DALAM MAHKAMAH RAYUAN MALAYSIA

(BIDANG KUASA RAYUAN)

RAYUAN SIVIL NO.: B-01(A)-468-07/2018

ANTARA

1. KETUA PEGAWAI PENGUATKUASA AGAMA

2. PEGAWAI PENYIASAT, JABATAN AGAMA ISLAM SELANGOR

3. JABATAN AGAMA ISLAM SELANGOR

4. KETUA PENDAKWA SYARIE

5. KERAJAAN NEGERI SELANGOR PERAYU-PERAYU

DAN

MAQSOOD AHMAD & 38 LAGI RESPONDEN-RESPONDEN

(DIDENGAR BERSAMA)

DALAM MAHKAMAH RAYUAN MALAYSIA

(BIDANG KUASA RAYUAN)

RAYUAN SIVIL NO.: B-01(A)-513-08/2018

ANTARA

Maqsood Ahmad & 38 Lagi … Perayu-Perayu

DAN

1. Ketua Pegawai Penguatkuasa Agama

2. Pegawai Penyiasat, Jabatan Agama Islam Selangor

3. Jabatan Agama Islam Selangor

4. Ketua Pendakwa Syarie

5. Kerajaan Negeri Selangor …Respondent-Responden

[Dalam Mahkamah Tinggi Malaya Di Shah Alam
Dalam Negeri Selangor
Permohonan Semakan Kehakiman No. 25-56-10/2015

Dalam perkara mengenai satu permohonan oleh Maqsood Ahmad dan 38 yang lain pengikut ajaran Ahmadiah/Qadiani yang ditangkap dan ditahan oleh pegawai-pegawai penguatkuasa Jabatan Agama Islam Selangor untuk antara lainnya, deklarasi, certiorari dan mandamus berkenaan penyiasatan, pendakwaan yang dicadangkan dan pendakwaan Pemohon-pemohon di Mahkamah Syariah;

Dan

Dalam Perkara Enakmen Pentadbiran Agama Islam (Negeri Selangor) 2003, Enakmen Jenayah Syariah (Selangor)

1995 dan Enakmen Tatacara Jenayah Syariah (Negeri Selangor) 2003;

Dan

Dalam Perkara Fasal-Fasal 5, 8 dan 11 dan Senarai Negeri, Senarai II, Jadual 9, Perlembagaan Persekutuan;

Dan

Dalam Perkara Penetapan di bawah seksyen 41 Enakmen Pentadbiran Hukum Syarak bagi Negeri Selangor Bertarikh 11.4.1977 [JPM (U) W.P. 0172/6/1; PN.(PU2) 197] yang diwartakan sebagai P.U. (B) 279 dan “Fatwa tentang ajaran Ahmadiah/Qadiani di bawah Enakmen Pentadbiran Perundangan Islam 1989” bertarikh 22.6.1998 [JAI. Sel 8069/2; PU. Sel. AGM/0007. Jld 2] yang diwartakan sebagai Sel. P.U. 15 pada 24.9.1998 (Jil. 51, No.20, Tambahan No.6);

Dan

Dalam Perkara menurut Aturan 53 Kaedah-Kaedah Mahkamah 2012;

Dan

Dalam Perkara menurut seksyen 25 dan perenggan 1, Jadual kepada Akta Mahkamah Kehakiman 1964.

Antara

Maqsood Ahmad & 38 Lagi …. Pemohon

Dan

Ketua Pegawai Penguatkuasa Agama … Responden-Responden]

CORAM

BADARIAH SAHAMID, JCA
ZABARIAH MOHD. YUSOF, JCA (now FCJ)
NOR BEE ARIFFIN, JCA

JUDGMENT OF THE COURT

INTRODUCTION

[1] There are before us two related appeals arising from the same decision of the High Court at Shah Alam. Appeal number B-01(A)-468-07/2018 ('**Appeal 468**') is an appeal by the Selangor State Government and religious authorities against the substantive decision in a judicial review application in which the High Court granted the Applicants the various reliefs they sought against the Respondents. Appeal number B-01(A)-513-08/2018 ('**Appeal 513**') is a cross-appeal by the Respondents, who despite having been granted the remedies they primarily sought, disagree with the High Court's decision that it is the Syariah Courts and not the Magistrate's Courts who have jurisdiction to try offences under section 97(2) of the **Administration of the Religion of Islam (State of Selangor) Enactment 2003** ('**ARIE 2003**').

[2] For ease of reference, we shall refer to parties in accordance with their respective positions in Appeal 468. The learned High Court Judge below will be referred to as 'the learned Judge'.

[3] At the outset of this judgment we recall the wise words of Zulkefli Ahmad Makinudin, PCA in ***Indira Gandhi Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals*** **[2018] 1 MLJ 545**, at p.556 that*, " in deciding the issue before us, as judges we are not swayed by our own religious convictions and sentiments".* In upholding the Rule of Law, we now decide these appeals strictly on the basis of the Federal Constitution, relevant statutes and judicial precedent.

The Core Issue: Who is a Person 'Professing the Religion of Islam'?

[4] The core issue for consideration in these Appeals is essentially this: who is a person 'professing the religion of Islam'? This question carries both legal and religious ramifications. From a strictly religious perspective, the matter is best reserved for qualified Islamic scholars to determine in accordance with religious tenets and principles. We do not propose to view the matter from a spiritual perspective – which is a matter beyond our expertise and jurisdiction. It is not for us, a civil court, to decide who is and who is not a Muslim, by belief. Our focus, we must

emphasise at the outset, is to determine who is a person' professing the religion of Islam' in accordance with the Federal Constitution, relevant State Enactments and judicial precedent.

[5] It is an indisputable fact that our Federal Constitution demarcates between two distinct legal systems: the civil legal system, and the Syariah system. **Article 121(1A) of the Federal Constitution** recognises the power of the Syariah Courts when it exercises its power within its jurisdiction. Article 121(1A) expressly provides that the High Courts shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts. Thus, the consideration of who is a person 'professing the religion of Islam', must necessarily be examined in the context of the complex interplay between the two legal systems and the nation's Constitutional and legal history.

[6] The second issue which is related to the core issue abovementioned is the issue of evidence of religious identity, and in particular, in respect of the Malaysian Respondents, the conclusiveness of the religious identity stated in their respective Identification Cards (MyKad) as evidence of a person 'professing the religion of Islam'. We note that this issue was not raised at the High Court and was therefore not addressed by the learned Judge's Judgment. However, the issue was canvassed by learned

counsesl before us. We are of the view that this is a pertinent issue in the context of the jurisdiction and powers of the Appellants to investigate at least the Malaysian Respondents for Syariah offences under the ARIE 2003.

[7] We begin with a narration of the background facts, derived from the learned Judge's Judgment, with suitable modifications.

BACKGROUND FACTS

[8] The 39 Respondents claim to be members of the Ahmadiyya Muslim Jama'at religious group ('**Ahmadiyya**'). The Respondents had relocated their new base from Kampung Baru to Kampung Nakhoda, Batu Caves, where they have been carrying out their religious practices, including prayers within the compound of their base which goes by the name of '*Bait-us-Salam*'. On 24.4.2009, the Respondents received a letter from Majlis Agama Islam Selangor ('**MAIS**') stating that the Respondents could not use the '*Bait-us-Salam'* as a place of worship or to perform any prayers without prior written approval from MAIS ('**the Prohibitory Notice**'). This was done ostensibly pursuant to section 97 of the ARIE 2003.

[9] The learned Judge noted that the Prohibitory Notice was sent to the Ahmadiyya despite there being erected, by the Majlis Perbandaran Selayang sometime in 2005, with approval from the 5th Appellant, three signboards in front and to the side of '*Bait-us -Salam'*, identifying it as '*Bait-us-Salam'* and a further three signboards around Kampung Nakhoda, Batu Caves, with the words, "*Qadiani Bukan Agama Islam*" – a phrase stating that the Ahmadiyya belief is not Islam.

[10] Not wanting any confrontation with the authorities, the Ahmadiyya stopped using the '*Bait-us- Salam'* as a place of worship and relocated themselves to rented premises at No. 16-2, Dolomite Park Avenue, Jalan Batu Caves, 68100 Selangor ('**the Premises**') solely for prayer and worship purposes.

[11] On 11.4.2014 (Friday) at around 2.00pm, officers of the 3rd Appellant, Jabatan Agama Islam Selangor ('**JAIS**'), raided the Premises on the grounds that the Respondents were using those premises to perform their prayers. Such use was purportedly in contravention of section 97 of ARIE 2003 which provision reads as follows:

> "***Restriction on establishment of mosques and penalty***

(1) No person shall, without the permission in writing of the Majlis, erect any building to be used or use or cause to be used any building for purposes which may only be carried on in or by a mosque.

(2) Any person who contravene [sic] the provisions of subsection (1) shall be guilty of an offence and shall on conviction be liable to fine not exceeding three thousand ringgit or to imprisonment for a term not exceeding one year or to both."

[12] A plain reading of the provision suggests that Muslims are prohibited, without prior written approval, from erecting buildings with the aim of using them or causing them to be used for religious activities. A contravention of the above provision attracts penal sanctions.

[13] Upon the raid, the following events happened:

(i) The Respondents were informed that they had not obtained written permission to use the Premises for purposes which may only be carried on, in or by a mosque, and thus were in violation of section 97 of the ARIE 2003;

(ii) All 39 Respondents (36 of whom are adults and the other 3, minors) were present at the Premises and were arrested, detained and informed of the possibility of prosecution in the Syariah Court; and

(iii) The 1st Appellant issued the Respondents with Letters of Agreement and Bond ('**Bond'**) compelling them to appear before the Syariah court to answer to the charges against them.

Note: Not every Respondent is a Malaysian citizen. Some of them are overseas nationals living in Malaysia as UNHCR refugees. The respective nationality and religious statuses of the Respondents will be addressed in the appropriate portion of this judgment.

[14] The Appellants informed the Respondents that the raid was conducted in suspected violation of section 97 of the ARIE 2003. The Respondents countered by arguing that they were members of the Ahmadiyya and the Premises were being used for the purposes of their worship. The MAIS responded by issuing the Respondents with the Bond.

[15] On 10.7.2014, The Respondents filed an application for judicial review before the High Court of Malaya at Kuala Lumpur in respect of the

issuance of the Letters of Agreement and Bond to each of them. On 14.8.2014, leave to apply for judicial review was granted by the High Court at Kuala Lumpur. On 19.5.2015 however, the proceedings were transferred to the High Court of Malaya at Shah Alam.

[16] On 29.9.2017, the High Court had transmitted two Constitutional Questions to the Federal Court by way of a special case under section 84 of the Courts of Judicature Act 1964 ('**CJA**'). However, on 26.3.2018, the Federal Court remitted the said constitutional reference to the High Court on the view that the High Court was seized of the jurisdiction to determine and dispose them. This the High Court did thereby giving rise to the learned Judge's Judgment.

PROCEEDINGS BEFORE THE HIGH COURT

Application for Judicial Review

[17] Principally, the two questions ('**Questions**') framed for determination in the application for judicial review are as follows:

"***Question 1***

In light of Item 9 (read together with the sub-matter "mosques or any Islamic public places of worship" in Item 1) of the State List in the Federal Constitution and section 2 of the Syariah Courts (Criminal Jurisdiction) Act 1965, whether the Syariah courts in the State of Selangor do not have jurisdiction in respect of the offence in section 97(2) of the Administration of the Religion of Islam (State of Selangor) Enactment 2003.

Question 2

If the above question is answered in the negative: in light of 'Fatwa Tentang Ajaran Ahmadiah/Qadiani' gazetted as Jil. 51, No. 20, Sel. P.U. 15 on 24-9-1998, 'Pindaan Fatwa Tentang Ajaran Ahmadiah/Qadiani' gazetted as Jil. 53, No. 17, Sel. P.U. 36 on 17-8-2000 and Article 11 (read together with item 1 of the State List) of the Federal Constitution, whether the Syariah courts in the State of Selangor do not have jurisdiction over the members of the Ahmadiyya Muslim Jama'at religious group (translated in English as the 'Ahmadiyya Muslim Community') including the Applicants)."

[18] The Respondents' application for judicial review sought the following prayers for relief:

"*(a) A Declaration that pursuant to section 49 of the Administration of the Religion of Islam (State of Selangor) Enactment 2003 read together with the Ruling under section 41 of the Administration of Muslim Law Enactment for the State of Selangor dated 11.4.1997 [JPM (U) W.P. 0172/6/1; PN. (PU^2) 197] gazetted as P.U. (B) 279 and 'Fatwa tentang ajaran Ahmadiah/Qadiani di bawah Enakmen Pentadbiran Perundangan Islam 1989' dated 22.6.1998 [JAI. Sel 8069/2: PU. Sel AGM/0007. Jld 2] gazetted as Sel. P.U. 15 on 24.9.1998 (Vol. 51, No. 2, Addition No. 6), the Appellants have no jurisdiction to investigate and/or to prosecute the Respondents or each of them.*

(b) A Declaration that the actions and/or decisions of the Appellants and their servants, officers and/or agents to investigate and/or institute prosecutions and/or to prosecute the Respondents or each one of them contravenes the Respondents rights under Articles 5 and/or 8 and/or 11 and/or Item 1, List II, Schedule 9 of the Federal Constitution and/or section 49 of the Administration of the Religion of Islam (State of Selangor) Enactment 2003.

(c) An order in the nature of certiorari against the decisions of the Appellants and their servants, officers and/or agents to conduct investigations or continue investigations and/or to continue the intended

prosecution and/or to prosecute the Applicants or each of them.

(d) An order in the nature of certiorari against the decision of the 1st, 2nd and 3rd Appellants to issue the 'Surat Perjanjian dan Jaminan kepada Ketua Pegawai Penguatkuasaan Agama' respectively dated 11.4.2014 to the Respondent No. 11; 14.2014 to Respondent No. 33; 15.4.2014 Respondents No. 1, 2, 3, 4, 7, 9, 14, 19, 20, 35 and 39; 16.4.2014 to Respondents No. 10, 15, 18, 21, 22, 23, 25, 26, 27, 29, 34, 36 and 38; and 17.4.2014 to Respondents No. 5, 6, 8, 12, 13, 16, 17, 24, 28, 30, 31, 32 and 37.

(e) An order in the nature of mandamus against the Appellants to enforce the Ruling under section 41 of the Administration of Muslim Law Enactment for the State of Selangor dated 11.4.1977 [JPM (U) W.P. 0172/6/1; PN. (PU^2) 197] gazetted as P.U. (B) 279 and 'Fatwa tentang ajaran Ahmadiah/Qadiani di bawah Enakmen Pentadbiran Perundangan Islam 1989' dated 22.6.1998 [JAI. Sel 8069/2: PU. Sel AGM/0007. Jld 2] gazetted as Sel. P.U. 15 on 24.9.1998 (Vol. 51, No. 20, Addition No. 6) as against the investigation and/or prosecution or intended prosecution of the Respondents' cases and further to cancel and/or cease investigations and/or prosecution or any intended prosecution.

(f) An order in the nature of prohibition against the 1st, 2nd and 3rd Appellants and their servants, officers and/or agents from conducting investigations or continuing investigations against the Respondents or each of them.

(g) In the alternative, an order in the nature of prohibition against the 1st, 2nd and 3rd Appellants and their servants, officers and/or agents from conducting investigations or continuing investigations against the Respondents or each of them if the Respondents or each of them procures proof or evidence to the 1st, 2nd, and 4th Appellants that they are followers of the teachings of the Ahmadiah/Qadiani.

(h) An order in the nature of prohibition against the 1st, 2nd and 3rd Appellants and their servants, officers and/or agents from taking any steps to prosecute and/or continue with any intended prosecution against and/or to prosecute the Respondents or each of them.

(i) A declaration that all persons (whether citizens or non-citizens of Malaysia) professing the beliefs and doctrines of the Jemaat Ahmadiyah Muslim or Ahmadiyya Muslim Community are entitled to profess and practise their religion in the State of Selangor, and all laws enacted pursuant to the Ninth Schedule List II Item I of the Federal Constitution in the State of

Selangor are not applicable and of no effect to such persons."

THE 1998 AND 2000 FATWAS

[19] The primary grounds on which the Respondents sought the above prayers are the 1998 and 2000 Fatwas which in effect declare the status of Ahmadiyya as 'non-Muslims', and consequentially rendering them exempt from the jurisdiction and reach both of the Selangor Syariah Courts and ARIE 2003.

[20] At this juncture, it is pertinent to narrate the history and legal effect of the Two Fatwas. Sometime in 1953, there was a trial before His Royal Highness the Sultan of Selangor to determine the status of the Ahmadiyya as Muslims. Upon completion of the trial, HRH the Sultan concluded on the evidence that the Ahmadiyya are not, for all intents and purposes, Muslims. Following the royal decree, the then Honourable Prime Minister of Malaysia, Tunku Abdul Rahman earmarked several plots of land for the Ahmadiyya with the view of enabling their community to profess and practise their religion in peace. These lands were originally situated in Kampung Baru, Kuala Lumpur but the Respondents subsequently moved to Kampung Nakhoda and later to the Premises.

[21] Subsequently, the State of Selangor gazetted the following religious edicts known as 'fatwa' ('fatwas' in plural) denouncing the Ahmadiyya as non-Muslims: (gazetted as Jil. 51, No. 20, Sel. P.U. 15 on 24-9-1998, ('**the 1998 Fatwa**').

> **"ADMINSTRATION OF ISLAMIC LAW ENACTMENT 1989**
>
> *FATWA ON AJARAN AHMADIAH/QADIANI*'
>
> In exercise of the powers conferred by section 31(1) and section 32 of the Administration of Islamic Law Enactment 1989 the Mufti for the State of Selangor, after discussions with the Islamic Legal Consultative Committee, confirms and adopts the result of 1975 Law Committee as specified in the Schedule.
>
> **JADUAL/SCHEDULE**
>
> 1. Ajaran Qadianiadalah satu ajaran yang menyalahi dari ajaran Islam yang sebenarnya. Pengikut-pengikut ajaran Qadiani ini telah dihukumkan kafir oleh Ulamak-ulamak Islam serata dunia.
>
> 2. Jabatan Agama Islam Selangor telah menghukumkan kafir kepada pengikut-pengikut Qadiani yang berpusat di Batu 20 Jeram, Kuala Selangor pada 15.12.1953

setelah mereka dibicarakan di Istana Kuala Lumpur di hadapan D.Y.M.M. Sultan Selangor serta beberapa orang Alim Ulamak di Negeri Selangor ini. Setiap orang yang telah menjadi penganut ajaran Qadiani adalah telah murtad- (keluar dari Agama Islam). Maka wajiblah dituntut mereka bertaubat kembali kepada Islam dengan mengikrar dua kalimah syahadat.

3. Antara ciri-ciri ajaran itu ialah:

(a) Mirza Ghulam Ahmad mendakwa:

(i) Sebagai Nabi yang menerima wahyu.
(ii) Imam Mahadi.
(iii) Isa Al Masih.
(iv) Mempunyai mukjizat.
(v) Para Nabi menyaksikan dirinya.
(vi) Malaikat sebagai pancaindera tuhan.
(vii) Nabi Isa A.S. telah mati dan kuburnya di Srinagar.

(b) Ibadah haji di Qadian, India
(c) Menafikan jihad.
(d) Mengubah ayat-ayat Quran.

4. Orang-orang Islam adalah dilarang menjual, mengedar, membeli, memiliki atau memberi ceramah tentang isi kandungan buku-buku berikut:

(a) "Invitation to Ahmadiyah" yang dikarang oleh Hazrat Hj. Mirza Bashir-ud-din Ahmad (Khalifatul Masih II)

(b) Penawar Racun Fitnah Terhadap Ahmadiyyah yang ditulis oleh Pengurus Besar Jema'at Ahmadiah.

(c) Alam Sebagai Saksi yang dikarang oleh Mohamad Zain bin Hassan.

(d) "The Holy Quran with English Translation and Commentary' (Vol.II, Part I) yang dikarang oleh M. Mas'ud Ahmad."

[22] Pursuant to the 1998 Fatwa, the Ahmadiyya were denounced as non-Muslims ('*kafir*') and all followers of the Ahmadiyya are considered as apostates ('*murtad-keluar dari Agama Islam').*

[23] In 2000, the State of Selangor gazetted another Fatwa ('**the 2000 Fatwa**') which amended the 1998 Fatwa by the addition of paragraph 2A, as follows: ('*Pindaan Fatwa Tentang Ajaran Ahmadiah/Qadiani*' gazetted as Jil. 53, No. 17, Sel. P.U. 36 on 17-8-2000.

"ADMINSTRATION OF ISLAMIC LAW ENACTMENT 1989

AMENDMENT OF FATWA ON AJARAN AHMADIAH/QADIANI

In exercise of the powers conferred by subsection 31(1), and section 32 of the Administration of Islamic Law Enactment 1989, the Mufti for the State of Selangor, after discussions with the Islamic Legal Consultative Committee, amends the fatwa published on 24 th of September 1988 by inserting after paragraph 2 in the Schedule the following paragraph;

JADUAL/SCHEDULE

“2A. Memandangkan mana- mana orang yang telah menganuti ajaran Qadiani telah menjadi murtad (keluar dari Agama Islam), akibatnya dari segi Hukum syara’ dan Undang- Undang Sivil ialah-

(a) Perkahwinan orang tersebut boleh dibubarkan dengan pengesahan Mahkamah Syariah mengikut seksyen 46 Enakmen Undang- Undang Keluarga Islam Selangor 1984;

(b) Orang tersebut tidak boleh menjadi wali dalam akad nikah anak perempuannya;

(c) Orang tersebut tidak boleh mewarisi harta peninggalan kerabat-kerabat Muslimnya; dan

(d) Orang tersebut tidak berhak untuk mendapatkan apa-apa keistimewaan yang diperuntukkan kepada orang Melayu di bawah Perlembagaan Persekutuan dan Undang- Undang Negeri dan sekiranya hak-hak tersebut telah diberi, dinikmati atau diperolehi oleh orang tersebut,ia hendaklah terhenti dari berkuatkuasa dan boleh dilucut, ditarik balik dan dibatalkan, mengikut mana berkenaan, oleh pihak berkuasa yang berkaitan."

[24] The 2000 Fatwa amended the 1998 Fatwa by the addition of the legal implications on an Ahmadiyya which are essentially these (as regards the application of Islamic law): the marriage of an Ahmadiyya may be dissolved pursuant to section 46 of the Selangor Islamic Family Law Enactment 1984;an Ahmadiyya cannot be a *'wali'* in the solemnisation of the marriage of his daughter(s); an Ahmadiyya cannot inherit the property of his Muslim family members; and an Ahmadiyya is not entitled to the special positions that are accorded to Malays pursuant to the Federal Constitution and State legislation, and in the event that such special position has been given to an Ahmadiyya, that special position shall cease to have effect and can be stripped, revoked and nullified, as the case may be by the relevant authority.

[25] We shall collectively refer to the 1998 and 2000 Fatwas as the '**Two Fatwas**' or '**1998 and 2000 Fatwas**'.

[26] In addition, there are two other important features that we note about the aforementioned Two Fatwas. Firstly, according to section 49 of the ARIE 2003, a fatwa is binding on Muslims in the State of Selangor once it is gazetted. Section 49 reads as follows:

> "***A fatwa published in the Gazette is binding***
>
> *(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.*"

[27] There is no dispute that the 1998 and 2000 Fatwas have been gazetted. As such, there can be no question that they have the force of law under the auspices of section 49 of the ARIE 2003. In this respect,

the decision of this Court in ***A Child & Ors v Jabatan Pendaftaran Negara & Ors [2017] 4 MLJ 440*** is distinguishable.

[28] In that case, this Court held that a fatwa is not binding in law until and unless it has the benefit of the legislative process (paragraph 65). The fatwa in that case on the issue of legitimacy of a child was passed by the National Fatwa Committee and as such, fatwas issued by them have no force of law unless such fatwa are adopted in accordance with the laws of the State which chooses to adopt them. It is not disputed that the relevant fatwa by the National Fatwa Committee had not been adopted by the Johore State legislature. The position that fatwas issued by the National Fatwa Committee is not binding unless gazetted by the State has since been affirmed by the Federal Court on appeal in ***Jabatan Pendaftaran Negara & Ors v A Child & Ors (Majlis Agama Islam Negeri Johor, intervener)*** **[2020] 2 MLJ 277**.

[29] In the instant case, as indicated earlier, the 1998 and 2000 Fatwas are binding by virtue of section 49 of the ARIE 2003. The Two Fatwas are therefore binding in the State of Selangor.

[30] We note too, that neither of the parties, both here and at the Court below challenged the validity and binding force of the Two Fatwas. In

effect the Respondents challenged the jurisdiction of the Syariah Courts in respect of the Respondents premised on the Two Fatwas which declared Ahmadiyya to be non- Muslims. Therefore, we proceed on the basis that the validity and binding effect of the Two Fatwas is undisputed.

FINDINGS AND DECISION OF THE HIGH COURT

[31] The findings and decision of the learned Judge in respect of the Two Questions are as follows:

Question 1: The Jurisdiction of the Syariah Courts under Section 97(2) of ARIE 2003

[32] This question forms the crux of Appeal 513. The principal point for discussion regarding Question 1 is who has jurisdiction to adjudicate upon offences under section 97(2) of the ARIE 2003? At the High Court, the Respondents argued that the matter ought to be heard at the Magistrates' Court and not the Syariah Court.

[33] The learned Judge upon considering all the relevant provisions of the Federal Constitution concluded that the Syariah Courts are indeed the proper forum. Principally, Syariah Courts are empowered to try offences

under section 97(2) of the ARIE 2003 under Items 1 and 9 of List II of the Ninth Schedule of the Federal Constitution which stipulate as follows:

> *"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; 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, organization 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.

…

9. Creation of offences in respect of any of the matters included in the State List or dealt with by State law, proofs of State law and of things done thereunder, and proof of any matter for purposes of State law."

[34] Both Items 1 and 9 permit the State to establish offences. The learned Judge rightly identified the distinction between Items 1 and 9 in that the former deals specifically with offences within the 'precepts of the religion of Islam' while the latter covers all other offences which are not already enacted within the purview of Federal power or those which are not related to Islamic law.

[35] Further narrowing down the issue, the question for the learned Judge was: to which of the two Items does section 97(2) of the ARIE 2003 belong? We are of the view that his Lordship had correctly considered two landmark judgments of the Federal Court in ***Sulaiman Takrib v Kerajaan Negeri Terengganu; Kerajaan Malaysia (Intervener) & other***

***cases* [2009] 2 CLJ 54** and ***Fathul Bari Mat Jahya & Anor v Majlis Agama Negeri Sembilan & Ors* [2012] 4 CLJ 717**, where one of the issues raised was whether the alleged offences were offences within the ambit of 'the precepts of Islam'?

[36] The two Federal Court judgments abovementioned point out that the term 'precepts of the religion of Islam' ought to be given a broad interpretation. The Federal Court has time and time again emphasised that entries in the Legislative Lists ought to be construed in a manner giving them the widest significance. See also the judgment of the Federal Court in ***Gin Poh Holdings Sdn Bhd (in voluntary liquidation) v The Government of the State of Penang & Ors* [2018] 3 MLJ 417** which is a recent apex court pronouncement on how our courts ought to give legislative entries their widest possible construction.

[37] The High Court then proceeded to consider the 'pith and substance' doctrine in ***Mamat bin Daud & Ors v The Government of Malaysia* [1988] 1 CLJ (Rep) 197*,*** and arrived at the conclusion that in pith and substance, section 97(2) of the ARIE 2003 is a State law regulating mosques, something central to the Islamic faith. His Lordship then concluded that section 97(2) is within the ambit of the 'precepts of the religion of Islam' and hence, reading it with the phrase "mosques or any Islamic public place of worship" in Item 1 of List II, concluded that the

Syariah Courts are indeed clothed with the exclusive jurisdiction to hear offences thereunder.

[38] His Lordship also distinguished the decision of the High Court in ***Public Prosecutor v Mohd Noor Jaafar*** **[2005] 6 MLJ 745**. In that case a question was posed as to whether a contravention of section 5(3) of the **Control of Islamic Religious Schools (Malacca) Enactment 2002** ought to be tried at the Magistrates' Court or the Syariah Court. Low Hop Bing J held that the provision essentially governed religious schools and hence did not expressly fall within the exclusive jurisdiction of the Syariah Court.

[39] We are of the view that the regulation of mosques and other Islamic places of worship collectively constitute matters falling within the precepts of the religion of Islam. In our considered view, it is clear that the Federal Constitution expressly recognises and defines the regulation of 'public places of worship' as the 'precepts of the religion of Islam'. Thus, we accordingly agree with the learned Judge that Question 1 ought to be answered in the negative.

[40] Thus, it is the Syariah Courts (and not the Magistrates' Courts) which possess the jurisdiction to hear offences under section 97(2) of the ARIE

2003. This is because, the section, from a clear and plain reading of its language, was enacted squarely with the precepts of the religion of Islam in mind.

[41] In our respectful and considered view, there is no merit in the cross-appeal *i.e.* Appeal 513, because the learned Judge had applied all the correct principles of law to answer Question 1 in the negative, that is, in holding that it is the Syariah Courts and not the Magistrates' Courts who have jurisdiction to try offences under section 97(2) of the ARIE 2003. Accordingly, we affirm the decision of the learned Judge in respect of Question 1.

Question II: The Jurisdiction of the Syariah Courts over the Respondents

[42] This is the more pressing issue and constitutes the bone of contention between the parties in Appeal 468. The learned Judge answered the question in the affirmative *i.e.* that the Syariah Courts do not have jurisdiction over the Respondents or any Ahmadiyya.

[43] The learned Judge began his analysis by a lengthy exposition of the history of the Ahmadiyya. But at its crux, his Lordship examined the legal effect of the Two Fatwas and concluded that legally, their effect was to

excommunicate the Ahmadiyya from the Islamic community. The net resulting effect was that they were no longer recognised as Muslims and hence, the Syariah Courts could have no jurisdiction over the Respondents.

[44] The Court below followed the decision of Mustapha Hussain J in ***Abdul Rahim bin Haji Bahaudin v Chief Kadi, Kedah*** **[1983] 2 MLJ 370***,* which also involved the issue of jurisdiction of the Syariah Court over a member of the Ahmadiyya Jama'at pursuant to the **Kedah State Administration of Muslim Law Enactment 9 of 1962.** In that case, Abdul Rahim was arrested by officials of the Religious Department on charges of distributing religious pamphlets relating to the Ahmadi sect. He was charged for offences under s. 163(1) and s.163 (2) of the Administration of Muslim Law Enactment. He applied for judicial review for a writ of prohibition preventing the Chief Kadi from hearing any charges against the applicant there on the grounds that by a Fatwa dated April 10, 1972 issued by the Majlis Agama Islam, that followers of the teachings of the Ahmadiyya sect is an apostate group. The applicant's argument was that because he was an Ahmadiyya, he was not in law a Muslim and hence, the Syariah Court could have no jurisdiction over him.

[45] In the instant case, the Court below held that the effect of the Two Fatwas is that the followers of the Ahmadiyya are excommunicated from the mainstream Muslim community and are to be treated as members of a distinct religious group (see paragraphs 55 and 56):

> "*[55] Hence, both the fatwas issued by the Mufti of Selangor pursuant to 3 (1) of the Administration of Law Enactment 1989 on 22.6.1998 (gazetted on 17.8.2000) are binding on all Muslims in the State of Selangor and shall be recognised and upheld by the Syariah Courts in the State of Selangor.* ***The upshot of both these gazetted fatwas is that an Ahmadi is considered a non- Muslim by the State. This can be seen from the wordings of both the fatwas, i.e. an Ahmadi is a 'kafir' (disbeliever) and " murtad" (apostate),*** *and that he cannot inherit from his Muslim kin and the Islamic laws of succession does not apply; an Ahmadi cannot be the "wali" or guardian to give away his daughter in an Islamic marriage; an Ahmadi is not a Malay as defined in the Federal Constitution as it requires a Malay to profess the religion of Islam .The fatwas also state that in order for an Ahmadi to return to the fold as a Muslim, he would have to repent and pronounce the declaration of faith, i.e. to utter the khalimah shahadah.* ***So even though an Ahmadi may consider himself to be a Muslim or a member of an Islamic sect, the State does not regard him so, and***

has stripped him of all rights and privileges accorded to a Muslim in the State. The legal effect of both these fatwas is that the Ahmadi community has been excommunicated from the main stream Muslim community. *This fact is further manifested by the State not allowing the interment of the body of an Ahmadi within a Muslim cemetery and making available two plots of state land as reserve for burial of Ahmadis to the exclusion of Muslims. Therefore, in life and in death, the Ahmadis are separate and distinct from the main stream Muslim community.*

[56] Hence the effect of the fatwas and the actions of the State vis-a vis the Ahmadiyya community is that they are considered followers of a separate and distinct religion removed from Islam…to be treated as a distinct religious group equally entitled to the rights under Article 11 of the Federal Constitution, as all other religious groups in Malaysia e.g. those related to Buddhism, Christianity, Hinduism, Sikkhism or Taoism"

[Emphasis added]

[46] We observe that the learned Judge had accepted at face value that the Respondents were indeed persons professing and practising Ahmadiyya beliefs. His Lordship had addressed the matter as follows (at paragraphs 75 and 78):

"*[75]* ***The JAIS officers were informed by some of the applicants that all those present at the premises were members of the Jama'at, however, the JAIS officers did not heed the protestation of the applicants and proceeded to arrest and detain them, and subsequently issue them the bond.*** *Now, it belies logic to require the Jama'at to get permission from MAIS to use the premises as a place of worship, ie a mosque, when the Ahmadis have been declared as non-Muslims by virtue of the two fatwas issued by the State Mufti for Selangor. If the Ahmadis are not Muslims, the premises cannot by definition under s 2 of the ARIE, be termed a mosque, for by that statutory definition a mosque is a place where Islamic prayers are conducted.*

…

[78] The Applicants have stated that they are all members of the Jama'at and this is not challenged or controverted by the Respondents. A fortiori, in law and by the binding nature of the fatwas on the Respondents, the Applicants are non- Muslims and that is sufficient for them to be beyond the reach or jurisdiction of the Syariah Courts and the Syarie Chief Prosecutor."

[47] After concluding that all of the Respondents were indeed members of the Ahmadiyya community, his Lordship held that the Appellants had

acted in excess of their jurisdiction and accordingly allowed the Respondents' application for judicial review culminating in the following orders ('**the Impugned Orders**') as translated into English with necessary modifications to suit the titles of the parties before us:

> "*(a) A Declaration that pursuant to section 49 of the Administration of the Religion of Islam (State of Selangor) Enactment 2003 read together with the Ruling under section 41 of the Administration of Muslim Law Enactment for the State of Selangor dated 11.4.1997 [JPM (U) W.P. 0172/6/1; PN. (PU^2) 197] gazetted as P.U. (B) 279 and 'Fatwa tentang ajaran Ahmadiah/Qadiani di bawah Enakmen Pentadbiran Perundangan Islam 1989' dated 22.6.1998 [JAI. Sel 8069/2: PU. Sel AGM/0007. Jld 2] gazetted as Sel. P.U. 15 on 24.9.1998 (Vol. 51, No. 2, Addition No. 6), the Appellants have no jurisdiction to investigate and/or to prosecute the Respondents or each of them.*
>
> *(b) A Declaration that the actions and/or decisions of the Respondents and their servants, officers and/or agents to investigate and/or institute prosecutions and/or to prosecute the Applicants or each one of them contravenes the Applicants' rights under Articles 5 and/or 8 and/or 11 and/or*

Item 1, List II, Schedule 9 of the Federal Constitution and/or section 49 of the Administration of the Religion of Islam (State of Selangor) Enactment 2003.

(c) *An order in the nature of certiorari against the decisions of the Respondents and their servants, officers and/or agents to conduct investigations or continue investigations and/or to continue the intended prosecution and/or to prosecute the Applicants or each of them.*

(d) *An order in the nature of certiorari against the Respondent No. 11; 14.2014 to Respondent No. 33; 15.4.2014 Respondents No. 1, 2, 3, 4, 7, 9, 14, 19, 20, 35 and 39; 16.4.2014 to Respondents No. 10, 15, 18, 21, 22, 23, 25, 26, 27, 29, 34, 36 and 38; and 17.4.2014 to Respondents No. 5, 6, 8, 12, 13, 16, 17, 24, 28, 30, 31, 32 and 37.*

(e) *An order in the nature of mandamus against the Appellants to enforce the Ruling under section 41 of the Administration of Muslim Law Enactment for the State of Selangor dated 11.4.1977 [JPM (U) W.P. 0172/6/1; PN. (PU^2) 197] gazetted as P.U. (B) 279 and 'Fatwa tentang ajaran Ahmadiah/Qadiani di bawah Enakmen Pentadbiran Perundangan Islam 1989' dated 22.6.1998 [JAI. Sel 8069/2: PU. Sel AGM/0007.*

Jld 2] gazetted as Sel. P.U. 15 on 24.9.1998 (Vol. 51, No. 20, Addition No. 6) as against the investigation and/or prosecution or intended prosecution of the Respondents' cases and further to cancel and/or cease investigations and/or prosecution or any intended prosecution.

(f) An order in the nature of prohibition against the 1st, 2nd and 3rd Appellants and their servants, officers and/or agents from conducting investigations or continuing investigations against the Respondents or each of them.

(g) An order in the nature of prohibition against the 1st, 2nd and 3rd Appellants and their servants, officers and/or agents from taking any steps to prosecute and/or continue with any intended prosecution against and/or to prosecute the Respondents or each of them.

(h) The respondents shall pay the sum of RM25, 000 as costs to the applicants."

PARTIES' SUBMISSIONS

The Appellants' Arguments

[48] Appeal 468 is premised on six complaints contained in the memorandum of appeal. Briefly, these complaints can be summed up into the following three points:

(i) firstly, the learned Judge, erred by the mere application of the 1998 and 2000 Fatwas to make a finding that the Respondents are non-Muslims without regard to the presumption in section 74(2) of the ARIE 2003;

(ii) secondly, the 1998 and 2000 Fatwas are of general application on the non-Muslim status of the Ahmadiyya in Selangor and accordingly, the learned Judge erred in law when his Lordship decided that the arrests of the Respondents and the notices issued to them by the 3rd Appellant was unlawful by virtue of them being non-Muslims without first properly considering whether the Respondents are Ahmadiyya or not;

(iii) thirdly, (an issue not ventilated in the Court below) the learned Judge failed to consider that the Respondents are designated the status of 'Islam' in their respective MyKad (identification cards), that is, until a Syariah Court declares

them otherwise .(only in respect of the Respondents who are Malaysian citizens)

[49] In respect of the first complaint, the Appellants placed great reliance on section 74(2) of the ARIE 2003. We reproduce the section as follows:

> "***Jurisdiction does not extend to non-Muslims***
>
> *(1) No decision of the Syariah Appeal Court, Syariah High Court or Syariah Subordinate Court shall involve the right or the property of a non-Muslim.*
>
> *(2) For the avoidance of doubt, it is hereby declared that a Muslim shall at all times be acknowledged and treated as a Muslim unless a declaration has been made by a Syariah Court that he is no longer a Muslim.*"

[50] The Appellants liken the present case to the decision of the Federal Court in ***Kamariah Ali & Yang Lain lwn Kerajaan Kelantan & Satu Lagi* [2005] 2 ShLR 93** ('**Kamariah Ali**') which *inter alia*, decided that one cannot be allowed to escape Syariah prosecution simply by declaring that one has renounced the Islamic faith. Basically, the Appellants argue that what the Respondents are attempting to do here is to manoeuvre their way out of Syariah prosecution by claiming to be Ahmadiyya and to

thereby denounce their Islamic faith. The learned Judge ought to have applied the presumption in 74(2) of the ARIE 2003.

[51] The Appellants also place reliance on the decision of the Federal Court in ***Lina Joy lwn Majlis Agama Islam Wilayah Persekutuan dan lain-lain*** **[2007] 4 MLJ 585** ('**Lina Joy**') for the proposition that in cases where a Muslim had subsequently converted out of Islam, the Syariah Courts possesses the jurisdiction to determine the current religious status of the person who had renounced Islam. Thus a self-declaration by a person that he is non-Muslim is insufficient in the eyes of the law, and that until and unless the Syariah Court makes a declaration that he is a non-Muslim, he remains a Muslim in the eyes of the law, and thus section 74 as well as subsection 97(2) would apply to him.

[52] This leads us to the Appellants' second principal argument. The Appellants claim that the 1998 and 2000 Fatwas are only of general application and only serve to state that the Ahmadiyya belief is not Islam and any professors are not to be considered Muslims. What the Respondents must do, according to the Appellants, is to first apply to the Syariah Court for an order that they are not Muslims. A renunciation of Islam issued by the Syariah Court is a prerequisite to determine that the Respondents were not Muslims. They cannot place reliance simpliciter

on the existence of those Two Fatwas lest any person who claims to have left Islam may simply renounce their faith by claiming they are Ahmadiyya in order to escape Syariah prosecution.

[53] On these points, the learned Judge distinguished the pronouncement of the Federal Court in ***Kamariah Ali (supra)*** on the grounds that ***Kamariah Ali (supra)*** deals with a Muslim's renunciation of faith by unilateral declaration by way off a Statutory Declaration, which is ineffective until and unless the same is confirmed by a Syariah Court. In the instant case, the issue is not one of unilateral renunciation but rather the legal effect of "excommunication", pursuant to the two Fatwas. The learned Judge expressed the following view (at paragraph 77):

> "… *Now, if the members of the Jama'at have been declared as non- Muslims by virtue of the two Fatwas, why is there a necessity for any member of the Jama'at to further apply to the Syariah Court for a declaration that they are not Muslims. The Applicants state that there are approximately 5,000 members of the Jama'at in Malaysi*a. *It would be ridiculous to require all 5,000 members to apply to the Syariah Court to be declared as members of the Jama'at or as non-Muslims and also for their progenies, when they are born, to also make such an application. The absurd nature of this suggestion becomes even more apparent when considering that some of the applicants are foreigners.*

Should every foreigner who professes to be an Ahmadi be also required to make an application to the Shariah Court after he enters the country if he intends to participate in the religious rituals and prayers of the Jama'at. Surely not. When the religious authorities have by law excommunicated a sect from the state recognised mainstream or dominant orthodox Islam, then by implication all members of that sect would not be members of the state sanctioned mainstream orthodox Islam, ie Ahlul Sunnah Wa Jamaah."

[54] However, as we see it, the first two points of contention can be conflated into the third point. What significance can be derived from the documentary identification of the religious status of the Respondents, be it a MyKad, passport or some other document? The argument here is that in the case of the local Respondents, they have the designation 'Islam' as their religion in their MyKad. This raises issues relevant to the primary question in this appeal as to "who is a person professing the Religion of Islam".

[55] According to the Appellants, this identity issue stems from the affidavit by an officer of the 3rd Appellant, one Nurhelmi bin Ikhsan, who in an affidavit in reply deposed as follows in Appeal Record, B2(3) at page 540 at paragraph 16 (translated into English) reproduced below:

> "*… I verily state that the arrests of the Applicant [the Respondents] made by the Religious Enforcement Officer is based on his Identification Card which states the religion of Islam as well as a written admission from the Suspect who performed his Friday prayers at the said premises. Verily, at the time the investigation was conducted, they were 'Malays' and the Religious Enforcement Officer could not simply ignore said 'Malay' features and cease their investigations just like that.*"
>
> [Emphasis added]

[56] The Appellants argued that they had proceeded on the basis of the local Respondents' MyKad which had designated their religion as 'Islam'. As such, they ought to have been given the opportunity to first investigate whether the Respondents are indeed Ahmadiyya and that the learned Judge had exceeded his jurisdiction by deciding the status of the Ahmadiyya on his own accord, without prior evaluation of the evidence to determine such status.

The Respondents' Arguments

[57] Learned counsel for the Respondents did an admirable job reflected in the depth of his research, in taking us through the history of the Ahmadiyya in Malaysia. But as we have stated at the outset, we are not

here to adjudicate upon their religious status from a spiritual perspective. On an examination of the facts and circumstances in evidence, we merely have to be satisfied that the Respondents themselves are genuine Ahmadiyya in their own belief. To address this issue, we will only focus on the legal arguments.

[58] Mr Aston Paiva, learned counsel for the Respondents, based the gist of his submission on Article 11 of the Federal Constitution which guarantees freedom of religion. He put forward the argument that the Syariah investigation and prosecution process was abused to curtail the Ahmadiyya's rights to practise their religion which right was, despite the Two Fatwas, recognised when prior to their issuance, the Ahmadiyya were designated lands enabling them a place to freely practise their faith.

[59] Learned counsel for the Respondents then took us through the legislative history of the ARIE 2003 to illustrate how fatwas are in 'pith and substance' rulings enabling the State, with specific reference to the legislative entry allowing for the "determination of matters of Islamic law and doctrine and Malay custom" in Item 1 of List II, to excommunicate persons from what is seen as the mainstream Islamic faith.

[60] Considering that the Ahmadiyya have been excommunicated *vide* the 1998 and 2000 Fatwas, counsel for the Respondents argues that in the first place, the Ahmadiyya are not Muslims and thus, the presumption in section 74(2) of the ARIE 2003 ought not to apply to them. He argued, *a fortiori*, the fact of excommunication means that the Syariah Courts can have no jurisdiction over them.

[61] On the issue in respect of the religious identity stated in the MyKad, his submissions are threefold:

(i) Every Respondent affirmed and filed an affidavit admitting that they are Ahmadiyya which the Appellants have not rebutted;

(ii) The National President of the Ahmadi Jama'at filed an affidavit stating that the Respondents are of the Ahmadiyya community which affidavit also remains unrebutted by the Appellants; and

(iii) According to **regulation 24(1) of the National Registration Regulations 1990** ("**NRR 1990**") the burden to prove the contents of MyKad lies on the person alleging the truth thereof. The Appellants, who alleged that the Respondents are 'Islam'

have not adduced any evidence to show that the Respondents are indeed not Ahmadiyya.

[62] Learned counsel for the Respondents further argued that the change to the NRR 1990 to include 'Islam' in the MyKad was made *via* a retrospective amendment without prior consultation with the Ahmadiyya community. Thus, it would be unfair to place reliance on the Respondent's status as 'Islam' in their MyKad for the purposes of Syariah investigation and prosecution.

[63] Learned counsel for the Respondents then merged his arguments with the freedom of religion point, arguing that there are no constitutionally permitted grounds except those in Articles 11(4) and 11(5) of the Federal Constitution to restrict freedom of religion. The Ahmadiyya therefore ought not to be punished for professing their faith.

[64] Learned counsel for the Respondents also makes two other points. Firstly, that it would contravene Article 8 of the Federal Constitution to discriminate between local Ahmadiyya and their non-citizen counterparts solely on the basis of the MyKad (something which only the locals possess). All the more, he argues, Article 11 of the Federal Constitution applies to all persons regardless of their nationality.

[65] The other point he makes is essentially the same as the learned High Court Judge's reasoning *i.e.* it would be absurd to suggest that about 5,000 Ahmadiyya be expected to apply to the Syariah Courts to enable the removal from their MyKad their religious designation of 'Islam'.

[66] For the foregoing reasons, the Respondents argue that we ought to uphold the decision of the learned High Judge in respect of Appeal 468.

OUR DECISION

The Status of Islam in Malaysia

Jurisdiction of the Syariah Courts

[67] In order to appreciate the issues raised in these appeals in their historical and legal context, it is necessary to set the stage by an examination of the status of Islam in Malaysia within the constitutional and legal framework. It is beyond dispute that ours is a dual legal system. On the one side, we have the civil courts vested with the powers of judicial review.

[68] On the other side, we have the Syariah Courts which according to the Federal Constitution, are creatures of State law. The breadth of their

power is strictly confined to the limits in Item 1 of List II of the Ninth Schedule of the Federal Constitution.

[69] History has laid witness to numerous conflicts of jurisdiction between the civil and Syariah Courts. This conflict was borne of our colonial past. It has been well documented that prior to the arrival of the colonialists in Malaya, the *lex loci* was largely Islamic law and Malay custom headed by the respective Rulers of the Malay States.

[70] On this point, the renowned author RH Hickling in **'Malaysian Law – An Introduction to the Concept of Law in Malaysia' (Pelanduk Publications, 2001),** at pages 108-109 and 130, noted that Islamic law was by and large the *lex loci* prior to the arrival of the British:

> "***To some extent the principles of Muslim law came into Malaysia in the 15th century, with such codes as the Undang-Undang Melaka, with some aspects of the Muslim marriage law, the law of sale, and certain aspects of legal procedure were reduced to writing****. Such laws as the Malacca code were hybrid texts, varied in origin, often diffuse in purpose and probably uncertain in their operation: but they reflect that desire for certainty which is at the root of most legal systems.* ***As with other early legal systems, the Malacca code fell back upon the working of God through the operation of***

providence, in order to determine those disputes in which, for example, the contradictory oaths of the parties offered no hope of certainty.

…

With the arrival of the British in Penang in 1786, English law of a sort arrived in Malaysia. ***The fact that the lex loci of Penang was at the time of cession the law of a Malay-Muslim state****, the state of Kedah was conveniently overlooked: as, indeed, was the fact, a few years later, that Dutch law was the law of Malacca prior to the arrival of the British.*"

[Emphasis added]

[71] When the British arrived to peninsular Malaya, they recognised the status of Islamic law and Malay custom as the *lex loci* before allowing their own law to creep in. Sir Benson Maxwell R observed as far back as in 1858 in ***Regina v Willans*** **(1858) 3 Ky 16,** at page 21 as follows:

"*When an inhabited or conquered country is ceded, the new sovereign impliedly undertakes to administer the existing laws among his new subjects, until he changes them, but it does not follow that when the country is a desert, he is to be presumed to undertake that he will enforce the laws of the former Sovereign when settlers shall afterwards arrive.* ***Another objection to the continuance of the former law would arise in this***

case, from the nature of Mohametan law, which is the law of Quedah*…*

I think, in asserting that "a system of law which according to its own principles, can only be administered by Mohametan Judges and Mohametan arbitrators, upon the testimony of Mohametan witnesses, is not a system which can devolve ipso jure, and without express acceptance, upon a Government and people of a different faith". ***It seems to me impossible to hold that any Christian country could be presumed to adopt or tolerate such a system as its lex loci.***"

[Emphasis added]

[72] The framers of our Constitution themselves noted in the Reid Commission Report 1957 at paragraph 169, as follows:

"*We have considered the question whether there should be any statement in the Constitution to the effect that Islam should be the State religion.* ***There was universal agreement that if any such provision were inserted it must be made clear that it would not in any way affect the civil rights of non-Muslims****. In the memorandum submitted by the Alliance it was stated the religion of Malaysia shall be Islam.* ***The observance of this principle shall not impose any***

disability on non-Muslim nationals professing and practising their own religions and shall not imply that the State is not a secular State. There is nothing in the draft Constitution to affect the continuance of the present position in the States with regard to recognition of Islam or to prevent the recognition of Islam in the Federation by legislation or otherwise in any respect which does not prejudice the civil rights of individual non-Muslims."

[Emphasis added]

[73] The net result was that upon Independence, a dual legal system – one civil and the other Syariah – was established. However, that is not to say that the two systems are of equal status. For one, Article 160(2) of the Federal Constitution expressly excludes Syariah law from the definition of "law". The reliance on Syariah, as gathered from Item 1 of List II is strictly limited to personal law and matters incidental to the regulation of the Islamic religion.

[74] Two other provisions are relevant. The first is Article 3 of the Federal Constitution which stipulates that Islam is the official religion of the State. The other is the limitation to Article 11(1) in Articles 11(4) and 11(5) which we will come back to in due course.

[75] The status of Syariah law in relation to secular law was addressed in the celebrated judgment of Salleh Abbas LP in the case of ***Che Omar bin Che Soh v Public Prosecutor*** **[1988] 2 MLJ 55**. In that case, the accused was sentenced to death. He challenged his death sentence alleging it to be against the injunctions of Islam and that he being a Muslim, could not be sentenced to the same. The Supreme Court had occasion to consider the legal effect of Article 3 of the Federal Constitution. The judgment of Salleh Abas LP on the status of Islam in Malaysia is as follows:

> *"Thus, all laws including administration of Islamic laws had to receive this validity through a secular fiat…Thus, it can be seen that during the British colonial period, through their system of indirect rule and establishment of secular institutions, Islamic law was rendered isolated in a narrow confinement of the law of marriage, divorce and inheritance only. (See MB Hooker, Islamic Law in South-east Asia, 1984)*
>
> *In our view, it is this sense of dichotomy that the framers of the Constitution understood the meaning of the word 'Islam' in the context of Art.3. If it had been otherwise, there would have been another provision in the Constitution which would have the effect that any law contrary to the injunction of Islam will be void. Far from*

making such provision, art. 162, on the other hand, purposely preserves the continuity of secular law prior to the Constitution, unless such law is contrary to the latter.

… It is the contention of Mr. Ramdas Tikamdas that because Islam is the religion of the Federation, the law passed by Parliament must be imbued with Islamic and religious principles and Mr. Mura Raju, in addition, submitted that, because Syariah law is the existing law at the time of Merdeka, any law of general application in this country must conform to Syariah law. ***Needless to say that this submission, in our view, will be contrary to the constitutional and legal history of the Federation and also to the Civil Law Act which provides for the reception of English common law in this country****… [W]e 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*.

[Emphasis added]

[76] It is crystal clear therefore that within the larger framework of our Federal Constitution and legal history, Syariah jurisdiction was always intended to be limited and exclusive. Despite this clear demarcation of jurisdictions, there has been conflicts between the two systems which have been well documented by the renowned late Tan Sri Datuk Professor

Ahmad Ibrahim in his Article **'The Amendment to Article 121 of the Federal Constitution: Its Effect on Administration of Islamic Law' [1989] 2 MLJ xvii**.

[77] In the abovementioned article, the late Professor documented certain cases one of which is ***Myriam v Arif*** **[1971] 1 MLJ 265**. In that case the *Kathi* had adjudicated upon a couples' divorce and the custody of their children. The woman subsequently married someone else and applied to the High Court for a new custody arrangement. The High Court relied on section 45(6) of ***the Selangor Administration of Muslim Law Act (sic) 1952*** to find that it had jurisdiction to hear the matter and proceeded to issue a new custody arrangement. By doing so, the High Court had essentially adjudicated upon matters falling within the jurisdiction of the Syariah Courts. It is for this reason that the late Professor became the 'prime mover' behind the insertion of Article 121(1A) of the Federal Constitution. See generally the judgment of the Federal Court in: ***Latifah bte Mat Zin v Rosmawati bte Sharibun & Anor*** **[2007] 5 MLJ 101**, at paragraph 50.

[78] Article 121(1A) of the Federal Constitution reads:

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

[79] By virtue of the amendment, the Syariah Courts were perpetually granted exclusive jurisdiction over all matters related to Syariah as defined in Item I, List II of the Ninth Schedule of the Federal Constitution. Thus, at least on paper, solved was the legal conundrum of civil courts exercising Syariah jurisdiction.

[80] The purpose behind our lengthy exegesis above is to cement the point of the peculiar situation in Malaysia. It is a historical fact that Islamic law and Malay custom were largely the law of the land prior to the arrival of the British. In arriving at the best solution for an independent State, the framers of our Constitution deemed it necessary to include the Syariah system into our now largely secular regime. Taking the above cumulatively, it is apparent that the net result of the decades of legislative and judicial developments have shaped the respective jurisdictions of our civil and Syariah Courts. Thus, these legal developments, as will become more apparent later in this judgment, affect the freedom of religion of Muslims in Malaysia.

[81] The overall effect of the historical legal development is this. Our Syariah Courts have exclusive jurisdiction over all matters which fall under Item 1 of List II of the Federal Constitution. The decisions in the Courts demonstrate that Courts strive, as far as possible to strike a pragmatic and acceptable balance between the jurisdiction of civil and Syariah Courts.

[82] For one, the respective legislative entries in the said Item 1 must be given the widest possible meaning. This is from the pronouncements of the Federal Court in ***Sulaiman Takrib (supra)*** and ***Fathul Bari (supra)***. This method of interpretation ensures that the subject-matters upon which the Syariah Courts can adjudicate cannot be interpreted so pedantically so as to render the entire system redundant.

[83] Yet, at the same time, the reach of the Syariah Courts' jurisdiction is strictly confined to persons 'professing the religion of Islam'. In the result, only – and we hasten to add – *only if* a person 'professes the religion of Islam' can the Syariah Courts have jurisdiction over him. And, it is only when the Syariah Courts become cloaked with such jurisdiction can one even begin to consider the widest possible construction to be afforded to the respective legislative entries determining the breadth of the Syariah Courts' adjudicative powers over said persons. To illustrate the point, we refer to the ***Sulaiman Takrib (supra)*** and ***Fathul Bari (supra)*** cases. It

would have served no useful purpose to determine whether the phrase 'precepts of Islam' was broad enough to encompass certain offences if the offender was not even a Muslim to begin with. We refer to the judgment of Abdul Hamid Mohamad, CJ in the Federal Court case of ***Sulaiman Takrib (supra)***, where after examination of amongst others, Articles 3, 74 and 75 of the Federal Constitution and the Ninth Schedule, in particular, List II, His Lordship stated as follows (at paras. 21 and 22):

> *"[21] List II enumerates matters that the State Legislature may make laws. Item I is the relevant one. It is very lengthy. To avoid confusion, I shall only reproduce the material parts for the determination of this appeal:*
>
> > *…Islamic law…, 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 as 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.*

[22] At this juncture, I would only like to emphasise four points arising from this item. First, the State Legislature may create offences and punishment of offences:

(a) by persons professing the religion of Islam;
(b) against the precepts of Islam,
Provided it is not in regard to matters included in the Federal List."

Freedom of Religion and a Person "Professing the Religion of Islam"

[84] The conundrum here however is the larger question of who is a person 'professing the religion of Islam'? It should become apparent at this juncture: this rudimentary question forms the fulcrum of the jurisdiction of the Syariah Courts.

[85] Article 11(1) of the Federal Constitution guarantees every person the right to profess and practise his religion as well as the right to manage his own religious affairs, and subject to Article 11(4), to propagate it. The Article provides as follows:

"***Freedom of religion***

11. (1) Every person has the right to profess and practise his religion and, subject to clause (4), to propagate it.

…

(3) Every religious group has the right-

(a) to manage its own religious affairs;

(b) to establish and maintain institutions for religious or charitable purposes; and

(c) to acquire and own property and hold and administer it in accordance with law.

(4) State law and in respect of the Federal Territories of Kuala Lumpur, Labuan and Putrajaya, federal law may control or restrict the propagation of any religious doctrine or belief among persons professing the religion of Islam. (5) This Article does not authorize any act contrary to any general law relating to public order, public health or morality."

[86] This right to freedom of religion is sacrosanct, and distinct from other fundamental liberties for several reasons. For one, Article 11(1) unlike

say Articles 9 and 10, applies to every 'person' as opposed to every 'citizen'. Further, Article 11 does not have a "derogation clause" (using the term loosely) similar to those contained in the phrase "save in accordance with law" common to Articles 5 and 13. Even Article 8(1) is subject to limits based on the reasonable classification test first propounded by the Federal Court in ***Mohamed Sidin v Public Prosecutor*** **[1967] 1 MLJ 106** read together with the express permissible exceptions enumerated in that Article permitting discrimination in certain situations.

[87] Indeed, even in international human rights law, the freedom of religion is generally considered a non-derogable right. Just to emphasise our point, the Human Rights Committee observed in respect of Article 18 of the International Covenant on Civil and Political Rights ('**ICCPR**') in General Comment No. 22 as follows, at paragraph 1:

> "*The right to freedom of thought, conscience and religion (which includes the freedom to hold beliefs) in article 18.1 is far-reaching and profound; it encompasses freedom of thought on all matters, personal conviction and the commitment to religion or belief, whether manifested individually or in community with others. The Committee draws the attention of States parties to the*

> *fact that the freedom of thought and the freedom of conscience are protected equally with the freedom of religion and belief.* ***The fundamental character of these freedoms is also reflected in the fact that this provision cannot be derogated from, even in time of public emergency, as stated in article 4.2 of the Covenant****.*"
>
> [Emphasis added]

[88] The same applies in Malaysia. So sacrosanct is the right that even Article 150(6A) of the Federal Constitution prohibits Parliament from making laws which seek to curtail the freedom of religion even during times of emergency. The said Article reads:

> "*Clause (5) shall not extend the powers of Parliament with respect to any matter of Islamic law or the custom of the Malays, or with respect to any matter of native law or customs in the State of Sabah or Sarawak; nor shall Clause (6) validate any provision inconsistent with the provisions of this Constitution relating to any such matter or relating to religion, citizenship, or language.*"

[89] The only restrictions the Federal Constitution authorises in respect of the freedom of religion is in Articles 11(4) and 11(5). The former permits the Federal and State Legislatures (as the case may be) to prohibit the propagation of any religious doctrine other than Islam to persons

professing that religion. This again, is unique to our legal and political history which we highlighted earlier. Abdul Hamid Mohamad, CJ (as he then was) in the case of ***Sulaiman Takrib (supra)*** had examined the jurisdiction of the State Legislature under List II of the State List of the Ninth Schedule to the Federal Constitution and stated as follows (at para. 24):

> *"… the State Legislature may make law for the control of propagating doctrines and beliefs among persons professing the religion of Islam. So, any argument that any law that seeks to control the propagation of doctrines and beliefs among persons professing the religion of Islam is unconstitutional because it is inconsistent with Article 11 (freedom of religion) or any other provision is doomed to fail from the start."*

[90] Article 11(5) in turn prohibits any act contrary to any general law relating to public order, public health or public morality which may be done in the name of religion.

[91] An example of the effect of Article 11(5) is the decision in ***Halimatussaadiah v Public Service Commission, Malaysia & Anor*** **[1992] 1 MLJ 513** where the High Court effectively upheld the prohibition (issued in a circular) on a female public servant from wearing any attire covering a female public servant's face when on duty. The facts of the

case were that the plaintiff was working as a clerk at the State Legal Adviser's office in Ipoh. The plaintiff had been dressed in a purdah (face veil) which completely covered her face except for her eyes. The plaintiff had refused to comply with the circular on the ground that as a Muslim, she is required to cover her face. The High Court held that while Article 11 is intended to protect absolutely the religious beliefs of a person, but in exercising religious practices, Article 11(5) also clearly forbids any act which may lead to public disorder, affect public health or public morality. The High Court held the prohibition in the circular was justified on the grounds that the Office of the State Legal Adviser where the plaintiff was employed as a clerk deals with files relating to government secrets and thus for security reasons there is an obvious need to identify a person in such employment.

[92] Within the general framework of our Federal Constitution the right of freedom of religion operates differently between Muslims and non-Muslims. The first reason is a religious one *i.e.* the one relating to the regulation of apostasy. The second reason, and the one more pertinent to us, is the fact that the narrowly constructed jurisdiction of the Syariah Court is dependent on the religion of the subject.

[93] It is our observation that while Article 11(1) guarantees the twin freedoms to 'profess **and** practise' one's religion, the jurisdiction of the Syariah Court per Item I of List II is curiously crafted in such a way so as to apply to those 'professing the religion of Islam'. It seems that the words "practise" or "practising" were deliberately left out.

[94] We think there is a fundamental difference in the two provisions. While one may profess a certain faith, he or she may not necessarily practise it. Based on this difference in language, it is apparent to us that the framers of our Constitution expressly intended to apply a separate regime to Muslims on the basis of what Muslims themselves profess irrespective of whether such belief is demonstrated by practice.

[95] In other words, when the legal question of Islamic status is at play, it bears not only spiritual connotations. The effect is also legal. Whether they choose it or not, Muslims are governed by a whole catena of personal laws spanning the spectrum of marriage, divorce, guardianship of infants, inheritance and so on. They also become subject to specific offences to which non-Muslims are not. A simple change in belief bears therefore not only spiritual consequences as one might expect of freedom of religion, but for our purposes, also carries specific legal implications.

[96] For one, Article 160(2) defines a 'Malay' to mean, among others, any person who 'professes the religion of Islam', habitually speaks the Malay language and conforms to Malay custom. The effect of being 'Malay' also carries legal implications such as being conferred the special position under Article 153 of the Federal Constitution. This very fact is also emphasised in the 2000 Fatwa.

[97] With that, we will now examine what the phrase 'persons professing the religion of Islam' may mean in relation to the Respondents.

Persons 'Professing the Religion of Islam' and the Jurisdiction of the Syariah Courts over the Respondents

[98] While the Reid Commission and Item 1 of List II of the Federal Constitution note that Syariah law shall apply to 'persons professing the religion of Islam', neither of those two documents define what that phrase means. It is here the Appellants place reliance on section 74(2) of the ARIE 2003 to presume that the Respondents are Muslims until and unless declared otherwise by a Syariah Court.

[99] With respect, we think that this approach and the authorities cited do not assist them in that argument. First is the decision of the Federal Court in ***Kamariah Ali (supra)***. In that case, the accused persons were charged

and convicted under section 69 of the Council of Islamic Religion and Malay Custom, Kelantan, Enactment 1966 for committing acts that contravened the principles of Syariah and were sentenced to two years in prison. On appeal to the Syariah Appeal Court, the court affirmed the conviction but their sentences were substituted with another: releasing them on bail and good behaviour bond for a period of three to five years each which also required them to report to the relevant religious authority once a month to indicate their repentance.

[100] Thereafter however, the accused persons purported to make statutory declarations renouncing Islam. The Syarie Prosecutor then moved the Syariah Court to convict them for failing to abide by the Syariah Appeal Court's order to repent. For this they were convicted and sentenced to three years' imprisonment. The accused persons then applied for a writ of *habeas corpus* on the grounds that they were no longer Muslims and they were not subject to the jurisdiction of the Syariah Court. The accused persons essentially argued that without such jurisdiction, the Syariah Court had no basis to imprison them.

[101] The issue of renunciation of Islam arises, in particular in cases where a person declares his intention to convert out of Islam, and in cases like ***Lina Joy (supra***), consequentially to have the designation 'Islam'

deleted from his MyKad. In effect this would render him an apostate. The question then arises whether by such declaration, he remains subject to the jurisdiction of the Syariah Courts.

[102] In this respect the civil Courts appear to make a distinction between conversions out of Islam by those who were Muslims by original faith and those who were non-Muslims by original faith. In the former, premised on their original faith, they were subject to the jurisdiction of the Syariah Courts and require a renunciation in the Syariah Court to confirm their non- Muslim status. As for the latter, it is on the premise that they were non-Muslims to begin with and therefore not subject to the jurisdiction of the Syariah Courts, that no such renunciation of Islam was required for any supposed renunciation of their Islamic 'faith'.

[103] The *habeas corpus* application in ***Kamariah Ali (supra)*** eventually found its way to the Federal Court, which held that in the particular circumstances of the case, a renunciation of Islam in the Syariah Court was required to release the appellants from the jurisdiction of the Syariah Court. Ahmad Fairuz CJ opined as follows, at paragraphs 26-27 and 37:

> "*It is clear from the above contentions,* ***the issue to be decided is whether the appellants still professed the religion of Islam when they were charged in the Shariah High Court on the ground that they had failed to abide by***

the order of the Shariah Appeal Court for repentance*. In accordance with the ninth schedule List II – State List, of the Federal Constitution, the Shariah Court has jurisdiction only over persons professing the religion of Islam.*

> ***The phrase 'a person professing the religion of Islam' if read literally would mean that the appellants, after having declared the renunciation of the religion of Islam, are no longer professing the religion of Islam and hence they do not come within the jurisdiction of the Shariah Court. The question here is whether the literal interpretation ought to be used****?*
>
> *…* ***To make a statutory declaration declaring that they no longer profess the religion of Islam does not by itself release the appellants from the offence that lie before the Shariah Court****. By adopting the purposive approach, this court is of the view that the material time to determine whether the appellants were professing the religion of Islam, is, at the material time when the appellants were committing the offence under the Council of Islamic Religion and Malay Custom, Kelantan ,Enactment .Therefore, although the appellants had declared to be apostate in 1998, they were appropriately brought before the Shariah Court in 2000 because it involves an offence committed by the appellants when they were still professing the religion of Islam.* ***If this approach is not adopted, Muslims who***

are charged in the Shariah Court can easily raise the defence that they are no longer professing the religion of Islam and henceforth do not come within the jurisdiction of the Shariah Court. This, will in turn effect the administration of Islamic law in Malaysia and the laws of other religions."

[Emphasis added]

[104] The learned Judge distinguished the above decision on the view that it concerned the unilateral renunciation by persons who were in the first place Muslims by way of statutory declaration (see: paragraph 72 of the judgment). In the present case however, the Court below held that the Ahmadiyya are not in the first place Muslims by virtue of the 1998 and 2000 fatwas.

[105] We agree with the learned Judge to the extent his Lordship held that Ahmadiyya are not – legally speaking – Muslims. For clarity, the Syariah Court's jurisdiction is circumscribed by law. Thus, when the Two Fatwas legally and bindingly declare that Ahmadiyya shall not be considered Muslims, the Syariah Courts are, by that declaration, dispossessed of jurisdiction over such persons.

[106] ***Kamariah Ali (supra)*** stemmed from Terengganu. The provision in question there was section 102(2) of the **Council of the Religion of**

Islam and Malay Custom, Kelantan Enactment 1994 which is principally the same as section 74(2) of the ARIE 2003. The accused persons were Muslims to begin with, and so, it was only logical to presume that they remained Muslims until and unless they lawfully renounced Islam before the Syariah Court.

[107] The present appeal is closer in point to the decision of Mustapha Hussain J. in ***Abdul Rahim (supra)***. In that case, the High Court prohibited the Kadi from pursuing prosecution against the accused who was clearly of the Ahmadiyya community. The Appellants seek to distinguish this decision on the grounds that ***Abdul Rahim (supra)*** was decided before the 1998 and 2000 fatwas were promulgated. With respect, we see no merit in that argument.

[108] For the sake of completeness, we reproduce section 74(1) of the ARIE 2003 along with its shoulder note:

> "***Jurisdiction does not extend to non-Muslims***
>
> *(1) No decision of the Syariah Appeal Court, Syariah High Court or Syariah Subordinate Court shall involve the right or the property of a non-Muslim.*"

[109] In our view, the above provision is merely a restatement of a trite principle of law that a Syariah Court has no jurisdiction over non-Muslims. This position has consistently been upheld by our apex Court in at least two judgments. See: ***Latifah (supra)*** at paragraph 50 and ***Indira Gandhi (supra)*** at paragraph 75.

[110] Thus, in general terms, the presumption in section 74(2) of the ARIE 2003 has no application to the Ahmadiyya in the State of Selangor because following the 1953 trial before HRH the Sultan of Selangor and the subsequently gazetted 1998 and 2000 fatwas, an Ahmadiyya in the State of Selangor is not considered a Muslim.

[111] We are fortified in our view by the judgment of the Federal Court in ***Soon Singh a/l Bakar Singh v Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor*** **[1999] 1 MLJ 489**. At pages 501-502, Dzaiddin FCJ (as he then was) opined as follows:

> "*With respect to conversion out of Islam, only some State Enactments contain express provisions on the matter. For example, the Administration of the Religion of Islam and the Malay Custom of Pahang Enactment 1982 under Part VI states that where any person who has embraced the religion of Islam in accordance with*

the Part, apostasises from the religion, he shall report to the court of a kadi of his decision and the Yang di-Pertua shall register it. ***Before his decision is reported and registered, he shall be presumed to be still a Muslim. The Negeri Sembilan Administration of Islamic Law Enactment 1991 s 90(3) provides that a Muslim, or a saudara baru who has converted to Islam and later decides to renounce the same shall report the said decision to the Registrar of Saudara Baru, who shall register the said decision in the prescribed form. Before the said decision is reported and registered, he shall still be treated as a Muslim****. The Kelantan Enactment No 4 of 1994, s 102 also provides that no person who has confessed that he is a Muslim by religion may declare that he is no longer a Muslim until a court has given its approval to that effect. Before the court gives its approval, the person shall be presumed to be a Muslim and any matter which is connected with the Religion of lslam shall be applied to him...*

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.***"

[Emphasis added]

[112] At the risk of repetition, the position herein is different from the one in ***Kamariah Ali (supra)*** where the accused persons there were originally Muslims. Their subsequent unilateral renunciation of the faith would therefore be invalid until and unless by order of the Syariah Courts. Till then, they were presumed by law to remain Muslims.

[113] From the above, it therefore follows that the learned Judge of the Court below was correct in law to find generally that members of the Ahmadiyya community are not subject to the jurisdiction of the Syariah Courts. His Lordship simply followed the judgment of Mustapha Hussain J in ***Abdul Rahim (supra)*** who held that the applicant therein being an Ahmadiyya, could not be a Muslim and on that basis the learned Judge granted the prohibition order effectively injuncting any form of Syariah prosecution against the applicant in that case. We are therefore minded to affirm the High Court's decision to that extent.

[114] The Appellants' argument is that the decision in ***Abdul Rahim (supra)*** ought not to be followed on the grounds that it was decided before the insertion of the present sections 61 and 74(2) of the ARIE 2003. With respect, as stated earlier, we are unpersuaded because the reasoning runs afoul of the grain *of* ***Kamariah Ali (supra)*** and ***Soon Singh (supra)*** and their rationale as to why these presumptions exist. The 1998 and 2000 Fatwas already make the point that Ahmadiyya are in general not legally Muslims and as such, being of such status, the Syariah Courts cannot have jurisdiction over them.

[115] In a generic case, it cannot be said that an Ahmadiyya may be presumed to be a Muslim by virtue of section 74(2) of the ARIE but at the

same time be considered a non-Muslims under the 1998 and 2000 Fatwas. The two positions are contradictory to each other. In any event, this was not why section 74(2) was enacted. In our reading of Ahmad Fairuz FCJ's judgment in ***Kamariah Ali (supra)***, the purpose of the provision is to prevent actual Muslims from renouncing the Islamic faith to avoid Syariah prosecution. We do not think that such a provision can extend to presume a non-Muslims like the generic Ahmadiyya is a Muslim when in actual fact the law of the State of Selangor says he is not.

[116] To overcome the problem that a Muslim might no longer be Muslim in faith, the presumption in section 74(2) of the ARIE 2003 operates to presume that such a person, remains a person 'professing the religion of Islam'. As we said before, this is because Islam is not only a religion, but also carries legal ramifications. It also determines whether one is constitutionally a Malay or not and *a fortiori* whether such a person is entitled to the special position under Article 153 of the Federal Constitution.

[117] To clarify, if a person was born and raised as an Ahmadiyya, then his original religion is the Ahmadiyya religion. Because the Two Fatwas declare that his faith is not Islam, then in the State of Selangor, an Ahmadiyya is a non-Muslim just as a Christian or a Hindu is a non-Muslim.

If however, a person is born and raised as a Muslim (whether he chooses to practise his beliefs or not), he is in law a person 'professing the religion of Islam'. Should he change his religion from Islam to Ahmadiyya, just as if he were to attempt to renounce Islam for any other faith, he cannot in law do so unless by order of the Syariah Court as prescribed by the relevant State law. Thus, any renunciation of the Islamic faith is within the jurisdiction of the Syariah Courts. (See for example: ***Dalip Kaur v Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor [1992] 1 MLJ 1 and Lina Joy (supra)***. In ***Soon Singh (supra),*** the Federal Court held that the jurisdiction of the Syariah Court to deal with conversion out of Islam, although not expressly provided for in some State Enactments, can be read into those Enactments by implication.

[118] For the foregoing reasons, we find ourselves unable to agree with the Appellants on their argument in respect of section 74(2) of the ARIE 2003. The Respondents cannot be presumed to be Muslims under section 74 ARIE 2003 and be non-Muslims pursuant to the Two Fatwas, as these two contradictory positions are irreconcilable. We therefore find no reason to interfere with the learned Judge's decision in respect of Question 1 *i.e.* that the Syariah Courts have no jurisdiction to try an Ahmadiyya for a section 97(2) offence if, in the first place, the Respondents have always been Ahmadiyya.

[119] Given the strict technicalities of the law on this sensitive subject, we seek to avoid any potential doubt or confusion. At this juncture, we seek to make the following points clear:

(i) The freedom of religion is an absolute and non-derogable right save for the express limitations that the Federal Constitution itself allows. This for one is Article 11(4) on the prohibition of proselytization of any religion other than Islam to those professing the religion of Islam and the strict restriction being the one stipulated in Article 11(5).

(ii) The freedom of religion applicable to non-Muslims does not apply with equal force to Muslims. This is because being a Muslim confers one a legal status and changes the entire regime of personal law applicable to them. It also allows the State to enact offences specifically catered to Muslims under Item 1 of List II of the Ninth Schedule. This is supported by the difference in language in Item 1 which is relatively more narrowly worded to include all those 'professing' the religion of Islam whereas Article 11(1) uses the more liberal phrase 'profess and practise'.

(iii) Therefore, the term Islam for all intents and purposes inasmuch as it is a religious belief, is also a legal label demarcating between those who can and cannot seek recourse in and be tried (as the case may be) before the Syariah Courts. Section 74(2) of the ARIE 2003 and all related legislation of other States exist to presume that a person originally a Muslim is presumed to be a Muslim until and unless he seeks an order of the Syariah Court stating otherwise.

(iv) If a person is born and raised as a Muslim (whether he chooses to practise his beliefs or not), he is in law a person 'professing the religion of Islam'. Should he change his religion from Islam to Ahmadiyya, just as if he were to attempt to renounce Islam for any other faith, he cannot do so unless by order of the Syariah Court as prescribed by the relevant State law. Thus, any renunciation of the Islamic faith is within the jurisdiction of the Syariah Courts.

(v) The legal label of being a Muslim also has other legal effects. For one, it determines whether one is constitutionally a Malay or not and *a fortiori* whether such a person is entitled to the

special position under Article 153 of the Federal Constitution. This point is also made in the 2000 fatwa specifically in respect of the Ahmadiyya community.

(vi) The 1998 and 2000 fatwas essentially removed the legal status of the Ahmadiyya community as persons 'professing the religion of Islam'. Having lost that label, they cannot therefore be taken as persons or a class of persons being subject to the exclusive jurisdiction of the Syariah Courts prescribed in Item 1, List II of the Ninth Schedule of the Federal Constitution.

MyKad and Whether the Religious Identity "Islam" is conclusive evidence of a Person 'Professing the Religion of Islam'

[120] With that, the only question remaining before us is whether the Respondents herein are indeed Ahmadiyya by original faith or were Muslims by original faith but had subsequently converted from Islam to Ahmadiyya. This issue, we hasten to add is pertinent to the Malaysian Respondents because of their Malaysian identification cards and the Federal Court decisions of amongst others, ***Lina Joy (supra), Kamariah Ali (supra)*** and ***Soon Singh (supra)*** as discussed earlier. The

Appellants placed reliance on the word 'Islam' on the face of (at least some) of the Respondents' MyKad. This leads to the larger question: are MyKads to be deemed as conclusive evidence of a person's religious identity?

[121] During the course of our research, we found at least one article addressing this subject to the point. It is **Abdul Majid *et. al*, 'Apostasy in Islam and Identity Cards in Malaysia' (2015) 44 Comm. L. World Rev. 298** ('**the Article**'). There, the authors provide a lengthy exposition on the history of the MyKad or the National Registration Identity Card ('**NRIC**') the relevant portions of which we adopt in this judgment.

[122] The main law governing MyKad is the National Registration Act 1959 ('**NRA 1959'**) and its ensuing subsidiary regulation *i.e.* the NRR 1990. The progenitor of the NRA 1959 is the *kipandi* introduced by the British in Africa in 1920 which was basically a document containing certain particulars indicating the status of the person. Without this *kipandi*, a native of East Africa could not be employed and the failure to carry a *kipandi* and produce it when required was an offence.

[123] The *kipandi* worked so well for the British in their African colonies that they eventually imported the system into their own homeland *vide* the

United Kingdom National Registration Act 1939 ('**UKNRA 1939**'). But due to unpopularity, the British repealed their UKNRA 1939 and by doing so ended the use of national identity cards.

[124] Due to the overall success of the *kipandi* system in East Africa, the British eventually imported it into the then Malaya. It was primarily used during times of emergency specifically during the Communist Insurgency and the 1963-1966 Indonesian Confrontation. The learned authors cited the judgment of the Federal Court in ***Ooi Hee Koi v Public Prosecutor*** **[1966] 2 MLJ 183,** which in turn cited the decision of the King's Bench Division in ***William v Muckle*** **[1951] 2 All ER 367** which collectively held that the legislative intent behind identity cards was for 'security purposes'.

[125] Are the particulars in MyKad conclusive of a person's identity? On this point, there is a decision of this Court in ***Anne Theresa de Souza v Majlis Agama Islam, Jabatan Agama Islam Selangor & Ors and other appeals*** **[2010] 3 MLJ 748** *('***de Souza**') which the learned authors of the Article heavily criticise.

[126] The brief facts were these. There were several appeals one of which was brought by one Lim Yoke Khoon. She had converted to Islam to marry a Muslim man but their marriage subsequently ended in divorce.

She brought an action attempting to remove 'Islam' from her MyKad and to change her name from 'Noorashikin bte Abdullah' to Lim Yoke Khoon. But instead of using her so-called Muslim name 'Noorashikin bte Abdullah', she used her original birth name, 'Lim Yoke Khoon'. Her action found its way to the Court of Appeal which dismissed her appeal *in limine*. Tengku Baharudin Shah JCA, had this to say at paragraph 10:

> "*In the present case, the person named as the appellant before us and as the plaintiff in the court below had no legal identity. Put in another way, there was no natural person or legal entity by the name of the plaintiff or the appellant when the OS was instituted, or this appeal filed. The appellant purported to depose the affidavit filed in support of the OS but the IC number ascribed to her therein in fact belonged to Noorasyikin. The deed poll purportedly sworn by Noorasyikin at p 292 of the AR appeared to be signed by the appellant (her name appears to be the signatory) whereas the surat akuan purportedly sworn and signed by the appellant at p 306 of the AR bear the IC number of Noorasyikin. Amidst such confusion and misnomer one fact that stood out unchallenged was that the natural person and the holder of the IC No 7302218–05–5122 was Noorasyikin and not the appellant or plaintiff.* ***One may prefer to use names other than one's registered name but that would not alter one's legal identity as reflected in the IC unless and until such preference was duly effected according to the NRA****. For*

the moment the appellant remained a non-entity, could not initiate the OS in the High Court, and had no capacity to come to this court by way of appeal against the decision made which was itself in the circumstances a nullity."

[Emphasis added]

[127] His Lordship purported to take the Appellant's name as being indicative of her identity. However, the learned authors of the Article and the Respondents before us take the position that the particulars in a MyKad is not presumptive of one's identity. The argument is principally hinged on **Regulation 24 of the NRR 1990** which reads as follows:

"***No presumption concerning contents of identity cards, etc.***

(1) The burden of proving the truth of the contents of any written application for registration under these Regulations, or the contents of an identity card, shall be on the applicant, or on the person to whom such identity has been issued, or on any other person alleging the truth of such contents.

(2) Where any person claims that he is an exempted person the burden of proving such fact shall lie upon him."

[128] The learned authors of the Article and the Respondents take the position that given the express exclusion of a presumption of identity via Regulation 24, a MyKad cannot be indicative of a person's religious identity. The learned authors of the Article went to the extent of arguing that the decision of the Court of Appeal in **de Souza *(supra)*** was *per incuriam* by its failure to consider the said Regulation 24 which stipulates that a MyKad is not presumptive of one's identity.

[129] In support of the proposition that a MyKad is indicative of religious identity, the Appellants placed reliance on the decision of the Federal Court in ***Lina Joy (supra)***. The facts were briefly these. The Appellant was a Malay woman who went by the name Azalina binti Jailani. She applied to the National Registration Department ('**NRD**') to substitute that name with 'Lina Joy' and to remove her status as 'Islam'. Paragraphs 32-35 of the judgment of Ahmad Fairuz CJ explain the administrative details of the NRR 1990 which was retrospectively amended vide P.U.(A) 70/2000 with effect from 1 October 1999:

> "*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 October 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 1 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.

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")."*

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."

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."

[Emphasis added]

[130] The majority of the Federal Court in ***Lina Joy (supra)*** held that the NRD was correct to require the appellant in that case to first obtain an order of the Syariah Court indicating her renunciation of Islam before they could remove her status as 'Islam'. We note here two important points made in that case to wit, that it was undisputed that the appellant was of the Malay race and her original religion had always been Islam. Thus, the appellant was subject to the jurisdiction of the Syariah Courts of the relevant State. In respect of the argument that the Syariah courts no longer have jurisdiction over a Muslim who had converted out of Islam, the majority of the Federal Court held that the conversion out of Islam is necessarily in accordance with the principles and tenets of Islam, and a matter within the jurisdiction of the Syariah Courts. This was also the position taken in the cases of ***Soon Singh (supra)*** and ***Dalip Kaur (supra)***. Thus, the majority of the Federal Court in ***Lina Joy (supra)*** held that the NRD was correct to require the appellant to provide a certificate

of renunciation from a Syariah Court before the religious status of 'Islam' on the identity card of the Appellant could be deleted.

[131] There is another decision which warrants our attention, that is, ***Azmi bin Mohamad Azam v Director of Jabatan Agama Islam Sarawak & Ors*** **[2016] 6 CLJ 562** ('**Azmi**'). The facts were as follows. The applicant had left the religion of Islam and embraced Christianity. According to the applicant, the choice of Islam was decided for him when he was ten years old by his parents following their own conversion to Islam but since birth, the applicant was raised and brought up in the Bidayuh Christian community. The applicant had approached the Director-General of National Registration Malaysia's ('the third respondent') office to change his name on his identity card but was informed that a letter of release from Islam ('the letter') and a Syariah Court order were required.

[132] Accordingly, the applicant applied to the High Court for various reliefs essentially to compel the NRD to change his name from 'Azmi bin Mohamed Azam Shah @ Rooney' to 'Roneey anak Rebit'; and an order of mandamus to compel the NRD to remove the applicant's religion of Islam in his identity card and/or the records and/or particulars of the applicant's religion held at the National Registry to that of Christianity.

[133] In a consent order entered, the first, second and fourth respondents agreed to issue the letter of no objection to the applicant to renounce Islam. However, the third respondent still insisted on the letter and a court order. The applicant was informed by the Ketua Hakim Syarie of Jabatan Kehakiman Syariah Sarawak that the Syariah Courts in Sarawak do not have the jurisdiction to issue the letter. Premised on the information obtained from the Ketua Hakim Syarie, the applicant argued that the third respondent had no basis to insist on a Syariah Court order to effect the amendment in the applicant's identity card.

[134] Yew Jen Kie J (as she then was) granted the orders the applicant sought and in so doing, held as follows at paragraphs 26-27:

> "*In Lina Joy's case, supra, the appellant was a Malay woman brought up as a Muslim. She applied for the removal of "Islam" and her name "Azlina bte Jailani" to "Lina Joy" in her replacement identity card, which application was considered incomplete without an order of the Syariah Court stating that she has renounced Islam.*
>
> ***It is to be noted that the applicant in the present case is a Bidayuh by race and had been raised and brought up in a Christian Bidayuh community since birth. The choice of Islam religion was decided for***

> ***him by his parents following their own conversion to Islamic faith as he was ten years old. He has never practised the Islamic faith and has embraced Christianity****. He is not challenging the validity of his minor conversion. In exercise of the constitutional religion freedom, he is seeking a declaration that he is a Christian.*"
>
> [Emphasis added]

[135] The decision in ***Azmi (supra)*** remains good law. The decision was appealed but subsequently withdrawn. The NRD also abided by the decision, changed the applicants name and removed the word 'Islam' from his MyKad. See: *Ida Lim, 'Sarawakian Christian Rooney Rebit finally gets new IC without 'Islam'' The MalayMail (10 November2016) at <https://www.malaymail.com/news/malaysia/2016/11/10/sarawakian-christian-roneey-rebit-finally-gets-new-ic-without-islam/1246725>.*

[136] As we see it, the difference between ***Lina Joy (supra)*** and ***Azmi (supra)*** is in the original *de facto* status of the respective applicants. The applicant in ***Lina Joy (supra)*** was for all intents and purposes undisputedly a Malay woman who was originally a Muslim. In the ***Azmi case (supra)****,* the learned High Court Judge was satisfied that the applicant was never raised as a Muslim compounded by the fact that he could prove he was of Bidayuh heritage and had been raised as a

Christian. The fact that he was never given the chance to choose his religion once he attained the age of majority as propounded by the Supreme Court in ***Teoh Eng Huat v The Kadhi of Pasir Mas, Kelantan & Anor*** **[1990] 1 CLJ Rep 277**, further amplified the assertion that he was never a Muslim to begin with.

[137] With the foregoing authorities in mind, we are of the view a MyKad is not conclusive evidence of religious identity. Just because a MyKad states 'Islam' does not *ipso facto* mean that the given person is to be taken as a person 'professing the religion of Islam'. Firstly, our reading of ***Lina Joy (supra)*** suggests that the Federal Court, strictly considering administrative law, held that the NRD was not incorrect to require an order from the Syariah Courts before removing the word 'Islam' from the applicant's MyKad. The Federal Court did not venture to say that a MyKad was in fact conclusive of her status as a person 'professing the religion of Islam'. We are fortified in our view by comparing the decision in ***Lina Joy (supra)*** to the decision in ***Azmi (supra)***.

[138] But for the sake of caution, we hasten to add that if a person's MyKad clearly does not state that he or she is a Muslim, given the unique circumstances adjudicated in ***Lina Joy (supra)***, there would be no reason to investigate such a person for a Syariah offence because it is clear that

he or she is not a Muslim. However, if his/her MyKad says he/she is 'Islam', then that is where the ambiguity lies, because the religious identity as stated in the MyKad is not conclusive proof of what is stated if that fact is disputed. Thus, any person alleging a fact in the MyKad to be true still bears the burden of proving its truth.

[139] Next, we find logic in the argument that the plain language of Regulation 24 of the NRR 1990 excludes the application of any presumption of identity. There is at least one comparable decision from Singapore on point.

[140] The case of ***Lim Ying v Hiok Kian Ming Eric*** **[1991] 2 SLR(R) 538,** concerned the validity of a marriage between one woman and another woman who had undergone a sex change. The transsexual had persuaded the Singaporean NRD to change the designation of her gender from female to male. This they did. In defending the validity of her gender change, counsel for the transsexual woman argued that the identity card was indicative of her legal status as a male and by that fact the marriage was validly entered into between persons who were respectively male and female.

[141] Regulation 11 of the Singapore NRR 1991 is *in pari materia* with our Regulation 24 of the NRR 1990. VK Rajah JC in rejecting the conclusiveness of particulars on the identity card opined as follows, at paragraphs 51 and 52:

> "*A person issued with an identity card must, under the National Registration Regulations 1991, report a change in his name or other particulars which are to his knowledge incorrect to the nearest registration office and apply for a replacement identity card.*
>
> *Section 11 of the National Registration Act (Cap 201) places the onus of proving the truth of the contents of an identity card on the person to whom the identity card was issued or on any other person alleging the truth of its contents.* ***The particulars on the identity card are not conclusive evidence to establish the sex of a person for purposes of contracting a valid marriage under the Charter. The fact that the sex of the respondent was stated as a male on the identity card does not make her a male in law for purposes of marriage under the Charter****.*"
>
> [Emphasis added]

[142] In response to the ***Lim Ying (supra)*** decision, the Singapore Parliament amended the Singapore Women's Charter to expressly render one's identity card as *prima facie* proof of one's sex.

MyKad and Federal and State Legislative Powers

[143] Further, there is also merit in the Respondents' point on the separation of legislative powers of the Federal and State legislatures on this matter. The power to provide for national registration is provided in Item 3 of List I of the Ninth Schedule of the Federal Constitution. It is a federal power. For convenience, the said Item reads:

> "*3. Internal security, including —*
>
> *…*
>
> *(e) national registration.*"

[144] It will be noted that the opening words of the aforementioned item are 'internal security' which lends credence to the argument based on the decision in ***Ooi Hee Koi (supra)****,* that MyKads were meant for 'security purposes' and not as a *prima facie* means to establish identity.

[145] The issuance of a MyKad is governed by Federal law. However, the religious identity of a person is governed by State law. Thus, there may be contradictory positions of religious identity between what is stated on a MyKad and what has been determined by a State's Enactment. In the instant case, the Malaysian Respondents possess MyKads which state 'Islam' as their religion, but being Ahmadiyya, the two Fatwas in Selangor have denounced the Ahmadiyya as non-Muslims.

[146] In this respect, Articles 74(2), 76(1) and 76(2) of the Federal Constitution is pertinent and provides as follows:

> *"74. (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.*
>
> *76. (1) Parliament may make laws with respect to any matter enumerated in the State List, but only as follows, that is to say:*
>
> *(a) For the purpose of implementing any treaty, agreement or convention between the Federation and any other country, or any decision of an international organization of which the Federation is a member, or…*

> ***(2) No law shall be made in pursuance of paragraph (a) Clause (1) with respect to any matters of Islamic law or the custom of the Malays or to any matters of native law or custom in the States of Sabah and Sarawak and no Bill for a law under that paragraph shall be introduced into either House of Parliament until the Government of any State concerned has been consulted."***
>
> [Emphasis added]

[147] Given the clear demarcation of legislative powers, the authority to determine whether a person professes Islam is something clearly within the powers of the State Legislature derived collectively from Article 74(2) and Item 1 of List II of the Ninth Schedule respectively of the Federal Constitution. Whether or not the federal promulgated law designates someone a Muslim or otherwise therefore is not conclusive of the religious identity of the person concerned and consequently, the issue has to be determined in reference to the relevant State Enactments.

[148] If a MyKad does not actually represent the religious identity of a Muslim person, then the larger pressing concern is how exactly one's religious identity be determined. In respect of the Malaysian Respondents, the Appellants contention is that during the course of their investigation, they had relied not only on the religious identity as stated in

the MyKads of the Malaysian Respondents, but also on the fact that the Malaysian Respondents possessed 'Malay' features and thus it was reasonable, without any evidence to the contrary, to assume that the Respondents were Muslims and therefore, subject to the jurisdiction of the Syariah Courts and the enforcement of ARIE 2003.

[149] Therein lies the legal quandary. The Malaysian Respondents argue that the NRR 1990 was retrospectively amended and that as a result, the Malaysian Respondents were ascribed the status 'Islam' in their MyKad. The issue is compounded by the fact that the status of whether one is 'Islam' is determined by the respective State law. Thus, while an Ahmadiyya might be a Muslim in one State, he might be a non-Muslim in another State. Thus far, only the State Enactments of Selangor and Kedah have denounced the Ahmadiyya as non- Muslims. There is, as far as we are aware, no uniformity among the States on this subject.

[150] Besides MyKads, there is no other reliable identification, as far as we know, to determine whether a person does or does not professes the religion of Islam. This poses a real problem to the State religious authorities when investigating and subsequently finding that a person is designated as 'Islam' in his MyKad.

[151] While we have expressed the view that a MyKad is not the determining factor of one's religious identity, it appears to be the only convenient method of identification as far as law enforcement officers are concerned. Regulation 6 of the NRR 1990 for instance requires a person to carry his MyKad with him at all times. Thus, a MyKad, with security in mind, serves to enable identification of the holder of the MyKad.

[152] In respect of Syariah offences in the state of Selangor, sections 78 and 79 respectively establish the offices of the Chief Syarie Prosecutor and the Syariah Prosecutors. The duty of the Chief Syarie Prosecutor is primarily to institute, conduct or discontinue any proceeding for an offence before any Syariah Court. Section 79 establishes the role of Religious Enforcement Officers. Their main duty is to carry out the investigation of offences under this Enactment or under any other written law prescribing offences against the precepts of Islam by "persons professing the religion of Islam". How is a Religious Enforcement officer to know whether or not a specific person is or is not in that class? Thus, while MyKads are by no means conclusive proof of a person's religious identity, it therefore remains open to any person with a MyKad designated as 'Islam' to proffer proof he is not what MyKad says he is.

[153] Now, we understand learned counsel Mr Aston Paiva's argument that the retrospective amendment to the NRR 1990 was perhaps made without any prior consultation with the Ahmadiyya community with the result that they were erroneously ascribed with the title of 'Islam' notwithstanding the 1998 and 2000 fatwas.

[154] On the premise that the Ahmadiyya, are non-Muslims to begin with (according to the respective fatwas in Selangor and Kedah), we think the situation presented to us *i.e.* that the whole Ahmadiyya community would have to apply to the Syariah Courts for an order renouncing their faith so that they can approach the NRD to remove 'Islam' does not arise. This is because at least in respect of the Ahmadiyya who are not Muslims by origin, their adherents are in the same position as other non-Muslims like the Hindus, Buddhists and Christians, etc. Their situation is closer to that of the applicant in the ***Azmi (supra)*** case. This of course, is only true of persons who are originally Ahmadiyya by faith. As for those who were originally Muslims and may have converted to Ahmadiyya, in line with the authorities of ***Lina Joy (supra)***, ***Dalip Kumar (supra),*** and ***Soon Singh (supra)***, an order of renunciation of Islam by the Syariah Court is required.

[155] We are also very wary of the fact that there are fundamental issues at stake here. If the designation 'Islam' is not removed from the MyKads

of the Malaysian Ahmadiyya, would that mean that each and every time the Ahmadiyya community congregates for prayers, they would have to present proof that they are in fact an Ahmadiyya? It would certainly be in their interest to provide such identification. Otherwise, they may find themselves being subjected to investigation – an act which may be interpreted as religious persecution. What is needed, at the end of the day is clarity on the religious identity of the Ahmadiyya in order to determine whether or not they are subject to the jurisdiction of Syariah law in the respective States.

[156] In addition, as things stand, there also lies the equally real and important concern in ***Kamariah Ali (supra)***. Could there also be cases where actual born Muslims, or even those who converted to Islam might renounce the faith and claim to be Ahmadiyya in order to escape prosecution under the ARIE 2003 or any other State law? What is the State to do then? Further, considering the Ahmadiyya belief is not considered a part of Islam, the Ahmadiyya are also subject to the prohibition under Article 11(4) of the Federal Constitution from propagating their faith to Muslims. Thus clarity and certainty is required in the religious identity of the Ahmadiyya especially in their religious activities, to avoid a situation whereby they run the risk of contravening Article 11(4). The Ahmadiyya themselves have to ensure that any

propagation of their beliefs cannot involve Muslims, but only Non-Muslims, including their own adherents.

[157] The affidavit of Nurhelmi bin Ikhsan indicates that the Appellants have always doubted the Ahmadi status of the Respondents. This is distinguished from the facts of ***Abdul Rahim (supra)***, where the relevant State religious authority had expressly admitted and accepted that the applicant in that case was an Ahmadi. Here, the Appellants dispute the religious identity of the Respondents.

[158] We also note that one of the prayers of the Respondents sought in their application for judicial review is prayer (g) which we reproduced as follows:

> *"(g) In the alternative, an order in the nature of prohibition against the 1st, 2nd and 3rd Appellants and their servants, officers and/or agents from conducting investigations or continuing investigations against the Respondents or each of them* ***if the Respondents or each of them procures proof or evidence to the 1st, 2nd and 4th Appellants that they are followers of the teachings of the Ahmadiah/ Qadiani".***
>
> [Emphasis added]

[159] Premised on the above prayer, the Respondents themselves had indicated their amenability to be subjected to an investigatory process to prove that they are indeed Ahmadiyya. Thus, in our considered view, the learned Judge should have allowed an investigation into the Respondents' religious status. With respect, in our view, the learned Judge erred in finding the Religious Enforcement officers had exceeded their jurisdiction simply on the assumption that all the Respondents are indeed Ahmadi without making the distinction as to whether they are of the Ahmadiyyah faith by origin or by conversion from Islam.

Equality before the Law
Article 8 of the Federal Constitution

[160] We will now address the Respondents' arguments in respect of Article 8 of the Federal Constitution. Article 8 provides, in part, as follows:

> *"**Equality***
>
> *8. (1) All persons are equal before the law and entitled to the equal protection of the law.*
>
> *(2) Except as expressly authorized by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent, place of birth or gender in any law or in the appointment*

to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on any trade, business, profession or employment."

[161] In addressing this issue, we make two observations. Firstly, for reasons stated already, applying Regulation 24 of the NRR 1990, MyKads are not presumptive of identity. It remains open to any person – citizen or not – to produce proof to the Religious Enforcement Officers to contradict the contents of his MyKad. In the case of foreigners, we see no impediment to their right also to produce any credible proof of their identity. At this juncture we note that we are not relying on the MyKad to determine the Malaysian Respondents' religion. From wherever the Respondents are, it is for them to prove on evidence their religious status as Ahmadiyya. This is to dispel any notion that they may be Ahmadi by renouncing the Islamic faith as opposed to being Ahmadi by original faith. The nature of the evidence would necessarily differ between the foreign and the Malaysian Respondents as the foreign Respondents may refer to their international passports, UNHCR documentation or membership of Ahmadiyya from their home country. Malaysians may refer to their membership of the Jemaat Ahmadiyya in Malaysia or other relevant documentary evidence.

[162] The common requirement for both non-Malaysians and Malaysians is that the evidence proffered is credible evidence of the religious status of the respective Respondents. The treatment accorded is the same and thus, there is no discrimination between the Malaysian and non-Malaysian Respondents. The argument that there will be breach of Article 8 is therefore without merit.

Who Bears the Burden to Prove That a Person 'Professes the Religion of Islam'?

[163] Having held that the information stated in MyKad is not conclusive in the determination of a person's religious status as 'Islam', the next question is how is such determination to be made?

[164] Regulation 4(cc) (v) of the NRR 1990 requires that any person who is required to register under the Regulations shall give the relevant particulars including 'his religion'. Thus, it is clear that when the NRD registered the religion of the Malaysian Respondents herein, they did so with the benefit of information supplied to them by the said Malaysian Respondents. There may be several anomalies if this is the case.

[165] For one, the Malaysian Respondents may have themselves informed the NRD that they are Muslim. If that were the case, their

religious status would have been a fact which they themselves were responsible to supply. If they were in a State other than Selangor and Kedah, or any other State which does not excommunicate the Ahmadiyya from the mainstream Islamic faith, then it stands to reason that the Appellants' assertion that the Respondents are Muslim is correct.

[166] But, if the Respondents did indicate that they are Muslim at the time of registration, it could in turn have happened for two separate reasons. Firstly, the applicant of the MyKad may indeed be a Muslim when the MyKad was issued to him, but he currently professes the Ahmadiyya faith as a result of a subsequent conversion. Or secondly, that he was originally an Ahmadiyya and at the time the MyKad was issued to him but nonetheless registered himself as Muslim on the belief that his faith is still a part of Islam. In the former situation, his registration as 'Islam' was reflective of what he actually professed at the material time. However, if it was the latter, then the designation of his religious identity as 'Islam' would have been a mistake.

[167] The Respondent submits that the insertion of Regulation 4(cc)(v) was a retrospective amendment made without according the Ahmadi community the right to be heard. Our analysis indicates that the amendment was made nearly 20 years ago. If this was indeed a mistake,

then it would have been in the hands of the relevant Malaysian Respondents to take the necessary remedial steps to correct that mistake and to accept the legal position that their faith is not Islam under the laws of Selangor. That this is possible is apparent in the ***Azmi*** case cited earlier.

[168] Whatever be the case, it is only logical to conclude that a person's state of mind and what he 'professes' is strictly within his own knowledge. **Section 106 of the Evidence Act 1950**, in this regard provides as follows:

> *"**Burden of proving fact especially within knowledge***
>
> *106. When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him."*

[169] The evidential rule expressed in Regulation 24 of the NRR 1990 is basically a repetition of the cardinal rules of evidence as contained in **sections 101 and 102 of the Evidence Act 1950**. Such cardinal rule essentially stipulates that he who alleges must prove. That said, it is hardly possible much less practical to expect the one who alleges to prove what religion the other professes. What one professes is a state of mind

especially within that person's knowledge. It is therefore incumbent on the professor or believer *i.e* the Respondents to prove their faith.

[170] Strictly speaking, the right to freedom of religion among Muslims is subject to Item I of List II of the Ninth Schedule of the Federal Constitution which grants jurisdiction to the Syariah Courts solely on what one professes. Thus, to ascertain the Islamic religious identity is necessary. Otherwise, the entire purpose of the said Item 1 would be superfluous and would run afoul the basic legal infrastructure of the Federal Constitution.

[171] For the foregoing reasons, we are of the considered view that the burden to establish that the Respondents herein are indeed Ahmadiyya lies on them because their faith is a fact especially within their knowledge.

[172] We pause for a moment to note that this 'peculiarity', arises specifically in this case because the Ahmadiyyah consider themselves as Muslims though the law of Selangor says they are not. The difficulty, is that we do not know, on the facts of this case whether the Respondents are Ahmadi by original faith or whether there are among them any one who had renounced Islam to adopt the Ahmadi faith. If say a Christian or a Hindu were to convert to become an Ahmadi, it would unlikely be an issue whether he had renounced his Christian or Hindu faith before he

adopted the Ahmadi faith subsequently. This is why a factual examination of the religious status of the Respondents, which the learned Judge failed to undertake, is necessary.

What Amounts to Credible Evidence to Prove Religious Identity?

[173] Given the circumstances, there might of course be questions as to how one would prove his faith – or even lack of faith. We do not propose to lay out any definitive standard. That said, the evidence will have to be objective and credible enough to demonstrate that the Respondents are original professors of the Ahmadiyya faith. Nationally or internationally issued identification documentation would be one reliable indicia of proof. What others consider them to be would be useful supplementary or corroborative evidence (and not as primary evidence).

[174] In terms of seeking factors to determine one's religious identity, we found some guidance from the approach taken by the English Courts as reflected in a very recent judgment of the English Court of Appeal in ***WA (Pakistan) v The Secretary of State for the Home Department*** **[2019] EWCA Civ 302** ('**WA (Pakistan)**'). The main issue in the case was whether the appellant had satisfied the test to acquire refugee status. His case was primarily premised on whether he ought to be granted refugee

status in the United Kingdom because, he claimed that he wanted to continue preaching his beliefs in Pakistan which would lead to his persecution there. The Court of Appeal appeared to affirm the two-step process taken by the decision-makers below it in that (i) the decision-maker must satisfy himself whether the asylum-seeker is indeed Ahmadiyya; and (ii) whether his continuing practise of his faith would indeed lead to his persecution.

[175] For the purposes of this case, we are only concerned with the approach of the English Courts to determine religious identity, specifically whether someone is actually an Ahmadiyya or not – by way of guidance.

[176] In the ***WA (Pakistan)*** case, the Court of Appeal, at paragraph 60, approved the following approach taken by a tribunal in another case, that is, ***MN and others (Ahmadis – country conditions – risk) Pakistan CG*** **[2012] UKUT 00389(IAC), headnote 5**:

> *"In light of the above, the first question the decision-maker must ask is (1) whether the claimant genuinely is an Ahmadi.* ***As with all judicial fact-finding the judge will need to reach conclusions on all the evidence as a whole giving such weight to aspects of that evidence as appropriate*** *in accordance with Article 4*

> *of the Qualification Directive.* ***This is likely to include an enquiry whether the claimant was registered with an Ahmadi community in Pakistan and worshipped and engaged there on a regular basis. Post-arrival activity will also be relevant. Evidence likely to be relevant includes confirmation from the UK Ahmadi headquarters regarding the activities relied on in Pakistan and confirmation from the local community in the UK where the claimant is worshipping."***
>
> [Emphasis added]

[177] The above passage is guidance only to the extent of suggesting that the Court must evaluate the evidence as a whole to arrive at the objective conclusion that the given person is indeed genuinely Ahmadiyya. In ascertaining religious identity, the English Courts do not have to consider the issue of whether someone is Ahmadi by original faith or by conversion from Islam. This issue is therefore not factored in their assessment of a person's religious status. Thus, we caution that any guidelines adopted from England or any other country not similarly placed as ours will therefore have to be treated with caution, bearing in mind the structure of our Federal Constitution, as well as relevant state laws and legal precedents.

[178] Thus, given the systemic issues in our Federal Constitution, we think the approach taken by the Court below was, with respect, incorrect. The learned Judge presumed that the Respondents in the present case are indeed, Ahmadiyya without due regard to the averments by the relevant officer of the 3rd Appellant that the Appellants are unable to conclude that the Respondents are of the Ahmadiyya community. Without such a factual determination, the Court would be unable to determine whether the applicant is a genuine Ahmadiyya or an apostate. This distinction is important because the Courts must rule in accordance with the law which includes the Federal Constitution and the ARIE 2003.

[179] Learned counsel for the Respondents, Mr Aston Paiva argues that the Appellants have not rebutted the affidavits filed by the Respondents verifying that they are Ahmadiyya nor have they rebutted the affidavit by the President of the Jama'at verifying the same. We do not think this is the case. With respect, those affidavits were prepared for the purposes of this litigation. We are also not persuaded by this argument for two reasons.

[180] Firstly, the aforementioned affidavit of Nurhelmi bin Ikhsan indicates that the Appellants had always doubted the Ahmadiyya status of the

Respondents. Thus, it is clear that the religious status of the Respondents has always been the subject of dispute.

[181] Further, the present case is a polar opposite to what happened in ***Abdul Rahim*** **(*supra*)** where the State religious authority expressly admitted and accepted that the applicant in that case was an Ahmadiyya. For completeness, Mustapha Hussain J noted as follows at page 371:

> *"The Kedah State Administration of Muslim Law Enactment 9 of 1962, section 41(3)(a) and (b) conferred a jurisdiction to the Kadi's or the Syariah Court only to Muslims. This means that non-Muslims, (and the Applicant is a non-Muslim as declared by the Majlis itself,) are outside the jurisdiction of the Majlis and its Syariah Courts. This being so, the Application is therefore allowed.*
>
> ***In fact in his written submission the learned Legal Adviser using his own words says "the Respondent (i.e. the Majlis Ugama Islam and the Chief Kadi) concede that the Applicant is not a Muslim and therefore is not subject to the jurisdiction of Mahkamah Syariah"****. The Motion is allowed, a Writ of Prohibition is hereby issued prohibiting the Chief Kadi of Kedah, his agents and/or servants from hearing cases Jenayah 1/83, 2/83, 3/83 and 4/83 Syariah Court, Alor Setar.*"

[Emphasis added]

[182] As far as we can tell, the Appellants have made no such concession here. The Respondents or the President of the Ahmadi organisation can make any averment as to the Respondents Ahmadiyya status, but it is still open to the court to consider all documentary and other evidence before it can be determined that the person is by birth an Ahmadiyya and not a Muslim who has actually converted in contravention of State law. The evidence must be objective and credible.

The Respondents' Religious Status – Evaluating the Evidence

[183] We have already noted that the learned Judge did not undertake an evidential analysis to determine whether the Respondents or any one of them is either an Ahmadi by original belief or an Ahmadi by reason of his or her renunciation of the religion of Islam. Naturally, as the point was not canvassed in the Court below, neither the Appellants nor the Respondents made any submissions as to the factual status of the any of the Respondents in the High Court.

[184] Before us, the issue was one of law, that is, whether the fact that some of the Respondents' MyKads label them as 'Islam' has any legal effect on their religious status. What is clear is that it does not but

nonetheless, as the judgments by our Courts have made clear, such as that in ***Kamariah Ali (supra)***, whether the Respondents or any one of them is actually an Ahmadi by birth or by renunciation of the Islamic faith, poses a real issue.

[185] Of the 39 Respondents in this case, 28 are Malaysians (two of whom are minors), 8 are Pakistani (one of whom is a minor), 2 are Indian and one is Indonesian. The evidence in relation to each of the Respondents is voluminous. In all fairness to parties, we think it would be wholly untenable for us to pore through the evidence to determine the Respondents' actual religious status given that this point was not canvassed in the Court below and neither was the factual point argued in length before us.

[186] The foresight of learned counsel for the Respondents, Mr Aston Paiva in his drafting of the documents for the application for judicial review provides us with a significant recourse Prayer (g) of the Respondents' application for judicial review sought the following alternative relief:

> "*(g) In the alternative, an order in the nature of prohibition against the 1st, 2nd and 3rd Appellants and their servants, officers and/or agents from conducting investigations or continuing investigations against the*

Respondents or each of ***them if the Respondents or each of them procures proof or evidence to the 1st, 2nd, and 4th Appellants that they are followers of the teachings of the Ahmadiah/Qadiani.***"

[Emphasis added]

[187] Accordingly, we think in fairness to all parties, based on the applicable law, the opportunity be given to the Respondents to make their case in accordance with prayer (g) at the High Court.

[188] We accordingly conclude our judgment as follows.

CONCLUSION

[189] In respect of Appeal 513, and premised on our reasoning earlier, we are of the view that the learned Judge had correctly decided that it is the Syariah Courts and not the Magistrates' Courts which have jurisdiction to try section 97(2) offences under the ARIE 2003. We accordingly dismiss appeal 513.

[190] In respect of Appeal 468, premised on prayer (g) of the Respondents 'application for judicial review, the Respondents' case at its

themselves are willing to accept that the relief may be contingent upon them adducing proof that they are followers of the Ahmadiyya faith. Accordingly, for the reasons already indicated, we allow Appeal 468 in part and the order of the High Court in Appeal 468 is hereby set side.

[191] We accordingly remit the matter of Appeal 468 to the High Court to allow parties to make further submissions on the evidence already on record in accordance with prayer (g) of the Respondents' application for judicial review. For expediency, we hereby direct that the matter be fixed for case management at the High Court of Shah Alam forthwith.

[192] For the avoidance of doubt, should the Respondents or any of them make their case by cogent and credible supporting evidence that they are Ahmadiyya, then the High Court has the discretion to grant them the reliefs they seek to quash and prohibit all Syariah investigation and prosecution against them or further relief relevant to the successful enforcement of that order.

[193] Finally, as both appeals concern significant public interest, in line with standard judicial practice in such cases, we make no orders as to costs in both Appeals 513 and 468.

POSTCRIPT – Ambiguity of Religious Status

[194] In conclusion, we revert to the seminal question posed at the forefront of this judgment: who is a person "professing the Religion of Islam"? The crux of the matter in the instant case lies in the ambiguity of the religious status of the Respondents and in particular, the Malaysian Respondents who carry MyKads which list their religious status as Islam, when they claim to be Ahmadiyya. As we have sought to demonstrate in the course of our judgment, the answer will necessarily have to be determined on a case by case basis pursuant to the respective State laws, the Federal Constitution as well as relevant judicial precedents.

[195] The inescapable conclusion from a holistic reading of the Federal Constitution is that the entire corpus of personal laws applicable to persons depends solely on whether or not they 'profess the religion of Islam'. In the usual cases, if the Appellants or any other religious authorities suspect that a Syariah Offence has been committed, the absence of 'Islam', based on ***Lina Joy*** **(supra)** in the MyKad should be a clear enough indication that the person is not a Muslim and thus is not subject to the jurisdiction of the Syariah Courts. This case is unique in that the Ahmadiyya personally believe they are Muslims when the State laws of Selangor have already declared them to be non-Muslims.

[196] This ambiguity in religious status poses a serious problem. While we may have addressed the pertinent issues in this case, we can foresee difficult questions that may arise in similar cases in future. The Ahmadiyya are, as are all other persons, entitled to the freedom of religion subject to Article 11(4) and (5) of the Federal Constitution. But because of the dual legal system in Malaysia, their status, as to whether they are Muslims or not, coupled by the fact that their MyKad may state their religion to be 'Islam' (though not conclusive of their religious identity) may give rise to ambiguity in their religious status. The difficulties are compounded by the fact that the issuance of MyKads by the NRD is pursuant to Federal powers, while the issue of who is a person 'professing the religion of Islam' is determined pursuant to the respective State Legislatures.

[197] This results in the following question: must the Ahmadiyya always be able to show that they are Ahmadiyya lest, they always be in fear of being mistaken for Muslims? Perhaps appropriate measures should be taken by the relevant authorities to identify conclusively who is an Ahmadiyya to prevent future investigation and prosecution of genuine Ahmadis. This would also require the Ahmadiyya themselves to be in possession of relevant documentation, including MyKad which are not ambiguous as to their religious identity.

[198] In addition, there is also the thorny issue of the requirement for Muslims who had converted to Ahmadiyya to obtain a renunciation of Islam by the Syariah Courts in order to confirm their status. In respect of the Malaysian Respondents, this is also the requirement before the NRD can delete their religious status as 'Islam' from their MyKads. This would not be an issue if it were a non-Muslim converting to the Ahmadi faith.

[199] The appeals raise another fundamental yet unanswered question. Religion is a matter for the respective State Legislatures. While the Ahmadiyya are not considered Muslims in States like Selangor and Kedah, they might not have been excommunicated in other States. What is the status of the Ahmadiyya in the latter? Will they be subject to the jurisdiction of the respective Syariah Courts? There are no easy answers to these questions. However, what is clear is that any ambiguity in their religious status may expose them to the risk of prosecution and investigation by the respective Syariah Courts.

[200] This judgment addresses a specific case unique to the facts and the Two Fatwas which are valid and binding in Selangor. Perhaps it is timely that all the States in Malaysia, along with the Federal Government work out a unified regime as well as a proper mechanism to determine the religious status of the Ahmadiyya so that they are not perpetually put at

risk of Syariah investigation and prosecution. Clarity in the religious status of an Ahmadiyya would go a long way towards preventing similar occurrences in the future.

[201] The proposals for reforms we call for, in our considered view, are necessary if we are to protect and preserve the right to freedom of religion in Article 11(1) of the Federal Constitution with due regard to Articles 11(4) and 11(5) – a right which the Ahmadiyya are no less entitled to along with the adherents of other religious faiths in Malaysia.

T.T

(DATUK DR. BADARIAH SAHAMID)

JUDGE, COURT OF APPEAL,

PUTRAJAYA

DATED: 25 AUGUST 2020

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