Muslim dress in English Law: Lifting the veil on Human Rights

MARK HILL
Universidad de Cardiff

RUSSELL SANDBERG
Universidad de Cardiff

I

INTRODUCTION

The United Kingdom has no written constitution. Thus, in the absence of any general positive statements of rights, principles of universal application need to be extrapolated from specific judicial statements or statutory provisions[1]. The practical effect of this is that English law[2] generally favours individual freedom of action and allows people to do as they wish[3]. As one senior judge noted in 1979, 'England, it may be said, is not a country where everything is forbidden except what is expressly permitted; it is a country where everything is permitted except what is expressly forbidden'[4]. Historically this has resulted in the accommodation of religious dress. Julian Rivers has noted that at common law, individuals could wear what they pleased with the exception that

[1] For examples of general statements in relation to religion, see D McClean, 'State and Church in the United Kingdom' in G Robbers (ed) *State and Church in the European Union* (Second edition, Nomos Verlagsgesellschaft, Baden-Baden, 2005) 553-575, M Hill, 'Church Autonomy in the United Kingdom' in G Robbers (ed) *Church Autonomy* (2001, Peter Lang GmbH, Frankfurt am Main) 267-284 and R Sandberg, 'The Legal Status of Religious Denominations and State-Church Relations in the UK' in *Droit des Religions en France et en Europe: Recueil de Textes* (Bruxelles, Bruylant, 2006).

[2] The term 'English law' is used throughout the paper to describe the law of England and Wales. Scotland and Northern Ireland have separate legal systems which are not within the experience of the authors.

[3] See S Poulter, *Asian Traditions and English Law* (Trentham Books, Staffordshire, 1990) 1.

[4] *Malone v Metropolitan Police Commissioner* [1979] Ch 344 *per* Sir Robert Megarry V-C. See also: *AG v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 at 178 *per* Donaldson MR: 'the starting point of our domestic law is that every citizen has a right to do what he likes, unless restrained by the common law … or by statute'. See further, *Halsbury's Laws of England*, Vol 14, para 339 and M Hill, 'The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in the United Kingdom' (2005) 19(2) *Emory International Law Review* 1129 at 1131-1132 (Hereafter Hill, 'Limitations').

within certain 'contexts of power' (for example schools or the workplace) dress codes and uniform policies could be imposed[5].

However, an increase in the volume and specificity of legislation during the twentieth century has caused a revisiting of this traditional polity[6]. The first section of this paper comprises a general outline of the English law concerning religious dress, examining briefly how the common law position has been affected by laws on discrimination and human rights. The second section critically analyses the recent and seminal decision in *R(on the application of Begum) v Headteacher and Governors of Denbigh High School* [7] both at first instance and at two levels of appeal. The third and final section considers the *Begum* decision against the common law and statutory background and postulates certain conclusions concerning the wearing of the Muslim headscarf in English schools[8].

THE LAW ON RELIGIOUS DRESS

Over the last forty years, Parliament has supplemented the common law by legislating in a somewhat *ad hoc* manner to provide additional rights, duties and obligations. Sebastian Poulter has pointed out that there have been several instances where Parliament has enacted provisions designed to recognize or support cultural diversity or to assimilate cultures by outlawing or denying legal significance to ethnic and religious traditions[9]. In relation to religious dress, notable legislative activity attaches to the religious requirement for Sikhs of wearing a turban[10]. Two areas of law merit particular elaboration: discrimination law which continues to grow in a piecemeal manner[11] and a renewed emphasis upon human rights, resulting from the Human Rights Act 1998.

---

[5] J Rivers, 'Religious Dress: British Perspectives and OSCE Developments' (Strasbourg Conference) Available from http://www.strasbourgconference.org/papers (Hereafter Rivers, 'Religious Dress').

[6] 'Anglo-American legal thinking still remains strongly influenced by the traditions of the English common law – that is, of law developed pragmatically case by case through judicial decisions rather than elaborated from *a priori* general concepts or legislated in the form of codes or statutes. … Today, when legislation created by elected assemblies constitutes by far the most important source of new law in Western societies, this older conception of law can hardly dominate': R Cotterrell, *The Sociology of Law* (London, Butterworths, 1992) 17.

[7] [2006] UKHL 15.

[8] A previous attempt to provide such an account is S Poulter, 'Muslim Headscarves in School: Contrasting Legal Approaches in England and France'(1997) 17 *Oxford Journal of Legal Studies* 43 (Hereafter Poulter, 'Muslim Headscarves'). However, this account has now been superseded by the Human Rights Act 1998 and the decision in *Begum*.

[9] S Poulter, *Ethnicity, Law and Human Rights* (Oxford University Press, 1998) 48. Elsewhere he described English legal policy as being directed towards 'pluralism within limits': see Poulter, 'Muslim Headscarves' at 49.

[10] For a full account, see Poulter, *Ethnicity, Law and Human Rights* (ibid) chapter 8.

[11] See R Sandberg, 'To Equality and Beyond: Religious Discrimination and the Equality Act 2006' (2006) 8 *Ecclesiastical Law Journal* 470. A pledge to codify existing discrimination law into a single Equality Act was included in the Labour Party's Election Manifesto 2005. The law is currently subject to review.

(i) Discrimination Law[12]

The Race Relations Act 1976 forbade direct or indirect discrimination on the grounds of colour, race, nationality or ethnic origins[13]. Julian Rivers has noted that it was quickly realised that the Race Relations Act 1976 would have implications for the regulation of cultural and religious dress[14]. Sebastian Poulter commented that although under the Race Relations Act 1976, it might be imagined that Muslim girls would be entitled to wear headscarves in English schools, no such right existed and there was only a 'remote prospect' of a successful claim under the Act[15]. For Poulter, the vital point was that the Race Relations Act 1976 was focused on racial not religious discrimination[16].

Although courts have understood ethnic origins widely so that discrimination against a member of an 'ethnic minority' can be taken as encompassing religion as well as strictly racial differences and have thus regarded Sikhs[17], Jews[18], and gypsies[19] as separate racial groups (but not Rastafarians[20], national groups[21], or other religious groups), Muslims have consistently been defined as a religious group and not an ethnic one[22]. That said, as Poulter points out, this definitional hurdle can be circumvented by placing reliance on membership of a racial group: a Muslim pupil whose parents came to Britain from Pakistan could claim, for example, that any discrimination against her was based on her Pakistani nationality, her Pakistani 'national origin' (if she was a British citizen) or her Asian

[12] This section omits discussion of discrimination on grounds of sex, which was outlawed by the Sex Discrimination Act 1975 as amended by the Employment Equality (Sex Discrimination) Regulations 2005 (SI 2005/2467), or sexual orientation, see the Employment Equality (Sexual Orientation) Regulations 2003(SI 2003/1661) and parts 3 and 4 of the Equality Act 2006. International human rights instruments are also relevant here and are discussed below. It should be noted that Article 14 of the European Convention on Human Rights extends to 'the rights and freedoms set forth in [the] Convention'. Protocol 12, Article 1 includes a freestanding discrimination provision but this has not been ratified by the UK: see R Ahdar and I Leigh, *Religious Freedom in the Liberal State* (Oxford University Press, 2005) 109. Most of the developments in domestic discrimination law in recent years were motivated by Brussels rather than Strasbourg.

[13] For the difference between direct and indirect discrimination, see P Edge, *Legal Responses to Religious Difference* (London, Kluwer Law International, 2002) 248-255 (Hereafter, Edge, *Religious Difference*). In *Mandla v Dowell Lee* [1983] 2 AC 548, Lord Templeman stressed that the Act had outlawed discrimination 'in specified fields of activities' namely, 'employment, education and the provision of goods, facilities, services and premises'. See also Hill, 'Legal Limitations' at 1136.

[14] Rivers, 'Religious Dress'.

[15] Poulter, 'Muslim Headscarves'.

[16] Ibid at 63.

[17] *Mandla v Dowell Lee* [1983] 2 AC 548, compare this with the decision in the Court of Appeal which had considered them a religious group and thus outside the scope of the legislation: [1983] QB 1.

[18] *Seide v Gillette Industries Limited* [1980] IRLR 427.

[19] *Commission for Racial Equality v Dutton* [1989] 1 All ER 306. Reliance was placed upon their shared history, geographical origin, distinct customs, language derived from Romany, and, as with Sikhs, a common culture.

[20] *Crown Suppliers (PSA) Limited v Dawkins* [1993] ICR 517.

[21] See, for example, *Northern Joint Police Board v Power* [1997] IRLR 610, for a discussion of the Scots and English as separate racial groups.

[22] Muslims do not constitute an ethnic group because their descent cannot be traced to a common geographical origin; the spread of Islam is the spread of that faith rather than those who share it: Edge, *Religious Difference* 252. See also Poulter, 'Muslim Headscarves', and Hill, 'Legal Limitations' at 1136, and 1160.

'race'[23]. Such an individual could challenge, on grounds of indirect discrimination, a school uniform policy that forbade religious dress[24].

In the leading English case of *Mandla v Dowell Lee*[25], it was contended that the headmaster of a private school had unlawfully discriminated against a pupil by declining to accept him on the grounds that he wished to wear a turban. The House of Lords held that there had been indirect discrimination since although the headmaster had applied the 'no turban' rule equally to all racial groups, the rule was such that the proportion of Sikhs who could comply with it was considerably smaller than the proportion of non-Sikhs[26]. Although Sikhs could literally comply with the 'no turban' rule, they could not comply with it 'consistently with the customs and cultural conditions of the racial group' and this is what Parliament had meant[27]. Thus the 'no turban' rule could not be justified under the Act.[28] Lord Fraser commented that 'the kind of justification that might fall within that provision would be one based on public health'; and in *Panesar v Nestle*[29], for example, a factory rule against long hair and beards was justified on grounds of hygiene and safety, despite being indirectly discriminatory against Sikhs[30].

The consequence of *Mandla v Dowell Lee* is that there is a legal distinction between those forms of dress which are worn as part of one's membership of a group and/or cultural identity, and those forms of dress which are simply a reflection of personal taste[31]. Furthermore, one cannot rely on arguments derived from a Christian ethos, a secular ethos, or any other sort of ethos to deny the individual equality-based right to dress in a way which expresses one's racial or ethnic identity[32]. Thus the Race Relations Act 1976 may protect the wearing of the Islamic headscarf where a rule banning it constitutes indirect discrimination on racial rather than religious grounds. In *Hussain v Midland Cosmetic Sales*[33], the claimant refused to remove her headscarf to wear a protective cap that the gift packaging factory required on grounds of health and safety. She contended that

---

23 Poulter, 'Muslin Headscarves' at 64. For example, in relation to employment, in *J H Walker Limited v Hussain and Others* [1996] ICR 291, the Employment Appeal Tribunal held that an instruction not to take floating holidays in the busy months of May to July which included the Muslim festival of Eid on 11 June constituted indirect unlawful discrimination on the ground of race contrary to the Race Relations Act 1976 (s.1(1)(b)) on the grounds that the proportion of Asians who could comply was smaller than the number of Europeans, that it was not objectively justified irrespective of race, and that they suffered detriment. See: Hill, 'Legal Limitations' at 1160-1161.

[24] 'Indirect discrimination often occurs where apparently neutral institutional practices, which do not directly target minority groups, nevertheless have a disproportionately adverse impact upon members of such groups': Poulter, 'Muslim Headscarves' at 64.

[25] [1983] 2 AC 548.

[26] *Per* Lord Fraser of Tullybelton at 560.

[27] Ibid, 565-566.

[28] Ibid at 566-567.

[29] [1980] ICR 144.

[30] See Edge, *Religious Difference* 254.

[31] Rivers, 'Religious Dress'.

[32] Ibid.

[33] [2002] Emp LR 713.

she had been indirectly discriminated against since although the rule applied equally to all racial groups, the proportion of those of a Pakistani ethnic origin who could comply with it was considerably smaller than the proportion of those from other racial groups. Furthermore, that rule was not justifiable. The Employment Appeal Tribunal found that other women of Pakistani ethnic origin who did not want to remove their headscarves had been allowed 'to tuck them in so that the danger from loose hair or loose clothing was eliminated but that the claimant had not been offered this 'compromise solution'[34]. Therefore, in the claimant's case, the insistence on the removal of the headscarf was not justifiable. However, the application of these principles to the classroom would prove problematic. Indirect discrimination would be difficult to prove not only because 'in statistical terms, the wearing of Muslim headscarves by girls … appears to be [a] rare phenomenon' but also since such indirect discrimination would probably be held to be justified on health and safety grounds, 'for instance in some scientific experiments or activities involving vigorous physical exercise'[35].

Writing in 1997, Sebastian Poulter concluded that the 'technical legal rights' of Muslim girls to wear the headscarf in school were not protected in English Law[36]. However, since 1997, discrimination law has been extended to include discrimination on the grounds of religion or belief. The Employment Equality (Religion or Belief) Regulations 2003[37] and Part 2 of the Equality Act 2006 make provision concerning discrimination on grounds of religion or belief. The Employment Equality (Religion or Belief) Regulations 2003 outlaws direct and indirect discrimination, harassment and victimisation on the grounds of religion or belief in relation to employment and vocational training[38], while part 2 of the Equality Act 2006 does likewise in relation to the provision of goods, facilities and services[39]. Whilst further and higher education is covered by the Regulations, certain schools are also within the ambit of the Act[40]. The Regulations define 'religion or belief' to include 'any religion, religious belief, or similar philosophical belief'[41], the Act defines 'religion or belief' to include 'any religion', 'any religious or philosophical belief', 'a reference to lack of religion' and 'a reference to lack of belief'[42]. This definition is substituted into the Employment Equality (Religion or Belief) Regulations 2003, thereby extending those provisions to non-believers[43].

---

[34] Ibid at para 9.
[35] Poulter, 'Muslim Headscarves', 65-66.
[36] Ibid at 74.
[37] SI 2003/1660.
[38] For definitions of these terms, see regulations 3-5.
[39] For definitions of these terms, see section 45. See R Sandberg, 'To Equality and Beyond: Religious Discrimination and the Equality Act 2006' (2006) 8 *Ecclesiastical Law Journal* 469 for an analysis of Part 2 of the Act.
[40] See Sandberg, ibid for further details.
[41] Reg 2.
[42] Section 44.
[43] Section 77.

The case law on discrimination on grounds of religion or belief is in its infancy[44]. There have been only three employment tribunal cases concerning religious dress brought under the 2003 Regulations. In *Williams v South Central Limited*[45], a train driver who was a US citizen contested a rule that nothing should be placed on reflective waistcoats. He had stitched a small US flag on his jacket and contended that he had suffered discrimination, victimisation and harassment on grounds of religion or belief on the grounds that his loyalty to his native country amounted to a religious belief. The Employment Tribunal found that loyalty to a national flag or to one's native country was inconsistent with both the dictionary definition of 'belief' and the rules laid out in the Regulations; the facts did not support a case of religious discrimination. In *Ferri v Key Languages Limited,*[46] a Roman Catholic wore three religious necklaces at her job interview and was told not to wear the necklaces together at work as they were rather 'loud' and overtly religious. The claimant was later dismissed on result of alleged poor performance. She complained of discrimination citing the earlier event. The Employment Tribunal found that the claimant had not established a *prima facie* case: on the facts the employer had established that the claimant was sacked for her poor performance and not her religious beliefs. In *Mohamed v Virgin Trains*[47], the claimant contended that he had been dismissed for wearing a skull cap and for refusing to trim his beard, a requirement with which he was unable to comply on the grounds that he was a Muslim. The Employment Tribunal found that there was insufficient background evidence to suggest discrimination on the grounds of religion or belief; his dismissal was due to his poor performance and lack of enthusiasm[48]. The issue of the Islamic headscarf under these new laws is yet to be judicially tested and has not been subject to any detailed academic evaluation.

(ii) Human Rights Act 1998

In addition to the growing corpus of discrimination laws, the Human Rights Act 1998 has brought about a 'legal revolution'[49]. In the United Kingdom, courts do not apply international human rights laws unless those laws have been expressly incorporated into domestic law or are mirrored in the common law[50]. Though the first nation state of the

[44] A summary of existing cases is available online from the Equality Challenge Unit at: http://www.ecu.ac.uk/guidance/religionandbelief/Religionandbeliefcaselaw.html.

[45] Case Number: 2306989/2003, ET (16 June 2004).

[46] Case Number: 2302172/2004, ET (12 July 2004).

[47] Case Number: 2201814/2004, ET (12-14 October 2004, 20 May 2005); EAT Number: PA/0193/05/DA.

[48] A complaint concerning harassment on grounds of religion or belief failed because the actions about which the complaint were made occurred before the 2003 Regulations came into force: see para 64 of the judgment.

[49] R Sandberg, 'Human Rights and Human Remains: The Impact of *Dödsbo v Sweden*' (2006) 8 *Ecclesiastical Law Journal* 452. See also M Hill (ed) *Religious Liberty and Human Rights* (Cardiff, University of Wales Press, 2002) cf Poulter's comments about judicial review prior to the Human Rights Act 1998: Poulter, 'Muslim Headscarves' 68.

[50] Hill, 'Legal Limitations' 1130.

Council of Europe to ratify the European Convention on Human Rights (ECHR) on 18 March 1951, and though permitting individual petition to the European Court in Strasbourg since 1966, the United Kingdom had consistently declined to make the ECHR part of domestic law: 'the Courts regarded the Convention as an aid to interpretation but had no jurisdiction directly to enforce the rights and freedoms under the Convention'[51]. To assert that the Human Rights Act 1998 incorporated the Convention into English law is a convenient – although slightly misleading – shorthand[52]. Its own short title makes plain that it is 'an Act to give *further effect* to the rights and freedoms guaranteed under the European Convention on Human Rights'[53]. The Act has two explicit purposes; namely (a) statutory interpretation and (b) ensuring that public authorities behave in a convention compliant manner[54].

The Act, first and foremost, requires the courts to interpret United Kingdom legislation so far as is possible in a manner compatible with Convention rights[55] and, in so doing they must take into account – though not necessarily follow – the decisions of the European Court at Strasbourg[56]. The Court of Appeal, in its unanimous judgment in *Aston Cantlow Parochial Church Council v Wallbank*[57], put the matter with disarming simplicity: 'Our task is not to cast around in the European Human Rights Reports like black-letter lawyers seeking clues. In the light of s 2(1) of the Human Rights Act 1998 it is to draw out the broad principles which animate the Convention'[58].

Under the Human Rights Act 1998, it is unlawful for public authorities to act in a way which is incompatible with a Convention right. A 'public authority' is defined as 'any person certain of whose functions are of a public nature' and thus may include religious groups and organisations within religious organisations[59]. The House of Lords has now conclusively determined that a parochial church council of the (established) Church of

---

[51] *Waddington v Miah (Otherwise Ullah)* [1974] 2 All ER 377. See Lord Denning MR, *Ahmad v ILEA* [1977] 1 QB 36 at 41: 'The convention is not part of our English law, but, as I have often said, we will always have regard to it. … We will do our best to see that our decisions are in conformity with it. But it is drawn in such vague terms that it can be used for all sorts of unreasonable claims and provoke all sorts of litigation. As so often happens with high-sounding principles, they have to be brought down to earth'.

[52] M Hill, 'A New Dawn for Freedom of Religion' in M Hill, *Religious Liberty and Human Rights* (2002, Cardiff, University of Wales Press 2002) 6.

[53] Emphasis added.

[54] M Hill, 'A New Dawn for Freedom of Religion' (supra) 6.

[55] Section 3(1). In the event of there being an irreconcilable inconsistency, the domestic legislation prevails subject to a 'fast-track' system of executive action to bring English law into line with the Convention. See section 4 (declaration of incompatibility) and section 10 (remedial action).

[56] See generally J Rivers, 'From Toleration to Pluralism: Religious Liberty and Religious Establishment under the United Kingdom's Human Rights Act' in R Ahdar (ed), *Law and Religion* (Aldershot, Ashgate Dartmouth, 2000) p 136; M Hill, 'A New Dawn for Freedom of Religion' in Hill, *Religious Liberty and Human Rights* (supra) 1-13; I Leigh, 'Freedom of Religion: Public/Private, Rights/Wrongs' in M, Hill,(ed) *Religious Liberty and Human Rights* (supra)128-158.

[57] [2001] 2 All ER 363, *per* Morritt V-C,. Later overturned on each and every substantive issue by the House of Lords: [2004] 1 AC 546.

[58] Ibid paragraph 44.

[59] See section 6(3).

England is not a 'public authority' for the purposes of the Human Rights Act 1998[60]. As to the status of other religious groups, it should be noted that there is a general reluctance to interfere with the regulation of religious bodies both in the Strasbourg and in the domestic courts[61]. Stephen Sedley has contended that section 13(1) of the Act serves 'to reassure congregations that they are on the individual, not the state, side of the Convention'[62].

In relation to religious dress, it is important to note the effect of Article 9 of the ECHR. As a result of the Human Rights Act 1998, Article 9 is now part of English domestic law. It provides that:

> 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 the protection of the rights and freedoms of others.

In line with other international human rights documents, Article 9 protects both the right to freedom of thought, conscience and religion[63] and the right to manifest one's religion or belief[64]. Whilst the right to freedom of thought, conscience and religion is absolute[65], the right to manifest that religion or belief is qualified by Article 9(1) in that the manifestation must be 'in worship, teaching, practice and observance' and by the possible limitations in Article 9(2) which permits the State to interfere with the individual

---

[60] See *Aston Cantlow Parochial Church Council v Wallbank* [2004] 1 AC 546. Through extension by analogy, this seminal case will have a significant effect on other institutions of the Church of England. The House of Lords expressly rejected the reasoning of the Court of Appeal which had held that the Church of England being an established church automatically rendered its component bodies public authorities. See the report of the Joint Parliamentary Committee on Human Rights, *The Meaning of Public Authority Under the Human Rights Act* (February 2004), HL Paper 39, HC 382.

[61] See M Hill, 'Judicial Approaches to Religious Disputes' in R O'Dair and A Lewis (eds), *Law and Religion*, Current Legal Issues IV (Oxford, 2001) 409-420.

[62] S Sedley's Preface to M Hill (ed) *Religious Liberty and Human Rights* (supra) xiv. Section 13(1) provides that 'If a court's determination of any question arising under this Act might affect the exercise by a religious organisation (itself or its members collectively) of the Convention right to freedom of thought, conscience and religion, it must have particular regard to the importance of that right'.

[63] Known as the *forum internum*.

[64] The *forum externum.*

[65] This includes the absolute right to hold a religion or belief and to change it and has been interpreted as including the right not to swear allegiance to a particular religion or belief (*Buscarini v San Marino* (2000) 30 EHRR 208) and 'excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate': *Manoussakis v Greece* (1997) 23 EHRR 387 (see also *Metropolitan Church of Bessarabia v Moldova* (2002) 35 EHRR 306).

right if that interference is 'prescribed by law'[66]; if there is a legitimate aim[67]; and if the interference is 'necessary in a democratic society'[68].

In relation to religious dress, English courts now have a duty to take into account, though not necessarily to follow, the Strasbourg case law (including *Dahlab v Switzerland*[69] and *Sahin v Turkey*[70]) which has consistently held that restrictions on one's religious dress constitute an interference with one's Article 9 right to manifest one's religion or belief, albeit one that can be justified under Article 9(2) as being prescribed by law, having a legitimate aim and being 'necessary in a democratic society'.

The Human Rights Act 1998 will require a reconsideration of the English case law on racial and religious discrimination. In relation to the public sphere, which includes state schools, such 'public authorities' must act in a way which is compatible with the right to freedom of religion[71]. In the sphere of private employment, if discrimination on grounds of religion is litigated, and a court does not give due weight to freedom of religion, that decision by the court (itself a public authority) may itself constitute a violation of freedom of religion, and give rise to redress on appeal[72]. For Poulter, writing in 1997, the *de jure* absence of a legal right to wear the headscarf at school was corrected *de facto* by the attitude of schools which permitted Muslims to wear headscarves 'confidently and freely' since most schools seem willing to accommodate it[73]. This conclusion has been under-

[66] That is, it must have some basis in domestic law and that law should be accessible and its effects foreseeable: *Sahin v Turkey* (2005) 41 EHRR 8 (Grand Chamber decision).

[67] The legitimate aims are those outlined in Article 9(2): 'public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others'.

[68] That is, 'any such restriction must correspond to a "pressing social need" and must be 'proportionate' to the legitimate aim pursued': *Serif v Greece* (2001) 31 EHRR 20.

[69] Unreported, Application No.42393/98, 15 February 2001. A teacher of small children was told that she could not wear her headscarf at school. The Court held that although the state had interfered with her right to manifest her religion, such the interference was justified as it had the legitimate aim of protecting the rights and freedoms of others, public order and public safety. There was a 'pressing social need' given the impact that the 'powerful external symbol' conveyed by her wearing a headscarf could have and the possible proselytising effect.

[70] (2005) 41 EHRR 8. A 25 year old Muslim was a fifth year medical student was denied access to an examination, enrolment and lectures on the grounds that she insisted on wearing a headscarf, contrary to a University circular and Turkish law. The Court held that there had been no breach of Article 9 on the grounds that although the state had interfered with her right to manifest her religion, such interference was justified as being prescribed by law, having the legitimate aim of protecting the rights and freedoms of others and of protecting public order and being necessary in a democratic society. The Court held that the interference had a pressing social need given the existence of extremist political movements in Turkey and 'the impact which wearing such a symbol … may have on those who choose not to wear it' and was proportionate since the authorities 'sought throughout that decision-making process to adapt to the evolving situation through continued dialogue with those concerned, while at the same time ensuring that order was maintained on the premises'.

[71] Hill, 'Legal Limitations' 1165.

[72] Ibid.

[73] Poulter, 'Muslim Headscarves' at 74. See also his account relating to Altrincham Grammar School where a 'speedy sensible and pragmatic compromise was … reached, without the issue having to be tested in the courts', at 67-68.

mined to a degree by the recent case of *Begum*. Since the case was considered by the High Court, the Court of Appeal and the House of Lords, it merits a full discussion.

THE CASE OF SHABINA BEGUM

At time of writing, England has not had a case concerning the wearing of the Islamic headscarf in schools. The *Begum* case was concerned with the wearing of the jilbab in a state school contrary to the school's uniform policy. The school in question, Denbigh High School, is a secondary community school open to pupils of both sexes aged eleven to sixteen[74]. The School offered three uniform options: in addition to a v-neck jumper, a plain white shirt, a school tie and black shoes, girls could wear either navy blue trousers, an 'A line' or pleated knee length skirt or a navy blue shalwar kameeze made to the school pattern[75]. The kameeze is a sleeveless smock-like dress with a square neckline, worn to 'between knee and mid calf length' on top of a short or long sleeved white shirt and tie, usually under the school jumper[76]. The shalwar consists of 'loose trousers that taper at the ankles'[77]; there is a requirement that the shalwar should not be 'baggy'[78]. The shalwar kameeze was been worn by some Muslim, Hindu and Sikh female pupils.[79] The school went to some lengths to explain its dress code to prospective parents and pupils[80], and subjected it to regular review[81].

The claimant, Shabina Begum, was a Muslim born in the United Kingdom to parents of Bangladeshi origin[82]. In 2002, she was almost fourteen years old and had attended Denbigh High School for two years wearing the shalwar kameeze 'happily without com-

[74] Although 80% of the pupils at the school are Muslims, 'The school is a secular school. But it is not open to doubt that very many of its pupils, and their parents, will be believing and practicing adherents to the Moslem faith': *Per* Lord Scott [2006] UKHL 15, para 73. Muslims are 'well represented' in the management structure of the school: *Per* Lord Scott para 74, Ibid. A number of other religious and ethnic groups are represented, 'Children at the school speak 40 different languages, and 21 different ethnic groups (and 10 different religious groups) are represented': *Per* Brooke LJ, [2005] EWCA Civ 199 para 1. See also Lord Bingham, [2006] UKHL 15 para 3; Lord Hoffmann para 43.

[75] School uniform document quoted by Lord Scott at para 76. In relation to Physical Education, the 'religious sensitivities of some groups of girls' is protected by requirements consisting of 'tracksuit trousers, a long sleeved tee shirt and securely tied headscarf': Statement by David Connors (Deputy Headteacher, quoted by Bennett J, [2004] EWHC 1389 para 83.

[76] *Per* Brooke LJ, [2005] EWCA Civ 199 at para 6, school uniform document.

[77] Ibid.

[78] Ibid.

[79] *Per* Lord Bingham, [2006] UKHL 15, para 6.

[80] *Per* Lord Bingham at para 8.

[81] See Bennett J, [2004] EWHC 1389 para 3. In 1993 a working party was appointed by the school to re-examine its dress code, consulting parents, students, staff and Imams of three local mosques. No objection was made to the shalwar kameeze and no suggestion was made that it failed to satisfy Islamic requirements. Following the Working Party, the school approved the wearing of certain head-scarves: *Per* Lord Bingham, [2006] UKHL 15 para 7.

[82] *Per* Lord Hoffmann at para 42.

plaint'[83]. The Begum family had lived outside the catchment area but had chosen the school for Shabina and her sister[84]. On the first day of the Autumn term in September 2002, Shabina went to the school with her elder brother and 'another young man' and asked to speak to the head teacher, Mrs Yasmin Bevan, who was not available. Speaking instead to the assistant headteacher, Mr Stuart Moore, they insisted that Shabina be allowed to attend school wearing a jilbab[85], which was described as 'the only garment that met her religious requirements because it concealed, to a greater extent than the shalwar kameeze, the contours of the female body, and was said to be appropriate for maturing girls' in public[86], since it 'effectively conceals the shape of their arms and legs'[87].

Mr Moore said that the young men 'were very forceful in their approach' and 'talked of human rights and legal proceedings'[88]. He told Shabina to go home, change and return wearing school uniform[89]. Mr Moore did not believe that he was excluding the pupil, which he did not have the authority to do. Shabina and the two young men left, saying that 'they were not prepared to compromise over this issue'[90]. Shabina's solicitors wrote to the headteacher, the school governors and the Local Education Authority on 22 October 2002 contending that Shabina had been 'excluded/suspended' from the school 'because she refused to remove her Muslim dress comprising a headscarf and a long over garment'[91].

The letter alleged that the school's decision to exclude Shabina breached Articles 9, 8 and 14 of the ECHR and Article 2 of Protocol 1[92]. Shabina issued her claim for judicial

---

[83] As did her elder sister who 'continued to wear it without objection throughout her time at school': *per* Lord Bingham at para 9.

[84] *Per* Lord Bingham at para 9.

[85] An item of clothing that has been judicially described as 'a long coat-like garment'; 'a long shapeless back gown'; and 'a long shapeless dress ending at the ankle and designed to conceal the shape of the wearer's arms and legs': *Per* Lord Bingham at para 10, Lord Hoffmann at para 46 and Lord Scott at para 79'.

[86] *Per* Lord Bingham at para 10.

[87] *Per* Brooke LJ, [2005] EWCA Civ 199 para 8. Shabina and her brother believed that the shalwar kameeze originated as a Pakistani cultural dress without any particular religious foundation and that it did not meet the Islamic Shari'a requirement that women over the age of 13 should cover their bodies completely, apart from their face and hands. The shalwar kameeze was not appropriate because the white shirt revealed too much of the arms and the skirt length should go down to the ankles not the mid-calf: See the Court of Appeal judgment of Brooke LJ, [2005] EWCA Civ 199 at para 14.

[88] '[The] manner in which the demand was made was unreasonable as it verged on the threatening. I also thought that the timing was unreasonable in that the pupil arrived at school on the first day of term demanding to wear the non-uniform clothing': Statement (25.03.04), quoted by Bennett J, [2004] EWHC 1389 para 3. However, note that Shabina had told some of her teachers in the previous school year that she found the shalwar kameez school uniform unacceptable: Brother's Statement, quoted by Bennett J, [2004] EWHC 1389 at para 67. Furthermore, on 14 March 2002, the school held a charity non-uniform day at which Sabrina wore a jilbab: Bennett J, [2004] EWHC 1389 at para 85.

[89] This was 'the normal procedure'; He noted that 'to date, with the exception of this one incident, pupils have always complied with this and returned straight to school in correct uniform: Statement (25 March 2004), quoted by Bennett J, [2004] EWHC 1389 para 3.

[90] *Per* Lord Bingham, [2006] UKHL 15, para 10.

[91] 'The letter contended that the respondent believed that it was an absolute obligation on her to wear the dress and she was not prepared to take it off'. *Per* Lord Bingham at para 12.

[92] *Per* Lord Bingham at para 12.

review in February 2004. Her case was subsequently heard by the Administrative Court of the High Court, the Court of Appeal and the House of Lords. It is necessary to examine the reasoning and conclusions at each judicial level.

(i) The High Court[93]

At first instance, the Shabina sought damages and a mandatory order that the headteacher, school governors and Luton Borough Council make swift arrangements for her return to Denbigh High School. She made three allegations[94]: that she had been unlawfully excluded the claimant from school[95]; that this exclusion had denied her access to suitable and appropriate education in breach of Article 2, Protocol 1 of the ECHR; and that the exclusion had unlawfully denied her right to manifest her religion in breach of Article 9.

Bennett J noted that the fundamental submission of counsel was that Shabina was constructively and unlawfully excluded form the school in September 2002[96]. Bennett J found that she had not been excluded[97]: the school's action or stance could not amount to an exclusion 'either formal, informal, unofficial or in any way whatsoever' because the reality of the situation was and still is that Shabina entirely of her own volition, chose not to attend Denbigh High School unless the School agreed to her wearing the jilbab[98]. Having decided that Shabina had not been excluded from school, Bennett J considered the question of whether she had been denied her right to education under Article 2 of Protocol 1 to be rather artificial[99]. He nevertheless held that there was no breach of Article 2 of Protocol 1, highlighting the fact that other schools were open to Shabina[100].

In relation to the allegation that Shabina had unlawfully been denied her right to mani-

---

[93] [2004] EWHC 1389.

[94] *Per* Bennett J at para 47.

[95] Sections 64-68 of the School Standards and Framework Act 1988 and/or section 52 of the Education Act 2002 and the Education (Pupil Exclusions and Appeals) (Maintained Schools) (England) Regulations 2002.

[96] [2004] EWHC 1389 at para 48.

[97] The headteacher 'was expecting the Claimant to continue her education at Denbigh High School' and 'had every reason to believe but that the Claimant would continue to attend school and abide by the school uniform policy'. The headteacher 'earnestly and sincerely wanted the Claimant to attend school. It put no impediment or obstacle in the way of the Claimant. What the Defendant did insist on was that when the Claimant came to school she was dressed in accordance with the school uniform policy': see ibid, paras 57 and 60.

[98] Para 60; see also paras 61-62.

[99] Para 94. Article 2 of Protocol 1 to the ECHR provides that 'no person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions'.

[100] The judge noted that although the school's actions had the consequence of Shabina, because of her beliefs, not coming to school. This was an exclusion which it was in her power to avoid. He noted that 'It was at all times open to her to change her mind, dress in the school uniform and return to school: see paras 101-102. He noted that she had applied to one school but 'did not then carry through the appeal process. So far as I am aware, she never applied to the others': Para 103.

fest her religion in breach of Article 9, Bennett J noted that her rights under Article 9 (1) were 'engaged' since there was no suggestion that her motives or beliefs were not completely genuine and contained 'a certain level of cogency, seriousness and cohesion and importance'[101]. He found that there had been no breach of Article 9(1) on the grounds that even if she had been excluded, she would have been 'excluded for her refusal to abide by the school uniform policy rather than her beliefs as such'[102]. Drawing upon *Stedman v United Kingdom*[103], Bennett J held that although her refusal to respect the school uniform policy was 'motivated by religious beliefs', there had been no interference with her Article 9(1) right[104].

This analogy does bear scrutiny for several reasons. No explanation is given as to why *Stedman* should apply in relation to the sphere of education as opposed to employment[105]. Unlike an employment situation, selecting a school is not a contractual choice made by the individual. To the extent that there is a choice at all, it is invariably made by parents or guardians who are under a public law obligation to ensure their child is educated[106]. Also, whilst the decision in *Stedman* was that the application was manifestly unfounded because it had nothing to do with Article 9, Bennett J had already accepted not only that was Article 9 engaged but also that Shabina's actions were motivated by her religious belief[107]. Bennett J seemed to hint at the distinction between acts that are *manifestations* of religion or belief which are protected by Article 9 and those acts that are merely *motivated* by religion or belief which do not fall under the ambit of Article 9[108]: However, this distinction cannot be applied to the facts since it is nonsensi-

[101] *Campbell and Cosans v United Kingdom* (1982) 4 EHRR 293 followed. The judge rejected a subsidiary submission that the school governors' imposition of their own interpretation of the Islamic dress code breached the claimant's Article 9(1) right that excludes the State from determining whether one's religion or belief is legitimate on the grounds that there was 'nothing unlawful, unreasonable or impermissible in that finding. It was open to the Committee on the evidence. On a fair reading of the Defendant's reasoning the Committee was not determining whether the Claimant's beliefs were legitimate': see paras 70- 71.

[102] Para 74.

[103] (1997) 5 EHRLR 544.

[104] See [2004] EWHC 1389, paras 72-74.

[105] In *Stedman*, the Commission held that the applicant's claim that her dismissal for working on Sunday was contrary to Article 9 was 'manifestly unfounded' because the applicant was dismissed for 'failing to work certain hours rather than for her religious beliefs as such and was free to resign and did in effect resign from her employment'. Bennett J reasoned that Shabina had chosen to enter a school outside her catchment area knowing full well what were the requirements by way of school uniform and had started a second academic year knowing and abiding by the same policy: at 9 para 73.

[106] See D Nice (ed) *Education and the Law* (London, Councils and Education Press Limited, 1986) 108.

[107] See above.

[108] See, for example, *Arrowsmith v United Kingdom* (1981) 3 EHRR 218 where the applicant was convicted for distributing leaflets to soldiers discouraging them from accepting postings to Northern Ireland. She claimed her conviction interfered with her right to manifest her pacifist belief under Article 9. The Commission held that Article 9 had not been violated on the grounds that although the applicant was 'motivated or influenced' by her belief, her conduct did not 'actually express the belief concerned'. The leaflets did not feature Pacifist sentiments but were rather opposed to the UK government's policy in Northern Ireland. The Commission thus held that 'the leaflets did not express pacifist views'. Her application failed because her action did not actually express that belief.

cal to claim that wearing religious dress does not constitute a manifestation of one's religion or belief[109].

It is unnecessary to stretch the *Stedman* authority to deny that the Article 9(1) right is engaged since it is far more satisfactory to use the fluid tests of Article 9(2) to reason that Article 9 is indeed engaged but that the limitation to the right can be justified[110]. The fact that Bennett J expressed an opinion on the applicability of Article 9(2), although it was not strictly necessary for his decision, reinforces this logic[111]. Bennett J held that the limitation was prescribed by law since the school uniform policy was clearly published. It was well known and perfectly clear to Shabina[112]. Further, the interference had the legitimate aim of being for the protection of the rights and freedoms of others[113], in the proper running of a multi-cultural, multi-faith, secular school[114]. It was necessary in a democratic society since the school uniform policy promoted a positive ethos and a sense of communal identity and there was a pressing social need in that the school uniform policy aimed to protect the rights and freedoms of a significant number of Muslim girls at the school who do not wish to wear the jilbab and feel pressure on them either from inside or outside the school[115]. Therefore, Bennett J held, albeit *obiter*, that the interference was justified under Article 9(2).

It is regrettable that the technical issue of exclusion was given such prominence by counsel and by Bennett J since this detracted from the consideration given to Article 9(2). The judge's acceptance of the parallel reasoning between *Stedman* and the instant case is also regrettable. The ease with which Bennett J shows that the Article 9(2) limitations were applicable further supports the contention that the case should properly have been

---

[109] This logic was recognised by Lord Nicholls in *R v Secretary of State for Education ex parte Williamson* [2005] UKHL 15, para 32: 'If … the belief takes the form of a perceived obligation to act in a specific way, then, in principle, doing that act pursuant to that belief is itself a manifestation of that belief in practice. … If acting pursuant to such a perceived obligation did not suffice to constitute manifestation of that belief in practice, it would be difficult to see what in principle suffices to constitute manifestation of such a belief in practice'.

[110] R Sandberg, 'Human Rights and Human Remains: The Impact of *Dödsbo v Sweden*' (2006) 8 *Ecclesiastical Law Journal* 452.

[111] At para 74.

[112] Furthermore, although there was 'no document which stated that if a pupil came to school dressed contrary to the school uniform policy the pupil would be sent home to change into the school uniform and return to school; nor that if the pupil refused to change into the school uniform she would or might not be allowed to return to school', this was 'well known' to pupils: 'It must have been obvious that if a student did not abide by it the Defendant would seek to persuade the pupil to observe it and if necessary enforce it by requiring the student to go home and change': at para 79.

[113] At para 90.

[114] At para 91. The Judge commented that counsel for the School 'rightly… did not press the argument very hard that the limitation was necessary for the protection of morals. He held that although 'the "public safety" and "for the protection of health" arguments put forward on behalf of the Defendant [were] overblown': 'No risk assessments, it is said, were carried out in respect of the jilbab. By inference it is said that had there been, the wearing of the jilbab would not have been shown to increase the danger of tripping on stairs or the risk of an accident in science or other similar lessons': para 88.

[115] At para 91.

decided on these grounds. In relation to Article 9, the judge's decision was correct but his reasoning was questionable.

(ii) Court of Appeal[116]

In the Court of Appeal, Shabina did not pursue her claim for damages. She merely apply for a declaration that she had been unlawfully excluded from school and that the exclusion breached her rights under Article 9 and Article 2 of the First Protocol[117]. Brooke, Mummery and Scott Baker LJJ reversed Bennett J's decision in the High Court and their reasoning differed considerably. Brooke LJ noted that the case raised three questions: namely, (a) whether Shabina had been excluded from school? (b) if she had, were her rights under Article 9(1) limited? and (c) if they were was this limitation justified pursuant to Article 9(2)?[118].

In relation to the question of exclusion, Brooke LJ held that the school 'undoubtedly did exclude the claimant'[119]. He found that that the 'statutory procedures and departmental guidance' had not been followed since 'education law does not allow a pupil of school age to continue in the limbo in which she found herself'[120]. Brooke LJ held that the exclusion meant that Shabina's right under Article 9(1) was being limited[121]. He found that Shabina believed that her religion prohibited her from displaying as much of her body as would be visible if she were wearing the shalwar kameeze[122]. He noted that the sincerity

[116] [2005] EWCA Civ 199.

[117] At para 17. She no longer sought a mandatory order that the school make arrangements for her return to school: para 80.

[118] At para 17. In relation to the claim surrounding Begum's right to education under Article 2 of the First Protocol to the ECHR, Brooke LJ simply held that he was 'satisfied that the claimant is entitled to this declaration without the need for any inquiry into the rights and wrongs of what actually happened during the two years in which she was away from school when the School maintained that it was trying to send schoolwork to her at home. Any such expedient would have been inferior to a proper education': see paras 17 and 79.

[119] Shabina was 'sent away … for disciplinary reasons because she was not willing to comply with the discipline of wearing the prescribed school uniform, and she was unable to return to the school for the same reason': para 24

[120] At para 24. Brooke LJ noted that under education law, exclusion means 'exclusion on disciplinary grounds' (citing School Standards and Framework Act 1998, s 64 and Education Act 2002, s 52). He noted that the guidance from the Department of Education and Skills stated that 'Exclusion should not be used for breaching school uniform' and that 'formal exclusion is the only legal method of removal. Informal and unofficial exclusions are illegal regardless of whether they are done with the agreement of parents or carers': Department for Education and Skills Circular 10/99, 6.4, Department for Education and Skills Guidance 0087/2003. See paras 19-22 of the judgment.

[121] At para 49.

[122] At para 49. Since in his view, 'the epithet "fundamentalist" has resonations which it would be inappropriate to carry into the discussion of the issues in this difficult case', Brooke LJ distinguished between 'very strict Muslims' who believe that it is mandatory for women to wear the jilbab' and 'liberal Muslims' whose 'South Asian culture has accustomed them to consider the shalwar kameeze to be appropriate dress for a woman': para 31. After citing passages from the Quran, Brooke LJ noted that these 'two differing view points, one more liberal, one more strict, recurred again and again' in the 'letters and expressions of opinion from a number of well-informed sources' that the parties had consulted: at paras 33, 40, 31. He noted that although the 'mainstream opinion among south Asian Muslims' was that 'a garment like the shalwar kameeze (coupled with a headscarf) complies sufficiently with Islamic dress requirements', there was a 'minority view' that 'received respectable support' and was 'sincerely held' that 'the shalwar kameeze, even when it

of this belief was not in issue in these proceedings and that the Article 9 right 'excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate'[123]. Mummery LJ agreed. He held that it was no answer that she could have attended school if only she had worn the uniform and that it was irrelevant that she could have changed schools to accommodate her religious beliefs since she was not in the same position as an employee; rather there was a statutory duty to provide education and the school did not follow the proper statutory procedure for excluding her[124]. Brooke LJ held that there was thus a breach of Article 9(1) and that 'as a matter of Convention law it would be for the School, as an emanation of the state, to justify the limitation on her freedom created by the School's uniform code and by the way in which it was enforced'[125].

In its treatment of Article 9(1), the Court of Appeal approach is more satisfactory than that of Bennett J since it better embraces the spirit of the ECHR. However, whilst Bennett J's treatment of Article 9(2) was exemplary, the Court of Appeal – in the opinion of one commentator - hid 'under the blanket of procedure' producing a regrettable and erroneous approach imposing 'a stifling culture of formalism on public administrators that is quite at odds with the substantive objectives' of the Human Rights Act 1998[126]. Brooke LJ held that the school uniform limitation was prescribed by law in the Convention sense; there was a basis for the limitation in domestic law since 'the governors were entitled by law to set a school uniform policy for the School'; and the limitation itself was 'accessible and clear' since the Governors had 'published a clear, written policy which was available to all who might be affected by it'[127]. However, he failed to address adequately the question of whether the limitation had a legitimate aim. Despite noting that the only possible legitimate aims under Article 9(2) were that of public order or the protection of the rights and freedoms of others'[128], he failed to state definitively whether the limitation pursued these aims[129]. By inference, he must have concluded that it did not.

---

goes down to mid-calf, is not compliant, and that a garment like the jilbab, which disguises the shape of the wearer's arms and legs, is required': para 48.

[123] Para 49, quoting with approval the decision of the European Court of Human Rights in *Hasan and Chaush v Bulgaria* (26 October 2000: Appln No 30985/96) at para 78.

[124] Para 84. Note also that Mummery LJ was one of three judges in the Court of Appeal whose recent decision has given support to the revisiting of a line of English authorities concerning the accommodation of religious practices in the workplace: see *Copsey v WWB Devon Clays Limited* [2005] EWCA Civ 932.

[125] Para 49.

[126] T Poole, 'Of Headscarves and Heresies: The *Denbigh High School* Case and Public Authority Decision Making Under the Human Rights Act' [2005] *Public Law* 685 at 694 (Hereafter Poole 'Of Headscarves and Heresies').

[127] Para 60.

[128] He noted that 'There was no suggestion that the protection of public morals had any relevance'. Furthermore, 'a justification on health and safety grounds was dismissed by the judge and not resurrected on the appeal once evidence had showed that other schools (including the local school which the claimant now attends) had been able to accommodate girls wearing the jilbab without any serious concern being raised on that ground': para 50.

[129] See paras 51-56. He quotes from the witness statements of Mrs Bevan the Headteacher, Mr Connor the Deputy Headteacher and Mr Moore the Assistant Headteacher to show that there was concern among

Brooke LJ's analysis of whether the limitation was necessary in a democratic society was also novel[130]. He claimed, correctly in our view, that he was unable to derive any assistance from the cases the court was shown which related to employment disputes[131]. However, although he states that *Sahin* was important in showing the structured way in which issues of this kind are to be considered under the Convention'[132], Brooke LJ misconstrued how the court should apply that structure. Rather than deciding whether such a restriction could be justified as being necessary in a democratic society, he outlined the decision-making structure which the school should have used since, on his findings, the onus lay on the school to justify its interference with the Convention right[133]. This rests on a basic mistake[134]. Whilst courts apply such a proportionality test when reviewing decisions of public authorities after they have been made, there is nothing in the Human Rights Act, the ECHR or Convention jurisprudence that requires public authorities themselves to adopt a proportionality approach to the structuring of their own decision-making[135].

Brooke LJ contends that the school should have started from the premise that Shabina had a right which is recognised by English law rather than the premise that its uniform policy was there to be obeyed and if she did not like it, she could go to a different school[136]. This may be so, but Brooke LJ's assertion that there is a designated decision-making structure that the school should have followed is patently absurd[137]. Unfortunately it was supported by his fellow judges, Scott Baker LJ and Mummery LJ, who commented that the school could justify its decision by a structured reconsideration of the relevant

pupils, parents and staff that the jilbab was 'associated with extreme views': at para 51. He also notes that Bennett J thus held that the school uniform policy 'protects the rights and freedoms of not an insignificant number of Muslim female pupils who do not wish to wear the jilbab and either do, or will feel pressure on them to do so from inside or outside the school': at para 59. However, he does not seem to pass any comment approving or disapproving of this analysis.

[130] Curiously, he talks of the test of 'necessity' and does not use the fuller term 'necessary in a democratic society' as used in the text of Article 9(2) itself, apart from when he is referring to decisions of the European Court of Human Rights.

[131] Para 62.

[132] Ibid. He reasons that *Sahin* made it clear that 'a decision-maker is entitled to take into account worries like those expressed by the senior teaching staff of the School when it is deciding whether it is necessary to prohibit a person like the claimant from manifesting her religion or beliefs in public in the way in which she would wish'. para 72.

[133] Paras 75-76.

[134] Poole, 'Of Headscarves and Heresies' 689-690.

[135] Ibid.

[136] Para 76.

[137] He prescribes the following: '(1) Has the claimant established that she has a relevant Convention right which qualifies for protection under Article 9(1)? (2) Subject to any justification that is established under Article 9(2), has that Convention right been violated? (3) Was the interference with her Convention right prescribed by law in the Convention sense of that expression? (4) Did the interference have a legitimate arm? (5) What are the considerations that need to be balanced against each other when determining whether the interference was necessary in a democratic society for the purpose of achieving that aim? (6) Was the interference justified under Article 9(2)?'. Para 75.

issues[138]. Brooke LJ outlined some of the matters which it (and other schools facing a similar question) would no doubt need to consider'[139]. Mummery LJ supported 'the need for teachers and governors to be given authoritative written guidance on the handling of human rights issues in schools'[140].

The absurdity of the Court of Appeal's decision is exposed in the concluding remarks made in the judgments. Brooke LJ makes no mention of Shabina's rights but rather concludes that her appeal must be allowed because the school has lost its entitlement to resist the declarations she seeks on the grounds that the school approached the issues in this case from an entirely wrong direction and did not attribute to her beliefs the weight they deserved[141]. Scott Baker LJ's short concurring speech became somewhat surreal as he contended that there must have been a breach of Article 9 because it is not possible to know whether the particular circumstances at the school would have led the school to decide whether it was justified under Article 9(2)[142]. It was not surprising the warped logic and confused analysis in the Court of Appeal was revisited in the House of Lords.

(iii) House of Lords[143]

Whilst the House of Lords' decision is welcome in that it corrects the Court of Appeal's overly formulaic interpretation of Article 9(2), it is regrettable that the majority of their Lordships repeated and compounded the error originally made by Bennett J. Their Lordships properly concluded that there had been no breach of Shabina's Convention rights but their understanding and application of Article 9(1) is still questionable. For

[138] Mummery LJ noted that the 'process of justification … involves a careful and wise analysis in the very difficult and sensitive area of the relation of religion to various aspects of the life of the individual living in community with other individuals, who also possess rights and freedoms'. If the school could 'justify its stance on the school uniform policy' then 'there would be no breach of the Article 9(1) right': paras 86-87. Scott Baker LJ commented that 'had the School approached the problem on the basis … that the claimant had a right under Article 9(1) to manifest her religion, it may very well have concluded that interference with that right was justified under Article 9(2) and that its uniform policy could thus have been maintained'. However, the school had been erroneous in deciding that 'because the shalwar kameeze was acceptable for the majority of Muslims the claimant should be required to toe the line': at para 92.

[139] Namely:'(i) Whether the members of any further religious groups (other than very strict Muslims) might wish to be free to manifest their religion or beliefs by wearing clothing not currently permitted by the school's uniform policy, and the effect that a larger variety of different clothes being worn by students for religious reasons would have on the School's policy of inclusiveness; (ii) Whether it is appropriate to override the beliefs of very strict Muslims given that liberal Muslims have been permitted the dress code of their choice and the School's uniform policy is not entirely secular; (iii) Whether it is appropriate to take into account any, and if so which, of the concerns expressed by the School's three witnesses as good reasons for depriving a student like the claimant of her right to manifest her beliefs by the clothing she wears at school, and the weight which should be accorded to each of these concerns; (iv) Whether there is any way in which the School can do more to reconcile its wish to retain something resembling its current uniform policy with the beliefs of those like the claimant who consider that it exposes more of their bodies than they are permitted by their beliefs to show': para 81.

[140] Para 89.

[141] Para 78.

[142] Para 94.

[143] [2006] UKHL 16.

convenience, it is helpful to consider collectively their Lordships' analysis on whether the school uniform policy constituted a breach of Article 9(1) and whether, if it did, this could be justified under Article 9(2)[144].

The majority (Lords Bingham of Cornhill, Hoffmann and Scott of Foscote) held that there had been no interference with Shabina's rights under Article 9(1); Lord Bingham held that although Article 9(1) of the ECHR was 'engaged or applicable' because Shabina sincerely held the religious belief which she professed to hold[145], Article 9 does not protect all acts motivated or inspired by belief [146]. However, the authorities his Lordship relied on are suspect. Lord Bingham was correct that the Strasbourg court held in *Kalac v Turkey*[147] that 'in exercising his freedom to manifest his religion, an individual may need to take his specific situation into account' but Kalac's 'specific situation' was his membership of the armed forces which he had accepted voluntarily[148]. Lord Bingham's quotation from *Ahmad v United Kingdom*[149] is also somewhat selective. Although the Commission recognised that the Article 9 right was 'influenced by the situation of the person claiming that freedom', Lord Bingham omits to mention that the Commission qualified this statement by noting that 'The Commission has recognised this in the case of a detained person, and in the case of a person with special contractual obligations'[150]. Lord Bingham overstates the Strasbourg jurisprudence; the need to take into account one's

[144] In relation to the other claims made by Shabina, Lord Bingham of Cornhill, Lord Hoffmann and Lord Scott of Foscote held that she had not been excluded from the school and that there had been no violation of her right not to be denied education under Article 2 of the First Protocol of the ECHR. Lord Bingham and Lord Hoffmann both referred to *Abdul Hakim Ali v Head Teacher and Governors of Lord Grey School* [2006] UKHL 14, a case considered at the same time and by the same appeal committee as *Begum*. This case examined in depth the 'right to education' issue. Lord Bingham held that Shabina had not been denied 'access to the general level of education provision available in this country' and that 'the school did not intend to exclude [her] in the statutory sense of that word, nor did it believe that it was doing so': paras 36, 38. Lord Hoffmann held that Article 2 of the First Protocol 'confers no right to go to any particular school. It is infringed only if the claimant is unable to obtain education from the system as a whole': para 69. Therefore, this right was not infringed. Lord Scott stated 'if the conclusion that the school was entitled to have a school uniform policy that did not allow Shabina to wear a jilbab is right, as in my opinion it is, it must follow that the school did not by requiring her to wear the school uniform commit any breach of her Convention right to education': para 90.

[145] He noted that it did not matter that 'her belief may have changed' or that 'it was a belief shared by a small number of people'. Furthermore, the fact that Article 9(1) was engaged in itself made the case 'a significant case, since any sincere religious belief must command respect, particularly when derived from an ancient and respected religion': at para 21.

[146] Para 22. This is not contentious: it is well established by Strasbourg case law that the word 'practice' in Article 9(1) does not extend to acts motivated by religion or belief, only those acts that are manifestations of religion or belief. See *Arrowsmith v United Kingdom* (1981) 3 EHRR 218. See also Lord Nicholl's interpretation of this case in *R v Secretary of State for Education and Employment and others ex parte Williamson* [2005] UKHL 15 at para 32. To be a manifestation, the act must be 'intimately linked' to the belief.

[147] (1999) 27 EHRR 552 para 27.

[148] As the Court expressed it: 'In choosing to pursue a military career Kalac was accepting of his own accord a system of military discipline that by its very nature implied the possibility of placing on certain of the rights and freedoms of members of the armed forces limitations incapable of being imposed by citizens': (1999) 27 EHRR 552 para 28.

[149] (1981) 4 EHRR 126 para 11.

[150] (1981) 4 EHRR 126 para 11.

situation applies only in certain circumstances. His quotation from *R v Secretary of State for Education and Employment and others ex parte Williamson*[151] also requires further examination: Lord Bingham quotes Lord Nicholls as stating that 'what constitutes interference depends on all the circumstances of the case, including the extent to which in the circumstances an individual can reasonably expect to be at liberty to manifest his beliefs in practice'[152], but omits to mention that Lord Nicholls found that there was 'no comparable special feature' on the facts of that case.[153] The *Kalac* dictum, it is submitted, is not of universal application. It only applies where someone has voluntarily submitted to an internal system of rules, but the majority in the House of Lords seem to suggest that it is the norm.

Following this misreading of *Kalac v Turkey*, Lord Bingham boldly asserts that '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 practise or observe his or her religion without undue hardship or inconvenience'[154]. He outlines this proposition by reference to a number of Strasbourg cases on employment and education. However, although the *Kalac* principle undoubtedly applies to the employment cases in that the voluntary submission to a contract of employment creates a 'specific situation' which may effectively limit the employee's right, there is no authority for an extension of this principle to the sphere of education.

Furthermore, the education cases cited by Lord Bingham are not directly analogous to the instant case. His Lordship's assertion that *Kjeldsen, Busk Madsen and Pederson v Denmark*[155] is authority for the fact that a 'parent's philosophical and religious objections to sex education in state schools was rejected on the ground that they could send their children to state [sic] schools or educate them at home'[156] is not supportable. The reference to being able to choose another school was undoubtedly *obiter*[157], the case was decided on the finding that there was no indoctrination and thus no breach of the second sentence of Article 2 of the first Protocol. Furthermore, unlike *Begum*, this case concerned the rights of the parents not the child[158]. Lord Bingham's comment that *Karadu-*

[151] [2005] UKHL 15.

[152] Lord Nicholl's phrase is suspect in that there seems to be no authority backing the notion that there exists a separate 'reasonableness' test.

[153] [2005] UKHL 15 paras 38-39.

[154] Para 23.

[155] (1979) 1 EHRR 71.

[156] Para 23.

[157] Although the Court recognised that the parents had the right to 'educate them or have them educated at home' it recognised that this would mean 'suffering the undeniable sacrifices and inconveniences caused by recourse to one of those alternative solutions': para 54.

[158] Lord Bingham's citation of this case is curious. The case does not suggest that the school environment creates a 'specific situation' which may effectively limit the pupils' right to manifest. Nothing in this case suggests that pupils have 'voluntarily accepted an employment or role' which limits their Article 9 rights. On

man v Turkey[159] is a 'strong case' is contestable in that although it supports the assertion that the *Kalac* principle applies to students in higher education[160], it is difficult to see how this rationale can apply to state schools. The employment case law may legitimately be extended to higher education due to the existence of a contractual relationship between student and university. However, unlike a university student, a school pupil has not voluntarily accepted an employment or role which can then serve to limit his Article 9 rights.

Lord Bingham's assertion that there exists 'a coherent and remarkably consistent body of authority… which shows that interference is not easily established' again seems to overstate the law[161]. Mummery LJ in *Copsey v WBB Devon Clays Ltd*[162] summarised the clear line of decisions by the Commission as saying that 'Article 9 is not engaged where an *employee* asserts Article 9 rights against his employer in relation to his hours of working'[163]. Although the other cases cited above extend this beyond the employment sphere to include other voluntary contractual submissions to rules such as joining the military or enrolling at a university, outside these situations there is no support for the very broad proposition that 'interference is not easily established'.

Lord Hoffmann was similarly convinced that the case law was clear that there was no infringement of Article 9, relying on *Jewish Liturgical Association Cha'are Shalom Ve Tsedek v France*[164], where it was held that an alternative means of accommodating religious beliefs had to be impossible before a claim of interference under article 9 could succeed. This is curious since both Lord Hoffman and Lord Bingham questioned the *ratio* of this case: for Hoffmann, "impossible" may be setting the test rather high'[165]. Nonetheless each proceeded to adopt a watered down version of the test they had previously criticised. Lord Hoffmann, for instance, was critical of the Court of Appeal for distinguishing the employment cases 'on the grounds that it was not relevant to compare Shabina's position with that of an employee who was free to leave his employment', arguing that it was irrelevant that her choice was not contractual since 'it was a choice which she could have made'[166]. This suggests that provided there is a choice then an applicant's Article 9 right

---

similar grounds, his Lordship's analogy with *Valsamis v Greece* (1996) 24 EHRR 294 can be discounted. The case was about the right of the parents not the child. There is no suggestion that a school's disciplinary rules trump Article 9. Indeed, it is difficult to find any definitive statement to support the point Lord Bingham makes in the paragraph he cites: para 23

[159] (1993) 74 DR 93.

[160] The case recognised that the applicant's Article 9 rights were limited because she had chosen to pursue higher education in a secular university and had voluntarily submitted to university rules. It was the university rules 'which may make the freedom of students to manifest their religion subject to restrictions as to place and manner intended to ensure harmonious coexistence between students of different beliefs': (1993) 74 DR 93 at 108.

[161] Para 24.

[162] [2005] EWCA Civ 932.

[163] Ibid at para 31, emphasis added.

[164] (2000) 9 BHRC 27.

[165] Para 52.

[166] Paras 56-57.

to manifest is not even engaged. This sounds suspiciously similar to the *Jewish Liturgical* 'impossibility' test; the very one earlier disapproved of.

Lord Scott of Foscote used the Strasbourg case law to extrapolate a 'principle' concerning what he called the Article 9(2) right to manifest religion[167], namely 'a rule of a particular public institution that requires, or prohibits, certain behaviour on the part of those who avail themselves of its services does not constitute an infringement of the right of an individual to manifest his or her religion merely because the rule in question does not conform to the religious beliefs of that individual', especially 'where the individual has a choice whether or not to avail himself or herself of the services of that institution, and where other public institutions offering similar services, and whose rules do not include the objectionable rule in question, are available'[168]. However, his Lordship offered no binding authority as to why this should be applied to school pupils. Surely the choice of school (if there is one) rests with the parent or guardian; the concept of pupils as consumers is not properly arguable.

The confused understandings of the Convention case law within the speeches of the majority undermine their conclusions in relation to the alleged breach of Article 9(1).

Their Lordships reason that there was no breach of Article 9 because Shabina was free to attend another school[169] but such a proposition relies upon the extension of the *Kalac* principle to the school/pupil relationship and no legal basis for this is given. It is regrettable that the judgements of the minority do not address this issue. Lord Nicholls of Birkenhead simply says that he was not sure whether there had been interference with the Shabina's Article 9(1) right[170] whilst Baroness Hale of Richmond developed an argument that, although persuasive, was not couched in terms of the Strasbourg jurisprudence[171]. Lord Nicholls noted that he would prefer to state that there was interference with Article 9 and then to consider whether that interference was justified since this would require the public authority to 'explain and justify its decision'[172]. Had the majority heeded his

[167] Para 85. This was erroneous in that the right is contained in Article 9(1); Article 9(2) simply contains the limitations for the exercise of that right.

[168] Para 87.

[169] Lord Hoffmann noted that although Shabina's 'right was not … infringed because there was nothing to stop her from going to a school where her religion did not require a jilbab or where she was allowed to wear one': para 50. Lord Bingham noted that since Shabina's family chose the school from outside their own catchment area, that the school went to unusual lengths to inform parents of its uniform policy and that there was no evidence to show that there was any real difficulty in her attending another school: para 25.

[170] Para 41. This is especially regrettable given Lord Nicholl's seminal speech on Article 9 in *Williamson* (supra).

[171] Stressing that 'the choice of secondary school is usually made by parents or guardians rather than by the child herself' and that 'the child is on the brink of, but has not yet reached, adolescence', Baroness Hale professed herself 'uneasy' with the argument that Shabina 'had chosen to attend this school knowing full well what the school uniform was' and that 'it was she who had changed her mind about what her religion required of her, rather than the school which had changed its policy'. She noted that, 'it cannot be assumed, as it can with adults, that these choices are the product of a fully developed individual autonomy': paras 92-93.

[172] Para 41.

words, their analysis would have been more satisfying, being based fully upon Article 9(2), provided the formulaic approach of the Court of Appeal was avoided[173].

Their Lordship's treatment of Article 9(2) was less comprehensive than that of the Court of Appeal, largely because the majority had decided that there had been no interference under Article 9(1). Nevertheless, when read together the speeches elucidate how the separate requirements laid out in Article 9(2) were met.

Lord Bingham noted if there was an interference it would be prescribed by law since 'the school authorities had statutory authority to lay down rules on uniform, and those rules were very clearly communicated to those affected by them'[174]. Lord Bingham, Lord Hoffmann and Baroness Hale all agreed that such interference would have the legitimate aim of protecting the rights and freedoms of others'[175]. In relation to whether the interference was 'necessary in a democratic society' Lord Bingham and Baroness Hale gave great weight to whether the interference was proportionate[176]. For Baroness Hale, the question of proportionality in the instant case was a more 'difficult and delicate question' than 'it would be in the case of many similar manifestations of religious belief'[177]. She concluded that the school's uniform policy 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'[178]. Drawing upon *Sahin*[179], Lord Bingham concluded that that the interference with the Article 9(1) right was proportionate since the school 'had taken immense pains to devise a uniform policy which respected Muslim beliefs but did so in an inclusive, unthreatening and uncompetitive way'[180].

Interestingly, Lords Bingham and Hoffmann hinted at a domestic 'margin of appreciation' similar to that exercised at Strasbourg. Although Lord Hoffmann noted that this concept has 'no application' in domestic courts since 'it is for the courts of the United Kingdom to decide how the area of judgment allowed by that margin should be distributed between the legislative, executive and judicial branches of government',[181] he nevertheless noted that 'in some circumstances it will be appropriate for the courts to recognise

[173] It is significant that Lords Bingham and Hoffman still felt it necessary to consider Article 9(2) in depth anyway; cf. Lord Scott who confused the two parts of Article 9, speaking erroneously of the Article 9(2) right to manifest religion: para 85.

[174] Para 26.

[175] *Per* Lord Bingham at para 26, Lord Hoffmann at 58 and Lady Hale at 94.

[176] *Per* Lord Bingham para 26, Lady Hale at para 94. In contrast, the existence of a 'pressing social need' was barely discussed.

[177] Para 94. Drawing upon various sources, she noted that 'the sight of a woman in full purdah may offend some people, and especially those western feminists who believe that it is a symbol of her oppression, but that could not be a good reason for prohibiting her from wearing it': para 96.

[178] Para 98.

[179] Para 32.

[180] Para 34.

[181] Para 63.

that there is an area of judgment within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body or person whose act or decision is said to be incompatible with the Convention'[182]. Lord Bingham noted that it would 'be irresponsible of any court, lacking the experience, background and detailed knowledge of the headteacher, staff and governors, to overrule their judgment on a matter as sensitive as this. The power of decision has been given to them for the compelling reason that they are best placed to exercise it, and I see no reason to disturb their decision'[183]. As Lord Hoffmann put it, a 'domestic court should accept the decision of Parliament to allow individual schools to make their own decisions about uniforms'[184]. He noted that 'in applying the principles of *Sahin v Turkey* the justification must be sought at the local level and it is there that an area of judgment, comparable to the margin of appreciation, must be allowed to the school'.[185] Although the concept of a domestic margin of appreciation is in its infancy, and as yet poorly articulated by the senior judiciary, there is much to be said for a generous reading of Article 9(2) which permits local circumstances to feature in the evaluation of the precise borders of any limitation on freedom of religion.

Although the actual decision by the House of Lords is consistent with Strasbourg jurisprudence, the treatment of Article 9 by the majority will have an uncertain effect upon future judicial decisions surrounding freedom of religion. In relation to the issue of the Islamic headscarf in schools, *Begum* seems to extend the *Kalac* principle to the school/pupil relationship meaning that being in school is now a situation that the individual must take into account in manifesting his right to freedom of thought, conscience and religion. Indeed, some seem to go further, suggesting that there will be no breach of the right to manifest if the restriction is not mandatory in that one can choose an alternative which permits manifestation. Although the majority followed other domestic decisions in criticising the 'impossibility' test in *Jewish Liturgical Association*, they ended up embracing a similar high standard. In doing so the House of Lords restricted Article 9(1) quite unnecessarily given that legitimate limitations on the right are easily justified under Article 9(2). Indeed, the remarks of Lords Bingham and Hoffmann serve to widen the Article 9(2) limitations still further, essentially suggesting that domestic courts should defer decision-making to the public authority in question. Although Lord Bingham stressed that the *Begum* case concerned 'a particular pupil and a particular school in a particular place at a particular time' and did not constitute a ruling on whether Islamic dress, or any feature of

[182] Para 63. He quoted with approval the words of Lord Hope in *R v Director of Public Prosecutions, Ex p Kebilene* [2000] 2 AC 326, (at 380-381) that the Convention 'should be seen as an expression of fundamental principles rather than as a set of mere rules'.

[183] Para 34. This resonates with the approach endorsed by the House of Lords regarding the discretion of the BBC to regulate party political advertising: see *R (on the application of ProLife Alliance) v British Broadcasting Corporation* [2002] 3 WLR 1080, discussed in M Hill, 'Freedom of Expression: Defining the Limits for Broadcasters' (2004) 7 *Ecclesiastical Law Journal* 466.

[184] Para 64.

[185] Para 64.

Islamic dress, should or should not be permitted in the schools of this country',[186] it is clear that this case will have a major impact not just upon religious dress but also upon freedom of religion more generally.

MUSLIM HEADSCARVES IN ENGLISH SCHOOLS

Although England has not witnessed a 'headscarves in school' case, numerous developments over recent years concern religious dress. The effect of some of these provisions has yet to be fully experienced and it is too early to assess the long-term legacy of the *Begum* decision. Nevertheless it is remains the case that historically, English law accommodated religious dress, through permissive neutrality rather than positive right. *De facto* individual rights were only limited by 'contexts of power'[187]. Although the Race Relations Act 1976 gave express anti-discrimination rights to racial groups, its protection did not extend to Muslims *per se*. However at common law, a broad right still existed, the boundaries of which were deliberately indistinct.

Although discrimination on grounds of religion or belief is now protected by law, the law relating to schools (in the Equality Act 2006), is new and as yet untested. Early cases in relation to employment under the Employment Equality (Religion or Belief) Regulations 2003 are not particularly instructive. The Human Rights Act 1998 provides a positive right to religious freedom which necessitates a revisiting of the earlier authorities. The application of the Act in relation to a specific form of religious dress is to be found in the case of *Begum* at first instance and two appellate levels. Although we agree with the decision of the House of Lords, its application of Article 9(1) of the ECHR is flawed. The judgements of the majority seem to suggest that being at a school is a situation which of itself may curtail liberty to practise one's religion. This, in our view, is predicated upon a false analogy with the employment field, in which contracts may be freely entered into, containing such implied or express terms as may be appropriate. This flawed reasoning, however, may have a greater legitimacy in the discussion under Article 9(2) where the nature of the educational institution, in its particular local culture and environment, is a valid factor for consideration under the umbrella of the legal limitation on freedom of religion. To that extent, we anticipate that the concept of a domestic margin of appreciation is likely to gain currency. This is to be welcomed.

Begum might seem to suggest that despite the enactment of the Human Rights Act 1998, there remains no legal right for a Muslim to wear a headscarf in school. We disagree. Extending the limitation in the enjoyment of religious liberty to the educational sphere may alter the focus of the debate. However, one must bear very much in mind that the school uniform policy in *Begum* permitted the wearing of headscarves. The line was

[186] Para 2.
[187] Rivers, 'Religious Dress'.

drawn – after extensive consultation – at the jilbab. Had Shabina wished merely to wear the headscarf, this would have been permissible under the school uniform policy, pursuant to subsisting English common law.

CONCLUSIONS

The question of the wearing of the headscarf in the public square has not created any degree of controversy in England of the type experienced in France, the USA, or certain German länder. This is because historically and sociologically England has approached multi-culturalism in a permissive manner. Passive accommodation has been the guiding principle as opposed to regulation and express consent. This long-standing background is in the process of yielding to a fresh approach occasioned by a raft of specific legislation (mainly of a anti-discrimination nature) and by the fact that the actions of public authorities must be Convention-compliant by dint of the Human Rights Act 1998. The solidity of the common law rests on its longevity. Repeatedly applied but subtly nuanced, it comprises broad principles of universal application, refined and distilled over centuries. The modern legislation, enforced in the new landscape of the Human Rights Act 1998, lacks both the subtlety and the nuance. The judiciary, as the *Begum* case makes plain, are struggling to find a vocabulary to articulate a consistent and predictable jurisprudence. Whereas the common law takes the good of the society as its starting point, the recent rights-based legislation is essentially individualistic. The judges have a tendency to lose their way in the boggy marshland of the Article 9(1) right prior to establishing a more secure footing on the solid ground of public policy to be found in the Article 9(2) limitations. In this safe, firm and familiar position the judges can congregate, take in the topography, and chart a way forward.

These are early days. We consider that both Bennett J and the House of Lords got the decision right. This represents centuries of tolerant, fuzzy-edged liberalism, yet with the capacity to define long-stop boundaries when the circumstances so dictate. It also makes an appropriate nod in the direction of deference to the discretion of the decision maker. Their reasoning is not beyond criticism, and will need to be reconsidered as the new legislation beds itself in. One matter to be particularly applauded is the robust rejection of the overly formulaic approach of the Court of Appeal, taking as its starting point (erroneously) not the right of the individual but the process of the public body. The English judiciary is searching for a new vocabulary. This will come, but in the meantime we can be assured that religious dress will continue to be accommodated whenever possible and that there will be an onus on public authorities to adduce evidence and argument to help delineate the outermost limits of tolerance. The existence of an established church places religion –all religion– in a prominent place in public life. There is no principle of secularity or laïcité to defend. The headscarf is not itself objectionable in English schools. Other cases concerning particular types of dress will, for the future, be determined on a case by

case basis having regard to the broad principles identified in this paper, but with due regard being paid to prevailing local circumstances.