return to Christianity.

[5] Jenny, Mohd Syafiq and Salina (collectively referred to as the appellants) had each signed a statutory declaration evincing their intention to renounce Islam and they had notified the first respondent (JAIS) of their intention.

[6] Pursuant to their notification/application to renounce Islam, the appellants were requested by JAIS to attend counselling sessions/ course as an adherence procedure to renounce Islam. All the appellants

had attended the sessions as required and having completed the sessions, remained firm in their stand to renounce Islam. They wrote to JAIS for the Letter of Release from Islam but received no response.

[7] The appellants filed an application for leave to file judicial review against the Director of JAIS, Majlis Agama Islam Sarawak, the Director-General of National Registration Malaysia and the State Government of Sarawak as the first to the fourth respondents, respectively. The reliefs sought by the appellants were essentially for declaratory orders *inter alia* that they were no longer Muslims.

Proceedings in the High Court

[8] At the outset, learned Senior Federal Counsel raised an objection that the High Court had no jurisdiction to hear the leave application as the issue of apostasy was a matter related to Islamic law which fell within the jurisdiction of the Syariah court. The following cases were cited in support of the objection:

(i) *Soon Singh a/l Bikar Singh v Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor* [1999] 1 MLJ 489;

(ii) *Lina Joy lwn. Majlis Agama Islam Wilayah Persekutuan dan lain-lain* [2007] 4 MLJ 585;

(iii) *Majlis Ugama Islam Pulau Pinang dan Seberang Perai v Shaik Zolkaffily bin Shaik Natar & Ors* [2003] 3 MLJ 705; and

(iv) *Hj. Raimi Abdullah v Siti Hasnah Vangarama bt Abdullah and another appeal* [2014] 3 MLJ 757.

[9] In reply, learned counsel for the appellants submitted that the Syariah court has no jurisdiction over the matter as the appellants do not profess the religion of Islam and that there is no statutory power under the state legislation that grants the Syariah court power to adjudicate the issue of apostasy.

[10] The learned Judicial Commissioner (JC) ruled that as the appellants are still Muslims on papers, the Syariah court would have the jurisdiction to deal with their conversion out of Islam under Item 1, List II-Ninth Schedule of the Federal Constitution.

[11] Having considered *Lina Joy* (supra), *Majlis Ugama Islam Pulau Pinang* (supra) and *Hj Raimi Abdullah* (supra), the learned JC concluded that the absence of any express provision in the Syariah Courts Ordinance 2001 and Majlis Islam Sarawak Ordinance 2001 in relation to apostasy would not confer the jurisdiction in the civil court and the fact that the appellants may not have the remedy in the Syariah court would not make the jurisdiction exercisable by the civil court.

[12] The application was thus dismissed by the High Court, hence the appeal.

The Appeal

[13] The appeal concerned the issue of jurisdiction, namely whether the question of apostasy in Sarawak rests in the Syariah court or the civil court.

[14] Learned counsel for the appellants repeated his position taken in the High Court that the jurisdiction rests with the civil court. Learned counsel relied on subsection 25(2) of the Courts of Judicature Act 1964 (CJA) which provides:

> "(2) Without prejudice to the generality of subsection (1) the High Court shall have the additional powers set out in the Schedule:".

While paragraph 1 of the Schedule reads:

> "1. Power to issue to any person or authority directions, orders or writs, including writs of the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, or any others, for the enforcement of the rights conferred by Part II of the Constitution, or any of them, or for any purpose.".

[15] Learned counsel submitted that there is nothing stated in the Syariah Courts Ordinance 2001 that the Syariah court may hear cases in relation to apostasy or conversion out of Islam. Likewise, nothing could be found in Majlis Islam Sarawak Ordinance 2001 which provides for matters relating to conversion out of Islam.

[16] Since there is in fact no provision that gives the Syariah court jurisdiction to deal with the issue of apostasy, learned counsel submitted that the State Legislature must first provide in the Syariah Courts Ordinance 2001 a provision to give the Syariah court jurisdiction to deal with apostasy. In the absence of any provisions under the law relating to apostasy, learned counsel submitted that Article 11 of the Federal Constitution is the only governing law in relation to apostasy and conversion out of Islam.

[17] Thus, learned counsel submitted that the civil court has jurisdiction to hear the matter and that the learned JC erred in his decision, for the reason that there is no statutory provision under the Syariah Courts Ordinance 2001 that grants the Syariah court in Sarawak jurisdiction to adjudicate the issue of apostasy.

Our Decision

[18] We found no appealable error on the part of the learned JC in dismissing the application on the basis that the High Court had no jurisdiction to hear apostasy matters. The decision of the learned JC was consistent with several cases decided by the Federal Court on similar issue, namely *Dalip Kaur v Pegawai Polis Daerah Bukit Mertajam & Anor* [1991] 3 CLJ 2768; *Lina Joy* (supra), *Soon Singh* (supra), and *Hj Raimi* (supra).

[19] We do not propose to quote the relevant passages from the above authorities except to state that in *Lina Joy*, the majority judgment of the Federal Court referred to and followed *Soon Singh* whereas *Soon Singh* had referred to *Dalip Kaur*. In *Dalip Kaur*, the key issue before the Supreme Court was whether the deceased had effectively renounced the Islamic faith during his lifetime. It was held in *Dalip Kaur* that the only forum qualified to answer the question was the Syariah court and in *Soon Singh*, the Federal Court held that the jurisdiction of the Syariah court to deal with conversion out of Islam, although not expressly provided for in some State Enactments, can be read into those enactments by implication. In *Hj Raimi*, the Federal Court reiterated that whether a person was a Muslim or not was a matter falling under the exclusive jurisdiction of the Syariah court.

[20] Learned counsel for the appellants contended that there cannot be implication of jurisdiction and in this regard, highlighted the dissenting judgment of Richard Malanjum Chief Judge (Sabah & Sarawak) in *Lina Joy* (supra), where His Lordship said at pg 635:

> "[99] In *Ng Wan Chan v Majlis Ugama Islam Wilayah Persekutuan & Anor* (No. 2) [1991] 3 MLJ 487 Eusof Chin J (as he then was) who incidentally was also in the panel that decided Soon Singh case said this at p 489:
>
> > The Federal Constitution, Ninth Schedule List II – State List, specifically gives powers to state legislatures to constitute Muslim courts and when constituted, 'shall have jurisdiction only over persons professing the Muslim religion and in respect only of any of the matter included in this paragraph.
> >
> > Therefore, a syariah court derives its jurisdiction under a state law, (for Federal Territories – Act of Parliament) over any matter specified in the State List under the Ninth Schedule of the Federal Constitution.
> >
> > If state law does not confer on the syariah court any jurisdiction to deal with any matter stated in the State List, the syariah court is precluded from dealing with the matter. Jurisdiction cannot be derived by implication.
>
> [100] And in *Lim Chan Seng v Pengarah Jabatan Agama Islam Pulau Pinang* [1996] 3 CLJ 231 the learned High Court Judge was of the view that art 121 (1A) by itself did not automatically confer jurisdiction on the syariah court, even on matters that fell under the State List of the Ninth Schedule. It was the view of the learned Judge that the state legislature must first act upon the power given it by arts 74 and 77 of the Constitution and the State List and thus enact laws conferring the jurisdiction.
>
> …
>
> [104] Hence, I am in agreement with those views in that jurisdiction must be express and not implied. The doctrine of implied powers must be limited to those matters that are incidental to a power already conferred or matters that

> are necessary for the performance of a legal grant. And in the matters of fundamental rights there must be as far as possible be express authorization for curtailment or violation of fundamental freedoms. No court or authority should be easily allowed to have implied powers to curtail rights constitutionally granted.".

[21] With respect, we found that the learned JC was correct to follow the majority judgment in *Lina Joy*. It was the majority judgment that created the binding precedent. The minority judgment cannot be accepted as the correct state of law (see *Fawziah Holdings Sdn Bhd v Metramac Corp Sdn Bhd (previously known as Syarikat Teratai KG Sdn Bhd)* [2006] 1 MLJ 435; *Barat Estates Sdn Bhd & Anor v Parawakan a/l Subramaniam & Ors* [2000] 4 MLJ 107).

[22] Learned counsel had also referred us to the decision of the Federal Court in *Latifah bte Mat Zin v Rosmawati bte Sharibun & Anor* [2007] 5 MLJ 101 and *Abdul Kahar bin Ahmad v Kerajaan Negeri Selangor (Kerajaan Malaysia, Intervener) & Anor* [2008] 3 MLJ 617. In *Latifah bte Mat Zin*, the Federal Court unanimously stated as follows at pg 116:

> "[42] Similarly, in the case of the syariah courts. Item 1 of the State List, having stated 'the constitution, organization and procedure of Syariah courts', continues to provide 'which shall have jurisdiction *only* over persons professing the religion of Islam and in respect *only* of any of the matters included in this paragraph, but shall not have jurisdiction in respect of offences except in so far as conferred by federal law, the control of propagating doctrines and beliefs among persons professing the religion of Islam …' (Emphasis added).
>
> [43] What it means is that, the Legislature of a State, in making law to 'constitute' and 'organize' the syariah courts shall also provide for the jurisdictions of such courts within the limits allowed by item 1 of the State List, for example, it is limited only to persons professing the religion of Islam. The

use of the word 'any' between the words 'in respect only of' and 'of the matter' means that the State Legislature may choose one or some or all of the matters allowed therein to be included within the jurisdiction of the syariah courts. It can never be that once the syariah courts are established the courts are seized with jurisdiction over all the matters mentioned in item 1 automatically. It has to be provided for. At the very least, the law should provide 'and such courts shall have jurisdiction over all matters mentioned in item 1 of List II – State List of the Ninth Schedule.' If there is no requirement for such provision, then it would also not be necessary for the Legislature of a State to make law to 'constitute' and 'organize' the syariah courts. Would there be Syariah courts without such law? Obviously none. That is why such law is made in every State e.g. Administration of Islamic Law Enactment 1989 (Selangor).

[44] (The position in the Federal Territories is the same in this respect even though such law is made by Parliament because such law may only be made 'to the some extent as provided in item 1 of the State List …' – item 6(e) of the Federal List).

[45] The point to note here is that both courts, civil and syariah, are creatures of statutes. Both owe their existence to statutes, the Federal Constitution, the Acts of Parliament and the State Enactments. Both get their jurisdictions from statutes i.e. Constitution, federal law or State law, as the case may be. So, it is to the relevant statutes that they should look to determine whether they have jurisdiction or not. Even if the syariah court does not exist, the civil court will still have to look at the statutes to see whether it has jurisdiction over a matter or not. Similarly, even if the civil court does not exist, the syariah court will still have to look at the statute to see whether it has jurisdiction over a particular matter or not. Each court must determine for itself first whether it has jurisdiction over a particular matter in the first place, in the case of the syariah courts in the States, by referring to the relevant State laws and in the case of the syariah court in the Federal Territory, the relevant Federal laws. Just because the other court does not have jurisdiction over a matter does not mean that it has jurisdiction over it.".

[23] Applying the principle in *Latifah bte Mat Zin* (supra), learned counsel for the appellants submitted that since the Sarawak Syariah Courts Ordinance 2001 contain no provision relating to the conversion in or out of Islam, the Syariah court in Sarawak has no jurisdiction to deal with apostasy.

[24] We disagreed with learned counsel. The Federal Court, as can be seen from the authorities, had consistently held that matters of apostasy are within the jurisdiction of the Syariah courts and not the civil courts. Although the Sarawak Syariah Courts Ordinance 2001 did not provide for the conversion in or out of Islam, Part VIII of the Majlis Islam Sarawak Ordinance 2001 provides for conversion to the religion of Islam. In this regard it is pertinent to highlight the majority judgment in *Lina Joy* (supra) at pg 616, which affirmed the decision of the Federal Court in *Soon Singh*:

> "15.5 ... adalah sejajar dengan logik untuk Mahkamah Syariah, yang telah dengan jelasnya diberi bidang kuasa untuk mengadili perkara-perkara yang berkaitan dengan pemelukan agama Islam adalah, secara implikasi perlu, juga mempunyai bidang kuasa untuk mengadili perkara-perkara yang berkaitan dengan keluarnya seorang Muslim dari agama Islam atau kemurtadan.".

[25] Notwithstanding the numerous pronouncements made by the Federal Court that the issue of apostasy is a matter for the Syariah court to adjudicate, as highlighted by learned counsel, the appellants had the written confirmation from Syariah court that the Syariah court had no jurisdiction to declare that the appellants are no longer Muslims.

[26] Vide a letter dated 10.3.2015 (exhibit JP-1 at pg 69: record of appeal No. 344) the Syariah court had stated their position as follows:

> "3. Berdasarkan Ordinan-Ordinan yang digunapakai dan berkuatkuasa di Mahkamah Syariah Sarawak, tiada satu pun seksyen yang memberi kuasa kepada mahkamah ini berkaitan pengistiharan keluar Islam sepertimana yang dikehendaki oleh Jabatan Pendaftaran Negara.
>
> 4. Sehubungan itu, pihak kami tidak mempunyai bidangkuasa untuk mengeluarkan Sijil Peristiharan Keluar Islam sepertimana yang dikehendaki oleh pihak tuan.".

[27] Nevertheless, as mentioned in paragraph [24] above, the Majlis Islam Sarawak Ordinance 2001 contained provisions for conversion to the religion of Islam (see sections 68, 69 and 79 in respect of requirement for, and effect of conversion; capacity to convert to the religion of Islam and appointment of Registrar of Muslim Converts, respectively). Applying the principle in *Soon Singh* which was affirmed in *Lina Joy*, by necessary implication, JAIS/the Syariah court would therefore have the jurisdiction to deal with conversion out of Islam. Even if the Syariah court was correct to state that they have no jurisdiction because "tiada satu pun seksyen yang memberi kuasa kepada Mahkamah ini berkaitan pengistiharan keluar Islam ...", applying the principle in *Latifah bte Mat Zin*, it did not follow that the High Court had jurisdiction over the matter.

[28] The letter issued by the Syariah court had, undoubtedly placed the appellants in a deadlock.

[29] The appellants vide their affidavit in support of the application for leave, had averred to the fact that they had sent their respective application to JAIS notifying JAIS of their intention to leave Islam and to return to Christianity.

[30] Pursuant to the application to renounce Islam, Jenny was invited to attend a counselling session organised by JAIS where she attended the sessions three (3) times. After her session of counselling, she was told that she could leave Islam and that she just needed to wait for the report from JAIS. She did not receive the report until the filing of the application for leave for judicial review.

[31] Mohd Syafiq had also been requested by JAIS to attend the session/course in adherence to leave Islam. After attending the session/ course, JAIS refused to issue him the certificate for completing the course.

[32] As for Salina, she was also requested to attend spiritual counselling. She attended a few sessions and was told that she had completed all the requirements of JAIS to leave Islam. In a letter to the Chief Minister dated 20.3.2014, Salina described her deadlock as follows (exhibit SJ 5: record of appeal No. 352 at pp 57-58):

> "I hereby write to seek YAB Chief Minister's help to solve my problem herein as I am placed in a dilemma and/or a deadlock whereby there is no solution to application to renounce from Islam Faith and also to replace the my name (*sic*) and remove the word "Islam" from my Mykad.
>
> ...
>
> On 19/3/2014 at Baitulmal Building, Level 13, I was requested to affirm another Surat Akuan before Ustazah Rugayah Zen, which according to her will be my

last Surat Akuan as requested by JAIS. Following that she will send my file to JAIS Panel for them to issue a "Surat Sulit" to Jabatan Pendaftaran Negara. Sad to know that she informed that on JAIS side, my case is considered **"CLOSED"** despite that my particulars in my Mykad remain unchanged.

As far as I understand from JAIS, the "Surat Sulit" to be sent by JAIS to JPN shall only have the following content i.e. "memaklumkan bahawa (Salina, myself) telah selesai (tamat) mejalani (*sic*) segala procedure yang ditetapkan oleh Jabatan Agama Islam". **THERE IS NOTHING IN THE SAID LETTER TO INFORM THAT JAIS HAS APPROVED OR DISAPPROVED MY APPLICATION TO RENOUNCE ISLAMIC FAITH**. In other words, there is no clear decision from JAIS to JPN respecting my application to renounce Islam Faith.

JAIS is trying to pass the decision power to JPN regarding my application which YAB Chief Minister may well aware that JPN has no power at all to decide religious matter.

Under our Sarawak State Constitution, religious matter is under the purview of the State Government and that Federal Government has no power to interfere.

As of now, I am expecting a standard letter from JPN of which a copy is enclosed for your attention, whereby it expressly states that:

"2. Dukacita Dimaklumkan, permohonan tuan ditolak oleh panel pindaan Bahagian Pengenalan, kerana pertukaran nama atas sebab keluar agama Islam perlu mengemukakan **Surat Pengistiharan Keluar dari Mahkamah Syariah**.

3. Sehubungan itu, sekiranya, tuan berhasrat untuk mengemukakan permohonan semula, puan dinasihatkan mengemukakan surat dari **Mahkamah Tinggi Kuching bagi mendapatkan surat pengisytiharan keluar Islam**."

From the contents of JPN's letter, as earlier said, I am now in a deadlock, whereby:

> Firstly, **there is no Muslim lawyer** in Sarawak that would like to take up this sort of application even if the Syariah Court has jurisdiction to hear my case;
>
> Secondly, **the Civil High Court in Malaysia has no jurisdiction to hear matter relating to Islamic Law.**".

[33] While we understood the 'predicament' faced by the appellants, as stated aforesaid, the issue before us had been answered by the Federal Court in the above cited cases and the doctrine of stare decisis dictates that we follow those cases (see *Dato' Tan Heng Chew v Tan Kim Hor & Another Appeal* [2006] 1 CLJ 577).

[34] As for Article 11 of the Federal Constitution and the additional powers of the High Court stipulated in Schedule 1 of the CJA, we opined that it must be read in the context of Article 121(1A) of the Federal Constitution, where it is now settled by the long line of authorities that whether a person was a Muslim or not, was a matter under the exclusive jurisdiction of the Syariah court. On the factual matrix of this case, the appellants' remedy perhaps lies in the State Legislature.

[35] In the light of all the above, we unanimously dismissed the appeals with no order as to costs.

Dated: 1st November 2016

Signed
(**TENGKU MAIMUN BINTI TUAN MAT**)
Judge
Court of Appeal

Counsel/Solicitors:

For the Appellant:

Baru Bian (Joshua Parir Baru with him)
Messrs. Baru Bian & Co.

For the Respondents:

Shamsul Bolhassan and Leo anak Saga (for the 3rd Respondent)
Peguam Kanan Persekutuan
Jabatan Peguam Negara.

Saferi Ali and Hisyamudin Roslan (for the 1st, 2nd & 4th Respondents)
Pegawai Undang-Undang Negeri
Jabatan Peguam Negeri Sarawak.