THE CROWN COURT AT BLACKFRIARS

THE QUEEN

v.

D (R)

JUDGMENT OF H.H. JUDGE PETER MURPHY IN RELATION TO WEARING OF NIQAAB BY DEFENDANT DURING PROCEEDINGS IN CROWN COURT

Counsel for the Prosecution: Ms. Kate Wilkinson
Counsel for the Defence: Ms. Susan Meek

Introduction

1. The defendant, to whom I shall refer in this judgment as D, is a woman who has been charged on indictment at this court with a single count of witness intimidation. The facts alleged are not relevant for the purposes of this judgment, except for the fact that the defendant is alleged to have committed the offence while wearing the burq'a and niqaab,[1] and no issue of visual identification will arise at trial.

2. The question now before me was initially raised by the Court of its own motion, and not by the prosecution or the defence. The case was listed before me for a plea and case management hearing on 22 August 2013. A person, who both the prosecution and the defence agreed was D, appeared and surrendered to the dock. D was wearing a burq'a and niqaab. (I understand that burq'a is the term applied to the black loose shroud which covers the head and body, and that niqaab is the term applied to the black veil which covers the entire face, except for the eyes. In case my understanding is wrong, and so that there is no doubt, my concern is with the covering of the face, by whatever means that may be achieved. I am not concerned with any

[1] As frequently happens with words of foreign origin, various spellings are found in different sources. For simplicity, I have adopted uniform spellings of niqaab and burq'a.

other aspect of D's dress or appearance.) When I refer to the niqaab in this judgement, I refer to a covering of the face.

3. Through her counsel, I conveyed to D the court's request that she reveal her face (but no other part of her body) for the purpose of identification. After conferring with D, counsel said that D declined to comply with my request because her Muslim faith requires that she may not reveal her face in the presence of men. It may be that this refers to men who are not members of her immediate family.

4. I decided to take time to consider the matter. I adjourned the hearing until 12 September 2013, to be listed before me for further proceedings including legal argument, and extended the defendant's bail until that date. It became clear to me that, because the issue of the niqaab was bound to recur during the proceedings, it would be desirable to deal with it on a broader basis during the plea and case management hearing. I asked counsel to submit skeleton arguments dealing with the way in which the Court should approach the matter. I received skeleton arguments from both parties, and heard oral argument on the adjourned date. I am extremely grateful to both counsel for their clear, well-judged, and helpful submissions. I also received an expert report from Professor Susan Edwards, an expert witness on Gender and Islamic Dress, which was prepared on behalf of D.

5. At the hearing on 12 September 2013, I allowed the defendant to be identified by means of evidence from P.C. Hughes, a female police officer who knows D, and who observed D in private without her niqaab during a short adjournment for that purpose, and was able to say that she was certain that the person before the Court was in fact D. D was arraigned and pleaded not guilty to the sole count of the indictment. I conducted a general plea and case management hearing and heard argument about what further directions, if any, should be given about the wearing of the niqaab during the proceedings. Having heard argument, I adjourned the case further until 16 September 2013, to prepare this judgment.

Question to be Decided

6. The question is to what extent D is entitled to wear the niqaab during proceedings against her in the Crown Court. The plea and case management hearing is the occasion on which the judge should give directions for the proper management of the case, and this is, therefore, the proper occasion to consider the question of the niqaab generally in relation to the proceedings. No purpose would be served by re-opening the question every time the defendant comes before the Court for another appearance or hearing. Moreover, it is right that D should be aware of the directions given as soon as possible, so that she has ample time to consider her position further and take advice as needed. Thus, the purpose of this judgment is essentially to give further directions for the conduct of the proceedings.

7. I make clear at the outset that I address only the case of a defendant before the Crown Court. I do not intend to address the practice of Courts other than the Crown Court, especially that of civil or family Courts, in which other considerations may come into play. The practice of these courts differs greatly from that of the Crown Court. Cases are almost always heard by a judge sitting without a jury. In some proceedings in family courts, the procedure may be less adversarial and may lean more towards an inquisitorial approach. Ms. Wilkinson referred me to a decision of Macur J in the Family Division (*SL v. MJ* [2006] EWHC 3743 (Fam)) in which an informal compromise was arrived at. I will refer to it again later. The rules of evidence applicable to criminal trials are not applied, or are not applied as strictly, in civil and family cases and are subject to an ultimate judicial discretion. Most importantly, the panoply of procedural and evidential structures which are necessary when a person is accused of a criminal offence can be dispensed with.

8. Nor do I address the situation in which a woman wearing a niqaab attends the Crown Court solely as a witness, or as a juror, or appears as an advocate. I accept that there are different considerations in these instances. For example, the public has a strong interest in encouraging women who may be the victims of crime from coming forward, without the fear that the court process may compromise their religious beliefs and practices. On the other hand, the rights of the defendant in any resulting criminal proceedings must also be protected. So there is a potential for a challenging

conflict of competing public interests. A defendant may, of course, be a witness; but this does not define her role in the proceedings. As a defendant, she plays the central role throughout proceedings, and unlike a witness, she is brought before the court under compulsion and does not appear as a matter of choice. I hope that my observations may be helpful to judges who may have to confront these situations in future cases. But these questions are not before me, and must await another day.

The Need for Legal Principle

9. There is a pressing need for a court to provide a clear statement of law for trial judges who have to deal with cases in which a woman wearing the niqaab attends Court as a defendant. Given the ever-increasing diversity of society in England and Wales, this is a question which may be expected to arise more and more frequently, and to which an answer must be provided. I have found no authority directly on point in our domestic law. There are various extra-judicial sources which offer some guidance as a matter of general principle.

10. The Equal Treatment Bench Book (JSB 2004, Chapter 3.3, 2007) offers what the Bench Book itself describes as general guidance about the wearing of religious dress in the courtroom. Both counsel and Professor Edwards allude to this guidance, and I do not mean to disregard it, though I cannot agree with Professor Edwards' stark conclusion that '[i]n the UK the JSB permits the wearing of niqaabs'. The Bench Book rightly emphasises that, while various approaches are possible, the Court must balance any competing interests: but it concludes that 'the interests of justice remain paramount'. It rightly draws attention to the question of why, and to what extent, the judicial function may be impeded if a participant in the proceedings has her face covered. It rightly points out that the stress of appearing as a defendant may be increased, and the quality of any evidence she gives may be affected, if a defendant is obliged to uncover her face. The judge must weigh all these matters. In conclusion, the Bench Book says that 'the best way of proceeding comes down to basic good judge craft'.

11. It is at this point that I respectfully depart from the Bench Book. The issue of whether a defendant before the Crown Court may wear the niqaab during some or all

the proceedings is not one of 'judge craft', or even one for 'general guidance'. It is a question of law. The defendant has the qualified right to manifest her religion or belief pursuant to art. 9 of the European Convention on Human Rights ('the Convention'). By virtue of the Human Rights Act 1998, that right is cognisable as a matter of domestic law in the Crown Court. By virtue of s.6(1) and (3) of that Act, the Court is a public authority and may not act in a way incompatible with a Convention right. At the same time, the Court may be entitled to place restrictions on a qualified Convention right, such as that under art. 9. There is a line of judicial authority on that subject in the jurisprudence of the European Court of Human Rights (ECHR). There is domestic judicial authority. I refer to this authority below. Both the Convention and the judicial authority clearly insist that specific legal tests are to be applied, which cannot simply be reduced to a rubric of acting 'in the interests of justice'. The goal of the legal tests to be applied is, of course, to serve the interests of justice, but a more detailed analysis is required if the law is to be followed and applied. These are legal issues which engage both an important right of the defendant and the duty of the Crown Court to conduct proceedings in accordance with law.

12. The relegation of such important issues to the sphere of 'judge craft' or 'general guidance' has resulted in widespread judicial anxiety and uncertainty and to a reluctance to address the issue. To borrow and adapt slightly a phrase currently in vogue, the niqaab has become the 'elephant in the courtroom.' Trial judges need, not only general guidance, however helpful, but a statement of the law. It is my intent to attempt to provide such a statement in this judgment, but as may be imagined, I do so with some misgivings. I am a male judge dealing with an issue which mainly affects female Muslim defendants, and does so in an intimate way; though I make clear at the outset that everything I say in this judgment is intended to apply to defendants of either gender and to those of any religious faith, or none, in analogous situations. I am conscious also of the place of the Crown Court in the hierarchy of legal authority, and I express the hope that Parliament or a higher court will review this question sooner rather than later and provide a definitive statement of the law to trial judges.

13. Valuable assistance is to be found in the judgment of the Supreme Court of Canada in *R. v. NS*, 2012 SCC 72, [2012] 3 S.C.R. 726, and below, I gratefully adopt some of the propositions laid down in that case. But the decision must be approached

with caution with respect to the issue now before me, for two reasons. First, the case concerned the wearing of a niqaab, not by a defendant, but by a prosecution witness, which as I have indicated above, may raise different and challenging issues. Second, the right to freedom of conscience and religion under s.2(a) of the Canadian Charter, on which the witness in *NS* relied in claiming that she was entitled to wear the niqaab while giving evidence, appears to be a primary constitutional right in Canada. As such, it appears to be entitled, under Canadian law, to far greater weight in the balance of conflicting interests than the qualified right of manifestation of religious belief under art. 9 of the Convention, on which reliance is placed in this case. Indeed, under Canadian law, it may be equal in status to the right to a fair trial.

Sincerity of Belief in Obligation to wear Niqaab

14. I accept for the purposes of this judgment that D sincerely takes the view that, as a Muslim woman, she either is not permitted, or chooses not to uncover her face in the presence of men who are not members of her close family. I have been given no reason to doubt the sincerity of her belief. I say this because in one of the cases considered under the rubric of *R v. NS*, to which I shall refer in more detail below, the Supreme Court of Canada held that the judge at first instance should have taken evidence on the *voir dire* to establish the sincerity of the witness's beliefs before making a ruling on whether a niqaab should be removed while giving evidence. Neither counsel suggested that I had any duty to do this, and I would not take that step unless obliged to do so. This is for three reasons.

15. First, unlike cases where the question of religious dress or ornamentation arise in connection with employment or education, the practice of the courts must be uniform; they cannot vary between different cases or between different locations of the Crown Court. The highly variable conditions in different places of employment and education may suggest different results in different cases. But the practice of the Crown Court is a constant. If judges sitting in different cases or at different locations took different approaches with respect to whether or not a defendant may wear the niqaab in court, the result would be a kind of judicial anarchy. There must be a single practice, which does not depend upon the individual defendant. That being the case, the only fair course to take, it seems to me, is to make every assumption in the

defendant's favour about her sincerity in wearing the niqaab as a manifestation of her religion or belief.

16. Second, if the Court sought to explore the question of sincerity with every defendant, it would necessarily involve the Court in entering into a religious debate with the witness, which would be unseemly, and might even smack of a religious inquisition.

17. Third, it would from a practical point of view, be impossible for a judge to determine with consistency with what degree of sincerity such a choice is made by different defendants. Such a decision would be highly subjective. Even if it were possible, it is not clear that the Court's decision about whether the niqaab should be worn during court proceedings would be informed by that information. For example, Ms. Meek's written submission candidly tells me that D has been wearing the niqaab only since May 2012, but I do not think that this would justify the Court in treating D differently from a woman who had been wearing it for thirty years. It would not even be possible, as a matter of practical reality, to determine whether a woman's choice to wear the niqaab is freely made, or is the result of compulsion of some kind. For the Court to attempt to weigh degrees of sincerity would not only be unseemly, but also very dangerous; it may well justifiably expose the Court to charges of discrimination or of meddling in religious affairs in which it is not competent to meddle.

18. There may be exceptional cases where, for example, the prosecution has evidence that the niqaab is being abused as a disguise, to facilitate impersonation or for some other improper purpose. That kind of case would pose no real problem. The Court would be justified in taking immediate steps to protect the integrity of its proceedings. But in the absence of evidence of that kind, in a case where a woman states that she will not remove her veil in the presence of men because of her religious belief, I take the view that the Court should make the assumption that she does so sincerely. The Court should then decide the question before it on the basis of a universally applicable legal principle, and not on the basis of a subjective assessment of the motives of a particular defendant.

The Niqaab: Obligation and Choice

19. Ms. Meek submits, and I accept, that whether or not there is an obligation to wear the niqaab, a choice to do so must be respected as a manifestation of religion or belief. But it seems to me relevant to observe that whether or not there is an obligation to wear the niqaab is not a subject of universal agreement within Islam; rather, it is a choice made by individual women on a personal basis. This has been recognized judicially: see the opinion of Baroness Hale in the *Denbigh High School* case, discussed below, at [95]. It is also confirmed by the expert report of Professor Edwards, who draws attention to the potential political aspects of the question. Quite apart from that, it is a matter of common observation on the streets of London, on any day of the week, that not all Muslim women wear the niqaab. Many, indeed it would seem, the majority, go out in public with their faces uncovered, albeit they may wear a head dress and cover their bodies with conservative garments. This is consistent also with information disseminated by the Muslim Council of Britain, whose website contains the following information about Muslim female attire (Hijab).

> *'What does the word Hijab mean?'*
>
> *Hijab* is the Arabic term used to describe the attire worn by Muslim women. The literal meaning of *Hijab* is 'covering', but this term also carries a more general connotation of 'modesty'. *Hijab* as a social practise thus embraces not only clothing but also values and behaviour.
>
> The word *Hijab* is often mistranslated as the 'veil', which implies covering of the face and this is misleading. Although *Hijab* can involve the covering of a woman's face, most Muslims do not regard this to be essential.
>
> *'Does a Muslim woman have to wear Hijab?'*
>
> A central principle of the Holy Qur'an is that 'there is no compulsion in religion', as it is reiterated often in the Qur'an that truth stands out for itself. It is thus up to us as autonomous beings to contemplate and evaluate the merits of these teachings. Hence, although *Hijab* is certainly an integral part of the overall Islamic dress code, it is not for anyone to force it upon another human being.
>
> *'So how should a Muslim woman dress?'*

> In Islam, the basic rule is that women should cover their body with loose fitting clothes. This is a generic requirement and so the actual style of clothing is adaptable to suit personal preferences, cultural norms and practical requirements. There are therefore different styles of *Hijab* worn by women throughout the world. Some Muslim women, particularly those in the Arab world, also interpret *Hijab* to include an outer covering (*Burka*).
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> [www.mcb.org.uk/features, accessed on 4 September 2013.]

20. There is also a question about whether D would be entitled, and perhaps obliged, to uncover her face in proceedings before a court which applies Muslim law. I have received no expert evidence specifically dealing with foreign law; it would be ill-advised for me to try to make findings of fact about foreign law for evidential purposes, and I do not purport to do so: see *Bumper Development Corp. v. Commissioner of Police for the Metropolis* [1991] 1 WLR 1362. Professor Edwards, however, indicates that whether or not a woman may wear a veil in court is a question on which courts which apply Muslim law are divided. I mention it because D may well be aware of information readily available on the internet which might inform her decision to insist, or not to insist, on wearing the niqaab in this Court, or provide a basis for her to seek advice about her position from her Imam or another trusted source.

21. The following are included as exceptions to the general rules about covering the face by Shaykh Muhammads Al-Munajjid: see *Islam Question and Answer: When is it permissible for a woman to uncover her face?* www.islam-qa.com/en/2198 accessed on 25 August 2013.

> IV – Testimony
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> It is permissible for a woman to uncover her face when she is giving testimony in court, whether she is a witness in a case or is there to witness a deal, and it is permissible for the qaadi (judge) to look at her in order to know who she is and to protect the rights of all concerned.
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> Shaykh al-Dardeer said: "It is not permitted to give testimony against a woman in niqaab until she uncovers her face so that it may be known who she is and what she looks like."
>
> (*Al-Sharh al-Kabeer li'l- Shaykh al-Dardeer*, 4/194)

> Ibn Qudaamah said: "The witness may look at the face of the woman against whom he is testifying so that his testimony will speak about her in specific terms."
>
> Ahmad said: 'He cannot testify against a woman unless he knows who she is.'"
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> (*Al-Mughni*, 7/459; *al-Sharh al-Kabeer 'ala Matan al-Muqni'*, 7/348, *bi haamish al-Mughni*; *al-Hidaayah ma'a Takmilat Fath al-Qadeer*, 10/26).
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> V – In court cases
>
> It is permissible for a woman to uncover her face in front of a qaadi (judge) who is to rule either in her favour or against her, and in this situation he may look at her face in order to know who she is and for the sake of protecting people's rights.
>
> The same rules that apply to giving testimony or bearing witness also apply in court cases, because they serve the same purpose.
>
> (See *Al-Durar al-Mukhtaar*, 5/237; *Al-Hadiyah al-'Alaa'iyah*, p. 244; *Al-Hadiyah ma'a Takmilat Fath al-Qadeer*, 10/26).

22. I will now proceed as follows. First, I set out what seem to me to be the governing basic principles on which my decision of this matter must ultimately rest. Second, I will examine the correct approach to D's claim under art. 9 of the Convention, in the light of those principles. Third, I will consider what additional guidance is to be derived from *NS*. Finally, I reach a conclusion on the question before me and give directions accordingly.

Basic Governing Principles.

23. The Court recognises that all those who live in England and Wales enjoy freedom of conscience, freedom of religion, and freedom of religious expression. These rights are protected by the Common Law, but now derive also from art. 9 of the Convention. The Courts of England and Wales have a proud record of upholding religious freedoms, which are a valued part of our democratic way of life. The Court has the utmost respect for all religious beliefs, traditions and practices, and makes no distinction between those of different religious faiths, or between those with a

religious faith and those with no religious faith. The law applies to all alike without distinction. The fundamental importance of these rights in a pluralistic, multi-cultural society was clearly stated by Lord Nicholls of Birkenhead in *R (Williamson) v Secretary of State for Education and Employment* [2005] UKHL 15, [2005] 2 AC 246, paras 15-19.

24. The Courts of England and Wales may address rights under the Convention directly and may enforce and protect those rights as a matter of domestic law by virtue of of the Human Rights Act 1998. The Court is a public authority for the purposes of the Act, and must not act in a manner incompatible with a Convention right.

25. The corollary of the right of conscience and freedom of religion conferred by the law of England and Wales is that those who live in the jurisdiction have an obligation to respect its institutions, including the Courts. They have an obligation to obey the law, to participate in court proceedings when compelled to do so by law, and in so doing, to respect and follow the rules and practice of the Court.

26. The Crown Court is the creature of statute. Its jurisdiction and powers have been defined by a series of statutory provisions beginning with the Courts Act 1971. It applies the law of England and Wales, supplemented by Rules of Criminal Procedure. But its detailed practice in relation to the conduct of criminal proceedings also derives from that of its predecessors, the Courts of Assize and Quarter Sessions, and is the product of centuries of development and refinement at Common Law. In my view, there are three governing principles underlying the Court's practice.

27. First, the rule of law. In essence, this means that the law of the land must be the basis of all decisions taken by the Court, and that the law must apply equally to all those who come before the Court, regardless of ethnicity, religion, or any other personal attributes which might otherwise be the object of either prejudice or special favour. There can be no exceptions to, or derogations from, this principle.

28. Second, the principle of open justice. The primary meaning of open justice that criminal proceedings should be held in open court, in public, and be open to reporting

by the press: see *Attorney-General v. Leveller Magazine* [1979] AC 440, 450, per Lord Diplock. Any derogation from open justice should occur only in exceptional circumstances and where the interests of justice require it. The Court cannot derogate from this principle for lesser purposes, including that of sparing the feelings of a defendant: *cf. Malvern Justices, ex parte Evans* [1988] QB 540.

29. Third, the principle of adversarial trial. The adversarial trial is central to the administration of criminal justice in England and Wales, and the Crown Court relies on it to conduct trials in accordance with the rule of law. This principle is based on the proposition, derived from centuries of experimentation, practice, and experience, that the truth is most likely to emerge when:

- the prosecution and defence are free to present their conflicting cases;
- to an impartial jury;
- in accordance with law and the rules of evidence and procedure;
- enforced by an impartial judge; and
- in open court in a public forum.

30. It is essential to the proper working of an adversarial trial that all involved with the trial – judge, jury, witnesses, and defendant - be able to see and identify each other at all times during the proceedings. This is partly a matter of identification. It is obviously essential for the Court to know the identity of the person who comes before it as a defendant before a plea can be taken, and the defendant brought before a jury, and perhaps convicted and sentenced. Otherwise, there is an obvious potential for the interests of justice to be compromised. But the principle is much wider than that. If a fair trial is to take place, the jury (and for some limited purposes, the judge) must be able to assess the credibility of the witnesses - to judge how they react to being questioned, particularly, though by no means exclusively, during cross-examination. If the defendant gives evidence, this observation applies equally to her evidence. Moreover, juries very properly rely on their observation of the defendant, not only when she gives evidence (if she does so) but throughout the trial as all the evidence is given. Adversarial trials have always depended in part on these conditions being present in the courtroom.

31. In the case of *SL v. MJ*, to which Ms. Wilkinson referred me, Macur J, sitting without a jury, allowed a female Muslim witness to give evidence, having lifted her veil on condition that she was shielded from male counsel but could be seen by the (female) judge. I make no comment on that decision, but I take note that Macur J said: 'the ability to observe a witness' demeanour and deportment during the giving of evidence is important and, in my view, essential to assess accuracy and credibility'. I respectfully associate myself with that observation because it comports with the long experience of judges and counsel in adversarial proceedings in England and Wales.

32. McLachlin CJ, writing for majority of the Supreme Court of Canada in *NS*, said:

> [25] Covering a witness's face may also impede credibility assessment by the trier of fact, be it judge or jury. It is a settled axiom of appellate review that deference should be shown to the trier of fact on issues of credibility because trial judges (and juries) have the "overwhelming advantage" of seeing and hearing the witness — an advantage that a written transcript cannot replicate: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 24; see also *White v. The King*, [1947] S.C.R. 268, at p. 272; *R. v. W. (R.)*, [1992] 2 S.C.R. 122, at p. 131. This advantage is described as stemming from the ability to assess the demeanour of the witness, that is, to *see* how the witness gives her evidence and responds to cross-examination.
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> [26] Changes in a witness's demeanour can be highly instructive; in *Police v. Razamjoo*, [2005] D.C.R. 408, a New Zealand judge asked to decide whether witnesses could testify wearing burkas commented:
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> ". . . there are types of situations . . . in which the demeanour of a witness undergoes a quite dramatic change in the course of his evidence. The look which says "I hoped not to be asked that question", sometimes even a look of downright hatred at counsel by a witness who obviously senses he is getting trapped, can be expressive. So too can abrupt changes in mode of speaking, facial expression or body language. The witness who moves from expressing himself calmly to an excited gabble; the witness who from speaking clearly with good eye contact becomes hesitant and starts looking at his feet; the witness who at a particular point becomes flustered and sweaty, all provide examples of circumstances which, despite cultural and language barriers, convey, at least in part by his facial expression, a message touching credibility." [para. 78]
>
> [27] On the record before us, I conclude that there is a strong connection between the ability to see the face of a witness and a fair trial. Being able to see the face of a witness is not the only — or indeed perhaps the most important — factor in cross-examination or accurate credibility assessment. But its importance is too deeply rooted in our criminal justice system to be set aside absent compelling evidence. [id. at [27].

33. These long-established propositions are recognised, not only at Common Law, but more widely in States bound by of the fair trial provisions of art. 6 of the Convention. In *van Mechelen v. The Netherlands* (1997) 25 EHRR 647, the ECHR held the defendant's right to a fair trial was infringed where anonymous police witnesses gave evidence against the defendant in circumstances such that, not only did the defendant know their identities, but he was unable to observe their demeanour under direct questioning, and thus judge their reliability. This, also, was a case about witnesses, not defendants, but the principle applies readily to defendants also. As I noted earlier, it appears (though I make no finding of fact on this point) that at least some courts which apply Muslim law take the same view about the face being uncovered while a woman gives evidence, and indeed, while evidence is given against a woman.

34. Both Ms. Meek and Professor Edwards argue that the value of seeing a witness in the process of evaluating her evidence can be overstated; the dissenting judgment of Abella J in *NS* adverts to this proposition; and it must be weighed in the balance. I recognise that there is a school of thought to that effect, and I do not mean to suggest that other factors, including the substance of the evidence itself, are not also of great importance. Moreover, there may, of course, be cases in which the evidence given is formal or unchallenged. But I am satisfied that the ability of the jury to see and observe a witness remains of cardinal importance in almost all cases in the context of the adversarial trial. Otherwise, the witness is effectively immunised against cross-examination, which is incompatible with an adversarial trial. Ms. Wilkinson, on behalf of the Crown, supports this view in principle, though she does not accept that the Court should go beyond advising a defendant about the possible consequences of not being seen, and giving the jury an appropriate direction.

35. While the law permits no derogations from the principle of the rule of law, it does permit derogations from the principles of open justice and the adversarial trial process in limited circumstances. Witnesses are not always present in the courtroom. Unchallenged evidence may be given by way of the reading of witness statements, pursuant to s.9 of the Criminal Justice Act 1967, or may be presented by way of formal admission pursuant to s.10 of the same Act. Hearsay evidence may be given, enabling the jury to consider evidence of witnesses who do not appear before the

Court, in accordance with a specific statutory scheme: see Criminal Justice Act 2003, s.114 *et seq*. Witnesses may give evidence with the benefit of special measures: see Youth Justice and Criminal Evidence Act 1999, Part II, Chapter 1. Evidence by way of ABE interviews and live link remove the witness from the courtroom itself. Witnesses may be permitted to give evidence from behind a screen, which prevents the defendant and the public from seeing them, while allowing the judge, jury and counsel to do so. Some witnesses are permitted to give evidence anonymously: see Criminal Evidence (Witness Anonymity) Act 2008. There are provisions restricting publication of the identities of children and complainants in sexual cases: Children and Young Persons Act 1933, s.39; Sexual Offences (Amendment) Act 1992, s.1. Information may be withheld if it attracts public interest immunity, and hearings may be held in chambers to determine the extent to which disclosure of such materials must be made: see *H* [2004] 2 AC 134. But in all these cases, there is a reason for permitting such an exceptional course; that course is based on specific statutory provisions and linked to the fair and proper administration of justice.

The Right of Manifestation of Religion and Belief: art. 9 of the Convention

36. The question, therefore, is whether D's right to manifest her religion or belief under art. 9 of the Convention entitles her to wear the niqaab during proceedings in the Crown Court in which she is a defendant; and whether this right overrides, or must be balanced against the public interest in the Courts conducting criminal proceedings in accordance with the rule of law, open justice, and the adversarial trial process; and if so, what the result of that balancing process should be. Both counsel broadly agree that this is the question I must address.

37. Article 9 provides:

> 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

38. Art. 9 contains two distinct rights, which are different in character. The first is the right to freedom of thought, conscience, and religion, which is absolute. This seems to me to be the equivalent of the right to freedom of religion guaranteed by s.2(a) of the Canadian Charter, which was in issue in *NS*.

39. But the second, the right to manifest religion or belief, is a qualified right, which by virtue of art. 9(2) may be balanced against the public interest in public safety, public order, health or morals, or the protection of the rights and freedoms of others: as long as any limitation is prescribed by law, necessary in a democratic society, and proportionate. The protection of the rights and freedoms of others include, in my judgment, the rights and freedoms of persons who come before the court as complainants, witnesses and jurors; and of the public insofar as the public has an interest in the fair administration of criminal justice by the Crown Court. In *Refah Partisi (The Welfare Party) v. Turkey* (2003) 37 EHRR 1, [92] the Grand Chamber of the European Court of Human Rights ('ECHR') said:

> The Court's established case law confirms this function of the State [to ensure tolerance between religious groups]. It was held that in a democratic society the State may limit the freedom to manifest a religion, for example by wearing an Islamic headscarf, if the exercise of that freedom clashes with the aim of protecting the rights and freedoms of others, public order and public safety …
>
> While freedom of religion is in the first place a matter of individual conscience, it also implies a freedom to manifest one's religion alone and in private or in community with others, in public and within the circle of those whose faith one shares. Article 9 lists a number of forms and manifestations which manifestation of a religious belief may take, namely worship, teaching, practice and observance. Nevertheless, it does not protect every act motivated or influenced by a religion or belief …The obligation for a teacher to observe normal working hours which, he asserts, clash with his attendance at prayers, may be compatible with the freedom of religion … as may be the obligation requiring a motorcyclist to wear a crash helmet, which in his view is incompatible with his religious duties.

40. Following this general principle, the ECHR has upheld necessary and proportionate restrictions on the manifestation of religion or belief in connection with

an employee's obligations in the workplace: *Kosteski v. Former Yugoslav Republic of Macedonia* (2007) 45 EHRR 712 (no breach of art. 9 involved in employer fining employee for unauthorised taking time off work to attend prayers); in the context of education: *Dahlab v. Switzerland* (App. 42393/98) Decision of 15 February 2001, ECHR 2001-V (proper to order teacher not to wear Islamic headscarf while teaching, to protect religious neutrality in schools); and *Leyla Şahin v. Turkey* (2007) 44 EHRR 99 (proper to forbid wearing Islamic Headscarf in University to protect principle of secularism in higher education); the armed forces: *Kalaç v. Turkey* (1999) 27 EHRR 552 (officer's expression of religious views lawfully restrained to support government policy of secularism in the armed forces); and the professional sphere: *Pichon and Sajous v. France* (App. 49853/99, Decision of 2 October 2001, ECHR-2001-X (no violation in prosecuting pharmacists for refusing to honour legal obligation to supply contraceptives).

41. I have been unable to detect any difference of principle between the decisions of the ECHR and those of the courts of England and Wales with respect to the right of manifestation of religion. In *R v. Headteacher and Governors of Denbigh High School* [2006] UKHL 15, the House of Lords held that no violation occurred when a Muslim schoolgirl was required to wear a form of school uniform which had been approved for girls of all religions after extensive consultation within the community. The girl, or her guardian, could have chosen another school where the uniform was not required, and there were important interests in promoting equality and preventing discrimination which supported the adoption of the uniform. Lord Hoffman said (at [63]):

> In applying the Convention rights which have been reproduced as part of domestic law by the Human Rights Act 1998, the concept of the margin of appreciation has, as such, no application. 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. As Lord Hope of Craighead said in *R v Director of Public Prosecutions, Ex p Kebilene* [2000] 2 AC 326, 380-381:
>
> > The doctrine of the 'margin of appreciation' is a familiar part of the jurisprudence of the European Court of Human Rights. The European Court has acknowledged that, by reason of their direct and continuous contact with the vital forces of their countries, the national authorities are in principle better placed to evaluate local needs and conditions

> than an international court… This technique is not available to the national courts when they are considering Convention issues arising within their own countries. But in the hands of the national courts also the Convention should be seen as an expression of fundamental principles rather than as a set of mere rules. The questions which the courts will have to decide in the application of these principles will involve questions of balance between competing interests and issues of proportionality.

42. Several cases arising in the UK were decided by the ECHR in *Eweida and Others v. UK* (2013) 57 EHRR 37. In the *Eweida* case, the applicant, a Christian, was dismissed by British Airways (BA) for wearing a small silver cross in such a way as to be visible to members of the public with whom she dealt on behalf of her employer, in contravention of the employer's dress code for employees, and after she had been repeatedly admonished about it. The Court of Appeal ([2010] EWCA Civ 80) upheld the employment tribunal and found in BA's favour on the ground that: as the regulation was applicable to those of all religious faiths alike; and as the applicant had no religious obligation to wear the cross, the restriction did not violate the applicant's rights under art. 9. But the ECHR held that the Court had given undue emphasis to BA's commercial interests – there was no evidence of any harm done to BA's brand or image - and had not sufficiently balanced and protected the applicant's right to manifest her religion or belief under art. 9.

43. But in another case heard at the same time, the ECHR came to a different conclusion on similar facts. In *Chaplin v. Royal Devon and Exeter Hospital NHS Foundation Trust* ([2010] ET 1702886/2009) it was held proper to restrict a nursing sister from wearing a cross over her uniform on safety grounds, namely that it was liable to seized by a patient during her nursing duties. In other cases heard at the same time, the EHCR also dismissed applications based on the applicant's refusal, on religious grounds, to conduct civil partnership ceremonies as a registrar (*London Borough of Islington v. Ladele*); and the applicant's refusal as a psychological counselor to offer counseling to same-sex couples (*McFarlane v. Relate Avon Ltd* [2009] UKEAT 0106 69 3011). In these cases, the ECHR found that the UK was entitled to a margin of appreciation to uphold its laws made by a democratically elected Parliament and that no violation of art. 9 had occurred.

44. While the decisions in these cases arose from laws made by the legislative branch of government, there is no reason to suppose that different principles are to apply to the case where a Court makes an order which affects an art. 9 right, and I proceed on that assumption. I also hold that if necessary and proportionate restrictions may be imposed on art. 9 right in the workplace, in schools, and in the armed forces, there can be no objection in principle to restrictions being placed on that right in the Courts, if the legal requirements for the restriction are present.

45. Restrictions on the qualified right of religious manifestation may not be imposed arbitrarily, but must conform to art. 9(2). They must satisfy four legal requirements, which are as follows.

46. First, the restriction must have an established basis in law. This basis may derive from common law or statute, but must be accessible to the defendant in the sense that the law has been promulgated and is available to the defendant. See *Sunday Times v. UK* (1979-1980) 2 EHRR 245 at [47]; *Silver v. UK* (1983) 5 EHRR 347. Ms. Meek rightly draws attention to the way it was put in the former case, namely: that a person 'must be able – if need be with appropriate advice – to foresee to a degree that is reasonable in the circumstances, the consequences which a given action may entail'.

47. Second, the restriction must be legitimate. A restriction is legitimate if it genuinely pursues one of the aims set out in art. 9 (2) itself, which are the protection of national security, public safety, the prevention of disorder and crime, and the protection of the rights and freedoms of others. The Court must be clear about its objective, so that it can balance it against the proposed restriction on the defendant's qualified right of manifestation of religion or belief. The fair and effective operation of the criminal courts, which act in the interests of victims of crime and the public generally, is in my view both an important vehicle for the prevention of disorder and crime, and an important vehicle for the protection of the rights and freedom of persons including the victims of crime, and the public at large. The aim must be to allow the Court to function fairly and effectively in those interests.

48. Third, the restriction must be necessary in a democratic society. The word 'necessary' is not precisely defined, but it has been held must be more than 'useful',

'reasonable', or 'desirable'. At the same time it does not mean 'indispensable': *Handyside v. UK* (1976) 1 EHRR 737, at [48]. Similar observations can be found in the analogous case of the journalistic privilege under art.10 of the Convention, enacted in English law in the same terms by Contempt of Court Act 1981, s.10, by virtue of which disclosure of sources may be order only if 'necessary in the interests of justice …' Considering the meaning of 'necessary' in this context, the House of Lords in *Re an Inquiry under the Company Securities (Insider Dealing) Act 1985* [1988] AC 660, held that it requires more than relevance to the case, and falls somewhere between 'indispensable' and 'useful' or 'expedient'. Lord Griffiths said that it means 'really needed' [*id*. At 704]. I confess, with respect, to finding this rather circular guidance not particularly helpful.

49. Fourth, the restriction must be proportionate in the sense that there must be a rational connection between the objective and the restriction; and the means employed are not more than is necessary to achieve the objective. The Court must consider whether there is a less restrictive, but equally effective way of achieving the objective.

50. Thus far, as far as my researches go, no court in England and Wales has considered how these principles should apply to the specific case of the defendant who wishes to wear a niqaab in the Crown Court. But the Supreme Court of Canada has considered the position of a prosecution witness, and some valuable assistance can be derived from this case.

<u>*R v. NS*, 2012 SCC 72, [2012] 3 S.C.R. 726 (Supreme Court of Canada)</u>

51. In this case, NS was the complainant in a criminal case of sexual assault. NS was a Muslim, and indicated that for religious reasons she wished to testify while wearing her niqaab. The preliminary inquiry judge held a *voir dire*, concluded that NS's religious belief was 'not that strong' and ordered her to remove her niqaab. On appeal, the Court of Appeal held that if the witness's freedom of religion and the accused's fair trial interests were both engaged on the facts and could not be reconciled, the witness may be ordered to remove the niqaab, depending on the context. The Court of Appeal returned the matter to the preliminary inquiry judge. NS appealed. The

majority (McLachlin C.J.,Deschamps, Fish and Cromwell JJ) allowed the appeal. The following summary of the majority view is taken from the headnote, which I find, accurately reflects the majority opinion, paragraphs [1] – [57], written by McLachlin CJ:

> The issue is when, if ever, a witness who wears a niqaab for religious reasons can be required to remove it while testifying. Two sets of *Charter* rights are potentially engaged — the witness's freedom of religion and the accused's fair trial rights, including the right to make full answer and defence. An extreme approach that would always require the witness to remove her niqaab while testifying, or one that would never do so, is untenable. The answer lies in a just and proportionate balance between freedom of religion and trial fairness, based on the particular case before the court. A witness who for sincere religious reasons wishes to wear the niqaab while testifying in a criminal proceeding will be required to remove it if (a) this is necessary to prevent a serious risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and (b) the salutary effects of requiring her to remove the niqaab outweigh the deleterious effects of doing so.
>
> Applying this framework involves answering four questions. First, would requiring the witness to remove the niqaab while testifying interfere with her religious freedom? …
>
> The second question is: would permitting the witness to wear the niqaab while testifying create a serious risk to trial fairness? There is a deeply rooted presumption in our legal system that seeing a witness's face is important to a fair trial, by enabling effective cross-examination and credibility assessment. The record before us has not shown this presumption to be unfounded or erroneous. However, whether being unable to see the witness's face threatens trial fairness in any particular case will depend on the evidence that the witness is to provide. Where evidence is uncontested, credibility assessment and cross-examination are not in issue. Therefore, being unable to see the witness's face will not impinge on trial fairness. If wearing the niqaab poses no serious risk to trial fairness, a witness who wishes to wear it for sincere religious reasons may do so.
>
> If both freedom of religion and trial fairness are engaged on the facts, a third question must be answered: is there a way to accommodate both rights and avoid the conflict between them? The judge must consider whether there are reasonably available alternative measures that would conform to the witness's religious convictions while still preventing a serious risk to trial fairness.
>
> If no accommodation is possible, then a fourth question must be answered: do the salutary effects of requiring the witness to remove the niqaab outweigh the deleterious effects of doing so? Deleterious effects include the harm done by limiting the witness's sincerely held religious practice. The judge should consider the importance of the religious practice to the witness, the degree of state interference with that practice, and the actual situation in the courtroom

> — such as the people present and any measures to limit facial exposure. The judge should also consider broader societal harms, such as discouraging niqaab-wearing women from reporting offences and participating in the justice system. These deleterious effects must be weighed against the salutary effects of requiring the witness to remove the niqaab. Salutary effects include preventing harm to the fair trial interest of the accused and safeguarding the repute of the administration of justice.

52. While the approach taken by the majority is in some ways persuasive with respect to witnesses, it must be applied with caution to the case before me, for reasons I have mentioned previously but now repeat because of their importance. First, the case is that of a prosecution witness, and while a defendant may be a witness, she is before the case on a very different basis and occupies a more significant role in the trial. Second, the majority's analysis clearly treats the right to freedom of religion under s.2(a) of the Canadian Charter in a manner which corresponds to the freedom of thought, conscience and religion under art. 9(1) of the Convention. On this approach, for the purpose of balancing the right against any proposed limitation of the right, far greater weight must given to the right of freedom of religion, compared to balancing involving the right of manifestation of religion or belief under art. 9(2). Indeed, the Court seems to treat it as equivalent to the right to a fair trial. For those reasons, while the majority opinion offers valuable guidance, I do not think that it can be applied directly to the present case.

53. But in a separate concurring opinion, LeBel and Rothstein JJ [*id*. [58] – [79]] state some propositions which seem to me, not only to be correct, but to be capable of direct application to the question of whether a defendant is to be permitted to wear the niqaab during criminal proceedings. Once again, I cite from the headnote, finding that it accurately reflects the opinion.

> This appeal illustrates the tension and changes caused by the rapid evolution of contemporary Canadian society and by the growing presence in Canada of new cultures, religions, traditions and social practices. This case is not purely one of conflict and reconciliation between a religious right and the protection of the right of the accused to make full answer and defence, but engages basic values of the Canadian criminal justice system. The *Charter* protects freedom of religion in express words at s. 2(*a*). But fundamental too are the rights of the accused to a fair trial, to make full answer and defence to the charges brought against him, to benefit from the constitutional presumption of innocence and to avert wrongful convictions. Since cross-examination is a necessary tool for the exercise of the right to make full answer and defence, the consequences of restrictions on that

right weigh more heavily on the accused, and the balancing process must work in his or her favour. A defence that is unduly and improperly constrained might impact on the determination of the guilt or innocence of the accused.

The Constitution requires an openness to new differences that appear within Canada, but also an acceptance of the principle that it remains connected with the roots of our contemporary democratic society. A system of open and independent courts is a core component of a democratic state, ruled by law and a fundamental Canadian value. From this broader constitutional perspective, the trial becomes an act of communication with the public at large. The public must be able to see how the justice system works. Wearing a niqaab in the courtroom does not facilitate acts of communication. Rather, it shields the witness from interacting fully with the parties, their counsel, the judge and the jurors. Wearing the niqaab is also incompatible with the rights of the accused, the nature of the Canadian public adversarial trials, and with the constitutional values of openness and religious neutrality in contemporary democratic, but diverse, Canada. Nor should wearing a niqaab be dependent on the nature or importance of the evidence, as this would only add a new layer of complexity to the trial process. A clear rule that niqaabs may not be worn at any stage of the criminal trial would be consistent with the principle of public openness of the trial process and would safeguard the integrity of that process as one of communication.

54. In addition, I cite the following paragraphs from the opinion.

[76] From this broader constitutional perspective, the trial becomes an act of communication with the public at large. The public must be able to see how the justice system works. The principle of openness ensures that the courts and the trial process belong to all regardless of religion, gender or origin.

[77] In the courts themselves … the trial is a process of communication. To facilitate this process, the justice system uses rules and methods that try to assist parties that struggle with handicaps to overcome them in order to gain access to justice and take part effectively in a trial. Blind or deaf litigants, and parties with limited mobility, take part in judicial proceedings. Communication may sometimes be more difficult. But the efforts to overcome these obstacles and the rules crafted to address them tend to improve the quality of the communication process. Wearing a niqaab, on the other hand, does not facilitate acts of communication. Rather, it restricts them. It removes the witness from the scope of certain elements of those acts on the basis of the assertion of a religious belief in circumstances in which the sincerity and strength of the belief are difficult to assess or even to question. The niqaab shields the witness from interacting fully with the parties, their counsel, the judge and, where applicable, the jurors.

[78] A clear rule that niqaabs may not be worn would be consistent with the principle of openness of the trial process and would safeguard the integrity of that process as one of communication. It would also be consistent with the tradition that justice is public and open to all in our democratic society. This rule should apply at all stages of the criminal trial, at the preliminary inquiry as well as at the trial itself. Indeed, evidentiary issues arise and evolve at the

> different stages of the criminal process, and they affect the conduct of the communication process taking place during the trial.

55. These principles were laid down in the context of Canadian law and practice but I find them persuasive in the context of the defendant in the Crown Court in England and Wales. In my view, LeBell and Rothstein JJ have stated the underlying principles in a way which would be hard to improve on. I must now consider how those principles are to be applied to the law of England and Wales, taking into account art. 9 of the Convention.

Analysis

56. For several centuries the criminal courts in England and Wales have relied on the process of adversarial trial in open court. That process has evolved and changed over time, and may not always have functioned as effectively or as fairly as it does today. But today, the courts rely on this process to uphold the rule of law, to provide a trial which is fair to all parties, and to allow the highest possible degree of openness and transparency. The adversarial trial as used in England and Wales has never been impugned on the ground of its fairness or its ability to uphold the rule of law in any case, either domestic or before the ECHR. Nor can anyone deny its pivotal role in the administration of justice in England and Wales.

57. It must not be forgotten that the defendant is not the only person whose rights and freedoms are engaged by criminal proceedings. There are also victims. In the present case, there is a complainant, who claims to be the victim of witness intimidation, and who is also entitled to a fair determination of his allegations. It is the task of the Court to ensure that he receives that fair determination. There are also jurors. Twelve members of the public will take an onerous oath or affirmation as jurors to faithfully try the defendant and give a true verdict according to the evidence. It is the task of the Court to provide conditions under which they can discharge that important function. There is also the public. In a democratic society, the public has a strong interest in criminal proceedings being conducted fairly and effectively in the interests of public order and the protection of the rights and freedoms of others. It is the task of the Court to ensure that the public's interest is protected.

58. In my judgment, the adversarial trial demands full openness and communication, and, like LeBel and Rothstein JJ, I am firmly convinced that the wearing of the niqaab necessarily hinders that openness and communication. A criminal trial in the Crown Court is, by definition, a serious matter. It has the potential to change lives – not only that of the defendant, but also that of victims, witnesses and even jurors. The rights of all participants in the trial must be considered. I accept that a rule prohibiting the wearing of the niqaab in court at any stage would cause a defendant some degree of discomfort. That is a matter which cannot be overlooked. The court may, however, be able to mitigate that sense of discomfort in some ways, for example by forbidding the making or dissemination of images of the defendant in court, a minor but justified restriction on the freedom of the press, and by using its inherent powers to permit some limited special measures.

59. On the other hand, there is the question of the comfort – and beyond comfort, the rights and freedoms - of others whose participation in the trial is essential. In my view, it is unfair to ask a witness to give evidence against a defendant whom he cannot see. It is unfair to ask a juror to pass judgment on a person whom she cannot see. It is unfair to expect that juror to try to evaluate the evidence given by a person whom she cannot see, deprived of an essential tool for doing so: namely, being able to observe the demeanour of the witness; her reaction to being questioned; her reaction to other evidence as it is given. These are not trivial or superficial invasions of the procedure of the adversarial trial. At best, they require a compromise of the quality of criminal justice delivered by the trial process. At worst, they go to its very essence, and they may render it altogether impotent to deliver a fair and just outcome. They drive a coach and horses through the way in which justice has been administered in the courts of England and Wales for centuries. I would add that, although of lesser significance in the case of a judge, it is also unfair to require a judge to sentence a person he cannot see.

60. The question of the identification of the defendant when she comes before the Court, which was the immediate catalyst for this judgment, is a microcosm of the problems which may arise from compromising the Court's procedure. The Court has to be as sure as it can be that the person who enters a plea, and who is to be tried and

perhaps sentenced is the person named in the indictment. As I indicated above, I found that the evidence of P.C. Hughes was sufficient to identify D for the purposes of the plea and case management hearing. But there may be cases in which such evidence is not sufficient, for example where visual identification is an issue in the trial. Ms. Wilkinson agreed that the Court would have to take a different view in that case. Moreover, the Court must be conscious that it cannot apply the law differently on the basis of religion. The Court may not discriminate between different religious traditions, or between those with a religious belief and those with none. If D is entitled to keep her face covered, it becomes impossible for the Court to refuse the same privilege to others, whether or not they hold the same or another religious belief, or none at all.

61. There is a disturbing sub-text in this case. It seems to be suggested, in effect, that the mere assertion of the right to wear the niqaab deprives the Court of control over its own procedure. In argument, Ms. Meek suggested that D is entitled to wear the niqaab in public or in private at all times, and the Court must simply find a way to accommodate that right. In her written submission, Ms. Meek says that, if ordered to remove her niqaab in the court room in front of men and in public, '[D] will be upset and is likely to use her hands to cover her face, turn away, or look down'. How is the Court to respond to that?

62. It must be conceded that it is impossible in practice to compel a defendant who does not wish to cooperate with the Court to do so at all times. For example, a defendant may fail to appear for his trial, or may abscond during trial. A defendant in custody may refuse to leave his cell to come up to court. Any defendant may behave in such an obstructive or disruptive way that the judge is forced to have him removed from court. In such circumstances, the Court must continue, but must give the jury a careful direction that the defendant's conduct does not mean that he is guilty, and does not support the prosecution's case against him, and the judge must ensure, as far as possible, that the jury is not prejudiced against him because of his conduct. The defendant's conduct in keeping her face covered, though not intended as any form of misconduct, is analogous to these situations. It impedes the work of the Court, and it must be addressed by means of an appropriate direction by the judge.

63. The jurisdiction of England and Wales is essentially (though not formally) a secular democracy. I recognise that the jurisdiction is in the rather odd position that part of it (England) has an established church, while the other part (Wales) does not. But in neither part does the church interfere with the working of the courts. I do not for a moment suggest, to borrow language used in *NS*, that courts should be a religion-free zone where religious beliefs and practices must be parked at the door of the court. On the contrary, the Courts must respect and protect religious rights as far as that can properly be done. But in my view, it is necessary to the working of the Crown Court in a democratic society for the Court, not the defendant, to control the conduct of judicial proceedings. A defendant cannot, by claiming to adopt a particular religious practice, oblige the court to set aside its established procedure to accommodate that practice. That would be to privilege religious practice in a discriminatory way, and would adversely affect the administration of justice.

64. Ultimately, it seems to me that Court must be entitled to place some restriction on art. 9 right if it reaches the point where the unrestrained exercise of that right interferes to an unacceptable degree with the Court's ability to conduct a trial which is fair to all parties. I am unable to accept the proposition that the Court is powerless to protect its proceedings from unfairness merely because a defendant asserts an art. 9 right.

65. As Ms. Meek points out, unlike an employee, or even a witness, a defendant does not have the ability to choose whether or not to appear before the Crown Court. Nor is she free to approach another location of the Court to explore whether the judges there may take a different view. But she is free to make choices in the context of the trial, including the choice of how to dress for court, and whether or not to give evidence. In the *Denbigh High School* case, at [22], Lord Bingham noted:

> As the Strasbourg court put it in *Kalaç v Turkey* (1997) 27 EHRR 552, para 27:
>
> > "Article 9 does not protect every act motivated or inspired by a religion or belief. Moreover, in exercising his freedom to manifest his religion, an individual may need to take his specific situation into account."
>
> The Grand Chamber endorsed this paragraph in *Sahin v Turkey*, (Application No 44774/98, 10 November 2005, unreported), para 105.

The Commission ruled to similar effect in *Ahmad v United Kingdom* (1981) 4 EHRR 126, para 11:

> ". . . the freedom of religion, as guaranteed by Article 9, is not absolute, but subject to the limitations set out in Article 9(2). Moreover, it may, as regards the modality of a particular religious manifestation, be influenced by the situation of the person claiming that freedom."

66. But, having said that, I remind myself of the importance of honouring a defendant's right under art. 9 to dress, in general, in such manner as she wishes in accordance with her religious beliefs; and of the discomfort she may suffer if she is not permitted to wear the niqaab.

67. I also recognise the intrinsic merit which the niqaab has in the eyes of women who wear it. I reject the view, which has its adherents among the public and the press, that the niqaab is somehow incompatible with participation in public life in England and Wales; or is nothing more than a form of abuse, imposed under the guise of religion, on women by men. There may be individual cases where that is true. But the niqaab is worn by choice by many spiritually-minded, thoughtful and intelligent women, who do not deserve to be demeaned by superficial and uninformed criticisms of their choice. The Court must consider the potential positive benefits of the niqaab. As Baroness Hale said in the *Denbigh High School* case (above, at [94-[95]):

> If a Sikh man wears a turban or a Jewish man a yamoulka, we can readily assume that it was his free choice to adopt the dress dictated by the teachings of his religion. I would make the same assumption about an adult Muslim woman who chooses to wear the Islamic headscarf. There are many reasons why she might wish to do this. As Yasmin Alibhai-Brown (*WHO do WE THINK we ARE?*, (2000), p 246) explains:
>
> "What critics of Islam fail to understand is that when they see a young woman in a *hijab* she may have chosen the garment as a mark of her defiant political identity and also as a way of regaining control over her body."
>
> Bhikhu Parekh makes the same point (in "A Varied Moral World, A Response to Susan Okin's 'Is Multiculturalism Bad for Women'", *Boston Review*, October/November 1997):
>
> "In France and the Netherlands several Muslim girls freely wore the hijab (headscarf), partly to reassure their conservative parents that they would not be corrupted by the public culture of the school, and partly to reshape the latter by indicating to white boys how they wished to be treated. The hijab in their

> case was a highly complex autonomous act intended to use the resources of the tradition both to change and to preserve it."
>
> …
>
> But it must be the woman's choice, not something imposed upon her by others. It is quite clear from the evidence in this case that there are different views in different communities about what is required of a Muslim woman who leaves the privacy of her home and family and goes out into the public world …

68. The question is how these considerations should be balanced. Leaving aside questions of identification, I do not consider that it is necessary to ask a defendant to remove her niqaab for the purposes of the trial generally. While it remains true that juries scrutinise defendants throughout the proceedings, and take note of a defendant's reaction to the evidence as it is given throughout the trial, I am not persuaded that this is of sufficient importance to require a restriction on the defendant's right to wear the niqaab.

69. But the question of the defendant's evidence, if she gives evidence, is a different matter. For the reasons given earlier in this judgment, the ability of the jury to see the defendant for the purposes of evaluating her evidence is crucial. There is an obvious possibility that a rule that the niqaab must not be worn would inhibit some defendants from giving evidence in their defence, or would make the giving of evidence an uncomfortable experience. Ms. Meek rightly emphasises this important point. The right to give evidence is a fundamental one, and it must be protected. It is an essential component of the defendant's right to a fair trial, both at Common Law and under art. 6 of the Convention. But Member States are free to give effect to that right within the framework of their respective legal systems. Article 6 does not prevent the Court from adopting a fair and proportionate procedural rule to prevent that right from being abused.

70. In my judgment, the right to give evidence must be seen in context. When seen in context, it becomes clear that the right to give evidence involves a corresponding duty to submit that evidence to the scrutiny of the jury. The jury has a duty to decide what evidence to accept, what evidence not to accept, and what weight to accord to any particular piece of evidence. They must decide what evidence is credible and

reliable, and what is not. There is rarely, if ever, a case in which a defendant's evidence could be described as unimportant or in which the defendant's evidence is not challenged. Very often, that evidence plays a decisive part in the jury's decision; it always plays an important role. I dealt earlier in this judgment with the pivotal requirement that the jury must be able to see the witness. It is no accident that our appellate reports are replete with observations that the jury, or judge, 'had the advantage of seeing as well as hearing the witnesses'. That is a recognition of the fact that, as Macur J said in *SL v. MJ*, 'the ability to observe a witness' demeanour and deportment during the giving of evidence is important and … essential to assess accuracy and credibility'. This process is a fundamental and necessary attribute of the adversarial trial, and if it is taken away, the ability of the jury to return a true verdict in accordance with the evidence is necessarily compromised.

71. In other areas of public life, accommodations are routinely found. For example, if a woman wearing a niqaab presents herself at the security check point at an airport, or has to be photographed to obtain a passport or a driving licence, the necessary procedures can be complied with privately, presided over by female officials. The same accommodation cannot be made at the Crown Court, both because the rule of law is engaged, and because to do so might well involve a disproportionate allocation of court resources. For example, a claim to be tried before a female judge and jurors, with female court staff, and excluding males from the public gallery would probably constitute an unlawful discrimination against male judges, jurors, court staff and members of the public and the press; it would also represent a huge disruption of the court's administration. I hasten to add that D has made no such claim in this case, but it is necessary for the Court to try to foresee the consequences of any rule of law it may adopt.

72. There will inevitably be occasions when the manifestation of a person's religion or belief comes into potential conflict with the demands of court proceedings. In most cases, these conflicts are easily resolved: for example, witnesses and jurors may be sworn on a book appropriate to their beliefs (or may make a secular affirmation); a juror's wish to observe a religious festival during which the Court is sitting is often accommodated; advocates are often permitted to wear a turban or full length dress while appearing professionally in court. These accommodations do not affect the

proper functioning of the Court, and are proper in an age when the Court serves a pluralist, multi-cultural society. But in cases where such conflicts cannot be resolved, the Court must balance the right of manifestation of religion against the interests of justice in securing a fair trial for all the participants and the strong public interest in the proper administration of criminal justice. Although D claims a right to wear the niqaab in court, I note that the derogations from the principles of open justice and adversarial trial to which I referred earlier – for example, hearsay evidence, special measures, and anonymous witnesses – would not be permitted in the absence of specific statutory provisions. There is no statutory provision regarding niqaabs, and it is at least arguable that wearing the niqaab cannot be permitted in law to the extent that it derogates from those principles.

73. It is rare for the defendant's manner of dress to be an issue in the conduct of judicial business. Today, the Courts are rightly tolerant of informality or diversity of dress on the part of defendants, witnesses, and jurors. But a defendant's dress may become an issue. For example, the defendant's choice of dress may invoke the rules of bad character evidence if, unless corrected, it would give the jury a false impression, for example if the defendant appears at court wearing a clerical collar or military uniform: see Criminal Justice Act 2003, s.101(1)(f). If a defendant were to appear wearing a t-shirt with an obscene, racist, or offensive logo, it cannot be doubted that the Court would be entitled to take steps to protect the dignity of the proceedings. And it the defendant's dress interferes to an unacceptable degree with the Court's ability to conduct a trial which is fair to all parties, the Court may similarly have to take action to ensure that the trial can proceed in the manner prescribed by law, and is fair to all parties.

74. While any restriction on the defendant's right to give evidence is a serious measure, and one to be taken only when really necessary, the principle of imposing such a restriction is not unknown, and indeed can be found in contemporary practice as far back as the notice of alibi provisions of the Criminal Justice Act 1967. I regard such a measure in the circumstances of this case, not as infringing the right to give evidence, but as protecting it from abuse.

75. I now consider the four questions I must ask before deciding whether some restriction on D's general right to wear the niqaab should be imposed for the purpose of trial in the Crown Court.

Basis in Law

76. There is no legal restriction on the wearing of the niqaab anywhere in the United Kingdom. Nor is there any statutory provision or rule of procedure in England and Wales which deals with the wearing of the niqaab in court. Certain materials in the public domain, for example the Equal Treatment Bench Book, might lead a reader to suppose that there is at least a limited right to do so, at least in some courts. But the Bench Book is not a source of law. In my view, a reader who considers all relevant materials in the public domain about the practice of the Crown Court would be clear about the essential ingredients of an adversarial trial, to which I have referred above. Moreover, that reader would also be aware that a trial judge has an inherent power to regulate the conduct of proceedings in the Crown Court in order to ensure that no abuse of the Court occurs, and to ensure that the proceedings are fair to all parties. This principle of law, too, is in the public domain and available to D, as it is to the public generally. It is a matter on which a person could receive accurate advice from any experienced solicitor. For these reasons, I hold that there is a proper basis in law for restricting the wearing of the niqaab in court, but only if the other conditions are present.

Legitimacy of Aim

77. As I have already observed, the Court must be clear about its objective, so that it can balance it against the proposed restriction on the defendant's qualified right of manifestation of religion or belief. The fair and effective operation of the criminal courts, which act in the interests of victims of crime and the public generally, is in my view both an important vehicle for the prevention of disorder and crime, and an important vehicle for the protection of the rights and freedom of persons including the victims of crime, and the public at large. The aim must be to allow the Court to function fairly and effectively in those interests. I conclude for this reason that the

aim involved in restricting the right to wear the niqaab on this limited basis is legitimate.

Necessity in a Democratic Society

78. I need not repeat what I have said about what seem to me to be the essential components of an adversarial trial and the centrality of the adversarial trial in the administration of justice in England and Wales and, through the administration of justice, the protection of the rights and freedoms of victims of crime, and of the public at large. Nor do I need to repeat what I have said about the adverse effect produced on the adversarial trial if a defendant wears the niqaab in court. This is not just a question of a restriction being 'useful', 'reasonable' or 'desirable'. I conclude that some restriction of the right of a defendant to wear the niqaab during proceedings against her in the Crown Court is necessary in a democratic society. Balancing the right of religious manifestation against the rights and freedoms of the public, the press, and other interested parties such as the complainant in the proper administration of justice, the latter must prevail over D's right to manifest her religion or belief during the proceedings against her to the extent necessary in the interests of justice. No tradition or practice, whether religious or otherwise, can claim to occupy such a privileged position that the rule of law, open justice, and the adversarial trial process are sacrificed to accommodate it. That is not a discrimination against religion. It is a matter of upholding the rule of law in a democratic society.

Proportionality

79. But I must also consider whether the restriction is proportionate in the sense that there is a rational connection between the aim and the restriction; and that the means employed are no more than is necessary to achieve the aim. As both counsel rightly submit, the Court must consider whether there is a less restrictive, but equally effective way of achieving the aim. I must consider specifically whether the Court's aim can be achieved by an approach other than removing the niqaab at all times. That there is a rational connection between the aim and the restriction seems clear. The restriction tends to maintain the quality and fairness of the trial process. But is there a less restrictive approach which would be equally effective in promoting the aim?

Conclusion

80. I propose to adopt the least restrictive approach consistent with what I see as the necessity of enabling the Court to conduct the proceedings fairly and effectively in the interests of all parties. In my judgment, the following principles should be applied when a defendant in the Crown Court asserts the right to wear the niqaab during the proceedings.

81. The question of identification must be dealt with in open court whenever it arises. The defendant should be asked to remove the niqaab for this purpose. If she refuses to do so, the Court should adjourn briefly to allow an officer or other reliable female witness to examine the defendant's face in private, and to give positive evidence of identification in open court. This procedure must be followed on every occasion when identification is needed, especially before arraignment, the return of the verdict, and sentence, if the defendant is convicted. There may be cases where this procedure is insufficient, and where the niqaab must be removed, for example when there is an issue of visual identification, or suspicion of impersonation.

82. In general, the defendant is free to wear the niqaab during trial. The judge should, nonetheless, in the absence of the jury, advise the defendant of the possible consequences of so doing, and make it clear that she will not be free to do so while giving evidence. She should be invited to remove the niqaab during trial, and given time to reflect and take advice if she wishes to do so. Again, if there is an issue of visual identification to be decided by the jury, it may necessary to order that the niqaab be removed, at least while evidence relevant to that issue is given.

83. If the defendant gives evidence, she must remove the niqaab throughout her evidence. The Court may use its inherent powers to do what it can to alleviate any discomfort, for example by allowing the use of screens or allowing her to give evidence by live link. Again, the judge should, in the absence of the jury, advise the defendant of the possible consequences of refusing to remove the niqaab. She should be invited to remove the niqaab and given time to reflect and take advice if she wishes

to do so. If she refuses, the judge should not allow her to give evidence, and must give the jury a clear direction in the terms suggested in the Bench Book, with appropriate modifications, about the defendant's failure to give evidence.

84. I recognise that particular circumstances may arise in other cases which may lead a judge, having considered the matters which must be considered, to make a different order. I cannot, and do not attempt to enumerate such situations, but they may include cases in which the evidence is effectively agreed; or where the defendant's evidence would be purely formal, or would not be challenged. This must be a matter for the judge to decide on the facts of each case.

85. Though I have made much use of the feminine form in this judgment, everything I have said is to be taken to apply to male defendants in equal measure, should an analogous situation arise; and it applies alike to both male and female defendants of any, or no, religious faith.

Directions

86. Accordingly, before this plea and case management hearing ends, I give the following directions -

(1) The defendant must comply with all directions given by the Court to enable her to be properly identified at any stage of the proceedings.

(2) The defendant is free to wear the niqaab during trial, except while giving evidence.

(3) The defendant may not give evidence wearing the niqaab.

(4) The defendant may give evidence from behind a screen shielding her from public view, but not from the view of the judge, the jury, and counsel; or by mean of a live TV link.

(5) Photographs and filming are never permitted in court. But in this case, I also order that no drawing, sketch or other image of any kind of the defendant while her face is uncovered be made in court, or disseminated, or published outside court.

(6) I reserve the case to myself until further order.

Dated 16 September, 2013.