DALAM MAHKAMAH PERSEKUTUAN MALAYSIA

(BIDANG KUASA RAYUAN)

MAHKAMAH PERSEKUTUAN RAYUAN SIVIL NO.: 01 – 2 – 2006 (W)

ANTARA

LINA JOY (NO. K/P: 640108-10-5038)	**...**	**PERAYU**
DAN		
1. MAJLIS AGAMA ISLAM WILAYAH PERSEKUTUAN	**...**	**RESPONDEN PERTAMA**
2. KERAJAAN MALAYSIA	**...**	**RESPONDEN KEDUA**
3. KETUA PENGARAH PENDAFTARAN NEGARA	**...**	**RESPONDEN KETIGA**

(Dalam Mahkamah Rayuan Malaysia

Bidang Kuasa Rayuan

Rayuan Sivil No.: W – 01 – 29 – 2001

Antara

Lina Joy (No. K/P: 640108-10-5038)	...	Perayu
Dan		
1. Majlis Agama Islam Wilayah Persekutuan	...	Defendan Pertama

2. Kerajaan Malaysia ... Defendan Kedua
3. Ketua Pengarah Pendaftaran Negara ... Defendan Ketiga

Coram: Y.A.A. Tun Dato' Sri Ahmad Fairuz Bin
Dato' Sheikh Abdul Halim, KHN

Y.A. Dato' Alauddin Bin Mohd. Shariff, HMP

Y.A. Dato' Richard Malanjum, HMP

DISSENTING JUDGMENT

Preliminary

1. I had the privilege of deliberating with their Lordships the learned Chief Justice and Mr. Justice Dato' Alauddin, FCJ on the draft judgment for this appeal.

2. With the greatest respect I am unable to concur with them on the final decision of this appeal. Hence, it is thus my task to express my views and reasons on what I think should be the outcome of this appeal.

3. Sworn to uphold the Federal Constitution (the Constitution), it is my task to ensure that it is upheld at all times by giving effects to what I think the founding Fathers of this great nation had in mind when they framed this sacred document.

4. It is therefore my view that when considering an issue of constitutional importance it is vital to bear in mind that all other interests and feelings, personal or otherwise, should give way and assume only a secondary role if at all. The wise words of Salleh Abas LP in ***Che Omar bin Che Soh v PP [1988] 2 MLJ 55*** are thus worthy of recall when he said this at page 57:

> *'..we have to set aside our personal feelings because the law in this country is still what it is today, secular law, where morality not accepted by the law is not enjoying the status of law.'*

5. I would also say that the appeal before us is indeed not easy to resolve for it involves issues of critical importance in the hearts

and minds of the people in this country. Cursory handling may result in unnecessary anxieties to the general public. Thus, intensive discussions and research works had to be done with great patience and sincerity before any conclusion could be made.

6. In order to understand the real issues at hand I think it is necessary to state and understand the important chronological facts of this appeal.

Background Facts

7. It is common ground that the Appellant is a Malay woman born on 8th January 1964. She was brought up as Muslim by her family and her given name is Azalina binti Jailani.

8. On 21 February 1997 she applied to the National Registration Department (NRD) (the first application) to change her name to Lina Lelani. The reason she gave in her statutory declaration to

support the application was that she had renounced Islam for Christianity and that she intended to marry a Christian.

9. Her application for name change was rejected by the NRD without any reason being given on 11 August 1997.

10. However, she made a second application for name change but this time to Lina Joy on 15 March 1999 (second application). In accordance with sub-regulation (1) of reg. 14 of the National Regulations 1990 (the Regulations), she again submitted a statutory declaration and stated that the reason for name change was her conversion to Christianity.

11. According to her, she received no reply and when she went to enquire about her second application in July 1999 she was told by an officer at the NRD office in Petaling Jaya that since her identity card did not state her religion, to avoid any difficulty in processing her application she should not mention conversion as the reason for name change.

12. The Appellant asserted that at that time it was not known to the Appellant then nor was she informed by NRD that the Regulations would shortly be amended and that her change of name alone would be insufficient for her purposes. The amendment that was introduced shortly was to make it a requirement that in the Identity Cards of Muslims the religion must be stated. In her Affidavit in support of her Originating Summons in the High Court the Appellant asserted that it was a "*trick*" or "*muslihat*" by NRD and the Appellant was aggrieved over this.

13. Such advice led the Appellant to submit a further statutory declaration on 2.8.1999. In the new statutory declaration there was no mention that the reason for the change of name was due to conversion of religion but stated her reason for change of name as a matter of mere choice. The Appellant resubmitted the application dated 15.3.1999 with a new statutory declaration sworn on 2.8.1999.

14. On 22 October 1999, NRD wrote to her saying that her application for name change from ‘Azlina binti Jailani’ to ‘Lina Joy’ was approved and she was asked to apply for a new replacement identity card. This she did on 25.10.1999. However, by the time she applied for the replacement card the Appellant asserted that unknown to her, the Regulations had been amended (vide P.U.(A)70/2000) which came into force retrospectively on 1st October 1999) to require that the identity card should state the particular of religion for Muslims. Anyway, in the application form which asked her to state her religion the Appellant stated her religion to be Christianity.

15. The application by the Appellant for replacement identity card was rejected. The form as processed by NRD carried a departmental entry by unnamed officer who wrote thus:

> *“Arahan En.Rahim agama pemohon dikekalkan kepada Islam”*
>
> (Translation: “Mr. Rahim instructed that the religion of the applicant be retained as Islam”).

16. On the notation it was later explained by the Director General of NRD in this manner:

> "*This notation was made because the information contained in the National Registration Department's record showed that the Applicant is a Muslim and the Applicant had not forwarded any documentation from the Syariah Court nor any Islamic Authority concerned to prove her statement that she had renounced her Islamic faith.*"

17. Consequently, her replacement identity card stated her religion as Islam although the name change to Lina Joy was effected. Her original name of Azalina binti Jailani was also stated on the reverse side of the replacement identity card. This was also as a result of the amendments introduced vide P.U.(A)70/2000.

18. The Appellant then made a third application on 3.1.2000 (third application) to NRD office in Petaling Jaya. She applied to remove the word "Islam" and her original name from her

replacement identity card. She tendered a statutory application to support her application. The counter clerk however refused to accept her application on the ground that it was incomplete without an order of the Syariah Court to the effect that she had renounced Islam. The Director General attempted to deny that the application was rejected at the counter. However the Court of Appeal accepted the version of the Appellant.

19. That is where the position of the Appellant in her quest to change her name completely and drop the reference to her original religion in the identity card came to a standstill.

Proceedings In The Courts Below

20. By way of Originating Summons the Appellant decided to seek relief in the High Court praying, inter alia, for several declaratory orders against the Majlis Agama Islam Wilayah Perseketuan (Majlis) and the Government of Malaysia in respect of her right to freedom of religion, the constitutionality of section 2 of the Administration of Islamic law (Federal

Territories) 1993, the applicability of Syariah Enactments to her who professed the religion of Christianity and the constitutionality of the state and federal legislations that forbade conversion out of Islam.

21. In addition she sought for an order that her name be entered in the Registry Book as having converted out of Islam. The Appellant had joined the Majlis and sought the said declaratory orders because she said that she entertained fear that action would be taken against her by the religious authorities.

22. The Respondents filed a striking out application. However, the learned High Court Judge heard Originating Summons itself and dismissed it completely without granting any of the remedies the Appellant sought. She appealed.

23. In the Court of Appeal, the parties by consent narrowed down the issues and the relief sought for significantly. The constitutional issues were abandoned and the appeal focused purely on an issue of administrative law, that is, whether the

Director General of NRD correctly exercised the discretion vested in him under the law.

24. With the consent of the Court of Appeal, the Director General was added as a respondent. The questions that were posed to the Court of Appeal stated as follows:-

(i) whether reg. 14 of the 1990 Regulations required only a statutory declaration and nothing else, and therefore the Director General, in asking for the Syariah Court order or certificate, was imposing additional requirement to the regulation; if so,

(ii) whether the imposition of such additional requirement amounted to Wednesbury unreasonableness on the part of the Director General or the National Registration Department.

25. However these questions were subsequently summarized thus:

‘whether the NRD was right in law in rejecting the appellant's application under reg. 14 of the National Registration Regulations 1990 ("the 1990 Regulations") to have the statement of her religion as "Islam" deleted from her NRIC and in requiring a certificate and/or order from the Syariah Court.’

26. By majority the Court of Appeal answered the summarized question in the affirmative.

Proceeding Before This Court

27. Arising from the answer by majority of the Court of Appeal the Appellant sought for leave to appeal to this Court.

28. On 13th April, 2006 after hearing the respective submissions of counsel for the parties leave to appeal was granted on three questions for consideration by this Court. The questions are:

a. Whether the National Registration Department (NRD) is entitled in law to impose as a requirement for deleting the entry of Islam in the Applicant's Identity Card (IC) that she produce a certificate or a declaration or an order from the Syariah Court that she has apostatized?

b. Whether the NRD has correctly construed its power under the National Registration Regulations 1990, in particular Regulation 4 and Regulation 14, to impose the requirement as stated above when it is not expressly provided for in the Regulations?

c. Whether ***Soon Singh*** was rightly decided when it adopted the implied jurisdiction theory propounded in ***Md Hakim Lee*** *v.* ***Majlis Agama*** *(1998) 1 MLJ 681* in preference to ***Ng Wan Chan*** *v.* ***Majlis Agama (No.2)*** *(1991) 3 MLJ 487* and ***Lim Chang Seng*** *v.* ***Pengarah Jabatan Agama Islam*** *(1996) 3 CLJ 231* which declared that unless an express jurisdiction is conferred on the Syariah Court, the civil courts will retain their jurisdiction?'

29. When hearing of the appeal proper began learned counsel for the parties herein initially agreed to approach the matter purely from the administrative law aspect. However, upon being allowed to express their views during the hearing proper learned counsel for the various interested non-governmental bodies appearing on watching brief raised some constitutional issues which the Appellant and Respondents agreed to skip earlier on. Hence, in fairness to the Appellant and Respondents this Court allowed their learned counsel to submit on those constitutional issues in reply.

30. I propose to deal with the first two Questions together and deal with the third Question separately.

Questions 1 and 2:

31. These Questions appear to be substantially an administrative law issue. However beneath it lurks fundamental constitutional issues involving fundamental liberties and in the context of the

constitutional arrangement in Malaysia the division of powers between the State and Federal authorities.

Fundamental Legal Principles

32. I therefore begin by restating some well-entrenched legal principles which may seem obvious to many yet often overlooked.

33. Article 3 (1) of the Constitution placed Islam to a special position in this country. However, Article 3(4) clearly provides that nothing in the Article derogates from any other provision of the Constitution thereby implying that Article 3(1) was never intended to override any right, privilege or power explicitly conferred by the Constitution. (See: ***Che Omar bin Che Soh v PP*** [supra]). Indeed this is in consonant with Article 4 of the Constitution which places beyond doubt that the Constitution is the supreme law of this country. Article 4 thereof is abundantly clear. It follows that to be valid all laws whether federal or state legislations of any kind and whether they are pre or post

Merdeka must be in conformity with the provisions of the Constitution including those dealing with fundamental liberties. (See: ***Surinder Singh Kanda v Govt. of the Federation of Malaya (1962) 28 MLJ 169; Aminah v Supt. Of Prisons (1968) 1 MLJ 92; City Council of George Town v Govt. of Penang [1967] 1 MLJ 169; Nordin Salleh v Dewan Undangan Kelantan [1992] 1 MLJ 697***).

34. Legislative bodies, whether Parliament and State Assemblies do not therefore have independent and sovereign legislative power merely on the basis of the Legislative Lists in Schedule 9 of the Constitution. In fact such legislative powers are derived from the Constitution itself. Hence, one is not wrong to say that the Legislative Lists are subordinate to the fundamental liberties provisions enshrined in the Constitution. (See: ***PP v Mohamed Ismail [1984] 2 MLJ 219***).

35. Just as any legislation or any part thereof will be struck down if it fails to conform with any of the provisions of the Constitution so too with administrative, departmental and executive

discretions, policies and decisions. In other words they too must not infringe any of the provisions of the Constitution. (See: ***PP v Su Liang Yu [1978] 2 MLJ 79***; ***Madhavan Nair v PP [1975] 264***). In addition, administrative, departmental and executive discretions, policies and decisions must also be within the ambit of the enabling legislations otherwise they too will be struck down for being ultra vires the legislations. (See: ***Ghazali v PP [1964] 30 MLJ 159***). Of course it goes without saying that the enabling legislation must also be in conformity with the provisions of the Constitution. (See: ***PP v Mohamed Ismail*** [supra]).

36. In order to supervise and monitor the exercise of administrative, departmental or executive discretions our courts have followed with modifications where necessary the legal principles pronounced by the courts in other common law jurisdictions. For instance, to be valid administrative, departmental or executive discretions must not suffer any of the three categories of legal infirmities, namely, illegality, irrationality and procedural impropriety. (See: ***CCSU v. Minister for the Civil***

Service [1984] 3 All ER 935; Persatuan Aliran Kesederaran Negara v Minister of Home Affairs [1988] 1 MLJ 442).

37. Indeed check on the exercise of administrative, departmental or executive discretions in this country is critical otherwise the acclaimed observance to the rule of law will just be a hollowed statement. A clear caution and advice on the danger was given by none other than his Lordship Raja Azlan Shah CJ (as His Majesty then was) in ***Pengarah Tanah Dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd [1979] 1 MLJ 135*** where his Lordship said this at page 148:

> *"Every legal power must have legal limits, otherwise there is dictatorship. In particular, it is a stringent requirement that a discretion should be exercised for a proper purpose, and that it should not be exercised unreasonably. In other words, every discretion cannot be free from legal restraint; where it is wrongly exercised, it becomes the duty of the courts to intervene. The courts are the only defence of the liberty of the subject against*

departmental aggression. In these days when government departments and public authorities have such great powers and influence, this is a most important safeguard for the ordinary citizen: so that the courts can see that these great powers and influence are exercised in accordance with law. I would once again emphasise what has often been said before, that "public bodies must be compelled to observe the law and it is essential that bureaucracy should be kept in its place".

38. It is thus with the salutary caution and advice by His Majesty in mind that I proceed to consider the thorny and sensitive legal problems presented to this Court for judicial determination in the form of Questions 1 and 2.

The Scope Of Regulations 4 And 14 Of The National Registration Regulations 1990 And Their Implementation

39. The relevant portions of Regulation 4 of the **National Registration Regulations 1990** as amended reads:

'Any person who is required to register under Regulations 3(1) or 3(2) or to re-register under regulation 18 or 28 or who applies for a replacement identity card under regulation 13 or 14 shall –

(a) …

(b) …

(c) give the following particulars to the registration officer as aforesaid, namely:

(i) his name as appearing in his Certificate of Birth or such other document or, if he is mown by different names, each of such names, in full;

(ii) his previous identity card number, if any;

(iii) the full address of his place of residence within Malaysia;

(iv) his race;

(iva) his religion (only for Muslims); w.e.f. 1.10.1999;

(v) his place of birth;

(vi) his date of birth and sex;

(vii) his physical abnormalities, if any;

(viii) his status as a citizen of Malaysia other citizenship status;

(ix) such other particulars as the registration officer may generally or in any particular case consider necessary for the purpose of identification, and

(x) produce such documentary evidence as the registration officer may consider necessary to support the accuracy of any particulars submitted.'

40. For Regulation 14 of the **National Registration Regulations 1990** the un-amended version is relevant and it reads:

'14. (1) A person registered under these Regulations who –

(a) changes his name;

(b) acquires the citizenship of Malaysia or is deprived of his citizenship of Malaysia; or

(c) has in his possession an identity card containing any particular, other than his address, which is to his knowledge incorrect,

shall forthwith report the fact to the nearest registration office and apply for a replacement identity card with the correct particulars.

(2) Any person registered under these Regulations who apply for a change of name under subregulation (1) shall furnish the registration officer with a statutory declaration to the effect that he has absolutely renounced and abandoned the use of his former name and in lieu thereof has assumed a new name and the

reason for such change of name shall also be stated in the statutory declaration.'

41. Thus, Regulation 4(c) stipulates, inter alia, when any person applies for a replacement identity card the Registration officer has to be supplied with the particulars stated therein and '*such other particulars as the registration officer may generally or in any particular case consider necessary for the purpose of identification…*' and '*produce such documentary evidence as the registration officer may consider necessary to support the accuracy of any particulars submitted*.'

42. Besides supplying the required particulars under Regulation 4 a person applying for change of name is also required under Regulation 14 to furnish a statutory declaration declaring '*to the effect that he has absolutely renounced and abandoned the use of his former name and in lieu thereof has assumed a new name and the reason for such change of name*'.

43. Having considered therefore Regulations 4 and 14 in their entirety vis-à-vis the adopted policy or the requirement imposed by NRD and having the Constitution in the forefront of my mind and having considered the submissions of learned counsel for the parties and those allowed by this Court to address, I think some pertinent conclusions can be derived in relation to the two Questions.

44. First, relevant in considering the foregoing Regulations is Article 8 (1) of the Constitution which proclaims that *'all persons are equal before the law and entitled to the equal protection of the law'*. Simply put it means that it requires all persons in like circumstances should be treated alike. It applies to both legislative powers and administrative discretion as well as to substantive and procedural rights and duties. (See: ***Lachmandas v State of Bombay [1952] SCR 710***). And Article 8(2) prohibits any form of discrimination against citizens unless expressly authorized by the Constitution itself on the ground only of religion, race, descent or place of birth or gender in any law... In other words all forms of discrimination are

forbidden unless it is explicitly permitted by the Constitution and that classification of people is permitted provided it is reasonable classification and not based on constitutionally forbidden grounds or on arbitrary or irrational differences. Hence, classification must be based on intelligible differentia which distinguishes those that are grouped together from the others that are left out. (See: ***Datuk Haji Harun Idris v PP [1977] 2 MLJ 155; Pathumma v State of Kerala A [1978] SC 771***). Only Article 8(5) provides that Article 8 does not invalidate or prohibit any provision regulating personal law which generally means domestic relations, family matters, succession, marriage, divorce and so forth. With respect the registration and identity card regulations are not provisions governing or regulating personal law.

45. Regulation 4, in particular sub-regulation 4(c) (iva), has, however, singled out Muslims for additional procedural burdens and impediments which are not connected to personal law. It requires that any registrant or person applying who is a Muslim has to state his or her religion. The requirement does not apply

to non-Muslims. There is therefore a differential treatment for Muslims. Hence, in my view this tantamount to unequal treatment under the law and in the absence of any exception found to justify the discrimination the said sub-regulation has infringed Article 8(1) of the Constitution. In other words it is discriminatory and unconstitutional and should therefore be struck down. For this reason alone that the relief sought for by the Appellant should be granted namely, for a declaration that she is entitled to have an NRIC (Identity Card) in which the word 'Islam' does not appear.

46. I am also unable to accede to any suggestion that the sub-regulation is covered by Article 8(5) of the Constitution. The Regulation has nothing to do with regulating personal law of a Muslim.

47. Second, Regulations 4 and 14 provide the mechanics by which a person can apply for replacement identity card, that is, the applicant has to supply particulars as stipulated and such other particulars necessary for the purpose of identification and to

produce documentary evidence to support the accuracy of any particulars submitted. (Emphasis added).

48. However, in the matter before us it is not in dispute that NRD insisted, based on its policy when there is nothing expressed in the two Regulations, for the production of an apostasy certificate by the Appellant from the Federal Territory Syariah court or some Islamic authority before her third application could be processed.

49. Learned Senior Federal counsel appearing for the 2nd and 3rd Respondents had the same view on the point when it was submitted '*that para (c)(ix) and (x) of reg 4 empowers the registration officer to call for additional information as well as documentary evidence from the Appellant when she applied to correct her particulars pertaining to the word "Islam" in her IC under reg 14(1)(c). Therefore, there was nothing illegal in the NRD requesting the appellant to produce a certificate and/or order from the Syariah Court or any other relevant Islamic authority.*'

50. Learned Senior Federal counsel also relied on an implied power of NRD officers duly appointed by virtue of the National Registration Act 1959 the authority to enforce certain conditions which they consider reasonably necessary in performing their duties and functions under the National Registration Act 1959 and the regulations made there under.

51. Such submission however can only be sustained if the third application of the Appellant is considered in isolation for it is true that in her identity card issued after the second application the word 'Islam' appeared consequent to the amendment P.U.(A)70/2000) which came into force retrospectively on 1st October 1999.

52. The majority judgment of the Court of Appeal agreed with the approach taken by NRD when it said this:

> '…*I believe that the NRD adopts the policy that a mere statutory declaration is insufficient for it to*

remove the word "Islam" from the identity card of a Muslim. It is because the renunciation of Islam is a matter of Islamic law on which the NRD is not an authority that it adopts the policy of requiring the determination of some Islamic religious authority before it can act to remove the word "Islam" from a Muslim's identity card. The policy of the NRD is stated in paragraph 14 of the Director General's affidavit dated 27 January 2005. In view of the considerations that I have set out I am of the view that the policy is a perfectly reasonable one.'

53. With respect, I am unable to agree with the majority judgment of the Court of Appeal and the submission of the learned Senior Federal counsel. I think the minority judgment of the Court of Appeal took the correct approach in the construction of those Regulations when it said this:

'*In her statutory declaration dated February 21, 1997 stated, among other matters: (i) that she had never*

professed or practiced Islam as her religion since birth; (ii) that she had embraced Christianity in 1990; and (iii) that she intended to marry a Christian. Her later statutory declaration dated March 15, 1999 affirmed in support of her application dated January 3, 2000 adds little to what she had previously declared. The form she attempted to submit on January 3, 2000 makes it clear in column 31 that she no longer wished to be a Muslim. In these circumstances, an order from the Syariah Court does nothing to support the accuracy of the particular that the appellant is a Christian. However, the baptismal certificate dated May 11, 1998 produced by the Appellant in evidence amply supports the accuracy of the particular that the Appellant is a Christian. This conclusion is amply supported by examining the way in which Regulation 14(2) is constructed. That Sub-regulation requires the applicant to state in his or her statutory declaration the reason for the change of name. In the appellant's case, she stated that her reason for the change of

name was that she was now a Christian. Accordingly, there is nothing in Regulation 4(cc) (xiii) (sic) (to read Regulation 4(c)(x)) that supports the action of the Director General in this case. It follows from what I have said thus far that an order or certificate from the Syariah Court is not a relevant document for the processing of the appellant's application. It is not a document prescribed by the 1990 Regulations. Nor is it a particular that a registration officer is entitled to call for as a particular under Regulation 4(cc) (xiii)' (sic) (to read Regulation 4(c)(x).)

54. I would add that NRD overlooked the point that the application of the Appellant should be considered within the context of the requirements of Regulations 4 and 14 only and should not bring in any extraneous factor such as retrieving information from its record. In the form submitted by the Appellant she stated her religion to be Christianity. This fact was known by NRD as early as 21.02.1997. Hence the third application should have been processed and considered only on that basis and to construe

the series applications by the Appellant as one continuous episode. And to my mind if the Appellant has satisfied the requirements of Regulations 4 and 14 NRD has no option but to allow her application. It is not the function of NRD to add in further requirements which have not been stipulated in those Regulations. It is also not the function of NRD to ensure that the Appellant has properly apostatized. Such matter should be left to the relevant religious authorities to take up any action deemed necessary or appropriate. NRD has not shown that one of its statutory duties is to ensure that a person has properly renounced the Islamic faith in accordance with the requirements by the Islamic authorities. I would therefore think that in coming to its decision to reject the application of the Appellant on account of non-production of an order or a certificate of apostasy from the Federal Territory Syariah Court or Islamic authorities NRD had asked itself the wrong question and had taken legally irrelevant factor into account and excluded legally relevant factor.

55. Accordingly, I am inclined to agree with the submission of learned counsel for the Appellant that 'in requiring production of a document that is not provided for nor authorised by the Regulation NRD had acted ultra vires its powers under the Regulations' and hence acted '*illegally*' in the context of principle enunciated in ***CCSU v. Minister for the Civil Service*** (supra) because it has not understood correctly "*the law that regulates* (its) *decision making power*".

56. Lord Diplock in the **CCSU** case (supra) said this:

> *"By 'illegality' as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable."*

57. Third, there is merit in the contention by learned counsel for the Appellant that the insistence by NRD for a certificate of apostasy is not consonant with the requirement of Regulation 4 (c) (x) because 'the call for proof of renunciation of religion does not fall within the meaning of the words "particulars submitted". The only "particulars submitted" by the Appellant was her status as a Christian or of her conversion to Christianity…NRD was only empowered to call for such documentary evidence that it considered "necessary to support the accuracy of any particulars submitted". The relevant "particulars submitted" was that the Appellant was a "Kristian". Thus the NRD could call for documentary evidence to support the accuracy of that particular ("Kristian") which the Appellant had submitted. However, the NRD could not call for documentary evidence that the Appellant was or was not a Muslim. This is because the Appellant had not submitted any particular that she was a Muslim.'

58. The majority judgment of the Court of Appeal circumvented the above contention by holding thus:

'*The appellant's misfortune lay in the fact that by the time the NRD approved her application, the retrospective requirement of law that the identity card of a Muslim should state his religion had started to be implemented, so that the religion 'Islam' had to be stated in the appellant's replacement identity card. I bear in mind that the appellant in her application for the replacement identity card after the approval of her change of name did state her religion as Christianity. Dato' Cyrus Das in his oral submission said that it was unreasonable for the officer concerned to direct, as stated under item 37 of the application form, that the appellant's religion remain as Islam, seeing that the change of name, which was approved, was due to change of religion. But with the substitution of the statutory declaration, the change of name was no longer sought on the basis of change of religion and was not considered and approved on that basis. According to the records of the NRD the appellant was a Muslim. The question of change of religion did not arise for the NRD at that stage. It was therefore not*

unreasonable for the officer concerned to direct that the appellant's religion remain as Islam. I may mention that in para 13.3 of the appellant's affidavit in support of her originating summons she said that the advice that she should submit another statutory declaration was a trick or tactic (muslihat) and there seems to be a suggestion in para 13.4 that the NRD deliberately delayed approving her application until after the implementation of the new requirement so that when the replacement identity card came to be issued it would, while bearing the new name that the appellant desired, nevertheless show her to be a Muslim, but this allegation of trickery or tactic has not been followed up in the appellant's submission in this appeal. In any case, as I said, since the administrative law question that has been framed for this appeal is concerned with the appellant's third application, and is not concerned with the second application, any criticism of the NRD's manner of handling the second application is irrelevant.

……

In the appellant's third application in Form JPN 5/2, under items 29, 30 and 31 she in effect stated that the error in her identity card was in the statement of her religion as 'Islam', which therefore she wanted removed. It amounted to her saying that she had renounced Islam. The NRD could therefore, under para (x), require her to produce documentary evidence to support the accuracy of her contention that she was no longer a Muslim.'

59. With respect, the holding in the majority judgment of the Court of Appeal completely disregarded the fact that the Appellant made several applications for a change of name. Surely those applications should be regarded as part of a continuing act on the part of the Appellant. To confine the matter to the third application only is completely ignoring the history of the plight of the Appellant in her dealings with NRD. I am inclined to agree with the submission that 'if the NRD had correctly acted on the Appellant's choice of religion for the replacement I.C. in October 1999, and had not rejected it on the ground that she

had not produced an apostatisation order, there would have been no necessity for the third application to correct the particulars as regards entry of "religion"'.

60. In fact the 'compartmentalized approach' adopted by the majority judgment of the Court of Appeal led it to distinguish the present appeal from the unreported case of ***Ismail bin Suppiah v Ketua Pengarah Pendaftaran Negara (R–1–24–31 of 1995***. In the majority judgment the case of ***Ismail bin Suppiah*** was ruled to be only concerned with change of name whereas in the present appeal the central issue relates to removal of the word 'Islam' from the identity card of the Appellant. With respect I am unable to agree with the distinction made. Such an approach could only be correct if the history of the present appeal is omitted. Otherwise both cases are premised on the same reason.

61. Fourth, there is justification to say that NRD being the decision-maker 'had misunderstood the provision under which he had to act and denied relief to the Appellant. The decision-maker

cannot by misconstruing the provision decide on something that is not provided for. The decision-maker is confined to the matters prescribed for in the statute and not to "*base their decision on some matter which is not prescribed for*".' (See: ***Anisminic Ltd v Foreign Compensation Tribunal [1969] 1 All ER 208***). I would say that there was an abuse of power on the part of NRD when it failed to take into consideration a legally relevant factor, namely the statutory declaration and the documents submitted by the Appellant, preferring its policy of requiring a certificate of apostasy from the Federal Territory Syariah Court which in the first place is not stipulated in the Regulations 4 and 14 thereby taking legally irrelevant factor into consideration in making a decision. (See also: ***R v Inner London Education Authority ex parte Westminster City Council [1986] 1 All ER 19; Breen v Amalgamated Engineering Union [1971] 1 QB 175; Pengarah Tanah Dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd*** [supra]).

62. In the majority judgment it was said that the policy adopted by NRD was reasonable and that it was justified for NRD to request for a certificate of apostasy since '"*renunciation of Islam is a question of Islamic law*" and that it "*is not within the jurisdiction of the NRD and that the NRD is not equipped or qualified to decide*"'.

63. With respect I would say that the majority judgment erred in considering an issue which should not have been there in the first place, namely affirming the insistence by NRD for a certificate of apostasy when the Appellant had in fact met all the requirements stipulated in Regulations 4 and 14.

64. Further, the conclusion in the majority judgment that the impugned policy adopted by NRD was reasonable within the test of ***Wednesbury Corporation v Ministry of Housing (1966) 2 QB 275*** has unfortunately missed one cardinal principle. The implementation of the policy has a bearing on the Appellant's fundamental constitutional right to freedom of religion under Article 11 of the Constitution. Being a

constitutional issue it must be given priority and independent of any determination of the Wednesbury reasonableness. A perceived reasonable policy could well infringe a constitutional right. Hence, before it can be said that a policy is reasonable within the test of Wednesbury its constitutionality must be first considered. The majority judgment failed to carry out such an exercise before coming to its conclusion on the NRD policy.

65. Another aspect of the majority judgment which, with respect, I am inclined to disagree is its holding that the Director General of NRD was right in stating that apostasy is exclusively within the realm of the Syariah Court. In my view apostasy involves complex questions of constitutional importance especially when some States in Malaysia have enacted legislations to criminalize it which in turn raises the question involving federal-state division of legislative powers. It therefore entails consideration of Articles 5(1), 3(4), 11(1), 8(2), 10(1)(a), 10(1)(e), 12(3) and the Ninth Schedule of the Constitution. Since constitutional issues are involved especially on the question of fundamental rights as enshrined in the Constitution

it is of critical importance that the civil superior courts should not decline jurisdiction by merely citing Article 121(1A). In my view the said Article only protects the Syariah Court in matters within their jurisdiction which does not include the interpretation of the provisions of the Constitution. Hence when jurisdictional issues arise civil courts are not required to abdicate their constitutional function. Legislations criminalizing apostasy or limiting the scope of the provisions of the fundamental liberties as enshrined in the Constitution are constitutional issues in nature which only the civil courts have jurisdiction to determine.

66. Fifth, it is worthy to note that while a public authority is allowed to adopt departmental policies and to broadcast them to all concerned, it must not allow its policies to override its statutory duty to act in the public interest. A public authority must also have the legal authority when it wishes to impose a substantive or procedural requirement to those who come before it. Administrative powers cannot be utilized to achieve collateral or unauthorized purposes no matter how noble or well-intended these purposes or policies might be. (See: ***Pyx Granite v***

Ministry of Housing [1959] 3 All ER 1; Padfield v Minister of Agriculture [1968] 1 All ER 694).

67. The consequence of the approval by the majority judgment of the Court of Appeal to the policy adopted by NRD is to condone the unlawful delegation of authority by NRD to some other third body when it is not sanctioned by the law. (See: ***Jackson Stanfield v Butterworth (1948) 2 All ER 358; Lavender v Minister of Housing (1970) 3 All ER 871; Isman bin Osman v Govt. of Malaysia [1973] 2 MLJ 143***). In fact I think the majority judgment has permitted NRD to extinguish its statutory discretion by a self-imposed fetter.

68. Sixth, by voluntarily abdicating its discretionary power under a federal law to an outside religious body NRD had acted with irrationality in the sense as described in ***CCSU*** case (supra). I would say that NRD had unlawfully agreed to act under the dictation of another. It is well accepted in administrative law that a decision maker or body is entitled to consult and seek advice from any source, provided it retains the ultimate authority to

make the final decision. It must retain its power to act independently in pursuance of the statutory purpose of the law. (See: ***De Smith, Judicial Review of Administrative Action***, *4th Edition at page 309*). Indeed a public authority is obliged to make its own decision and not act on the dictates of another. (See: ***Bread Manufacturer of New South Wales v Evans (1986) 56 ALJR 89; Commissioner of Police v Gordhandas Banji AIR 1952 SC 16; P Patto v Chief Police Officer, Perak & Ors [1986] 2 MLJ 204***).

69. Seventh, in the present appeal the insistence by NRD for a certificate of apostasy from the Federal Territory Syariah Court or any Islamic Authority was not only illegal but unreasonable. This is because under the applicable law, the Syariah Court in the Federal Territory has no statutory power to adjudicate on the issue of apostasy. It is trite law that jurisdiction must come from the law and cannot be assumed. Thus the insistence was unreasonable for it required the performance of an act that was almost impossible to perform. (See: ***Wednesbury Corporation***

v Ministry of Housing [supra]; ***Oriental Insurance Co Ltd & Anor v Minister of Finance [1992] 2 MLJ 776***).

70. Another aspect of the unreasonableness of the policy of NRD is in its consequence if followed. In some States in Malaysia apostasy is a criminal offence. Hence, to expect the Appellant to apply for a certificate of apostasy when to do so would likely expose her to a range of offences under the Islamic law is in my view unreasonable for its means the Appellant is made to self-incriminate.

71. Eighth, it is a settled principle in administrative law that a public authority must not act mechanically. It must consider each case on its own merits. It must retain the discretion to depart from its policy whenever public interest so demands. (See: ***R v Windsor Licensing ex parte Hodes (1983) 2 All ER 551***). However in the present appeal it was shown by the Appellant that her repeated applications were rejected across the counter in a mechanical way by giving effect to the extra-legal policy.

72. Ninth, I would also say that in rejecting the application of the Appellant without giving her a fair hearing and assigning reasons for the decision, NRD had failed to observe the principles of natural justice, a procedural impropriety that could be a basis to nullify any judicial, administrative, departmental or executive decision. (See: ***J P Berthelsen v Director General Immigration [1987] 1MLJ 134***). The need becomes critical when the constitutional right of the Appellant under Article 11(1) is involved, that her legitimate expectations were raised when her name change was allowed, that she had spent many years to try to resolve her problem with NRD including her compliance with an advice given by a staff of NRD and that it was the inclusion of the word 'Islam' in her new identity card that led her to seek for judicial review.

73. Tenth, there is also the duty of NRD to act fairly towards the Appellant. In appropriate cases there may be a duty to act fairly prior to the making of delegated legislations. (See: ***R v Secretary for Health ex parte United States Tobacco International Inc. (1991) 3 WLR 529***). In the case of the

Appellant there was no challenge to her assertion that at the time she was advised to make the third application she was not informed or given any notice that Regulation 4 would be amended. In my view there is therefore a reasonable suspicion that Regulation 4, although formulated in 2000, was deliberately amended retrospectively to 1.10.1999 in order to target and to prejudice the third application of the Appellant made on 23.10.1999. The duty to act fairly and thus observing the rules of natural justice was not done by NRD. The least that NRD could have done was to notify the Appellant of the impending amendment when advising her to submit the third application as only NRD would have known of the impending amendment which had definite impact to the third application of the Appellant. In my view NRD had failed to comply with one aspect of the rules of natural justice.

74. Thus, for the foregoing reasons my answers to the first two Questions are therefore in the negative.

Question 3

75. This third Question is focused on this Court's decision in ***Soon Singh a/l Bikar Singh v Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor (1999) 1 MLJ 489*** where this Court was of the opinion that 'the jurisdiction of the syariah courts to deal with the conversion out of Islam, although not expressly provided in the State Enactments, can be read into them by implication derived from the provisions concerning conversion into Islam. It is a general rule of construction that if the meaning of a statute is not plain, it is permissible in certain cases to have recourse to a construction by implication and the court may draw inferences or supply the obvious omissions…. altering the jurisdiction of courts of law, which in the words of Tindal CJ in Albon v Pyke (1842) 4 M & G 421 at p 424: 'the general rule undoubtedly is, that the jurisdiction of the superior courts is not taken away, except by express words or necessary implication'. In the instant case, in our opinion, the general rule of construction applies and the court can have recourse to a construction by implication. Implication may arise from the language used, from the context, or from the

application of some external rule. They are of equal force, whatever their derivation (Bennion's Statutory Interpretation (2nd Ed) p 362). It is quite clear to us that the legislative purpose of the State Enactments and the Act is to provide a law concerning the enforcement and administration of Islamic law, the constitution and organization of the syariah courts and related matters. Therefore, when jurisdiction is expressly conferred on the syariah courts to adjudicate on matters relating to conversion to Islam, in our opinion, it is logical that matters concerning conversion out of Islam (apostasy) could be read as necessarily implied in and falling within the jurisdiction of the syariah courts. One reason we can think of is that the determination of a Muslim convert's conversion out of Islam involves inquiring into the validity of his purported renunciation of Islam under Islamic law in accordance with hukum syarak (Dalip Kaur). As in the case of conversion to Islam, certain requirements must be complied with under hukum syarak for a conversion out of Islam to be valid, which only the syariah courts are the experts and appropriate to adjudicate. In short, it does seem inevitable that since matters on conversion to Islam

come under the jurisdiction of the syariah courts, by implication conversion out of Islam should also fall under the jurisdiction of the same courts.'

76. But the final conclusion in the above case was preceded by this statement:

> 'In this regard, we share the view of Hashim Yeop A Sani CJ (Malaya) in Dalip Kaur that 'clear provisions should be incorporated in all State Enactments to avoid difficulties of interpretation by the civil courts,' particularly in view of the new cl (1A) of art 121 of the Constitution which as from 10 June 1988 had taken away the jurisdiction of the civil courts in respect of matters within the jurisdiction of the syariah courts.'

77. I am aware that ***Soon Singh*** case was also decided by this Court. I also noted that their Lordships in that case were well aware of the views expressed in at least two other cases by the learned Judges of this Court. (See: ***Dalip Kaur v Pegawai***

Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor [1992] 1 MLJ 1 *and* ***Mohamed Habibullah bin Mahmood v Faridah bte Dato Talib [1992] 2 MLJ 793***). But their Lordships preferred to follow the reasoning of the High Court in ***Md Hakim Lee v Majlis Agama Islam Wilayah Persekutuan, Kuala Lumpur [1998] 1 MLJ 681***.

78. In view of the approach taken by their Lordships in ***Soon Singh*** case I think there is nothing to prevent this Court hearing this present appeal to reconsider the views expressed in those cases referred to above and the cases in the High Courts.

79. In ***Ng Wan Chan v Majlis Ugama Islam Wilayah Persekutuan & Anor (No 2) [1991] 3 MLJ 487*** Eusof Chin J (as he then was) who incidentally was also in the panel that decided ***Soon Singh*** case said this at page 489:

> '*The Federal Constitution, Ninth Schedule List II — State List, specifically gives powers to state legislatures to*

constitute Muslim courts and when constituted, 'shall have jurisdiction only over persons professing the Muslim religion and in respect only of any of the matter included in this paragraph'.

Therefore, a syariah court derives its jurisdiction under a state law, (for Federal Territories — Act of Parliament) over any matter specified in the State List under the Ninth Schedule of the Federal Constitution.

If state law does not confer on the syariah court any jurisdiction to deal with any matter stated in the State List, the syariah court is precluded from dealing with the matter. Jurisdiction cannot be derived by implication.'

80. And in ***Lim Chan Seng v Pengarah Jabatan Agama Islam Pulau Pinang [1996] 3 CLJ 231*** the learned High Court Judge was of the view that Article 121(1A) by itself did not automatically confer jurisdiction on the syariah court, even on matters that fell under the State List of the Ninth Schedule. It

was the view of the learned Judge that the state legislature must first act upon the power given it by Articles 74 and 77 of the Constitution and the State List and thus enact laws conferring the jurisdiction.

81. In ***Dalip Kaur*** case his Lordship Hashim Yeop A Sani CJ (Malaya) expressed his view thus:

> '*We are of the view that clear provisions should be incorporated in all the state Enactments to avoid difficulties of interpretation by the civil courts. This is particularly important in view of the amendment to art 121 of the Federal Constitution made by Act A704 of 1988. The new cl (1A) of art 121 of the Constitution effective from 10 June 1988 has taken away the jurisdiction of the civil courts in respect of matters within the jurisdiction of the syariah courts. But that clause does not take away the jurisdiction of the civil court to interpret any written laws of the states enacted for the administration of Muslim law….If there are clear provisions in the State Enactment,*

the task of the civil court is made easier when it is asked to make a declaration relating to the status of a person whether such person is or is not a Muslim under the Enactment. A clear provision can, for example, be in the form of a provision imposing obligation on the relevant authority to keep and maintain a register of converts who have executed a deed poll renouncing Islam.'

82. His Lordship Harun Hashim SCJ in ***Mohamed Habibullah bin Mahmood v Faridah bte Dato Talib*** [supra] at page 800 stated this:

'*I am therefore of the opinion that when there is a challenge to jurisdiction, as here, the correct approach is to firstly see whether the syariah court has jurisdiction and not whether the state legislature has power to enact the law conferring jurisdiction on the syariah court.*'

83. The views expressed in the last two cases decided by the apex court of this country came from eminent Judges of our time

which should therefore be given the weight they deserved. And I can appreciate the approach adopted by the learned High Court Judges in ***Ng Wan Chan*** and ***Lim Chan Seng***.

84. Hence, I am in agreement with those views in that jurisdiction must be express and not implied. The doctrine of implied powers must be limited to those matters that are incidental to a power already conferred or matters that are necessary for the performance of a legal grant. And in the matters of fundamental rights there must be as far as possible be express authorization for curtailment or violation of fundamental freedoms. No court or authority should be easily allowed to have implied powers to curtail rights constitutionally granted.

85. In my view to rely on implied power as a source of jurisdiction would set an unhealthy trend. For instance under List 1, Item 15 Schedule 9 of the Constitution, Parliament is authorized to pass laws relating to 'social security'. To date no law has been passed governing minimum wages in this country. If the implied jurisdiction doctrine is adopted there is nothing to prevent the

Industrial Court from assuming jurisdiction relying on Item 15 and thus adjudicating on matters pertaining to minimum wages. If that were to occur then all that is required will be a list of what Parliament or the State Assembly can enact and that will entitle the courts to have jurisdiction on such matters irrespective of whether there is any specific legislation enacted.

86. I am therefore inclined not to follow the reasoning in ***Soon Singh*** case. My answer to Question 3 is therefore in the negative.

Other Issues

87. I have indicated earlier on in this Judgment that learned counsel who submitted before us during the hearing were given the opportunity to submit on other issues other then those agreed upon by the Appellant and the Respondents.

88. I have given those points due consideration. However, I am of the view that on the facts and circumstances of this appeal

particularly in the manner in which it was argued by the parties earlier on I need not have to make any definite findings on them in order to come to my final conclusion. Perhaps they can be deliberated on another occasion.

Conclusion

89. For the reasons that I have given above my answers to the three Questions are all in the negative. Accordingly, I am satisfied that the Appellant has succeeded in establishing the merits of her appeal. I would therefore allow her appeal and grant her the declaration on those terms as she prayed for in that she is entitled to have an NRIC (Identity Card) in which the word 'Islam' does not appear. I would therefore direct the Director General to forthwith comply with the terms of the said declaration. Costs to the Appellant here and below.

Signed.
(DATO' RICHARD MALANJUM)
Chief Judge Of Sabah And Sarawak

Date: 30th May, 2007

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