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**(Not Yet) Taking Rights Seriously: The House of Lords in Begum v. Headteacher and Governors of Denbigh High School.**

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# **(Not Yet) Taking Rights Seriously: The House of Lords in Begum v Headteacher and Governors of Denbigh High School.**

Gareth Davies\*

*This article discusses the decision of the House of Lords in Begum v Denbigh High School, concerning the right of a pupil to wear the jilbab to school. It suggests that the House of Lords misunderstood the nature of the right to religious freedom, and had no basis for the view that it was not restricted. Moreover, they were alarmingly ad-hoc in deciding whether any restriction was justified. They did not engage seriously with evidence, but instead took the view that the opinions of a good head teacher should be deferred to. When that head teacher is restricting religious freedom it is suggested that this is an unacceptable way to decide cases, and courts need to consider whether there is objective support for arguments about the need to preserve calm and prevent conflict.*

## **Introduction**

In 2002 Shabina Begum, then a student at Denbigh High School in Luton, decided that as a Muslim she was obliged by her religion to wear the jilbab, a form of loose clothing that conceals the shape of the body. The jilbab is commonly worn by Muslim women in many areas of the Middle East and Southeast Asia. Muslim women in Pakistan, India and Bangladesh, where most

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British Muslims have their roots, more commonly wear the shalwar kameeze, a more fitted garment.

The dress code at Denbigh High does not permit the jilbab, and the school was not inclined to change its rules. As a result Ms Begum stopped going to school and began legal action claiming a violation of her Article 9 ECHR right to freedom of religion, as protected in the UK by the Human Rights Act 1998.

The judge at first instance found against her, but the Court of Appeal reversed that decision.<sup>1</sup> It found that the school dress code might well be justifiable under Article 9(2), for example in the cause of protecting the rights and freedoms of others. However, in responding to Ms Begum's request to wear the jilbab the head teacher and governors were obliged to consider her right to religious freedom, as well as other interests, such as harmony in the school, and find the appropriate balance. In fact they had merely considered the interests of the school as a whole and of other pupils, and had not accorded any weight in their decision making to Ms Begum's Article 9 right. Thus while, upon a new consideration it was quite possible that they would be able to justifiably arrive at the same answer, in the absence of evidence of a balanced consideration the school's decision was annulled.

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<sup>1</sup> At first instance; R (on the application of Begum (by her litigation friend, Rahman)) v Headteacher and Governors of Denbigh High School [2004] EWHC 1389 (Admin); [2004] ELR 374. On appeal; CA [2005] EWCA Civ 199; [2005] 1 WLR 3372. Annotations; Poole 'Of Headscarves and Heresies: The Denbigh High School case and public authority decision making under the Human Rights Act' [2005] PL 685; Davies 'Banning the Jilbab: Reflections on Restricting Religious Clothing in the Light of the Court of Appeal in SB v Denbigh High School' (2005) 1:3 European Constitutional Law Review 511; A.Blair and W.Apps 'What not to wear and other stories: addressing religious diversity in schools' (2005) 17 Education and the Law 1; Scolnicov 'A dedicated follower of (religious) fashion' (2005) 64 CLJ 527. For comparison with the position in other European countries see O.Gerstenberg 'Germany: Freedom of conscience in public schools' (2005) 3 International Journal of Constitutional Law 94; K.Berthou 'The Issue of the Voile in the Workplace in France: Unveiling Discrimination' (2005) 21 International Journal of Comparative Labour Law and Industrial Relations 281.

The House of Lords has now reversed this decision.<sup>2</sup> Five judges sat of which four provided full-length judgments. The substance of their majority position may be summarized as follows: the head teacher is clearly a good and sensible head teacher, the dress code was drawn up in a reasonable way after wide consultation, schools are entitled to have dress codes, and therefore we feel no inclination to interfere. Added by Baroness Hale is the proposition (paraphrased here) ‘and she is a child, whose religious views may be taken less seriously than those of an adult, and for whom schools should provide a place of protection from undue religious pressure from family and community’.

Legally, the judgment may be reduced to the following two propositions: there was no limitation of Ms Begum’s religious freedom because she could have gone to another school which allowed the jilbab, and even if there was such a limitation it was justified under Article 9(2) ECHR by the protection of the rights and freedoms of others. The criticism of these propositions is as follows: the first is wrong in law, and the second is not supported in the judgments by either reasoning or reference to evidence. It is accepted entirely on the basis that the head teacher and governors take this view, and that in their behaviour generally they seem to be sensible and not prejudiced. This may therefore be fairly described as a remarkably *ad personem* judgment, an impression increased by the repeated references to the excellence of the head teacher and the unreasonable and even threatening behaviour of Ms Begum and her brother. The question in fact decided is not whether the dress code was objectively justified, but who the court is inclined to trust.

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<sup>2</sup> [2006] 2 WLR 719; [2006] UKHL 15.

This note considers the points above, before moving to some broader policy thoughts. Two themes emerge which may indicate the direction of the law in future cases. These are the easy imposition of the values and behaviour of the religious mainstream on minority groups within a religion, and the inclination to avoid treating questions of justification as substantive evidential ones.

### **Was there an interference with Ms Begum's religious freedom?**

Article 9 ECHR provides that limitations of religious freedom may be justified by other interests. Lord Hoffman, Lord Bingham, and Lord Scott agreed that there was no need to consider such justifications because there was in fact no limitation, although they preferred to use the word 'interference'. Lord Bingham summarized the position most clearly; 'The Strasbourg institutions have not been at all ready to find an interference with the right to manifest religious belief in practice or observance where a person has voluntarily accepted an employment or role which does not accommodate that practice or observance and there are other means open to the person to practice or observe his or her religious without undue hardship or inconvenience'.<sup>3</sup> Given that Ms Begum had known of the dress code when she began at Denbigh High, and indeed had complied with it for two years before she felt the need to wear the jilbab, and given that there were other schools in the area which permitted the jilbab and there was 'no evidence to show that there was any real difficulty in her attending one or other of these schools', there was no interference.<sup>4</sup> The reasoning of Lords Hoffman and Scott was similar, although Lord Hoffman expressed some concerns about the precise standard of difficulty necessary. He noted with doubt

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<sup>3</sup> Paragraph 23 of the judgment.

<sup>4</sup> Para 25.

the view derivable from one case that an interference would only arise if it had been ‘impossible’ for Ms Begum to find another school, but it was not necessary to decide this since it did not appear to have been even ‘difficult’.<sup>5</sup>

Baroness Hale and Lord Nicholls disagreed. They felt there had been an interference, although ultimately a justified one. Lord Nicholls said that the finding of no interference ‘may over-estimate the ease which which Shabina could move to another, more suitable school and underestimate the disruption this would be likely to cause to her education’.<sup>6</sup>

The majority supported their view with reference to several decisions and judgments from the Commission and Court of Human Rights in Strasbourg. For example, employees required to work on particular days of the week which conflicted with their religious adherence were found not to be suffering interference with their rights because they had voluntarily accepted the employment and were free to seek more flexible jobs.<sup>7</sup> Similarly, an employer who did not allow an employee to take breaks five times a day for prayer was found not to be interfering with his freedom.<sup>8</sup>

As well as these, the three cases providing most support to their Lordships were *Kalaç v Turkey*,<sup>9</sup> *Karaduman v Turkey*,<sup>10</sup> and *Jewish Liturgical Association Cha’are Shalom Ve Tsedek v France*.<sup>11</sup> In the first of these, a Turkish air force officer was compulsorily retired as a result of

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<sup>5</sup> Paras 51-52.

<sup>6</sup> Para 41.

<sup>7</sup> *Stedman v United Kingdom* (1997) 23 EHRR CD 168; *Konttinen v Finland* (1996) 87-A DR 68.

<sup>8</sup> *Ahmad v United Kingdom* (1981) 4 EHRR 126.

<sup>9</sup> (1997) 27 EHRR 552.

<sup>10</sup> (1993) 74 DR 93.

<sup>11</sup> (2000) 9 BHRC 27.

association with a fundamentalist religious group. There was no interference because in joining the military he voluntarily accepted military discipline, which might be stricter than civilian law. What constituted an interference could depend on the context, and in the context of the military an individual might have to accept strict rules. He knew that when he joined. In the second, a female student who refused to remove her headscarf for a graduation photo was denied a graduation certificate. By choosing to study in a secular institution she had accepted its rules, and therefore must abide by them. In the third, a French Jewish group challenged national rules on slaughtering of animals which were incompatible with their religious rules on the same subject. There was found to be no interference with their freedom because they could easily obtain supplies of meat which did comply with their requirements from Belgium.

What is odd is that their Lordships did not consider in this context the two most relevant, and recent, cases, *Dahlab* and *Sahin*.<sup>12</sup> These concerned the wearing of a headscarf by a schoolteacher and a university student respectively. Both are decisions of the Court, rather than the Commission, and the latter is given extra authority by the fact that it was appealed to the Grand Chamber which confirmed the initial judgment.

In both cases it was argued that there was no interference with Article 9. In *Dahlab* the point was made by the Swiss Government that the complainant could work in private schools which would allow her headscarf, while in *Sahin* the Turkish government argued that the application of non-discriminatory laws to individuals could not comprise an interference. In both cases these positions were rejected. In neither case were the reasons for this clearly explained – although on

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<sup>12</sup> *Dahlab v Switzerland* no 42393/98 (dec) ECHR 2001-V; Application no 4474/98 *Sahin v Turkey* (2005) 41 EHRR 8 (Chamber); Judgment of 10 November 2005 (Grand Chamber).

a plain-language reading of Article 9 this is hardly necessary; if religious practice results in dismissal or expulsion, religious freedom is fairly obviously limited. Lord Hoffman suggested that the important factor in *Sahin* was that there was no other Turkish university where the headscarf could be worn; national rules were in issue.<sup>13</sup> This is true, but the judgment in the case does not unequivocally support the view that this was why there was an interference. The relevant words are these: ‘her decision to wear the headscarf may be regarded as motivated or inspired by a religion or belief and, without deciding whether such decisions are in every case taken to fulfil a religious duty, the Court proceeds on the assumption that the regulations in issue, which placed restrictions of place and manner on the right to wear the Islamic headscarf in universities, constituted an interference with the applicant’s right to manifest her religion’.<sup>14</sup> Not entirely transparent perhaps, but it would be brave to suggest on the basis of these words that it is the absence of other options, rather than simply the penalty for religious practice, which leads to the finding of interference.

What their Lordships seem to have missed is the distinction between two kinds of situation. On the one hand there are rules that make no distinction on the basis of religion, and do not aim to regulate religion, but simply have an incidental effect on some religious practices. These include the employment cases above, and *Tsedek*. In these cases the Court of Human Rights is reluctant to find an interference unless there is no alternative path open to the complainant, or perhaps an unduly difficult one. The reasons for this are simple; almost any rule may impact on religion somehow, particularly since ‘religion’ is an open-ended category, and it becomes legally inconvenient to call all such impacts interferences. It would require a very broad approach to

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<sup>13</sup> Para 59.

<sup>14</sup> Paragraph 71 of the Chamber judgment, quoted and endorsed at paragraph 78 of the Grand Chamber judgment.

permissible restrictions. This would be contrary to the current and consistent approach to rights, which is to construe derogations as narrowly as possible, in order to preserve and enhance the seriousness of the rights themselves. A consequently stricter approach to what constitutes a limitation may be seen as consistent with this. Non-discriminatory inconveniences do not attract Article 9's attention. It is for serious matters. However, when it is engaged, it will have teeth.

Then there is, on the other hand, a different kind of situation; the rule which intentionally aims to regulate religious practice or expression. Insofar as this prohibits certain forms of manifestation, this is obviously an interference, even if perhaps a relatively minor one. It is, as an attempt by authority to control religion, exactly what Article 9 is all about. Into this category fall rules which prohibit religious clothing *because it is religious clothing*. Rules such as those in *Dahlab*, *Sahin*, and Denbigh High School are exactly of this kind. Indeed, it was not seriously disputed by the school that their choice to allow the headscarf but not the jilbab was primarily to do with the different beliefs which they understood to be expressed by each.<sup>15</sup> They were making a choice about which kinds of belief could be manifested in the school.

The two cases which seem to conflict with this analysis are *Kalaç* and *Karaduman*, the air force case and the graduation photo case respectively. The second of these was a Commission decision of 1993, and its finding is frankly incompatible with *Sahin*. It also concerned a rule which applied to all Turkish universities, and in the decision the questions of interference and justification are all mixed up. Ultimately the finding is that since the rule is justified it is not an interference, which is comprehensible, but not compatible with a clear two-stage interference-

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<sup>15</sup> One can go further; that was the essence of their *justification* for the policy. See discussion in text below. There was some discussion of health and safety issues associated with loose clothing, which were ultimately found not decisive. See Bennet J at first instance.

justification test such as Article 9 lays out. Rather, it provides a global answer to whether the rule is a violation of Article 9. The case therefore provides very weak support for any doctrinal position, and it is perhaps not surprising that the Court in *Sahin* ‘reinterpreted’ the decision, stating that it showed that restrictions on religious freedom could be justified under Article 9(2) by other interests.<sup>16</sup> It seems that the official position is therefore that there *was* an interference in *Karaduman* (but a justified one), in conformity with *Dahlab* and *Sahin* and the analysis above, and contrary to their Lordship’s reading of the case.

*Kalaç* is more complex. The Court did clearly find that there was no interference. However, they are equally clear that this was because the compulsory retirement was not in fact prompted by his religious practices, but by his breaches of military discipline: ‘the Supreme Military Council’s order was, moreover, not based on Group Captain Kalaç’s religious opinions and beliefs or the way he had performed his religious duties but on his conduct and attitude. According to the Turkish authorities, this conduct breached military discipline and infringed the principle of secularism.

The Court accordingly concludes that the applicant’s compulsory retirement did not amount to an interference with the right guaranteed by Article 9 since it was not prompted by the way the applicant manifested his religion’.<sup>17</sup>

The reference to the ‘principle of secularism’ muddies the waters somewhat here, since it suggests that in fact Captain Kalaç’s religious behaviour was the reason for disciplining him. It is

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<sup>16</sup> Paragraph 111 of the Grand Chamber judgment.

<sup>17</sup> Paras 30-31.

also open to argument whether the Court's interpretation of the conduct of the authorities is a convincing one. However, for the purposes of establishing the principles behind Article 9 the paragraphs quoted make two important points. The first is that in this case, the finding is that the authorities did not discipline Captain Kalaç because of any manifestation of religion. The second is that if they had taken action against him for this reason, it would have been an interference with his religious freedom (albeit perhaps justified). Applying these findings to the case in hand, it may be noted that it was precisely Ms Begum's 'manifestation' of her religion which conflicted with the school rules, and was not tolerated. Had she remained in school with her jilbab she would ultimately have been disciplined because of this manifestation, and so, following *Kalaç*, there would have been an interference. The fact that she avoided this discipline by staying at home is not relevant to this characterisation of the threat and effects. If a rule provided for all Muslims leaving their homes to be imprisoned would a Muslim staying at home have no Article 9 case?

By contrast, still applying *Kalaç*, if Ms Begum had been disciplined because of threatening or intolerant behaviour or expression by her in school, then this would not have been an interference, even if her views or behaviour were motivated by religion. However, no accusation was made in the case of such expression or behaviour on her part.

*Kalaç* therefore provides no support for their Lordship's finding that there was no interference.

Even if their Lordships were in fact right in assimilating this situation to the 'incidental effects' cases on employment, and *Tsedek*, it would still then be necessary to ask how reasonable it was

to expect Ms Begum to change schools. Was it so difficult that the rule would nevertheless have been an interference? This is a difficult question both legally and factually. Legally, because the standard of difficulty is not clear from the caselaw, although it is suggested that Lord Bingham's 'undue hardship' test is probably about as clear and sensible as one can get.<sup>18</sup> Factually, because the question of what it costs a teenage girl to change schools does not appear a question without depth. Should one look at the individual girl, the schools, the broader context? Denbigh High, all agreed, was generally a very good school. Were the others nearby notably worse? Would going there have led to significant educational disadvantage? In any case, can a 13 year old girl make such a decision on her own? Perhaps her family would not let her switch schools. The suggestion between the lines is that her brother (her father is no longer alive) encouraged her to wear the jilbab. Perhaps he also felt she should not be driven away from Denbigh High? It does not seem to have been considered, nor what relevance this might have to her possibilities for changing schools. It is not perhaps clear quite how all these questions should be dealt with, but having found the degree of difficulty and hardship involved to be central to the question of whether there is an interference Lord Hoffman's glib remarks that 'there was nothing to stop her from going to a school where her religion did not require a jilbab [i.e. a girl's school] or where she was allowed to wear one' and 'people sometimes have to suffer some inconvenience for their beliefs' are regrettable, particularly since he, like the other judges, does not in fact consider what difficulties might be involved or refer to any evidence on this point.<sup>19</sup> It may be that the point was not argued. However, it is suggested that having to change school at the age of 13 in order to manifest one's religion should be *prima facie* seen as a sufficiently serious and disruptive step to constitute an interference. At the very least, their Lordships might have asked themselves

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<sup>18</sup> Para 23.

<sup>19</sup> Para 50.

whether going to a different butcher or changing jobs for an adult – the cases they referred to – are more or less of a hardship than changing schools for a teenager. Human rights cases are about human beings, and analogies between cases which ignore the human characteristics of the parties involved are not worthy of a senior court.

### **Possible justifications under Article 9(2)**

Four of the five judges agreed that the dress code was or would be justified by the need to protect the rights and freedoms of others, one of the grounds referred to in Article 9(2).<sup>20</sup> Lords Bingham and Hoffman considered this in the alternative, since they found no interference anyway, whereas Lord Nicholls and Baroness Hale made this the basis of their decision. Lord Scott did not consider the matter.

The threats to these others can be grouped into three types, all of which were referred to in different ways in the judgments. Were the school to amend its dress code to allow the jilbab then girls who did not in fact wish to wear it might be pressured into doing so by family or friends, and seen as ‘less good’ Muslims if they did not do so. Hence their religious freedom would be limited.<sup>21</sup> Secondly, allowing the jilbab would create two categories of Muslims within the school, which might lead to conflict, threatening the harmony and good functioning of the school as a whole, and therefore being detrimental to the rights and freedoms of at least some pupils

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<sup>20</sup> See generally J.Martínez-Torrón ‘Limitations on Religious Freedom in the Case Law of the European Court of Human Rights’ (2005) 19 Emory International Law Journal 587.

<sup>21</sup> One is tempted to say, following their Lordships, that in this case the girls could always change to a school that did not allow the jilbab. Sometimes one has to suffer a little inconvenience for one’s beliefs, after all. Or does this argument only work one way?

within it. Thirdly, some pupils and teachers associated the jilbab with extreme or fundamentalist views, and would find its presence intimidating. Hence a prohibition protected them.

The last two of these are particularly problematic. As one commentator said, ‘that some students claimed to fear those students wearing the jilbab is clearly not a good reason. Schools should not pander to prejudice’.<sup>22</sup> This may in fact be a bit strong. If allowing the jilbab would in fact lead to very serious problems – perhaps physical violence – then even though those problems were caused by the prejudices of others, and not by the behaviour of the jilbab-wearers, a restriction might be justified. Ultimately, public order and safety trump almost everything. However, a restriction based on such prejudices, where the religious freedom of a minority is in effect sacrificed to the collective calm, must only be imposed as a last resort, and every effort must be made to find other ways to solve the problem. In the context of a school, the mere fact that many students have negative feelings about jilbab wearers, and the atmosphere of the school might as a result be harmed by allowing the jilbab is by no means an adequate justification for prohibition. The atmosphere of many a gentleman’s club or profession, in various places and various times, has no doubt been poisoned by the admission of women, black people, and Jews, all of which will have brought conflict to previously harmonious places. However, the price of that harmony was bigotry and exclusion. *Mutatis mutandis* a prejudice-based restriction on religious clothing in schools.

The argument concerning categories of Muslims has another problem too; there were already two categories as a result of allowing the headscarf. Not all Muslims wear it. In any case, the simple fact is that tolerance allows visible minorities. Outward homogeneity can only be

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<sup>22</sup> Scolnicov ‘A dedicated follower of (religious) fashion’ (2005) 64 CLJ 527 at 528.

maintained by intolerance. Thus the mere fact that visible difference creates divisions is hardly an impressive argument. The task of authority in such a situation is to create a context in which different groups get along, not to attempt to eliminate the visible presence of those groups which the majority dislike. The European Court of Human Rights has, incidentally, repeated this fairly banal observation a number of times.<sup>23</sup> It is not just common sense; it is the law.

The only really good argument is the first one – that some girls would be pressured into wearing the jilbab. This may well be true. In that case there is a remarkably symmetrical situation; the rights of girls who wish to wear the jilbab are not compatible with the rights of those who do not. Neither group is at fault. The ‘fault’ lies rather with family and friends who, given the opportunity, restrict the freedom of choice of the girls.

So, which group wins then? In such situations the Court of Human Rights is very clear that the appropriate response is to find a balance, and indeed that is obviously unavoidable.<sup>24</sup> It is also inherent in proportionality.<sup>25</sup> It may be necessary to prohibit the jilbab to protect some girls, but one still has to ask whether this prohibition is proportionate to its ends. In other words one has to consider whether the interests it serves and protects are proportionate to those it harms.

Finding such a balance may involve asking how many girls are in each group. How many wish to wear the jilbab, and how many would be forced to? This is a difficult evidential questions,

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<sup>23</sup> Approval and citations in *Sahin v Turkey*, note 12 above, at para 107 of the Grand Chamber judgment.

<sup>24</sup> *Sahin*, *ibid*, at 107-108. See also note 51 below. On the balances religious freedom requires see R.Fahlbeck ‘Ora et Labora – On Freedom of Religion at the Work Place: A Stakeholder cum Balancing Factors Model’ (2004) 20 *International Journal of Comparative Labour Law and Industrial Relations* 27. See also (an ironic reference, in the circumstances) Lord Bingham at para 32.

<sup>25</sup> See note 51 below.

because those opposed to it may well be inclined to exaggerate in order to prevent its permission. The judges referred to the fact that several girls had said they were fearful of being forced to wear it, and this must be taken seriously, but it must also be borne in mind that these were teenagers whose religious views differed from those of Ms Begum.<sup>26</sup> One does not need to be a child psychiatrist to see that there is also room for appropriate levels of scepticism and investigation of such claims.

On the other hand, girls with frightening brothers or fathers might claim that they truly wish to wear the jilbab when in fact they are simply scared to say anything else. Ms Begum was accompanied by her brother in all meetings, and he was also her litigation friend. Her desire to wear it should be taken seriously, but also, in making the balance, exposed to appropriately critical and sceptical probing.

As well as mere numbers, one should consider the nature and seriousness of the loss of freedom. Is it worse to be forced to wear something one does not want to than to be prevented from wearing something one does? This may seem a rather Jesuitical question, but it is amenable to serious, concrete consideration, which exposes its importance. How does a Muslim girl feel when forced to take off a garment that she believes religious modesty requires her to wear? Is it, as has been suggested, similar to forcing a more typical British schoolgirl to wear a skirt several inches shorter than she finds decent?<sup>27</sup> How serious an imposition would we consider that? On the other hand, how does a girl feel if she is forced to wear something that she associates,

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<sup>26</sup> See note 54 below.

<sup>27</sup> Davies 'Banning the Jilbab', note 1 above, at 527.

perhaps, with a devaluation of her value and equality, or with a loss of freedom and potential? Might such an imposition force her to reconsider herself, lead to a true loss of potential in life?

On top of this, it is important to consider issues of equality.<sup>28</sup> Western nations largely allow families to make choices about the upbringing of their children. Some parents allow great freedom, and others less. A child who complained that their parents forced them to wear dull or conservative clothes would have no legal case, and even a Christian or Jewish child who complained that they were forced to attend church or synagogue, or to participate in certain religious rituals, contrary to their personal beliefs, would be unlikely to attract the sympathy of a court. Family can be a burden, as every teenager knows, but it is nevertheless accepted by the state and the law as the primary authority over those under eighteen.

So if public authority intervenes on behalf of Muslim girls to 'rescue' them from pressure to wear headscarves or jilbabs, is this compatible with religious equality? Is it not singling out one religion as less respectable, one religious community where families may not have free reign? If so, this would be contrary to Article 14 ECHR, which provides that religious freedom, as other rights, must not be limited in a discriminatory way. Consistency across the religious spectrum is required.

Of course, a case could be made that Islam *is* different, which would, arguably, justify different treatment. While there are sexist doctrines in most religious groups, many would argue that none go as far in this direction as strict versions of Islam do. Hence there is also a conflict between religious freedom and equality to be resolved. Yet on the other hand, others would argue against

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<sup>28</sup> For a useful survey of this issue see Apps and Blair, note 1 above.

this; there will be plenty of, often educated and successful, Muslim women ready to take the stand to swear that Islam does not diminish them, and that protection from the male gaze is liberating, not oppressive.<sup>29</sup>

The real question for the House of Lords was how to deal with these matters. Should it take a view on the evidence, or should it concede that such complex factual issues are primarily for the initial decision-maker – the school – and merely engage in some kind of marginal or procedural review? In fact, with the exception of Baroness Hale, it produced a rather unhappy compromise between the two.

### **The nature of the review**

The Court of Appeal had produced a highly structured approach. It wished to see that the school had begun from the premise that Ms Begum had a fundamental right protected by law, and that any restriction must be justified and proportionate. It also wished to see that in considering the policy due weight was given by the school to all relevant factors, notably Ms Begum's belief – and her right to manifest it. It annulled the school decision for failure on both grounds. Instead of taking the view that its dress code limited freedom and must be justified, it took the view that it was entitled to have a dress code and Ms Begum should comply. Further, in considering whether the dress code should be amended to allow the jilbab the school considered many factors, including whether the code was agreeable to the majority of most Muslims, but did not accord

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<sup>29</sup> See E.Tarlo 'Reconsidering Stereotypes: Anthropological Reflections on the Jilbab Controversy' (2005) 21 *Anthropology Today* 13; D.Lyon and D.Spini 'Unveiling the Headscarf Debate' (2004) 12 *Feminist Legal Studies* 333.

sufficient, if any, balancing weight to Ms Begum's right to religious freedom and the extent and seriousness of the infringement thereof.

The male members of the House of Lords found this much too complicated. It was unreasonable to expect non-lawyers such as head teachers and governors to think in terms of human rights, and follow the argumentative structure of Article 9.<sup>30</sup> They took the view that the ECHR did not contain procedural requirements, but substantive ones. It does not matter how national authorities make their decisions, as long as they do not, in fact, violate rights: 'what matters in any case is the practical outcome, not the quality of the decision-making process that led to it'.<sup>31</sup>

As an interpretation of the ECHR case law this is convincing, yet it has certain problems. After all, how is a national authority to make sure that it does not, in fact, violate rights? Surely one of the best ways would be to make sure that it considers all the relevant factors and makes its decisions according to procedures which allow representation of all interests? The Court of Appeal's checklist, while a little over-long and over-detailed, might have been of great help to schools. By considering the questions that the Court of Appeal suggests they must consider they could gain reasonable confidence that their decisions were legally sound. Now they must just do what they think is sensible and hope that the courts agree with them. Such an unstructured approach will only work if courts accord great deference to decision-makers. As the next section shows, that is what the House of Lords does.

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<sup>30</sup> Even, apparently, if they had help from solicitors: para 31. Since the Court of Appeal's procedure is really not that complicated, this is rather a slur on the legal profession.

<sup>31</sup> Para 31.

A consequence of rejecting the procedural approach is that one must look at the substantive question. Was the dress code in fact justified? Since a goal within Article 9(2) was easy to state, the real issue was one of proportionality. Lord Bingham is representative of all the judges when he says ‘the court’s approach to an issue of proportionality under the Convention must go beyond that traditionally adopted to judicial review in a domestic setting....there is no shift to a merits review, but the intensity of review is greater than was previously appropriate’,<sup>32</sup> and later ‘it is therefore necessary to consider the proportionality of the school’s interference with the respondent’s right to manifest her religious belief by wearing the jilbab to the school’.<sup>33</sup>

A review of the substance of a decision, without looking at the way it was made, but without engaging in merits review, must be understood to mean that the court will not second guess the decision-maker, but will rather ask whether the decision they reached is within the range of what may be considered reasonable or plausible. If so, it will treat that as rebutting a rights claim. As Lord Hoffman said, since the UK enjoys a margin of appreciation under the ECHR, and since it decentralises decision-making on dress codes to schools, rather than having national laws, the margin of appreciation should also be considered to be decentralised, at least for the purposes of judicial review.<sup>34</sup>

In fact there are two separate questions involved here. That schools may be allowed a degree of discretion and variation in judging where lines should be drawn, according to local circumstances, may be seen as a decentralisation of the margin of appreciation, and perhaps fair enough. At any rate, it is indeed the way UK law works. However, there is also the question of

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<sup>32</sup> Para 30.

<sup>33</sup> Para 32.

<sup>34</sup> Paras 63-64.

the degree to which courts should require schools to explain their decisions, in order to ensure adequate review and protection of rights. This is not about decentralisation, it is about intensity of review. Conflating the two creates the risk that decisions which are in fact contemptuous of rights will not be exposed because review is superficial, but this will be treated as a margin of discretion matter. Schools may be allowed some variation in value choices and balancing, but to ensure the protection of rights courts must engage in review sufficiently intense to establish what choices and balances the school has in fact made.

## **Evidence**

Their lordships mentioned the reasons above as justifications for the school's interference. However, a mere statement of possible justifications does not suffice to decide a case.<sup>35</sup> A court must also indicate why it believes the facts on which the justifications are based to be true. Were the negative scenarios associated with wearing the jilbab merely hypothetical and unrealistic scaremongering, or a reasonable and accurate assessment of the situation?<sup>36</sup>

Lord Hoffman addressed this issue by reference. He stated that the trial judge had had 'ample material' for deciding that the scenarios were plausible.<sup>37</sup> That may be true. However, in an appeal judgment in the common law tradition it is hardly adequate. Some indication of what that

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<sup>35</sup> See Judge Tulkens' dissenting judgment in *Sahin v Turkey* (Grand Chamber) on the importance of 'in concreto' evidence of a 'pressing social need' rather than just 'abstract arguments'. Her judgment is probably the most carefully reasoned and coherent discussion of religious clothing that a court in Europe has yet produced. See also *Smith and Grady v United Kingdom* (Application nos 33985/96 and 33986/96) where the European Court of Human Rights found that derogations from rights could not be justified by mere assertions of risk. Concrete and specific evidence was required. See para 89 of the judgment, and further citations therein.

<sup>36</sup> For a discussion of the importance and problems of the associated evidential issues see S.Knight 'Religious Symbols in Schools: Freedom of Religion, Minorities and Education' (2005) 51 EHRLRev 499 at 513-515.

<sup>37</sup> Para 58.

evidence was and why it was convincing would have been appropriate. There was no such indication.

In fact a reading of Lord Hoffman's judgment indicates to the reader that, as with the other judges, his primary reason for accepting that permitting the jilbab brought serious consequence for the rights and freedoms of others was because the head teacher, and to a lesser extent the school governors, said so.<sup>38</sup> The views of the head teacher were repeated, accorded respect, and acceded to, without any consideration of arguments or evidence against them. It is hard to believe that such arguments were not made, and indeed even if they were not, it is the duty of a judge to consider the evidence of parties sceptically and critically. In a contested case, the fact that one party says a thing is true cannot as such decide the matter.<sup>39</sup> It is necessary to consider arguments against the view, and the view of the opposing party, before coming to a conclusion. Their lordships did not do this. They adopted wholesale the opinions of one party to the case without any discussion or consideration of reasons why these might in fact not be accurate. This is surely rather scandalous. After all, it is perfectly apparent that even a well-meaning and experienced person in authority may well succumb to the temptation to prize a peaceful life and the status quo over the desires and rights of particular individuals, and may tend to over-estimate the risks of change. Perhaps that did not occur in this case. But is it asking too much to expect the House of Lords to at least consider the extent to which the school may possibly have got it wrong?

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<sup>38</sup> The paragraphs in which their Lordships say why they find this particular limitation justified are 33-34, 58, 65, and 98. It may be seen that the content is meager. The rest of their discussion of justification is either abstract or procedural.

<sup>39</sup> See note 35 above.

Lord Bingham explained that to do so was out of the question (having earlier said that the court could not avoid the difficult question of the ban's proportionality, and must face up to it, and decide it 'objectively'<sup>40</sup>). The school had the relevant expertise and was best placed to decide, and for a court to overrule them on 'a matter as sensitive as this' would be 'irresponsible'.<sup>41</sup>

What then is the function of judicial review, one is tempted to ask?

Rather than consider directly the factual plausibility of the threats to freedom that the jilbab allegedly comprised, their Lordships supported their decision to support the school in an indirect way. They accepted the school's version because it was a good school, and in particular because the head teacher seemed to be a good head teacher. The judgments abound with references to how the school had improved since the head teacher came to it, how it achieved above average results and had been harmonious and successful in recent years. Moreover, the head teacher could not be accused of being anti-Muslim. She was herself born in Bengal, and permitted headscarves and the shalwar kameeze. Therefore she both understood and respected Islam.

An additional factor which seemed to greatly impress some of their Lordships, as it indeed had had a peculiar fascination for the judges in the Court of Appeal, was that the uniform policy had been drawn up after wide consultation with Muslim authorities and was held by many to be compatible with mainstream Muslim dress requirements.

One consequence of this point was that Ms Begum's desire to wear the jilbab was taken less seriously. Lord Scott even thought it 'extraordinary' that a Muslim girl might not regard the

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<sup>40</sup> Para 30.

<sup>41</sup> Para 34.

shalwar kameeze as sufficiently modest.<sup>42</sup> It is, it is submitted, far more extraordinary that a senior judge should make such a statement. It is manifestly the case that religions have different streams, and the authority of one, even the dominant one, is therefore of very little use in a case concerning another. Would his Lordship find it extraordinary if a Methodist or Lutheran in the United Kingdom disagreed on doctrine with the Archbishop of Canterbury? Or if a practicing Anglican felt that his freedom of religion encompassed the capacity to disagree with the Catholic Church, still the dominant Christian Church worldwide? Only Lord Hoffman explicitly stated that whether or not the majority of Muslims wore one outfit did not make the belief of a minority that another was necessary any less genuine or worthy of respect.<sup>43</sup>

The opinions of the Muslim authorities, however genuine, sincere and founded in knowledge and scholarship, clearly apply to many branches of Islam but not all, and as such are not relevant to the case except insofar as the wide consultation indicates that the school and head teacher were doing their best to construct a fair and tolerant policy. This was the second, and understandable, message that their Lordships took from the point. They mentioned the school's concessions to mainstream Islam as evidence of the fairness and tolerance of the decision-makers.<sup>44</sup>

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<sup>42</sup> Para 83. The paragraph suggests that his view is based on the effort taken by the school to devise a flexible uniform, a manifest *non sequitur*, combined with his own understanding of Islamic modesty, about which no comment will be made. His surprise should probably be understood as in fact deriving from Ms Begum's disagreement with so many Imams, a point of view which is criticized in the text above but at least has the virtue of coherence.

<sup>43</sup> Para 50.

<sup>44</sup> Several judges also mentioned that the fact that the school allowed the shalwar kameeze and headscarf indicated that it respected diversity and was flexible, clearly implying that Ms Begum's case was thereby weakened (see paras 34, 83, 98). This is diversity as some kind of box to be checked, after which one can move on. On the contrary, it is an ongoing obligation. The idea that tolerating one religious group can reduce or remove the obligation to respect another is simply bizarre.

Thus the basis of the substantive finding that an interference with religious liberty was justified is remarkably *ad personem*. The evidence relied upon does not go to the threat itself but to the character of the decision maker. Since this character seemed worthy, the decision was accepted too.

The personal emphasis is further highlighted by repeated, and rather oblique, suggestions that Ms Begum was in some way a less deserving party. Several of their Lordships mention that the teachers found her behaviour in demanding to wear the jilbab ‘unreasonable’ and that her brother seemed even ‘threatening’.<sup>45</sup> Lord Bingham and Lord Scott mention that when they came to school to discuss the matter they talked of ‘human rights and legal proceedings’.<sup>46</sup> The clear implication is that this was unreasonable, confrontational, and not appropriate. Schoolchildren should defer.<sup>47</sup> Perhaps they should beg?

These comments are unfortunate. In many cases there is an equitable element; the merit of the parties and the quality of their behaviour is relevant to the decision. However, this is not one of them. The questions upon which the entire case turns are whether a prohibition of the jilbab is a restriction of religious freedom, and, if so, whether it is necessary to protect the rights and freedoms of others, and proportionate to that goal. The character, nor even behaviour, of the individual who wishes to wear the jilbab does not play a role in either of these. The right of socially unskilled and insecure, or as Lord Hoffman would put it, uncivil,<sup>48</sup> people to manifest their religion is no less than that of the charming and urbane - or if it is, this had better be argued

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<sup>45</sup> Para 10; Para 46; Paras 79-80;

<sup>46</sup> Para 10; Para 79.

<sup>47</sup> See D.Monk ‘(Re)constructing the head teacher: legal narratives and the politics of school exclusions’ (2005) 32 Law and Society 399.

<sup>48</sup> See para 50.

and explained. Hence the comments about Ms Begum and her brother's attitude, combined with the frequent praise of the teacher, combine to nurture the unpleasant thought that this case may have been decided, however subconsciously, on inappropriate grounds. The absence of any other good reasoning magnifies the concern, of course.

Indeed, the evident distaste with which Lords Bingham and Scott refer to Ms Begum and her brother's mention of 'human rights' is rather startling.<sup>49</sup> It is as if they consider this something outrageous and wrongful. Indeed, it is probably not the most attractive or skilful commencement of a negotiation, particularly of a school pupil with her teacher. However, precisely in that situation the pupil starts with a disadvantage, and may need to play their strongest card in order to be taken seriously. We may reasonably surmise, given the position of the school, now endorsed by their Lordships, that the initial reaction of the school to her request was a simple refusal, on the basis of the dress code. How then, is a pupil to protect their rights, if they may not refer to them? Even if Ms Begum was wrong, if she believed that she had a fundamental right to religious freedom that was being restricted, and the school refused to adapt its behaviour, was it therefore wrong of her to raise the point? One can imagine that it is difficult for teachers in an age of legalism, when pupils know their rights and sometimes expect them to be respected, but this is the price of treating pupils as human beings – indeed of rights themselves. They are precisely a tool of individual assertion, and if we think, as even their Lordships do, that pupils are human beings with rights too, then they can hardly be blamed for using them. The sneering and accusatory tone directed at Ms Begum because she dared to mention her rights may well be authentic to the non-rights tradition of the common law, but since the Human Rights Act has in fact been passed it amounts almost to contempt for parliament. The capacity of the weak to

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<sup>49</sup> See note 46 above.

challenge authority is the price paid for rights, and if their Lordships dislike this they should properly voice their criticisms in the political arena rather than in court.

### **The lack of balance**

Perhaps this distaste for rights explains what is otherwise the most baffling aspect of the judgments – their lack of consideration of the extent and importance of the alleged interference with religious freedom. Even if there were good reasons for thinking that the rights of other schoolgirls might be threatened by permitting the jilbab, this is not the end of the matter. One has to balance the potential interference with their rights against that with Ms Begum's.<sup>50</sup> Any other approach renders the law ridiculous, allowing minor risks to justify huge incursions into rights. Derogations, rather than rights, become trumps.

The legal framework for this balancing is proportionality, which, as every lawyer using it knows, contains three elements. A measure must be effective towards its ends, go no further than is necessary to meet those ends, and must be proportionate to them; it must not be a sledgehammer cracking a nut.<sup>51</sup> Their Lordships simply ignored this last element. What is particularly regrettable is that it is only at this third, balancing stage that the interests of the victim of the interference with rights fall to be considered. That there is an interference is a condition for considering proportionality, but it is only in its third part that one asks how serious that

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<sup>50</sup> See note 24 above.

<sup>51</sup> See C.Evans *Freedom of Religion Under the European Convention on Human Rights* (OUP, 2001) at 146-147; S.Van Drooghenbroeck *La Proportionnalité dan le Droit de la Convention Européenne des Droits de l'Homme* (Brussels: Bruylant, 2001); *National Union of Belgian Police v Belgium* (1979-80) 1 EHRR 578, at 579, where the Court asks whether 'the disadvantage suffered by the applicant is excessive in relation to the legitimate aim pursued by the Government'; Judge Telkens in *Sahin v Turkey*, note 12 above; *Sahin v Turkey* (Grand Chamber) at 107-108.

interference is, and what value should be assigned to the protected manifestation. Baroness Hale was the only judge to find the degree and importance of the restriction of Ms Begum's freedom even relevant to whether it should be restricted. That failure on the part of the other judges is, it is suggested, indefensible from the perspectives of both law and justice. No fair court can consider that the interests of one pupil trump without further question the interests of another.

This is not even a case of acceding over-enthusiastically to the views of the school. The school did not claim that they had weighed Ms Begum's interests in the balance. They had merely considered the disadvantages of the jilbab and found them significant. It was no part of their case, at least as reported in the trial judgment, or those of the Court of Appeal and House of Lords, that these disadvantages had been balanced against the harm that the rule did to Ms Begum. As the Court of Appeal found, and the House of Lords celebrated, the school simply took the view that school rules were there to be obeyed.

### **The liberal argument**

The most profound and thoughtful argument was put forward by Baroness Hale. She considered that the responsibility of schools and the state was not just to allow freedom of religion but also to provide a place where children could be free from it. In order to develop as individuals and find their own thoughts, the state should protect them from their surroundings and family, and pressures which might limit their own freedom of choice.

The tension which this thought captures is between the role of the state and that of the family in raising children.<sup>52</sup> What are the limits of their justifiable roles and powers, and when should the state assert limits to the family? Everyone may accept freedom of religion as an abstract principle, but freedom for families, or for individuals, notably women and girls? The two may not be compatible, and a restriction on religious expression may serve the liberty of the latter to a greater extent. As Baroness Hale argued, this is a fortiori when it is girls who are involved. To doubt the choice of adult women raises many difficult questions, but to accept the choices of girls as being automatically and authentically their own is equally difficult. There is certainly a good argument for the secular school.

There are two problems with this view however. One is the price it imposes in cultural alienation. Forcing children to behave and dress in a way that is alien to their families and communities may encourage individual and critical thought, but it also puts them in a stressful and complex position, and risks isolating them from their upbringing and surroundings.<sup>53</sup> Should we tear children from their families and culture in the name of their own good?

The answer is of course not an absolute one, but a question of balancing interests. At some point, yes, as the legal position on female circumcision correctly shows. Making that balance requires expert evidence and consideration of what exactly the effects and consequences might be – something outside the expertise of this writer. However, it also requires, again, a consideration of

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<sup>52</sup> See L.Lundy 'Family Values in the Classroom? Reconciling Parental Wishes and Children's Rights in State Schools' (2005) 19 *International Journal of Law, Policy and the Family* 346; M.Levinson 'Liberalism Versus Democracy? Schooling Private Citizens in the Public Square' (1997) 27 *British Journal of Political Science* 333; F.Radnay 'Culture, Religion and Gender' [2003] 1 *International Journal of Constitutional Law* 663, cited by Baroness Hale.

<sup>53</sup> *Ibid.*

equality. In making these difficult balances it is impossible – since social sciences are not exact - to be sure that courts or society are getting it right, but the least we can do is ensure that we maintain some kind of fairness of treatment across different groups. The Baroness did not consider this, making her argument incomplete, and inadequate to support her conclusion. Can we consistently ban the jilbab without intervening to protect Catholic children from views on contraception which may one day endanger their health and happiness, and which the doctrine of their church certainly does not encourage them to think critically and fairly about? Should sending children to church be banned? What about the practices and roles that more orthodox branches of Judaism afford to women? Can we leave these untampered with by public authority and still claim not to have preferred and disfavoured religions?

## **Conclusions**

The House of Lords may have been right to reject the intricacy of the Court of Appeal's procedural demands. They probably are too burdensome and it is, indeed, the result which matters. However they fell into the second of the traps which the Court of Appeal warned about – that of making decisions about rights without considering all the relevant factors. They ignored the interest of the party claiming her rights.

This matters not just in principle but in the concrete case, because it seems pretty clear that the school did get things importantly wrong. Even if they were quite right in their identification of the problems that the jilbab might cause, they did not consider what harm might be done by not allowing it. As the Court of Appeal said, upon a proper reconsideration of all the issues involved

they might come to the same conclusions about their uniform. However, they might not – they might then realise that some of their pupils are suffering both religious discrimination and a serious limitation of religious freedom, and that this is not something they want in their school, and ultimately destructive of the very harmony they claim to pursue. Perhaps they would look for other ways to address the problems of intimidation and extremism. How will we know, since they did not think about the victims of their actions, and the House of Lords sees no reason why they should?

Moreover, contrary to their Lordships' view, the Muslim background of the head teacher, and the tolerance of majority Islamic views that the school's behaviour indicated, are cause for concern rather than comfort. Views deviating from the dominant mainstream – by contrast with those having no connection with it - are precisely those which are most likely to attract hostility and rejection. The greater the extent that shalwar kameeze-wearing Muslim girls represent the norm at Denbigh High and in its surrounding community, and the greater the extent that the school shows itself to be accepting of this, the greater the chance that minority Muslim groups will face suppression and the greater the vigilance required in ensuring that their interests are respected.<sup>54</sup> The orthodox are less tolerant of heresy than the outsider is. Their Lordships' view is analogous to the claim that a Catholic (or Methodist) background and respect for Catholicism (or Methodism) indicates that a person is predisposed to respect Methodists (or Catholics). If only. One wonders if their Lordships would in fact take this view.

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<sup>54</sup> The fact that the jilbab is traditionally worn in Arab states and the shalwar kameeze worn in India, Pakistan and Bangladesh, and the majority of the Muslim girls in the school and the head teacher were from these latter areas, raises questions of possible discrimination which neither Court of Appeal nor House of Lords saw fit to consider. That Ms Begum's family also came from this area does not diminish the chances – those parting ways with a culture or faith are generally treated more harshly than those who never belonged. See Davies, note 1 above, at 526.

The ease with which a minority religious group was assimilated to the mainstream is certainly striking. It may almost be seen as a technique of social engineering. An authority over Islam was designated, even though it is neither in fact a monolithic nor in principle an interpretatively monopolistic religion.<sup>55</sup> Any resulting suppression of individual or group freedom can now be treated as essentially concerning internal ideological disputes, not legal rights. It is however as naïve as the behaviour of an occupying army that chooses representatives of the natives without being sure that they are genuinely representative. The order and structure that an outsider finds convenient are not always the order and structure that societies and religions, especially those in transition, actually possess.

Perhaps the most disturbing aspect of the judgments is their dehumanising tone and character, Baroness Hale excepted. The case is all about human interests, about the conflicting desires and interests of a group of schoolgirls, through which a path must be found. Their Lordships displayed considerable warmth and sympathy when discussing the head teacher, so we know they are not incapable of expressing these emotions, yet when discussing the victim they were cold and dismissive, without pausing for a moment to wonder what the human cost for her of their decision might be – a legally as well as morally relevant consideration.

There may be some Islamophobia involved. It is so pervasive in society that while we may assume judges consciously attempt to be fair and unbiased, there is no reason to think them immune from subconscious influence by the stereotypes and prejudices which abound. Their blithe acceptance of what is, if one steps back to look at the bigger picture, clear religious discrimination against strict Muslims would support this. But probably to just as great an extent

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<sup>55</sup> See Tarlo, note 29 above.

this judgment is about over-deference to figures of authority. Their Lordships clearly do not like the upstart character of rights and seemed shocked that a pupil would challenge a school rule. The right of schools to have uniforms was far more clear and certain in their judgments than the right of pupils to religious freedom.

In practice this reverses the burden of proof. Once an interference with rights is shown it is for the interferer to justify their actions. Under their Lordships' approach a simple statement of reasons would seem to suffice, whereupon it is for the victim to establish that the reasons are unsupported by evidence. There is, it seems, a presumption that authority, or at least head teachers, are right. In general, there may be much to say for that. However, it is somewhat problematic when the authority in question is one party to a lawsuit.

A final problem which the case highlights is the structure of Article 9 itself, which dates from a simpler age. It provides individual rights, but was written in a context where religious individuals were invariably part of a defined and probably authoritarian group. It will have been seen at its conception largely in terms of given and known religions and their protection. In a more individualistic age, where belief has infinite genuine varieties and doctrinal authority is not only diverse but largely without any legitimacy other than the consent of those who accept it, Article 9 is a disruptive and potentially chaotic force. It can only be contained by reading it historically and narrowly. There may be no difference in sincerity – or for that matter coherence - between the beliefs of one individual or small group and another more mainstream and established one, but we can be sure that the latter will receive more respect and protection, and this is not just about prejudice or bias, but about the inability of any system of law to function if every sincere

person has the potential for a personal opt-out. Article 9, read naturally, does not fully and clearly reflect the position held by either the population or judges, who give legal certainty and established authority a higher value than the text suggests.

Another sign of Article 9's structural inadequacy is the fact that situations such as Ms Begum's fall within the right to 'manifest' religion. There is no right as such to practice a belief. The difference is that practicing one's religion suggests that one does simply what one's beliefs command – as Ms Begum wished. By contrast, manifesting religion suggests - not unambiguously, but the hint is there – a communicative act. Manifestation of religion has a suggestion of proselytising, of preaching and proclaiming in public. The distinction is important because such a communicative reading of manifestation makes it far easier to justify restrictions – it seems reasonable that proselytising should in general receive less protection than purely religious conduct. In the context of Islamic clothing this point has been used against Muslim women and girls, whose clothing is treated as a 'symbol' of Islam,<sup>56</sup> which conflicts with prohibitions on religious statements in schools and other public places. Thus the action of those who cover their head, body or hair is portrayed as directed at others, and thus more threatening, even aggressive.

In fact the most conventional Islamic reason for wearing the jilbab, or for that matter the headscarf, is simply modesty.<sup>57</sup> It is certainly religiously inspired, but for most Muslim women

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<sup>56</sup> The European Court of Human Rights is an important culprit; see *Sahin v Turkey* (Grand Chamber) at 111 on headscarves as communicative symbols. See further Gerstenberg, note 1 above; A.Nieuwenhuis 'State and Religion, Schools and Scarves, An Analysis of the Margin of Appreciation as Used in the Case of *Leyla Sahin v Turkey*' (2005) 1:3 European Constitutional Law Review 495.

<sup>57</sup> S.Poulter 'Muslim Headscarves in School: Contrasting Approaches in England and France' (1997) 17 OJLS 32 at 45-46. This is not to deny that motivations for particular individuals may of course be more complex, and there is certainly a recent trend among young Muslim women in Europe towards wearing religious clothing as a statement of

in the world the point of the act is not to communicate with others. It is unimportant whether others realise why they are covering themselves, or understand the covering to come from Islam. The important fact is simply that others do not see their hair or body. There is no attempt to communicate any message, and the headscarf or jilbab are, on this wearing, not symbols; they do not carry meaning. Rather, they are signs – facts from which it is possible, for the informed person, to draw a conclusion, but without it being the intent of the wearer that this be the case.

Hence to call the wearing of religious clothing a ‘manifestation’ is to cultivate an incorrect and, in this context, perjorative idea. Yet one wonders whether religious dress codes were in the minds of the writers of Article 9. Insofar as some Christians believe in modest clothing, their practices fall within the Western norm and are unlikely to be treated as religious. The long skirts and long-sleeved blouses of strict Protestant women in Northern Europe, just as the headscarves of the elderly Catholic and Orthodox women in Southern and Eastern Europe, fall sufficiently within what is culturally conventional that conflicts of the type Ms Begum faced are unlikely. Rather, manifestation of Christianity does tend to take the form of intentionally communicative and even proselytising acts – the wearing of crucifixes or clerical suits, or preaching in public. The structure of Article 9 reflects the needs of fragmented Christianity within a Christian continent, not the broader religious diversity we are face today.

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religious affiliation, and even of independence and empowerment. See Lyon and Spini, note 29 above, on the ‘new veil’ and Islamic feminism.