MAJLIS AGAMA ISLAM SELANGOR

v.

DAHLIA DHAIMA ABDULLAH & ANOTHER APPEAL

Court of Appeal, Putrajaya
Yaacob Md Sam, Ravinthran Paramaguru, Mohd Nazlan Mohd Ghazali JJCA
[Civil Appeal Nos: B-01(NCVC)(A)-40-01-2022 & B-01(NCVC)(A)-57-01-2022]
13 January 2023

Constitutional Law: *Courts — Jurisdiction — High Court — Appeal against grant of declaratory order by High Court that respondent was not a person who professed the religion of Islam — Respondent was born to non-Muslim parents and was under five years old when she was converted to Islam following conversion of her mother — Prior determination by Syariah High Court and Court of Appeal that respondent was a person who professed the religion of Islam — Whether High Court lacked jurisdiction to determine respondent's application — Whether respondent's application to High Court an ab initio or a renunciation case*

Islamic Law: *Jurisdiction — Application by respondent to High Court for declaration that she was not a person who professed the religion of Islam — Respondent was born to non-Muslim parents and was under five years old when she was converted to Islam following conversion of her mother — Prior determination by Syariah High Court and Court of Appeal that respondent was a Muslim and professed the religion of Islam — Whether High Court lacked jurisdiction to determine respondent's claim — Whether respondent's application to High Court an ab initio or a renunciation case*

The respondent was born on 17 November 1986 to non-Muslim parents and was converted to Islam when she was below five years old following the conversion of her mother who intended to marry a Muslim person after her divorce from the respondent's father. Conversion cards were subsequently issued to the respondent and her mother by the Jabatan Agama Islam Selangor on 28 August 1993. The consent of the respondent's father was not obtained for her conversion. Upon attaining the age of 27, the respondent filed a summons in the Kuala Lumpur Syariah High Court against the Majlis Agama Islam Kuala Lumpur (MAIWP summons), seeking a declaration that she was no longer a Muslim. The respondent averred that her purported conversion was because of her mother's conversion; that she had never professed the religion of Islam at any time but had continued to profess the Hindu religion, and was allowed to do so by her mother and stepfather. The Kuala Lumpur Syariah High Court dismissed the MAIWP summons and the respondent's appeal against the said decision was dismissed by the Syariah Court of Appeal. The respondent thereafter commenced proceedings in the Kuala Lumpur High Court by way of Originating Summons (OS) against the Majlis Agama Islam Selangor (MAIS) and the Selangor State Government seeking a declaration that she was not a person professing the religion of Islam. The OS was objected to

on the ground of lack of jurisdiction by the High Court as the religious status of the respondent fell within the jurisdiction of the Syariah Courts.

The High Court granted the declaration sought by the respondent on the basis that the respondent was never a Muslim to begin with since she had never practiced the religion of Islam; that her conversion when she was a minor was in contravention of s 147 of the Administration of Muslim Law Enactment 1952 (1952 Enactment); and that the proceedings before the Syariah Court had been nullified by the Federal Court's decision in *Rosliza Ibrahim v. Kerajaan Negeri Selangor & Anor* (*Rosliza Ibrahim*) as the Syariah Court lacked the jurisdiction to determine the question of the respondent's assertion that she did not profess the religion of Islam *ab initio*. Hence the instant appeals by MAIS and Kerajaan Negeri Selangor respectively and in support of which it was argued that *Rosliza Ibrahim* and *Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals* (*Indira Gandhi*) which were relied on by the respondent were distinguishable from the facts in the instant case which was essentially that the respondent was not attempting to convert out of the religion as she was never a Muslim to begin with, and that a determination had already been made by the Syariah High Court and the Syariah Court of Appeal that the respondent was a person who professed the religion of Islam. The respondent however argued that her case was an *ab initio* case and therefore it was for the civil court to make a determination as to whether she was a Muslim in the first place.

Held (allowing the appeals and setting aside the decision of the High Court):

Per Mohd Nazlan Mohd Ghazali (majority)

(1) The facts in *Rosliza Ibrahim* and *Indira Gandhi* were of sufficient similarity to those in the instant case, to readily trigger the application of the doctrine of *stare decisis*, and the Court in this instance was therefore bound to follow the said decisions. (para 27)

(2) The law as enshrined in the Federal Constitution (Constitution) did not countenance any review or appeal, let alone re-litigation or unravelling by the civil court of a decision that was within the exclusive jurisdiction of the Syariah Court. (para 29)

(3) On the authorities, where as in the instant case, the Syariah Court had already determined that the respondent was a Muslim, the distinction drawn in *Rosliza Ibrahim* must necessarily be construed and answered as a renunciation case. A determination by the Syariah Court that a person was still a Muslim as in the instant case, necessarily meant that the person was a Muslim and not one who was never a Muslim. On the issue of jurisdiction alone, the High Court's finding that the decisions of the Kuala Lumpur Syariah Court and the Syariah Court of Appeal had been nullified by *Rosliza Ibrahim*, was erroneous and could not be sustained. (paras 43-44, 47 & 50)

(4) By virtue of s 74(3) of the Administration of Islamic Law Enactment 1989 (1989 Enactment), the certificate of conversion to Islam should be conclusive proof of the facts stated therein. Hence, given that the conversion cards were issued to the respondent and her mother on 28 August 1993, the conversion of the respondent was therefore valid. (paras 61 & 74)

(5) The conversion of the respondent when she was a minor, irrespective of whether it was valid or not, should not be determinative of the question of her present religious status without examining the entire factual matrix of the case on proof of profession, especially when her application for declaratory relief by way of the MAIWP summons was first filed by her at the age of 27. (para 86)

(6) As was established in *Rosliza Ibrahim*, a Muslim would be legally identified as a "person professing the religion of Islam" regardless of whether the person practiced or not, or whether the person continued to believe in the faith or otherwise. In this regard, the respondent's averments in the OS and in her supporting affidavits concerning her Islamic religious practice or absence of it, were diametrically opposed to the findings of the Syariah High Court and Syariah Court of Appeal. (paras 112-113)

(7) In light of the respondent's admissions and the definitive findings by the Syariah High Court as affirmed by the Syariah Court of Appeal, the High Court's finding that the respondent's admission in the Syariah proceedings that she had practiced praying, fasting, and attended Islamic religious classes and ceremonies whilst staying with her Muslim convert mother and Malay Muslim step-father were "mere experiences and exposures to the religion" that did not equate to the Islamic religious practice or the profession of the religion, was not tenable. Hence the finding that the respondent had never been a Muslim, was erroneous. (paras 115-116)

(8) The respondent had no *locus standi* to file the OS in the High Court given that her status as a Muslim had already been judicially determined by the Syariah Courts. (para 118)

(9) On the facts, the respondent had failed to prove on a balance of probabilities that she was never a person who had professed the religion of Islam. The respondent's case thus was not an *ab initio* case but ought to be considered as a 'no longer a Muslim' or a renunciation case, which fell within the Syariah and not the civil jurisdiction. (paras 119-123)

Per Ravinthran Paramaguru (dissenting)

(10) Section 70 of the 1989 Enactment which replaced the 1952 Enactment, and which provided for the automatic conversion of a minor without the consent of a non-converting parent, only came into force on 1 September 1991 which was after the date of the purported conversion of the respondent, and thus could not apply to the respondent's conversion. The prevailing law at the

material time of the purported conversion of the respondent on 17 May 1991 was s 147 of the 1952 Enactment which categorically stipulated that no person under the age of majority should be converted. In the circumstances, the High Court's finding that the conversion of the respondent was invalid, could not be faulted. (paras 153-154)

(11) Notwithstanding that as at the date of issuance of the conversion cards, the 1989 Enactment had come into force, the said conversion cards could not logically be conclusive proof of a valid conversion if the conversion was patently unlawful in the first place for having been performed in breach of the 1952 Enactment which was the prevailing law at the material time. (paras 157-158)

(12) In light of *Indira Gandhi*, the adjudication of the validity of conversion of religion without the consent of the non-converting parent was not a matter of faith or apostasy but a matter of interpretation of a constitutional provision. Hence the civil court was clearly seised with jurisdiction to adjudicate the matter. (para 159)

(13) Rule 4(1) of the Administration of Islamic Law (Conversion of Minors) Rules 1991 which was made under the successor law i.e. the 1989 Enactment, required the written consent of the father of the minor for the conversion. Thus, even if the 1989 Enactment which came into force later was applicable, the conversion would be invalid as it was undisputed that the consent of the respondent's father was never obtained. Even if there was a provision in the State law that allowed for the unilateral or automatic conversion of minors, the same could override the supreme law of the land i.e. the Federal Constitution which required the consent of both parents before a minor could be converted. In the circumstances, the respondent's conversion on 17 May 1991 was invalid. (para 160)

(14) The High Court's finding of fact that the conversion of the respondent at the material time when she was a minor was unlawful and that she was not a person professing the religion of Islam from the outset, could not be faulted and did not warrant appellate interference in the absence of evidence to contradict the first-hand affidavit evidence of the respondent's mother that the respondent did not practice the religion of Islam and was allowed to continue in her original faith. (paras 162 & 164)

(15) As was correctly found by the High Court, the respondent did not lack *locus standi* to file the OS and that *res judicata* did not apply. In view of *Rosliza Ibrahim*, the respondent should not be prevented from pursuing her right to determine her religious status which was a matter of constitutional and legal identity, in the civil court. The fact that the respondent had sought relief from the Syariah Court did not *ipso facto* deprive the civil court of jurisdiction, bearing in mind that the instant case was an *ab initio* case, the subject matter of which fell within the jurisdiction of the civil court. (paras 166-168)

(16) The doctrine of prospective ruling was inapplicable in this case. The principles of law in respect of the jurisdiction of the Court as enunciated in *Rosliza Ibrahim*, must be taken as declaratory of the law without being unduly constricted by the said doctrine. (para 169)

Case(s) referred to:

Abillah Labo Khan v. Public Prosecutor [2002] 1 MLRA 294 (refd)

Azmi Mohamad Azam v. Director Of Jabatan Agama Islam Sarawak & Ors [2016] 2 MLRH 533 (refd)

Chee Pok Choy & Ors v. Scotch Leasing Sdn Bhd [2001] 1 MLRA 98 (refd)

Dalip Kaur Gurbux Singh v. Pegawai Polis Daerah (OCPD), Bukit Mertajam & Anor [1991] 1 MLRA 301 (Rep) 77 (refd)

Haji Raimi Abdullah v. Siti Hasnah Vangarama Abdullah & Another Appeal [2014] 3 MLRA 173 (refd)

Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals [2018] 2 MLRA 1 (folld)

Kaliammal Sinnasamy v. Majlis Agama Islam Wilayah Persekutuan (JAWI) & Ors [2010] 3 MLRA 355 (refd)

Kerajaan Malaysia & Ors v. Tay Chai Huat [2012] 1 MELR 501; *[2012] 1 MLRA 661 (refd)*

Latifah Mat Zin v. Rosmawati Sharibun & Anor [2007] 1 MLRA 847 (refd)

Lina Joy lwn. Majlis Agama Islam Wilayah Persekutuan & Yang Lain [2007] 1 MLRA 359 (refd)

Majlis Agama Islam Pulau Pinang lwn. Siti Fatimah Tan Abdullah [2009] 1 MSLR 8(Sya) 162 (refd)

Re Spectrum Plus Ltd [2005] UKHL 41 (refd)

Rosliza Ibrahim v. Kerajaan Negeri Selangor & Anor [2021] 2 MLRA 70 (folld)

Soon Singh Bikar Singh v. Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor [1999] 1 MLRA 115 (refd)

Syarifah Nooraffyzza Wan Hosen v. Director of Jabatan Agama Islam Sarawak & Ors [2017] 2 SSLR 387; *[2017] 6 MLRA 345 (refd)*

Syarikat Rodziah v. Malayan Banking Bhd [2021] 3 MLRA 556 (refd)

Wan Johairiza Wan Ab Rahman v. Mahkamah Rayuan Syariah Selangor & Ors [2022] 2 MLRH 569 (refd)

Zulpadli Mohammad & Ors v. Bank Pertanian Malaysia Bhd [2013] 3 MLRA 344 (refd)

Legislation referred to:

Administration of Islamic Law Enactment 1989, ss 70, 74(3)

Administration of Islamic Law (Conversion of Minors) Rules 1991, r 4(1)

Administration of Islamic Law (Federal Territories) Act 1993, ss 2, 46(2)(b)(x)

Administration of Muslim Law Enactment 1952, ss 146, 147

Administration of the Religion of Islam (State of Selangor) Enactment 2003, ss 2(1)(b), 123

Courts of Judicature Act 1964, s 25(2)

Federal Constitution, arts 11(1), 74(2), 121(1A), Ninth Schedule

Islamic Family Law (State of Selangor) Enactment 2003, s 111

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For the 2nd appellant
[Kerajaan Negeri Selangor]: Salim Soib @ Hamid (Husna Abdul Halim with him); Pejabat Penasihat Undang-Undang Negeri Selangor

For the respondent: Malik Imtiaz Sarwar (Surendra Ananth with him); M/s Surendra Ananth

JUDGMENT

Mohd Nazlan Mohd Ghazali JCA (Majority):

Introduction

[1] These are appeals against the decision of the High Court which allowed the respondent's application for a declaration that she is not a person who professes the religion of Islam. After having heard the appeals which was conducted by way of a remote communication technology via Zoom, we, by a majority, decided to allow the appeals for the reasons contained in these grounds of judgment.

Key Background Facts

[2] These two appeals, which were heard together before us originated from an originating summons ("OS") instituted by the respondent at the High Court in Shah Alam, against Majlis Agama Islam Selangor (MAIS) and the Selangor State Government. The principal relief sought by the respondent in the OS was for a declaration that she is not a person professing the religion of Islam.

[3] The respondent was born on 17 November 1986 to non-Muslim parents whose marriage was registered under the Law Reform (Marriage and Divorce) Act 1976. Her father professed the Hindu religion and her mother was originally a Buddhist.

[4] Some-time in 1991, following the separation of her parents, and this was when the respondent was about five years old, the respondent followed and lived with her mother in Selayang Baru. On 17 May 1991, the respondent's mother visited Jabatan Agama Islam Selangor (JAIS) / PERKIM to convert to the religion of Islam. It was not a secret that the reason for the conversion was that she wished to marry a Muslim person after the conclusion of her divorce.

[5] The respondent was also brought to JAIS / PERKIM by her mother who claimed that an officer informed her that the respondent had to be converted into Islam as well in order to ensure she would get custody over the respondent. The respondent's mother further asserted that the officer had also informed her that once the respondent attained the age of 18, she would be able to choose her own religion.

[6] As was integral to the conversion process, the respondent's mother uttered the requisite affirmation of faith - "Kalimah Syahadah", and did it twice. The respondent, then barely five, unsurprisingly did not, but both mother and daughter were issued conversion cards by JAIS. And it bears emphasis that based on the card issued on 28 August 1993 to the respondent, she had been converted on 17 May 1991. Her mother took the name Farah Hor binti Abdullah, and for the respondent, Dahlia Dhaima binti Abdullah.

[7] Separately on 7 August 1992, the Kuala Lumpur High Court granted a *decree nisi* in relation to her parents' divorce proceedings, where care, control and custody of the respondent was granted to her mother. The decree absolute was granted on 18 December 1992.

[8] Although the respondent's father passed away on 22 March 1996, her mother had affirmed an affidavit to aver that the respondent's father's consent had never been obtained for the conversion of the respondent.

[9] The respondent's quest for declaratory relief on her religious status started on 12 December 2013, when the respondent, by then aged 27, filed a summons against the Majlis Agama Islam Wilayah Persekutuan ("MAIWP") at the Kuala Lumpur Syariah High Court (No 14100-043-0968-2013) ("MAIWP Summons") primarily for a declaration that she was no longer a Muslim, even though as learned Counsel for the respondent was firm in highlighting that in her statement of claim for the MAIWP Summons, the respondent maintained that she had never professed Islam and the purported conversion occurred only because of her mother's conversion.

[10] The respondent maintained that she never professed the religion of Islam at any point in time but instead continued to profess the Hindu religion, frequently visited her father's family and went to Hindu temples with them. Her mother and stepfather too allowed her to practise and profess the Hindu religion.

[11] The Kuala Lumpur Syariah High Court dismissed the MAIWP Summons on 20 July 2017. And her appeal was subsequently dismissed by the Syariah Court of Appeal on 12 January 2021.

[12] Of crucial importance, which will be made manifest later in this judgment, is the contention of the respondent that her case is that she has never professed the religion of Islam.

[13] The respondent then turned to the Civil Court. It is reasonable to state that this course of action was not unexpected in light of the recent landmark decision of the Federal Court in *Rosliza Ibrahim v. Kerajaan Negeri Selangor & Anor* [2021] 2 MLRA 70, in respect of which much of the case of the respondent relied on.

[14] Central to that important decision, and relevant to the instant case, is the firm distinction drawn by the Federal Court between 'one who no longer professes the religion of Islam' and 'one who never professes the religion of Islam'. The former refers to apostasy or renunciation cases which fall within the jurisdiction of the Syariah Courts, whilst the latter, described as *ab initio* cases, fall within the jurisdiction of the Civil Courts.

[15] In support of her OS, the respondent argued that her conversion was invalid and a nullity because it violated s 147 of the Administration of Muslim Law Enactment 1952, then in force at the material time.

[16] That provision reads as follows:

> No person who has not attained the age of puberty shall be converted to the Muslim religion.

[17] In their opposition to the OS, both appellants made the key argument that the High Court did not have jurisdiction to hear the OS as the bone of contention on the respondent's religious status fell within the jurisdiction of the Syariah Courts.

Essence Of High Court Decision

[18] The High Court agreed with the respondent, allowed the OS and granted the declaration sought by the respondent. The learned High Court Judge as such determined that this was a case where the respondent was never a Muslim to begin with, such that following *Rosliza*, the Court had the jurisdiction to hear her application.

[19] The High Court also ruled that the conversion of the respondent when she was a minor contravened s 147 of the Administration of Muslim Law Enactment 1952 ("the 1952 Enactment").

[20] It was also held that the earlier proceedings in the Syariah Court had been nullified by the Apex Court decision in *Rosliza* because the Syariah Court had in the first place no jurisdiction to determine the question of the respondent's assertion that she did not profess the religion of Islam *ab initio*. This was determined by the High Court to be a case of one never being a Muslim since the respondent never professed the religion and as the conversion was not valid.

Main Points Of Arguments At Appeal

[21] Before us the respondent submitted that the appeals should be dismissed as this Court would be equally bound by *Rosliza* and *Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals* [2018] 2 MLRA 1, the other Federal Court decision much relied on by the respondent. The

position taken by both appellants however, according to the respondent, was untenable for they clearly run counter to both these case authorities.

[22] The appellants on the other hand argued that *Rosliza* and *Indira Gandhi* are not relevant to the instant case and ought to be distinguished because of a number of reasons. First, whilst *Rosliza* and the instant case concerned applicants seeking declarations by way of originating summons that they were not persons professing the religion of Islam, the subject matter in the application in *Indira Gandhi* was not concerned with the status of her children as Muslim converts but rather with questions of the legality the administrative action taken by the Registrar of Muallaf in the exercise of his statutory powers. The instant case also does not involve arguments on the right to profess and practise the religion of one's choice under art 11 of the Federal Constitution. This is because in the OS the respondent's case was essentially that she was not attempting to convert out of the religion since she was never a Muslim to start with.

[23] Secondly, in *Indira Gandhi* the applicant sought to invalidate the conversion of their daughters by their father without the consent of the applicant mother. In the instant case there is no evidence that the respondent's late father had in his lifetime (before his passing in 1996) ever challenged her conversion which happened in 1991.

[24] Thirdly, and this is crucial, unlike in both *Rosliza* and *Indira Gandhi*, in the instant case, the Syariah High Court and the Syariah Court of Appeal had already made a determination that the respondent is a person who professes the religion of Islam.

Analysis & Findings Of This Court

[25] The arguments of the appellants are not unattractive or without merit. After all, *Rosliza* is not a case of conversion unlike presently and *Indira Gandhi* too, not like the present, concerns a challenge of administrative decision in the issuance of the certificate of conversion.

[26] But we acknowledge these two decisions of the Apex Court establish important principles that are especially relevant to the issues for determination in the instant case - whether the case is about one seeking a declaration she is a Muslim or that she is no longer a Muslim which determines the Court having the jurisdiction on the matter, and perhaps less so, whether both parents had given consent to the conversion to make it constitutionally valid.

[27] There is in our view absolutely no doubt that by the doctrine of *stare decisis* or judicial precedent, this Court must follow the binding precedent created by these decisions of the Federal Court. The facts of *Rosliza* and *Indira Gandhi* are of sufficient similarity to those in the instant case to readily trigger the application of the doctrine of *stare decisis* (see the Federal Court decision in *Kerajaan Malaysia & Ors v. Tay Chai Huat* [2012] 1 MELR 501; [2012] 1 MLRA 661).

(A) The Important Matter Of Jurisdiction

[28] As a pivotal matter of jurisdiction, in all such cases like the present, the critical question to be determined is whether the application is an *ab initio* or a renunciation case. We would think that the ruling in *Rosliza* by the Federal Court does not only apply prospectively, in light of the rule that if the verdict on fresh interpretation of the law did not come with any declaration as to whether the ruling should apply prospectively, then the general rule that all judgments of the Courts apply retrospectively, takes effect (see the decision of this Court in *Abillahbin Labo Khan v. Public Prosecutor* [2002] 1 MLRA 294).

[29] However it must be appreciated that in this instant case, like probably many other cases, the religious status of the respondent has in fact been determined by the Syariah High Court, in this case that of the Federal Territory of Kuala Lumpur. It has even been affirmed by the Syariah Court of Appeal of the Federal Territory of Kuala Lumpur. The law, as enshrined in the Federal Constitution no less, does not, we emphasise, countenance any review or appeal, let alone re-litigation or unravelling by the Civil Court of a decision which is within the exclusive jurisdiction of the Syariah Court.

[30] It is manifest that the critical context here is the duality of the legal system in the country's constitutional construct as so firmly and immutably enshrined in the Federal Constitution, specifically in art 121(1A) which reads thus:

> The Courts referred to in Clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah Courts.

[31] Reference in Clause (1) is to the Civil Court - all such superior and subordinate Courts throughout Malaysia.

[32] The Syariah Courts in the States are in a different hierarchy of court system which is parallel to the Civil Court system. Article 121(1A) must additionally be construed in light of item 1 of the State List. Under item 1 of List II - State List, the Syariah Courts have jurisdiction over persons professing the religion of Islam in respect of any matters stipulated therein, and include Islamic law and personal and family law of persons professing the religion of Islam.

[33] And further art 74(2), read together with item 1 of List II - State List to the Ninth Schedule confer on the States the power to establish Syariah Courts as the judicial institution with the jurisdiction on all matters administered under Syariah laws. This clearly provides that all matters on Islamic affairs are under the jurisdiction of the States.

[34] It is true, as clarified in *Indira Gandhi* that art 121(1A) does not constitute a blanket exclusion of the jurisdiction of Civil Courts whenever a matter relating to Islamic law arises. Article 121(1A) does not oust the jurisdiction of the Civil Courts as soon as a subject matter relates to the Islamic religion. The inherent judicial power of Civil Courts in relation to judicial review and questions of constitutional or statutory interpretation is not and cannot be removed by this Article.

[35] It must also be recognised that in this context, leading cases such as the Federal Court decision in *Latifah bte Mat Zin v. Rosmawati bte Sharibun & Anor* [2007] 1 MLRA 847 held that Syariah Courts are similar to the Sessions and Magistrate Courts in the sense that their powers are confined to item 1 in List II - State List of the Ninth Schedule to the Federal Constitution and in particular, only over persons professing the religion of Islam. And that fundamentally the Civil Superior Courts are directly established by the Constitution itself, whereas the Syariah Courts in a State was established only upon the Legislature of the State enacting to establish it under the powers given to it by the said item 1 of the State List.

[36] Nonetheless, the appellants are clearly not wrong in submitting that art 121(1A) vests the exclusive jurisdiction of Syariah laws in that Syariah Courts are the competent authority in respect of the administration of Islamic laws. Reference may also be usefully made to a number of decisions of high authority in respect of art 121(1A) on the status of decisions of the Syariah Courts on the issues concerning religious status, including conversions out of the religion of Islam, as well as divorce matters.

[37] Thus in *Soon Singh Bikar Singh v. Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor* [1999] 1 MLRA 115 the Federal Court stated that the jurisdiction of the Syariah Court to deal with conversion out of Islam, though not expressly mentioned in the relevant State Enactment, could be read into the same by necessary implication as derived from the provisions therein on conversion into Islam.

[38] In *Kaliammal Sinnasamy v. Majlis Agama Islam Wilayah Persekutuan (JAWI) & Ors* [2010] 3 MLRA 355 the Court of Appeal held that determination of the question as to whether a person is a Muslim or otherwise is, under art 121(1A), the sole jurisdiction of the Syariah Court. Earlier, to similar effect, the Supreme Court in *Dalip Kaur Gurbux Singh v. Pegawai Polis Daerah,* (OCPD)*, Bukit Mertajam & Anor* [1991] 1 MLRA 301 ruled that the question of whether a person was a Muslim or had renounced the religion before his death was to be properly determined in the forum of the Syariah Court.

[39] In *Haji Raimi bin Abdullah v. Siti Hasnah Vangarama bt Abdullah & Another Appeal* [2014] 3 MLRA 173 the Federal Court observed that it would be highly inappropriate for the Civil Courts to adjudicate on the validity of conversion of any person into Islam since this was construed as a religious issue which pursuant to art 121(1A) means the Civil Courts have no jurisdiction as it would be a matter strictly within the exclusive jurisdiction of the Syariah Court. And in *Lina Joy* the Federal Court established that apostasy out of Islam is concerned with Islamic law which fell within the jurisdiction of Syariah Courts, thus to the exclusion of the Civil Courts under art 121(1A).

[40] We should highlight that more directly to the point of the jurisdictional authority of the Civil Court *vis-à-vis* the Syariah Court, reference may also be usefully made to the decision of the Court of Appeal in *Kaliammal Sinnasamy v.*

Majlis Agama Islam Wilayah Persekutuan (Jawi) & Ors [2010] 3 MLRA 355 where an application for a declaration that a deceased was a Hindu at the time of his death was refused in light of the Order of the Syariah High Court stating that the deceased was a Muslim. The following passages are especially instructive:

> "[12] Reverting to the issue at hand, a Syariah High Court has the power to hear and decide to make a declaration as to the status of a person as a Muslim. It is the Court of competent jurisdiction for that purpose. This is established in *Dalip Kaur Gurbux Singh v. Pegawai Polis Daerah (OCPD), Bukit Mertajam & Anor* [1991] 1 MLRA 301 SC; *Soon Singh Bikar Singh v. Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor* [1999] 1 MLRA 115 FC; *Lina Joy lwn. Majlis Agama Islam Wilayah Persekutuan & Yang Lain* [2007] 1 MLRA 359 FC. In the light of these cases, *Ng Wan Chan (supra)* is no longer authority.
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> [13] As held in *Nor Kursiah Baharuddin v. Shahril Lamin & Anor* [1996] 1 MLRH 719 599 HC and approved in *Kamariah Ali lwn. Kerajaan Negeri Kelantan, Malaysia & Satu Lagi Dan Rayuan Yang Lain* [2002] 1 MLRA 436 CA, **it is not for the civil court to go behind that order of the Court of competent jurisdiction to question the merits of the matter decided upon by that Court. It is therefore not for the civil Court to look behind the order and say whether the Syariah High Court acted correctly or not and to interfere with its decision**.
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> [Emphasis Added]

[41] Even more clearly, another decision of the Court of Appeal in *Syarifah Nooraffyzza Wan Hosen v. Director of Jabatan Agama Islam Sarawak & Ors* [2017] 2 SSLR 387; [2017] 6 MLRA 345, a clear cut renunciation case, ruled to similar effect. Mohd Zawawi Salleh JCA (as he then was) delivering the judgment of the Court stated the following:

> "[25] We are of the view that Syariah courts and civil courts form two separate legal system. We agree with the view expressed by Salbiah Ahmed in her article entitled: "*Islam in Malaysia: Constitutional and Human Rights Perspectives*", Muslim World Journal of Human Rights 2, No 1 (2005), when she asserts that:
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> **State Syariah Courts are not Courts inferior to the Federal Courts as the term "inferior court" is understood in terms of appeal and judicial review by superior courts over inferior courts. The State Syariah Courts are in a separate hierarchy to that of the federal civil courts. There is no right of appeal from the State Syariah Courts to the federal civil courts. There is no power of judicial review by the federal high court over the State Syariah Courts.**
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> (See also Hassan Saeed, "*Freedom Religion, Apostasy and Islam*" (2004) 149 at 150).
>
> [26] In the same vein, in *Kamariah Ali lwn. Kerajaan Negeri Kelantan, Malaysia Dan Satu Lagi Dan Rayuan Yang Lain* [2002] 1 MLRA 436, Abdul Hamid Mohamed JCA (as he then was) said:

... **bukanlah dalam bidang kuasa Mahkamah ini untuk mengkaji semula keputusan-keputusan mahkamah syariah yang terletak dalam sistem berlainan itu. Mahkamah ini mesti menerima Mahkamah Tinggi Syariah itu telahpun membuat keputusan fakta itu, mengikut hukum syarak dan mahkamah ini tidak berkuasa campur tangan dalam keputusan itu dan menggubahnya, membatalkannya, mengisytiharkan ia tidak sah atau tidak menghiraukan dan membebaskan perayu-perayu.**...

(See also *Nor Kursiah Baharuddin v. Shahril Lamin & Anor* [1996] 1 MLRH 719 599).

[27] In *Subashini Rajasingam v. Saravanan Thangathoray* [2006] 4 MLRH 155, a case concerning the custody of children when one parent had converted to Islam, the demarcation between the civil and Syariah courts was interpreted to mean that Syariah courts "are not lower in status than civil courts... they are of equal standing under the (Federal Constitution) (at [23])".

[Emphasis Added]

[42] More recently is a decision of the High Court in *Wan Johairiza Wan Ab Rahman v. Mahkamah Rayuan Syariah Selangor & Ors* [2022] 2 MLRH 569 where an applicant sought leave for judicial review to challenge the decision in respect of divorce proceedings by the Selangor Syariah Court of Appeal which had dismissed the application for revision filed by the applicant. The High Court held that the application for judicial review must fail for lack of jurisdiction. In its judgment which has since been affirmed by the Court of Appeal, the High Court held as follows:

"[24] It is my view that based on art 121 (1A) of the FC, the decisions made by the Syariah Courts cannot be reviewed by the civil High Courts. The insertion of art 121 (1A) of the FC is to stop the practice of aggrieved parties coming to the civil High Courts to review the decisions made by the Syariah Courts. This is recognized by the Federal Court in the case of *Sukma Darmawan Sasmitaat Madja (supra).*

...

[31] in *Indira Gandhi (supra)*, the subject matter of judicial review is the issuance of certificates of conversions by the Registrar of Muallafs under the Administration of the Religion of Islam (Perak) Enactment 2004). *Indira Gandhi* does not involve any decision made by the Syariah Courts.

[32] Whereas in *Rosliza (supra)*, there is no judicial review filed and the matter was commenced by way of originating summons seeking declarations, among others, that the Plaintiff is not a person professing the religion of Islam. The case of *Rosliza* too does not involve any decision made by the Syariah Courts.

[33] In the present case, I find that the subject matter of review is the decision by the Syariah Appeal Court which is made within its jurisdiction and therefore, it is not amenable to judicial review by virtue of art 121 (1A) of the FC.

> [34] Therefore, premised on the above, the Applicant's reliance on *Indira Gandhi (supra)* and *Rosliza (supra)* is misplaced and devoid of merit.
>
> [35] The Applicant contended that the Applicant can file a judicial review against the Syariah Court as they are akin to inferior tribunal. The Applicant again refers to the Federal Court's decision in *Indira Gandhi (supra)*.
>
> [36] However, I find that the said decision is not an authority to support the Applicant's contention that judicial review can be filed against the Syariah Court. In fact, *Indira Gandhi* is not a case where a judicial review application is filed against the Syariah Court.
>
> [37] The nub of the Federal Court's decision in *Indira Gandhi* in relation to the status of the Syariah Court is that the power of judicial review lies with the Civil Court and the Syariah Court is inferior only in the sense that the Syariah Court has no power of judicial review".

[43] As such, in light of these authorities, in our view this must mean that in cases where the Syariah Court has already made the determination that an applicant is a Muslim, like in the instant case, the distinction drawn in *Rosliza* must necessarily be construed and answered as a renunciation case. It is irrelevant whether the application filed at the Syariah Court is stated as one never was a Muslim or one no longer is a Muslim precisely because the judicial determination has already been made by the Syariah Court, in that one is a Muslim or is still a Muslim. A judicial determination by the Syariah Court that a person is still a Muslim, like presently, must necessarily mean he is a Muslim, and not one who was never a Muslim. This therefore already answers the question on the distinction posed in *Rosliza*.

[44] These authorities on art 121 (1A) have established that the Civil Court clearly has no power of judicial review over the Syariah Court let alone reversing or departing from or in any manner re-litigating or unravelling or going behind the decisions of the Syariah Court as this in our view would tantamount to an infringement of art 121 (1A) of the Federal Constitution. Accordingly, in our view, on this issue of jurisdiction alone, the decision of the High Court in the instant case which held that the decisions of the Kuala Lumpur Syariah High Court and the Syariah Court of Appeal have been nullified by the authority of *Rosliza* because the Syariah Court had no jurisdiction to determine the question of the respondent's assertion that she never professed the religion of Islam, is erroneous and cannot be sustained.

[45] We further observe that there was not even any prayer in the OS which sought to set aside the decisions of the Syariah High Court and the Syariah Court of Appeal, which would have been otiose anyways, for lack of jurisdiction given the centrality of art 121(1A) to the country's dual system constitutional construct, as discussed earlier.

[46] The respondent too did not refer this Court to even one decision of the Civil Court which sanctions the making of any judgment by the Civil Court

which for all intents and purposes represents a re-litigation of a decision arrived at by the Syariah Court.

[47] And because determination had already previously been pronounced by the Syariah Courts in this case that the respondent is still a Muslim, this is therefore necessarily a renunciation case which should rightly fall under Syariah jurisdiction within the context of the distinction formulated in *Rosliza*.

[48] On this ground of absence of jurisdiction alone, the two appeals must be allowed.

(B) Whether This Is An *Ab Initio* Or Renunciation Case

[49] For completeness, notwithstanding the jurisdictional point which has completely answered the respondent's case (that this is a renunciation case given the prior determination that she is still a Muslim made by the Syariah High Court, affirmed by the Syariah Court of Appeal), we wish to also examine the merits of the application by the respondent, again, by applying *Rosliza*. The High Court arrived at the decision that this was an *ab initio* case, following *Rosliza* largely on account of the respondent's own averment that she was never a Muslim and that she did not show she had affirmatively professed the religion of Islam since her conversion.

[50] The important point to note too here is the obvious one that mere assertion that an application is an *ab initio* case does not automatically oust the jurisdiction of the Syariah Court. Just because an application is made to the Civil High Court and drafted in terms of an *ab initio* case, it cannot mean that the Civil Court is immediately seised of jurisdiction to consider the declaration sought for. What the Civil Court must do in such situation is to determine whether the case is one of *ab initio* or renunciation in nature.

[51] This was made clear by the Federal Court in *Rosliza*, where it was held thus:

> "[108] ... Whether it is an *ab initio* case or a renunciation case will require a careful examination of the factual matrix of the case".

[52] This is what we shall do next. It will be readily seen that there are a number of issues in the background or factual matrix of the instant case that do not assist the respondent in establishing that there was no affirmative profession of the religion of Islam or that this was an *ab initio* case.

1) The Conversion

[53] A principal question to be considered is the status of the conversion of the respondent on that 17 May 1991. The appellants' position on this was that the prevailing law for conversion to Islam at that material time was the Administration of Islamic Law Enactment 1989 ("the 1989 Enactment"), specifically s 70 which states as follows:

> Consequential conversion of children
>
> If, at the moment of conversion to Islam, a *muallaf* whether male or female, has any natural child who has not attained the age of majority according to Hukum *Syara' (baligh)*, the child becomes converted to Islam at the same moment.

[54] Given the above, it was argued that the conversion of the respondent to Islam was valid and in accordance with the State law even though she had yet to attain the age of majority since she would have been for all intents and purposes then automatically converted to Islam at the same time as when her mother converted to Islam. In addition, s 74(3) of the 1989 Enactment provides that a certificate of conversion to Islam shall be conclusive proof of the facts stated therein.

[55] The learned High Court Judge was in our view however to a certain extent correct in dismissing this submission given that the State legislative history of this law unmistakably recorded that the 1989 Enactment which concerned conversion to Islam in Part VIII only came into force on 1 September 1991 (via Sel. P.U. 58/1991). This was plainly a date which was subsequent to the conversion date of the respondent on 17 May 1991, albeit by not more than a mere three and a half months. This, it must be emphasised was before the 1989 Enactment came into force.

[56] For completeness, on 1 September 2003, s 123 of the Administration of the Religion of Islam (State of Selangor) Enactment 2003 (via Sel. P.U. 25/2003) came into force and repealed the 1989 Enactment.

[57] The applicable law governing conversion at the material time was in fact the 1952 Enactment, referred to earlier. Section 146 provided as follows:

> Section. 146 Control of conversion
>
> No person shall be converted to the Muslim religion otherwise than in accordance with the provisions of this enactment or any rules made thereunder.

[58] And it is reiterated that s 147 of the 1952 Enactment reads as follows:

> Section. 147 No conversion of children
>
> No person who has not attained the age of puberty shall be converted to the Muslim religion.

[59] Given the prohibition against conversion of a child who had yet to attain puberty, the conversion of the respondent to Islam on 17 May 1991 was held by the High Court to be an infringement of the State law of conversion in force then. As noted by the learned High Court Judge, the respondent was then only four years and five months old.

[60] Accordingly, the learned High Court Judge found that the respondent was not validly converted to Islam, and therefore, she could not be a person professing the religion of Islam despite being erroneously identified as a Muslim-convert for so many years.

[61] However, in our view it could on the other hand be stated that given that JAIS had subsequently on 28 August 1993, by which time the 1989 Enactment had come into force, issued a conversion card to the respondent upon the registration of her conversion, this attracted the application of s 74(3) of the 1989 Enactment which provided that a certificate of conversion to Islam shall be conclusive proof of the facts stated therein. In other words, the conversion was valid.

[62] It is useful at this juncture to refer to *Rosliza* where the Federal Court ruled that the High Court and the Court of Appeal were erroneous in their conclusions as these had been arrived at on the evidentially flawed premise that the appellant was originally a Muslim seeking to renounce her religion.

[63] Significantly, in its assessment of the issue whether the High Court has exclusive jurisdiction to hear the matter, the Federal Court formulated the question as to whether a person is or is not a Muslim rather than whether a person is no longer a Muslim.

[64] The Federal Court in *Rosliza* observed that whilst it was undisputed that the applicant's biological father is a Muslim, under s 111 of the Islamic Family Law (State of Selangor) Enactment 2003 a child born less than six months (Islamic calendar) or born to a woman not married to the man who fathered the child is illegitimate and the paternity of the child could not be established in the father. Thus, since the applicant in that case is an illegitimate child in the absence of proof of marriage of her parents at the time she was born, s 111 applied to the father to remove him of any ascription of paternity to the applicant. The putative father cannot as such, in law, be considered the child's father.

[65] The Federal Court then ruled that on a true construction of s 111 of the Islamic Family Law (State of Selangor) Enactment 2003, the word "parents" in paragraph (b) of the interpretation of "Muslim" in s 2 of the Administration of the Religion of Islam (State of Selangor) Enactment 2003 does not include the putative father of an illegitimate child. Thus, the applicant cannot be considered a Muslim simply by virtue of the said s 2(1)(b) of the s 2 of the Administration of the Religion of Islam (State of Selangor) Enactment 2003.

[66] Relevant to this analysis is the discussion on the meaning of professing religion in the Federal Constitution and the term profess and practice in art 11(1) of the Federal Constitution which extends to how one may be identified with a religion and the level of devotion to their beliefs, while Item 1 of the State List excludes the word practice. The Federal Court in *Rosliza* made this important observation:

> [82] 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.
>
> [83] Article 11(1) of the FC guarantees the right to profess and practice one's religion. The conjunction "and" in art 11(1) suggests that it governs more than mere professing. It extends to how one identifies oneself or how one may be identified with a specific religion and the right to also determine one's own level of devotion to his or her belief. However, item 1 of the State List singularly uses the word "professing". Contrasting art 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".
>
> [84] 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 jurisdiction of the Syariah Courts by virtue of art 121(1A) of the FC.
>
> [85] The dispute before us relates to the question of one's constitutional identity. It therefore necessitates constitutional interpretation of something which only the superior courts of this country have the right to address. It is only when one's faith is the main subject matter of the dispute does such dispute fall within the jurisdiction of the Syariah Courts. In this regard, there is a significant distinction between "one who no longer professes the religion of Islam" on the one side, and 'one who never professes the religion of Islam', on the other. This will be further elaborated later".

[67] As such it has been made patently clear that in order to ascertain whether or not the matter falls under the purview of Syariah Court jurisdiction, both these aspects must be present, namely, jurisdiction of *ratione personae* (or by reason of the person) and of *ratione materia* (or by subject matter). And that the word "*professing*" in item 1 of the State List is one concerning constitutional identity, which is to be interpreted by the civil courts whilst the phrase "*profess and practice*" in art 11 relates to the question of faith which, following art 121(1A) falls within the jurisdiction of the Syariah Courts.

[68] It was importantly further emphasised in *Rosliza* that in *ab initio* cases, the issue before the Court is not one of faith. It is instead concerning one's identity under the Federal Constitution. A Muslim by identification would be legally identified as a "person professing the religion of Islam" regardless of whether he practises it or not, or whether he continues to believe in the faith or otherwise. Renunciation cases on the other hand, concern persons who despite being Muslims, no longer have faith or believe in the religion. Her Ladyship Tengku Maimun CJ further explained as follows:

> "[108] The case is no different here. At the risk of repetition, if a matter concerns an *ab initio* case, that is, the question whether a person is in the first place a "person professing the religion of Islam" it necessarily concerns a question regarding one's identity under the FC which in turn necessitates constitutional interpretation. This is because the phrase "persons professing the religion of Islam" is a constitutional term. Accordingly, the civil courts are 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. **The distinction drawn from the cases of *Lina Joy (supra)* and *Azmi (supra)* illustrates the difference. Whether it is an *ab initio* case or a renunciation case will require a careful examination of the factual matrix of the case**".
>
> [Emphasis Added]

[69] *Lina Joy lwn. Majlis Agama Islam Wilayah Persekutuan & Yang Lain* [2007] 1 MLRA 359 involved a case where a Malay Muslim woman wanted to convert to Christianity, which was a renunciation case. As was the case of *Majlis Agama Islam Pulau Pinang lwn. Siti Fatimah Tan Abdullah* [2009] 1 MSLR 8(Sya) even though the applicant was originally a non-Muslim who converted to Islam but later chose to renounce it. These cases are distinguishable from *Rosliza* on the basis that the latter is an *ab initio* case, not a renunciation case.

[70] The Federal Court in *Rosliza* contrasts *Lina Joy* with *Azmi Mohamad Azam v. Director Of Jabatan Agama Islam Sarawak & Ors* [2016] 2 MLRH 533. The situation faced by the applicant in *Rosliza* is similar to that in *Azmi Mohamad Azam*. Thus, *Lina Joy* and *Siti Fatimah* are renunciation cases where the issue was whether one was no longer a Muslim, whilst in *Azmi Mohamad Azam* and *Rosliza*, the question was whether one was never a Muslim. Tengku Maimun CJ stated thus:

> "*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)*."

[71] In the instant case, the respondent argued that hers is an *ab initio* case, and that she was never a Muslim. It is as such for the civil court to make a determination whether she was a Muslim in the first place. Now, it bears repetition that in order to do that, as is clear in the above passage in *Rosliza*, a careful examination of the factual matrix of the case is necessary. The Federal Court emphasised the same point earlier in the judgment as follows:

> "[98] What can be distilled from *Lina Joy* 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 of such proof, the case may be classified as an *ab initio* case".

[72] A careful examination of the factual matrix of the instant case is thus essential to determine whether there is proof that the respondent in the case had affirmatively professed the religion of Islam at the material time, which is a constitutional identity issue, not one of practice or faith. In the absence of such proof, the respondent could not be identified as a Muslim, and the case would be that she was never a Muslim - an *ab initio* case.

[73] Now, it has earlier been found by the High Court that the conversion of the respondent in 1991 was legally flawed for non-compliance with the provisions of the State Enactment in force then.

[74] We have however determined to the opposite effect in that pursuant to s 74(3) of the 1989 Enactment the conversion was not invalid. But for argument sake - even assuming it was not valid, the question then arises - whether this would be a complete answer to the constitutional identity issue - that she was therefore not one who had ever professed the religion of Islam if the conversion was invalid? The High Court was of the said conclusion.

[75] The answer, in our view, is however in the negative. The reason is that as stated in *Rosliza*, the entire factual matrix of the case must be examined for proof of affirmative profession of the religion by the respondent at the material time. And it bears emphasis this does not concern one's faith but instead one's identity under the Federal Constitution. A Muslim by identification would be legally identified as a "person professing the religion of Islam" regardless of whether he or she practises the religion or not.

[76] Three key observations about the conversion status of the respondent in the instant case are of significance.

2) Wide Definition Of 'Muslim'

[77] First and foremost, the definition of a Muslim in s 2 of the Administration of Islamic Law (Federal Territories) Act 1993 includes practical considerations and are not entirely concerned with the practice of the religion, or the extent of one's true faith.

[78] The Syariah High Court decided that the respondent is a Muslim (affirmed on appeal) by applying the interpretation of "Muslim" in s 2 of the Administration of Islamic Law (Federal Territories) Act 1993 which defines "Muslim" to mean-

(a) a person who professes the religion of Islam;

(b) a person either or both of whose parents were, at the time of the person's birth, Muslims;

(c) a person whose upbringing was conducted on the basis that he was a Muslim;

(d) a person who has converted to Islam in accordance with the requirements of s 85;

(e) a person who is commonly reputed to be a Muslim; 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 verbal or written.

[79] This is a widely drafted definition which is plainly not confined only to one professing the religion of Islam by conversion.

3) Validity Of Conversion Not Determinative

[80] The second observation has relevance to the case of *Azmi Mohamad Azam v. Director Of Jabatan Agama Islam Sarawak & Ors* [2016] 2 MLRH 533, which, as mentioned earlier, the Federal Court in *Rosliza* categorised as an *ab initio* case (as distinct from *Lina Joy* which was a clear renunciation case).

[81] In *Azmi Mohamad Azam*, the applicant, although was raised in a Bidayuh Christian community, was just ten when his then Christian parents decided to convert to Islam. However, when he attained the age of majority, he chose Christianity as his religion. He has never practised the Islamic faith and had embraced Christianity. It should be added that neither was there any Syariah Court proceedings involved in *Azmi Mohamad Azam*.

[82] The point is he did not challenge the validity of his conversion as a minor. The High Court ruled that since the applicant 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 dictated that he could not be considered as a person professing the religion of Islam.

[83] It was thus held in *Azmi Mohamad Azam* that since the applicant's conversion was not based on his professing Islam but by virtue of his mother's conversion and his mother's choice for him, now that the applicant was a major, he would be at liberty to exercise his constitutional religious right to choose his religion under art 11 of the Federal Constitution.

[84] The point of relevance here is that in *Azmi Mohamad Azam*, in his legal pursuit to be recognised as a Christian, he did not challenge the validity of his conversion. In other words, the High Court in that case ruled that notwithstanding the conversion into Islam, the applicant on evidence had not in the first place professed his faith in Islam.

[85] The reverse in our view must as such be no less true. Even if assuming that the process of conversion is a nullity (which we found not to be the case), it does not necessarily mean that the person is not a Muslim if evidence shows

that he in fact still professes the religion based on applicable legal interpretation despite any conversion which could turn out to be legally flawed.

[86] As such, similarly in the instant case, the conversion of the respondent when she was a minor at barely five, irrespective of whether it was valid or otherwise, should not be determinative of the question of her present religious status, without examination of the entire factual matrix of the case on proof of profession, especially when the application for declaratory relief was first filed by her in the MAIWP Summons very much later in 2013 at the age of 27.

4) Conversion Validity Never Raised In The Syariah Proceedings

[87] The third observation on this issue of conversion is this. Despite the contention raised at the High Court and now repeated before us disputing the validity of her conversion as a minor, it is significant to note that the respondent never mentioned in the proceedings in the Syariah Courts this specific complaint as a reason to deny her professing the Islamic faith. The respondent could have raised this at the Syariah High Court but she did not.

[88] Her pleadings in the MAIWP Summons made absolutely no mention of any challenge against the validity of her conversion *vis-à-vis* s 147 of the 1952 Enactment.

[89] Apart from her religious status having already been determined by the Syariah High Court of Federal Territory of Kuala Lumpur, the respondent did not, as mentioned, produce any proof on any challenge against the respondent's conversion to Islam during her childhood or that against the custody order granted to the respondent's mother (who later converted to Islam) by the respondent's late father. At the same time neither did the respondent's OS seek to nullify the Syariah High Court of Federal Territory of Kuala Lumpur proceeding or to challenge the authority's power in issuing the respondent's conversion card as a Muslim.

[90] This lends much credence to the appellants' contention that the respondent's complaint in the OS against the conversion is an afterthought.

5) Respondent's Pleadings Fashioned On Renunciation

[91] This further fortifies the view that the respondent's grievance in the OS was about wanting to leave the religion, not that she was never a Muslim to begin with. For this, it bears emphasis that her own pleadings in the Syariah Court can be clearly read and understood to mean just that.

[92] The respondent herself pleaded in paras 7 and 8 of her statement of claim in the MAIWP Summons that she embraced Islam on 17 May 1991 following her mother's conversion from Hinduism to Islam as the latter wished to marry a Muslim man who was named therein. In para 11 the respondent further stated that even though she became a Muslim, she was given the freedom by

her mother to practise the Hindu religion and had often visited the family of her father who was of Hindu faith.

[93] More, in para 14 the respondent pleaded that she never practised the Islamic faith since her conversion to Islam was merely one of form and not substance as it was done only because of her mother who had to convert to marry a Malay Muslim. In para 19.1 she clearly asked for the declaratory relief that she was no longer a Muslim.

[94] Thus, the respondent recognised she was a Muslim such that in her pleadings before the Syariah proceedings it was a case of wanting to be declared no longer a Muslim. But subsequently in the OS, her position changed, and her case became one who was never a Muslim to begin with.

[95] The pleadings in the MAIWP Summons are as such a form of judicial admission which thus operate to prevent or estop the respondent from adopting a different stance. In a recent decision of this Court in *Syarikat Rodziah v. Malayan Banking Bhd* [2021] 3 MLRA 556 it was held that a party is estopped from taking a position different from what was pleaded in its earlier suit or changing its stance in another action. The party's admissions in pleadings in the earlier suit would amount to judicial admissions admissible against it.

[96] Related to this, in another decision of a Court of Appeal in *Zulpadli bin Mohammad & Ors v. Bank Pertanian Malaysia Bhd* [2013] 3 MLRA 344 it was explained that the rationale of judicial estoppel is to prevent intentional inconsistency and to protect the Court from the perversion of judicial machinery.

[97] It is true that the MAIWP Summons was pre-*Rosliza*. There was no recognisable legal distinction at that time between *ab initio* and renunciation cases. But still, even then, there was nothing preventing the respondent from asserting in the MAIWP Summons that she was never a Muslim.

[98] Regardless of the extent of clarity in the state of the law then, the respondent could have easily argued to such effect, attacked the validity of the conversion, and asked for a declaration that she was not a Muslim. Instead, from the totality of her pleadings in the MAIWP Summons it was unmistakably clear that she admitted that she converted to Islam as a child, only that she now wished not to be recognised as one since as claimed by her, she had never practised the faith.

6) Respondent's Averments In OS Contradict Earlier Syariah Judicial Findings

[99] In her affidavit in support of the OS dated 10 May 2021 the respondent made the point that she never practised the religion of Islam. She said she was brought up as a Hindu and that continued even after conversion in 1991 when she was four. She averred that with her father and his family, she had visited and prayed at Hindu temples and celebrated Hindu festivals. The respondent

stated that even after her father's demise in 1996, she continued her practice in the religion of Hinduism, often with members of her father's family.

[100] The respondent emphasised she never followed the Islamic faith. She claimed to have never prayed or attended mosques, nor celebrated any Muslim festivals. Neither did she observe the need to consume only Halal food. The respondent averred that her Muslim-convert mother and her Malay-Muslim step-father with whom she lived in Selayang Baru (since her parents' separation) until she was about 17 allowed her to continue to profess Hinduism.

[101] Having completed her secondary school, the respondent then enrolled at Tunku Abdul Rahman College residentially, and thereafter stayed with an aunt in Bangsar from around 2010 until 2015 when she started living alone in Subang Jaya until presently. As mentioned, she initiated the MAIWP Summons in 2013, as she felt she needed to remove the mention of Islam as her religion from her identity card given her assertion that she had never professed the religion.

[102] She was first ordered by the Syariah High Court to undergo counselling with the religious department for a period of four months, twice a month. But as she maintained her stance, the matter proceeded for trial where she called two witnesses - her mother and a cousin from her father's family. As stated earlier, on 20 July 2017 the Syariah High Court dismissed the MAIWP Summons. On 12 January 2021 the Syariah Court of Appeal affirmed the decision of the Syariah High Court and dismissed her appeal.

[103] In her reply affidavit of 11 August 2021 the respondent repeated most of her averments in the supporting affidavit including making the emphasis that her conversion on 17 May 1991 was entirely not her choice but the decision of her mother to convert at the material time. The respondent also stated that although whilst at primary school she had been asked to take the subject *Pendidikan Agama Islam*, her mother never taught her about the religion let alone sent her to Islamic religious school.

[104] In addition, for the OS, the respondent also had the support of an affidavit by her mother, affirmed on 10 May 2021 which also stated that the respondent was raised as a Hindu and practised the religion. Her mother averred that the respondent did not profess or practise the religion of Islam during the time the respondent lived with her.

[105] However, in an afidavit keterangan filed earlier by the respondent's mother - Farah Hor binti Abdullah - for the purpose of the MAIWP Summons, which is exhibited in the respondent's affidavit in the instant OS, it is stated that even though the respondent did not practise the religion, that her mother did not teach her about Islam given her own ignorance, and that her mother did not prevent the respondent from practising any other religion, her mother did not know the religion practised by her daughter after she started staying alone from age 17.

[106] Crucially, in her affidavit in support, the respondent not only exhibited her pleadings as filed in the MAIWP Summons, but also the grounds of judgment of the Syariah High Court of 20 July 2017 and of the Syariah Court of Appeal dated 12 January 2021. These are exhibits produced by the respondent herself. And these grounds of judgment provided a different picture of the religious status of the respondent.

[107] The respondent stated however that these decisions which rejected her application for the declaration that she was no longer a Muslim had no bearing on her OS before the High Court in Shah Alam because she was never one who professed the religion of Islam at any point in her life, that the conversion was invalid, especially in light of *Indira Gandhi* and that the matter should properly be considered in the jurisdiction of the Civil Courts.

[108] We reiterate that in the first place, the subject matter in dispute in *Indira Gandhi* was not the status of the appellant's children as Muslim converts or with the questions of Islamic personal law and practice. It was on the legality of the administrative action taken by the Registrar in the exercise of his statutory powers in issuing the certificate of conversion, and not in respect of the facts stated in the certificate.

[109] And in that case, since the appellant was a non-Muslim, thus absent the requisite *locus* to appear before the Syariah Court, the Civil Court became seised with jurisdiction to hear the matter. Further, the Federal Court applied the doctrine of prospective overruling in *Indira Gandhi*, so as not to give retrospective effect to decisions of the courts which had already taken place prior to the date of the judgment. In fact, neither did the respondent raise *Indira Gandhi* in the Syariah proceedings which in fact concluded only in 2021 with the affirmation of the decision of the Syariah High Court by the Syariah Court of Appeal. We have also stated that despite the averment by the respondent's mother that the consent of the respondent's father was never obtained for the conversion (an argument developed in the context of the ruling against unilateral conversion in *Indira Gandhi*), there is no evidence that her late father had ever challenged the conversion. In any event, as discussed earlier, we have also found the conversion to be valid (particularly in the context of the 1952 Enactment and the 1989 Enactment), and that even if it was not, it would not in this case be determinative of the question on the respondent's religious status.

[110] Secondly, no less importantly, having stated all that, the Syariah High Court and the Syariah Court of Appeal in this case did come to the conclusion that the respondent was still a Muslim. The summary of the key findings of the Syariah High Court in the MAIWP Summons are as follows:

(1) The respondent asked for a declaration that she was no longer a Muslim and for the records of the first appellant to change the status of the respondent to be one who was a non-Muslim;

(2) Despite the respondent observing the order of the Syariah High Court for her to undergo MAIWP counselling sessions (eight in total), she maintained her position to leave the religion;

(3) On the crucial issue of whether she was a Muslim, the Syariah High Court referred to s 2 of Akta Pentadbiran Undang-Undang Islam (Wilayah-Wilayah Persekutuan) 1993 which defines a Muslim in any one of the following terms:

"orang Islam" ertinya-

(a) seseorang yang menganut agama Islam;

(b) seseorang yang salah seorang atau kedua ibu bapanya, pada masa kelahiran orang itu, ialah orang Islam;

(c) seseorang yang cara dia dibesarkan telah dijalankan atas asas bahawa dia orang Islam;

(d) seseorang yang telah masuk Islam mengikut kehendak seksyen 85;

(e) seseorang yang lazimnya dikenali sebagai orang Islam; atau

(f) seseorang yang ditunjukkan telah menyatakan, dalam hal keadaan di mana dia terikat oleh undang-undang untuk menyatakan yang benar, bahawa dia adalah orang Islam, sama ada pernyataan itu secara lisan atau bertulis.

(4) Quite apart from her conversion, relying particularly on sub-paragraphs (c) and (e) above, it was held that the respondent was a Muslim;

(5) In respect of the other critical issue of whether the conduct, actions and activities of the respondent showed that she was not a Muslim, it was found by the Syariah High Court that despite the conversion being a process not understood by the respondent who was only slightly above four then, she had since been raised by her Muslim-convert mother and Muslim step-father until she was 17. The respondent acknowledged she was a Muslim even during her primary school where in her affidavit used in the proceedings she stated that her teacher asked her to take the subject Pendidikan Islam. Further even though she maintained she never practised the religion, she agreed when cross-examined during trial that whilst she was living with her mother and step-father she followed their Islamic practices and rituals such as praying, fasting, and occasionally attended religious classes, as well as programs and festivities related to the religion of Islam;

(6) Despite the respondent's testimony that she never practised the teachings of the religion of Islam and instead observed Hinduism even when living with her mother until she attained 17 since her mother gave her the freedom to practise her religion of choice, the Syariah High Court found that her claim that she practised Hinduism during that period unproven. At trial, the respondent's mother gave evidence as her witness and confirmed that whilst she did not teach her daughter the religion, she had no knowledge when the respondent started to follow the Hindu

religion. The respondent's one other witness, a cousin of hers also gave evidence that he did not know whether or not the respondent followed Islam when living with her mother. He only knew of the respondent not observing Islam but following Hinduism based on what had been told by the respondent to him, and when she attended prayers at the Hindu temple with him;

(7) It was determined that the respondent had the requisite basic knowledge as a Muslim. When asked, she was able to pronounce the *kalimah syahadah* and explain what it meant. Thus the reasons given by the respondent to leave the religion are irrelevant since the contention that one does not practise the religion could not determine her religious status. Not observing the requirements of the religion and even attending prayers at Hindu temples and celebrating Hindu festivals did not necessarily invalidate the *syahadah* or her religious belief especially when she herself was fully aware that she was a Muslim and identified as one from small and during her primary school days;

(8) The application to renounce Islam was made only after some 23 years after the conversion into Islam. This is also not to mention that the respondent's identity card already stated that she is a Muslim and she had been carrying this status for the past 23 years and been using her Muslim name for the past three decades. The respondent had the same duties and responsibilities as others professing the Islamic faith. Any lack of understanding ought to be addressed by learning more about the religion instead of asking for a declaration that one is no longer a follower of the faith;

(9) The Syariah High Court concluded that her conversion was regular and valid and no defects had been shown to invalidate the same. There was similarly insufficient evidence proffered by the respondent to substantiate her claim to justify that she be declared a non-Muslim; and

(10) The respondent's application for a declaration that she was no longer a Muslim was therefore refused.

[111] In the subsequent decision by the three-member panel of the Syariah Court of Appeal of the Federal Territory of Kuala Lumpur dated 12 January 2021 as set out in its grounds of judgment, the key findings may be conveniently summarised as follows:

(1) On the issue of whether the trial Judge was wrong in ruling the respondent was a Muslim, regard was properly had to the interpretation of a 'Muslim' in s 2 of the Administration of Islamic Law (Federal Territories) Act 1993 (as the Bahasa Malaysia version set out above) which includes (a) a person who professes the religion of Islam; (b) a person either or both of whose parents were, at the time of the person's birth, Muslims; (c) a person whose upbringing was conducted on the basis that she was a Muslim.

(2) It was reiterated that after the conversion in 1991, the respondent was formally registered as a Muslim when she was seven, and her identity card

too signifies her religion as Islam, and her mother remained a Muslim when the respondent reached 18 years old. There is again no evidence that the respondent's father challenged the conversion of the respondent in 1991 or after she was formally registered as a Muslim subsequently in 1993.

(3) The respondent became a Muslim upon the conversion of her mother since under Syariah principles, the religion of a minor below the age of 18 would follow that of a Muslim parent. In addition, under art 12(4) of the Federal Constitution, the Court could make the presumption that if the parents or lawful custodian of a minor are Muslims, the minor is also a Muslim.

(4) In respect of the second issue, as to whether the trial Judge erred in not accepting the respondent's testimony that she did not profess or practise the religion of Islam, the Syariah Court of Appeal did not find any error in the conclusions reached by the trial Judge.

(5) It was additionally determined that the respondent's first witness - her own mother - was not a competent witness in light of the relationship, and as for the one other witness, her male cousin, the Court ruled that although his testimony could be accepted despite being a non-Muslim, the respondent had not produced sufficient number of witnesses as required under Syariah rules as stated in s 86(5) of the Syariah Court Evidence (Federal Territories) Act 1997. No other witnesses had been produced to support her claim that she did not practise the religion of Islam during the years she lived with her mother until she turned 17 as well as during the period thereafter.

(6) Neither did the respondent produce clear documentary evidence to substantiate her religious practice during the period. The pictures submitted by the respondent (of performing Hindu prayers and playing with dogs) are not sufficiently cogent since they could instead be said to have been specifically produced for this case.

(7) The evidence of the respondent's lifestyle and practice which did not conform with the requirements of the religion did not necessarily result in her ceasing to be a Muslim. It had more to do instead with sins and rewards of an individual Muslim *vis-à-vis* his or her failure either to perform what is obligated or to refrain from what is prohibited. Even the commission of a major sin does not make a Muslim cease to be one in the absence of clear evidence that such infringements violate one's creed and *aqidah*.

(8) The decision of the Syariah High Court is affirmed - the respondent has failed to prove her case to justify the granting of a declaration that the respondent was no longer a person professing the religion of Islam.

[112] The Syariah High Court thus declared the respondent as a Muslim, having considered the evidence stated earlier in the context of the definition of "orang Islam" under the said s 2 which includes "(c) seseorang yang cara dia dibesarkan telah dijalankan atas asas bahawa dia orang Islam". As stated

earlier, *Rosliza* established that a Muslim by identification would be legally identified as a "person professing the religion of Islam" regardless of whether she practises or not, or whether she continues to believe in the faith or otherwise. s 2 (c) of the Administration of Islamic Law (Federal Territories) Act 1993 is an example which provides for an interpretation of a Muslim by identification, thus becoming a "person professing the religion of Islam" notwithstanding it concerns less with one's religious practice and degree of faith but more on considerations on one's background and upbringing.

[113] It is as such, clear that the averments of the respondent in her OS and supporting affidavits concerning her Islamic religious practice, or absence of it are diametrically opposed to the findings of the Syariah High Court and Syariah Court of Appeal as found in the respective grounds of judgment as produced in the respondent's own affidavit. There is no suggestion however that these grounds are not genuine. Furthermore, Kuala Lumpur Syariah High Court is a court of competent jurisdiction under art 121(1A) of Federal Constitution and seised with jurisdiction to hear and determine the issue of the religious status of the respondent under s 46(2)(b)(x) of the Administration of Islamic Law (Federal Territories) Act 1993.

[114] At the risk of repetition, the respondent, as recorded in the grounds of judgment of the Syariah High Court was stated to have made admissions during proceedings, specifically - *"*Plaintif mengikut amalan mereka seperti puasa, sembahyang, mengikuti kelas agama sekali sekala dan menghadiri program yang berkaitan agama serta kenduri menurut masyarakat Islam. Tambahan, Plaintif mempunyai asas pengetahuan sebagai orang Islam kerana mampu mengucap dua kalimah syahadah dan menjelaskan maksud syahadah kepada Mahkamah semasa berbuat demikian*"*.

[115] In light of the said admissions and the definitive findings made by the Syariah High Court as affirmed by the Syariah Court of Appeal, we are of the view that the determination by the High Court in the OS proceeding that the admissions in the earlier Syariah proceedings by the respondent that she had practised praying, fasting, attended Islamic religious classes and ceremonies whilst staying with her Muslim convert mother and Malay Muslim step-father are "mere experiences and exposures to the religion" that did not equate to the Islamic religious practice or the profession of the religion, is not tenable.

[116] The finding of the High Court that the respondent has never been a Muslim is therefore erroneous.

7) Other Issues

[117] This application by the respondent to the Syariah High Court of the Federal Territory of Kuala Lumpur was made under s 46(2)(b)(x) of the Administration of Islamic Law (Federal Territories) Act 1993. The respondent had chosen to submit to the jurisdiction of the Syariah High Court of Federal Territory of Kuala Lumpur. Throughout the entire process, including at the

Syariah Court of Appeal, the respondent was represented by Syarie Counsel. About four months after the date of the Syariah Court of Appeal Order, the respondent on 10 May 2021 instituted the instant OS, this time in Shah Alam Civil High Court against the appellants. Thus, the respondent chose to commence her suit in Kuala Lumpur Syariah High Court but later initiated the OS in Shah Alam Civil High Court.

[118] In any event, the respondent's religious status having already been determined by Kuala Lumpur Syariah High Court and Syariah Court of Appeal, also means that this OS is *res judicata*, and potentially an abuse of court process. Since her status as a Muslim has already been judicially determined by the Syariah Courts, the respondent has no *locus standi* to re-litigate a similar application before the Civil High Court by way of this OS. Moreover, when there are multiplicity of proceedings in any court(s), the Court is vested with power to strike out the subsequent proceeding on the plea of *res judicata*, as mandated under s 25(2) and item 11 of the Schedule to the Courts of Judicature Act 1964.

[119] Given all these considerations on the factual matrix of the case, we are inclined to conclude that the respondent has not on a balance of probabilities proved her case to be one where she was never a person who professed the religion of Islam. This was not therefore an *ab initio* case. Instead it ought to have been considered as a 'no longer a Muslim' or a renunciation case, falling therefore within the Syariah jurisdiction. The decision of the High Court which found to the contrary ought therefore to be set aside and the appeals be allowed.

Conclusion

[120] In view of all the reasons as discussed above, we reiterate that we find that the OS filed by the respondent at the High Court in Shah Alam for a declaration that she was not a Muslim to be a matter that fell within the Syariah, not Civil jurisdiction.

[121] As judicial determination on the religious status of the respondent had already previously been made by the Kuala Lumpur Syariah Court and affirmed by the Kuala Lumpur Syariah Court of Appeal, the OS must be construed as a renunciation case in light of art 121(1A) of the Federal Constitution and considering that the Civil Courts have no jurisdictional authority to appeal, review or set aside and go behind the decisions of the Syariah Courts. These include relitigating at the Civil Court issues already determined in the Syariah Court and departing from the earlier findings of the Syariah Court. Any re-opening at the Civil Courts of decisions made by the Syariah Courts on an individual's religious status is firmly not countenanced by art 121(1A) of the Federal Constitution. We emphasise that *Rosliza* and *Indira Gandhi* do not involve any prior judicial determination by the Syariah Courts of the relevant issues, unlike in the instant case before us.

[122] In any event, for completeness, even if the jurisdictional point is disregarded, we find that the factual matrix of the case, given the several considerations highlighted above, demonstrates that the respondent has not succeeded in establishing that she never professed the religion of Islam.

[123] The OS is also on this latter analysis, a renunciation case, thus falling outside the jurisdiction of the Civil Courts.

[124] As such, the appeals are allowed, and the decision of the High Court is set aside. My learned brother, Yaacob bin Haji Md Sam JCA has read this judgment in draft and has agreed with it.

[125] We however make no order as to costs.

Ravinthran Paramaguru JCA (Dissenting):

Introduction

[126] The two appeals before this Court are against the decision of the High Court that granted a declaration that the respondent is not "a person professing the religion of Islam". The respondent's case was that she was never a Muslim. The appellant in Civil Appeal No: B-01(NCVC)(A)-40-01-2022 is the Majlis Agama Islam Selangor whereas the appellant in Civil Appeal No: B-01(NCVC)(A)-57-01-2022 is the State Government of Selangor. The appellants were the 1st and 2nd defendants in the High Court. For the sake of convenience, I shall refer to them as the 1st and 2nd appellants respectively.

[127] The 1st appellant had counterclaimed that the respondent is a vexatious litigant. The counterclaim was dismissed by the High Court but there is no appeal against this part of the decision. Thus, I shall not address the issues that are relevant to the counterclaim.

Background Facts

[128] I shall first refer to the background facts deposed in the affidavits which were summarised by the learned High Court Judge.

[129] The respondent was born on 17 November 1986 to non-Muslim parents. Her given name at birth was Dahlia Dhaima. Her late father was a Hindu of Indian descent whereas her mother was a Buddhist of Chinese descent. The marriage was registered under the Law Reform (Marriage And Divorce) Act 1976. The couple separated in 1991. The respondent's mother took the respondent who was then under the age of five to live with her in Selayang Baru, Selangor. The marriage was dissolved on 18 December 1992 when decree absolute was granted by the High Court. But before the dissolution of the marriage, the respondent's mother converted to the Islamic faith on 17 May 1991. She took the name of Farah Hor binti Abdullah. The respondent who was only 4 years and five months old was also purportedly converted to the Islamic faith and was given the name of Dahlia Dhaima binti Abdullah. There

is no dispute that her father did not give consent to her conversion. He passed away on 22 March 1996. The respondent's mother was issued a conversion card by the Jabatan Agama Islam Negeri Selangor (JAIS) on the same day whereas the respondent was issued the conversion card only two years later when she turned seven. But the conversion card of the respondent stated that she was converted on 17 May 1991.

[130] The respondent's mother subsequently married a Muslim, namely one Zafri bin Manap on 10 April 1993. Thereafter, the respondent lived with her mother and step-father until she moved out at the age of 17 to commence her tertiary education at Kolej Tunku Abdul Rahman. Upon completion of her studies in 2010, she moved in with her aunt in Bangsar, Kuala Lumpur. In 2015, she decided to live by herself. The above facts are not in dispute.

[131] I shall now turn to the essential facts that underpin the originating summons of the respondent. The respondent's mother filed an affidavit to support the originating summons. She said that when the respondent was purportedly converted to Islam, she did not inform the respondent's father or obtain his consent. She also said that the five-year-old respondent did not utter the Affirmation of Faith during the conversion and did not know what was happening. During the time the respondent lived with her until present time, the respondent did not practise the Islamic faith but instead practised Hinduism.

[132] The respondent in her affidavit said as follows. She has been practising Hinduism since she was young. She frequented Hindu temples with her paternal relatives. Her mother and step-father permitted her to practise her chosen faith which is Hinduism. She never practised the Islamic faith or celebrated any of its festivals or prayed as a Muslim.

[133] The respondent first filed a summons for a declaration that she was no longer a Muslim at the Kuala Lumpur Syariah High Court. But her case in the statement of claim before the Syariah High Court was that she never professed the Islamic faith from the outset. The respondent was the Majlis Agama Islam Wilayah Persekutuan (MAIWP). The summons against MAIWP was dismissed on 20 July 2017. The appeal by the respondent was dismissed on 12 January 2021. It was only after the termination of the Syariah court proceedings that the respondent commenced the instant originating summons in the High Court.

Decision Of The High Court

[134] The High Court considered two crucial issues raised by the appellants. The first issue was whether the civil court possessed jurisdiction to declare that the respondent is not a person professing the religion of Islam. The second issue was whether the appellant had *locus standi* to file the instant originating summons given that she had filed a summons in the Syariah High Court earlier.

[135] The learned High Court Judge considered the argument of the appellants that the respondent's case in the true sense is that she is no longer a Muslim. It is not her case that she was never a Muslim. In other words it is an apostasy or renunciation case. Therefore, according to Counsel for the 1st appellant, the issue at hand is a matter of faith. It follows that only the Syariah court is seized with jurisdiction to determine the issue. Counsel for the respondent argued otherwise. He argued that as the respondent was *ab initio* a non-Muslim, the Syariah court had no jurisdiction in the matter. The learned High Court Judge had regard to the recent Federal Court case of *Rosliza Ibrahim v. Kerajaan Negeri Selangor & Anor* [2021] 2 MLRA 70. In that seminal case, the Federal Court in discussing the jurisdiction of the civil court and the Syariah court drew a distinction between apostasy cases where one claims to have left the religion of Islam and cases when one says that he or she was never a Muslim in the first place. The Federal Court held that in apostasy or renunciation cases, the Syariah Court has jurisdiction whereas in cases where it is claimed that one was never a Muslim *ab initio*, the civil court would have the right to adjudicate the matter. However, the Federal Court cautioned that "whether it is an *ab initio* case or a renunciation case will require careful examination of the factual matrix of the case".

[136] The learned High Court Judge noted that in the instant originating summons, the respondent asserted that she was never a Muslim because she did not profess the religion and that her conversion was not valid. In respect of the admissions made in the Syariah court by the respondent that she followed some of the practices of the Islamic religion when growing up, the learned High Court Judge said that only amounted to exposure to the religion of her mother and step-father. His Lordship considered the fact that throughout the Syariah court proceedings, the respondent did not admit to professing the religion of Islam. In the premises, he held that the admission of facts in the Syariah court cannot stop her from exercising her constitutional right in the civil court.

[137] The appellants raised the issues of *locus standi* and *res judicata* as the respondent had approached the Syariah court for a declaration that she was "no longer a Muslim". Only after her application before the Syariah court failed, did she file the instant originating summons for a declaration that "she is not a person professing the religion of Islam". The learned High Court Judge reasoned as follows in respect of the *locus standi* and *res judicata* issues. At the time the respondent filed her summons in the Syariah High Court in 2013, the law was "opaque" as to the demarcation of jurisdiction between the Syariah courts and the civil courts in respect of apostasy cases and cases where an applicant claims that he or she was never a Muslim *ab initio*. The law became clearer after the decision of the Federal Court in the *Rosliza Ibrahim* case. Therefore, the avenue to approach the civil court was not available before the *Rosliza Ibrahim* case. In this context, His Lordship noted that in the Syariah court, the respondent stated that she did not choose to practise the religion of Islam at the time of her conversion and did not practise it subsequently either. Therefore, the learned High Court Judge ruled she ought not be prevented from

having her right in respect of her religious status determined in the civil court. For this reason also, the learned High Court Judge ruled that the respondent is not a vexatious litigant.

[138] In respect of the respondent's conversion on 17 May 1991, the learned High Court Judge held that it was invalid as she was only four years and five months old at that time. His Lordship came to this conclusion after considering the prevailing law at the time, ie, s 147 of the Administration of Muslim law Enactment 1952 which read as follows:

> No person who has not attained the age of puberty shall be converted to the Muslim religion.

[139] His Lordship rejected the appellants' argument that under s 70 of the Administration of Islamic Law Enactment 1989, the respondent was automatically converted to Islam with her mother because the said law came into force on a later date, ie on 1 September 1991. For the same reason, His Lordship rejected the argument that the conversion card that was issued two years later was "conclusive proof of the facts stated therein". The conclusivity clause found in s 74(3) of the latter 1989 Enactment had not come into force on the date of conversion.

[140] In respect of the issue canvassed by Counsel for the respondent based on the Federal Court case of *Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals* [2018] 2 MLRA 1 that the respondent was converted unilaterally by her mother without the consent of her father, the learned High Court Judge declined to consider it because His Lordship had found that the conversion in the instant case was unlawful from the outset.

[141] For the above reasons, the learned High Court Judge granted the declaration that the respondent "is not a person professing the religion of Islam". At the same time, His Lordship dismissed the 1st appellant's counterclaim that she was a vexatious litigant. His Lordship did not make any order in respect of costs.

Issues In The Appeal

[142] In the originating summons, the respondent prayed for a declaration that she is not Muslim. It was her case in the affidavits that her conversion was invalid and that she was not a person professing the religion of Islam from the outset. Her Counsel contended that this is not a case where a person who had converted to Islam is seeking a declaration that he or she is not a Muslim due to renunciation of faith. In other words, this is not an apostasy case or to borrow the expression from the judgment in *Rosliza Ibrahim* case, an "exit case" but rather an "*ab initio* case". Therefore, the civil court has jurisdiction to hear her application, especially as it relates to a fundamental liberty, ie freedom of religion.

[143] On the other hand, both Counsel for the 1st appellant and 2nd appellant are on common ground that the respondent's originating summons was in the "true sense" a renunciation case and therefore only the Syariah court has jurisdiction in respect of the relief sought. In respect of the validity of the conversion, Counsel for the 1st appellant argued that it was valid whereas Counsel for the 2nd appellant did not address the issue. However, Counsel for the 2nd appellant relied on the Syariah Court's decision that found that the respondent is a Muslim. Counsel for the 1st appellant also raised the argument that the matter is *res judicata* and that the respondent has no *locus standi* to approach the civil court after having failed in the Syariah court. He described the instant originating summons as an "afterthought" by the respondent.

[144] Thus, the main issues that fall for determination in this appeal are the same issues canvassed in the High Court, ie jurisdiction, the religious status of the respondent, the validity of conversion, *locus standi* and *res judicata*.

Jurisdiction

[145] Both Counsel for the 1st and 2nd appellants argued that the High Court has no jurisdiction to grant relief to the respondent by virtue of art 121(1A) of the Federal Constitution. Article 121(1A) reads as follows:

> (1A) The Courts referred to in cl (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts.

[146] The Courts referred to cl (1) are the two civil High Courts, namely the High Court of Malaya and the High Court of Sabah and Sarawak. Counsel for the 1st appellant argued that although the relief sought is a declaration that the respondent "is not a person professing the religion of Islam", it is actually a case where the respondent wanted to renounce the religion and therefore it is a matter of faith and not a matter of constitutional right as to her religious status.

[147] Both Counsel for the appellants cited a plethora of authorities that held that apostasy is a matter within the exclusive jurisdiction of the Syariah court. I find it unnecessary to discuss the said cases as Counsel for the respondent has not quarrelled with that proposition. This point was also made in the *Rosliza Ibrahim* case. But Counsel for the 1st appellant and Counsel for the 2nd appellant also cited many authorities to support the proposition that in any matter that is related to religious status, the civil courts should decline jurisdiction because of art 121(1A). Counsel for the respondent disagreed with this argument. I am of the respectful view that these cases should be read in the light of the later Federal Court judgments in the *Rosliza Ibrahim* case and in the *Indira Gandhi* case. For this reason as well, I shall not refer to the previous cases that run counter to the decision in the *Rosliza Ibrahim* case.

[148] In the *Rosliza Ibrahim* case, the Federal Court drew a distinction between apostasy or renunciation cases and cases where an applicant seeks relief in the civil court on the basis that he or she was never a Muslim in the first place. In

ruling that the civil court has jurisdiction in the latter type of cases but not the former, Tengku Maimun CJ said as follows:

> [99] Reverting to the question: do the civil courts possess jurisdiction to determine the status of persons who claim to 'never have been 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. When it concerns a renunciation case, the civil courts have consistently held that it was within the jurisdiction of the Syariah Courts conferred under art 121(1A) of the FC. For the record, learned senior federal Counsel appearing for the attorney general as *amicus curiae*, agreed that it is the civil courts that have jurisdiction over persons of the '*ab initio* category'.
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> [100] The distinction between *ab initio* and renunciation cases and how the civil courts have always respected the Syariah Courts' jurisdiction in renunciation cases was most recently addressed by the Court of Appeal in *Maqsood*. Dr Badariah Sahamid JCA pertinently observed as follows:
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> [101] In this respect the civil courts appear to make a distinction between conversions out of Islam by those who were Muslims by original faith and those who were non-Muslims by original faith. In the former, premised on their original faith, they were subject to the jurisdiction of the Syariah Courts and require a renunciation in the Syariah Court to confirm their non-Muslim status. As for the latter, it is on the premise that they were non-Muslims to begin with and therefore not subject to the jurisdiction of the Syariah Courts, that no such renunciation of Islam was required for any supposed renunciation of their Islamic 'faith'.

[149] Thus, art 121(1A) of the Federal Constitution that was cited by both Counsel for the appellants can oust the jurisdiction of the civil court only if it is clearly established that the subject matter in question falls within the exclusive jurisdiction of the Syariah Court. Tengku Maimun CJ further said as follows on this point:

> [103] All judicial power vests solely in the civil superior courts as per the basic structure of our FC ingrained in art 121. However, art 121(1A) dispossess the civil courts of jurisdiction *ratione materiae* once it is established that the subject-matter of the suit is one which falls within the jurisdiction of the Syariah Courts. Having said that, in *ab initio* cases, the issue before the court is not one of faith. It is a question of one's identity under the FC. In contrast, renunciation cases concern persons who despite being Muslims, no longer have faith or believe in the religion.

[150] It is also instructive to read the following passages from the judgment of the *Indira Gandhi* case in which Zainun Ali FCJ exhorted civil courts not to lightly decline jurisdiction under art 121(1A) without scrutinising the nature of the matter before it. I reproduce the relevant passages below:

> [103] Premised on the above authorities, the Federal Court in *Haji Raimi Abdullah v. Siti Hasnah Vangarama Abdullah & Another Appeal* [2014] 3 MLRA 173 reaffirmed that 'it is settled law that the question of whether a person is a Muslim or not is a matter falling under the exclusive jurisdiction of the Syariah Court'.
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> [104] **In essence, the position taken in *Siti Hasnah* is that since matters of conversion involves Islamic law and practice, which are areas within the Syariah Court's expertise, it must follow that the Syariah Courts must have jurisdiction over such matters to the exclusion of civil courts. With respect, this approach is unduly simplistic**. It ignores the broader constitutional context in which art 121(1A) is framed. It is worth reiterating that the effect of art 121(1A) is not to oust the jurisdiction of the civil courts as soon as a subject matter relates to the Islamic religion. The powers of judicial review and of constitutional or statutory interpretation are pivotal constituents of the civil courts' judicial power under art 121(1). Such power is fundamentally inherent in their constitutional role as the bulwark against unlawful legislation and executive action. As part of the basic structure of the constitution, it cannot be abrogated from the civil courts or conferred upon the Syariah Courts, whether by constitutional amendment, Act of Parliament or state legislation.
>
> [105] We take a firm stand on this - in that before a civil court declines jurisdiction premised on the strength of art 121(1A), it should first examine or scrutinise the nature of the matter before it. If it involves constitutional issues, it should not decline to hear merely on the basis of no jurisdiction.
>
> [Emphasis Mine]

[151] Thus, the critical and determinative question in respect of jurisdiction is whether the instant case is an apostasy or renunciation case in the first place. On the face of the originating summons and the affidavits filed in support of it, there is no element of apostasy or renunciation. The respondent did not apply in the originating summons to renounce the religion of Islam. It is undisputed that the respondent is not a Muslim by original faith as she is the issue of a non-Muslim marriage contracted under the Law Reform (Marriage And Divorce) Act 1976. It is also undisputed that she was under five years old at the time of her purported conversion and that the consent of her non-Muslim father was not obtained. The High Court had therefore correctly assumed jurisdiction to consider the matter on the merits whether to grant declaratory relief in respect of her religious status. I shall now consider issues relating to the finding of the High Court that the respondent is not a person professing the religion of Islam.

Validity Of Conversion

[152] As I said earlier, the 2nd appellant has taken no position on this issue. However, the 1st appellant maintained that the conversion of the respondent was valid.

[153] As I pointed out earlier, on the date of conversion on 17 May 1991, the respondent was only four years and five months old. The prevailing law was s 147 of the Administration of Muslim Law Enactment 1952 (the 1952

Enactment) which enacted that no person who has not attained the age of puberty shall be converted to the Muslim religion. Counsel for the appellants cited s 70 of the Administration of Islamic Law Enactment 1989 (the 1989 Enactment) that replaced the 1952 Enactment. It read as follows:

> If, at the moment of conversion to Islam, a *muallaf* whether male or female, has any natural child who has not attained the age of majority according to Hukum Syara' (*baligh*), the child becomes converted to Islam at the same moment.

[154] This provision, to all intents and purposes, provides for the automatic conversion of a minor without the consent of a non-converting parent. It came into force only on 1 September 1991 which is after the date of the purported conversion. Thus, it cannot apply to the respondent's conversion. The 1989 Enactment was subsequently repealed but a similar provision was enacted in the successor law. There is no evidence that the respondent underwent any conversion ceremony on any later date or upon attaining puberty. The only purported conversion was on 17 May 1991 which clearly transgressed the written prevailing law ie s 147 of the 1952 Enactment. I note that Counsel for the 1st appellant did not address the point about violation of s 147 and the effect of it in respect on the conversion of the respondent. In my opinion, as the prevailing law categorically stipulated that no person who has not attained the age of majority shall be converted, the decision of the learned High Court Judge that the conversion was invalid cannot be faulted. Furthermore, s 146 of the said 1952 Enactment provided as follows:

> No person shall be converted to the Muslim religion otherwise than in accordance with the provisions of this enactment or any rules made thereunder.

[155] Therefore, in the light of the clear violation of s 147, the purported conversion of the respondent on 17 May 1991 was anything but lawful.

[156] Counsel for the 1st appellant also argued that the conversion card that was issued two years later is conclusive proof that the respondent is a Muslim. This argument is based on s 74(3) of the 1989 Enactment that read as follows.

> (3) A certificate of Conversion to Islam shall be conclusive proof of the facts stated therein.

[157] I find no merit in this argument for this reason. It may well be that on the date of issuance of the conversion card, the 1989 Enactment had come into force. Therefore the fact of conversion that is stated in the conversion card may constitute proof that the respondent underwent a formal conversion two years earlier. However, it cannot logically be conclusive proof of a valid conversion if the conversion was patently unlawful in the first place on the date it was performed because of breach of the prevailing written law which is the 1952 Enactment.

[158] But before I conclude the discussion on the validity of the respondent's conversion under the 1952 Enactment, lest it be said that the civil court has no jurisdiction to interpret provisions of the said law, I shall quote below the following passage from the judgment of Zainun Ali FCJ in the *Indira Gandhi* case that said otherwise:

> [95] Clause (1A) also does not remove the jurisdiction of civil courts in the interpretation of legislation. This is the case even in relation to legislation enacted for the administration of Muslim law, as was held in *Dalip Kaur Gurbux Singh v. Pegawai Polis Daerah (OCPD), Bukit Mertajam & Anor* [1991] 1 MLRA 301:
>
> The new cl 1A of art 121 of the Constitution effective from 10 June 1988 has taken away the jurisdiction of the civil courts in respect of matters within the jurisdiction of the Syariah Courts. But that clause does not take away the jurisdiction of the civil court to interpret any written laws of the states enacted for the administration of muslim law ... **If there are clear provisions in the State Enactment the task of the civil court is made easier when it is asked to make a declaration relating to the status of a person whether such person is or is not a Muslim under the Enactment**.
>
> [Emphasis Added]

Consent Of The Father

[159] In the light of the *Indira Gandhi* case, the adjudication of the validity of conversion of religion without the consent of the non-converting parent, is not a matter of faith or apostasy but a matter of interpretation of a constitutional provision. Therefore, the civil court is clearly seized with jurisdiction to adjudicate the matter.

[160] In the instant case, the respondent's mother's affidavit averring she did not obtain the consent of her then husband was not disputed. As I said earlier, this point was not deliberated upon by the learned High Court Judge as His Lordship found that the conversion was unlawful from the outset. I shall consider this issue as counsel for the parties raised it in this appeal. In the *Indira Gandhi* case, notwithstanding the provision in the Administration of the Religion of Islam (Perak) Enactment 2004 for the conversion of underage children unilaterally by one parent, the Federal Court held that the consent of both parents is required under art 12(4) of the Federal Constitution. In the instant case, there is no provision in the 1952 Enactment that authorises the conversion of a minor at the material time without the consent of the non-converting parent. It is interesting to note that r 4(1) of the Administration of Islamic Law (Conversion of Minors) Rules 1991 which was made under the successor law, ie the 1989 Enactment, required the written consent of the father of the minor for the conversion. Thus, even if the 1989 Enactment which came into force later is applicable, the conversion would be invalid as it is undisputed that the consent of the father was never obtained. Anyway, it is axiomatic that even if there was a provision in the State Law that allowed for unilateral or

automatic conversion of minors, it cannot override the Supreme Law of the land which is the Federal Constitution which requires the consent of both parents before a minor can be converted. Therefore, on this ground as well, the respondent's conversion on 17 May 1991 is invalid. I have also considered the argument that unlike in the *Indira Gandhi* case, in the instant case, the respondent's father did not challenge the conversion by way of judicial review before he passed away. Notwithstanding that fact, as it is undisputed that the consent of the father was not obtained, as a matter of law, the conversion cannot be lawful as it breached a provision of the Federal Constitution. Moreover, the point was taken up by the respondent in this originating summons. Therefore, the distinction made about the absence of challenge to the conversion when the respondent was still a child is of no consequence.

Whether Respondent Is A Person Professing The Religion Of Islam?

[161] It is trite law that an appellate court will be slow in interfering with the findings of fact of the court of first instance without good reason. In the instant case, the learned High Court Judge gave careful consideration to the unrebutted affidavit evidence of the respondent and her mother. I shall repeat below the salient evidence that led the learned High Court Judge to conclude that the respondent is not a person professing the religion of Islam.

[162] As I said earlier, the finding of the learned High Court Judge that the conversion of the five-year old minor was unlawful cannot be faulted. Therefore, the respondent was not a person professing the religion of Islam from the outset as found by the learned High Court Judge. The respondent's mother deposed in her affidavit that the respondent continued to practise Hinduism while she lived with her and her Muslim husband. She did not profess the religion of Islam. The respondent's mother said that she agreed for her daughter to be converted for a reason. After she separated from her Hindu husband, she decided to convert to Islam as she wanted to marry a Muslim. An officer from the Jabatan Agama Islam Negeri Selangor (JAIS) advised her that the respondent should also be converted to Islam to buttress her custody application in the pending divorce proceedings. The respondent in her affidavit said that she had been frequenting Hindu temples and celebrating Hindu festivals with her paternal relatives since young. She also averred that both her mother and her Muslim step-father permitted her to profess and practice her chosen faith. There is no affidavit from her step-father to contradict her averment. The learned High Court Judge accepted the affidavit evidence of both the respondent and her mother. In my view, this finding of fact by the learned High Court Judge does not warrant appellate interference. The respondent's mother's evidence was not contradicted by anyone and her evidence would constitute the best evidence in respect of matters pertaining to the respondent's upbringing from the age of five until she left the family home to pursue tertiary education at the age of 17.

Admissions Of Fact In The Syariah Court

[163] The learned High Court Judge also gave due consideration to the submission of Counsel for the 1st appellant that some admissions were made by the respondent during the Syariah court proceedings. She admitted that during the time she lived with her mother and step-father, she did follow some Islamic practices such as praying, fasting and attending religious ceremonies. She is also able to utter the Affirmation of Faith. She was required to attend eight sessions of Syariah counselling at the Jabatan Agama Islam Wilayah Perseketuan during the Syariah court proceedings. However, the learned High Court Judge dismissed the contention of the Counsel for the 1st appellant that the said admissions meant that the respondent is person professing the religion of Islam in the following passage of his judgment:

> [33] On the present facts, the plaintiff merely narrated her experiences, associations and exposures to the religion of Islam when she was young. She was being truthful during the Syariah proceedings. However, throughout the Syariah proceedings, she did not admit she professed the religion of Islam. The plaintiff did not retract her statements or admissions in the Syariah proceedings in this is Originating Summons. What the plaintiff was saying in this Originating Summons was that she did not profess the Islam religion *ab initio*. Therefore, those admission of facts in the Syariah Court proceedings could not stop her from exercising her constitutional right in the civil court.

[164] I am wholly in agreement with the reasoning of the learned High Court Judge. It is crucial to note that the respondent never resiled from her basic contention in the Syariah court proceedings or in the originating summons that she was not a person professing the religion of Islam. The admissions of fact in the Syariah court proceedings relate to incidents of a childhood spent with a Muslim step-father and Muslim convert mother as found by the learned High Court Judge. It follows that she was exposed to Islamic practices at an early age. However, her narration of her childhood exposure to the religion of Islam cannot detract from the first-hand affidavit evidence of her mother who said that the respondent did not practise the religion of Islam and was permitted to continue in her original faith.

Locus Standi* And *Res Judicata

[165] Counsel for the 1st appellant argued in the High Court that the respondent lacked *locus standi* to seek relief through the instant originating summons because she had earlier filed a summons in the Syariah High Court in Kuala Lumpur for a declaration that she was no longer a Muslim (Syariah case No. 043). It was argued that the originating summons was an afterthought and that the respondent was bound by the decisions of the Syariah High Court and Syariah Court of Appeal that dismissed her summons. For this reason, the matter is *res judicata* and the respondent was estopped from relitigating the matter in the civil court.

[166] I see no merit in the above argument for the following reasons. I am in agreement with the decision of the learned High Court Judge who ruled that the respondent did not lack *locus standi* and that the doctrine of *res judicata* does not apply. The learned High Court Judge noted that prior to the decision of the Federal Court in the *Rosliza Ibrahim* case, the law was not clear in respect of the demarcation of jurisdiction between apostasy cases and cases where the applicant asserts that he or she was never a Muslim to start with. I find this observation of the learned High Court Judge to be entirely correct. In a host of cases (some of which were cited by Counsel for the 1st appellant) that preceded the *Rosliza Ibrahim* case, the Courts did not make any distinction between apostasy cases and cases where it is pleaded that either the conversion was unlawful or that the applicant was never a Muslim *ab initio*. The civil courts declined to adjudicate on the basis that the matters were within the jurisdiction of the Syariah court without scrutinising the subject matter. Therefore, given the existing judicial attitude at that time and the predicament that the respondent was in, the learned High Court Judge described her action in seeking relief from the Syariah court as something done "out of necessity". That is why she sought a declaration in the Syariah court that she is a person who "is no longer a Muslim". But, as I pointed out earlier and as noted by High Court, the respondent consistently maintained her narrative that she never practised the religion of Islam. Thus, I would agree with the learned High Court Judge that in view of the *Rosliza Ibrahim* case which has opened a new judicial pathway for applicants in the same situation as the respondent, she should not now be prevented from pursuing her right to determine her religious status in the civil court which is a matter of constitutional and legal identity. In the premises, with respect, I find it difficult to agree with learned Counsel for the 1st appellant's characterisation of the originating summons as a mere "afterthought" by the respondent.

[167] I would also agree that the fact that the respondent sought relief from the Syariah court does not *ipso facto* deprive the civil court of jurisdiction. It is trite law that jurisdiction cannot be conferred by consent or agreement if there was no jurisdiction in the first place. Zainun Ali FCJ in the *Indira Gandhi* case said as follows:

> [74] It is not open for the Syariah Courts to enlarge their own jurisdiction by agreements: 'it is a fundamental principle that no consent or acquiescence can confer on a court or tribunal with limited statutory jurisdiction any power to act beyond that jurisdiction' (*Federal Hotel Sdn Bhd v. National Union Of Hotel Bar & Restaurant Workers* [1982] 1 MLRA 314).

[168] Therefore, it should not matter that the respondent, for lack any legal avenue, approached the Syariah court first. Jurisdiction cannot be vested in the Syariah court if the court has no jurisdiction in the subject matter to start with, especially in a matter that involves a fundamental liberty under the Federal Constitution. The learned High Court Judge found that the respondent was not a person professing the religion of Islam and that her conversion was unlawful. Therefore, the subject matter plainly falls within the jurisdiction of the civil

court as it is an *ab initio* case. It follows that the decision of the Syariah court is not binding on her. To reiterate, it is trite law that neither consent nor *estoppel* nor waiver can confer jurisdiction upon a court that lacks jurisdiction and thus the doctrine of *res judicata* cannot apply to any decision made by such a court (see *Chee Pok Choy & Ors v. Scotch Leasing Sdn Bhd* [2001] 1 MLRA 98).

Doctrine Of Prospective Ruling

[169] In respect of the change in the law brought about by the *Rosliza Ibrahim* case, Counsel for the 1st respondent argued that the doctrine of prospective ruling should apply. Therefore, the avenue that was opened by the *Rosliza Ibrahim* case cannot be availed by the respondent who had failed in her attempt to obtain relief in the Syariah court earlier. The said doctrine limits the general principle of retroactivity that applies to a court ruling. The purpose of the doctrine is to mitigate the potential harshness that may arise from a change in the law following a ground-breaking decision of an apex court. This American judicial doctrine was discussed at length for the first time in the House of Lords in *Re Spectrum Plus Ltd* [2005] UKHL 41 which was cited by Counsel for the 1st appellant. The doctrine is now part of the *corpus* of our law following its adoption in local cases. However, I fail to see its application here. Counsel for the respondent correctly pointed out that whilst Zainun Ali FCJ pronounced in the *Indira Ghandi* case that the doctrine will apply to that case, the Federal Court in the *Rosliza Ibrahim* case did not make any similar pronouncement. In the premises, the principles of law in respect of the jurisdiction of the Court in cases such as this that was enunciated in the *Rosliza Ibrahim* case must be taken as declaratory of the law without being unduly constricted by the doctrine of prospective ruling.

Conclusion

[170] For the foregoing reasons, I am of the view that the learned High Court Judge had correctly granted the relief sought in the originating summons. I shall therefore affirm the decision of the High Court and dismiss the appeals. No order as to costs.

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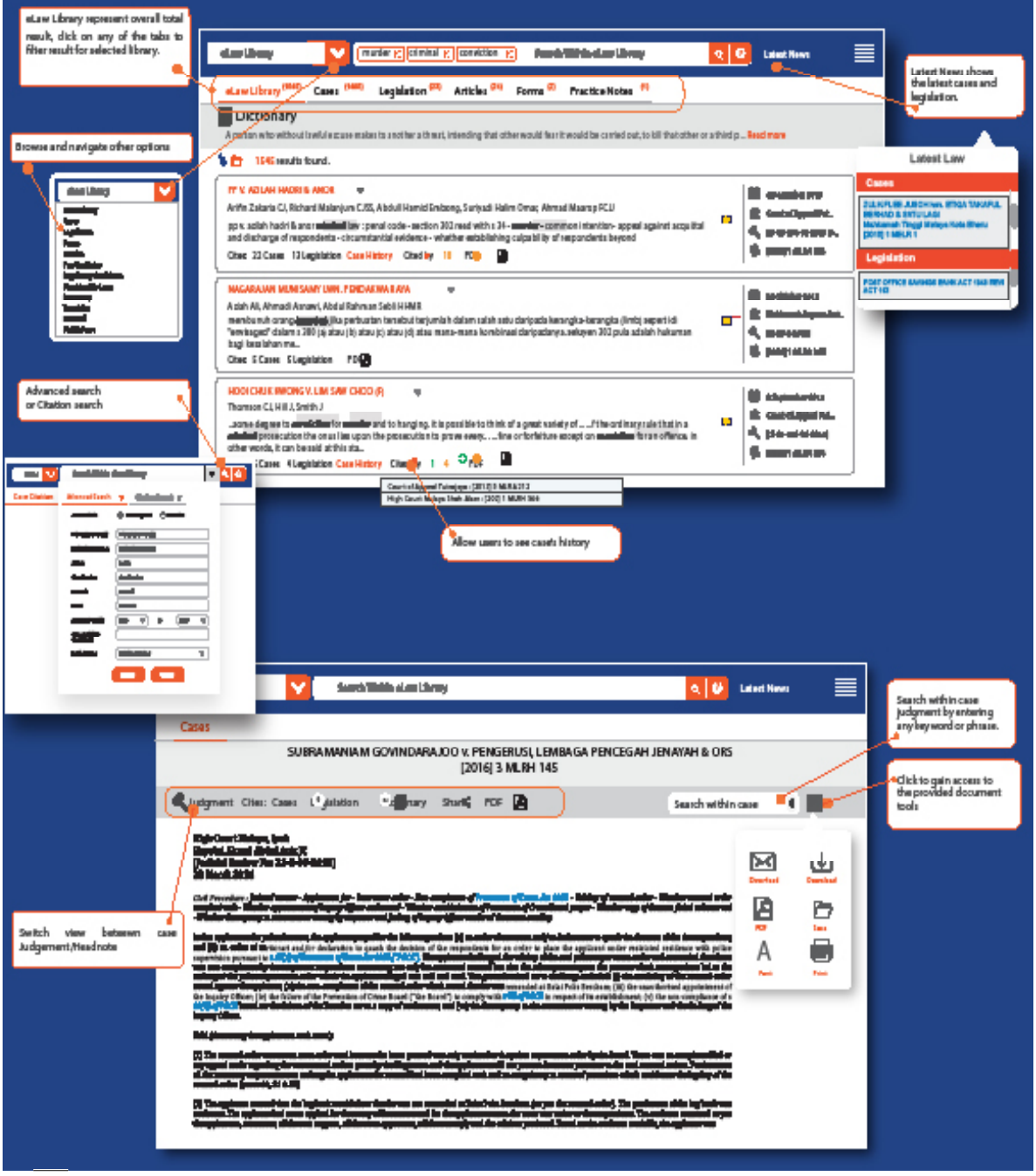

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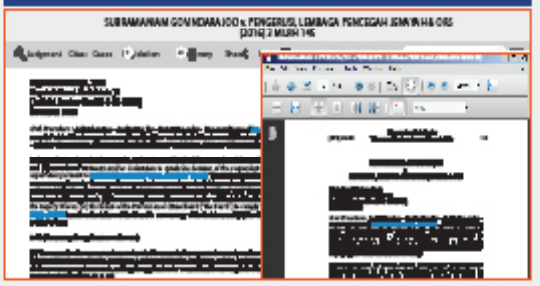

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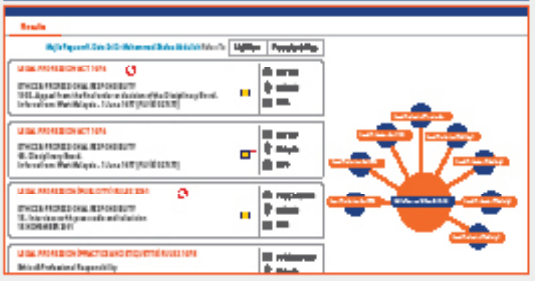

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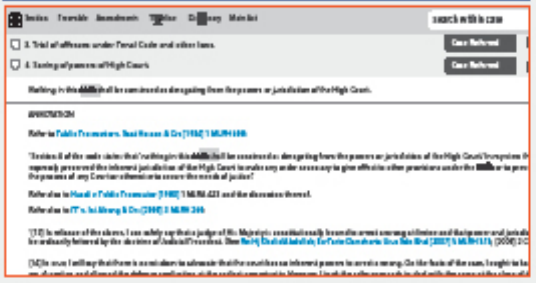

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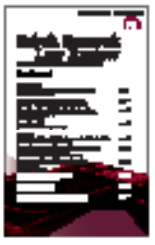

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