Privy Council Appeal No. 3 of 1991

(1) Mastan E-Allam Bhewa and
(2) Abdool Rahim Dowlutsing *Appellants*

v.

(1) The Government of Mauritius and
(2) The Director of Public Prosecutions *Respondents*

FROM

THE SUPREME COURT OF MAURITIUS

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 20TH JULY 1992

Present at the hearing:-

LORD KEITH OF KINKEL
LORD BRIDGE OF HARWICH
LORD GOFF OF CHIEVELEY
LORD LOWRY
LORD SLYNN OF HADLEY

*[Delivered by **Lord Keith of Kinkel**]*

This appeal is brought from a judgment of the Supreme Court of Mauritius dated 15th May 1990 delivered in an action whereby the plaintiffs, the appellants before their Lordships' Board, sought under section 17 of the Constitution of Mauritius a declaration that the Civil Status (Amendment) Act 1987 was in breach of section 11 of the Constitution and was invalid. By the judgment appealed from the Supreme Court dismissed the action.

Section 11 of the Constitution is the provision that guarantees freedom of religion. The appellants are followers of Islam. The Civil Status Act 1981 by sections 29 to 32 introduced provisions under which parties to a Muslim religious marriage might declare at the time of celebration that they wished the marriage to be governed by Muslim Personal Law, in which event the marriage would be governed by that law and such rules as might be promulgated by a Commission of Muslim Jurists, appointed by the Governor-General, and approved by the Assembly. Pending the promulgation of such rules the marriage was to be governed by specified provisions of the Code Napoleon.

The Governor-General duly appointed Commissioners, and they embarked upon their task, but difficulties were encountered and for reasons which it is unnecessary to go into the work ground to a halt.

In 1987 there was enacted the Civil Status (Amendment) Act 1987. This repealed sections 29 to 32 of the Act of 1981, and by an amendment to section 33 of that Act it prohibited all religious marriages unless the parties to it were already civilly married to each other, or the celebrant was either a person authorised under the Act or was assisted by a person designated by the Registrar-General.

The appellants found the provisions of the Act of 1987 objectionable because they had the effect of removing the prospect that in due course Muslim religious marriages would come to be governed by Muslim Personal Law. However, the Supreme Court held that the Act was not unconstitutional.

It is unnecessary to enter upon an examination of the grounds upon which the Supreme Court reached its decision because the question as to the constitutionality of the Act of 1987 has been rendered completely academic as a result of the enactment on 21st December 1990 of the Civil Status (Amendment No. 2) Act 1990. This excepted Muslim religious marriages from the prohibition contained in the amended section 33 of the Act of 1981, and it made provision for the celebration by authorised persons of religious marriages having civil effect and for the setting up of a Muslim Family Council, the duties of which were to include the making of rules governing marriages celebrated in accordance with Muslim rites and the dissolution of such marriages. So in substance the position has reverted to that which prevailed before 1987, with the substitution of the Muslim Family Council for the Commission of Muslim Jurists. Their Lordships were informed that the new Council has given notice that it is in operation, but that it has not yet made any rules as provided for in the Act of 1990.

The Act of 1990 was not mentioned in the original written case for the appellants in this appeal, nor in that for the respondents. It was, however, appended to a supplementary case lodged for the appellants on the morning of the hearing before the Board. In the light of the Act Sir Hamid Moollan, Q.C., who appeared for the appellants, did not feel in a position to present any substantive argument in support of the appeal.

In these circumstances their Lordships consider that it would not be appropriate to make any order in the appeal either as to its disposal or as to costs.