Shamala a/p Sathiyaseelan v Dr Jeyaganesh a/l C Mogarajah (also known as Muhammad Ridzwan bin Mogarajah) & Anor

FEDERAL COURT (PUTRAJAYA) — REFERENCE NO 06–7 OF 2009 (W)
ZAKI AZMI CHIEF JUSTICE, ALAUDDIN PCA, ARIFIN ZAKARIA CJ (MALAYA), RICHARD MALANJUM CJ (SABAH AND SARAWAK) AND ZULKEFLI FCJ
12 NOVEMBER 2010

Civil Procedure — Contempt of court — Breach of court order — Whether alleged contemnor could be heard before she had purged contempt

Family Law — Children — Custody — Interim order granting appellant care and control and respondent access — Appellant fled country with children — Whether appellant in contempt of court — Whether appellant-contemnor should be allowed to prosecute her appeals vide reference

This judgment arose from a reference by the Court of Appeal to the Federal Court under art 128(2) of the Federal Constitution ('Constitution'), wherein five constitutional questions were raised. The appeal before the Court of Appeal arose from the decision of the High Court in a family court matter over the custody of the two children of the marriage ('the children'). The civil marriage between the husband ('the respondent') and the wife ('the appellant') was solemnised in accordance with Hindu marriage rites on 5 November 1998. When the question of the custody of the children arose before the High Court, an interim order was made by the court granting the appellant care and control of the children and the respondent the right of access to the children on weekends from 1–2pm. In the meantime, this matter took on an added dimension when the respondent who had earlier on embraced the Muslim faith arranged for the conversion of the children to Islam, without the knowledge of the appellant. On 16 April 2004 the appellant fled the country with her children and has not returned to date. The respondent, who was deprived of his right to have access to the children, then applied for and obtained leave ('the leave order') for contempt proceedings to be commenced against the appellant for breach of the interim order. The leave order, directed the wife to return the children within the jurisdiction of the Malaysian court while awaiting the disposal of the case. Although the respondent had obtained leave to commence contempt proceedings against the appellant, he could not proceed further with the contempt proceedings as the appellant was out of the country. In the appeal before the Court of Appeal it was agreed that the hearing of the appeal and all other pending appeals in connection with the actions between the parties

involving related issues should be stayed pending the disposal of this reference. The questions posed in this reference were complex and touched on some of the most fundamental constitutional issues, such as whether in the interpretation of the phrase 'parent or guardian' as found in art 12(4) of the Constitution the wife had the equal right as that of the husband over the religion of the children. At the hearing of this reference the respondent raised the preliminary objection that the appellant should not be allowed to prosecute her appeals vide this reference because she was in contempt of court, for failing to comply with the interim order and the leave order.

Held, allowing the preliminary objection and dismissing this reference with costs:

(1) (per **Zaki Azmi Chief Justice**) The appellant, who had avoided the contempt proceedings taken against her by the respondent, sought the court's assistance to grant her leave to raise the five constitutional questions posed by the Court of Appeal. To allow her leave to appeal would in effect grant her benefit without her having performed her part of the obligations for which she maybe in contempt. Further, the appellant would have an unfair advantage by not complying with the court order, because the children who had been away with her for six years would most likely choose to live with her if they were examined now. The appellant also committed further contempt when she failed to surrender the travel documents of the children after being directed to do so. As such, there was no need for this court to grant the appellant further time to comply with the orders of court, for to give her anymore time would encourage persons like her to commit contempt against the court with the hope that the court would give him or her opportunity to correct it (see paras 1–3).

(2) (per **Arifin Zakaria CJ (Malaya)**) It would be most unjust to the respondent and for this court to allow the appellant to avail herself of the judicial process, when it was clear that she had no intention to comply with the court orders. The court should not permit itself to be used by the appellant for her own end or benefit. Unless and until the two children are brought back, the court should decline to proceed with the reference (see paras 7 & 9).

(3) (per **Richard Malanjum CJ (Sabah and Sarawak)**) Although as a general rule the party who is found to be in contempt of court should not be heard until he had purged his contempt, the court had a discretion that must be exercised judicially as to whether or not a litigant ought to be heard notwithstanding his contempt. The core issue between the parties in this case was over the custody of the children and thus what needs to be considered is the paramount interests and welfare of the children, which may even prevail over the bar on a contemnor to be

heard. Both parties were entitled to safeguard his or her constitutional rights to the children and it should be the solemn duty of this court to ensure that constitutional rights enshrined in the Constitution are safeguarded. The appellant in the present case had yet to comply with the interim court order and the leave order, but strictly speaking there was no contempt order made against the appellant because the respondent who had obtained leave to commence contempt proceedings against the appellant had not proceeded with those proceedings against her. In the circumstances, the interest of justice was best served by making an order that the appellant and the children be granted three months from today to appear before this court, failing which this reference would be deemed dismissed (see paras 30, 34, 38, 44, 47 & 50–51).

(4) (per **Zulkefli FCJ**) There must be an element of certainty in the conduct of proceedings before this court. In the circumstances, to grant the appellant further time to comply with the orders of the court would be most untenable in the circumstances of this case (see para 61).

[Bahasa Malaysia summary

Penghakiman ini berbangkit daripada rujukan Mahkamah Rayuan kepada Mahkamah Persekutuan di bawah perkara 128(2) Perlembagaan Persekutuan ('Perlembagaan'), di mana lima persoalan perlembagaan dibangkitkan. Rayuan di hadapan Mahkamah Rayuan berbangkit daripada keputusan Mahkamah Tinggi di mahkamah keluarga tentang hak penjagaan dua orang anak daripada perkahwinan tersebut ('anak-anak tersebut'). Perkahwinan sivil antara suami ('responden') dan isteri ('perayu') diupacarakan mengikut adat perkahwinan Hindu pada 5 November 1998. Apabila persoalan hak penjagaan dibangkitkan di Mahkamah Tinggi, suatu perintah sementara dibuat oleh mahkamah memberikan perayu pemeliharaan dan kawalan anak-anak tersebut dan hak responden untuk melawat anak-anak tersebut pada hujung minggu dari jam 1–2 petang. Sementara itu, perkara ini diberi dimensi yang baru apabila responden yang telah menganut agama Islam menguruskan pengislaman anak-anak tersebut tanpa pengetahuan perayu. Pada 16 April 2004 perayu melarikan anak-anaknya ke luar negara dan tidak pulang sehingga kini. Responden, yang dinafikan haknya melawat anak-anak tersebut, kemudiannya memohon dan mendapat keizinan ('perintah keizinan') untuk prosiding penghinaan dimulakan terhadap perayu bagi pelanggaran perintah sementara. Perintah keizinan tersebut mengarahkan isteri memulangkan anak-anak tersebut kepada bidang kuasa mahkamah Malaysia sementara menunggu kemuktamadan kes tersebut. Walaupun responden telah mendapatkan keizinan untuk prosiding penghinaan terhadap perayu, dia tidak boleh meneruskan dengan prosiding penghinaan itu kerana perayu berada di luar negara. Dalam rayuan di hadapan Mahkamah Rayuan, telah dipersetujui bahawa pendengaran rayuan dan kesemua rayuan yang masih belum didengar yang berkaitan dengan tindakan-tindakan antara pihak-pihak melibatkan

isu-isu yang berkaitan harus ditangguhkan sementara menunggu kemuktamadan rujukan ini. Persoalan yang diajukan dalam rujukan ini adalah kompleks dan menyentuh beberapa isu perlembagaan asasi, iaitu sama ada tafsiran frasa 'parent or guardian' seperti dalam perkara 12(4) Perlembagaan isteri mempunyai hak saksama dengan suami terhadap agama anak-anak. Semasa pendengaran rujukan ini, responden membangkitkan bantahan awalan bahawa perayu tidak harus dibenarkan meneruskan rayuan-rayuannya menerusi rujukan ini disebabkan dia menghina mahkamah kerana gagal mematuhi perintah sementara dan perintah keizinan.

Diputuskan, membenarkan bantahan awalan dan menolak rujukan ini dengan kos:

(1) (oleh **Zaki Azmi Ketua Hakim Negara**) Perayu, yang telah mengelak prosiding penghinaan yang telah dikenakan terhadapnya oleh responden, memohon bantuan mahkamah untuk memberikannya keizinan untuk membangkitkan lima persoalan perlembagaan yang diutarakan Mahkamah Rayuan. Memberikannya keizinan untuk merayu sebenarnya memberikannya manfaat tanpa dia perlu memenuhi tanggungjawabnya yang mana dia mungkin menghina mahkamah. Selanjutnya, perayu akan mempunyai faedah tak saksama dengan tidak mematuhi perintah mahkamah, disebabkan anak-anak yang telah tinggal bersamanya selama enam tahun berkemungkinan besar akan memilih untuk tinggal bersamanya jika mereka disoal sekarang. Perayu juga melakukan penghinaan lagi apabila dia gagal menyerahkan dokumen-dokumen perjalanan anak-anak setelah diarahkan berbuat sedemikian. Oleh itu, tidak perlu bagi mahkamah ini memberikan lanjutan masa kepada perayu agar mematuhi perintah-perintah mahkamah, kerana memberikan lanjutan masa kepada perayu akan menggalakkan orang lain yang sepertinya melakukan penghinaan terhadap mahkamah dengan harapan mahkamah akan memberikan mereka peluang untuk memperbetulkannya (lihat perenggan 1–3).

(2) (oleh **Arifin Zakaria HB (Malaya)**) Tentunya amat tidak adil kepada responden dan mahkamah ini untuk membenarkan perayu menggunakan proses kehakiman sedangkan jelas sekali bahawa dia tidak berniat untuk mematuhi perintah-perintah mahkamah. Mahkamah tidak harus membenarkan ia digunakan oleh perayu untuk faedah atau kepentingan dirinya sendiri. Sehinggalah kedua-dua anak-anak itu dibawa pulang, mahkamah harus menolak untuk meneruskan rujukan tersebut (lihat perenggan 7 & 9).

(3) (oleh **Richard Malanjum HB (Sabah dan Sarawak)**) Walaupun sebagai peraturan amnya pihak yang didapati menghina mahkamah tidak harus didengar hinggalah dia membersihkan penghinaan itu, mahkamah mempunyai budi bicara yang mesti dilaksanakan secara adil sama ada

seorang litigan harus didengar tanpa mengambilkira penghinaannya. Isu utama antara pihak-pihak dalam kes ini adalah berkenaan hak penjagaan anak-anak dan oleh itu apa yang harus dipertimbangkan ialah keutamaan kepentingan dan kebajikan anak-anak tersebut, yang mana mungkin mengatasi kekangan ke atas orang yang menghina mahkamah untuk didengar. Kedua-dua pihak berhak melindungi hak-hak perlembagaan mereka terhadap anak-anak tersebut dan seharusnya menjadi kewajipan mahkamah ini memastikan hak-hak perlembagaan yang diabadikan dalam Perlembagaan dilindungi. Perayu dalam kes ini masih belum mematuhi perintah sementara dan perintah keizinan, tetapi sebenarnya tiada perintah penghinaan dibuat terhadap perayu disebabkan responden yang telah memperoleh izin untuk memulakan prosiding penghinaan terhadap perayu tidak meneruskan prosiding tersebut. Dalam keadaan ini, kepentingan keadilan akan tercapai dengan memberi perintah bahawa perayu dan anak-anak diberikan tempoh tiga bulan bermula dari hari ini untuk hadir di hadapan mahkamah, yang mana jika gagal, rujukan ini akan dianggap ditolak (lihat perenggan 30, 34, 38, 44, 47 & 50–51).

(4) (oleh **Zulkefli HMP**) Harus terdapat unsur kepastian dalam perjalanan prosiding di hadapan mahkamah ini. Dalam keadaan ini, untuk memberikan perayu lanjutan masa untuk mematuhi perintah-perintah mahkamah amatlah tidak munasabah melihat kepada keadaan kes ini (lihat perenggan 61).]

Notes

For cases on breach of court order, see 2(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1894–1915.

For cases on custody, see 7(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 3078–3123.

Cases referred to

Attorney-General v Times Newspapers Ltd [1974] AC 273, HL (refd)

Basheshar Nath v The Commissioner of Income-Tax, Delhi & Rajasthan & Another AIR 1959 SC 149, SC (refd)

Byrne v Ireland [1972] IR 241 (refd)

Degen v United States 517 US 820 (1996) (refd)

Diana Clarice Chan Chiing Hwa v Tiong Chiong Hoo [2002] 2 MLJ 97, CA (refd)

Educational Company of Ireland Ltd v Fitzpatrick (No 2) [1961] IR 345 (refd)

Hadkinson v Hadkinson [1952] 2 All ER 567, CA (refd)

Leaway v Newcastle City Council (No 2) (2005) 220 ALR 757, SC (refd)

Mahabir Prasad v Mahabir Prasad [1982] 1 MLJ 189, FC (refd)

Marriage of MKA and SH Fahmi (1995) 19 Fam LR 517 (refd)

Meadows v Minister for Justice Equality and Law Reform [2010] IESC 3 (refd)

Meskell v Coras Iompair Eireann [1973] IR 121 (refd)
Mohan Kumar Rayana v Komal Mohan Rayana (Bombay Family Court Appeal No 29 of 2007) (refd)
Ntandazeli Fose v The Minister of Safety and Security [1997] ZACC 6 (refd)
Polanski v Conde Nast Publications Ltd [2005] 1 WLR 637, HL (refd)
RV Srinath Prasad v Nandamuri Jayakrishna and Ors [2001] 4 SCC 71 (refd)
Raja v van Hoogstraten [2004] EWCA Civ 968, CA (refd)
Ramesh Lawrence Maharaj v Attorney-General of Trinidad and Tobago (No 2) [1979] AC 385, PC (refd)
Rosy Jacob v Jacob A Chakramakkal AIR 1973 SC 2090, SC (refd)
Schumann v Schumann (1964) 6 FLR 422 (refd)
Simpson v Attorney-General (Baigent's case) [1994] 3 NZLR 667, CA (refd)
Steven Mishkin Pesin v Maria Teresa Osorio Rodriguez 244 F 3d 1250 (11th Cir 2001) (refd)
Sumedha Nagpal v State of Delhi and Ors JT 2000 (7) SC 450 (refd)
Wee Choo Keong v MBf Holdings Bhd & Anor and another appeal [1993] 2 MLJ 217; [1993] 3 CLJ 210, SC (refd)
X Ltd v Morgan-Grampian (Publishers) Ltd and others [1991] 1 AC 1, HL (refd)

Legislation referred to

Administration of Islamic Law (Federal Territories) Act 1993 s 95(b)
Federal Constitution arts 8, 11, 12(4), 75, 121(1A), 128(1), (2), Part II
Guardianship of Infants Act 1961 s 5(1)
Law Reform (Marriage and Divorce) Act 1976

Appeal from: Civil Appeal No W-01–31 of 2004 (Court of Appeal, Putrajaya)

Cyrus Dass (Ambiga Sreenevasan, Steven Thiru, Revi Nekoo, Matthew, Ratnam and Ng See Teng with him) (Hakem, Arabi & Associates) for the appellant.
Muralee Menon (Jaffar & Menon) for the first respondent.
Azmi Mohd Rais (Zulkifli Yong with him) (Zulkifli Yong Azmi & Co) for the second respondent.
Lim Chee Wee for the Bar Council.
Shamugam for the Malaysian Consultative Council of Buddhism, Christianity, Hinduism, Sikhism and Taoism.
Mina Samitan for the Association of Women Lawyers.
Haris Ibrahim for the All Women's Action Society, Women's Aid Organisation, Women's Centre for Change Penang, Sisters in Islam and Persatuan Kesedaran Komuniti Selangor.
Malik Imtiaz for the National Human Rights Society.
Anno Xavier for Sidang Injil Borneo Semenanjung (SIB).
Quek Nee Meng for Malaysian Chinese Association.

Zaki Azmi Chief Justice:

[1] I have had the privilege of studying the grounds of judgment of my

learned brother the Chief Judge of Sabah and Sarawak. I thoroughly agree with his reasoning and with the authorities cited therein. I do not however agree with his order that this court should give the wife any further time to appear before this court. She had avoided the contempt proceedings taken against her by the husband. While having done so she now seeks the court's assistance to grant her leave to raise the questions mentioned in the grounds of judgment of the learned CJSS. To allow her leave to appeal would in effect grant her benefit without her having performed her part of the obligations for which she maybe in contempt. She had also been away since 2004, ie for six years and has not returned to Malaysia. By doing so she had unlawfully had custody of the children and even if the court were to examine the children now as to who would they choose to live with, most likely they will choose to live with the wife. She had therefore an unfair advantage by not complying with the court order.

[2] By now the children would be about 12 years and 9 years respectively. She was also to surrender their travel documents to the court which she failed to do. To grant her further opportunity would encourage persons like her to commit contempt against the court with the hope that the court will give him or her opportunity to correct it. The law and an order of the court is meant to be respected and complied with and not to be looked down or disdained.

[3] For those reasons, I would allow the preliminary objection, dismiss this application and revert the matter to the Court of Appeal to be dealt with accordingly. There is no reason to give her anymore time. Costs will be borne by the applicant.

Arifin Zakaria CJ (Malaya):

[4] This is a reference by the Court of Appeal under art 128(2) of the Federal Constitution wherein five constitutional questions were posed to us. Apparently, the reference was made with the consent of all parties. The appeal before the Court of Appeal arose from the decision of the High Court in a family matter. The facts of the case were set out in the judgment of my learned brother CJSS and I do not propose to restate them here.

[5] At the hearing before us, learned counsel for the first respondent objected to the reference on the ground that leave was granted by the High Court on 6 May 2004 for contempt proceedings to be commenced against the appellant for breach of the interim order dated 17 April 2003. The interim order, inter alia, gave the respondent the right of access to the children.

In the order of 6 May 2004, the High Court further directed the appellant to bring back the children within the jurisdiction of the Malaysian court while

awaiting the disposal of the case. This became necessary because the appellant had on 16 April 2004 fled the country together with the two children. And by letter dated 14 May 2004, the appellant's solicitor informed the respondent's solicitor that they have no knowledge of the whereabouts of the appellant.

[6] It is true that up to now, the respondent had only obtained leave to commence contempt proceedings against the appellant. Therefore, strictly speaking, the appellant could not be said to be in contempt of court as yet. But, the respondent could not proceed further with the contempt proceedings as the appellant is out of the country. However, judging from her conduct, it is apparent that she has no intention of complying with the orders of the court.

[7] In the circumstances, I am of the view that it would be most unjust to the respondent for this court to allow the appellant to avail herself of the judicial process, when it is clear that she has no intention to comply with the court orders. The court should not permit itself to be used by her for her own end or benefit. As stated by my learned brother CJSS, to do so '... would result in the constitutional right of the husband being made illusory irrespective of who succeeds. And it is the solemn duty of this court to ensure that the constitutional rights enshrined in the FC is safeguarded'. The same observation was made by Abdul Hamid bin Omar LP in *Wee Choo Keong v MBf Holdings Bhd & Anor and another appeal* [1993] 2 MLJ 217 at p 221; [1993] 3 CLJ 210 at p 213, which reads as follows:

> In this regard, we are mindful of the competing public interest in a litigant having a right to be heard. Although the right to be heard is a fundamental right vested in all litigants, that right however cannot be taken as an absolute right. Where the litigant shows himself to have little or no regard to an order issued against him, then he has to an extent, forfeited his right to be heard or at least postponed that right until he has suitably purged his contempt.

[8] In this connection, I would also refer to *Hadkinson v Hadkinson* [1952] 2 All ER 567, a decision of the English Court of Appeal, wherein the facts are quite similar to the present case. In that case, it was held, inter alia, that where an order related to a child, the court would be adamant on its due observance, for such an order was made in the interests of the welfare of the child, and the court would not tolerate any interference with or disregard of its decisions on those matters, and least of all would permit disobedience of an order that a child should not be removed outside its jurisdiction. It was further held that the mother was not entitled to prosecute or be heard in support of her appeal until she had taken the first and essential step towards purging her contempt by returning the child to the jurisdiction. Lord Denning, in delivering judgment of the court had this to say at p 575:

A The present case is a good example of a case where the disobedience of the party impedes the course of justice. So long as this boy remains in Australia, it is impossible for this court to enforce its order in respect of him. No good reason is shown why he should not be returned before counsel is heard on the merits of this case, so that, whatever order is made, this court will be able to enforce it. I am prepared to accept the view that in the first instance the mother acted in ignorance of the order, but nevertheless, once she came to know of it, she ought to have put the matter right by bringing the boy back. Until the boy is returned, we must decline to hear her appeal.

[9] Reverting to the present case, I am of the firm view that unless and until the two children are brought back, the court should decline to proceed with the reference. Finally, I wish to state that in coming to my decision, I have had the advantage of reading both the judgments of the learned Chief Justice ('CJ') and my learned brother Chief Judge of Sabah and Sarawak ('CJSS'). I entirely agree with the analysis of the law and authorities cited by the learned CJSS in support of his judgment but for the reasons given above, with much regret, I could not agree with the order as proposed by him. As stated by the learned CJ, much time had passed since the leave order was made by the High Court and the appellant continues to stay out of the jurisdiction. For that reason, the respondent could not commence the contempt proceeding against the appellant. In the circumstances, I do not see the need for this court to grant the appellant further time to comply with the orders of the court. Orders of the court must be respected otherwise, the integrity and respect for the judiciary will be seriously undermined.

[10] In the result, I agree with the learned CJ that the preliminary objection by the respondent ought, in the circumstances, to be allowed and the reference be dismissed forthwith with costs. Accordingly, the matter is to be remitted to the Court of Appeal for disposal.

Richard Malanjum CJ (Sabah and Sarawak):

REFERENCE

[11] The matter before this court is a reference submitted by the Court of Appeal ('COA') pursuant to art 128(1) of the Federal Constitution ('FC').

The five questions posed for consideration read:

(a) Whether s 95(b) of the Administration of Islamic Law (Federal Territories) Act 1993 (Act 505) is ultra vires art 12(4) and art 8 of the Federal Constitution read in their proper context?

(b) Whether s 95(b) of the Administration of Islamic Law (Federal Territories) Act 1993 (Act 505), as state law, is by reason of art 75 of the

Federal Constitution, inconsistent with a federal law, namely, s 5(1) of the Guardianship of Infants Act 1961 (as amended) and is therefore invalid? A

(c) In the context of art 121(1A) of the Federal Constitution, where a custody order is made by the Shariah Court or the High Court, on the basis that it has jurisdiction to do so, whether there is jurisdiction for the other court to make a conflicting order? B

(d) Where there has been a conversion of the children of a civil marriage into Islam by one parent without the consent of the other parent, whether the rights of remedy under Part II of the Federal Constitution of the non-Muslim parent read with the Law Reform (Marriage and Divorce) Act 1976 is vested in the High Court? C

(e) Whether in the context of arts 8, 11, 12(4), and 121(1A) of the Federal Constitution, the Shariah Court has exclusive jurisdiction to determine the validity of conversion of a minor into Islam once the minor has been registered by the registrar of *muallafs* (Majlis Agama Islam)? D

[12] These questions were formulated by the COA with the consent of counsel for the parties during the hearing of the appeal (W-01–31 of 2004) against the judgment of the High Court in Originating Summons No S8–24–1727 of 2003. It was thus agreed that the hearing of the appeal and all other pending appeals (W-1084 of 2003, W-02-1033, W-02–504 of 2004 and 02–824 of 2003) in connection with the actions between the parties involving related issues should be stayed pending the disposal of this reference. E F

[13] It cannot be denied that the questions posed are complex and touch on some of the most fundamental constitutional issues besetting this country today. Yet what triggered them is in essence a family court matter over the custody of two young children aged 3 years 11 months and 2 years 5 months respectively ('the children') at the time of the filing of the Originating Summons No S8–24–1727 of 2003. They are the children of the wife-appellant ('wife') and husband-respondent ('husband') born out of their civil marriage solemnised in accordance with the Hindu marriage rite on 5 November 1998. G H

[14] And ordinarily, custody issue involves the consideration of the paramount interest and welfare of a child (see *Mahabir Prasad v Mahabir Prasad* [1982] 1 MLJ 189; *Diana Clarice Chan Chiing Hwa v Tiong Chiong Hoo* [2002] 2 MLJ 97). It is essentially a question of fact and cannot be decided merely based upon the rights of the parties under the law (see *Sumedha Nagpal v State of Delhi and Ors* JT 2000 (7) SC 450). Further, it is not a matter to be approached in the way a court of law would do in commercial or contractual cases. I

[15] 'In selecting proper guardian of a minor, the paramount consideration should be the welfare and well being of the child. The litigation where the question of a custody is involved and where the parties are at loggerheads, in our opinion, such litigation cannot be dealt with like any other petition/suit or appeal in civil or commercial litigation. The courts are not expected to examine legality of the impugned order or go into a question as to whether the trial court has committed any error of law. Such litigation needs to be dealt with keeping the welfare and well being of the child in view': per DB Bhosale J in *Mohan Kumar Rayana v Komal Mohan Rayana* (Bombay Family Court Appeal No 29 of 2007).

[16] Similar view was also expressed earlier on by the Indian Supreme Court in *Rosy Jacob v Jacob A Chakramakkal* AIR 1973 SC 2090 when it said this:

> The children are not mere chattels; nor are they mere playthings for their parents. Absolute right of parents over the destinies and the lives of their children has, in the modern changed social conditions, yielded is the considerations of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of the society and the guardian court in case of a dispute between the mother and the father, is expected to strike a just and proper balance between the requirements of welfare of the minor children and the rights of their respective parents over them.

[17] While the question of custody simpliciter itself demands a tactful approach due to its sensitive nature and sentimental attachment thereto (see *RV Srinath Prasad v Nandamuri Jayakrishna and Ors* [2001] 4 SCC 71), this matter before this court has taken an added dimension of enormous constitutional importance. It arises from the fact that the husband had arranged for the conversion of the children to Islam on 25 November 2002 without the knowledge and consent of the wife. The husband himself had earlier on embraced the Muslim faith on 19 November 2002. Thus, the change in the circumstances of the family members has brought into focus, inter alia, art 121(1A) of the FC. And connected thereto to be considered for their constitutional implications in the dispute between the parties are arts 8, 11 and 12(4) of the FC.

THE PRELIMINARY OBJECTION

[18] As this court prepared to hear this reference learned counsel for the husband stood up to raise a preliminary objection. It was quickly followed by a counter objection from learned counsel for the wife submitting that the preliminary objection should be dismissed in limine due to the absence of notice as required under the Bar Council Ethics Rules. The counter objection was overruled as being merely a technicality and would cause no prejudice to the wife.

[19] Basically the preliminary objection relates to the assertion by learned counsel for the husband that as the wife is in contempt of court she should not be allowed to prosecute her appeals vide this reference. He cited the case of *Wee Choo Keong v MBf Holdings Bhd & Anor and another appeal* [1993] 2 MLJ 217 to substantiate his contention for the application of the general principle that 'a party in contempt cannot be heard further in the same proceedings for his own benefit unless and until he has purged his contempt. It is alleged that the wife has failed to comply with the interim court order dated 17 April 2003 ('court order') as well as the subsequent court order dated 6 May 2004 ('leave order') and has not purged her contempt.

THE COURT ORDERS

[20] The court order was granted pursuant to an application made under Originating Summons No S8–24–3586 of 2002. The terms are these:

(a) that the husband has access to the children every Saturday from 1pm and 2pm until the following day (Sunday) at the same time;

(b) that the husband is to pick up the children from the house of the wife;

(c) that the husband is not allowed to bring the children outside the district of Alor Setar;

(d) that the husband is to pay maintenance of RM250 for the children respectively by crediting into their saving accounts; and

(e) that the arrest warrant issued by the Shariah High Court Selangor under *Mal* Case No 0200–028–04 of 2003 is not to be enforced pending the disposal of the Civil Suit No S8–24–297 of 2003.

[21] It is not in dispute that the wife and the children left Malaysia in 2004. To date they have not returned.

[22] As a result the husband has not been able to have access to the children as stipulated in the court order. He thus applied ex parte under the same action and obtained the leave order. It was also a term in the leave order that pending the disposal of the said action the wife was to return the children within the jurisdiction of the court in Malaysia and to surrender to the court their travel documents until further order. To date neither of these two orders has been complied with.

[23] Meanwhile, on 20 July 2004 the High Court heard and disposed of the Originating Summons No S8–24–3586 of 2002. It ordered a joint legal custody of the children to the wife and husband 'which meant that both the parents had to discuss and agree on issues about their two infant children', for

example 'choosing the method of education, choice of religion and administrating the children's property'.

[24] The court however ordered that 'the care and control which covered the day to day care of the two infant children and the responsibility for looking after them daily would be given' to the wife with the husband allowed to visit them on alternative weekends from 1–2pm on Saturday to Sunday 1–2pm. The prohibition for the husband to take the children out of Alor Setar as earlier ordered in the court order was maintained.

THE PRINCIPLE IN *WEE CHOO KEONG* CASE AND THE CURRENT POSITION

[25] Learned counsel for the wife submitted that *Wee Choo Keong* case stated the law wrongly when it said that 'there are no exceptions to the general rule' and as such it should not be followed. Learned counsel proffered that the new test is whether 'in the circumstances of an individual case the interests of justice would be best served by hearing the party' who is in contempt.

[26] In view of what was submitted I took the liberty of reading carefully the judgment of the then Supreme Court in *Wee Choo Keong* case.

[27] In that case the appellants (Wee and another) had appealed against the decision of the trial court to hear first the substantive motion of the respondents to commit the appellants to prison for contempt of court alleging that the appellants had breached the ex parte injunction obtained by the respondents earlier on.

[28] In dismissing the appeal the court said this, inter alia, at p 221:

> It has not been seriously disputed and indeed we find that it is also an established general rule of law that a party in contempt cannot be heard further in the same proceedings for his own benefit unless and until he has purged his contempt. The question which we have to determine in these appeals is the ambit of that general rule.
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> ...
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> We are unable to accept that any exceptions per se exist to the general rule that a party in contempt cannot be heard until he has purged his contempt. *We are in favour of the views expressed by Denning LJ in Hadkinson v Hadkinson [1952] 2 All ER 567 that it is a matter of discretion depending on the circumstances of the case whether or not a litigant ought to be heard notwithstanding his contempt. This flexible approach to the jurisdiction is based upon a discretion to be exercised in accordance with the circumstances of the case which was accepted by the House of Lords in X Ltd v*

Morgan-Grampian (Publishers) Ltd and others [1991] 1 AC 1 … The rationale for the rule is public policy. Orders of court must be treated with respect and require strict obedience.

...

In this regard, we are mindful of the competing public interest in a litigant having a right to be heard. Although the right to be heard is a fundamental right vested in all litigants, that right however cannot be taken as an absolute right. Where the litigant shows himself to have little or no regard to an order issued against him, then he has to an extent, forfeited his right to be heard or at least postponed that right until he has suitably purged his contempt.

...

In this context, we are more inclined to accept the view expressed by Young J in *Young v Jackman* (1986) 7 NSWLR 97 where he said: 'Accordingly, it would seem from 1820 onwards that the rule that a person will not be heard when he is guilty of contempt extended as well to the case where a party was considered to be in contempt, that is, where his contempt had prima facie been demonstrated to the court or alternatively when he had confessed the facts which were the subject of a charge of contempt.' (Emphasis added.)

[29] Having therefore carefully considered what was said by the then Supreme Court I do not think the court adopted, as portrayed, a rigid position 'that a person in contempt should not be heard'. It is obvious from the judgment that in coming to its decision the court was well appraised of the views expressed by the learned judges in *Hadkinson v Hadkinson* [1952] 2 All ER 567.

[30] No doubt the court said that it could not 'accept that any exceptions per se exist to the general rule that a party in contempt cannot be heard until he has purged his contempt'. But that was because it had already taken preference of the view expressed by Denning LJ to that of Romer LJ and Somervell LJ.

[31] The view of Denning LJ was subsequently considered and approved by the House of Lords in *X Ltd v Morgan-Grampian (Publishers) Ltd and others* [1991] 1 AC 1. Lord Bridge of Harwich (with whom Lord Templeman, Lord Griffiths, Lord Oliver of Aylmerton and Lord Lowry agreed) said this, at p 46:

I cannot help thinking that the more flexible treatment of the jurisdiction as one of discretion to be exercised in accordance with the principle stated by Denning LJ better accords with contemporary judicial attitudes to the importance of ensuring procedural justice than confining its exercise within the limits of a strict rule subject to defined exceptions. But in practice in most cases the two different approaches are likely to lead to the same conclusion, as they did in *Hadkinson* itself and would have done in *Astro Exito Navegacion SA v Southland Enterprise Co Ltd and Nan Jong Iron and Steel Co Ltd (The Messiniaki Tolmi)* [1981] 2 Lloyd's Rep 595.

[32] In *Polanski v Conde Nast Publications Ltd* [2005] 1 WLR 637 Lord Nicholls of Birkenhead reinforced the view when he said this at p 642 para 18:

> A similar approach is now adopted in cases where a party seeking to be heard by the court is in contempt of court. That fact is not of itself a bar to the contemnor being heard: see per Denning LJ in *Hadkinson v Hadkinson* [1952] P 285 at p 298, approved by Lord Bridge of Harwich in *X Ltd v Morgan-Grampian (Publishers) Ltd and others* [1991] 1 AC 1 at p 46. In *Arab Monetary Fund v Hashim and others* (unreported, 21 March 1997), quoted by Potter LJ in the judgment of the Court of Appeal in *Motorola Credit Corp v Uzan (No 2)* [2004] 1 WLR 113 at p 128, Lord Bingham of Comhill CJ said the preferable approach is to ask:
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> whether, in the circumstances of an individual case, the interests of justice are best served by hearing a party in contempt or by refusing to do so, always bearing in mind the paramount importance which the court must attach to the prompt and unquestioning observance of court orders.

(see also in *Marriage of MKA and SH Fahmi* (1995) 19 Fam LR 517 — a decision of the full court of the Family Court of Australia).

[33] Accordingly, I find no good reason to say that *Wee Choo Keong* case is erroneous in law. The then Supreme Court preferred the approach that 'it is a matter of discretion depending on the circumstances of the case whether or not a litigant ought to be heard notwithstanding his contempt'.

[34] And it is trite law that discretion must be exercised judicially. His Honour Campbell J in *Leaway v Newcastle City Council (No 2)* (2005) 220 ALR 757 on the right of a contemnor to be heard, eruditely put it this way at para 87:

> At the outset, I note that it is not suggested that the discretion that a judge might exercise in deciding not to hear a person in contempt is a completely open ended or unguided one. If it is to be a discretion which is exercised judicially, it needs to be one which aims at achieving an objective or objectives which are able to be stated as a matter of law, or to involve a balancing of factors which can be said, as a matter of law, to be ones which are appropriate to take into account for the purpose of exercising that discretion. Only one standard has been invoked, as the objective which is sought to be advanced by sometimes declining to hear someone who is in contempt, by the judges who have favoured it being a matter of discretion whether a person in contempt should be heard. That standard is what is appropriate for the administration of justice.

[35] I am therefore of the view that the approach adopted in *Wee Choo Keong* case is not entirely out of step with the modern formulation of the test by the Court of Appeal (England and Wales) in *Raja v van Hoogstraten* [2004] EWCA Civ 968 at para 82 per Chadwick LJ:

That an appellate court may refuse to hear a party who has been found to be in contempt and who has made no attempt to purge that contempt is not in doubt — see *Hadkinson v Hadkinson* [1952] P 285, *Astro Exito Navegacion SA v Southland Enterprise Co Ltd and Nan Jong Iron and Steel Co Ltd (The Messiniaki Tolmi)* [1981] 2 Lloyd's Rep 595 and *X Ltd v Morgan-Grampian (Publishers) Ltd and others* [1991] 1 AC 1. But it is now recognised that there is no general rule that a court will not hear an application for his own benefit by a person in contempt unless until he has first purged his contempt; so that, in order to avoid the application of that rule the party in contempt must bring himself within some established exception. The approach which the court should adopt is now found in the judgment of Lord Bingham of Cornhill, Chief Justice, in *Arab Monetary Fund v Hashim and others* (unreported, 21 March 1997). After referring to the speeches of Lord Bridge of Harwich and Lord Oliver of Aylmerton in *X Ltd v Morgan-Grampian*, Lord Bingham said this:

From those speeches it is, I think, clear that it is wrong to take as a starting point the proposition that the court will not hear a party in contempt and then ask if the instant case falls within an exception to that general rule. *It is preferable to ask whether, in the circumstances of an individual case, the interests of justice are best served by hearing a party in contempt or by refusing to do so always bearing in mind the paramount importance which the court must attach to the prompt and unquestioning observance of court orders*. (Emphasis added.)

[36] In other words the modern formulation of the test is a refinement of the discretionary test first propounded by Denning LJ in *Hadkinson v Hadkinson*.

[37] Thus, in exercising the discretion in relation to the preliminary objection in this reference it should be taken into account the facts and the circumstances prevailing between the wife and husband as well as that of the children while keeping in mind how best the interest of justice can be served.

SAFEGUARDING CONSTITUTIONAL RIGHTS

[38] The core issue between the parties is over the custody of the children. And as stated above, ordinarily, in coming to any decision on the issue what need to be considered is the paramount interests and welfare of the children which may even prevail over the bar on a contemnor to be heard (see *Schumann v Schumann* (1964) 6 FLR 422).

[39] However, as noted earlier, this reference has an added fundamental constitutional issue.

[40] Premised on the undisputed facts it is the wife who is seeking, inter alia, for the interpretation of the phrase 'parent or guardian' as found in art 12(4) of the FC which reads:

(4) For the purposes of Clause (3) the religion of a person under the age of eighteen years shall be decided by his parent or guardian.

[41] In the event that this court rules in her favour she will thus have the equal right as that of the husband over the religion of the children. In short she is seeking an order to establish her constitutional right which for now the husband says he has the sole rights in view of the word 'parent or guardian' in singular used in the constitutional provision.

[42] Assuming therefore for a moment that the contention of the wife is sustained by reading the provision (art 12(4) of the FC) as giving both the wife and husband equal right over the religion of the children, I am of the view that in removing the children out of Malaysia and thus out of the jurisdiction of this court the wife has not only disobeyed the court order but has also deprived the husband of his constitutional right to the children which in my view is a very serious matter.

[43] The wife is before this court with a complaint that she has been deprived of her constitutional right to the children. But it is also a fact that the husband has been deprived of access to the children since 2004 despite the court order and hence his constitutional right. I would therefore think that he is equally entitled to complain that his constitutional right has been infringed.

[44] Both parties are entitled to safeguard his or her constitutional rights to the children. And bearing in mind that constitutional rights are sacrosanct it is expected that they must be religiously safeguarded. Thus, it was said and which I agree that if 'an established right in law exists a citizen has the right to assert it and it is the duty of the courts to aid and assist him in the assertion of his right. The court will therefore assist and uphold a citizen's constitutional rights. Obedience to the law is required of every citizen, and it follows that if one citizen has a right under the Constitution there exists a correlative duty on the part of the other citizens to respect that right and not to interfere with it' (see *Educational Company of Ireland Ltd v Fitzpatrick (No 2)* [1961] IR 345 per Budd J at p 368).

[45] The view of Budd J was subsequently supported by Walsh J in *Meskell v Coras Iompair Eireann* [1973] IR 121 at p 133 when he said that 'if a person has suffered damage by virtue of a breach of a constitutional right or the infringement of a constitutional right, that person is entitled to seek redress against the person or persons who have infringed that right' (see also *Byrne v Ireland* [1972] IR 241). And it 'is the task of the courts to ensure that where rights are wrongfully breached that remedies are effective' (see *Meadows v Minister for Justice Equality and Law Reform* [2010] IESC 3; *Basheshar Nath v The Commissioner of Income-Tax, Delhi & Rajasthan & Another* AIR 1959 SC

149; *Ntandazeli Fose v The Minister of Safety and Security* [1997] ZACC 6; *Ramesh Lawrence Maharaj v Attorney-General of Trinidad and Tobago (No 2)* [1979] AC 385 (PC); *Simpson v Attorney-General (Baigent's case)* [1994] 3 NZLR 667 (CA)). I find no reason why the foregoing legal principles cannot be adopted into our local jurisprudence.

[46] Indeed constitutional rights are so cherished that even a conduct which is calculated to 'inhibit suitors generally from availing themselves of their constitutional right to have their legal rights and obligations ascertained and enforced in courts of law, by holding up any suitor to public obloquy for doing so or by exposing him to public and prejudicial discussion of the merits or the facts of his case before they have been determined by the court or the action has been otherwise disposed of in due course of law' has been considered as in contempt of court (see *Attorney-General v Times Newspapers Ltd* [1974] AC 273 at p 310, per Lord Diplock).

[47] Thus, before considering this reference which would involve the determination of the constitutional rights of both the wife and the husband, it is only fair that this court should ensure that the parties are on equal footings in all respects. Having the wife in the present position of 'heads I win, tails you lose' is not conducive to the just determination of such important constitutional questions. It would result in the constitutional right of the husband being made illusory irrespective of who succeeds. And it should be the solemn duty of this court to ensure that constitutional rights enshrined in the FC are safeguarded. Further, it is settled law that a litigant should be allowed to enjoy the fruit of his or her litigation.

[48] Incidentally, in determining the respective constitutional rights of the husband and the wife over the children the question of who is at fault or who initiated the problem should not arise. The paramount interest of the children must be given priority.

[49] Therefore, with the foregoing factors in the forefront on my mind and taking into account the question of how best the interest of justice is served in the exercise of discretion and in fairness the parties should be heard notwithstanding there is an issue of contempt raised. Unfortunately the wife was absent during the hearing. And I am conscious that any decision made by this court should not be in vain.

THE RULING

[50] But I also noted that learned counsel for the wife informed this court during the hearing that he needed to take instruction whether the wife would be willing to return to Malaysia with the children upon the determination of

this reference. Maybe learned counsel for the wife should be allowed to seek for the necessary instruction as I do not think any serious prejudice would be caused. Further, the husband had only obtained leave for contempt against the wife and did not proceed with it. Thus, strictly speaking, an order is yet to be obtained that in law the wife is in contempt although it is not in dispute that due to her absence in this country the wife is yet to comply with the court order and the leave order.

[51] Accordingly in the final analysis and notwithstanding any instruction that may be obtained by learned counsel for the wife, I am of the view that since there is no undue serious prejudice I am therefore inclined to rule that the interest of justice is best served by making an order that the wife and the children are to appear before this court within three months from today failing which this reference will be deemed dismissed with costs. Upon dismissal the Court of Appeal may then proceed to deal with the matter before it accordingly.

OTHER CONTENTIONS CONSIDERED

[52] It was emphasised before us that the alleged contempt committed by the wife relates to the orders of the High Court which are not under appeals. Hence it was submitted that the general principle that a party in contempt cannot be heard should not apply. Such submission is premised on the basis that the general principle should be confined to contempt in the same suit, proceedings or cause as that in which the application was made (see *In the Marriage of MKA and SH Fahmi*).

[53] With respect, although the court order and the leave order are not directly being appealed against, they are however interim orders of the High Court made under the Originating Summons No S8–24–3586 of 2002. The final judgment of the High Court disposing of the said action is under appeal together with the other judgments in respect of the other related actions between the parties. These appeals are interrelated and collectively upon which the questions posed in this reference were formulated by the COA. It is therefore quite farfetched to say that since there are no appeals against the court order and the leave order the alleged contempt cannot be said to be in the same suit, proceedings or cause.

[54] Thus, with the alleged contempt being in the same suit, proceedings or cause as this reference and if the general principle as discussed above is strictly applied and without considering the modern formulation of the test, this reference could be dismissed in limine but for my ruling above.

[55] Mr Malik Imtiaz, learned counsel for the National Human Rights Society submitted that this court should proceed to answer the questions referred and let the final determination of the appeals to the COA guided by the answers given to the questions posed in this reference.

[56] At first blush the suggestion seems reasonable. However, the answers, if given, to the questions posed would entail, in practical effect, their mere formal application to the critical issues raised in those appeals. In other words, the contentious issues raised in the appeals are therefore addressed while circumventing the general principle invoked in the preliminary objection. That in my view may not be in the best interest of justice.

THE FUGITIVE DISENTITLEMENT DOCTRINE

[57] Just as a matter of interest and not an indication that the doctrine may be applied in our courts any time soon, a person in contempt before a court in the United States of America in criminal or civil case may have the fugitive disentitlement doctrine applied against him. It is an equitable doctrine with a goal of 'not so much to punish the fugitive, but rather to eliminate the possibility of 'heads I win, tails you lose' litigation, wherein the fugitive could enjoy the results of a victory while ignoring (and by his or her conduct, effectively negating) the consequences of defeat'. Further, it provides the court the discretion to preclude a fugitive from calling upon the resources of the court to determine his claim or appeal (see *Degen v United States* 517 US 820 (1996) at p 823; *Steven Mishkin Pesin v Maria Teresa Osorio Rodriguez* 244 F 3d 1250 (11th Cir 2001)).

[58] The doctrine however was not endorsed by House of Lords. Although Their Lordships differed in the outcome of the appeal before them (3–2) in *Polanski v Conde Nast Publications Ltd* they were on common ground in dealing with the issue of access to justice for fugitives from justice. This is what Lord Nicholls of Birkenhead said at p 644 paras 30–31:

> 30 I understand the intuitive dislike of relieving a fugitive of a disadvantage which until recently was inherent in his self created status. Until recently the fugitive had to make up his mind whether (a) to surrender his fugitive status and give his oral evidence in court or (b) to maintain his flight from justice and suffer whatever disadvantages this might have in civil proceedings to which he was a party as claimant or defendant.
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> 31 I understand that. But overall the matter which weighs most with me is this. Despite his fugitive status, a fugitive from justice is entitled to invoke the assistance of the court and its procedures in protection of his civil rights. He can bring or defend proceedings even though he is, and remains, a fugitive. If the administration of justice is not brought into disrepute by a fugitive's ability to

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> have recourse to the court to protect his civil rights even though he is and remains a fugitive, it is difficult to see why the administration of justice should be regarded as brought into disrepute by permitting the fugitive to have recourse to one of the court's current procedures which will enable him in a particular case to pursue his proceedings while remaining a fugitive.

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[59] Similarly, Lord Carswell at p 658 para 90 said this:

> 90 I may state at once that I would not support the application of the principle in such a way that a person in the position of the claimant would become in effect an outlaw. Mr Pannick for the defendants, quite rightly in my opinion, disclaimed reliance on any such use of the principle. I also respectfully agree with the view expressed by Lord Nicholls of Birkenhead in para 19 of his opinion that it is not appropriate to have resort to the doctrine of *ex turpi causa non oritur actio*. Nor is it necessary to import into our legal system the full rigour of the fugitive offender doctrine accepted in courts in the United States; …

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D

CONCLUSION

[60] In conclusion I repeat my ruling in para 42 above.

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Zulkefli FCJ:

[61] I have had the benefit of reading the judgments of the learned Chief Justice, Chief Judge of Malaya and Chief Judge of Sabah and Sarawak and I agree with the conclusion reached by both the learned Chief Justice and the Chief Judge of Malaya. I am of the view there must be an element of certainty in the conduct of proceedings before the court. To grant the appellant further time to comply with the orders of the court would be most untenable in the circumstances of this case.

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Preliminary objection allowed and reference dismissed with costs.

Reported by Kohila Nesan

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