KARUNAIRAJAH RASIAH v. PUNITHAMBIGAI PONIAH
FEDERAL COURT, KUALA LUMPUR
ABDUL HAMID MOHAMAD FCJ; MOHD NOOR AHMAD FCJ; PAJAN SINGH GILL FCJ
[CIVIL APPEAL NO: 02-12-2003-B]
9 APRIL 2004
[2004] 2 CLJ 321

***FAMILY LAW**: Children - Maintenance - Parent's legal duty to maintain child over 18 years of age - Whether duty extends until child completes tertiary education - Involuntary financial dependence for the purpose of pursuing tertiary education - Whether a mental or physical disability for duty to arise - Ching Seng Woah v. Lim Shook Lin (distinguished) - Law Reform (Marriage and Divorce) Act 1976, ss. 52, 92, 93, 95*

Pursuant to a High Court order made in 1997, the appellant husband paid for maintenance in respect of his three daughters. He stopped paying maintenance for his eldest daughter when she attained the age of 18. It was not disputed that s. 95 of the Law Reform (Marriage and Divorce) Act 1976 ('the 1976 Act') entitled him to do so unless the exception applied, namely, where the child had a physical or mental disability. The respondent wife applied to the High Court for an order to compel the appellant to continue the said payments, and if necessary for the other two children as well until they completed their tertiary education. The High Court relied on the case of *Ching Seng Woah v. Lim Shook Lin* wherein the husband was ordered to pay child maintenance in respect of his two children until their tertiary first degree. The learned judge held that the eldest daughter in the present case was suffering from an involuntary financial dependence constituting a physical or mental disability within the exception provided by s. 95 of the 1976 Act. Accordingly, the respondent's application was granted. On appeal, the Court of Appeal affirmed the decision of the High Court. The appellant now appealed to this court. The sole issue was whether involuntary financial dependence was a physical or mental disability within the exception provided by s. 95 of Act 1976.

Held:

Per Abdul Hamid Mohamad FCJ

[1] In the Court of Appeal case of *Ching Seng Woah v. Lim Shook Lin*, the husband agreed in his evidence in chief to pay maintenance to his daughters until they received their first degree. The court held that a person could not be permitted to reprobate what he had approbated. That was the ratio of the case. Anything more said about s. 95 of the 1976 Act was mere *obiter*.

[2] The word "disability" in s. 95 of the 1976 Act covers only "physical" and "mental" disability. It cannot cover financial dependence. There is no legal basis for interpreting the exceptions in s. 95 to include financial dependence for the purpose of pursuing tertiary education after the child attains the age of 18. The only basis for such an

interpretation that goes against the clear words of the law is on a moral basis. However, moral grounds can never override clear provisions of the law in deciding a case. The function of the judge is to apply the law, whatever his personal view about the law may be.

[3] The Islamic Family Law (Federal Territories) Act 1984 is more advanced than its civil counterpart. Section 79 thereof specifically provides that the court is empowered to make a maintenance order beyond the child's age of 18 "to cover such further period as it thinks reasonable, to enable the child to pursue further or higher education or training". Such words cannot be interpreted into the existing provisions of s. 95 of the 1976 Act. There has to be a specific provision to that effect which is a matter for Parliament to address. This case had to be decided according to the law as it now stood.

*[**Bahasa Malaysia** Translation Of Headnotes*

Ekoran satu perintah Mahkamah Tinggi yang dibuat pada tahun 1997, perayu suami telah membayar nafkah bagi tiga orang anak perempuannya. Beliau berhenti membayar nafkah bagi anak sulungnya apabila ia mencapai umur 18 tahun. Tidak dinafikan bahawa s. 95 Akta Membaharui Undang-Undang (Perkahwinan dan Perceraian) 1976 ('Akta 1976') membenarkan pemberhentian bayaran nafkah tersebut kecuali jika pengecualian, iaitu di mana kanak-kanak berkenaan mengalami kecacatan fizikal ataupun mental, terpakai. Responden isteri memohon kepada Mahkamah Tinggi bagi perintah untuk memaksa perayu meneruskan pembayaran nafkah yang diberhentikan, dan jika perlu untuk kedua- dua anak yang lain juga sehingga mereka menamati pelajaran tinggi mereka. Mahkamah Tinggi bergantung kepada kes *Ching Seng Woah lwn. Lim Shook Lin* di mana suami diperintah membayar nafkah kedua-dua anaknya sehingga ke tahap ijazah pertama mereka. Yang arif hakim merumuskan bahawa anak sulung dalam kes semasa menanggung masaalah kebergantungan kewangan di luar kawalan, yang mana ia merupakan suatu kecacatan fizikal atau mental dalam erti kata pengecualian s. 95 Akta 1976. Permohonan responden, dengan itu, telah dibenarkan. Ketika rayuan, Mahkamah Rayuan telah mengesahkan keputusan Mahkamah Tinggi. Perayu merayu lagi dan isu yang berbangkit adalah sama ada kebergantungan kewangan di luar kawalan merupakan suatu kecacatan fizikal atau mental yang dirangkumi oleh pengecualian s. 95 Akta 1976.

Diputuskan:

Oleh Abdul Hamid Mohamad HMP

[1] Dalam kes Mahkamah Rayuan *Ching Seng Woah lwn. Lim Shook Lin,* suami bersetuju dalam keterangan utamanya untuk membayar nafkah kepada anak-anaknya sehingga mereka menerima ijazah pertama mereka. Mahkamah memutuskan bahawa seorang tidak boleh menarik balik apa yang telah dijanjikannya. Itulah *ratio* kes tersebut. Apa sahaja yang dikatakan selain darinya berkenaan s. 95 Akta 1976 adalah *obiter.*

[2] Perkataan "kecacatan" dalam s. 95 Akta 1976 hanya meliputi kecacatan "fizikal" atau "mental". Ia tidak boleh merangkumi kebergantungan kewangan. Tidak ada asas undang-undang untuk mentafsir pengecualian-pengecualian di dalam s. 95 sebagai termasuk kebergantungan kewangan bagi maksud melanjutkan pelajaran ke peringkat ijazah selepas kanak-kanak mencapai umur 18 tahun. Satu-satunya asas bagi pentafsiran sedemikian yang bertentangan dengan perkataan jelas undang-undang adalah asas moral.

Namun, dalam memutuskan sesuatu kes, alasan moral tidak mungkin mengatasi peruntukan jelas undang-undang. Fungsi hakim adalah untuk melaksanakan undang-undang, tanpa mengira apa pandangan peribadinya terhadap undang-undang tersebut.

[3] Akta Undang-Undang Keluarga Islam 1984 adalah lebih ke hadapan berbanding Akta serupa undang-undang sivil. Seksyen 79 Akta tersebut menyatakan secara spesifik bahawa mahkamah adalah berkuasa untuk membuat perintah nafkah melampaui umur 18 tahun bagi kanak-kanak "meliputi apa-apa tempoh tambahan yang difikirkannya munasabah, bagi membolehkan anak itu mengikuti pelajaran atau latihan lanjut atau lebih tinggi". Perkataan-perkataan ini tidak boleh ditafsirkan ke dalam peruntukan semasa s. 95 Akta 1976. Harus ada satu peruntukan spesifik yang membolehkan pentafsiran sebegitu yang mana ianya adalah satu halperkara untuk Parlimen mengatasinya. Kes ini perlu diputuskan mengikut undang-undang sepertimana ianya wujud ketika ini.

Rayuan dibenarkan.]

Reported by Usha Thiagarajah

Case(s) referred to:

Ching Seng Woah v. Lim Shook Lin [1997] 1 CLJ 375 CA ***(dist)***

Gisela Gertrut Abe v. Tan Wee Kiat [1985] 1 LNS 124; [1986] 2 MLJ 58 ***(refd)***

In the Marriage of Mercer [1996] ALR 237 ***(refd)***

Kulasingam v. Rasammah [1981] 2 MLJ 36 ***(refd)***

Penner v. Danbrook 39 RFL (3rd) 286 ***(refd)***

PQR (mw) v. STR [1993] 1 SLR 574 ***(refd)***

Waterhouse v. Waterhouse [1905] 94 LT 133 ***(refd)***

Legislation referred to:

Islamic Family Law (Federal Territories) Act 1984, s. 79

Law Reform (Marriage and Divorce) Act 1976, ss. 52, 76(3), 87, 92, 93, 95, 125

Counsel:

For the appellant - Balwant Singh Sidhu; M/s Balwant Singh Sidhu & Co

For the respondent - Foo Yet Ngo (CP Mahendran); M/s RR Chelliah Brothers

Case History:

Court Of Appeal : [2003] 2 CLJ 246
High Court : [2000] 5 CLJ 21

JUDGMENT

Abdul Hamid Mohamad FCJ:

On 30 January 1997, the High Court made an order, by consent, as follows:

> Respondent (Appellant in this court and also in the Court of Appeal - added) dikehendaki membayar kepada Pempetisyen (Respondent in this Court and also in the Court of Appeal - added) jumlah sebanyak RM4,200 (iaitu RM1,400.00 bagi seorang anak) sebagai nafkah bagi ketiga-tiga orang anak hasil dari perkahwinan tersebut berkuatkuasa dari 1.1.97 dan tunggakan sebanyak RM60,000.00 sebagai penyelesaian akhir dan penuh dalam masa 3 bulan dari tarikh ini.

The appellant made the payments pursuant to the order until April 1998. However, by a letter dated 12 May 1998 to the respondent, he stated that he would cease payment for the eldest child ("Anitha") on the ground that she had attained the age of 18 years. Accordingly he stopped paying the maintenance for Anitha from May 1998.

The respondent applied to the High Court for an order to compel the appellant to continue making the maintenance payments to Anitha and, by necessary implication, for the other two children as well, until they complete their degree education ("pendidikan ijazah").

The High Court ordered that the consent order for the maintenance of the three children be extended beyond the age of 18 years in the event that Anitha and/or the other children do gain a place in any public or private educational institution of higher learning to obtain their first degree respectively.

The appellant appealed to the Court of Appeal. His appeal was dismissed.

On 23 September 2003, this court granted the appellant leave to appeal on the following questions of law:

> Whether upon a proper construction of Section 95 of the Law Reform (Marriage and Divorce) Act 1976, the involuntary financial dependence of a child of the marriage for the purposes of pursuing and/or completing tertiary and/or vocational education comes within the exception of physical or mental disability so as to entitle the child to maintenance beyond the age of 18 years.

That is the question posed to this court.

Before the High Court, the question was worded in a slightly different manner. In the High Court the words "in order to obtain a first degree" were inserted after the words "tertiary education." Those words are omitted in the question posed to this court. In other words, the question posed to us does not limit the financial dependence for the purpose of pursuing and/or completing tertiary education in order to obtain a first degree only.

The High Court answered the question in the affirmative. The court relied mainly on the judgment of the Court of Appeal in *Ching Seng Woah v. Lim Shook Lin [1997] 1 CLJ 375*, which the learned judge held was binding on him. In other words, the High Court held that Anitha was entitled to the maintenance payment to pursue/complete her tertiary education until she obtains a first degree because she was suffering from involuntary financial dependence for the purpose and that such involuntary financial dependence falls within the exception provided by s. 95 of the Act ie, "where the child is under a physical or mental disability...." What it means is that a child who gains admission into an institution of higher learning suffers from physical or mental disability until she obtains his or her first degree! I dread to think of the connotation of such an interpretation.

The Court of Appeal dismissed the appellant's appeal and confirmed the decision of the High Court. Its conclusion is to be found in this passage:

> To reiterate, on our part, we associate with the views expressed by the Court of Appeal in *Ching Seng Woah* mentioned earlier that in appropriate cases, involuntary financial dependence is a physical disability under section 95 of the Act. Indeed the matter before us is such a case. We may even go a step further in saying that this involuntary financial dependence can also be taken as a mental disability under the section for the purpose of the child of the marriage pursuing their tertiary education in order to be better equipped in their future working life.

Having considered the moral grounds for such an interpretation, the Court of Appeal referred to s. 92 of the Act and concluded:

> ... section 95 should not be looked at in isolation. It may well be appropriate as a general principle to be applied notwithstanding the qualification provided for in the section. However, in a given situation such as in the present case, it should be construed in a more liberal fashion in the light of the duty imposed upon the parent to maintain their children as embodied in section 92 of the Act.

I do not think that it is necessary for me to reproduce the arguments of the learned counsel before us. I shall refer to them as I go along.

For easy reference, the provisions of the Act referred to in the judgments of the High Court and the Court of Appeal as well as by both learned counsel in their arguments before us are reproduced.

Section 52 provides:

> 52. If husband and wife mutually agree that their marriage should be dissolved they may after the expiration of two years from the date of their marriage present a joint petition

> accordingly and the court may, if it thinks fit, (make a decree of divorce) on being satisfied that both parties freely consent, and that proper provision is made for the wife and for the support, care and custody of the children, if any, of the marriage, and may attach such conditions to the (decree of divorce as it thinks fit).

Section 87 provides:

> In this Part, wherever the context so requires, "child" has the meaning of "child of the marriage" as defined in section 2 who is under the age of eighteen years.

Section 92 provides:

> Except where an agreement or order of court otherwise provides, it shall be the duty of a parent to maintain or contribute to the maintenance of his or her children, whether they are in his or her custody or the custody of any other person, either by providing them with such accommodation, clothing, food and education as may be reasonable having regard to his or her means and station in life or by paying the cost thereof.

Section 93 provides:

> (1) The court may at any time order a man to pay maintenance for the benefit of his child:
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> (a) if he has refused or neglected reasonably to provide for the child;
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> (b) if he has deserted his wife and the child is in her charge;
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> (c) during the pendency of any matrimonial proceedings; or
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> (d) when making or subsequent to the making of an order placing the child in the custody of any other person.
>
> (2) The court shall have the corresponding power to order a woman to pay or contribute towards the maintenance of her child where it is satisfied that having regard to her means it is reasonable so to order.
>
> (3) An order under subsection (1) or (2) may direct payment to the person having custody or care and control of the child or trustees for the child.

Section 95 provides:

> 95. Except where an order for custody or maintenance of a child is expressed to be for any shorter period or where any such order has been rescinded, it shall expire on the attainment by the child of the age of eighteen years or where the child is under physical or mental disability, on the ceasing of such disability, whichever is the later.

We will now look at the relevant case law. I shall begin with Malaysian cases.

Kulasingam v. Rasammah [1981] 2 MLJ 36 is a judgment of the High Court (Hashim Yeop Sani J, as he then was). In that case, the respondent's wife applied for maintenance for herself

and her daughter who was over twenty years old. Regarding the daughter the learned magistrate gave maintenance for her. On appeal to the High Court, Hashim A. Yeop Sani J held that the Age of Majority Act 1971 was applicable and therefore the daughter who was over 20 years old was not entitled to maintenance. That case was decided under the Married Women and Children (Maintenance) Ordinance 1950. The Ordinance was silent on the meaning of "child". My check with the library copy of this Court shows that there was no provision in the Ordinance similar to s. 95 of the 1976 Act. Instead, s. 3 provides:

> 3(1) If a person neglects or refuses to maintain his wife or a legitimate child of his which is unable to maintain itself, a court, upon due proof thereof, may order such person to make monthly allowance for the maintenance of his wife or such child, in proportion to the means of such person, as to the court seems reasonable.

In other words, there was no provision similar to s. 95 of the 1976 Act that states that the order "shall expire on the attainment by the child of the age of eighteen years...". There was also no definition of "child" as in s. 87 of the 1976 Act that provides for an age limit that it must be "under the age of eighteen years." Yet, the learned judge applied the provisions of the Age of Majority Act 1971 and concluded that as the daughter was over 18 years of age, she was not entitled to maintenance. It is true that this case is not an authority for the interpretation of the exception in s. 95 of the 1976 Act. Yet, under circumstances which should be more favourable to the respondent (in that case) the court applied the provision of the Age of Majority Act 1971 to limit the entitlement of maintenance of a child to 18 years.

Gisela Gertrut Abe v. Tan Wee Kiat [1985] 1 LNS 124; [1986] 2 MLJ 58 is a case under the 1976 Act. Leaving out the details, it was held that the respondent's legal responsibility to maintain the eldest daughter (who was 22 years old and who was studying in England) ended when she attained the age of 18 years and, similarly, in respect of the younger daughter (who was also studying in England) when she attains the age of 18 years. In her judgment (Siti Norma Yaacob J, as she then was), *inter alia* said:

> Under section 95 of the Law Reform (Marriage and Divorce) Act 1976, the duration of a maintenance order made in favour of a child expires, in the absence of any expressed shorter period, on the child attaining the age of 18 years. Reading this section, it is clear that the mandatory provision and that being the case, I consider that consideration of moral grounds is of no relevance whatsoever.

This is perhaps the first reported case on s. 95 of the 1976 Act regarding the duration of a maintenance order. The judgment clearly shows that the learned judge considered the provisions of s. 95. True that she did not mention the exception. But, anybody reading that section would not have missed it as it is a one-sentence section.

The case went on appeal to the Supreme Court - see [1986] 2 MLJ 297. The appeal was allowed regarding part of the orders made by the High Court. Even though I find the judgment rather difficult to comprehend, the Court appears to agree with the learned High Court judge that "an order for maintenance of a normal child of the marriage shall expire on the child attaining the age of eighteen years (see s. 95 of the Act.)" - see p. 299-300 of the report.

We now come to *Ching Seng Woah v. Lim Shook Lin [1997] 1 CLJ 375*, the judgment of the Court of Appeal followed by the High Court and the Court of Appeal in this case. In that

case, the High Court, *inter alia*, ordered that the appellant ("husband") pay RM1,000 per month for the two daughters, their medical bills and their education up to tertiary first degree. On appeal to the Court of Appeal the husband's counsel argued that the trial judge should not have ordered any maintenance at all for each of the two daughters beyond their eighteenth birthday. A very important point must be noted in considering this case and that is:

> At the trial, contrary to his answer in totally denying any liability for maintenance for his wife or children, **the husband agreed in his evidence in chief to pay maintenance to his two daughters and support their education until they receive their first degree**. (emphasis added)

That is the background to the order for maintenance for the daughters' education up to tertiary first degree.

Thus, when learned counsel for husband argued before the Court of Appeal that the maintenance order expired on the daughters' attainment of the age of 18, the Court of Appeal commented:

> In the narrow context of this case, the submission is somewhat startling because it comes from a husband who in the court below undertook on oath and with the benefit of legal advice to maintain his daughters till they received their first degree ie, till they were educationally equipped to find their rightful place on the job market. It is a fundamental doctrine of law that a person cannot be permitted to reprobate what he has approbated. We therefore reject this submission.

In my view that is the ratio of the case. Anything more said about s. 95 of the 1976 Act is mere obiter, even though, in view of the submission by the learned counsel for the husband, it was to be expected that the Court of Appeal should and would say something on it.

The other point that should be noted is that at the time the High Court made the maintenance order "the daughter was just over 16 1/2 years and the younger just over 13 1/2 years" - p. 121 of the report. Since they were both below 18 years old and the husband (their father) had, under oath, in the High Court "undertook" to maintain them till they received their first degree, no one can fault the High Court judge for making the order that he did regarding such maintenance.

I shall now come to that part of the judgment of the Court of Appeal regarding s. 95.

> When parents divorce, the children suffer the most. If Mr. Sidhu is right, every able bodied child of 18 can be turfed out into the streets with impunity! Not only can they not look to their parents thereafter for money but also by inference for shelter in the matrimonial home! Section 95 could thus become the bohsia's charter.
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> In the narrow context of this case, this submission is somewhat startling because it comes from a husband who in the court below undertook on oath and with the benefit of legal advice to maintain his daughters till they received their first degree, ie till they were educationally equipped to find their rightful place on the job market. It is fundamental doctrine of law that a person cannot be permitted to reprobate what he has approbated. We therefore reject this submission.

As to its wider implications, our view is that the powers provided for the protection of children by Pt.VIII of our Act are additional to and not restrictive of the powers contained in Pts VI and VII. Part VIII, s. 95 in particular, has to be viewed in the context of a child who is not simultaneously faced with the break-up of the family homestead. The parental duties in this context are spelt out by s. 92 and it extends to accommodation, clothing, food and education as may be reasonable having regard to his or her means and station in life or by paying the cost thereof.

Here the two boys are both enjoying a tertiary education; and the issue is whether the court can direct the husband to provide for his daughters till their tertiary degree, even if he had not undertaken to do so. The court's powers under s. 52 are very wide and transcend the limitations contained in s. 95, because s. 52 operates in a situation where the family is being legally disintegrated.

Mr Sidhu did not canvas what the words 'physical or mental disability' in s. 95 meant. An 18 year old computer whiz-kid who is a wheel chair case and therefore well able to earn a living at that age could here be contrasted with another 18 year old who is physically and mentally fit but is otherwise totally unable to fend for himself on the job market. In the present case, we have no evidence of the accomplishments of the two daughters. However, we must take note that, unlike the United Kingdom and many other European countries, Malaysia is not a welfare state. Whilst the married women's claim to a share of the matrimonial assets is now entrenched in our laws, the rights of the dependent young persons in these assets is yet to receive proper articulation. *Kulasingam v. Rasammah* [1981] 2 MLJ 36 was not cited to us, but that 20 year old daughter was claiming under the Married Women and Children (Maintenance) Ordinance 1950. Notwithstanding the definition of disability under s. 17 of the English Children's Act 1989 (also not cited to us but see *Bromley's Family Law* (8th edn.) at p. 643), we are inclined to the view that in appropriate cases, involuntary financial dependence is a physical disability under s. 95 of the Act. There are far reaching social implications here and we would prefer to say no more now as to whether English attitudes are suitable to Malaysian conditions in such a case or its corollary which is the duty to aged and dependent parents by their progeny. We would however reiterate that the question of proper provision under s. 52 of the Act and the powers of property division under s. 76 (as opposed to providing maintenance simpliciter) could involve transfers of property not just for the benefit of the spouses *inter se* but also for the benefit of the dependent children.

At the same time of the decree nisi, the elder daughter was just over 16 1/2 years and the younger just over 13 1/2 years. They had rights which had to be, and must have been taken into account by the trial judge when she apportioned the assets as she did. Had either parent refused to maintain them, the court would have had to consider what independent right they had against the parental assets to secure their position (see s. 79 of the Act).

First, personal views on the state of the law and moral obligations on the part of parents towards their children should be disregarded. A case has to be decided according to the law as it stands, irrespective of a judge's personal view on it and moral obligations can never take precedence over the law. What the law should be is a matter for the legislature.

What is the legal basis for the decision of the Court of Appeal regarding s. 95? The court

appears to rely on the provisions of ss. 52 and 92.

The only issue posed to this court is whether financial dependence falls within the meaning of the phrase "physical or mental disability". Even without looking at a dictionary the word "disability" is always used in relation to "physical" or "mental". As far as I can remember, I have not come across an example when the word "disability" is used in relation to a "financial" situation. The phrase "financial disability" sounds very odd to me.

We shall now look at the meaning of "disability" as given by the Concise Oxford Dictionary:

> disability..., a physical or mental condition that limits a person's movements, senses, or activities, disadvantage or handicap especially one imposed or recognised by the law.

Clearly, it is the first meaning that is relevant in interpreting the word "disability" used in s. 95 whatmore when the word is preceded by "physical and mental".

The words "physical" and "mental" are always used to describe the two opposing or complimentary elements of a human being - the physical and the mental elements. Thus, the same dictionary gives the meanings of "physical" as follows, omitting what are clearly not relevant to the context:

> "physical... 1 of or relating to the body as opposed to the mind... 2 of or relating to things perceived through the senses as opposed to the mind; tangible or natural forces generally...

The same dictionary gives the meanings of "mental" as follows:

> "mental... 1 of, done by, or concurring in the mind. 2 of relating to disorder or illness of the mind...

The word "disability" is also used in The Family Maintenance Act, s.s. 1990-91 (Saskatchawan). The section reads:

> 2. In this Act...
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> (b) 'child' means a person who:
>
> (i) is under the age of 18 years; or
>
> (ii) is 18 years of age or over and is unable, by reason of illness or disability, to withdraw from his or her parents' charge or obtain the necessaries of life.

In *Penner v. Danbrook* 39 RFL (3rd) 286, it was argued that the term "disability" in the section should be interpreted to include economic and social disability and that a person pursuing her education could be found to be disabled, and thus a child eligible for maintenance within the meaning of the section.

The Saskatchewan Court of Appeal held that the argument was untenable, and went on to say:

> First, the term disability as used in the section must connote some physical or mental incapacity, usually arising from injury or disease, although it might arise from other causes. Mere lack of knowledge or training or an unfulfilled wish to improve one's self are not, in the ordinary language, considered to be disabilities. To extend the meaning of the term disability to such matters would make the section of such broad application that anyone of any age, education, or experience could fit into it, and the age limitation imposed by the legislature would be rendered meaningless.
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> ...
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> ... The legislature intended to limit the jurisdiction of the courts to grant maintenance to children over the age of 18 years to those cases of proven illness or disability, and the term disability was not intended to include cases such as Nicole, who remained dependent only because of the continuation of her education was seen by her mother as desirable.

Clearly the word "disability" as used in s. 95 covers only "physical" and "mental" disability. It cannot cover financial dependence. The word "child" used in s. 95 is also defined in s. 87, the first section in "PART VIII" on "PROTECTION OF CHILDREN" to mean a child under the age of eighteen years. Section 95 is a part of PART VIII. We have also seen in *Gisela Gertrut Abe (supra),* the Supreme Court also states that "an order for maintenance of a normal child of the marriage shall expire on the child attaining the age of eighteen years (see s. 95 of the Act" - p. 299 - 300 of the report). When the Supreme Court in that judgment used the words "a normal child", it clearly means a child who is not "under physical or mental disability".

Section 52 was referred to by the Court of Appeal in this case. With respect, I find that that section is not of any assistance in the interpretation of s. 95.

A lot of reliance was placed by the High Court judge in this case and the Court of Appeal both in this case and in the case of *Ching Seng Woah (supra)* on s. 92 to come to the conclusion that they did. With respect, in my view s. 92 merely declares the duty of a parent to maintain or contribute to the maintenance of his or her child and spells out what the parent should provide for the child. That is a general provision. Section 95 is specific regarding the duration of the order for maintenance. The duration is not mentioned in s. 92. Only s. 95 speaks of the duration. Thus, I do not see how s. 92 can qualify s. 95. Indeed, to hold that s. 92 qualifies or overrides s. 95 would render the provisions of s. 95, a specific provision for the particular purpose, nugatory.

Section 93 too offers no assistance in interpreting s. 95. Section 93 empowers the court to make a maintenance order for the benefit of child under the circumstances therein provided, the most relevant paragraph being para. (a) ie, where he has refused or neglected reasonably to provide for the child. Again, the duration is not mentioned. On the other hand, the section refers to "child", which is clearly defined in s. 87 mentioned earlier which means a child of the marriage who is under the age of eighteen years.

With respect, I find no legal basis for interpreting the exceptions in s. 95 to include financial dependence for the purpose of pursuing and/or vocational education after the "child" has completed the age of eighteen years. The only basis for such an interpretation, which goes against the clear words of the law, is moral basis. And Siti Norma Yaacob J puts it very aptly

in *Gisela Gertrut Abe v. Tan Wee Kiat (supra)* that "moral grounds is of no relevance whatsoever". Moral grounds can never override clear provisions of the law in deciding a case. The function of a judge is to apply the law, whatever his personal view about the law may be.

It should be noted that s. 79 of the Islamic Family Law (Federal Territories) Act 1984 (which has been adopted by the State Legislatures for application in the States) made by the same Parliament that enacts the 1976 Act, contains the following provisions:

> 79. Except:
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> (a) where an order for maintenance of a child is expressed to be for any shorter period; or
>
> (b) where any such order has been rescinded; or
>
> (c) where any such order is made in favour of:
>
> (i) a daughter who has not been married or who is, by reason of some mental or physical disability, incapable of maintaining herself;
>
> (ii) a son who is, by reason of some mental or physical disability, incapable of maintaining himself,
>
> the order for maintenance shall expire on the attainment by the child of the age of eighteen years, but the Court may, on application by the child or any other person, extend the order for maintenance **to cover such further period as it thinks reasonable, to enable the child to pursue further or higher education or training**. (emphasis added).

In this respect, the Islamic Family Law (Federal Territories) Act 1984 is more advanced than its civil counterpart. In reality, those are the words that the respondent wants this court to "legislate as an amendment" to the existing provisions of s. 95. The respondent has succeeded in the High Court and the Court of Appeal. With respect, I will not do such a thing. That is not the function of the court. That is a matter for the Parliament. By doing so, the court will be usurping the function of the legislature. If separation of powers were to have any meaning, the three branches of the government must respect each other's jurisdiction. There should be no interference, no usurpation of powers either way.

Learned counsel for the respondent referred us to the provisions of s. 69(5) of the (Singapore) Women's Charter (as well as legislations in other countries) in an attempt to convince us that it is the policy in those countries too to provide for maintenance for a child to pursue or complete his or her tertiary education. I agree with her that that is the policy in those countries and it should be the policy in this country too. But, whereas that is also the law in those countries, it is not the law in this country, except for the law applicable to Muslims.

What had happened in Singapore was that the law was amended after the decision in *PQR (mw) v. STR* [1993] 1 SLR 574. In that case, the plaintiff, *inter alia*, was seeking for a maintenance order to be varied. The relevant provisions of the (Singapore) Women's Charter under consideration in that case were as follows:

Section 125:

> Except where an order for custody or maintenance of a child is expressed to be for any period shorter period or where any such order has been rescinded, it shall expire:
>
> (a) on the attainment of the age of 21 years;
>
> (b) upon the child obtaining gainful employment; or
>
> (c) where the child is under any physical or mental disability, on the ceasing of such disability, which ever is the later.

Section 116:

> In this Chapter (Welfare of Children), wherever the context so requires, 'child' means a child of the marriage as defined in section 84 but who is under the age of 21 years.

The issue regarding maintenance in that case was whether the daughter who was then more than 22 years old but was studying at a university is Australia was entitled to maintenance.

Punch Coomaraswamy J after referring to the (English) Domestic Proceedings and Magistrates' Court Act 1978 and the (English) Matrimonial and Family Proceedings Act 1984, said:

> In Singapore law, there is however no equivalent of either English Act. There is no definition of 'infant' in the Interpretation Act (Cap. 1). The Women's Charter, ss. 125 and 116 are clear as to the upper limit of 21 years...

The learned judge went on to hold:

> I find that the meaning of 'child' under s. 116 applies to section 61 and hence the legal duty to provide maintenance ceases upon the child attaining 21, the age of majority. I come to this conclusion as a result of the indicators of the upper limit of maintenance as provided by ss. 116 and 125. **If the present law is unsatisfactory in this aspect, it will be for Parliament to address the problem and not the courts**. (emphasis added).

Therefore the learned judge held that the defendants' legal duty to provide maintenance ceased for the daughter upon her attaining 21 years old age" (However, in that case since that defendant willingly agreed to continue to provide the daughters university tuition fees till she finishes her general degree at the Australian university and for her honours degree if she qualifies and he also agreed to be bound by an order of the court to that effect, the court made the order.)

A few points should be noted about that case. First, s. 61 of the (Singapore) Women's Charter is substantially the same as s. 96 of the 1976 Act. The provision of s. 116 of the (Singapore) Women's Charter is in *pari materia* with that of s. 87 of the 1976 Act, except for the upper limit of 21 years instead of 18 years. The provision of s. 125 of the (Singapore) Women's Charter is the same as in s. 95 of the 1976 Act except that in the former the section is broken into three paragraphs and another exception is provided in s. 125 of the (Singapore) Women's Charter but not in s. 95 of the 1976 Act ie, "upon the child obtaining gainful employment".

However, it is important to note that the exception "where the child is under any physical or mental disability" is exactly the same in both Acts.

Secondly, the learned judge refused to follow the decision of the English court in *Waterhouse v. Waterhouse* [1905] 94 LT 133 in view of the clear provisions of the Singapore law and the difference between Singapore and English laws.

Thirdly, the learned judge, took the view that if the law was unsatisfactory, it was for Parliament to address the problem, not the courts.

Subsequently, the Women's Charter was amended, with effect from 30 May 1997. The new sub-s. (5) of s. 69 provides:

> (5) The court shall not make an order under subsection (2) for the benefit of a child who has attained the age of 21 years or for a period that extends beyond the day on which the child will attain that age unless the court is satisfied that the provision of the maintenance is necessary because:
>
> (a) of a mental or physical disability of the child;
>
> (b) the child is or will be serving full-time national service;
>
> (c) the child is or will be or (if an order were made under subsection (2)) would be receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation, whether or not while in gainful employment; or
>
> (d) special circumstances, other than those stated in paragraphs (a), (b) and (c), exist which justify the making of the order.

The Australian case of *In the Marriage of Mercer* [1996] ALR 237 was referred to us. In that case, the husband applied to discharge a consent order in respect of maintenance of the eldest child of his former marriage. The child was 19 years old and was undertaking tertiary education. The judgment of Watson J, *inter alia*, reads:

> In the Family Act the code for the maintenance of children is to be found in ss. 73, 75 and 76. Section 73 provides that the parties to a marriage are liable, according to their respective financial resources, to maintain the children of the marriage who have not attained the age of 18 years. This is a general statement of principle defining age of 18 years. This is a general statement of principle defining parental obligation up to 18. It does not provide any guidance once a child of a marriage becomes an adult.

Section 76 generally limits the duration of child maintenance orders up to the child's 18th birthday. However, s. 76(3) provides:

> The court may:
>
> (a) provide in an order for the maintenance of a child who has not attained the age of 18 years that the order shall continue in force until a day that is later than, or for a period that extends beyond, the day on which the child will attain the age; or

(b) make an order for the maintenance of a child who has attained the age of 18 years, being an order that is expressed to continue in force until a day, or for a period specified in the order,

if the court is satisfied that the provision of the maintenance is necessary to enable the child to complete his education (including vocational training or apprenticeship) or because he is mentally or physically handicapped, and, in that case, the order continues in force until that day or the expiration of that period, as the case may be.

In a case such as the present the court has to be satisfied that the provision of the maintenance is necessary to enable the child to complete his education, etc.

Thus, we see that in Australia too there is a specific provision in the Act that empowers the court to make a maintenance order after the child has attained the age of 18 years if it is necessary to enable the child to complete his education.

So, it is a non-starter to argue that since in other countries a child is provided with maintenance to enable him or her to complete his or her tertiary education, the courts in Malaysia should do the same. We should look at our law and decide according to our law as it now stands. Just as what was done in Singapore, it is for the Parliament to address the problem, not the courts. In fact our Parliament and the State Legislatures had already done it in regard to the Islamic Family Law.

In the circumstances, I would answer the question posed to this court in the negative. The appeal is allowed with costs here and in the courts below. The deposit is to be refunded to the appellant.

My learned brothers Mohd. Noor Ahmad and Pajan Singh Gill FCJJ have read this judgment in draft and agreed with it.