

Civil court cannot annul religious court's order as both are of equal status, says government lawyer

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The High Court was wrong to issue a mandamus order to the Inspector-General of Police to arrest a Muslim convert and return his daughter to his ex-wife in a custody case as the Federal Constitution does not allow the civil court to interfere in the affairs of the religious court, a government lawyer said today.

Senior Federal Counsel Noor Hisham Ismail told the Court of Appeal that the High Court could not annul an order of a Shariah Court due to an amendment to the Federal Constitution in 1988.

"Parliament made amendments to avoid the civil court interfering in the affairs of the Shariah court," he said in his submissions to set aside the order given by High Court judge Lee Swee Seng.

He said both courts have exclusive jurisdiction and one was not superior to the other. In 2009, the religious court in Ipoh had granted Muhammad Ridhuan Abdullah, who was formerly known as K. Pathmanathan, the custody of his three children, Tevin Darsiny, 17, Karan Dinish, 16, and Prasana, 6, after he unilaterally converted them to Islam.

The following year, the High Court in Ipoh granted kindertgarten teacher M. Indira Gandhi full custody of all three children and Ridhuan was ordered to return Prasana Diksa to Indira.

On May 30 this year, the Ipoh High Court cited Ridhuan for contempt and issued a warrant of arrest against him after he repeatedly failed to hand over Prasana Diksa to Indira.

Indira had also obtained a recovery order from the High Court to compel the police to locate Ridhuan.

The failure of the police to act resulted in her filing for a judicial review seeking the mandamus order, as IGP Tan Sri Khalid Abu Bakar was insistent that police would take the middle path in cases where disputing parties had obtained separate orders from the civil and Shariah courts.

On September 12, the High Court allowed a judicial review by Indira for a mandamus order to force Khalid to arrest Ridhuan and return Prasana Diksa to her.

Khalid then obtained a stay order from the Court of Appeal on September 25.

His appeal against Lee's order was heard today before a three-man bench chaired by Datuk Abdul Rahim Abdul Aziz.

Hisham said since the Shariah Court had issued a custody order, the judge was also wrong in granting a recovery order to compel the police to locate and return the child to the mother.

However, he said the Police Act imposed a duty on the IGP to perform his function as prescribed under the law.

He said it was only a perception that non-Muslims were barred from seeking justice in the Shariah Court.

Indira's lawyer Aston Paiva said she was a blameless person and used the court to seek a remedy to end her predicament.

"It is the husband who had gone into hiding and the mother never saw the daughter despite a High Court order in 2010," he said.

Paiva, who was assisted by M. Kula Segaran and N. Selvam, said it was wrong of Hisham to claim that a civil court could not make the mandamus order.

"The husband's defence is that he has a Shariah Court order and will not respect the High Court order to return the child," he said.

Paiva said the couple were married under civil law and their divorce and other relief like maintenance and division of property should be decided by the High Court.

"The husband's conversion to Islam does not affect the civil marriage unless decided by the civil court," he said.

He said the High Court in Ipoh intervened because the Shariah Court had exceeded its authority.

"A civil court can invalidate a Shariah Court order and this has been done many times in the past," he added.

Paiva said Indira's remedy was in the civil court because a non-Muslim spouse could not go to the Shariah Court as that forum was for persons professing the religion of Islam.

He said Khalid had ignored the High Court and made his own interpretation not to enforce the orders.

"He should have gone back to the civil court to ask for directive by making the necessary applications which he did not do," he said.

Paiva said the Shariah Court had no jurisdiction over the police as it was not a person professing the Islamic religion and as such, Khalid was not bound by a religious court order.

"Article 121 (1A) was crafted to avoid conflict of jurisdiction and not to oust the supervisory power of the civil court," he added.

He also said there would be a state of lawlessness if the order of mandamus was not granted as it meant a civil servant could ignore the civil court.

"Public confidence in the judiciary will erode because the court can say anything it wants but orders will not be executed," he said.

Paiva said Indira would never be able to see her daughter whom she last saw when the child was 11 months old.

Lawyer Philip Koh Tong Ngee, who represented the Malaysian Consultative Council of Buddhism, Christianity, Hinduism, Sikhism and Taoism, told the bench as a friend of the court that Khalid was bound to enforce the Police and Child Acts as they were federal laws.

He said the religious court was constituted under state law.

"Article 75 of the constitution stated that when there is inconsistency between federal and state law, the former shall prevail," he added.

The appellate court reserved judgment. – October 30, 2014.

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