

Sultan Azlan Shah Lecture Oxford

Religious Dress

Lady Hale, President of The Supreme Court

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It is a great pleasure to be delivering a lecture in the Sultan Azlan Shah series. The late Sultan was the most respected jurist and judge in Malaysia until he became Sultan of Perak and later King of Malaysia. Last year I had the honour giving the annual lecture in his memory in Kuala Lumpur, in the presence of his son, the present Sultan, the Sultana and other members of their family. My title then was ‘The Supreme Court – Guardian of the Constitution?’ and one sentence in that lecture got me into trouble with sections of the press back here. I hope that my current lecture will not prove so controversial.

Introduction

I have had an interest in the subject of religious dress since the 1990s when I was in the Family Division of the High Court trying a child care case in which the local authority alleged that a young baby’s serious head injuries had been caused ‘non-accidentally’ by one or both parents. His father was a doctor from Pakistan training for Membership of the Royal College of Physicians. His mother was an arts graduate from Pakistan but they had decided that she would go into full purdah while they were here. That meant a long robe, a face veil, a headscarf and a black gauze shroud covering the whole of her head and upper body. Parents are compellable witnesses in care proceedings and it was essential that I heard her evidence. But we had an easy solution. Care proceedings are held in private. The judge was a woman. Counsel for the local authority was a woman. Counsel for the child’s guardian ad litem was a woman. Counsel for the parents was a man, but it was agreed that she could give evidence behind a screen. Thus the only male who could see her face was her husband and the only counsel who could not see her was her own.

That experience left me in little doubt of the importance of seeing the face of a witness giving evidence. This mother’s love for her children was quite apparent. So too was the fact that, from

time to time, she was repeating a rehearsed script rather than giving me her true recollections of what had taken place.

My dilemma was easily solved. But the dilemma facing His Honour Judge Peter Murphy in the Crown Court at Blackfriars in September 2013 was not (see *R v D(R)*, Judgment of 16 September 2013). He was presiding over the trial by jury of a defendant charged with witness intimidation who appeared in the dock wearing what he termed a burq'a – a loose black shroud covering the head and body – and a niqaaab – a black veil covering the whole of her face except for the eyes. He was concerned only about the face covering. Obviously in such cases one potential problem is identification – making sure you have got the right defendant – but that was solved by a female police officer who knew the defendant seeing her in private without her niqab and giving evidence that she was sure that the person in the dock was the person accused. It would have been more difficult if identification was an issue. But the more serious problems were whether she should be uncovered while giving evidence – so that the jury would be able to assess her credibility – and generally during the trial – so that the jury would be able to watch her reactions to what was going on when others were giving evidence or counsel were making their submissions or the judge was delivering his summing up. After a comprehensive review of the principles and the authorities, Judge Murphy ruled that she was free to wear the niqaaab during the trial except while giving evidence; that she might not give evidence wearing the niqaaab, but she could give evidence behind a screen shielding her from public view but not from the view of the judge, jury and counsel (or by live video link). He also ruled that no drawing, sketch or other image of any kind while her face was uncovered could be made, disseminated or published outside court.

Judge Murphy also said that he was conscious of the place of the Crown Court in the hierarchy of legal authority (he meant that it was below the Court of Appeal and Supreme Court) and expressed the hope that Parliament or a higher court would review the question sooner rather than later and provide a definitive statement of the law to trial judges (para 12). The then Lord Chief Justice, Lord Thomas, at his press conference soon afterwards, said that he hoped to issue guidance in the fairly near future. But that did not happen. He was asked why not at his press conference in November 2014 and replied that they had been waiting for the judgment of the European Court of Human Rights in a case against France (the *SAS* case, discussed later). He hoped to be able to get back to it as soon as reasonably practicable, but there had not been any

problems. Asked again in November 2015, he repeated that there was not a problem and so it had gone to the back of the queue. In the meantime, the National Secular Society had written to the Lord Chancellor asking him to intervene to ensure that clear instructions were issued to prohibit face coverings in court, at least for defendants, witnesses, judges and court officials (20 May 2015). The Minister responsible for the courts responded, in my view correctly, that this was a matter for the judiciary (8 June 2015).

That is how things still stand, and it may well be that the current Lord Chief Justice, Lord Burnett, will share his predecessor's view that there is not a problem¹.

But of course court proceedings are not the only context in which the question of religious dress arises. It comes up far more frequently in schools and other educational establishments and in the workplace, where there are often rules about what pupils, students or employees may and may not wear.

What is the law about it?

There are two main sources of relevant law:

- (1) Non-discrimination law, now contained in Equality Act 2010

Non-discrimination law is largely derived from European Union law, with some 'gold-plating' (ie doing more than EU law requires). It applies to the suppliers of employment, accommodation, goods and services, whether in the public or private sectors.

It used only to cover discrimination on grounds of race (widely defined to include ethnicity) and sex – but in *Mandla v Dowell Lee* [1983] 2 AC 548, the House of Lords held that Sikhs were an ethnic group for this purpose (and in *Rv Governing Body of JFS* [2009] UKSC 15, [2010] 2 AC 728 case the Supreme Court confirmed, as had always been assumed, that Jews were also an ethnic group for this purpose). That is not an issue now, as the anti-discrimination laws have been extended to cover discrimination on grounds of religion or belief as well.

¹ After this lecture was delivered, on 28 February 2018, the Judicial College published an updated, expanded and improved version of the Equal Treatment Bench Book. This includes guidance on religious dress and wearing the veil (including the niqab and the burqa) in court. Source: <https://www.judiciary.gov.uk/wp-content/uploads/2018/02/equal-treatment-bench-book-february2018-v5-02mar18.pdf>

Discrimination comes in two main forms – direct and indirect. Direct discrimination is where a person is treated less favourably than others because of his religion or belief. That is, the religion or belief is the reason for the less favourable treatment – Sikhs, Jews or Muslims, for example, are singled out for less favourable treatment. Indirect discrimination is where an employer or service provider applies the same rules to everyone, but those rules put, say, Sikhs, Jews or Muslims at a particular disadvantage when compared with others who do not share their religious beliefs, and the individual suffers that disadvantage. The distinction is important because, as a general proposition to which there are only a few exceptions, direct discrimination cannot be justified. Indirect discrimination, on the other hand, can be justified if the employer or service provider can show that the rule in question is a proportionate means of meeting a legitimate aim.

In *Mandla v Dowell Lee*, the complaint was that a private school had discriminated against a Sikh boy by refusing to admit him unless he removed his turban and cut his hair in accordance with the school rules. The House of Lords held that this was indirect, rather than direct, discrimination. The rule applied to everyone, but it put the Sikh boy at a disadvantage compared with boys who did not share his beliefs. They also held that it could not be justified – in that case because it was the very fact that wearing the turban was a manifestation of his ethnic origins which was said to justify the rule, but the justification has to be independent of the complainant's ethnic origins. Nowadays, I suspect that the school could have found a better reason.

It is quite possible for employers and service-providers to have reasons for their rules which are independent of the religion or ethnicity of the complainant and are sufficient to justify them. A well-known example is *Azmi v Kirkless Metropolitan Borough Council* [2007] ICR 1154. The complainant was employed as a bilingual support worker at a school. As a devout Muslim she was accustomed to wearing a face veil in the presence of adult males. The school refused her request to do so when working with male teachers, because obscuring the face and mouth impeded communication with the pupils. The school had conducted a comparison of her work both with and without the veil. This was indirect rather than direct discrimination because the school would have said exactly the same to anyone else who wanted to cover their face for whatever reason. And it was justified. The aim was to improve the educational performance of the pupils – especially those from minority ethnic backgrounds for most of whom English was a second language – and the means chosen were proportionate because the quality of her

communication with the pupils was much better without the veil and could not be achieved by other means.

That approach is entirely consistent with two recent Grand Chamber decisions in the Court of Justice of the European Union (CJEU) in Luxembourg, decided on 14 March 2017. In *Bougnaoui v Micropole SA* (Case C-188/15) the complainant was a design engineer who wore an Islamic headscarf (I do not find it helpful to refer to the hijab as a veil). She was sacked after a customer had objected to her wearing it on site. The Company argued that taking account of the customers' wishes made it a genuine occupational requirement not to wear a veil – and thus an answer to a claim even of direct discrimination. The Court rejected that argument. But it pointed out that it was not clear whether this was a case of direct discrimination – a difference of treatment based directly on her religion or belief - or whether the company had a general rule prohibiting the wearing of any visible sign of political, philosophical or religious belief. The latter might be indirect discrimination but it could be justified by a legitimate aim, such as a policy of neutrality vis-à-vis the company's customers.

The Court cross-referred to *Achbita v G4S Secure Solutions NV* (Case C-157/15) decided the same day. Ms Achbita began working for G4S as a receptionist in 2003. In 2006 she told them that she intended to wear an Islamic headscarf in future. She was told that the wearing of visible political, philosophical or religious signs was contrary to the company's position of neutrality and an express rule was shortly afterwards promulgated to that effect. Ms Achbita continued insist and was sacked. The CJEU confirmed that a prohibition based on such a rule did not constitute direct discrimination but might be indirect discrimination unless justified as a proportionate response to a legitimate aim of political, philosophical and religious neutrality. This might be the case provided that the policy was genuinely pursued in a consistent and systematic manner. Those were questions for the national court.

An example of how a national court might approach such questions – albeit arising under the German Constitution rather than EU law – is a 2015 decision of the German Federal Constitutional Court (1 BvR 471/10, 1 BvR 1181/10, 27 January 2015). This considered similar arguments in relation to Muslim teachers in state schools, who were asked to remove their headscarves. One was given a formal warning for wearing a beret and polo-necked jumper

instead. The other was sacked for refusing to remove her headscarf. There was a State law prohibiting teachers from publicly expressing views of a political, religious, ideological and similar nature which were likely to endanger or interfere with the neutrality of the State vis-à-vis pupils and parents or to endanger or disturb the political, religious or ideological peace at school (although the representation of Christian and occidental educational and cultural values did not amount to an infringement). The Court held that the general prohibition on teachers expressing their religious beliefs through their outward appearance violated their freedom to profess their faith under the German Basic Law (article 4(1), (2)). The interference was a serious one. The aim of preserving school peace and neutrality was legitimate, but the measure had to respond to a concrete threat to those aims, which had not been demonstrated. Wearing a headscarf does not by itself threaten those aims or interfere with the pupils' own freedom of faith, as long as staff did not seek to promote their faith or influence pupils. But the exception for Christian and occidental values was discriminatory and therefore void.

(2) Human rights law under HRA 1998

The German Court was construing provisions of the German Constitution which are very similar to Article 9 of the ECHR:

'1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

'2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals or for the protection of the rights and freedoms of others.'

This too has come up in the context of school uniforms and employers' dress codes. I first encountered it in the House of Lords in the case of *R (Sabina Begum) v Governors of Denbigh High School* [2006] UKHL 15, [2007] 1 AC 100, where a Muslim school girl had not been allowed to wear a jilbab. The school uniform permitted the headscarf and the shalwar kameez but not the jilbab. It had been carefully worked out in agreement with the local community. The majority of their Lordships held that this was not even an interference with her right to manifest her religion,

as her family had deliberately chosen to send her to that school and she could have gone to another one where she would have been allowed to wear it. Lord Nicholls and I held that it was an interference. But we all held that it was justified.

As I put it, the school was trying to balance the conflicting considerations of respect for diversity and promoting social cohesions and the freedom of others to develop their full potential:

‘Social cohesion is promoted by the uniform elements of shirt, tie and jumper, and the requirement that all outer garments be in the school colour. But cultural and religious diversity is respected by allowing girls to wear either a skirt, trousers, or the shalwar kameez, and by allowing those who wished to do so to wear the hijab. This was indeed a thoughtful and proportionate response to reconciling the complexities of the situation. This is demonstrated by the fact that girls have subsequently expressed their concern that if the jilbab were to be allowed they would face pressure to adopt it even though they do not wish to do so.’

I think that we can now be confident that the European Court of Human Rights in Strasbourg would share the view of the minority that the school’s uniform policy was an interference with Sabina’s right to manifest her religion. But I suspect that they might also agree that the interference was justified.

There was a series of admissibility cases against France in the Strasbourg Court complaining about the exclusion of pupils from school for refusing to remove conspicuous symbols of religious affiliation – either Islamic headscarves or Sikh keskis (under-turbans). A French law of 2004 prohibited the wearing of all conspicuous signs of religious faith during lessons. The Strasbourg court held that this was a restriction on their freedom to manifest their religion. However, it was in accordance with the law and pursued the legitimate aims of protecting the rights and freedoms of others and public order. It was also meant to protect the constitutional principle of secularity – *laïcité* – an aim which was in keeping with the values underlying the Convention and the court’s case law. The complaints were held inadmissible: see *Ranjit Singh v France* (Application no 27561/08, Decision of 30 June 2009).

Those same arguments were deployed before the United Nations Human Rights Committee in *Bikramjit Singh v France* (Communication 1852/2008, 4 February 2013). A young Sikh complained that being expelled from school for refusing to remove his keski was a breach of article 18 of the International Covenant on Civil and Political Rights 1966, which for this purpose is virtually identical to article 9 of the European Convention. The Committee recognised that the principle of secularism – *laïcité* – was in itself a means of protecting the religious freedom of all the population; and also that the 2004 law had responded to some real incidents of interference with the religious freedom of pupils and sometimes even threats to their physical safety, so it served the purpose of protecting the rights and freedoms of others, public order and safety. However, France had not furnished compelling evidence that, by wearing his keski, the complainant would have posed a threat to the rights and freedoms of other pupils or to good order in the school. Further, his permanent exclusion from school was disproportionate and had led to serious effects upon the education he was entitled to receive.

There was a similar disparity of views between the Strasbourg Court and the UN Human Rights Committee in the case of *Mann Singh v France*. French law required people to appear bare-headed on their passport and other identity photographs. The Strasbourg Court (Application no 24479/07, Decision of 13 November 2008) held that it did amount to an interference with the freedom to manifest the Sikh religion by wearing a turban at all times. But it was prescribed by law and pursued the legitimate aim of ensuring public safety by enabling drivers to be identified with the maximum degree of certainty and verifying that they were authorised to drive the vehicle concerned. The requirement was only a sporadic one. The Human Rights Committee (Communication no 1928/2010, 36 BHRC 675) agreed that the requirement pursued a legitimate aim. However, France had not explained why wearing a turban covering the top of the head and part of the forehead but leaving the rest of the face clearly visible would make it more difficult to identify a person who wore the turban at all other times than if he were to appear bareheaded. And although it was a one-off requirement it interfered with his freedom on a continuing basis because he could be compelled to remove his turban during identity checks.

Why the UN Committee was prepared to subject the justifications offered by France to much closer scrutiny than was the Strasbourg court is an interesting speculation. Stephanie Berry (see

(2017) 37(4) *Legal Studies* 672) suggests that the Strasbourg court has a longer history of considering such cases, many of them from Turkey, whereas the UN Committee was considering the issue afresh; that the 47 Member States of the Council of Europe have a predominantly Christian or secular tradition, whereas the UN Committee is dealing with a wider diversity of states; the decisions of the Strasbourg court are legally binding, whereas those of the UN Committee are only advisory 'views'; and the Strasbourg court recognises a margin of appreciation within which views may legitimately differ between Member States, whereas the UN Committee does not. It is fair to say that Berry does not accept that these are good reasons for the Strasbourg court to differ from the UN view.

Since then, Strasbourg has decided at least two important cases about the wearing of religious dress or symbols. *Eweida v United Kingdom* (2013) 57 EHRR 213 concerned a woman working for British Airways and an NHS theatre nurse who were both prohibited from wearing a discreet cross at work. They had both complained of discrimination to an employment tribunal and lost (in the Court of Appeal and the Employment Appeal Tribunal respectively) on the ground that the rules did not put Christians generally at a disadvantage, because wearing a cross was a matter of personal choice and not a religious requirement. (As an aside, this is an approach which makes Christians feel that they are being discriminated against, because there is not much that they are actually required to do by way of religious observance, but it means a lot to those who choose to manifest their faith in this way.) The Strasbourg Court held that this was nevertheless an interference with their right to manifest their religion. In the British Airways case, it was not justified – the UK authorities had not struck a proper balance. They had given too much weight to British Airways' corporate image policy and not enough to Ms Eweida's religious freedom. It was a discreet cross unlikely to have a negative impact on the corporate image – and the rules had been changed soon afterwards anyway. The nurse, Ms Chaplin, was different. The rule against wearing any form of jewellery was for health and safety reasons which had greater weight and the local courts were better able to judge whether it was justified.

It may be that this indicates a greater willingness on Strasbourg's part to subject the justifications offered to careful scrutiny. But against that might be put the Grand Chamber case of *SAS v France* (2015) 60 EHRR 244, in which a French law banning the wearing of face coverings in all public places was upheld. It sought to guarantee the conditions of living together, to protect the

principle of interaction between individuals essential for the expression of pluralism, tolerance and broadmindedness - basically the same laïceté justification as in the Sikh cases.

Drawing the threads together

1. You will notice that none of these cases, and nothing in this lecture, has sought to examine the theological basis for the religious views held by the complainants.

One member of the House of Lords in *Sabina Begum* (who happens to have two children of Muslim faith) did express the view that “the notion that the shalwar kameeze school uniform would not accord with essential requirements of Islamic modesty for teenage girls seems to me an astonishing one” (para 83).

My attention has also been drawn to two sources which state that it is not contrary to Sharia law for a woman to uncover her face when she is giving testimony in court or for a male Magistrate or Judge to look at her in order to identify who she is, to make assessments as to her credibility where this is an issue and to protect the rights of all concerned. One is the Australian National Imams Council’s *Explanatory Note on the Judicial Process and Participation of Muslims*, citing several texts in support. The other is *The Reliance of the Traveller*, by Ahmad ibn Naqib al-Misry, translated by Nuh Ha Mim Keller (Beltsville, Maryland, USA, 1994) which is to the same effect.

However, in *SAS v France*, the Court held (repeating the view expressed in *Eweida* at para 81) that, provided a complainant’s views attain a certain level of cogency, seriousness, cohesion and importance, ‘the state’s duty of neutrality and impartiality is incompatible with any power on the state’s part to assess the legitimacy of religious beliefs or the ways in which those beliefs are expressed’ (para 55). So it is not for us to question the validity of a person’s beliefs, provided that they are sincerely held.

2. It is unlikely that a ban on all or any items of religious dress or symbols will be considered direct discrimination on religious grounds for the purpose of the Equality Act 2010, provided that the rule is not aimed at a particular religion as opposed to a particular type of dress or symbol.

3. On the other hand, such a ban could be considered indirect discrimination for the purpose of the 2010 Act, because it places adherents of a particular faith at a disadvantage when compared with people who do not share that faith. Since *Eweida*, this should include Christians, even though they are mostly not obliged to manifest their religion by wearing a religious symbol or dress, as much as Jewish or Muslim women who feel obliged to cover their hair and in some cases their face.
4. The focus would then turn to whether the ban was a proportionate means of achieving a legitimate aim.
5. The Equality Act only applies to certain kinds of act by employers and service-providers – such as sacking an employee or excluding a pupil. It does not apply to every act which might be seen as discriminatory. But it does apply to private as well as public employers and service-providers.
6. The Human Rights Act, on the other hand, applies only where the acts of public authorities are incompatible with the Convention rights. This includes the acts of courts and tribunals, which is why what might otherwise be thought acts of private bodies, such as British Airways, may be caught.
7. School uniforms, employers' dress codes and requirements for photo identification may all amount to interferences with the right to manifest one's religion under article 9. The fact that you may go to another school or another employer does not mean that there is no interference, although it may make the interference easier to justify.
8. Once again, therefore, we are back to justification – is the interference or limitation a proportionate means of achieving a legitimate aim?

9. The cases have discussed a variety of possible legitimate aims – ranging from protecting a corporate image, through preserving other schoolgirls’ right to choose, health and safety considerations, public safety, interaction and communication between individuals, or preserving neutrality as between different political, religious and philosophical views, to securing the basic principles of a fair trial – the right to a fair trial being another of the fundamental rights guaranteed by the European Convention in article 6.

Back to where I started

It is not for me to give guidance to the courts of England and Wales as to the approach which they should adopt: that is a matter for the Lord Chief Justice, should he think it necessary. I can only decide the cases which come before me in the Supreme Court. I agree with HHJ Murphy that it is a question of law, not simply judge-craft, but the question of law depends upon balancing the freedom to manifest one’s religion against the justifications for interfering with that freedom, and judge-craft may do a good deal to anticipate problems and secure a reasonable accommodation. I also agree with Judge Murphy that in this particular context it is face coverings and not other items of dress which present the dilemma. We do take it for granted in this country that observing a person’s facial expressions, body language and general demeanour are an important part of assessing their credibility. The Koranic sources mentioned earlier seem to share that view. And our adversarial trial system depends crucially on testing a witness’s evidence through cross-examination – I suspect that most advocates would find it difficult to imagine how one would cross-examine a witness whose face one could not see. Others have questioned whether that is, in fact, so – particularly as demeanour is so culturally determined. What seems shifty to us may in fact be a mark of respect in the witness. But the same expectation should be applied to *all* witnesses – the ingredients of a fair trial should be the same for all, regardless of their religious or other beliefs.

A rather more difficult question is whether the magistrates, judge or jury should be able to observe a defendant’s demeanour throughout the trial. I would much have preferred to be able to watch the doctor’s wife’s reactions to what was being said throughout the proceedings. But I think that I could weigh up the evidence without doing so.

And another question is how far the same should apply to the other actors in the trial process – the magistrates, judge, jurors and court officials.

Fortunately, as I say, these are not – at least yet – questions for me. But when I sit in Court No 1 at the Supreme Court I am very conscious of one of the portraits hanging there – Sir John Fielding, who succeeded his half-brother Henry Fielding as Chairman of the Middlesex Magistrates in 1754. Sir John was blind – he was known as ‘the blind beak of Bow Street’. He was said to be able to recognise 3000 criminals by the sound of their voices, but he was also a notable social and penal reformer. So a little bit of me is wondering – if he could do it why couldn’t we all? But another bit of me is persuaded of the value of the face-to-face interaction which I experienced so vividly all those years ago.