

Refugee Review Tribunal

AUSTRALIA

RRT RESEARCH RESPONSE

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This response was prepared by the Country Research Section of the Refugee Review Tribunal (RRT) after researching publicly accessible information currently available to the RRT within time constraints. This response is not, and does not purport to be, conclusive as to the merit of any particular claim to refugee status or asylum.

Questions

1. Can you please provide advice on the Sharia Law in the State of Pahang in relation to the question of custody of children in circumstances where the parents divorce, and whether in fact formal custody arrangements will normally be made?
2. Furthermore, can you please source material on the issue of access by a non-custodial parent where that parent is a non-practising Muslim?
3. From the sources consulted it seems that the matter of abandoning Islam is problematic and again is covered by state Shariah law. Can you provide advice on this and the issue of reversion to a non-Muslim name in such circumstances?

RESPONSE

1. Can you please provide advice on (i) the Sharia Law in the State of Pahang in relation to the question of custody of children in circumstances where the parents divorce, and (ii) whether in fact formal custody arrangements will normally be made?

(i) Sharia Law and Child Custody

Karamah, a “charitable, educational organization which focuses upon the domestic and global issues of human rights for Muslims”, provides the following information on custody and Islamic family law in Malaysia in a paper, *Women’s Rights Within Islamic Family Law in Southeast Asia*:

The legal system in Malaysia is a dual system, based on both English common law and Islamic law. Civil courts have jurisdiction over the majority of laws, including contracts, torts, property, crime, and constitutional and administrative matters. The *Syariah* courts, which are established and regulated by the states, have jurisdiction over Islamic family law matters. **Article 121(1A) of the Federal Constitution, introduced in 1988 by constitutional**

amendment, states that the civil courts have no jurisdiction in matters that fall within the Syariah court jurisdiction.

Islamic law applies only to Muslim citizens and includes only matters specified in the State List of the Federal Constitution such as matrimonial law, charitable endowments, bequests, inheritance, and offences that are not governed by federal law (matrimonial offences, *khalwat* (close proximity), and offences against the precepts of Islam). The power to legislate these matters lies with each state legislature and state Sultan, with the Federal Parliament only legislating such matters for the Federal Territories of Kuala Lumpur, Labuan and Putrajaya. Because there are 13 states and one federal jurisdiction, there are 14 different sets of Islamic laws in Malaysia.

In 1984, the Federal Parliament enacted the *Islamic Family Law (Federal Territories) Act* 1984 (Act 303) for the Federal Territories that was designed to be a model law for the other states. Many of the states have adopted slightly altered versions of this model...

Sections 81 through 87 of the *Islamic Family Law (Federal Territories) Act* 1984 govern physical custody of children in Malaysia. **A child below the age of *mumaiyyiz* (discernment – 9-11 years for a daughter and 7-9 years for a son) will stay with the mother, while a child above that age has the right to choose between the two parents.** There are several circumstances where the mother loses the right to custody, such as if she remarries and the marriage is not seen as appropriate for the child or in the child's best welfare. Judges consistently consider the welfare of the child as the first priority in child custody cases. **Mothers who have converted to Islam are sometimes discriminated against, as there is a perception that they could not raise their children according to an Islamic way of life.**

In terms of legal guardianship, the father is considered the primary guardian under the *Islamic Family Law Act*. This is consistent with an earlier provision in the *Guardianship of Infants Act* for non-Muslims. This provision was changed in the *Guardianship of Infants Act* in 1999 to provide equal guardianship rights for men and women, but this Act is not applicable to Muslims. Although the *Islamic Family Law Act* has not yet been amended, the government, at the urging of women's groups, issued a directive that all mothers, including Muslim mothers, are authorised to sign any document a child requires for official purposes, such as school registration, identity card registration and passport application (Karamah Undated, *Women's Rights Within Islamic Family Law in Southeast Asia*, Karamah website http://www.karamah.org/docs/Womens_rights_SEA.pdf - Accessed 27 July 2005 – Attachment 1).

For a discussion on the distinction between custody and guardianship in Muslim family law, see the extract on "Custody" from Pearl and Menski's *Muslim Family Law* (Pearl, D. and Menski, W. 1998, *Muslim Family Law*, Sweet & Maxwell, London, pp. 410-12 – Attachment 2).

Information appearing on the website of the Council of Churches of Malaysian indicates, among other things, that sections 82 and 83 of the *Islamic Family Law Act* also "disqualify persons who are non-Muslims or not practising Muslims from being granted custody of children" (Teoh, L. 2003, 'Understanding Islamic Jurisprudence', *News*, December, Council of Churches of Malaysia <http://www.ccmalaysia.org/news/news%20200312c.htm> – Accessed 27 July 2005 – Attachment 3).

The state of Pahang adopted a version of the *Islamic Family Law Act* in 1987 known as the *Islamic Family Law Enactment*. According to an abstract appearing on the website of the

National Library of Medicine, the *Islamic Family Law Enactment* differs from the *Islamic Family Law Act* “in the following major respects”:

1) marriages between Muslims and non-Muslims are prohibited; 2) a *wali Hakim* (special guardian appointed by the Sultan) is authorized to consent to marriage if the *wali* (guardian) of the bride unreasonably withholds consent; 3) the grounds for divorce are fewer (failure to maintain and cruelty being omitted), although there is a general provision allowing divorce for any ground that is recognized as valid by Islamic law; 4) a son is to be maintained until the age of 15, not 18; and 5) a religious court, rather than a civil court, may order a putative father to maintain his illegitimate child (‘Islamic Family Law Enactment 1987’, *Annual Review of Population Law* 1988, Volume 15, National Library of Medicine website http://www.ncbi.nlm.nih.gov/entrez/query.fcgi?cmd=Retrieve&db=PubMed&list_uids=12289651&dopt=Abstract – Accessed 27 July 2005 – Attachment 4).

Malaysian case law provides a general background against which problems in relation to child custody might be assessed. Pertinent cases deal with custody and the rights of a non-converting spouse against a converted spouse when one spouse converts to Islam and “crosses over from one jurisdiction to another”, and typically include disputes where the children of the converted spouse are themselves converted to Islam without the knowledge or consent of the non-converting spouse as a ploy to secure custody through the Syariah court system. Example are *Ganga Devi a/p Chelliah v Santanam Damodaram* [2000] 2 AMR 1485 and *Shamala Sathiyaseelan v Dr Jeyaganesh C Mogarajah & Anor* [2004] 2 CLJ 416.

In *Ganga Devi a/p Chelliah v Santanam Damodaram*:

[t]he parties were Hindus and married in 1987 according to Hindu rights. The husband converted to Islam and obtained an order of the Alor Setar Syariah Court giving custody of the son to the husband. It was held that because of Article 121 (1A) [of the Constitution] the High Court has no jurisdiction to set aside the order of the Syariah Court (Teoh, L. 2003, ‘Understanding Islamic Jurisprudence’, *News*, December, Council of Churches of Malaysian <http://www.ccmalaysia.org/news/news%20200312c.htm> – Accessed 27 July 2005 – Attachment 3).

In *Shamala Sathiyaseelan v Dr Jeyaganesh C Mogarajah & Anor* the parties were also Hindus and married in 1998 according to Hindu rights. As outlined in one of many sources consulted:

In 2002, the marriage broke down after a sequence of events, including the husband’s conversion to Islam and his taking a Muslim wife. Three months after her husband’s conversion, Shamala filed for divorce.

The High Court initially granted Shamala the custody of her two children, as is usually the case for children below six. However, the father, Ridzuan, obtained a custodial order (ex-parte) for the same children from the Syariah Court in Shah Alam. The custodial order was granted to Ridzuan among others, on the basis that he had converted to Islam and had also converted the two children in Islam. Shamala asserted that the children’s conversion was carried out without her knowledge or consent...

In the same Syariah court proceedings a warrant of arrest was issued against Shamala for her failure to attend the Syariah Court...

Pursuant to the Syariah Court Order, using the weekend custody given by the Civil Court, Ridzuan took the two children to keep them indefinitely. Shamala was allowed to visit the

children while Ridzuan, leaning against the Syariah Order (which has no jurisdiction over Shamala) kept the children.

Shamala then filed an application for leave to commence a committal proceeding on Ridzuan on 27 May 2003 on the basis that Ridzuan had failed to comply with the interim court order dated 17 April 2003 when Ridzuan

- failed to return the children on 25 May 2003
- took the children out of Alor Star District
- failed to pay maintenance for both children amounting to RM500...

On 11 September 2003, the Civil Court cited the Defendant (husband) for contempt and ordered that the children be returned to the Plaintiff (wife). The Civil Court also declared that the Syariah Court order was not binding on a non-Muslim and set aside the warrant of arrest issued by the Syariah Court.

Subsequent to this High Court decision, Shamala applied to the Civil High Court for a declaration that the conversion of the minor children to Islam was a nullity. On 13 April 2004, the Court dismissed Shamala's application on the ground that the Civil Court did not have the jurisdiction to hear the matter and only the Syariah Court could adjudicate on such matters. Further, the learned Judge agreed that Shamala did not have the locus to appear in the Syariah Court.

The custody application which was filed on 31 December 2002 was finally heard by the Court where the parties had filed written submissions. The High Court, on 20 July 2004, gave joint custody to Shamala and Ridzuan but the care and control over the children's daily life were given to Shamala subject to a 'caveat' – that is, if the Plaintiff (wife) taught her articles of faith to the children or made them eat pork then she would lose the right to actual custody of the children (Hashim R. C. 2004, 'Justice and jurisdictions: The *Shamala Sathiyaseelan v. Dr Jeyaganesh C Mogarajah* (Muhammad Ridzuan) custody case', *Aliran Monthly* online edition, July <http://www.aliran.com/monthly/2004b/7d.html> - Accessed 27 July 2005 – Attachment 5).

While *Ganga Devi a/p Chelliah v Santanam Damodaram* and *Shamala Sathiyaseelan v Dr Jeyaganesh C Mogarajah & Anor* both address situations where one spouse in a custody dispute "crosses over from one jurisdiction to another" (Ngo, F. Y. Undated, 'Malaysia's Family Law: Custody and Religion', Law Asia website <http://www.lawasia.asn.au/uploads/images/FLMalaysia.pdf> - Accessed 28 July 2005 – Attachment 6), they are only ostensibly relevant to the situation where a spouse in a custody dispute converts out of Islam and anticipates denial of parental contact by reason of being an apostate (Arabic., *murtadd*). Information was not found on those aspects of the issue. Nonetheless, the following may be noted:

- In child custody disputes where one party is Muslim, reports indicate that "children frequently end up with the Muslim parent" (Malaysian PM defers inter-faith council' 2005, *South China Morning Post*, 3 March – Attachment 7; Stewart, I. 1998, 'How Islam guards its own in marriages of different faiths', *The Australian*, 12 February – Attachment 8; 'Why can't I see my children?', *The New Straits Times*, 26 May – Attachment 9).
- A person's apostasy may not place him beyond the jurisdiction of Sharia law, and in this sense the locus of any future application they might make with respect to custody

or access would appear to lie in that jurisdiction. This would accord with the structure of Malaysia's dual legal system; the practice of civil courts relinquishing jurisdiction in cases where state Syariah courts have concurrent jurisdiction in accordance with Article 121(1A) of the Federal Constitution; and provisions in the law that make conversion to Islam typically "non reversible", and the view of secular courts that apostates from Islam are still subject to Shari'ah law. (For details, see Karamah Undated, *Women's Rights Within Islamic Family Law in Southeast Asia*, Karamah website http://www.karamah.org/docs/Womens_rights_SEA.pdf - Accessed 27 July 2005 – Attachment 1; Ngo, F. Y. Undated, 'Malaysia's Family Law: Custody and Religion', Law Asia website <http://www.lawasia.asn.au/uploads/images/FLMalaysia.pdf> - Accessed 28 July 2005 – Attachment 6; 'Malaysian PM defers inter-faith council' 2005, *The South China Morning Post*, 3 March – Attachment 7; Immigration and Refugee Board of Canada 2002, MYS39562.E – *Malaysia: Update to MYS24409.E of 27 June 1996 concerning discrimination against Malaysians of Chinese descent*, 21 August – Attachment 10; Burton, J. 2004, 'Custody fight puts focus on "Islamisation" of Malaysia....', *The Financial Times*, 23 July – Attachment 11).

The following may also be noted with respect to "conversion out of Islam by persons who were previously converts to Islam":

What has happened over the years is a curious situation where there is a denial of one's fundamental liberties if a case is perceived to have come under the purview of the State Syariah Courts. Thus for example in a case of conversion out of Islam, the matter is perceived to be one of conversion of Muslims and not one of freedom of religion, in which case the High Courts have refused jurisdiction....

Due to the particularities of Islam as an identity of being Malay, the applications to the High Court for a declaration that a Muslim is no longer a Muslim has curiously involved non-Malays...

The majority of cases on conversions fall under this category. The Civil High Courts whether at first instance or on appeal have established the precedent that it has no power to decide on the validity of conversions out of Islam. Every conversion out of Islam case is treated as a case on Art. 121 (1A) 'jurisdictional conundrum', even in a case where there is no specific State Islamic law on the matter which then leaves the party without any remedy under any law.

Lawyers have raised challenges under either (1) 'remedy prayed for' approach (therefore a declaration is a writ only Civil Courts are empowered to order) or (2) a 'subject matter' approach. None of these cases have tested the freedom of religion clause under Art. 11 of the Constitution.

The highest court to have decided these points in a conversion case is the Federal Court in the case *Soon Singh Bikar v Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor* [1999] 1 MLJ 489. The highest court is the Federal Court. A Federal Court decision binds the High Court on similar facts.

Soon Singh was 17 years old (a minor) when he became Muslim from Sikhism. He prayed for a declaration that he was no longer a Muslim some 13 years later. The presiding Federal Court judge made a statement in obiter that the applicant could take a case citing Art. 11 (1) on freedom of religion if his conversion to Islam was not done willingly but he was forced. In

suggesting this option, the judge appeared to be prepared to accept the reading that the Civil Court may assume jurisdiction in a constitutional challenge on a fundamental liberty infringement. Unfortunately, the Federal Court also said that the State Islamic Court has the jurisdiction over conversion cases even in the absence of a specific piece of State Islamic law on the matter as “the conversion out of Islam... can be read into them by implication derived from the provisions concerning conversion into Islam”. Thus conversion into Islam or conversion out of Islam is a ‘subject matter’ in the State List. However this consideration can be said to be in obiter as the facts in *Soon Singh* was not a case where the State Islamic law is absent.

It is noted that decisions in the Civil Courts are pointing to the direction that on any matter (not limited to conversion or the religion of the parties at hand), as long as the ‘subject matter’ is a matter in the State List, the State Islamic Court has jurisdiction, even if the prayer applied for is a matter under the jurisdiction of the Federal Courts (Ahmad, S. Undated, ‘Islam in Malaysia, Constitutional and Human Rights Perspectives’, pp. 2, 36-39, Emory University website http://www.law.emory.edu/IHR/wrkpaper/s_ahmad.doc - Accessed 28 July 2005 – Attachment 12).

It is important to note that the sources consulted indicate that an Islamic reading of the principle of a child’s welfare is often “the central focus in making a custody under” under Shari’ah law in Malaysia. In a relevant paper on the subject, Dr. Najibah Mohd Zin provides the following comments:

Muslim jurists conclude that the custodial parent is not only responsible for the daily care and control of the child, but he or she is also responsible to decide all matters in which the child could not decide for himself and the cultivate of the child’s mind by giving proper education in preparation for the child’s future. The ability of the custodial parent to perform these objectives of child custody often determines which parent will get the custodial right. The Malaysian law as codified in the *Islamic Family Law (Federal Territories) Act 1984* (...) upholds these nobles objectives and provides that:

An order for custody may be subject to such conditions, as the Court thinks fit to impose and, subject to such condition, if any, as may from time to time apply, shall entitle the person given custody to decide all questions relating to upbringing and education of the child [*Islamic Family Law (Federal Territories) Act 1984* s. 87].

To perform this task, the law assumed that the mother is the best person to shoulder the burden as they are gifted by the female qualities and Shafi’is regard this task as a ‘woman’s duty’. The father’s role is equally significant as a guardian to the child and he is responsible for physical needs of the child as well as to administer the child’s property until the child reaches puberty or gets married for a girl (Zin, N. M 2005, ‘How best interests of the child is best served in Islamic law with special reference to its application in the Malaysian Shariah court’, Law Rights website <http://www.lawrights.asn.au/docs/zin2005.pdf> - Accessed 30 July 2005 – Attachment 13).

Elsewhere in his paper, Dr. Zin notes that the *Islamic Family Law (Federal Territories) Act 1984* also provides that, subject to certain restrictions (such as remarriage), “the mother shall be of all persons the best entitled to the custody of her infant during the connubial relationship as well as after its dissolution” (Zin, N. M 2005, ‘How best interests of the child is best served in Islamic law with special reference to its application in the Malaysian Shariah court’, Law Rights website <http://www.lawrights.asn.au/docs/zin2005.pdf> - Accessed 30 July 2005 – Attachment 13).

In considering anticipated problems in relation to child custody, please also note the existence of laws in the state of Pahang which punish apostates from Islam. According to information appearing on the website of the Council of Churches of Malaysia:

Section 185 of the *Administration of the Religion of Islam and the Malay Custom* of Pahang provides for a punishment of a fine not exceeding RM 5,000.00 or for a term of imprisonment not exceeding three years and to whipping of not more than six strokes for a Muslim who states that he has ceased to be a Muslim (Teoh, L. 2003, 'Understanding Islamic Jurisprudence', *News*, December, Council of Churches of Malaysian <http://www.ccmalaysia.org/news/news%20200312c.htm> – Accessed 27 July 2005 – Attachment 3).

Further information on the issue of apostasy from Islam appears in the response to question 3 below.

(ii) Formal Custody Arrangements

The sources consulted broadly suggest that while custody is often decided by the courts in Malaysia, formal custody arrangements lack uniformity according to the relevant law as well as the supporting mechanism of local law enforcement. The following may be noted:

- Reports pointing to the existence and heterogeneity of court ordered custody arrangements appear in many of the Attachments. Among other things, they indicate that custody arrangements are skewed in favour of Muslim men against non-practicing and newly converted Muslim women, and are frequently tied to an Islamic reading of the principle of a child's welfare. (See 'Tragedy of the innocents' 1997, *The New Straits Times*, 28 February – Attachment 14; 'Why can't I see my children?' 1997, *The New Straits Times*, 26 May – Attachment 9; Stewart, I. 1998, 'How Islam guards its own in marriages of different faiths', *The Australian*, 12 February – Attachment 8; Zin, N. M Undated, 'How best interests of the child is best served in Islamic law with special reference to its application in the Malaysian Shariah court', Law Rights website <http://www.lawrights.asn.au/docs/zin2005.pdf> - Accessed 30 July 2005 – Attachment 13.)
- This appears to be the case even in the High Court whose caveat in *Shamala Sathiyaseelan v Dr Jeyaganesh C Mogarajah & Anor* "cautioned the Hindu mother from influencing the infants' religious belief "by teaching them her articles of faith or by making them eat pork"" (Ahmad, S. 2004, 'Civil-Syariah Conflict: A View on infant conversions to Islam', *Aliran Monthly* online edition, Volume 24, Issue 9 <http://www.aliran.com/monthly/2004b/9e.html> - Accessed 27 July 2005 – Attachment 15).
- As noted by the US Department of State in an advisory on 'International Parental Child Abduction', "Malaysian police or local law enforcement are reluctant to get involved in custody disputes and could not be counted on to enforce custody decrees by the Malaysian court" ('International Parental Child Abduction—Malaysia' Undated, US Department of State website http://travel.state.gov/family/abduction/country/country_506.html - Accessed 27 July 2005 – Attachment 16).

2. Furthermore, can you please source material on the issue of access by a non-custodial parent where that parent is a non-practising Muslim?

Information was not found in the sources consulted addressing access by a non-custodial parent where that parent is a non-practising Muslim or apostate Muslim convert.

Dr. Zin's aforementioned report provides the following on the right of parental access under Shari'ah law:

The Islamic law always encourages both parents to have an access to their children regardless to whom the custody is granted. Even though the Muslim jurists are in disagreements with regard to the frequency of the meetings, however both parents should have a close contact by not imposing unnecessary conditions that disturb the parent and child relationship...

In applying the above principle into practice, the Malaysian law provides:

An order for custody may be subject to such conditions as the Court thinks fit to impose and, subject to such conditions, if any, as may from time to time apply, shall entitle the person given custody to decide all questions relating to the upbringing and education of the child. Without prejudice to the generality of subsection (1), an order for custody may—

(c) provide for the child to visit a person who deprived of custody or any member of the family of a parent who is dead or has been deprived of custody at such times and such periods as the Court considers reasonable;

(b) give a parent deprived of custody or any member of the family of a parent who is dead or has been deprived of custody the right of access to the child at such times and with such frequency as the Court considers reasonable [*Islamic Family law (Federal Territories) Act* 1984, s. 87(1)(2)(c)(d)].

The Malaysian Shariah Court in *Abdul Rahman v Husna and others* [1998] has ordered the father who had been deprived of custody to visit the child during the weekends, school holidays and during festive seasons by mutual arrangement between the father and the maternal aunt (the custodian). At the same time, he was also ordered to provide maintenance for the child in exercising his duty as guardian. In *Wan Junaidah v Latiff* [1989] the judge decided that the elder children should remain in the custody of the father while the younger child should remain in the custody of the mother. The court ordered both parents to arrange amicably as to appropriate visitation rights. In *Mohamed Radhi v Khadija* [1998] the court cautioned both parents to always maintain harmonious relationship after the divorce especially in relation to parent and child relationship. Thus, the right of access should be seen as a means to protect the interest of the child as well as the right of the both biological parents. This is to avoid a tug of war situation, as both parents are equally responsible for their children/ Perhaps, the current approach of granting joint custody order would be more appropriate to encourage active participation of both parents for the betterment of their children (Zin, N. M 2005, 'How best interests of the child is best served in Islamic law with special reference to its application in the Malaysian Shariah court', Law Rights website <http://www.lawrights.asn.au/docs/zin2005.pdf> - Accessed 30 July 2005 – Attachment 13).

According to the US Department of State's advisory on International Parental Child Abduction, "[a]lthough visitation rights for non-custodial parents are not expressly stipulated in Malaysia's Civil Code, [Civil] court judgments often provide visitation rights for non-custodial parents" ('International Parental Child Abduction—Malaysia' Undated, US Department of State website http://travel.state.gov/family/abduction/country/country_506.html - Accessed 27 July 2005 – Attachment 16).

As already noted, visitation rights are clearly spelled out in section 87 of the *Islamic Family Law (Federal Territories) Act 1984*. Media reports also indicate that they are granted in practice by Shari'ah courts, and sometimes even where the parent has been a non practising Muslim (Why can't I see my children?' 1997, *The New Straits Times*, 26 May – Attachment 9; 'Divorce terms to be recorded today' 2003, *The New Straits Times*, 23 July – Attachment 17; Zin, N. M. 2005, 'How best interests of the child is best served in Islamic law with special reference to its application in the Malaysian Shariah court', Law Rights website <http://www.lawrights.asn.au/docs/zin2005.pdf> - Accessed 30 July 2005 – Attachment 13). Excerpts from a media report referring to the existence of visitation rights and the realities of access follows:

HER husband had won custody of their children but even in victory he seethed in anger as he promised his ex-wife she would never get to see them again...

At the time, Tengku Mahmood, a member of the Johor royalty, had accused Faridah of being an unfit mother and told the judge that she had abandoned their children for months and was nowhere to be found...

While Tengku Mahmood got custody of the children, Faridah was allowed visitation rights every alternate 48 hours but only after handing over her passport to the court.

Faridah was also required to serve a three-day notice on her husband before she could take her children away each time.

In addition, she could not go beyond Mersing, Johor - where her ex- husband has one of his homes - whenever she is with the children.

"After the divorce, I stayed with my ex-husband's relatives who were all so supportive of me," she said.

Then, as she had predicted, her anguish started. It would seem that her former spouse was making good his threats.

"My requests, through my lawyer, to visit our children Iskandar and Mariam, were either totally ignored or he would give one excuse or other as to why I couldn't visit them then."

At an open hearing at the Malacca Syariah High Court last Tuesday, Sulaiman Abdullah, Faridah's syarie lawyer, told presiding judge Ibrahim Lembut that she had been prevented from visiting her children.

The court was told that excuses ranged from "the father had already planned activities for the children prior to the mother's request to see them" to "they are going abroad for a holiday".

"In the 15 months since Tengku Mahmood got custody, Faridah has only been able to see her children for a total of six hours and she is devastated by this," Sulaiman explained, adding that the longest period she was allowed with her children was two hours...

In rebutting Sulaiman's argument that Faridah wasn't allowed her visitation rights, Tengku Mahmood's syarie lawyer, Yusuf Rahmat, explained that the times when Faridah requested to see the children, they were either attending school or tuition.

To this, judge Ibrahim said that it was not a good excuse and expressed disappointment in Tengku Mahmood for not allowing a mother to visit her children while she had placed complete trust in the court when her visitation rights were granted.

Ibrahim also said that allowing a mother to see her children for a mere one or two hours at a time was definitely insufficient.

Yusuf replied that his client had been informed by reliable sources that Faridah had engaged professional help to kidnap their children and take them to America.

Ibrahim pointed out that there were risks in any case but it was still no excuse to prevent the children from seeing their mother.

He then ordered Tengku Mahmood to allow Faridah to visit her children every alternate two days. Sulaiman requested for an interim order for this and it was granted...

Through Sulaiman, Faridah asked that she be allowed to visit her children the following day. This was agreed upon in court but at Press time we were told Faridah was again disappointed.

"He didn't bring them over. We waited and waited but they did not come. I have not slept since last night (Wednesday, May 21). I am so afraid that he has taken the children where I cannot find them"...

[Faridah]...says the court gave custody to her ex-husband because "he was born a Muslim", and that it was "in the best interest of the immortal soul of the children"

During the custody hearing, Faridah was also asked if she prayed, to which she answered "no". "I could have lied but I would have been in conflict with myself as I take my relationship with God very seriously" (Why can't I see my children?' 1997, *The New Straits Times*, 26 May – Attachment 9).

3. From the sources consulted it seems that the matter of abandoning Islam is problematic and again is covered by state Shariah law. Can you provide advice on this and the issue of reversion to a non-Muslim name in such circumstances?

Two *Research Responses*, both dated 22 October 2004 and containing more or less the same information, provide advice on the problems of abandoning Islam and specific advice on the issue of reversion to a non-Muslim name in such circumstances (Country Research 2004, *Research Response MYS17055*, 22 October – Attachment 18; Country Research 2004, *Research Response MYS17054*, 22 October – Attachment 19).

The report appearing on the website of the Council of Churches of Malaysia, cited above, provides a useful and accurate summary of the law on apostasy and the problems of abandoning Islam. Among other things, the report states the following:

The addition of Article 121(1A) [Federal Constitution] has resulted in the Federal Court holding in the case of *Soon Singh v. PERKIM Kedah* [1999] 2 AMR 1211 that where a convert to Islam sought a declaration from the High Court that he is no longer a Muslim, the High Court has no jurisdiction to hear the case and only the Syariah Court has such jurisdiction.

There followed a string of decisions of the High Court and Court of Appeal on the High Court not having the jurisdiction to decide whether a person is a Muslim although that person has declared that he is not

4. Restriction of Conversion out of Islam

Examples of Punishment for Apostasy:

Sabah Syariah Criminal Offences Enactment 1995 Sec 63(1) provides that if a Muslim intends to or attempts to convert out of Islam, the Syariah Court shall order such person to be detained in the Islamic Rehabilitation Centre for a term not exceeding 36 months.

Section 55 (2) provides that a person converting out of Islam is deemed to have insulted the religion of Islam and may be punished with a fine not exceeding RM 2,000.00 or imprisonment of one (1) year or both.

Melaka Enakmen No. 6 Tahun 1991 Sec 66(1) provides for apostates to be held at a detention centre for 6 months for counselling.

Sec 67(1) further provides that if after detention, the apostate does not repent, he can be subject to a penalty of RM 5,000.00 or imprisonment of 3 years or both.

Section 185 of the Administration of the Religion of Islam and the Malay Custom of Pahang provides for a punishment of a fine not exceeding RM 5,000.00 or for a term of imprisonment not exceeding three years and to whipping of not more than six strokes for a Muslim who states that he has ceased to be a Muslim.

Similar provisions punishing apostates are found in Kelantan, Terengganu, Negeri Sembilan and Perak.

In 1999, the Cabinet was reported to have approved a uniform State Bill for adoption by the States, which would empower the Syariah Court to send an apostate to a faith rehabilitation centre for up to one year. Happily the proposed Bill was withdrawn, though the State Assembly of Perlis did pass the Bill called Islamiah Aqidah Protection (The State of Perlis Bill) 2000, but it was not gazetted.

Problems faced by apostates and non-Muslims who are considered Muslims

a. Government Authorities' definition of Muslim

In Malaysia a person's name is connected to his religion. Thus a person who has a Muslim name is deemed to be a Muslim and a person whose birth certificate shows that one of his parents had a Muslim name is also deemed to be a Muslim.

With the advent of information technology the moment a person converts to Islam, that conversion is recorded in the central computer maintained by the Registration Department and the religion of that convert will be changed to "Islam".

b. Identity Card

The National Registration Act requires all Malaysians from the age of 12 and above to apply for an identity card that must be carried by all Malaysians at all times.

With the advent of information technology, the Registration Department is fully computerised and is online, together with all State and Federal Muslim Religious Departments and the Registrar of Marriages.

By a gazette notification in 2000 but with retrospective effect to 1.10.1999, the National Registration Act was amended to include the religion of a person if he is a Muslim. The word "Islam" is then printed on the identity card of a person deemed to be Muslim on the criteria stated above and the Registrar will not remove that word unless the person obtains a letter from Syariah Court or the State Islamic Department and his former name is also endorsed at the back of the identity card.

By gazette notification of 26th July 2001, applicants for new identity cards are required to state their religions, but a person deemed to be a Muslim will have the word "Islam" endorsed on his identity card regardless of what religion he declares himself to profess, and regulation

14 is amended to exclude change of name for reason of change of religion (Teoh, L. 2003, 'Understanding Islamic Jurisprudence', *News*, December, Council of Churches of Malaysian <http://www.ccmalaysia.org/news/news%20200312c.htm> – Accessed 27 July 2005 – Attachment 3).

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