SIS FORUM (MALAYSIA) & ANOR

v.

JAWATANKUASA FATWA NEGERI SELANGOR & ORS

Federal Court, Putrajaya
Tengku Maimun Tuan Mat CJ, Abang Iskandar Abang Hashim PCA, Nallini Pathmanathan, Abu Bakar Jais, Abdul Karim Abdul Jalil FCJJ
[Civil Appeal No: 01(f)-23-09-2023(W)]
19 June 2025

Administrative Law: *Judicial review — Declaration and certiorari — Application seeking declaration that fatwa issued by 1st respondent pursuant to s 47 Administration of the Religion of Islam (State of Selangor) Enactment 2003 was invalid, and praying for order of certiorari to quash said fatwa — Whether fatwa could not apply to 1st appellant since it was a corporation — Whether fatwa made in excess of jurisdiction*

Constitutional Law: *Judiciary — Fatwa — Application seeking declaration that fatwa issued by 1st respondent pursuant to s 47 Administration of the Religion of Islam (State of Selangor) Enactment 2003 was invalid, and praying for order of certiorari to quash said fatwa — Whether civil courts had jurisdiction to review fatwa for compliance with constitutional limits and statutory authority — Whether jurisdiction of civil courts was excluded in respect of fatwa related to Islamic law — Whether fatwa could bind corporation — Whether fatwa exceeded jurisdiction conferred by Item 1, State List, Ninth Schedule of Federal Constitution*

The appellants herein had filed an application for judicial review ('JR') at the High Court ('HC') seeking a declaration, essentially, that a fatwa issued by the 1st respondent on 17 July 2014 and gazetted on 31 July 2014 ('Fatwa') pursuant to s 47 of the Administration of the Religion of Islam (State of Selangor) Enactment 2003 ('ARIE 2003') was invalid, and praying for an order of *certiorari* to quash the Fatwa. The HC dismissed the application, and the Court of Appeal ('COA') by a majority dismissed the appeal and affirmed the decision of the HC. Hence, the present appeal by the appellants in which there were two main issues requiring determination. The first issue was that the Fatwa could not possibly apply to the appellants because the 1st appellant, being a corporation, could not profess the religion of Islam and was not, therefore, encompassed within the power of the Selangor State Legislative Assembly ('SLA') to make laws under Item 1, State List, Ninth Schedule ('Item 1') of the Federal Constitution ('FC'). The second issue was that the Fatwa could not purport to direct federal authorities to take action, nor suggest that books could be confiscated or that social media restrict references to the appellants. By this, the Fatwa was thus invalid because it was made in excess of jurisdiction, ie it purported to touch on matters over which the respondents had no power because such matters were not encompassed in Item 1.

Held (allowing the appeal by way of majority decision):

Per Tengku Maimun Tuan Mat CJ (Majority):

(1) Both the State Legislature and the Syariah Courts were limited by Item 1, especially the Syariah Courts, which were also limited by State law that must be passed within the ambit of Item 1. State law could not, therefore, confer more power upon any administrative bodies, such as the 1st respondent and any Syariah Courts beyond what Item 1 itself permitted. It was a trite principle of law that legislative entries must be accorded the widest possible construction. Yet, at the same time, the Court in construing it must also pay sufficient regard to the wording used and the context, including any punctuation. (paras 51-52)

(2) In an ordinary sense of interpretation and giving the phrases their widest possible meaning, it meant that whatever was separated by a semicolon referred to separate limbs of Item 1. Item 1 actually contained eight limbs. Limb (i) of Item 1, which was perhaps the broadest limb in terms of the powers to legislate and which stated that the States might make laws in respect of Islamic law, including personal and family law, was subject to the condition that such persons must be persons professing the religion of Islam. As to what was meant by "profess", the judgment in *SIS Forum (Malaysia) v. Kerajaan Negeri Selangor; Majlis Agama Islam Selangor (Intervener) ('SIS Forum(1)')* had addressed this issue sufficiently. The observations in *SIS Forum (1)* could not be deemed as *obiter dicta* because they formed part and parcel of the judicial reasoning that resulted in the finding that s 66A of the ARIE 2003 was unconstitutional. The reasoning underpinning this was that apart from the fact that s 66A usurped judicial power vested in the Superior Courts, additionally the Syariah Courts conceptually could not perform judicial review over the bodies mentioned in s 66A for the reason that they, being artificial persons, could not therefore be deemed as persons professing the religion of Islam within the meaning of Item 1. (paras 53-57)

(3) The COA in this case failed to abide by *stare decisis* in their erroneous attempt to distinguish this case from the earlier decision in *SIS Forum (1)* without any sound legal basis. Judgments of the Federal Court, unless overruled by a later decision of the same Court, were binding and failure to abide by them was an affront to the administration of the justice system. The judgment in *SIS Forum (1)* agreed with and adopted *Kesultanan Pahang v. Sathask Realty Sdn Bhd ('Kesultanan Pahang')*, which also affirmed the principle that corporations could not profess a faith. Hence, the Court in the present case was fully inclined to uphold *stare decisis* and, accordingly, follow the precedent established in *SIS Forum (1)* and *Kesultanan Pahang*. (paras 58-59)

(4) In any event, the word 'profess' even in its widest sense could only be stretched so far as to denote 'a commitment to faith' – something only a natural person was capable of doing. It denoted the mental and spiritual acceptance of certain beliefs and utterances as well as adherence foremost to the Kalimah Syahadah and for practising Muslims, acts of worship vide solat fardhu and

solat sunnah, fasting in the month of Ramadhan as well as the performance of the Holy Pilgrimage (Hajj). Corporations were unable to do those things because they were not natural persons. The HC Judge ('HCJ') in this case deemed it fit to lift the corporate veil of the 1st appellant and concluded that the directing minds of the 1st appellant were Muslims. As such, the Fatwa could, in this regard, apply to the 1st appellant. The Majority Judgment of the COA appeared to endorse the HC's view. However, there was no basis for the corporate veil to be lifted. The Fatwa, by its clear language, applied to the 1st appellant by name and all other natural persons who associated themselves with the form of belief that the Fatwa condemned. Thus, the HC essentially went above and beyond even the words of the Fatwa by concluding that references to the corporation (1st appellant) and its directing minds were one and the same when the Fatwa itself made a clear distinction between the 1st appellant-corporation on the one side and natural persons on the other. Lifting the corporate veil, therefore, did violence to the language of the Fatwa by disregarding the clear distinction the Fatwa itself made between the '1st appellant', individuals (individu), associations (pertubuhan) and institutions (institusi). Even without lifting the corporate veil, the Muslim individuals who were behind the 1st appellant were already covered under the word 'individu'. (paras 60-62)

(5) The Fatwa, hence, could not apply to the 1st appellant as the 1st appellant, not being a natural person, was incapable of being construed as a person professing the religion of Islam. Paragraph 1 of the Fatwa had said: "Fatwa Pemikiran Liberalisme Dan Pluralisme Agama 1. SIS Forum (Malaysia) dan mana-mana individu, pertubuhan, atau institusi yang berpegang kepada fahaman liberalisme dan pluralisme agama adalah sesat dan menyeleweng daripada ajaran Islam." The Court in the instant case made no observation nor comment on the part of the paragraph that said 'fahaman liberalisme dan pluralisme agama adalah sesat dan menyeleweng daripada ajaran Islam' as it was in no position to do so. However, consistent with the reasons stated above, para 1 of the Fatwa was only valid to the extent that it applied to natural persons (individu) and invalid to the extent that it applied to artificial persons, including the 1st appellant. In other words, para 1 was valid only to the extent that it was read by deleting these phrases – "SIS Forum (Malaysia)" and "dan pertubuhan, atau institusi". (paras 67-70)

(6) Once a fatwa was gazetted, it was binding on all Muslims in that State, and as all Syariah Courts in Selangor must recognise all matters laid down therein, the gazetted fatwa carried legal force. As such, even if the Fatwa could not strictly be categorised as a subsidiary legislation, it was akin to subsidiary legislation and could, in principle, be treated as such, and the ARIE 2003 could be treated as its parent Act. Whether under the ARIE 2003 or the publication in the Gazette, the fact remained that the powers of the Selangor SLA were limited and circumscribed by Item 1. If the parent Act of the Fatwa, the ARIE 2003, was so circumscribed by Item 1, it must also follow that the Fatwa, being itself subordinate to the ARIE 2003, must remain further subordinate to Item 1.

Hence, not only must the Fatwa be limited in application to persons professing the religion of Islam, the subject matter of the Fatwa too must be confined to the matters expressly enumerated in Item 1. (paras 81-84)

(7) By the terms of s 49 of the ARIE 2003, such a Fatwa must be recognised by the Syariah Courts and must necessarily bind the Muslims in the State of Selangor. There was nothing prohibiting any person from filing a summons in the Syariah Courts to compel compliance with the Fatwa. The binding effect and the offence of disobedience of the Fatwa were created not by the Fatwa itself, but by s 49 of the ARIE 2003. The offending paragraphs that fell within the contentions on this issue stated: "Fatwa Pemikiran Liberalisme Dan Pluralisme Agama ... 2. Mana-mana bahan terbitan yang berunsur pemikiran-pemikiran fahaman liberalisme dan pluralisme agama hendaklah diharamkan dan boleh dirampas. 3. Suruhanjaya Komunikasi dan Multimedia Malaysia ('SKMM') hendaklah menyekat laman-laman sosial yang bertentangan dengan ajaran Islam dan Hukum Syarak." As it carried the force of law, the Fatwa clearly mandated the confiscation of publications in para 2. The express conferral of authority by the phrase 'boleh dirampas' was not supported by any limb in Item 1. As for para 3, the Fatwa having the force of law clearly amounted to an instruction to SKMM to take action on social media platforms against any person who conformed to or propagated such views condemned by the Fatwa. These matters exceeded the jurisdiction of the 1st respondent and the entire Selangor SLA, as these were State-passed, legally mandated intrusions upon federal law and federal powers, and in the case of para 3, against a federal body. (paras 85-88)

(8) Paragraph 4 of the Fatwa which said: "4. Mana-mana individu yang berpegang kepada fahaman liberalisme dan pluralisme agama hendaklah bertaubat dan kembali ke jalan Islam", conformed with limb (vii) of Item 1 to the extent that it allowed the States to enact laws on 'control of propagating doctrines and beliefs among persons professing the religion of Islam'. The substance of para 4 itself conformed with Item 1 and the ARIE 2003, and appeared to be severable from the rest of the offending paragraphs of the Fatwa. Hence, there was no issue with it. (paras 89-90)

(9) In determining this appeal and the validity of the Fatwa, consistent with art 121(1A) of the FC, the Court had not made any substantive findings or comments on the substance and merit of the condemnation in the Fatwa, namely, whether 'fahaman liberalisme and pluralisme agama adalah sesat dan menyeleweng daripada ajaran Islam', as that was purely a matter of Islamic law and within the jurisdiction of the 1st respondent and the Syariah Courts. The present case only concerned the validity of the Fatwa *vis-à-vis* the ARIE 2003, which in turn was adjudged against the FC, specifically Item 1. Therefore, the Fatwa was valid but only to the extent that it excluded the offending paras 2 and 3 and to the extent that para 1 was read down as applying to natural persons only. (paras 91-92)

Per Abu Bakar Jais FCJ (Dissenting):

(10) The HCJ could not be faulted in finding the Syariah Court had the jurisdiction in respect of the Fatwa as the same related to 'the control of propagating doctrines' and 'beliefs among persons professing the religion of Islam' or 'the determination of matters of Islamic law and doctrine'. The HC, therefore, had correctly denied the JR application for a declaration that the Fatwa issued by the 1st respondent was invalid. The HC, in consequence, had rightly ordered no *certiorari* to quash the said Fatwa. The HC was correct to decide on the present case by determining whether the Civil Courts in the first place had jurisdiction to hear the application for JR. The HC was not in error in determining that only the Syariah Courts would have jurisdiction to hear and decide on a challenge against a fatwa such as in the present case. The above approach by the HCJ should mean that this single issue on jurisdiction would be sufficient to dispose of the application for JR at the HC. The Fatwa, under the circumstances, was a matter for Muslims alone and its application was for the Muslim community. The Syariah Courts should be the best and appropriate forum instead of the Civil Courts to decide on the validity of a fatwa such as the present one before the HC, COA and the Federal Court. The Civil Courts should not encroach on the jurisdiction of the Syariah Courts and neither should the latter encroach on the jurisdiction of the former. Each should respect the jurisdiction of the other. Malaysia enjoyed a peaceful coexistence among the communities by respecting the two different courts, and hence it should remain in that manner for many years to come. (paras 125-128)

(11) The Court's focus in this instance should not be blinkered by the assertion that since the 1st appellant was a company, it could not be subjected to the Fatwa as it was regressive in approach to ignore the people supporting the company. One ought to have the vision and foresight in asking who the people were behind this company. Its own name, SIS Forum (Malaysia) or "Sisters in Islam", clearly showed its identity. Further, in reality, a company could not exist without persons manning it. At the very least, the 2nd appellant, the Executive Director and founder of the 1st appellant, was a Muslim. The HCJ also noted that all the directors of the 1st appellant were likewise Muslims, and the members of the same were also Muslims. It was disturbing that the 1st appellant could escape and not be subjected to the Fatwa simply by being a company, but nonetheless venturing to make assertions and expressing views affecting the precepts and tenets of Islam. The HCJ was not wrong to find that, since its inception, the 1st appellant had raised and issued statements on matters involving the religion of Islam. As a consequence, the Fatwa in this case should rightly be applicable against the appellants. (paras 138, 139 & 144)

(12) Bearing in mind that it was decided that the Syariah Courts had the jurisdiction in respect of the core dispute on the Fatwa and not the Civil Courts, the issue regarding s 66 of the ARIE 2003 became irrelevant. First, there must be a determination based on the subject matter approach to see whether the Syariah Courts had jurisdiction in the present case. Once it was

decided that the Syariah Courts had jurisdiction, the dispute must go before the same for a decision. It mattered not then that s 66 of the ARIE 2003 granting JR power to the Syariah Courts was already struck down by *SIS Forum (1)*. (para 155)

(13) As the essence of the dispute in this case was on the Fatwa, the Court should look at the subject matter of the case. The subject matter approach should result in the dispute on the Fatwa being considered within the jurisdiction of Syariah Courts and not the Civil Courts. This approach, formulated by the highest court in this country, was still good law. Once it was within the jurisdiction of the Syariah Courts, those courts alone would determine the validity of the Fatwa issued. It was also high time that a company, although strictly speaking was not a "person", must also be subjected to a fatwa, especially based on the facts of this case. (paras 161-163)

Case(s) referred to:

Alma Nudo Atenza v. PP & Another Appeal [2019] 3 MLRA 1 (refd)

Dhinesh Tanaphll v. Lembaga Pencegahan Jenayah & Ors [2022] 4 MLRA 452 (refd)

Iki Putra Mubarrak v. Kerajaan Selangor [2020] 4 MLRA 1 (refd)

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

Jabatan Pendaftaran Negara & Ors v. Seorang Kanak-Kanak & Ors; Majlis Agama Islam Negeri Johor (Intervener) [2020] 2 MLRA 487 (refd)

Kesultanan Pahang v. Sathask Realty Sdn Bhd [1998] 1 MLRA 119 (folld)

Ketheeswaran Kanagaratnam & Anor v. PP [2024] 2 MLRA 288 (refd)

Ketua Pegawai Penguatkuasa Agama & Ors v. Maqsood Ahmad & Ors And Another Appeal [2021] 1 MLRA 286 (refd)

Ketua Pegawai Penguatkuasa Agama & Ors v. Maqsood Ahmad & Ors And Another Appeal (Civil Application No 08(f)-272-09-2020) (Unreported) (refd)

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

Mamat Daud & Ors v. The Government Of Malaysia [1987] 1 MLRA 292 (refd)

Myriam lwn. Mohamed Ariff [1971] 1 MSLR 5 (distd)

Nik Elin Zurina Nik Abdul Rashid & Anor v. Kerajaan Negeri Kelantan [2024] 3 MLRA 1 (refd)

Nivesh Nair Mohan v. Dato' Abdul Razak Musa & Ors [2021] 6 MLRA 128 (refd)

Pendaftar Mualaf Negeri Perlis & Ors v. Loh Siew Hong & Another Appeal [2025] 3 MLRA 276 (refd)

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

Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Another Case [2017] 4 MLRA 554 (refd)

SIS Forum (Malaysia) & Yang Lain lwn. Jawatankuasa Fatwa Negeri Selangor & Yang Lain [2023] 5 MLRA 181 (refd)

SIS Forum (Malaysia) v. Kerajaan Negeri Selangor; Majlis Agama Islam Selangor (Intervener) [2022] 3 MLRA 219 (folld)

Sulaiman Takrib v. Kerajaan Negeri Terengganu; Kerajaan Malaysia (Intervener) & Other Cases [2008] 3 MLRA 257 (refd)

The Co-Operative Central Bank Ltd v. Feyen Development Sdn Bhd [1997] 1 MLRA 318 (refd)

Legislation referred to:

Administration of the Religion of Islam (State of Selangor) Enactment 2003, ss 47, 48(6), 49, 51(1), (2), (3), 66, 66A

Communications and Multimedia Act 1998, s 3(3)

Courts of Judicature Act 1964, s 78

Federal Constitution, arts 3(1), 4(1), 5(1), 8(1), 10(1)(a), 11(4), (5), 37(1), 74, 121(1), (1A), Ninth Schedule, Item 1, limbs (i), (iv), (v), (vi), (vii)

Printing Presses and Publications Act 1984, s 7

Syariah Criminal Offences (Selangor) Enactment 1995, ss 12(c), 13

Other(s) referred to:

Fatwa Pemikiran Liberalisme Dan Pluralisme Agama, paras 1, 2, 3, 4

Counsel:

For the appellants: Malik Imtiaz Sarwar (Yvonne Lim, Surendra Ananth & Sabrina Ameen with him); M/s Fahri, Azzat & Co

For the 1st respondent: Zainul Rijal Abu Bakar (Mohamed Haniff Khatri, Aidil Khalid, Danial Farhan Zainul Rijal, Ali Huzaifah Shariff Ahmed, Muhammad Hariz Md Yusoff & Nur Fatin Syakinah Kamarudin with him); M/s Chambers of Zainul Rijal

For the 2nd respondent: Yusfarizal Yusoff (Majdah Muda with him); M/s Muda

For the 3rd respondent: Salim Soib @ Hamid, (Husna Abdul Halim with him); Selangor State Legal Advisor's Office

[For the Court of Appeal judgment, please refer to *SIS Forum (Malaysia) & Yang Lain lwn. Jawatankuasa Fatwa Negeri Selangor & Yang Lain* [2023] 5 MLRA 181]

JUDGMENT

Tengku Maimun Tuan Mat CJ (Majority):

Preliminaries

[1] This judgment is delivered by the remaining judges on this panel pursuant to s 78 of the Courts of Judicature Act 1964, as our learned brother, Abdul Karim Abdul Jalil FCJ, has since mandatorily retired from the Bench.

[2] My learned brother, Abang Iskandar Abang Hashim PCA and my learned sister Nallini Pathmanathan FCJ, have seen this judgment in draft and have agreed with it.

[3] In all civilised democracies with independent Judiciaries, judicial review applications are routine against the Executive branch of Government for decisions and omissions they make in the exercise or non-exercise of their discretion. In most cases, the subject matter of the exercise of discretion is not the main issue in the plaint; rather, it is the manner in which the decision was made and/or concerns a review of the legal basis upon which such power was exercised or not exercised.

[4] It will be appreciated that this appeal is no different. While it concerns a certain fatwa (religious edict), the case has nothing to do with the substantive beliefs held in the religion of Islam nor does it have anything to do with the administration of the substantive aspects of the religion of Islam.

[5] The 3rd respondent is the Government of the State of Selangor and a member of the Executive branch. The 1st and 2nd respondents are organs of the 3rd respondent and are also members of the Executive branch.

[6] They, like all other Executive organs, are conferred powers by the Federal Constitution ('FC') and laws passed by the State Legislative Assembly ('SLA') of Selangor. Their exercise or lack of exercise of those powers is therefore subject to judicial review. The fact that they deal with matters pertaining to Islamic faith, dogma, and doctrine — is beside the point, and these matters are, in any event, not within our purview.

[7] As such, we state here that this case has nothing to do with the substance of the religion of Islam, its mandates, dictates or its doctrine and matters relating to its belief. The present challenge only concerns the review of the respondents' exercise of certain powers under the law, which is distinct from the substance and contents of their decisions.

Article 121(1) And 121(1A) Of The Federal Constitution

[8] We find it necessary to begin this judgment by stating that there has been a long-term confusion over the operation of art 121(1A) of the FC, which in recent times ought to have become clear and quelled.

[9] It is impossible to comprehend art 121(1A) in isolation as it must be read together with art 121(1) which states:

> "Judicial power of the Federation
>
> 121.(1) There shall be two High Courts of co-ordinate jurisdiction and status, namely-
>
> (a) one in the States of Malaya, which shall be known as the High Court in Malaya and shall have its principal registry at such place in the States of Malaya as the Yang di-Pertuan Agong may determine; and

(b) one in the States of Sabah and Sarawak, which shall be known as the High Court in Sabah and Sarawak and shall have its principal registry at such place in the States of Sabah and Sarawak as the Yang di-Pertuan Agong may determine;

(c) (Repealed),

and such inferior courts as may be provided by federal law; and the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law.".

[10] The confusion with art 121(1A) is made worse when we consider that judicial power, which forms the subject of art 121(1), has itself been the subject of considerable debate in the past years. Whatever these debates once were, they have been irrevocably settled by a large number of decisions emanating from the Federal Court, namely and among others:

(i) *Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Another Case* [2017] 4 MLRA 554 ('*Semenyih Jaya*');

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

(iii) *Alma Nudo Atenza v. PP & Another Appeal* [2019] 3 MLRA 1 ('*Alma Nudo*')

(iv) *Dhinesh Tanaphll v. Lembaga Pencegahan Jenayah & Ors* [2022] 4 MLRA 452 ('*Dhinesh*');

(v) *Nivesh Nair Mohan v. Dato' Abdul Razak Musa & Ors*[2021] 6 MLRA 128 [Case No: (05(HC)-7-01/2020(W)), decided on 25 April 2022] ('*Nivesh Nair*'); and

(vi) *Ketheeswaran Kanagaratnam & Anor v. PP* [2024] 2 MLRA 288 ('*Ketheeswaran*'),

(collectively: 'First Group of Cases').

[11] In summary, these and related cases have upheld a primary facet of our FC that the Superior Courts remain the sole collective body that may interpret the provisions of the FC that are supreme. These decisions also affirmed that, as a corollary to the power to interpret the FC, the Courts must necessarily retain the power of judicial review over legislative and Executive conduct or excesses.

[12] Litigation, with respect to the cases above, arose in various contexts. There is a more specific context insofar as art 121(1A) is concerned, as in cases such as these, it was alleged that the Superior Courts may not review certain Executive conduct because it pertained to Islamic faith, law and doctrine. These cases either directly or indirectly argued that such an exercise of judicial power cannot be done, for it would violate the said art 121(1A).

[13] In this context, we now reproduce art 121(1A), as follows:

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

[14] In this regard, the Federal Court has also rendered judgment in other cases within which similar arguments were raised (either by direct reference to art 121(1A) or otherwise) to the effect that the Superior Courts cannot and do not have powers of review because the subject matter of such a review was within the jurisdiction of the Syariah Courts.

[15] The most notable cases where such matters were either directly or indirectly addressed are these:

(i) *Iki Putra Mubarrak v. Kerajaan Selangor* [2020] 4 MLRA 1 ('*Iki Putra*');

(ii) *Rosliza Ibrahim v. Kerajaan Negeri Selangor & Anor* [2021] 2 MLRA 70 ('*Rosliza*');

(iii) *SIS Forum (Malaysia) v. Kerajaan Negeri Selangor; Majlis Agama Islam Selangor (Intervener)* [2022] 3 MLRA 219 ('*SIS Forum (1)*');

(iv) *Nik Elin Zurina Nik Abdul Rashid & Anor v. Kerajaan Negeri Kelantan* [2024] 3 MLRA 1 ('*Nik Elin*'); and

(v) most recently: *Pendaftar Mualaf Negeri Perlis & Ors v. Loh Siew Hong & Another Appeal* [2025] 3 MLRA 276 [Civil Application No 08(f)-35-02-2024(W), decided on 4 March 2025] ("*Loh Siew Hong*'),

(collectively: 'Second Group of Cases').

[16] Additionally, we also have the judgment of the Court of Appeal in *Ketua Pegawai Penguatkuasa Agama & Ors v. Maqsood Ahmad & Ors And Another Appeal* [2021] 1 MLRA 286 ('*Maqsood Ahmad*') which extensively discussed the interpretation of art 121(1A) and the jurisdiction of the Syariah Courts. Leave to appeal to the Federal Court against the decision of the Court of Appeal was dismissed (see: Federal Court Civil Application No 08(f)-272-09-2020). In any event, the Federal Court in *Rosliza* has directly endorsed the Court of Appeal's decision in *Maqsood Ahmad*.

[17] These cases clearly explain the operation of art 121(1A) in light of art 121(1).

[18] Without getting into the specifics already contained in those cases, the brief answer to the question: 'why was there a need to enact art 121(1A) of the FC?' — is this. Prior to the amendment that introduced art 121(1A), there had been instances where the Superior Courts not only engaged in judicial review against the Syariah Court or State-run religious bodies, but went to the extent of making or even reversing substantive decisions of the Syariah Courts.

[19] One such example was the decision in *Myriam lwn. Mohamed Ariff* [1971] 1 MSLR 5 ('*Myriam*'). In that case, the Kadi had adjudicated upon the custody arrangement between a couple who had been divorced. When the wife remarried, she applied to the High Court to vary the custody arrangement, and the High Court accordingly varied the arrangement. To emphasise an obvious point, this decision was rendered before the amendment in 1988 to incorporate art 121(1A).

[20] If we peruse Item 1, State List, Ninth Schedule of the FC ('Item 1'), which was substantively the same then when *Myriam* was decided as it is now, the provision stipulates thus:

> "List II — State List
>
> 1. Except with respect to the Federal Territories of Kuala Lumpur, Labuan and Putrajaya, Islamic law and personal and family law of persons professing the religion of Islam, including the Islamic law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trusts;...".

[21] Clearly, the custody of the children in *Myriam* was a matter that fell within the ambit of Islamic law, specifically the law relating to 'marriage, divorce and guardianship'. As such, it was a matter within the jurisdiction of the Syariah Courts.

[22] Back then, there was no specific constitutional bar against the Superior Courts exercising jurisdiction over disputes which jurisdiction rightly belonged to the Syariah Courts. What that meant was any person who was professing the religion of Islam, and who was therefore subject to the jurisdiction of the Syariah Court (jurisdiction *ratione personae*), could bring his dispute pertaining to Islamic law (jurisdiction *ratione materiae*) before the Superior Courts even if that meant bypassing or supplanting the Syariah Court.

[23] Thus, art 121(1A) was passed with the express and incontrovertible effect that the Superior Courts (being the Courts mentioned in cl (1) of art 121): '**shall have no jurisdiction in respect of any matter within the jurisdiction** of the Syariah courts.' (our emphasis).

[24] Post insertion of art 121(1A), any case like *Myriam* that is filed in the Superior Courts would be at once rejected for the reason that the subject matter of the dispute is within the jurisdiction of the Syariah Courts. We see an extremely lucid and direct example of this in the decision of the Federal Court in *Latifah Mat Zin v. Rosmawati Sharibun & Anor* [2007] 1 MLRA 847 ('*Latifah*').

[25] In *Latifah*, the Superior Courts were seized with jurisdiction to issue letters of administration upon there being a successful decree of Faraid by the Syariah Court. Here, the Syariah Court had determined the issue of distribution between the Muslim beneficiaries of the deceased Muslim's estate and the Superior Court was constitutionally tasked to enforce the Faraid by issuing

letters of administration. However, one party in the High Court contested the Faraid claiming that certain monies could not be subjected to Faraid because they were given to that party by the deceased as a hibah prior to his death.

[26] The High Court in that case then ordered a trial to be held on that issue and made a substantive determination on the issue by ruling that there was no hibah. On appeal, the Court of Appeal reversed the High Court's decision and held that whether or not there was a hibah was a matter upon which only the Syariah Courts can decide.

[27] The Federal Court, in our respectful view, correctly upheld the Court of Appeal's decision. Hibah is a matter of Islamic personal law and inheritance, and accordingly, by virtue of art 121(1A), only the Syariah Courts could decide it. The High Court was wrong to embark on that assessment by itself, especially when the learned trial Judge found that Islamic law applied in the determination of whether there was a valid hibah. *Latifah* is therefore a positive example of how the Superior Courts enforced art 121(1A) of the FC.

[28] In this entire analysis, including the First and Second Groups of Cases, it has been shown that art 121(1A) serves to clarify the jurisdiction of the civil Superior Courts *vis-à-vis* the Syariah Courts. What remains paramount is that art 121(1) is still the prevailing provision on judicial power, as principally that power remains vested in the Superior courts as its vessel. Thus, per art 4(1) of the FC, any laws passed after Merdeka Day (and this includes laws passed by Parliament or the State Legislative Assemblies) are subject to scrutiny by and only by the Superior Courts. This includes provisions of the FC and any law passed by Parliament seeking to amend the FC.

[29] This must and does include the fact that it is only the Superior Courts that are entrusted to interpret art 121(1A) of the FC, as it is also a provision of the FC. The same applies to Item 1 and any other provision of the FC, including art 11. Put another way, the Syariah Courts have under art 121(1A), the exclusive jurisdiction to determine matters that are within their jurisdiction *ratione materiae*, but who should make the determination whether in the first place, the matter is within their jurisdiction? The answer must necessarily be the Superior Courts in art 121(1).

[30] However, much like what happened in *Latifah*, once a matter is clearly determined by the Superior Courts to rightly be within the jurisdiction of the Syariah Courts, the Superior Courts will then cease to possess jurisdiction over both the litigant and the subject matter of the suit. Viewed in this way, one should — even with little diligence — be able to comprehend how and why (without repeating the judgments here) *Rosliza*, *Indira Gandhi* and *SIS Forum (1)* were decided the way they were.

[31] It should be clear that art 121(1A) serves to regulate by limiting the jurisdiction of the Superior Courts in that they cannot exercise powers over matters that are within the jurisdiction of the Syariah Courts. It does not,

however, grant in any way jurisdiction to the Syariah Courts above and beyond the limited categories of subject matters granted to them by Item 1. For the avoidance of doubt, the power to interpret the FC with finality (including art 121(1A) itself) and all laws including State Laws and including the benefit of issuing public law remedies is solely a judicial power vested in the Superior Courts by virtue of the all-encompassing dictates of art 121(1) as the paramount provision.

[32] In other words, art 121(1A) serves to correctly restrict the jurisdiction of the Superior Courts from hearing matters within the jurisdiction of the Syariah Courts, but it does not otherwise enlarge the jurisdiction of the Syariah Courts to include judicial power under art 121(1) or beyond the legislative entries in Item 1.

[33] As has often been said, all legal power must have legal limits, and the adjudicator of those limits upon constitutional and legal interpretation is the Superior Courts. Viewed from this perspective, to the extent that the Syariah Courts act beyond their jurisdiction, they remain subject to judicial review by the Superior Courts.

The Appeal

[34] On the facts, the appellants have sought to challenge a certain fatwa that they say affects them, and they do this not by reference to the contents of that fatwa tested against the grain of Islamic law, but for constitutional and statutory reasons. We find, consistent with all the cases before this, that this is a matter purely for the determination of the Superior Courts as a point of constitutional importance and administrative law.

Background

[35] The judicial review application from which this appeal emanates concerns a fatwa issued by the 1st respondent on 17 July 2014 and gazetted on 31 July 2014 pursuant to s 47 of the ARIE 2003. It is titled: 'Fatwa Pemikiran Liberalisme Dan Pluralisme Agama' ('Fatwa').

[36] The Fatwa reads:

> "Fatwa Pemikiran Liberalisme Dan Pluralisme Agama
>
> 1. SIS Forum (Malaysia) dan mana-mana individu, pertubuhan, atau institusi yang berpegang kepada fahaman liberalisme dan pluralisme agama adalah sesat dan menyeleweng daripada ajaran Islam.
>
> 2. Mana-mana bahan terbitan yang berunsur pemikiran-pemikiran fahaman liberalisme dan pluralisme agama hendaklah diharamkan dan boleh dirampas.

3. Suruhanjaya Komunikasi dan Multimedia Malaysia (SKMM) hendaklah menyekat laman-laman sosial yang bertentangan dengan ajaran Islam dan Hukum Syarak.

4. Mana-mana individu yang berpegang kepada fahaman liberalisme dan pluralisme agama hendaklah bertaubat dan kembali ke jalan Islam".

[37] The appellants, who claim that they are directly and adversely affected by the Fatwa, seek the following reliefs in their application:

"1. Satu deklarasi bahawa Keputusan yang dibuat oleh Responden-responden pada 17 Julai 2014 melalui fatwa, dengan nombor rujukan MAS/SU/BUU/01-2/002/2013-3(4), yang digazetkan pada 31 Julai 2014 di bawah Bahagian III Enakmen Pentadbiran Agama Islam (Negeri Selangor) 2003 (Enakmen 1 Tahun 2003):

   a. setakat mana ia secara tersirat memperuntukkan kesalahan berkaitan "akhbar, penerbitan, penerbit, percetakan dan mesin cetak" adalah bercanggahan dengan s 7 Akta Cetak, 1984;

   b. setakat mana ia mengarahkan penyekatan laman-laman sosial adalah bercanggahan dengan s 3(3) Akta Komunikasi dan Multimedia 1998; dan

   c. melampaui ("in excess") peruntukan Artikel 10, Artikel 11, Artikel 74 dan Jadual Kesembilan Senarai I dan II Perlembagaan Persekutuan setakat mana ia cuba memperuntukkan perkara-perkara kesalahan berkaitan dengan mengekang hak mana-mana individu, pertubuhan dan sebagainya untuk mendokong "fahaman liberalisme dan pluralisme" agama, "bahan terbitan" hak bersuara dan expresi "pemikiran-pemikiran fahaman liberalisme dan pluralisme agama", penyekatan hak bersuara expresi di "laman-laman sosial yang bertentangan dengan agama Islam dan Hukum Syarak", yang mana kesemuanya bukan merupakan perkara-perkara yang boleh diperuntukkan ("legislated") di bawahnya.

2. Satu deklarasi bahawa Pemohon Pertama, yang merupakan sebuah "company limited by guarantee" yang diperbadankan di bawah Akta Syarikat 1965, atau mana-mana pihak lain yang tidak memprofes agama Islam tidak boleh tertakluk kepada Keputusan yang dibuat oleh Responden-responden pada 17 Julai 2014 melalui fatwa, dengan nombor rujukan MAS/SU/BUU/01-2/002/2013-3(4), yang digazetkan pada 31 Julai 2014 di bawah Bahagian III Enakmen Pentadbiran Agama Islam (Negeri Selangor) 2003 (Enakmen 1 Tahun 2003) memandangkan Enakmen Pentadbiran Agama Islam (Negeri Selangor) 2003 (Enakmen 1 Tahun 2003) serta bidangkuasa Responden-responden hanyalah terpakai kepada individu yang memprofes agama Islam.

3. Satu perintah *certiorari* untuk memasukkan keputusan yang dibuat oleh Responden-responden pada 17 Julai 2014 melalui fatwa, dengan nombor rujukan MAIS/SU/BUU/01-2/002/2013-3(4), yang digazetkan pada 31 Julai 2014 di bawah Bahagian III Enakmen Pentadbiran Agama Islam (Negeri Selangor) 2003 (Enakmen 1 Tahun 2003) yang memiliki kesan untuk kononnya:

a. mentakrifkan "SIS Forum (Malaysia) dan mana-mana individu, pertubuhan atau institusi yang berpegang kepada fahaman liberalisme dan pluralisme agama" sebagai "sesat dan menyeleweng daripada ajaran Islam";

b. mengharamkan, meskipun kuasa sebegitu tidak terletak dengan Responden-responden, dan memberi kuasa *carte blanche* kepada mana-mana pihak untuk merampas "mana-mana bahan terbitan yang berunsur pemikiran-pemikiran fahaman liberalisme dan pluralisme agama";

c. mengarahkan *inter alia* suatu agensi Persekutuan iaitu khususnya Suruhanjaya Komunikasi dan Multimedia Malaysia (SKMM) untuk "menyekat laman-laman sosial yang bertentangan dengan ajaran Islam dan Hukum Syarak'; dan

d. mengarahkan mana-mana individu yang berpegang kepada fahaman liberalisme dan pluralisme agama untuk bertaubat dan kembali ke jalan Islam untuk dibawa ke dalam Mahkamah Tinggi untuk dibatalkan dengan serta merta."

[38] The High Court dismissed the judicial review application. The Court of Appeal upheld the decision by a majority of 2-1.

Analysis/Decision

The Contentions

[39] The appellants have advanced for our consideration ten (10) questions of law ('Leave Questions') which we will not reproduce at this stage. Suffice it to say that if we distil their arguments to their core, they have primarily two main issues which, in our considered view, are sufficient to determine this appeal.

[40] The first issue is that the Fatwa cannot possibly apply to them because the 1st appellant, being a corporation, cannot profess the religion of Islam and is not therefore encompassed within the Selangor SLA's power to make laws under Item 1. The second issue is that the Fatwa cannot purport to direct federal authorities to take action, nor suggest that books can be confiscated or that social media restrict references to the appellants. By this, the Fatwa is therefore invalid because it is made in excess of jurisdiction, ie it purports to touch on matters upon which the respondents have no power over because such matters are not encompassed in Item 1.

[41] In particular relation to the Court of Appeal, the appellants contend that the Court of Appeal failed to abide by *stare decisis*. They claim that the Federal Court in *SIS Forum (1)* had already addressed the legal point on whether a religious identity can be conferred on a corporation. The Court of Appeal, however, deemed such findings obiter dicta and refused to follow precedent.

[42] All the respondents adopt and apply each other's submissions as their own. In particular, the 1st respondent's reply is essentially this.

[43] First, in relation to the second issue, a fatwa is effectively a religious edict and cannot be considered legislation. They are merely opinions in the form of a religious edict and cannot therefore be likened to subsidiary legislation. The Fatwa's main purpose is to provide advice, and in their words:

> "39.... it is further argued that opinions formed by a mufti or an Islamic jurist, which constitutes a fatwa, may include direction and/or advisories to relevant agencies in matters relating Hukum Syarak. In other words, the fatwa, being an opinion by a Muslim jurist, may suggest or propose any action, conduct or any measures to be taken. There is nothing wrong or unconstitutional with that. But of course, it would be up to the relevant Government agencies to decide, as to whether to follow or not such advisories or directives.".

[44] In their submission, the purpose of the Fatwa is to assist the relevant arms of Government in their positive obligations having regard to the fact that Islam is the religion of the Federation under art 3(1) of the FC and that the Yang di-Pertuan Agong is the head of Islam as per art 37(1). As such, they appear to suggest that, as Islam is the official religion of the Federation, including in Selangor, the Fatwa merely operates as advice that can be followed by such authorities.

[45] In relation to the first issue raised by the appellants, the 1st respondent maintains that the appellants' contention is a misnomer because a Fatwa can be issued regarding any subject on Islam, including inanimate objects as well as physical or abstract ideas. Further, there has been no crime and no person has been charged in the Syariah Court, such that an assessment needs to be made on whether the 1st appellant is capable of professing the religion of Islam.

[46] The respondents submit effectively that the observations by the Federal Court in *SIS Forum (1)* on 'person professing the religion of Islam' were indeed *obiter dicta* as the matter in that case had to do with the validity of s 66A of the ARIE 2003 and not whether corporations can be said to profess the religion of Islam.

[47] The rest of the respondents adopt a similar line of argument. As an additional point, the respondents argue that religious identity can also be attached to corporations, given the principle of 'corporate religion'. In this respect, reference was made to authorities from foreign jurisdictions and also to the payment of Zakat by a corporation with Muslim members.

First Issue — Status Of The 1st Appellant As A 'Person' Professing The Religion Of Islam

[48] Item 1, reproduced in full, reads thus:

> "1. Except with respect to the Federal Territories of Kuala Lumpur, Labuan and Putrajaya, Islamic law and personal and family law of persons professing the religion of Islam, including the Islamic law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trusts; Wakafs

and the definition and regulation of charitable and religious trusts, the appointment of trustees and the incorporation of persons in respect of Islamic religious and charitable endowments, institutions, trusts, charities and charitable institutions operating wholly within the State; Malay customs; Zakat, Fitrah and Baitulmal or similar Islamic religious revenue; mosques or any Islamic public place of worship, creation and punishment of offences by persons professing the religion of Islam against precepts of that religion, except in regard to matters included in the Federal List; the constitution, organisation and procedure of Syariah courts, which shall have jurisdiction only over persons professing the religion of Islam and in respect only of any of the matters included in this paragraph, but shall not have jurisdiction in respect of offences except in so far as conferred by federal law; the control of propagating doctrines and beliefs among persons professing the religion of Islam; the determination of matters of Islamic law and doctrine and Malay custom.".

[49] Here, the contention by the respondents is that the application by the appellants is premature and there is no need to determine whether or not the 1st appellant can profess the religion of Islam because no charge has been brought before the Syariah Court.

[50] With respect, we find this contention misplaced. What is of crucial importance is that Item 1 is contained within the State List in the Ninth Schedule of the FC. Item 1 deals with the power of the State Legislature, in this case Selangor, to enact laws that pertain to the matters contained in the said Item 1. Syariah Courts are creatures of statute — enacted by State laws.

[51] As such, both the State Legislature and the Syariah Courts are limited by Item 1, more so the Syariah Courts, which are also limited by State law that must be passed within the ambit of Item 1. State law cannot, therefore, confer more power upon any administrative bodies, such as the 1st respondent and any Syariah Courts beyond what Item 1 itself permits.

[52] It is a trite principle of law that legislative entries must be accorded the widest possible construction. Yet, at the same time, the Court in construing it must also pay sufficient regard to the wordings used and the context, including any punctuation. If we peruse Item 1, some parts of it separate the words using commas and other parts with semicolons.

[53] In an ordinary sense of interpretation and giving the phrases their widest possible meaning, it means that whatever is separated by a semicolon refers to separate limbs of Item 1. If we were to separate the various limbs of Item 1 and number them for easier comprehension, Item 1 would look like this:

"1. Except with respect to the Federal Territories of Kuala Lumpur, Labuan and Putrajaya,

(i) Islamic law and personal and family law of persons professing the religion of Islam, including the Islamic law relating to succession,

testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trusts;

(ii) Wakafs and the definition and regulation of charitable and religious trusts, the appointment of trustees and the incorporation of persons in respect of Islamic religious and charitable endowments, institutions, trusts, charities and charitable institutions operating wholly within the State;

(iii) Malay customs;

(iv) Zakat, Fitrah and Baitulmal or similar Islamic religious revenue;

(v) mosques or any Islamic public place of worship, creation and punishment of offences by persons professing the religion of Islam against precepts of that religion, except in regard to matters included in the Federal List;

(vi) the constitution, organisation and procedure of Syariah courts, which shall have jurisdiction only over persons professing the religion of Islam and in respect only of any of the matters included in this paragraph, but shall not have jurisdiction in respect of offences except in so far as conferred by federal law;

(vii) the control of propagating doctrines and beliefs among persons professing the religion of Islam;

(viii) the determination of matters of Islamic law and doctrine and Malay custom.''

[54] As can be seen, when it is broken down per the semicolons and numbered for convenience, there are actually eight limbs of Item 1. Limb (vi) deals with the establishment of Syariah Courts, including stipulating, in particular, that they may only have jurisdiction over persons professing the religion of Islam (*ratione personae*) and only have jurisdiction over matters contained within Item 1 (*ratione materiae*). As such, it is not quite correct to say we cannot determine whether the Fatwa applies to the 1st respondent simply because there is no charge before the Syariah Court.

[55] In fact, limb (i), which is perhaps the broadest limb in terms of the powers to legislate and which says that the States may make laws in respect of Islamic law, including personal and family law, is subject to the condition that such persons must be persons professing the religion of Islam.

[56] What then is meant by 'profess'? Suffice it that we reproduce the judgment of this Court in *SIS Forum (1)* as follows:

"'Persons' professing the religion of Islam

[86] I now turn to briefly consider Dato Malik's argument that the definition accorded to 'Muslim' by s 2 of ARIE 2003 is not in conformity with item 1

of the State List because effectively only a natural person may 'profess' the religion of Islam.

[87] As I understand it, the constitutionality of s 2 has not been challenged in this petition. Even if it was, the issue might only be addressed in the appellate jurisdiction of this court and not its original jurisdiction as is presently invoked.

[88] Regardless, it is my view that the petitioner's argument is relevant within the context of the present competency challenge against s 66A of the ARIE 2003. The opening words of item 1 read: 'Islamic law and personal and family law of persons professing the religion of Islam'. This indicates that the *ratione materiae* jurisdiction of the Syariah Courts was intended only to cover the subject matter of personal laws which would by their nature only apply to natural persons.

[89] Further, the word 'profess' in its natural and ordinary meaning suggests a declaration of faith which is something an artificial or juridical person is incapable of doing (see *Kesultanan Pahang v. Sathask Realty Sdn Bhd* [1998] 1 MLRA 119).

[90] The interpretation of the phrase 'persons professing the religion of Islam' and reading the purpose of item 1 suggest that item 1 could not have contemplated and was never intended to confer judicial review powers on the Syariah Courts simply by defining the intervener as a 'Muslim'. Judicial review, by its very nature, involves supervising administrative bodies by reference to public law powers vested in them. There is no regard to religion.

[91] **I, therefore, find that the attempt to confer jurisdiction of judicial review on the Syariah Courts by purporting to define the 'Majlis' as a 'Muslim' is beside the point notwithstanding s 2 of the ARIE, and s 66A of the same therefore stands unconstitutional.**".

[Emphasis added]

[57] These observations cannot be deemed as *obiter dicta* because these observations form part and parcel of the judicial reasoning that resulted in the finding that s 66A of the ARIE 2003 is unconstitutional. The reasoning underpinning this was that apart from the fact that s 66A usurps judicial power vested in the Superior Courts, additionally the Syariah Courts conceptually cannot perform judicial review over the bodies mentioned in s 66A for the reason that they, being artificial persons cannot therefore be deemed as persons professing the religion of Islam within the meaning of Item 1.

[58] As an aside, we accept the appellants' assertion that the Court of Appeal in this case failed to abide by *stare decisis* in their erroneous attempt to distinguish this case from the earlier decision in *SIS Forum (1)* without any sound legal basis. We would remind all Judges below that the judgments of the Federal Court, unless overruled by a later decision of the same Court, are binding and failure to abide by them is an affront to the administration of our justice system.

[59] The judgment in *SIS Forum (1)* agreed with and adopted *Kesultanan Pahang v. Sathask Realty Sdn Bhd* [1998] 1 MLRA 119 ('*Kesultanan Pahang*'), which also affirmed the principle that corporations cannot profess a faith. Consistent with our own advice to all the Courts below, we are fully inclined to uphold *stare decisis* and accordingly, we do hereby follow the precedent established in *SIS Forum (1)* and *Kesultanan Pahang*.

[60] In any event, it is our view that the word 'profess', even in its widest sense, can only be stretched so far as to denote 'a commitment to faith' — something only a natural person is capable of doing. It denotes the mental and spiritual acceptance of certain beliefs and utterances as well as adherence foremost to the Kalimah Syahadah and for practising Muslims, acts of worship *via* solat fardhu and solat sunnah, fasting in the month of Ramadhan as well as the performance of the Holy Pilgrimage (Hajj). Corporations are unable to do those things because they are not natural persons.

[61] The High Court Judge in this case deemed it fit to lift the corporate veil of the 1st appellant and concluded that the directing minds of the 1st appellant were Muslims. As such, the Fatwa can, in this regard, apply to the 1st appellant. The Majority Judgment of the Court of Appeal appeared to endorse the High Court's view.

[62] With respect, we find that there was no basis upon which the corporate veil was lifted. The Fatwa, by its clear language, applies to the 1st appellant by name and all other natural persons who associate themselves with the form of belief that the Fatwa condemns. Thus, the High Court essentially went above and beyond even the words of the Fatwa by concluding that references to the corporation (1st appellant) and its directing minds are one and the same when the Fatwa itself makes a clear distinction between the 1st appellant-corporation on the one side and natural persons on the other. Lifting the corporate veil, therefore, does violence to the language of the Fatwa by failing to ignore the clear distinction the Fatwa itself makes between the '1st appellant', individuals (individu), associations (pertubuhan) and institutions (institusi). Even without lifting the corporate veil, the Muslim individuals who are behind the 1st appellant are already covered under the word 'individu'.

[63] The respondents raise an interesting point on corporate religion, and they rely on, among others, the decision of the Supreme Court of the United States and the European Court. A point was also made that corporations do pay Zakat, and accordingly, they may be subject to Islamic laws and edicts as persons professing the religion of Islam. With respect, we are not convinced.

[64] Firstly, whatever decisions made by foreign jurisdictions on corporate religion generally are of little assistance, as we are here interpreting the words 'person professing the religion of Islam' in the context of Item 1 of the State List, Ninth Schedule.

[65] Secondly, the subject of Zakat is encapsulated in limb (iv) of Item 1 to the extent that it says: 'Zakat, Fitrah and Baitulmal or similar Islamic religious revenue'. It is pertinent to note that limb (iv) makes no reference to 'persons professing the religion of Islam', unlike limbs (i), (v), (vi), and (vii), which specifically refer to 'persons professing the religion of Islam'.

[66] Thirdly, the performance of certain religious duties by a corporation on behalf of its Muslim members is not the same as saying that the corporation is a person professing the religion of Islam. We cannot, therefore, conclude that this payment of Zakat by corporations should amount to saying that Islamic law can apply to corporations as persons professing the religion of Islam in the context of this case.

[67] Thus, we agree with the appellants and the Minority Judgment of the Court of Appeal that the Fatwa cannot apply to the 1st appellant as the 1st appellant, not being a natural person, is incapable of being construed as a person professing the religion of Islam.

[68] We reiterate para 1 of the Fatwa to the extent that it says, as follows:

> "Fatwa Pemikiran Liberalisme Dan Pluralisme Agama
>
> 1. SIS Forum (Malaysia) dan mana-mana individu, pertubuhan, atau institusi yang berpegang kepada fahaman liberalisme dan pluralisme agama adalah sesat dan menyeleweng daripada ajaran Islam."

[69] We make no observation nor comment on the part of the paragraph that says 'fahaman liberalisme dan pluralisme agama adalah sesat dan menyeleweng daripada ajaran Islam' as we are in no position to do so.

[70] However, consistent with the reasons stated above, we find that para 1 of the Fatwa is only valid to the extent that it applies to natural persons (individu) and invalid to the extent that it applies to artificial persons, including the 1st appellant. In other words, para 1 is valid only to the extent that it is read by deleting the words: 'SIS Forum (Malaysia)' and the words: 'dan pertubuhan, atau institusi'.

Second Issue — Direction To Federally Established And Controlled Authorities

[71] The second main issue deals with the general question of whether the Fatwa as a whole is valid, having regard to the fact that it purports to suggest that certain federal authorities take specific action against the 1st appellant (specifically) and other persons (including the 2nd appellant) generally.

[72] The argument by the appellants to this extent, and apart from the prayers sought, is that such action contravenes s 7 of the Printing Presses and Publications Act 1984 [Act 301] ('PPPA 1984') as regards the portion of the Fatwa that deals with written publications and s 3 of the Communications and Multimedia Act 1998 [Act 588] ('CMA 1998') where it deals with social media.

[73] It cannot be disputed that under the two Acts, namely the PPPA 1984 and CMA 1998, the power to control publications is specifically vested in federally established and controlled authorities.

[74] In the case of the former Act, the Fatwa specifically endorses the confiscation of published material.

[75] In the case of the latter, a specific commission is enacted by law to oversee all such matters. This commission is referred to as the Malaysian Communications and Multimedia Commission ('MCMC') or its National Language acronym: 'SKMM'. The Fatwa makes direct references to that commission, and in the respondents' words: 'suggests' to take certain action against social media to the extent that it propagates the appellants' beliefs that contradict the doctrinal decree in the Fatwa.

[76] It is now a well-recognised position in law that a fatwa whether issued by the National Fatwa Committee (at the federal level) or by the State's Fatwa Committee (in this case the 1st respondent in Selangor), carries no legal force unless they are first gazetted by the State within which they are sought to be applied. This is what was observed at least in relation to fatwa issued by the National Fatwa Committee in *Jabatan Pendaftaran Negara & Ors v. Seorang Kanak-Kanak & Ors; Majlis Agama Islam Negeri Johor (Intervener)* [2020] 2 MLRA 487, per Rohana Yusuf PCA:

> "[75] The opinion of the National Fatwa Committee or a fatwa becomes law in the State of Johore and would be legally binding only if it is gazetted in the State Gazette under s 49 of the Administration of the Religion of Islam (State of Johor) Enactment 2003 (Enactment No 16 of 2003). That Enactment requires that a fatwa becomes law and only has the force of law upon gazetting and a provision on the procedure of making a fatwa is articulated in s 48. Under s 49, it further provides on how a fatwa becomes law and binding on the Muslim...".

[77] In the context of a fatwa issued generally by the 1st respondent, the ARIE 2003 contains a specific procedure by which a fatwa may be clothed with the force of law. The procedure is made very clear in ss 47 and 48 of the ARIE 2003.

[78] Section 47 stipulates:

> "Power of the Fatwa Committee to prepare a fatwa
>
> 47. Subject to s 51, the Fatwa Committee shall, on the direction of His Royal Highness the Sultan, and may on its own initiative or on the request of any person by letter addressed to the Mufti, prepare fatwa on any unsettled or controversial question of or relating to Hukum Syarak.".

[79] That is the substance upon which a fatwa may be decreed. The procedure for making the decree is explained at length in s 48, as follows:

"Procedure in making a fatwa

48.(1) Before a Fatwa Committee makes a fatwa, the Mufti may cause any study or research to be carried out as directed by him and a working paper to be prepared.

(2) Whenever the Committee proposes to make a fatwa the Mufti shall call a meeting of the Fatwa Committee for the purpose of discussing the proposed fatwa.

(3) After a fatwa is prepared by the Fatwa Committee, the Mufti shall, on behalf and in the name of the Fatwa Committee, submit the fatwa prepared to the Majlis.

(4) The Majlis may, after deliberating upon the fatwa, make a recommendation to His Royal Highness the Sultan for his assent for the publication of the fatwa in the Gazette.

(5) The recommendation made under subsection (4) shall be accompanied by an explanatory memorandum and comments from the Majlis if the Majlis considers such explanation or comments are required.

(6) When a fatwa has been assented to by His Royal Highness the Sultan, the Majlis shall inform the State Government of the fatwa and thereafter shall cause the fatwa to be published in the Gazette.

(7) A fatwa published in the Gazette shall be accompanied by a statement that the fatwa is made under this section.

(8) A fatwa shall be published in the national language in the Rumi script, but the text of the fatwa in the Jawi script may also be published.

(9) Any statement made by the Fatwa Committee shall not be taken to be a fatwa unless such statement is published in the Gazette in accordance with subsection (6).".

[80] Once a fatwa is published in the gazette and, in this case, in Selangor by the 3rd respondent, the effect of such a publication renders that fatwa binding on all Muslims in that State. Section 49 states:

A fatwa published in the Gazette is binding

49.(1) Upon its publication in the Gazette, a fatwa shall be binding on every Muslim in the State of Selangor as a dictate of his religion and it shall be his religious duty to abide by and uphold the fatwa, unless he is permitted by Hukum Syarak to depart from the fatwa in matters of personal observance.

(2) A fatwa shall be recognised by all courts in the State of Selangor of all matters laid down therein.".

[81] The wording above is crystal clear and leaves, in our view, no room for any other interpretation. Once a fatwa is gazetted, it is binding on all Muslims in that State, and as all Syariah Courts in Selangor must recognise all matters laid down therein, the gazetted fatwa carries legal force.

[82] Whether or not the appellants are correct in stating that a fatwa is like a subsidiary legislation is simply to put a label on the legal effect of the fatwa. Whether they are subsidiary legislation or not is, in our view, beside the point because under s 49 of the ARIE 2003, fatwas are binding and legally recognisable. As such, any fatwa issued by the 1st respondent and gazetted by the 3rd respondent does carry with it the force of law. And thus, even if we cannot strictly categorise the Fatwa as a subsidiary legislation, we would say that the Fatwa is akin to subsidiary legislation and can, in principle, be treated as such, and the ARIE 2003 can be treated as its parent Act.

[83] Whether under the ARIE 2003 or the publication in the Gazette, the fact remains that the powers of the Selangor SLA are limited and circumscribed by Item 1. If the parent Act of the Fatwa, being the ARIE 2003, is so circumscribed by Item 1, so too must it follow that the Fatwa, being itself subordinate to the ARIE 2003, must remain further subordinate to Item 1.

[84] Hence, not only must the Fatwa be limited in application to persons professing the religion of Islam, the subject matter of the Fatwa too must be confined to the matters expressly enumerated in Item 1 of the State List.

[85] To this extent, the respondents appear to suggest that the Fatwa only serves as a suggestion and otherwise does not have a legal bite. With respect, we cannot agree. Going by the terms of s 49 of the ARIE 2003, such a Fatwa must be recognised by the Syariah Courts and necessarily binds the Muslims in the State of Selangor. There is nothing prohibiting any person from filing a summons in the Syariah Court to compel compliance with the Fatwa. The binding effect and the offence of disobedience of the Fatwa are created not by the Fatwa itself, but by s 49 of ARIE 2003 (see *Sulaiman Takrib v. Kerajaan Negeri Terengganu; Kerajaan Malaysia (Intervener) & Other Cases* [2008] 3 MLRA 257).

[86] For the avoidance of doubt, the offending paragraphs that fall within the contentions on this issue read:

> "Fatwa Pemikiran Liberalisme Dan Pluralisme Agama
>
> 2. Mana-mana bahan terbitan yang berunsur pemikiran-pemikiran fahaman liberalisme dan pluralisme agama hendaklah diharamkan dan boleh dirampas.
>
> 3. Suruhanjaya Komunikasi dan Multimedia Malaysia (SKMM) hendaklah menyekat laman-laman sosial yang bertentangan dengan ajaran Islam dan Hukum Syarak."

[87] As stated earlier, we cannot accept the respondents' contention that the Fatwa is a mere suggestion. We find that, as it carries the force of law, the Fatwa clearly mandates the confiscation of publications in para 2. The express conferral of authority by the words 'boleh dirampas' is not supported by any limb in Item 1.

[88] As for para 3, the Fatwa having the force of law clearly amounts to an instruction to MCMC to take action on social media platforms against any person who conforms to or propagates such views condemned by the Fatwa. We find that these matters exceed the jurisdiction of the 1st respondent and the entire Selangor SLA, as these are State-passed, legally mandated intrusions upon federal law and federal powers, and in the case of para 3, against a federal body.

[89] That leaves us with para 4 of the Fatwa, which says:

> "4. Mana-mana individu yang berpegang kepada fahaman liberalisme dan pluralisme agama hendaklah bertaubat dan kembali ke jalan Islam".

[90] In our view, the above paragraph conforms with limb (vii) of Item 1 to the extent that it allows the States to enact laws on 'control of propagating doctrines and beliefs among persons professing the religion of Islam'. The substance of para 4 itself conforms with Item 1 and the ARIE 2003, and appears to be severable from the rest of the offending paragraphs of the Fatwa. We therefore do not find any issue with it. As found earlier, the same is true in respect of para 1 of the Fatwa, but only to the extent that it applies to natural persons and not artificial persons such as the 1st appellant.

[91] As a final observation, in determining this appeal and the validity of the Fatwa, we restate again our initial observation, which was stated at the outset of this judgment with respect to the First and Second Category of cases. Consistent with art 121(1A) of the FC, we have not made any substantive findings or comments on the substance and merit of the condemnation in the Fatwa, namely whether or not 'fahaman liberalisme and pluralisme agama adalah sesat dan menyeleweng daripada ajaran Islam' as that is purely a matter of Islamic law and within the jurisdiction of the 1st respondent and the Syariah Courts. The present case only concerns the validity of the Fatwa *vis-à-vis* the ARIE 2003, which in turn is adjudged against the FC — specifically — Item 1.

[92] In our final analysis, we find that the Fatwa is valid but only to the extent that it excludes the offending paras 2 and 3 and to the extent that para 1 is read down as applying to natural persons only, as explained earlier. As such, constitutionally speaking, the Fatwa remains valid but only if it is read as follows (those marked as red and strikethrough indicating our deletions):

> "Fatwa Pemikiran Liberalisme Dan Pluralisme Agama
>
> 1. ~~SIS Forum (Malaysia) dan~~ Mana-mana individu~~, pertubuhan, atau institusi~~ yang berpegang kepada fahaman liberalisme dan pluralisme agama adalah sesat dan menyeleweng daripada ajaran Islam.

2. ~~Mana-mana bahan terbitan yang berunsur pemikiran-pemikiran fahaman liberalisme dan pluralisme agama hendaklah diharamkan dan boleh dirampas.~~

3. ~~Suruhanjaya Komunikasi dan Multimedia Malaysia (SKMM) hendaklah menyekat laman-laman social yang bertetangan dengan ajaran Islam dan Hukum Syarak.~~

4. Mana-mana individu yang berpegang kepada fahaman liberalisme dan pluralisme agama hendaklah bertaubat dan kembali ke jalan Islam."

Conclusion

[93] Parties have raised numerous other issues in their submissions. We do not consider it necessary to decide them having regard to the fact that our deliberations up to this point sufficiently dispose of this appeal.

[94] We now reproduce the Leave Questions:

"Leave Question 1

Does the decision of the Federal Court in *The Co-Operative Central Bank Ltd v. Feyen Development Sdn Bhd* [1997] 1 MLRA 318 have the effect of precluding the Court of Appeal from treating decisions of the Federal Court as not correctly reflecting the legal position on an issue on the basis that such decisions were in actuality mere *obiter dicta*?

Leave Question 2

Whether the right to a fair hearing and to due process of a party to an appeal before the Court of Appeal, as guaranteed by arts 5(1) and 8(1), Federal Constitution, are to be treated as having been compromised by reason of the following, such that it can be said that there is a real danger that the decision of the court was arrived at by reason of apparent bias on the part of the court?

2.1 Where the court sought to avoid binding decisions of the Federal Court by treating determinations in such decisions as being mere *obiter dicta* despite it being apparent that this is not the case?

2.2 Where the court made findings of a determinative effect on issues which were not raised by the parties to the proceedings and without having given them an opportunity to be heard in respect of the same?

2.3 Where the court relied on material sourced independently by the court, and which was not referred to by any of the parties during the hearing, and which they were not given an opportunity to be heard on; and

2.4 With respect to question 2.3, where the material referred to was authored by a serving member of the Judicial Appointments Commission?

Leave Question 3

Is a fatwa, once published in the Gazette under s 48(6), Administration of the Religion of Islam (State of Selangor) Enactment 2003 ("2003 Enactment"), a form of subsidiary law and/or delegated legislation?

Leave Question 4

If so, does the civil court have jurisdiction to judicially review the making of a fatwa, or its publication in the Gazette under s 48(6), 2003 Enactment, once it is so gazetted on the grounds generally available for the review of subsidiary or delegated legislation, including constitutionality and illegality?

Leave Question 5

If so, is the making of a fatwa, or its publication in the Gazette under s 48(6), 2003 Enactment, subject to the guaranteed fundamental liberties in Part II, Federal Constitution such that it cannot have the effect of restricting and/or prohibiting the freedom of expression guaranteed under art 10(1)(a), Federal Constitution or otherwise contravene art 11(5)?

Leave Question 6

Having regard to ss 12(c) and/or 13 of the Syariah Criminal Offences (Selangor) Enactment 1995, is a fatwa subject to the principle of *nullum crimen sine lege, nulla poena sine lege* (there must be no crime or punishment except in accordance with law which is fixed and certain) enshrined in arts 5 and 8, Federal Constitution?

Leave Question 7

Can a court treat a company incorporated under the Companies Act 1965 or Companies Act 2016 as a person professing the religion of Islam?

Leave Question 8

In making or preparing a fatwa under ss 47 to 49, 2003 Enactment, whether such fatwa is published in the Gazette under s 48(6), 2003 Enactment or otherwise, does the Fatwa Committee established under s 46 of the 2003 Enactment, have the power to incorporate directives to agencies or bodies of the Federal Government or the State Government into such fatwa?

Leave Question 9

Where s 48, 2003 Enactment on the procedure of making a fatwa must be read as imposing a duty on the Fatwa Committee to comply with the rules of natural justice, including the opportunity to be heard, as guaranteed under arts 5(1) and/or 8(1), Federal Constitution?

Leave Question 10

Is it mandatory for the Fatwa Committee to adopt the procedure in s 51, 2003 Enactment where a fatwa concerns matters affecting national interest within the meaning of s 51(3), 2003 Enactment?".

[95] In light of what has been decided, we answer Leave Questions 3 and 4 in the affirmative, and Leave Questions 7 and 8 in the negative. We do not consider it necessary to answer the rest of the Leave Questions.

[96] We find that both the High Court and the majority of the Court of Appeal were plainly wrong in arriving at the conclusions that they did. Additionally, the Court of Appeal erred when it failed to abide by *stare decisis* and to follow the Federal Court's earlier decision in *SIS Forum (1)*.

[97] For all the reasons aforesaid, we allow the appeal and set aside the orders of the High Court and the Court of Appeal. We grant an order in terms of paras 1(a) and (b), para 2, and paras 3(a), (b) and (c) only of the prayers for relief reproduced from the judicial review application in para 35 of this judgment.

[98] For the avoidance of doubt, these are our orders:

"1. Satu deklarasi bahawa Keputusan yang dibuat oleh Responden-responden pada 17 Julai 2014 melalui fatwa, dengan nombor rujukan MAS/SU/BUU/01-2/002/2013-3(4), yang digazetkan pada 31 Julai 2014 di bawah Bahagian III Enakmen Pentadbiran Agama Islam (Negeri Selangor) 2003 (Enakmen 1 Tahun 2003):

   a. setakat mana ia secara tersirat memperuntukkan kesalahan berkaitan "akhbar, penerbitan, penerbit, percetakan dan mesin cetak adalah bercanggahan dengan s 7 Akta Cetak, 1984; dan

   b. setakat mana ia mengarahkan penyekatan laman-laman sosial adalah bercanggahan dengan s 3(3) Akta Komunikasi dan Multimedia 1998.

2. Satu deklarasi bahawa Pemohon Pertama, yang merupakan sebuah "company limited by guarantee" yang diperbadankan di bawah Akta Syarikat 1965, atau mana-mana pihak lain yang tidak memprofes agama Islam tidak boleh tertakluk kepada Keputusan yang dibuat oleh Responden-responden pada 17 Julai 2014 melalui fatwa, dengan nombor rujukan MAS/SU/BUU/01-2/002/2013-3(4), yang digazetkan pada 31 July 2014 di bawah Bahagian III Enakmen Pentadbiran Agama Islam (Negeri Selangor) 2003 (Enakmen 1 Tahun 2003) memandangkan Enakmen Pentadbiran Agama Islam (Negeri Selangor) 2003 (Enakmen 1 Tahun 2003) serta bidangkuasa Responden-responden hanyalah terpakai kepada individu yang memprofes agama Islam.

3. Satu perintah *certiorari* untuk memasukkan keputusan yang dibuat oleh Responden-responden pada 17 Julai 2014 melalui fatwa, dengan nombor rujukan MAIS/SU/BUU/01-2/002/2013-3(4), yang digazetkan pada 31 Julai 2014 di bawah Bahagian III Enakmen Pentadbiran Agama Islam (Negeri Selangor) 2003 (Enakmen 1 Tahun 2003) yang memiliki kesan untuk kononnya:

   a. mentakrifkan "SIS Forum (Malaysia) dan mana-mana pertubuhan atau institusi yang berpegang kepada fahaman liberalisme dan pluralisme agama" sebagai "sesat dan menyeleweng daripada ajaran Islam";

b. mengharamkan, meskipun kuasa sebegitu tidak terletak dengan Responden-responden, dan memberi kuasa *carte blanche* kepada mana-mana pihak untuk merampas "mana-mana bahan terbitan yang berunsur pemikiran-pemikiran fahaman liberalisme dan pluralisme agama"; dan

c. mengarahkan *inter alia* suatu agensi Persekutuan iaitu khususnya Suruhanjaya Komunikasi dan Multimedia Malaysia (SKMM) untuk "menyekat laman-laman sosial yang bertentangan dengan ajaran Islam dan Hukum Syarak'.

untuk dibawa ke dalam Mahkamah Tinggi untuk dibatalkan dengan serta merta."

[99] We make no order as to costs as this is, in our view, a public interest litigation.

Abu Bakar Jais FCJ (Dissenting):

Introduction

[100] This is an appeal against the decision of the majority at the Court of Appeal ("COA"). The majority had affirmed the decision of the High Court ("HC"). The grounds of judgment written by the learned HC judge, Nordin Hassan J (now FCJ), are reported in . The written grounds of the COA, both majority and minority, can be seen in *SIS Forum (Malaysia) & Yang Lain lwn. Jawatankuasa Fatwa Negeri Selangor & Yang Lain* [2023] 5 MLRA 181.

[101] At the HC, the appellants filed an application for judicial review ("JR") for a declaration essentially that the Fatwa issued by the 1st respondent, which is the State Fatwa Committee, is invalid and pray for an order of *certiorari* to quash the said Fatwa. The HC dismissed the application for JR. In turn, the COA, by a majority, dismissed the appeal and affirmed the decision of the HC.

[102] The Fatwa reads as follows:

FATWA PEMIKIRAN LIBERALISME DAN PLURALISME AGAMA

1. SIS FORUM (Malaysia) dan mana-mana individu, pertubuhan, atau institusi yang berpegang kepada fahaman liberalisme dan pluralisme agama adalah sesat dan menyeleweng daripada ajaran Islam.

2. Mana-mana bahan terbitan yang berunsur pemikiran-pemikiran fahaman liberalisme dan pluralisme agama hendaklah diharamkan dan boleh dirampas.

3. Suruhanjaya Komunikasi dan Multimedia (SKMM) hendaklah menyekat laman-laman sosial yang bertentangan dengan ajaran Islam dan Hukum Syarak.

4. Mana-mana individu yang berpegang kepada fahaman liberalisme dan pluralisme agama hendaklah bertaubat dan kembali ke jalan Islam.

[103] The Fatwa was gazetted on 31 July 2014. The Fatwa gazette stated that the Fatwa was prepared by the Fatwa Committee of Selangor pursuant to a perintah ("directive") from the Sultan of Selangor.

Summary Of The Decision Of The HC

[104] Article 121(1A) of the Federal Constitution is clear that the Civil Courts have no jurisdiction over matters within the jurisdiction of the Syariah Courts. Matters within the jurisdiction of a Syariah Court are provided for under art 74, read together with Item 1 of List II — State List in the Ninth Schedule of the Federal Constitution.

[105] The question is whether the "Fatwa"' falls within the List II — State List in the Ninth Schedule of the Federal Constitution, in particular under the category of 'the control of propagating doctrines' and 'beliefs among persons professing the religion of Islam' or 'the determination of matters of Islamic law'. Upon perusal of the Mufti's affidavit in reply, the learned HC judge ("HCJ") was of the opinion that the Fatwa gazette pertains to matters of Islamic law, which is aimed at controlling or restricting the ideologies of liberalism and pluralism among followers of the Islamic faith. Therefore, the preparation and the publication of the Fatwa gazette are in accordance with the powers within art 11(4) of the Federal Constitution and s 47 of the Administration of the Religion of Islam (State of Selangor) Enactment 2003 ("ARIE 2003"). Moreover, all procedures stipulated under s 48 of ARIE 2003 for the preparation and publication of the Fatwa gazette have been complied with by the 1st respondent.

[106] In addition, s 66 of ARIE 2003 provides a pathway for any person to apply for JR of the decision of any committee exercising its functions under the same, including the 1st respondent in the exercise of its functions under s 47 of ARIE 2003 in preparing and publishing the Fatwa. The HCJ was of the view that, on the ground of jurisdiction alone, the appellants' application for JR must necessarily fail.

[107] In relation to the other issues raised, the appellants failed to demonstrate that the Fatwa gazette contravenes fundamental principles laid down in the Federal Constitution and federal laws, especially the Communications and Multimedia Act 1998 and the Printing Presses and Publications Act 1984.

[108] With regard to the status of the present 1st appellant, a company that is claimed not to fall within the category of 'persons' who can profess the religion of Islam and is not bound by the Fatwa gazette, all the evidence must be considered. The 1st appellant, with its synonym 'Sisters in Islam,' clearly demonstrates its relation to Islam. The founder, the administrator, and the members of the 1st appellant are of the Islamic faith, and the activities carried out are in relation to the Islamic religion. The 1st appellant cannot hide behind its status to spread and propagate teachings that would contravene the Islamic religion. The corporate veil of the 1st appellant can be lifted to reveal the

individuals who determine the direction of the same. Therefore, the Fatwa gazette applies to the 1st appellant.

Summary Of The Decision Of The COA By The Majority

[109] The majority in the COA is of the view that the main dispute by the appellant is on the gazette of the Fatwa.

[110] By virtue of s 47 of ARIE 2003, the 1st respondent can issue a fatwa on any issues not finalised or that have raised controversy pertaining to Hukum Syarak. The assertion by the respondents that a fatwa is issued to give explanation/elaboration, and interpretation of Hukum Syarak is not denied by the appellants. In turn, the appellants' assertions by way of affidavits were mere denials based on individual rights under the Federal Constitution. As the assertion by the respondents on the scope and function of a fatwa by the respondents was not denied, it can be deduced that a fatwa is one of the sources of Islamic jurisprudence issued by credible parties based on Hukum Syarak. In other words, a fatwa could only be issued by experts on Hukum Syarak.

[111] As the Fatwa is grounded on Hukum Syarak, any dispute on the Fatwa and its contents is under the exclusive jurisdiction of the Syariah Court. This is supported by the Federal Court case of *SIS Forum* (*Malaysia*) *v. Kerajaan Negeri Selangor; Majlis Agama Islam Selangor (Intervener)* [2022] 3 MLRA 219 ("SIS Forum (1)") that states as follows:

> [78] As regards the procedure, it necessarily requires compliance with written law and the failure to do so might result in the issuance of public law remedies that can only be issued by the civil superior courts. **The contents of the fatwa and their interpretation are a different story and a matter purely for the jurisdiction of the Syariah courts to the extent that it relates to "hukum syarak" or personal law and not matters which objectively might be taken to contradict any written law (Federal or State statutes or even the FC for that matter**).
>
> [79] Thus, simply put, if the *vires* of any fatwa or the conduct of the Fatwa Committee is challenged purely on the basis of constitutional or statutory compliance, then it is a matter for the civil courts. **If the question pertains to the matters of the faith or the validity of the contents of the fatwa tested against the grain of Islamic law, then the appropriate forum for review or compliance is the Syariah courts.**
>
> [Emphasis Added]

[112] The appellants dispute the finding by the respondents that the former are involved in the liberalism and pluralism of the religion. However, this is a matter of Hukum Syarak, and therefore, the dispute should be within the purview and jurisdiction of the Syariah Courts and not the Civil Courts.

[113] A fatwa can be reviewed and need not necessarily be static. The appellants could apply for the Fatwa to be amended and rescinded by the 1st respondent. Therefore, the JR should not have been filed challenging the same.

Summary Of The Decision Of The COA By The Minority

[114] The opening words of item 1 of List II-State List in the Ninth Schedule of the Federal Constitution read — 'Islamic law and personal and family law of persons professing the religion of Islam'. This indicates that the *ratione materiae* jurisdiction of the Syariah Courts was intended only to cover the subject matter of personal laws, which would, by their nature, only apply to natural persons. The 1st appellant is a company and not a natural person. Further, the word 'profess' in its natural and ordinary meaning suggests a declaration of faith, which is something an artificial or juridical person is incapable of doing. Therefore, the Syariah Court has no jurisdiction with regard to the dispute regarding the Fatwa. *SIS Forum (1)* had decided that the respondents had no jurisdiction at all over artificial persons like a limited company or corporation.

[115] The Fatwa was also issued in violation of s 51 of ARIE 2003, as the respondents must refer the Fatwa to the National Fatwa Committee because the same affected national interest. It affected national interest as it directed federal agencies and departments to take actions, ie Malaysian Communications and Multimedia Commission ("MCMC") and the Ministry of Home Affairs.

[116] The Fatwa also contravened s 7 of the Printing Presses and Publications Act 1984, as only the relevant federal Minister is empowered to act under this provision in respect of impugned printing or publication as referred in para 2 of the Fatwa. The respondents as state authorities could not do the same.

[117] There was no right of hearing given to the 1st appellant when it was declared to be holding to liberalism and pluralism that is deviant to Islam, as stated in the Fatwa. Every citizen also has a right to free speech and expression under the Federal Constitution.

[118] The Fatwa is vague. No explanation on the terms "liberalism and pluralism", but declared the 1st appellant deviant of Islamic belief without a factual basis.

Decision

[119] It is appropriate to begin by reminding everyone of the essential preliminary points that ought to be considered in arriving at the decision regarding the present appeal. The first point to note is that in Malaysia, there are the Civil Courts and Islamic Courts or Syariah Courts, essentially for the administration of justice. This maybe obvious to many for it to be contentious but it is still possible some are not aware of it or choose to forget it. The two different types of courts are provided for under our Federal Constitution. When the British decided to grant us independence, they knew, like many others, it was crucial that these two different courts be recognised, acknowledging the different communities as pivotal supporting these courts and for these courts to carry out their functions and duties for these communities. For many years, and continuously, this is part of the evidence showcasing the respect and deference of the different ethnic communities for each other.

[120] The British also knew the country was predominantly Muslim, but with others embracing different religious beliefs. They knew too they needed at that time to acknowledge the existence of the Syariah Courts, already operating in some forms before independence.

[121] In our Federal Constitution, the Civil Courts and the Syariah Courts are recognised by looking at art 121(1) and art 121(1A) that read as follows:

> Judicial power of the Federation
>
> 121.(1) There shall be two High Courts of co-ordinate jurisdiction and status, namely-
>
> (a) one in the States of Malaya, which shall be known as the High Court in Malaya and shall have its principal registry at such place in the States of Malaya as the Yang di-Pertuan Agong may determine; and
>
> (b) one in the States of Sabah and Sarawak, which shall be known as the High Court in Sabah and Sarawak and shall have its principal registry at such place in the States of Sabah and Sarawak as the Yang di-Pertuan Agong may determine;
>
> (c) (Repealed),
>
> and such inferior courts as may be provided by federal law; and the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law.".

[122] Article 121(1A) in turn states as follows:

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

[123] In turn, art 74, read together with Item 1 of List II-State List in the Ninth Schedule of the Federal Constitution, provides the jurisdiction of the Syariah Courts, and it states as follows:

> Subject matter of federal and State laws
>
> 74.(1) Without prejudice to any power to make laws conferred on it by any other Article, Parliament may make laws with respect to any of the matters enumerated in the Federal List or the Concurrent List (that is to say, the First or Third List set out in the Ninth Schedule).
>
> (2) Without prejudice to any power to make laws conferred on it by any other Article, the Legislature of a State may make laws with respect to any of the matters enumerated in the State List (that is to say, the Second List set out in the Ninth Schedule) or the Concurrent List.
>
> (3) The power to make laws conferred by this Article is exercisable subject to any conditions or restrictions imposed with respect to any particular matter by this Constitution.

(4) Where general as well as specific expressions are used in describing any of the matters enumerated in the Lists set out in the Ninth Schedule the generality of the former shall not be taken to be limited by the latter.

[124] Item 1, reproduced in full, reads:

> 1. Except with respect to the Federal Territories of Kuala Lumpur, Labuan and Putrajaya, Islamic law and personal and family law of persons professing the religion of Islam, including the Islamic law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trusts; Wakafs and the definition and regulation of charitable and religious trusts, the appointment of trustees and the incorporation of persons in respect of Islamic religious and charitable endowments, institutions, trusts, charities and charitable institutions operating wholly within the State; Malay customs; Zakat, Fitrah and Baitulmal or similar Islamic religious revenue; mosques or any Islamic public place of worship, creation and punishment of offences by persons professing the religion of Islam against precepts of that religion, except in regard to matters included in the Federal List; the constitution, organisation and procedure of Syariah courts, which shall have jurisdiction only over persons professing the religion of Islam and in respect only of any of the matters included in this paragraph, but shall not have jurisdiction in respect of offences except in so far as conferred by federal law;**the control of propagating doctrines and beliefs among persons professing the religion of Islam; the determination of matters of Islamic law and doctrine** and Malay custom.
>
> [Emphasis Added]

[125] Looking at the above, I find that the learned HCJ, could not be faulted nor erroneous in finding the Syariah Court had the jurisdiction in respect of the Fatwa as the same relates to 'the control of propagating doctrines' and 'beliefs among persons professing the religion of Islam' or 'the determination of matters of Islamic law and doctrine'.

[126] The HC, therefore, had correctly denied the JR for a declaration that the Fatwa issued by the h1st respondent is invalid. The HC in consequence had rightly ordered no *certiorari* to quash the said Fatwa. In fact, the HC was absolutely correct to decide on the present case by determining whether the Civil Courts in the first place have jurisdiction to hear the application for JR. The HC was not in error in determining that only the Syariah Courts would have jurisdiction to hear and decide on a challenge against a fatwa such as in the present case.

[127] I agree that the above approach by the learned HCJ should mean this single issue on jurisdiction would be sufficient to dispose of the application for JR at the HC. The Fatwa under the circumstances, in short, is a matter for the Muslims alone and its application is for the Muslim community. The Syariah

Courts should be the best and appropriate forum instead of the Civil Courts to decide on the validity of a fatwa such as the present one before the HC, COA and this court.

[128] The Civil Courts should not encroach on the jurisdiction of the Syariah Courts. Neither the latter should encroach on the jurisdiction of the former. Each should respect the jurisdiction of the other. This country has enjoyed a peaceful coexistence among the communities by respecting the two different courts, and it should remain in that manner for many more years in the future.

[129] It is also relevant to note that a fatwa could not contradict Hukum Syarak. Indeed, in the present case, there is no argument disputing this. Hukum Syarak, in turn, is based on divine revelation based on the Quran, the holy book of the Muslims and the hadis or sayings and practices of Prophet Muhammad. Essentially, by his actions, words and what he had approved.

[130] Thus, when a challenge is made against a fatwa, the Syariah Courts will have jurisdiction and not the Civil Courts, including this court. The appellants should present their objections against the Fatwa at the Syariah Courts. There is no evidence before us to suggest this could not be done. This issue alone is sufficient to determine the present appeal.

[131] After all, there is no evidence before this court that Syariah Courts judges are not well-trained or lack the required knowledge to determine the validity of the Fatwa or the extent of its applicability.

[132] In this regard, I could see no wrong when the learned HCJ decided to look at the substance of the challenge, which is against the Fatwa. This is how the learned HCJ found and said:

> [11] Next, in determining the question of jurisdiction of the Syariah Court and the Civil Court, the approach to be taken is the subject matter approach and not the remedy prayed approach as decided by the Federal Court in the case of *Azizah Shaik Ismail & Anor v. Fatimah Shaik Ismail & Anor* [2003] 1 MLRA 570, where the principle was explained in the following manner;
>
> > "This appeal has again raised the question of jurisdiction of the Shariah Court and the High Court. If the Syariah Court has jurisdiction over the matter, the High Court does not have jurisdiction over it — art 121(1A), Federal Constitution. That calls for the determination of the approach that the court should take in determining the jurisdiction of the Syariah Court. This court has very recently decided on this point in *Majlis Ugama Islam Pulau Pinang Dan Seberang Perai v. Shaik Zolkaffily Shaik Natar & Ors* [2003] 1 MLRA 283. In that case the subject matter was the adjudication and administration of the will of a deceased Muslim, even though the respondents (plaintiffs in the High Court) had prayed for remedies of a declaration that the land in question be surrendered to the estate of Shaik Eusoff Shaik Latiff, deceased, a declaration as executors of the deceased's estate and for an account and, in the alternative, the respondents prayed for damages and an injunction.

Haidar Mohd Noor CJ Malaya (delivering the judgment of the court) surveyed the earlier judgments of this court, the Supreme Court as well as of the High Court and concluded:

> We respectfully agree with Abdul Hamid Mohamad J that *Isa Abdul Rahman* cannot be supported.

It should be noted that '*Isa Abdul Rahman*' is the case of *Majlis Agama Islam Pulau Pinang lwn. Isa Abdul Rahman & Yang Lain* [1992] 1 MLRA 240. In that case, even though the land and mosque in issue were a 'wakaf am', the Supreme Court held that since the real order asked for by the respondents was a perpetual injunction to restrain the appellant or its agents from demolishing the said mosque and to restrain the appellant from taking any preliminary steps to demolish the mosque and erect a commercial building on the site, and since the Syariah Courts did not have jurisdiction to issue an injunction, therefore the High Court had jurisdiction over the suit. This approach is what has become known as 'the remedy approach'. Secondly, the decision of Abdul Hamid Mohamad J referred to in the judgment of Haidar Mohd Noor CJ (Malaya) refers to the case of *Abdul Shaik Md Ibrahim & Anor v. Hussein Ibrahim & Ors* [1999] 1 MLRH 713 which adopted the 'subject matter' approach.

Therefore, this court has put to rest that the subject matter approach should be adopted.

In this case, there is no doubt that the subject matter of the case is the custody of the child. That clearly falls with the jurisdiction of the Syariah Court. Even learned counsel for the appellants did not dispute that. His argument was that since the Syariah Court had no jurisdiction to issue the writ of *habeas corpus*, the Civil Court had the jurisdiction to issue the same in this case. The short answer to that argument is that *habeas corpus* is the remedy sought and not the subject matter of the case.

Since the subject matter in question is the custody of the child and since that is clearly within the jurisdiction of the Syariah Court, by virtue of the provisions of art 121(1A) of the Federal Constitution, the High Court has no jurisdiction over the matter.

[12] This approach was followed in the case of *Kassim @ Osman Ahmad v. Dato' Seri Jamil Khir Baharom & Ors* [2014] MLRHU 535, were the Judge states the following:

> [10] The Federal Court, in *Azizah Shaik Ismail & Anor v. Fatimah Shaik Ismail & Anor* [2003] 1 MLRA 570 and in *Majlis Ugama Islam Pulau Pinang Dan Seberang Perai v. Shaik Zolkaffily Shaik Natar & Ors* [2003] 1 MLRA 283 had made it clear that when there is a dispute concerning a question of jurisdiction of the Syariah Court and the Civil Court, **the approach to be taken is the subject matter approach and not the remedy prayed approach.**

[Emphasis Added]

[133] With respect to the minority judgment of the COA, nothing was said by the same on this binding authority on this subject matter approach in order to determine whether the Syariah Court, in the first place, has jurisdiction. The

failure to consider this is fatal in the overall decision to allow the appeal by the minority.

[134] I shall also refer to what is material as mentioned by the minority judgment of the COA in this case. The following were said:

> [3] **Our focus in our analysis should be on the issues** arising for determination in this appeal which may be summarised as follows:
>
> 1) Whether the **Fatwa** exceeds the jurisdictional competence of the Respondents as the 1st Appellant is a company and not a person professing the religion of Islam?
>
> 2) Whether the **Fatwa** is *ultra vires* ss 47 and 51, Administration of the Religion of Islam (State of Selangor) Enactment 2003 ("Selangor 2003 Enactment")?
>
> 3) Whether the **Fatwa** violates s 7, Printing Presses and Publications Act 1984 ("PPPA") and s 3, Communications and Multimedia Act 1998 ("CMA")?
>
> 4) Whether the **Fatwa** contravenes arts 5, 8, 10 and 11, Federal Constitution ("FC")?
>
> 5) Whether the issuance of the **Fatwa** had breached rules of natural justice?
>
> [Emphasis Added]

[135] From the above, it is clear that the focus of the minority judge should have been the Fatwa itself. In all five limbs above, the learned judge did not miss the word 'Fatwa'. Therefore, what should have been done is to ask which court has jurisdiction when it comes to the issue of a fatwa? It is the Syariah Court. This is because of the subject matter approach based on binding authorities on the minority at the COA, as explained earlier and which was correctly referred to by the learned HCJ. I would say that the minority judge, with respect, did not address this subject matter approach, resulting in the erroneous decision that the Fatwa issued can be challenged in a Civil Court. I consider this a core issue, as if there is no jurisdiction on the Civil Courts to adjudicate on a fatwa, then the whole case brought by the appellants against the Fatwa could not be sustained.

[136] Although there are other matters challenging the issuance of the Fatwa such as the same should not be applicable to the 1st appellant as a company and its alleged overreach in directing the MCMC and Ministry of Home Affairs for its enforcement, the substance or the subject matter of the challenge is still the Fatwa as it stands. As pointed out by the HC, based on cogent authorities as shown above, therefore, the jurisdiction to determine the result or the outcome of that challenge lies in the Syariah Courts and not the Civil Courts.

[137] One issue raised by the appellants before us is that the Fatwa should not stand against the 1st appellant as it is a company. In essence, it is contended that there is also no jurisdiction for the Fatwa to be issued as the same could not bind a company. Further, the appellants argued that as the 1st appellant is a company, it is not a person professing the religion of Islam and therefore the Fatwa could not apply against it.

[138] On this issue, I am compelled to say that this court's focus should not be blinkered by the assertion that since the 1st appellant is a company, therefore it could not be subjected to the Fatwa. It is also regressive in approach to ignore the people supporting the company and simply say that since it is a company, it could not be bound by the Fatwa. This should not be done as one ought to have the vision and foresight in asking who the people are behind this company. Its own name, SIS Forum (Malaysia) or "Sisters in Islam", clearly shows its identity. Is that insufficiently clear? I do not think so.

[139] Further, in reality, a company could not exist without persons manning it. At the very least, the 2nd appellant, who was the executive director and founder of the 1st appellant, is a Muslim. The learned HC judge also noted that all the directors of the 1st appellant (the company) are likewise Muslims, and the members of the same are also Muslims. It is disturbing that the 1st appellant could escape and not be subjected to the Fatwa simply by being a company but nonetheless venturing to make assertions and expressing views affecting the precepts and tenets of Islam. The HC was not wrong to find that, since its inception, the 1st appellant had raised and issued statements on matters involving the religion of Islam.

[140] Another way to view this submission of the appellants is that indirectly it says the company had expressed opinions affecting Islam, but because it is a company, it is not persons professing Islam, and therefore, the Fatwa could not be issued against it. This should not be allowed as those opinions, if it is not scrutinised, controlled and regulated by the Fatwa, could be seriously flawed to the Muslims' understanding of what is acceptable or unacceptable in their own religion. After all, in essence, the Fatwa in this case was only issued after deliberations by respected and recognised Islamic scholars. In this case, it is issued by the Fatwa Committee. It should be common knowledge that the Fatwa in this case is not issued by a single scholar. Therefore, lesser entities (companies) or mere mortals (those operating and being members of the companies) should be magnanimous in accepting that there are groups of people who are more learned and knowledgeable in the understanding of the religion.

[141] Most rightly, would be unconcerned if a company does not venture to express views on Islam. But if it does, then it should be prepared to be subjected to scholars issuing a fatwa such as in this case. In this regard, the learned HCJ, was completely right to find that the objective to control and restrict doctrine or belief amongst Muslims as empowered by art 11(4) of the Federal Constitution

will be ineffective if any statements or views against the teaching of Islam is made under the name of a company like the 1st appellant. This provision of the Federal Constitution states as follows:

> State law and in respect of the Federal Territory, federal law may control or restrict the propagation of any religious doctrine or belief among peoples professing the religion of Islam.

[142] Accordingly, the learned HCJ was also correct in referring to the Supreme Court case of *Mamat Daud & Ors v. The Government Of Malaysia* [1987] 1 MLRA 292, where Salleh Abas LP said as follows:

> [25] I accept that to allow any Muslim or groups of Muslims to adopt divergent practices and entertain differing concepts of Islamic religion may well be dangerous and could lead to disunity among Muslims and, therefore, could affect public order in the States. But the power to legislate in order to control or stop such practices is given to States as could be seen from art 11 Clause (4):
>
> > (4) State law and in respect of the Federal Territory, federal law may control or restrict the propagation of any religious doctrine or belief among peoples professing the religion of Islam.
>
> [26] It is they alone which can say what should be the proper belief, rule and concept of Islamic religion or what should not be its interpretation and what should be the rule in a particular given situation or case. Clause (4) is a power which enables States to pass a law to protect the religion of Islam from being exposed to the influences of the tenets, precepts and practices of other religions or even of certain schools of thought and opinions within Islamic religion itself.

[143] A company would still be bound by a fatwa, especially in this case, depending on the makeup of that company and/or what it did in its work in relation to Islam. Even a company devoid of Muslims manning the same or being members should also still be subjected to a similar fatwa as in this case if it decides to venture propagating views unacceptable to Islamic beliefs. It is highly dangerous if such a company exists for the cohesive understanding and respect we have maintained for decades as citizens for each other. Fortunately, this has not happened as the 1st appellant is a company run by Muslims and its members are Muslims and with its identity as Muslims by its very name. However, there is still no guarantee that will not happen if we are not careful. But before that happens, it is only wise to be guarded in our approach and say that even a company must be subjected to close scrutiny. It should not be concluded just because a company is not a person professing Islam as a religion, such as in this case, the provision of the Federal Constitution should not apply to the same.

[144] As a consequence and for the reasons mentioned above, the Fatwa in this case should rightly be applicable against the appellants.

[145] Another issue advanced by the appellants is that the Fatwa is *ultra vires* s 47, reading it with s 51 ARIE 2003. Section 47 ARIE 2003 states as follows:

> Subject to s 51, the Fatwa Committee shall, on the direction of His Royal Highness the Sultan, and may on its own initiative or on the request of any person by letter addressed to the Mufti, prepare fatwa on any unsettled or controversial question of or relating to Hukum Syarak.

[146] Section 51 in turn reads as follows:

> (1) Notwithstanding the powers of the Fatwa Committee under s 47, **whenever it appears to the Fatwa Committee that a fatwa proposed to be made is related to matters affecting national interest**, the Fatwa Committee shall adjourn its discussions on the proposed fatwa and submit the matter to the Majlis.
>
> (2) After deliberating upon the matter, the **Majlis may make a recommendation to His Royal Highness the Sultan for his assent to refer the proposed fatwa to the National Fatwa Committee, through the Conference of Rulers.**
>
> (3) Without prejudice to the generality of subsection (1), a fatwa shall be deemed to be related to matters affecting national interest if **the question is related to any matter, policy, programme or activity which directly affect the interest of the Federal Government, a state Government or any of its ministries, departments or agencies.**
>
> (4) If His Royal Highness the Sultan gives his assent under subsection (2), the Majlis shall, before the fatwa is referred to the National Fatwa Committee, inform the state Government of the reference.
>
> (5) When a proposed fatwa has been referred to the National Fatwa Committee, the Committee shall present its advice and recommendations to the Conference of Rulers in accordance with subsection (2) on the matter.
>
> (6) If the National Fatwa Committee advises or recommends that the proposed fatwa be made, with or without any modification as it may recommend, or advises or recommends another fatwa on the same matter and the Conference of Rulers have agreed with the advice and recommendation of the National Fatwa Committee, the Majlis shall consider the advice and recommendation and thereupon may cause the fatwa according to such advice and recommendation to be published in the Gazette without any amendment or modification, and the provision of s 48, except subsection 48(7), shall apply thereto.
>
> (7) A fatwa published in the Gazette shall be accompanied by a statement that the fatwa is made under this section.
>
> [Emphasis Added]

[147] Essentially, the argument by the appellants on the above provisions is that the Fatwa must be referred to the National Fatwa Committee, and this was never done. Therefore, the Fatwa, according to the appellants, could not stand.

[148] As seen, before s 51 of ARIE 2003 could be operative for the benefit of the appellants as argued, there are several material conditions that must be met as follows:

(a) the subjective determination of the Fatwa Committee (the 1st respondent) that the present Fatwa proposed is related to matters affecting national interest. This is seen in s 51(1) above.

(b) the 2nd respondent may make a recommendation to His Royal Highness the Sultan for his assent to refer the proposed fatwa to the National Fatwa Committee, through the Conference of Rulers. This is seen in s 51(2) above.

(c) His Royal Highness the Sultan must give his assent. This is also seen in s 51(2) above.

(d) a fatwa shall be deemed to be related to matters affecting national interest if the question is related to any matter, policy, programme or activity which directly affect the interest of the Federal Government, a state Government or any of its ministries, departments or agencies. This is seen in s 51(3) above.

[149] As for (a) above, in the first place, I could not see any evidence established by the appellants that it appeared to the 1st respondent that the Fatwa affected national interest. It must be proven that national interest had been affected by the subjective determination of the 1st respondent. There is no evidence from the appellants to prove this against the 1st respondent.

[150] As for (b) above, the key word used is "may". It is not "shall". Therefore, the general rule is that it is not mandatory that the 2nd respondent must make a recommendation to His Royal Highness the Sultan for his assent. There is again no evidence coming from the appellants regarding this point.

[151] As for (c) above, there is also no evidence from the appellants that His Royal Highness had given his assent for the proposed Fatwa to be referred to the National Fatwa Committee.

[152] As for (d) above, a fatwa shall be deemed to be related to matters affecting national interest if the question is related to any matter, policy, programme or activity which directly affects the interest of the Federal Government and a state Government. However, there is no evidence proven by the appellants that the Fatwa affected national interest in relation to any matter, policy, programme or activity which directly affects the interest of the Federal Government and a state Government. Neither the Federal Government nor any state Governments have made any statements admitting or acknowledging their interest had been

so affected, including their ministries, departments or agencies. Without those kinds of statements, it should not be presumed that the interest of the Federal Government or a state Government had been affected.

[153] In this regard, the accepted general principle is that he who asserts must prove. It means the appellants must prove all that is listed from (a) to (d) above, but as there is no evidence to that effect, s 51 ARIE 2003 as shown above could not be said to be contravened.

[154] Another contention by the appellants is on the case *SIS Forum (1)*, which decided JR is not merely procedural but a substantive part of judicial power. It is inherent and forms the very core function of an independent judiciary. It is the exclusive judicial power of the Civil Courts. Essentially because of this decision of the Federal Court, the Syariah Courts do not have the power in respect of hearing or granting remedies when it comes to JR application. That affects s 66 of ARIE 2003 in that the same has been struck down by *SIS Forum (1)* because essentially this provision wrongly allows for JR to be heard by the Syariah Courts. Hence, the argument of the appellants is that the learned HCJ erred in finding s 66 of ARIE 2003 allows for JR to be applied against the Fatwa.

[155] Having in mind that I have decided the Syariah Courts do have the jurisdiction in respect of the core dispute on the Fatwa and not the Civil Courts, this issue on s 66 of ARIE 2003 becomes irrelevant. First, there must be a determination based on the subject matter approach to see whether the Syariah Courts have jurisdiction in this case. Once it is decided that the Syariah Courts do have jurisdiction, the dispute must go before the same for a decision. It matters not then that s 66 of ARIE 2003 granting JR power to the Syariah Courts is already struck down by *SIS Forum (1)*.

[156] On the minority's view at the COA that there was no right of hearing given to the 1st appellant when it was declared to be holding to liberalism and pluralism that is deviant to Islam, I noticed that the minority did not allude or refer at all to the finding of the HC as follows:

> Aside from the above meetings, on 12 January 2012, a dialogue was held between the panel of Fatwa Committee of Selangor headed by the Mufti of Selangor and SIS Forum (Malaysia) represented by 8 of its members including the 2nd applicant. The matters discussed includes the issue of liberalism and pluralism of religion.

[157] The above proves that there were hearings held with the appellants before the Fatwa was issued. This also would suggest it is more possible that the appellants were heard and their explanations were discussed before a determination is made that they were engaging in liberalism and pluralism against Islam. It also shows it is more likely that the appellants could not have been seriously accused before the scholars heard them.

[158] The above would indicate that "liberalism and pluralism of religion" had been discussed, including through the dialogue. To say the Fatwa is vague and no explanation on the terms "liberalism and pluralism" but yet the 1st appellant is declared deviant of Islamic belief as narrated by the minority judge at the COA, is, with respect, inconsistent with what were the facts as found by the learned HCJ as seen above.

[159] I should also point out even when the Fatwa could not stand according to the appellants because it needs the enforcement of MCMC and the Ministry of Home Affairs, this issue still had wrongly evaded the case law authorities from the Federal Court that decided the courts should look at the subject matter approach or substantive challenge to determine whether the Syariah Courts have the jurisdiction to hear and decide on the dispute. Thus, whether a federal department or agency is referred to in the Fatwa issued by a state for its execution, that does not really matter, as the dispute on the Fatwa in the first place is within the jurisdiction of the Syariah Courts based on the subject matter approach. The Fatwa should be argued in all aspects before the Syariah Courts.

[160] With regard to the arguments by the appellants regarding the application of the Communications and Multimedia Act 1998 and the Printing Presses and Publications Act 1984 with reference to para 2 of the Fatwa, these contentions should come secondary to the arguments on the Fatwa itself — paras 1 and 4. The core dispute about the Fatwa is in the jurisdiction of the Syariah Courts. Therefore, the applicability or alleged infringement of the two written laws should also go before the Syariah Courts, as the subject matter approach means it is the Syariah Courts that have jurisdiction over the dispute.

Conclusion

[161] The question to ask is, what is the dispute in this case? The answer is the dispute is on the Fatwa. That is the essence of the dispute. Of course, there are other issues. However, these issues could not be more important than the dispute over the Fatwa. As the Fatwa is the core dispute, I am guided by the principle that I should look at the subject matter of the case.

[162] The subject matter approach should result in the dispute on the Fatwa being considered within the jurisdiction of Syariah Courts and not the Civil Courts. This approach, formulated by the highest court in our country, is still good law. Once it is within the jurisdiction of the Syariah Courts, those courts alone shall determine the validity of the Fatwa issued.

[163] It is also high time that a company, although strictly speaking is not a "person", must also be subjected to a fatwa, especially based on the facts of this case.

[164] I am also of the view that all issues, including the ancillary issues, have been addressed. Therefore, I am not inclined, and I see no necessity to answer the questions posed with respect to the appeal. Based on all the reasons explained, I have no hesitation in dismissing the present appeal.

[165] I shall end this by saying that I find it strange if a Syariah Court has no jurisdiction to rule on a dispute about a fatwa.