Neutral Citation Number: [2006] EWHC 298 (Admin)

Case No: CO/10461/2006

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

21/02/2007

B e f o r e :

MR JUSTICE SILBER

Between:

R (on the application of X (by her father and litiagtion friend))	**Claimant**
- and -	
The Headteachers of Y School	**First Defendant**
The Governors of Y School	**Second Defendants**

Dan Squires (instructed by Webster Dixon) for the Claimant
Peter Oldham (instructed by Stone King of Bath) for the Defendants
Hearing dates: 8 & 9 February 2007
Further written submissions were supplied on 13 and 15 February 2007

HTML VERSION OF JUDGMENT

The Honourable Mr Justice Silber :

I. Introduction

1. A. The issue raised on this application is whether on the particular facts of this case a particular school was entitled as a matter of public law to refuse to allow a Muslim girl to wear at School the niqab veil, which is a veil which covers her entire face and head save for her eyes. This judgment is fact-sensitive and it does not concern or resolve the issue of whether the wearing of the niqab should be permitted in the schools of this country. That is not a question that a court could or should be asked to resolve. Nothing that appears in this judgment seeks to resolve or to throw any light on this problem or the circumstances in which a veil should be permitted to be worn in schools or any other arena in this country. Indeed it follows that nothing in this judgment is intended to be any comment on the traditions or the requirements of the religion of Islam.
2. B. It is necessary to stress first that my role on this application is limited and second that this is not an appeal on a question of fact. Indeed as was pointed out by Richards J (as he then was) in **Bradley v The Jockey Club** [2004] EWHC 2164 QB in passages which were expressly approved on appeal in that case by Lord Phillips MR. [2005] EWCA Civ 1056 [17] when giving the judgment of the Court of Appeal that:

> *(a) "37 ... The function of the court is not to take the primary decision but to ensure that the primary decision-maker has operated within lawful limits…the essential concern should be with the lawfulness of the decision taken: whether the procedure was fair, whether there was any error of law, whether any exercise of judgment or discretion fell within the limits open to the decision maker, and so forth . . ."* and
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> .
>
> *(b) "43. Of course, the issue in the present case is not one of procedural fairness but concerns the proportionality of the penalty imposed. To my mind, however, that underlines the importance of recognising that the court's role is supervisory rather than that of a primary decision-maker. The test of proportionality requires the striking of a balance between competing considerations. The application of the test in the context of penalty will not necessarily produce just one right answer: there is no single 'correct' decision. Different decision-makers may come up with different answers, all of them reached in an entirely proper application of the test. In the context of the European Convention on Human Rights it is recognised that, in determining whether an interference with fundamental rights is justified and, in particular, whether it is proportionate, the decision-maker has a discretionary area of judgment or margin of discretion. The decision is unlawful only if it falls outside the limits of that discretionary area of judgment. Another way of expressing it is that the decision is unlawful only if it falls outside the range of reasonable responses to the question of where a fair balance lies between the conflicting interests"*

2. X, the claimant is a 12 year old Muslim girl who is a pupil at Y school ("the school") which is a selective all-girls grammar school. She entered her second year there in September 2006. By that time, the claimant had reached puberty and in line with her own genuinely held religious faith she wished to wear the niqab when she attended the school and while she was being taught by male teachers or likely to be seen by men. The three older sisters of the claimant A, B and C had previously attended the school and they wore the niqab.

3. The claimant and her parents were told by the head teacher of the school that she was not permitted to wear the niqab at school and since 6 October 2006 she has not attended the school. Since that time, the school has arranged for her to be provided with some tuition funded by the school but this is substantially less tuition than she would have received if she had attended the school The claimant has been offered a place at another selective entry girl's grammar school Q where she would be able to wear the niqab. This school Q has achieved results in public examinations, which are well above the average. The local authority will provide the claimant with transport to and from school Q and this journey from her home will take about 25 minutes. The claimant has not accepted this offer but neither the claimant nor

her parents have explained what, if anything is wrong with this school Q other than that the claimant would prefer to stay at Y school.

4. In these proceedings, the claimant seeks to challenge the decision of the head teacher of the school not to allow her to attend the school wearing the niqab. At the outset of the hearing, I gave the claimant permission to proceed with the claim. Orders have been made under section 39 of the Children and Young Persons Act 1933 preventing the disclosure of among other things of the name of the claimant, her sisters or the school Y pending further order.

II. The Chronology

5. The claimant X has 3 older sisters who have been referred to as A, B and C and who all attended the school and who all wore the niqab during their time at the school. A attended the school between 1995 and 2002 and while B and C were pupils there respectively between 1997 and 2003 and between 1998 and 2004. Their evidence was that they wore niqabs at the Y school without complaint after they reached puberty but of course they had left before X started at the school in 2005.

6. While the claimant's three sisters were at the Y school, they only wore the niqab when they had a male teacher and at least one of the claimant's sisters also wore a specially adapted veil for science and physical education classes as well as for design and technology classes in order to ensure they could participate safely and fully in those classes. The evidence shows that each of the claimant's three sisters did well while at the school and that they fully participated in the activities of the school. All of them are now embarking on interesting careers or are still studying.

7. The claimant was successful in obtaining a place at the school which selects its pupils after a competitive entry system and she started attending there in September 2005. During her first year at the school, the claimant contends that she wore the niqab occasionally to the School in her first year but the evidence from the defendants is that she only wore it once for a school photograph without any of the school's staff noticing it and then she took it off immediately afterwards. It is common ground in the light of the decision in **R v Camden LBC ex parte Cran** (1995) 94 LGR 8, 12 that the proper approach for me to adopt where there is disagreement on evidence is that I should accept the evidence of the defendants; that means that I should hold that the claimant only wore the niqab on that one occasion in her first year and then only for a limited period for the school photograph.

8. As I have explained by the time when the claimant started her second year at the school on 7 September 2006, she had entered puberty and she then chose to wear the niqab on a permanent basis. She and her family had clearly and genuinely assumed that the claimant like her sisters would be permitted to wear it. The claimant's evidence is that prior to September 2006 no indication had been given to her or the family that this would not be the case or that there had been any change of policy of the school towards wearing a niqab at school.

9. Shortly after the start of the new term in September 2006, the claimant was called to speak to her head of year and she was then asked why she was wearing the niqab. The claimant explained that she was surprised to be asked why she wore the niqab as the teacher, who was questioning her, had taught her sisters and so she would have been aware of the reasons why Muslim women wear niqabs. According to the claimant, when she explained that she wore it for religious reasons, she was told, as was the case, that the large number of other Muslim girls at the school did not wear the niqab. The claimant said that she then explained that there is a difference of opinion and that some Muslims follow the opinion that it is not a central part of their faith to wear a niqab while she, that is the claimant, felt it was compulsory to wear the niqab. So the claimant had stated that it was for that reason that she choose to wear the niqab.

10. After that meeting the head teacher of the school wrote to the claimant's parents on 14 September 2006. The letter stated that:

"...Since [the claimant] returned to school last week, she has been covering her face in certain circumstances. I regret to have to tell you this does not conform to our school uniform policy. Please note we are also discouraging the wearing of a floor-length skirt.

Our school uniform policy makes it possible for Muslim girls that adhere to the requirements of their faith. We follow the Guidance Notes for Buckinghamshire Schools… This document was drawn up in full consultation with leaders of all faiths and has their backing.

I hope that you will feel able to ask [the claimant] to remove her veil at all times when she is at School and provide her with trousers and/ or a shorter skirt".

11. The *Guidance Notes for Buckinghamshire of Schools* to which the head teacher had referred does not make any specific reference to the niqab or whether or not pupils should be permitted to wear it. This document does however state that "*girls should be allowed to cover their hair with a scarf if they wish to do so*" and it continues by noting that while the scarf covering the hair "*will meet the basic requirements of Islam there are a minority who may wish to cover their bodies with a long garment and even cover their faces".* The Guidance does not indicate how schools should deal with those Muslim girls who wish to cover their faces or from what age they should be allowed to wear it.

12. After they had received the letter of 14 September 2006, the parents of the claimant attended a meeting with the head teacher of the school and the claimant's form tutor on 20 September 2006 to discuss the contents of the letter. The stance of the head teacher was that the claimant should not be permitted to wear the niqab at all. Indeed in another letter to the claimant's parents dated 19 September 2006, the head teacher of the school stated that the claimant had been told that **"***we could not permit her to continue covering her face while at school".*

13. A further meeting took place between the claimant, her parents and the head teacher on 28 September 2006 at which it was apparent that the head teacher was unwilling to change her mind and that she was seeking to convince the parents of the claimant to put pressure on the claimant to change her mind. At the end of the meeting, the parents of the claimant asked for further time and they explained that they wished to consult a religious scholar to seek guidance on the issue of the niqab.

14. On 29 September 2006, the head teacher wrote to the parents of the claimant stating first that she could continue to wear the niqab until 6 October 2006 and second that if the claimant continued to insist on wearing the niqab while at school after that time, *"[the parents] will need to remove [her] from the School and make alternative arrangements for her education".*

15. On 4 October 2006, the head teacher wrote a letter to the parents of the claimant informing them the claimant should return to school on or after 9 October 2006 with her face uncovered or else she would be excluded from the school. The claimant has not returned to the school since Friday 6 October 2006 but the school have arranged and paid for the claimant to receive tuition in Mathematics, English and Science but she is now receiving substantially less tuition than she would have received if she was still attending the school. The offer to the claimant of the place at the alternative school Q has not been accepted notwithstanding its academic standing, its similar status to the claimant's present school Y as a selective entry grammar school, the provision of free transport to and from this school and the fact that the claimant could wear her niqab there.

16. The claimant's father wrote on 4 October 2006 to the governors of the school explaining that the three older sisters of the claimant had attended the school over a ten- year period and that they had been permitted to wear the niqab.

17. This letter was copied and sent not only to the head teacher but also to the head of year for the claimant. Responses to that letter were sent to the claimant's parents by the chairman of the governors and the head teacher explaining that the governors would not become involved in a decision about the school uniform. In a letter dated 9 October 2006, the head teacher suggested that a further meeting should take place between the father of the claimant and the Islamic Scholar who was being consulted by the claimant and her family on the issue. Unfortunately the Scholar, Mr Suleimen Ghami, who the claimants' family wished to consult, could not attend a meeting during Ramadan and this meant a meeting with him, the claimant's parents and the head teacher could not be arranged until 1 November 2006.

18. On the morning before the meeting, the head teacher received a letter from the claimant's solicitors stating that they were instructed on behalf of the claimant and warning the head teacher that legal action would ensue if a satisfactory arrangement was not reached at the meeting which was due to begin at 1.30pm on that day.

19. The head teacher thought it was regrettable that the claimant's family had taken this step and she was then advised by the Association of School and College Lecturers not to hold the meeting until she had taken legal advice. When the meeting took place on that day, the head teacher explained at the outset that as solicitors had been consulted, she was not prepared to hold a discussion as had been originally planned until she had first obtained legal advice. Mr Ghani the Muslim Scholar did not appear to have known that the claimant's family had consulted a solicitor or to be familiar with the history of the matter but he explained that the wearing of the niqab was not a compulsory requirement of the Koran but that it was a matter on which each female could form her own views.

20. The head teacher explained that she was not willing to discuss the issues as the claimant's family had consulted solicitors.

21. The present proceedings were commenced on 13 December 2006 in which the claimant seeks to judicial review the decision of 14 September 2006 to refuse to allow her to wear the niqab at school. Although nothing turns on it, it does not appear that any decision was made in that letter but one was made soon afterwards. The defendants to the claim are the head teacher of the school and the governors of the school. At the outset of the present proceedings, I gave permission to the claimant to pursue the present claim.

22. The claimant who brings this claim by her father and litigation friend claims that the school has acted unlawfully because:

> (a) the refusal to allow the claimant to wear the niqab at the school constitutes a breach of the claimant's rights under article 9 of the European Convention on Human Rights("the Convention") ("the article 9 claim") (see paragraphs 23 to 100 below);
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> b) she had a legitimate expectation that she would be permitted to wear the niqab at the school and she would probably not have applied to the school had she known that she would not be permitted to do so. Further, it is contended that there was no proportionate or objective justification for changing the uniform policy so as to frustrate the legitimate expectation of the claimant ("the legitimate expectation claim") (see paragraphs 101 to 129 below); and
>
> (c) the claimant's three older sisters were in a similar position to the claimant but they, unlike the claimant, had been allowed to wear the niqab at school. It is said that it is axiomatic to rational decision-making that

identical cases should be treated in an identical way unless there is some good reason not to do so. The claimant's case is that there was no good reason for the School to change its policy on the wearing of niqabs in the way it did and so to treat the claimant differently to her sisters ("the similar treatment claim") (see paragraphs 130 to 138 below).

III. The Article 9 Claim

(i) Introduction

23. It is common ground that the claimant's article 9 rights have been engaged in this case and that the claimants sincerely held, and holds, the religious belief which she claimed and professed to hold. Article 9 of the Convention provides, insofar as is material, that:

> "*Freedom of thought, conscience and religion*
>
> *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…or for the protection of the rights and freedoms of others."*

24. The claim is in respect of the claimant's *"right to freedom… to manifest [her] religion or belief",* which as is common ground is a qualified right. Mr. Daniel Squires counsel for the claimant contends that the defendants have interfered with the claimant's article 9 rights. Mr. Peter Oldham counsel for the defendants disagrees and he submits that even if the defendants have interfered with the claimant's article 9 rights, they can rely on article 9 (2) and also that their actions satisfy the requirements of proportionality. This submission is disputed by Mr. Squires.

(ii) Infringement of Article 9.

25. Mr. Oldham relies on the reasoning and decision of the House of Lords in **R (Begum) v Governors of Denbigh High School** [2005] 2 WLR 3372 and to which I will refer as "the Begum case" in order to justify his submission that the claimant's article 9 rights have not been infringed. In that case, a majority of the Appellate Committee (Lords Bingham of Cornhill, Hoffmann and Scott of Foscote) held on the facts of that case, that the article 9 rights of a Muslim claimant had not been infringed when she was not allowed to wear to her school a jilbab, which is a long coat-like garment. It was also decided unanimously that the school could in any event rely on Article 9(2.) with the result that the claimant's article 9 rights had not been infringed.

26. Importance is attached by Mr. Oldham to the reasoning of Lord Bingham with whom Lord Scott expressly agreed when he said (with my lettering inserted in square brackets) that :

> *"23. The Strasbourg institutions have not been at all ready to find an interference with the right to manifest religious belief in practice or observance [A] where a person has voluntarily accepted an employment or role which does not accommodate that practice or observance and [B] there are other means open to the person to practise or observe his or her religion without undue hardship or inconvenience…*

24…the authorities do in my opinion support the proposition with which I prefaced paragraph 23 of this opinion…"

27. Mr. Oldham contends that this analysis assists the defendant because it is not disputed that the claimant has a place at Q another selective entry grammar school at which she could wear the niqab. The results of that school are well above average and the journey from the claimant's home to that school would take about 25 minutes and the local authority would provide transport. So Mr. Oldham says that this shows that in the present case in Lord Bingham's words in limb B that "*there are other means open to the person to practice or observe…her own religion without undue hardship or inconvenience*".

28. Mr. Squires' reply is that this passage from Lord Bingham's speech does not assist the defendants because there is an *additional* requirement in that passage which has to be satisfied before it can be shown that an infringement of article 9 has not occurred. That condition is what I have described as limb (A), namely that "the person has *voluntarily accepted* [A]... [a] role which does not accommodate the practice or observance" (emphasis added). His contention is that the claimant had not "*voluntarily accepted*" such a role because what the claimant believed is as stated in her witness statement that she could wear the niqab to school. It is noteworthy that the claimant in the **Begum** case went to her school even though it had an established policy of not permitting the wearing of jilbabs and I agree that this constitutes a material difference from the present case

29. The difficulty confronting Mr. Squires is that the passage from Lord Bingham's speech, which I quoted in paragraph 26 above does not state that there will not be breach of article 9 rights *only* in a case in which the requirements of *each* of the limbs (A) and (B) is satisfied. Indeed Lord Bingham in this passage was not surprisingly only addressing the factual situation in **Begum** in which there was not only an alternative school available but also a rule prescribing the wearing of jilbabs. My task is to ascertain whether there is an interference with an article 9 right when there is merely an alternative school Q available but where (unlike the position in the **Begum** case) there has not been a well-known practice at the claimant's school of prohibiting the wearing of the article in question.

30. This issue can be refined to being a question of whether a person's article 9 rights are infringed if a person is prohibited from wearing the article of clothing connected with his or her religion at their present school but that person is permitted to wear the article in another available suitable alternative school. If the answer is in the affirmative then there has been no interference with the claimant's article 9 rights and the claimant could move to the alternative school Q to which I have referred in paragraph 3 above and where she could wear her niqab. Mr. Squires attaches importance to the statement of Baroness Hale of Richmond in **Begum** that "*92 ...Most of your lordships take the view that [the pupil claimant]'s right to manifest her religion was not infringed because she has chosen to attend this school knowing full well what the uniform was..*" Even if the ratio in **Begum** is so limited on the interference issue, I have been persuaded that the claimant's article 9 rights have not been infringed by the school's decision not to allow her to wear the niqab for four reasons.

31. First, Lord Scott explained in **Begum** (with my emphasis added) that:

> *"87 ...The cases demonstrate the principle that 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. And in particular this is so* ***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****".*

32. Second, Lord Hoffmann said also in **Begum** (with my emphasis added) that:

> *"50..... But her right was not in my opinion 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.* ***Article 9 does not require that one should be allowed to manifest one's religion at any time and place of one's own choosing****..."*

33. Third, the Strasbourg jurisprudence should be followed by the English courts (see, for example **R (Anderson) v Secretary of State** [2003] 1 AC 837, 879-880 [18] when Lord Bingham explained that the House of Lords *"will not without good reason depart from the principles laid down in a carefully considered judgment of the Grand Chamber*")and this Strasbourg case law shows that there is no interference with an article 9 right where there is an alternative place at which the services in question can be provided without the objectionable rule in question. It is clear that the purpose of the Human Rights Act 1998 is not to enlarge the Convention rights or remedies of those whose convention rights have been violated but to enable those rights and remedies to be enforced by the domestic courts in the United Kingdom (see for example, **Begum** [29]). Turning to the relevant Strasbourg case law, in the case of **Jewish Liturgical Association Cha'are Shalom Ve Tsedek v France** (2000) 9 BHRC 27, an association of ultra-orthodox Jews complained that their rights under article 9 had been infringed because French law did not allow them to slaughter animals in accordance with their particular opinion of what Jewish ritual required. They could, however, have imported suitably slaughtered meat from Belgium or come to an agreement with the ordinary Jewish ritual slaughterers to produce meat according to their specifications. The opinion of the majority of the Grand Chamber was that there had been no infringement because:

> *"80 In the court's opinion, there would be interference with the freedom to manifest one's religion only if the illegality of performing ritual slaughter made it impossible for ultra-orthodox Jews to eat meat from animals slaughtered in accordance with the religious prescriptions they considered applicable."*

34. Lord Hoffmann said in **Begum** (supra) about this approach that:

> *"52...'Impossible' may be setting the test rather high but in the present case there is nothing to show that [the claimant] would have even found it difficult to go to another school'.*

35. Similar reasoning applies to the present case as the claimant has an alternative school Q which she could and which she can still attend. There are other cases in which the authorities in Strasbourg have held that there has not been an interference with an article 9 right where the claimant could manifest his or her religious beliefs in a different way. In **Begum**, reference is made to some such cases including **Konttinen v Finland** (1996) 87-A DR 68, in which the Commission when rejecting the applicant's claim pointed out, in paragraph 1, page 75, that he had not been pressured to change his religious views as a Seventh-Day Adventist or prevented from manifesting his religion or belief . Their reasoning was that having found that his working hours conflicted with his religious convictions, the applicant was free to relinquish his post and they did not apparently attach any importance to the fact relied upon by Mr. Squires that the claimant only becomes a Seventh - day Adventist after he had started his work with his employers.

36. Mr. Squires points out that this was a brief admissibility decision and Clayton and Tomlinson have said that such decisions are *"unlikely to be of significant jurisprudential value to the English courts"* (**The Law of Human Rights** paragraph 3.47 A). Such decisions are made pursuant to article 27(2) of the Convention and as such they are matters which in the words of section 2(1) of the Human Rights Act 1998, I must "take into account". It is noteworthy that in **Begum**, the Appellate Committee attached substantial weight to such cases (see paragraphs [23] and 54] and they also did in R **(Williamson) v Secretary of State** [2005] 2AC 246, 269 [63]). Indeed the weight of such authorities increases when, as is the position here, more than one of such cases which support the same proposition.

37. In another case, an application by a child punished for refusing to attend a National Day parade in contravention of her beliefs as a Jehovah's Witness, to which her parents were also party, was similarly unsuccessful in **Valsamis v Greece** (1996) 24 EHRR 294. The basis of the decision as stated in paragraph 38 of the judgment was that article 9 did not confer a right to exemption from disciplinary rules which applied generally and in a neutral manner and that there had been no interference with the child's right to freedom to manifest her religion or belief. Finally, in **Stedman v United Kingdom** (1997) 23 EHRR CD 168, which was another admissibility decision of the Commission, it was fatal to the applicant's article 9 claim that she was free to resign rather than work on Sundays to which she had a religious objection. Mr. Squires contends that there is some lack of clarity as to what that case decides but in **Begum** [23], it was said to be have been decided on the basis which I have just stated.

38. Fourth, I have not been shown or found any decision of the European Court of Human Rights or of any English court in which it was held that there was an infringement of person's article 9 rights when he or she could without excessive difficulty manifest or practice their religion as they wished in another place or in another way. The approach in Strasbourg courts to complaints that an applicant has been unable to manifest his or her religion or belief has been to impose a high threshold before interference can be established. Indeed, Lord Bingham observed in **Begum** that "*even if it be accepted that the Strasbourg institutions have erred on the side of strictness in rejecting complaints of interference..."* [24]. This approach, which is shown clearly in the decided cases, is also supportive of the conclusion that the article 9 rights of the claimant have not been interfered with.

39. I therefore conclude that the claimant's article 9 rights have not been interfered with as she could have accepted the offer of a place at school Q which achieved good academic results and which is easy for her to get to and most significantly where she could wear her niqab. I add that the claimant has not adduced any evidence or made any submission to indicate that this school is an unacceptable school for her. Although this means that the claimant's article 9 claim fails, I will deal with the arguments on the relevance of article 9(2) and proportionality as I have heard submissions about this.

(iii)Was the interference with the claimant's article 9 rights "prescribed by law?"

40. Mr. Squires contends that the interference with the claimant's article 9 right was not "prescribed by law". He attaches importance to the recent statement of the European Court of Human Rights in **Sahin v Turkey** [2006] ELR 73 that:

> *"84 The court reiterates its settled case-law that the expression 'prescribed by law' requires first that the impugned measure should have a basis in domestic law. It also refers to the quality of the law in question, requiring that it be accessible to the persons concerned and formulated with sufficient precision to enable them-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 and to regulate their conduct (**Gorzelik and Others v Poland** (unreported) 17 February 2004 (Gorzelik), para 64)"*

41. The claimant's case is that there was no ascertainable rule, which was being applied to the claimant when she was required to remove the veil because the school did not, according to Mr. Squires, have a published rule on whether the niqab could be worn with the result that the defendant's decision to prohibit the wearing of the niqab was wholly unforeseeable and could not have been predicted by any application of the known school's rules.

42. As I have explained, the claimant's case was that shortly after the start of her second year in September 2006, she was told by her head of year that she should not be wearing a veil. The claimant's parents then received the letter from the school dated 14 September 2006 which I have quoted in paragraph 14 above and which stated wearing the veil *"does not conform to our school uniform policy"*. This was followed by another letter to the claimant's parents dated

19 September 2006 in which the head teacher of the school stated that the claimant had been told that "*we could not permit her to continue covering her face while at school".*

43. In my view, the defendants had stated clearly, comprehensively and comprehensibly that the niqab could not be worn at school and that a breach of that rule would have serious consequences. So returning to the words used in **Sahin** which I quoted in paragraph 40 above, the defendants had made a rule prohibiting the wearing of the niqab which was:

> *"accessible to the persons concerned [namely the claimant] and formulated with sufficient precision to enable them [namely the claimant and those who wore niqab] to foresee to a degree reasonable in the circumstances the consequence which a given action [namely the wearing of the niqab] would have*"

.

44. Mr. Squires correctly in my view accepted that if the head teacher had announced in the school assembly that the wearing of the niqab would thereafter be prohibited, this would have satisfied the requirement that the interference was "*prescribed by law".* I cannot see why the position should be different if, as occurred in this case, the existence of this rule prohibiting the wearing of the niqab was communicated clearly to the only person then directly affected by it, namely the claimant.

45. I therefore conclude that the rule prohibiting the use of the niqab was *"prescribed by law*".

(iv) The Approach to Article 9(2) and Proportionality

46. As there has been some disagreement about the principles to be applied on these issues, it is appropriate now to explain how these matters should be approached. I bear in mind the high importance attached to article 9 rights and that the principles of proportionality applicable to convention rights which was explained by Lord Steyn in **R(Daly) v Secretary of State for the Home Department** [2001] 2 AC 532 when he said that:

> *"27. The contours of the principle of proportionality are familiar. In* ***de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing*** *[1999] 1 AC 69 the Privy Council adopted a three stage test. Lord Clyde observed, at p.80, that in determining whether a limitation (by an act, rule or decision) is arbitrary or excessive the court should ask itself: "whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective."*

Clearly, these criteria are more precise and more sophisticated than the traditional grounds of review."

It is common ground that in the present case that in order to apply the proportionality test in this case, it is necessary to replace the words "the legislative objective" with "the objective or objectives of the school"

47. As Dyson LJ explained in **Samaroo v Secretary of State** [2001] EWCA Civ 1139 [17], it is clear that what Lord Steyn said about proportionality was intended to be of general application to other human rights issues . In explaining why the intensity of review is somewhat greater

where proportionality is in issue than under the traditional grounds of review, Lord Steyn mentioned three significant differences:

> *"28 .First, the doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions. Secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations. Thirdly, even the heightened scrutiny test developed in* ***R v Ministry of Defence, Ex p Smith*** *[1996] QB 517, 554 is not necessarily appropriate to the protection of human rights."*

48. In **Begum,** guidance was given on the approach to be adopted in an article 9(2) case to the margin of discretion or of appreciation to be given to the decision maker and as I will explain the able submissions of Mr. Squires fail to take advantage of this important point. Lord Hoffmann quoted the Strasbourg Court decision in **Sahin v Turkey** (2004) 41 EHRR 109, 131-132 where it explained that:

> *"a margin of appreciation is particularly appropriate when it comes to the regulation by the Contracting States of the wearing of religious symbols in teaching institutions"*

49. He later stated that:

> "*64…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. That is the way the judge approached the matter and I think that he was right."*

50. Lord Scott also spoke of the margin of appreciation when he said that:

> "*84… As to the school's refusal to relax the uniform rules so as to allow Shabina to attend school wearing the jilbab, that too seems to me to have been well within the margin of discretion that must be allowed to the school's managers"*

51. Lord Bingham had stated about the pupil's request to wear the jilbab and the school's refusal to agree to it that:

> "34*…it would be irresponsible of any court ,lacking the experience, background and detailed knowledge of the head teacher, staff and governors to overrule their decision 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…"*

Baroness Hale's conclusion in **Begum** was that the although, the claimant's article 9(1) rights had been infringed, the school acted thoughtfully and proportionately in its uniform policy and her approach implied clearly that the school had a discretion as to how to deal with the conflicting claims of the claimant's article 9 rights and the arguments against allowing the pupil to manifest his or her religion in the particular circumstances of the case. (see for example paragraph 77(d) below)

52. I will apply the principles to which I have referred and also that:

(a) proportionality must be judged objectively by the court (**Williamson v Secretary of State for Education** [2005] 2 AC 246 [51]); and

(b) the approach adopted by the Grand Chamber in Strasbourg in **Sahin** (supra) in which the court recognised first the high importance of the rights protected by article 9, second the need in some situations to restrict freedom to manifest religious belief, third the value of religious harmony and tolerance between opposing or competing groups and of pluralism and broadmindedness, fourth the need for compromise and balance, fifth the role of the state in deciding what is necessary to protect the rights and freedoms of others; the variation of practice and tradition among member states and finally the permissibility in some contexts of restricting the wearing of religious dress.

53. Mr. Squires submitted that the correct approach to this case was as set out in **Samaroo ...**supra) in which it was stated by Dyson LJ giving the judgment of the Court of Appeal that:

(a) "19…I accept the submission of Mr Howell that, in deciding what proportionality requires in any particular case, the issue will usually have to be considered in two distinct stages. At the first stage, the question is: can the objective of the measure be achieved by means which are less interfering of an individual's rights?..."

(b) "20. At the second stage, it is assumed that the means employed to achieve the legitimate aim are necessary in the sense that they are the least intrusive of Convention rights that can be devised in order to achieve the aim. The question at this stage of the consideration is: does the measure have an excessive or disproportionate effect on the interests of affected persons?..."

*(c) " 39.In my judgment, it is not incumbent on the Secretary of State to prove that withholding of a deportation order in any particular case would seriously undermine his policy of deterring crime and order. Proof is not required. What is required is that the Secretary of State justify a derogation from a Convention right, and that the justification be "convincingly established": **Barthold v Germany** (1985) 7 EHRR 383, 403..."* and

(d) "39…In asking whether the justification has been convincingly established, the domestic court (as indeed the court in Strasbourg) should consider the matter in a realistic manner, and always keep in mind that the decision-maker is entitled to a significant margin of discretion. The Secretary of State must show that he has struck a fair balance between the individual's right to respect for family life and the prevention of crime and disorder. How much weight he gives to each factor will be the subject of careful scrutiny by the court. The court will interfere with the weight accorded by the decision-maker if, despite an allowance for the appropriate margin of discretion, it concludes that the weight accorded was unfair and unreasonable. In this respect, the level of scrutiny is undoubtedly more intense than it is when a decision is subject to review on traditional Wednesbury grounds, where the court usually refuses to examine the weight accorded by the decision-maker to the various relevant factors"

54. Mr. Oldham contends that this reasoning does not set out the correct test especially in the light of the reasoning and the decision in **Begum**. With great respect, I do not think that I should follow the approach in **Samaroo** for six reasons. First, the Appellate Committee did not apply these tests in **Begum** . Second, the unsuccessful pupil respondent in the House of Lords in **Begum** [28]) sought to rely on the reasoning in **Samaroo** in paragraphs 19 to 24 of the judgment but this submission was not accepted in the unanimous decision of the Appellate

Committee on proportionality which held that the rule prohibiting the wearing of jilbabs was proportionate.

55. Third, Lord Bingham explained that:

> *"29…But the focus at Strasbourg is not and has never been on whether a challenged decision or action is the product of a defective decision-making process, but on whether, in the case under consideration, the applicant's Convention rights have been violated. In considering the exercise of discretion by a national authority the court may consider whether the applicant had a fair opportunity to put his case, and to challenge an adverse decision, the aspect addressed by the court in the passage from its judgment in Chapman quoted above. But the House has been referred to no case in which the Strasbourg Court has found a violation of Convention right on the strength of failure by a national authority to follow the sort of reasoning process laid down by the Court of Appeal. This pragmatic approach is fully reflected in the 1998 Act. The unlawfulness proscribed by section 6(1) is acting in a way which is incompatible with a Convention right, not relying on a defective process of reasoning, and action may be brought under section 7(1) only by a person who is a victim of an unlawful act."*

56. Fourth, Lord Hoffmann also said in Begum that a court should not hold that "68…*a justifiable and proportionate restriction should be struck down because the decision-maker did not approach the question in the structured way in which a judge might have done"* . Fifth, it is difficult to understand how the reasoning in Samaroo is compatible with the approach of Lord Bingham and Lord Hoffmann. Finally, Lord Scott agreed with both Lord Bingham and with Lord Hoffmann

57. I therefore reject the submission of Mr. Squires that I should adopt the **Samaroo** approach in the light of the decision and the approach of the House of Lords in **Begum.** In paragraphs 95 to 99 below, I will show that in this particular case, the application of the **Samaroo** test would not lead to a different result than that which would follow from the application of the Begum approach

(v) "A lack of thought-out policy balancing the interests at stake"

58. Mr. Squires contends that the School cannot invoke article 9(2) because of its *"lack of thought out policy balancing the interests at stake".* Mr. Oldham disagrees and contends that this is not a relevant consideration but even if it was, the School has in any event complied with this approach.

59. It is the case of the claimant that the way in which a decision-maker takes a decision is relevant so as to show that a proper balance was struck for the purpose of article 9 (2). In support Mr. Squires points to the way in which two different courts of final appeal have dealt with this matter recently and which he submits shows that in the words of his written skeleton argument, this does not mean that "*the way in which a decision is taken and the factors that the decision-maker considered are irrelevant*". First, he points out that in **Begum** (supra), Lord Bingham explained that:

> *"34. On the agreed facts, the school was in my opinion fully justified in acting as it did. It had taken immense pains to devise a uniform policy which respected Muslim beliefs but did so in an inclusive, unthreatening and uncompetitive way. The rules laid down were as far from being mindless as uniform rules could ever be. The school had enjoyed a period of harmony and success to which the uniform policy was thought to contribute. On further enquiry it still appeared that the rules were acceptable to mainstream Muslim opinion. It was feared that acceding to the respondent's request would or might have significant adverse repercussions. It would in*

my opinion be irresponsible of any court, lacking the experience, background and detailed knowledge of the head teacher, 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…"

60. Second, in **Sahin v Turkey** (2004) 41 EHRR 109, when considering the refusal to allow headscarves to be worn at a university, the Grand Chamber in Strasbourg concluded on the issue of justification and proportionality that:

> *"[159] As regards the principle of proportionality, the court found … that there was a reasonable relationship of proportionality between the means used and the aim pursued. In so finding, it relied in particular on the following factors, which are clearly relevant here. First, the measures in question manifestly did not hinder the students in performing the duties imposed by the habitual forms of religious observance. Secondly, the decision-making process for applying the internal regulations satisfied, so far as was possible, the requirement, the requirement to weigh up the various interests at stake. The university authorities judiciously sought a means of whereby they could avoid having to turn away students wearing the headscarf and at the same time honour their obligation to protect the rights of others and the interests of the education system. Lastly, the process also appears to have been accompanied by safeguards-the rule requiring conformity with statute and judicial review-that were apt to protect the students' interests…"*

61. Mr. Squires contends that the school had reached its conclusion based on assumptions without having adequate evidence to justify them or without knowledge and consideration of some significant factors, then it could not in those circumstances justify reliance on the provisions in article 9 (2) . His case is that the way in which a decision is reached is relevant.

62. There are two reasons why I am unable to accept this submission. First, for the reasons which I have set out in paragraphs 54 to 57 above, I do not consider that a criticism of the process by which a decision was arrived at can lead to a conclusion that the decision-maker is thereby precluded from relying on article 9 (2) and second, even if I am wrong, there is nothing wrong with the procedure adopted by the school for the reasons which I will now seek to explain.

63. I do not agree with Mr. Squires that the school had not reached its decision to ban the wearing of niqabs by pupils based on assumptions but without having adequate evidence to justify them or without knowledge and consideration of some significant factors. On the contrary, the decision of the head teacher was only arrived at as result of many thoughtful and sensible inquiries.

64. The reasons for requiring the claimant not to wear the niqab were set out clearly in paragraphs 11 and 13 of the Acknowledgment of Service which was duly verified on behalf of the defendants and so must be regarded as the basis for justifying their decision to forbid the wearing of the niqab at the school. These reasons can be summarised as being first educational factors resulting from a teacher being unable to see the face of the girl with a niqab; second the importance of a uniform policy as promoting "uniformity and an ethos of equality and cohesion"; third security; and finally avoiding applying pressure on girls to wear a niqab. These points were all pursued by Mr. Oldham in his written skeleton arguments and at the hearing. The evidence from the defendants was that:

> (a). the aim of school uniform was to (i) encourage pride in a school; (ii) enable students to feel comfortable in their environment; (iii) ensure that girls of different faith felt welcome; (iv) encourage a sense of equality and cohesion within the School; and (v) protect children from social pressures to

dress in a particular way. This part of the school's ethos on this issue was supported by the chairman of its governors of the school, who explained that the purpose of having a uniform policy was far-reaching and that it, for example, encouraged among the pupils a sense of identity, a sense of equality and a sense of pride. This point was made clearly in the letter of 21 November 2006 from the local authority acting on behalf of the school to the claimant's solicitors answering the letter before action of 31 October 2006 All these are clearly thought-out and sensible reasons. The niqab was an addition to the uniform and with it, the claimant looked different from the other girls at the school;

(b)she took account of the results of her consultation with the Minority Ethnic and Traveller Achievement Service ("METAS"), which is a part of the County Council responsible for the School. METAS consists of consultants who advise schools on raising the achievements of various groups including ethnic minorities. The head teacher said that she was told by Linda Lewins that METAS had taken further advice from Muslim sources before confirming that there was no requirement to permit the wearing of the niqab;

(c) she had read and taken note of the contents of a document entitled "*Working Together to meet the needs of Muslim Pupils"* ("the Working Together document") which was published in 2005 for the schools in the county in which the defendant school was situated following a collaborative effort on the part of the local authority, schools and the Muslim community which highlights the good practice that schools should adopt. The Working Together document recommends that Muslim girl pupils in schools *"..should be allowed to cover their hair with a scarf if they wish to do so…The scarf need only cover the hair. Although this will meet the basic requirements of Islam there are a minority of very devout Muslim* ***women*** *who may wish to cover their bodies with a long garment and* ***even cover their faces***" (emphasis added).The head teacher explained perhaps not surprisingly that she did not consider that the claimant as a girl of 12 was to be regarded as a "woman";

(d) she took account of the contents of the National Union of Teachers Guidelines entitled "The Muslim Faith and School Uniform" and which stated that,"… *schools may wish to consider whether a pupil's request to be allowed to wear the naqab, a face cover would inhibit facial communication as part of teaching and learning".* The head teacher has explained in her witness statement that these matters formed part of her considerations in deciding not to permit the naqab to be worn at the school;

(e) had received the advice given to her by three Muslims that the school's uniform policy met the religious requirements of Islam and that it should not be expected that a girl should cover her face while at school. Those three Muslims were first Rashida Kari (who is a qualified teacher and who was on the working party for the National Union of Teachers guidance referred to in the last sub-paragraph), second Zahir Mohammed (who is a county councillor who is the lead spokesperson for secondary schools in the county in which the school is situated) and third Rafiq Raja, who is the Chair of the Muslim Parents Association in the town in which the School is based. I should add that a witness statement was made on the claimant's behalf by a Muslim scholar, Sheikh Suliman but perhaps surprisingly only three days before the hearing started on 5 February 2007 in which he said that the relevant verses of the Koran are very clear in showing that the female's face should be covered by a niqab in the presence of men and "*it is a requirement for those Muslims who take that view".* This witness statement was made more than four months after the head teacher made the decision concerning

the claimant's wearing of the niqab and in any event it is contrary to the information supplied to the head teacher and which is set out earlier in this paragraph;

(f) she considered the fact that the wearing of the niqab "*would tend to undermine the development of empathy between staff and students and between the students themselves and as such it may affect positive relationships*";

(g) she had reached her conclusion no doubt gained from more than 30 years of her teaching experience that effective teaching depends on students being able to interact with each other and in particular with the teacher as in her words "*being able to see facial expressions is a key component of effective classroom interaction. Successful teaching depends on the teacher being able 'to read' a student to see if the student understands, is paying attention, is distressed, or is enthusiastic. This also applies to interaction between students in group work. I think that wearing a niqab would impede this interaction between students in group work. I think that wearing a niqab would impede this interaction between staff and students*". This factor would according to the head teacher have been especially significant and pertinent for the claimant who, was according to all her reports, so very quiet and shy that an Individual Education Plan had been drawn up for her in March 2006;

(h) her belief was that in a number of lessons, facial expression is a key part of the learning process and of skill development in, for example, drama, English and any subject in which role play is adopted;

(i) her view was that in foreign languages lessons and to some extent in English lessons, the teacher needs to see how the pupil forms and shapes her words in order to help her to understand them and to pronounce them correctly. I add that the claimant speaks a language other than English in her home and that her application form to the school shows that English is not her first language;

(j) schools have become very security-conscious and that they now use different forms of security in the form of keypads on entrance doors and on internal locking systems. The need for security requires members of staff to be able to identify a person on the school premises without difficulty. The presence of niqab on pupils presents difficulties in identifying students and in the words again of the head teacher "*it would not be beyond the realms of possibility for an unwelcome person wishing to move around incognito to wear a niqab*". The claimant's father has explained that in an emergency, the claimant would remove her veil if she was asked by a male teacher but the point made by the head teacher remains valid when considered together with the importance of uniform in the school ethos for the reasons explained in sub- paragraph (a) above. These factors show that by giving the claimant some other distinguishing feature (such as a specifically coloured patch on her clothes) would not be an adequate solution to answer the security concerns of the head teacher ;

(k) a contributory factor was that the wearing of the niqab presents some health and safety issues although the head teacher accepts correctly in my view that these issues are not insurmountable and many, if not all of them may be overcome by using different coverings for the face. The health and safety factors relate to risks caused by the restrictions in the peripheral vision of the niqab wearer when dealing with science experiments where the wearer might be unaware of potential hazards, in physical education classes where the niqab wearer might not be aware of other people or the risk in

these lessons and in design and technology lessons of the niqab becoming caught on equipment.; and

(l) her view that if the niqab became an accepted part of school uniform, there might well be pressure brought to bear on other Muslim girls also to wear a niqab. Such pressure could come from either the families of the Muslim girls or from their friends at school. The head teacher believes that such a development would be undesirable for security and health reasons referred to in sub-paragraphs (j) and (k) above.

65. In my view, this list shows that the head teacher of the school considered with great care the question of whether the claimant should be allowed to wear the niqab. It took advantage of the published material in the Working Together document, the National Union of Teachers Guidelines document as well as specifically consulting with METAS which took advice from Muslim sources. None of these sources, which were available and which were produced to the head teacher or to the school, showed that there was a requirement for the claimant to wear the niqab. The head teacher also used her long teaching experience to appreciate the importance for a teacher to see the eyes of the students for the reasons which I set out in the last paragraph and this is borne out by the statements from teachers at the school, who have explained the difficulties which they experienced in teaching A, B and C, who were the sisters of the claimant who wore the niqab at school when they were at risk of coming into contact with males. I appreciate that each of these sisters do not accept that the wearing of the niqab impeded their learning but in the light of the reasoning in **ex parte Cran** (supra), it is common ground that I should accept as correct the evidence of the teachers, which I do especially as they all have substantial experience of teaching.

66. All this material shows that even if (which I do not consider to be the case) the school had an obligation to have a well-thought out policy balancing the interests at stake before being able to invoke the provisions of article 9(2), the school complied with this obligation. Mr. Squires contends that the school could and should have accommodated the claimant's wish to wear the niqab. He points out that school Q which has offered the claimant a place and to which I have referred in paragraph 3 above permits its pupils to wear the niqab and there is no good reason why the defendants should not have done likewise. This submission fails to appreciate the fact that different schools are entitled to adopt their own rational policies which is what I believe that the defendant school has done in this case. Mr. Squires' approach suggests that there is only one correct policy which the school could have adopted but as the passage quoted in paragraph 1B above shows, this is not the correct approach. In any event, the correct position is in Lord Bingham's words in **Begum**, which I have already quoted in paragraph 51 above, that:

> "34…*it would be irresponsible of any court ,lacking the experience, background and detailed knowledge of the head teacher, staff and governors to overrule their decision 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…"*

67. Thus I cannot accept Mr. Squires' submissions that the School had not taken account of the relevant interests at stake and balanced them. Indeed on the facts of this case, I have concluded as Lord Bingham did in **Begum** that:

> *"33…the school did not reject the [pupil's] request out of hand; it took advice and was told that its existing policy conformed with the requirements of mainstream Muslim opinion"*

That is precisely what was done in this case and the results of this their advice are set out in paragraph 64 (b) to (e) above.

68. If, which is not the case, I had been in any doubt about this, I would have taken note of the margin of appreciation due to the School to which I have referred in paragraphs 48 to 51 above. This would have led to a further reason for rejecting the complaint of Mr. Squires that there was a "lack of a thought-out policy balancing the interests at stake" but as I have explained in paragraphs 55 and 56 above, the process by which a decision is reached is not of any importance in the Strasbourg jurisprudence as it is necessary to focus on the actual decision, which in this case was clearly thought-out.

(vi) "…necessary in a democratic society for the protection of the rights of others" and proportionality

69. Mr. Oldham contends first that any restriction on the article 9 rights of the claimant was in the words of article 9 (2) *"necessary in a democratic society for the protection of the rights of others*" and second that any restriction was proportionate. Mr. Squires disagrees and so it becomes necessary to consider each of these matters relied on by Mr. Oldham in turn. It is common ground that the words *"necessary in a democratic society*" mean a pressing need and no separate point is taken that this requirement was not satisfied on the facts of this case. I will now turn to consider the heads of justification relied on by the school.

(vii) Justification for interference-the importance of school uniform

70. As I have explained, the head teacher attached great importance to the significant purposes of uniform which are to (i) encourage pride in a school; (ii) enable students to feel comfortable in their environment; (iii) ensure that girls of different faith felt welcome; (iv) encourage a sense of equality and cohesion within the school; and (v) protect children from social pressures to dress in a particular way. These points were supported by the chair of the governors who explained that the purpose of having a uniform policy was far-reaching and that it, for example, encouraged among the pupils a sense of identity, a sense of equality and a sense of pride. All these factors are clearly thought-out and sensible reasons. None of these points were cogently disputed by the claimant and indeed I consider them to be powerful and valid points which would justify the school's policy as being necessary in a democratic society for the protection of others provided that the actions of the school were consistent with these professed views.

71. It is also clear from the evidence that the school over the last few years has attached a great deal of importance to selecting school uniform which was among other things acceptable to its pupils and their parents. First, there was full scale review in 2001/2002 of the existing uniform in which the parents were invited to express their views on the uniform. I add that as they had a daughter at the school, the claimant's parents would then also have been consulted. This review was instigated because of concern about, among other things, the cost, warmth and comforts of the existing uniform as well the requirements of the different ethnic groups within the school. A committee was formed to deal with the review which included pupils, teachers and parents. The committee then put forward a number of options which were then voted on by the pupils who would have included the claimant's sister as the school were anxious to ensure everyone could put forward their views.

72. The hijab head scarf was discussed and it was felt that those who wanted to wear it could continue to do so provided its colours were those of the school uniform. The niqab was not discussed or indeed apparently raised by anybody. As a result of the survey and the detailed consultation exercise, the new uniform was introduced although pupils were able to wear the old uniform until it was replaced. There was then a further review conducted by the present head teacher which entailed sending a questionnaire to about 800 families and it focussed on the strictness of the interpretation of the existing policy. As a result of the survey, the numbers

of the different acceptable styles of trousers and skirts was reduced but the uniform policy was then to be and was strictly enforced. The head teacher explained that parents were and are regularly reminded of uniform matters in a general letter, which has been and is sent out to parents every half term.

73. This evidence leads me to the conclusion that it is correct that the school attached great importance to its pupils wearing the correct uniform and which had been selected in the light of representations from the pupils and their parents. More specifically it shows that the school attached importance to the four matters which I set out in paragraph 64(a) (i) to (v) above.

74. I should add that in B**egum** Lord Bingham explained that "26…*it was not suggested that the rules [on uniform including those relating to the wearing of jilbab] were not made for the legitimate purpose of protecting the rights and freedoms of others"*. When I asked what the evidence was in **Begum** which led to that conclusion, Mr. Squires pointed out that the evidence of the head teacher in that case was that she had believed that school uniform played an integral part in securing high and improving standards, serving the needs of a diverse community, promoting a positive sense of communal identity and avoiding manifest disparities of wealth and style.

75. These are very similar points to those put forward by the head teacher and the school in the present case as justification for the rule prohibiting the wearing of the niqab in the present case. The niqab was an addition to the uniform and with it, the claimant looked different from the other girls at the school This fact reinforces my view that these reasons put forward by the defendants constitute valid reasons for upholding this article 9(2) claim subject to the issue of proportionality to which I now turn

76. Applying the three limbs of the proportionality test set out in paragraph 46 above, the object of the school in relation to school uniform was sufficiently important to justify limiting the article 8 right. In addition, the measures adopted by the school in prohibiting the wearing of the niqab were rationally connected to the school's objectives and did no more than necessary to accomplish that objective.

77. I am fortified in coming to this conclusion by the fact that many of the reasons given by the Appellate Committee for their decision in the **Begum** case that the rule prohibiting the wearing of niqabs was proportionate on the grounds of the need for a uniform also apply with similar force in the present case because:

> (a) Lord Bingham explained that:*"33…when some other schools permitted it and for adhering to their own view of what Islamic dress required. None of these criticisms can in my opinion be sustained. The headscarf was permitted in 1993, following detailed consideration of the uniform policy, in response to requests by several girls. There was no evidence that this was opposed. But there was no pressure at any time, save by the respondent, to wear the jilbab, and that has been opposed. Different schools have different uniform policies, no doubt influenced by the composition of their pupil bodies and a range of other matters. Each school has to decide what uniform, if any, will best serve its wider educational purposes. The school did not reject the respondent's request out of hand: it took advice, and was told that its existing policy conformed to the requirements of mainstream Muslim opinion*
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> .
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> *34. on the agreed facts, the school was in my opinion fully justified in acting as it did. It had taken immense pains to devise a uniform policy which respected Muslim beliefs but did so in an inclusive, unthreatening and uncompetitive way. The rules laid down were as far from being mindless as uniform rules could ever be. The school had enjoyed a period of harmony*

and success to which the uniform policy was thought to contribute. On further enquiry it still appeared that the rules were acceptable to mainstream Muslim opinion. It was feared that acceding to the respondent's request would or might have significant adverse repercussions…" In the present case, the school has gone to great lengths to work out its policy on uniform in general and on niqabs in particular by making the inquiries to which I have referred in paragraph 64 (b) to(e) above;

(b) Lord Hoffmann approved of the approach of the school in the **Begum** case, which was that " *66…[the school] had decided that a uniform policy was in the general interests of the school and then tried to devise a uniform which satisfied as many people as possible and took into account their different religions…"* As I have explained in paragraphs 71 and 72 above, this is what the school did in this case as they consulted on the uniform policy. The school in the present case did rather better than the school in the Begum case because as Lord Hoffmann continued in the Begum case "66.. *When Shabina refused to wear the uniform, they did not "explore the reasons why [she] sincerely believed that she must wear [the jilbab]". They simply said that the policy was in place and that if she wanted to come to school she must wear the uniform".* In the present case as I have explained, when the claimant insisted on wearing the niqab*, the school* duly made inquiries to which I have referred in paragraph 64 (b) to (e) above about the need and desirability for girls like the claimant to wear niqab from Islamic sources;

(c) Lord Scott agreed with Lords Bingham and Hoffmann; and

(d) Baroness Hale said that "98…*Social cohesion is promoted by the uniform elements of shirt, tie and jumper, and the requirement that all outer garments be in the school colour. But cultural and religious diversity is respected by allowing girls to wear either a skirt, trousers, or the shalwar kameez, and by allowing those who wished to do so to wear the hijab. This was indeed a thoughtful and proportionate response to reconciling the complexities of the situation."* By the same token, in the present case, cultural and religious diversity was respected by allowing the pupils at the school to wear the hijab provided that it was in the school colours and by carrying out the inquiries to which I have referred in paragraph 64 (b) to (e) above.

78. So I conclude that even with the smallest margin of discretion, the rule prohibiting the wearing of the niqab was first made for the legitimate purpose of protecting the rights and freedoms of others because of the desirability of having a uniform and second because it meets the test of proportionality which I have outlined. The objective of having a uniform was sufficiently important to justify limiting the article 9 right and the rule prohibiting the wearing of niqabs was rationally connected to it. It also went no further than necessary to accomplish the school's objective. In consequence the article 9 (2) claim succeeds but as I heard arguments on the other heads of justification, I will deal with them briefly.

(viii) Justification for interference- Security and Proportionality

79. As I have explained in paragraph 64(j) above, the evidence shows that schools have in recent years become very security conscious and that many now have forms of security in the form of keypads on entrance doors and internal locking systems. The need for security requires members of staff to be able to identify a person on the school premises without difficulty. The presence of niqab on pupils presents difficulties in identifying students and in the words of the school's head teacher "*it would not be beyond the realms of possibility for an*

unwelcome person wishing to move around incognito to wear a niqab". She also points out that being able to identify girls speedily is important in the case of an emergency such as a fire assembly of if it is known that security has been breached.

80. The claimant's father has explained that in an emergency, the claimant would remove her veil if she was asked to do so by a male teacher but it is questionable why a teacher should be forced to take these steps especially when great speed might well be required and this procedure might delay matters especially if there are more pupils than the claimant wearing the niqab. I suspect that the claimant would have to be persuaded that there was a genuine emergency before she would agree to remove a veil in the presence of a male. I appreciate the Mr. Squires says that this would not be a problem as pupils wearing a niqab might have some other distinguishing feature, such as a piece of cloth sown on to their garment to identify the claimant but that would not enable the school to have its desired policy of having all its pupils in uniform for the reasons which I have already explained. In any event, the school should be allowed to decide how to approach this issue as it had a margin of discretion.

81. In my view, the school is able to justify its policy to prohibit the wearing of niqab by the claimant on the grounds of security and this was in the words of article 9(2) justified on the grounds of *"in the interests of public safety…or for the protection of the rights and freedom of others*" and this is so particularly in the light of the margin of appreciation due to the decision of the school for the reasons set out in paragraphs 48 to 51 above. Mr. Squires says that the risk of somebody disguising in a niqab is minimal but I am not prepared to overrule the fears of the head teacher and the mere fact that other schools such as Q permit the wearing of niqabs merely means that another head teacher in another school and in another town has a different approach. There might be different factors at play in school Q.

82. Turning to the question of proportionality**,** this security factor was sufficiently important to justify limiting the article 9 right of the claimant in the light of genuine and proper concern about security at the school. In addition the prohibition on wearing niqab was rationally connected to the objective of ensuring that the school remained secure and that its pupils and employees remained safe. Finally the means used to impair any article 9 right of the claimant by prohibiting the wearing of the niqab were no more than is necessary to accomplish this objective.

(ix) Justification for interference-. Educational standards and proportionality

83. The case for the school is that by wearing the niqab, the claimant would hamper her learning and the ability of the school to teach her for the reasons which I have explained in paragraph 64 (f) to (i) above. The head teacher explains that effective learning depends on pupils being able to interact with each other and in particular with the teacher. She says that effective teaching depends on the teacher being able to see if the pupils understand what she is being taught and if she is paying attention as well as discovering if she is distressed or enthusiastic.

84. The head teacher also explained that in foreign language tuition and to some extent in English lessons, the teacher needs to see how the pupil forms and shapes words in order to help the pupil to pronounce them correctly. This evidence was supported by members of the teaching staff at the school. It was pointed out that History is now taught with the extensive use of role play and so the wearing of the niqab by the claimant would inhibit the ability of the claimant to participate in these activities and to communicate with her peers

85. Mr. Oldham contends that not only are these valid concerns for all pupils who wear the niqab but they have added weight in the case of the claimant, who is a very quiet and shy girl who could and should make more contributions to class discussions even before she started to wear the niqab. As I have explained, the claimant was subject to a special programme in and from March 2006 because of these problems which arose before she started to wear the niqab.

86. Mr. Squires contends that these concerns are not justified and in support he relies on the evidence of the claimant's three elder sisters, who had, as I have explained, been pupils at the

school. They have all made witness statements in which they explain first that they wore the niqab while pupils at the school unless in a closed classroom with a female teacher and second that the wearing of the niqab at school did not cause any academic or other problems for them or inhibit their participation in school activities. Each of the claimant's sisters explains that they did well while at the school.

87. The evidence from their former teachers at the school is unfortunately different as they explain that there were difficulties caused in the classroom by the claimant's sisters wearing the niqab. An English teacher said that it was difficult to hear what one sister of the claimant was saying and therefore her comments had to be repeated to the class. He also said that it was difficult to detect from her facial expression if she had understood her task. Similar views were expressed by a Chemistry teacher at the school, who taught all three of the elder sisters of the claimant. Similarly a Music teacher of the claimant said that she taught an elder sister of the claimant and that she could not tell if she was singing or playing the recorder because of the presence of the niqab which she was wearing

88. It is common ground that in so far as there is disagreement between the evidence adduced on behalf of the claimant and that supplied by the defendants, as there has been no cross-examination of the makers of the witness statements, I should assume the facts to be those which favour the defendants ... see **ex parte Cran** (supra). Thus I conclude that I should accept the defendants' evidence and conclude that the wearing of the niqab inhibits effective teaching to and learning by those who wear it for the reasons which I have explained in paragraphs 64 (f) to (i) and 87 above.

89. Mr. Squires does raise an important point which is that the wording of article 9 (2) does not cover problems found by the claimant as it refers to limitations "*necessary in a democratic society…for the protection of the rights and freedoms of others*". In my view, he is correct as the use of the word "*others"* in article 9(2) indicates that the claimant's position has to be ignored. There is no evidence that the learning by the claimant's classmates has been impaired or adversely affected by a girl in their class wearing a niqab. In consequence, the school cannot rely on this ground relating to educational factors under article 9(2).

(x) *Justification for interference- pressure on other Muslim girls*

90. The head teacher explains that if the niqab became an accepted part of the school uniform, this would mean that other Muslim girls might have pressure applied to them by their families or by other pupils to wear the niqab. This is something which causes the head teacher concern because of the security aspects and to which I have already referred in paragraph 64(l) above.

91. Mr. Squires responds by contending that while there was evidence of this factor in the **Begum** case, nobody could predict what might happen in the present case if the niqab could be worn by pupils. He also points out that when the claimant's sisters wore the niqab between 1995 and 2004, there was no evidence that any group was pressurised to follow their example. In my view there is a difference between, on the one hand, the situation in a school when the niqab is worn by only one or two sisters and when there is no mention of whether niqabs can be worn and, on the other hand, a situation when it is *expressly* stated that niqabs can be worn which is what will occur if the claimant is successful. In the latter case, many Muslim girls might become subject to pressure to wear the niqab. Furthermore the head teacher will know how her pupils might react and it would be wrong for me to overrule her.. Furthermore, it was explained in the **Begum** case that the girls at the school subsequently expressed their concern that if the manifestation of religion in that case was to be allowed, they would face pressure to adopt it even though they did not wish to do so and that was considered to be of crucial importance by Baroness Hale (see paragraph 98); the head teacher had material to justify her fears on this front.

92. An additional and particularly persuasive reason why I accept the school's concern to be justified and to fall within article 9(2) on this ground be is that I have found the evidence of the head teacher to be thoughtful and correct on other points and indeed to be very convincing

and that encourages me to accept her concerns about the effect on other Muslim girls of allowing girls to wear the niqab I also believe in adopting Lord Bingham's words in **Begum** (supra) that:

> *"34…it would in my opinion be irresponsible of any court lacking the experience, background and detailed knowledge of the head teacher…to overrule their judgment on a matter as sensitive as this".*

93. On the issue of proportionality, I consider that that the objective of avoiding pressure on other Muslim girls to wear the niqab was sufficiently important to justify limiting the article 9 right and the rule prohibiting the wearing of niqabs was rationally connected to it. It also went no further than necessary to accomplish the school's objective.

94. In reaching those conclusions, I have not overlooked the contention of Mr. Squires that the evidence of the head teacher does not survive the close scrutiny required because she does not give the basis of this view or why this problem did not arise when the claimant's sisters wore the niqab. I consider that this is placing too high a burden on the school especially as first the recurring theme in **Begum** was to permit a margin of appreciation or discretion to the school as I have explained in paragraphs 48 to 51 above and second on matters such as the impact on other girls of permitting the wearing of niqab, the head teacher was using her judgment and her feel about the consequences of this change of the rules.

(xi) The Application of the ***Samaroo*** *Approach*

95. As I have explained, I was unable to accept the approach advocated in **Samaroo** for the reasons which I explained in paragraphs 54 to 57 above, but I then stated that I would return to consider what would be the effect of applying them, which I now do. Starting with the defendants' contention that they were justified in not permitting the wearing of the niqab because it might lead to pressure being applied to other girls to follow, I agree with Mr. Squires that that the head teacher goes no further than saying that there might be pressure applied but that she fails to explain why there might be pressure applied now even though none was exerted when the claimant's three sisters wore the niqab. Thus he says that there is no "pressing social need" of the kind referred to in **Daly ...**supra) [27].

96. I am unable to accept that argument because there is nothing wrong with a decision maker relying on the possibility of something occurring without being able to prove it. After all, as I explained in paragraph 53 (c) above, that is precisely what Dyson LJ said in **Samaroo** [39]. Another reason why I cannot accept Mr. Squires' complaint is, as Dyson LJ explained, that the defendants are entitled to a margin of discretion and that would enable them with the other factors to which I have referred in paragraphs 91 to 93 and above to show why there could now be a "pressing social pressure". It is necessary to recall that it was explained in the **Begum** case that the girls at the school subsequently expressed their concern that if the manifestation of religion in that case was to be allowed, they would face pressure to adopt it even though they did not wish to do so and that was considered to be of crucial importance by Baroness Hale (see paragraph 98); the head teacher had material to justify her fears on this front.

97. On the security aspect, Mr. Squires contends that the defendants' case that this factor could justify the rule against wearing niqabs fails both stages of the **Samaroo** test but I am unable to agree. I have explained why the other suggested means of dealing with the security problem would not be effective in paragraphs 68 (j) and 80 above. Again, I must stress that the defendants enjoyed a margin of discretion and also as Dyson LJ said in respect of a complaint that definite proof was required before a decision-maker could rely on some fact, "39*…that would ask the impossible. Proof is not required*"

98. I also cannot accept the claimant's further criticism to the effect that the claim of the defendants that the rule forbidding the wearing of niqabs could be justified on security aspects should not be accepted because first the risk that someone could enter the school dressed in a

niqab is minimal and second that previous head teachers of the school had allowed the claimant's sisters to wear a niqab without any adverse security consequences. I am unable to accept these criticisms not merely because the defendants are entitled to a margin of discretion but also because this was an area in respect of which it would be "irresponsible" to overrule the head teacher's considered opinion. She after all knows what the risks are in her town and in her school and above all at the present time why matters might be different from what they were a few years ago.

99. I was invited by Mr. Squires to consider if on each of the matters relied on by the school and which I have found to be grounds for derogation, the defendants' claims were "convincingly established" in the light of the **Samaroo** judgment and my answer is in the affirmative. So, if I were to apply **Samaroo**, I would be satisfied that the factors relied on by the school were proportionate

(xii) Conclusions on the Article 9 Issue

100. Although article 9 is engaged, I do not consider that the school has interfered with the claimant's article 9 rights but even if I am wrong then the interference has been justified under article 9(2) for the reasons which I have explained. As I have explained, an insuperable barrier to many of his submissions was the decision and reasoning in **Begum.**

IV. The Legitimate Expectation Issue

(i) Introduction

101. Mr. Squires contends that the claimant had a legitimate expectation that she would be permitted to wear the niqab at the school and that she would probably not have applied to the school had she known that she would not be permitted to do so. It is not the claimant's case that any written or oral representation was made to her which formed the basis of her expectation but rather that her legitimate expectation is based on the experience of her three elder sisters, who had been permitted to wear the niqab while they were pupils at the school some years ago. Further, it is contended by Mr. Squires that there was no proportionate or objective justification for changing the uniform policy so as to frustrate the legitimate expectation of the claimant that she could wear the niqab at her school.

102. Mr. Oldham disagrees and he submits that the claimant cannot establish a legitimate expectation because:

> (a) The school had not adopted a practice which constituted a representation as to how it would deal with the claimant if she were to wear a niqab at school;
>
> (b) There is no evidence that the claimant had an expectation induced by the school that she would be allowed to wear the niqab;
>
> (c) The claimant cannot show any detrimental reliance on any such expectation;
>
> (d) If the claimant had such a legitimate expectation, it was lawfully extinguished by the statutory duties of the school's governors; and
>
> (e) If the claimant had such a legitimate expectation, it was lawfully extinguished by the school's pursuance of legitimate aims which were proportionate.

103. Before dealing with each of these issues, it is appropriate to mention that both counsel rely on what was said by Laws LJ when giving the judgment of the Court of Appeal in **Nadarajah v Secretary of State** [2005] EWCA Civ 1363. He then explained insofar as is relevant to the existence of the expectation that:

> *"68... Where a public authority has issued a promise or adopted a practice which represents how it proposes to act in a given area, the law will require the promise or practice to be honoured unless there is good reason not to do so. What is the principle behind this proposition? It is not far to seek. It is said to be grounded in fairness, and no doubt in general terms that is so. I would prefer to express it rather more broadly as a requirement of good administration, by which public bodies ought to deal straightforwardly and consistently with the public. ...*

(ii) *Had the school adopted a practice which constituted a representation as to how it would deal with the claimant if she were to wear a niqab at school?*

104. The case for the claimant is that her three elder sisters were each permitted to wear the niqab while they were pupils at the school and that in consequence she too should be able to wear one. It is not denied that the claimant's sisters wore niqabs when pupils at the school but the school denies that as at the time when the claimant joined the school in September 2005 or when she wished to wear a niqab in September 2006 there was a practice that she should be permitted to do so. The test to be adopted by the courts in determining if there was such practice at that time is an objective one bearing in mind that a legitimate expectation arises from "*the existence of a regular practice which the claimant can reasonably expect to continue*" (**Council of Civil Service Unions v Minister for the Civil Service** [1985] AC 374, 401 per Lord Fraser of Tulleybelton).

105. There was no evidence that when the claimant's sisters were at the school from 1994 onwards that anybody other than these three pupils wore the niqab. Indeed if there had been, I would have been sure that it would have been well known to one or other of them and that this would have been mentioned in one or other of their witness statements. So I conclude that it was highly unlikely that anybody other than the claimant's sisters had worn the niqab at the school from 1995 onwards. It is necessary to bear in mind not only that the claimant's three elder sisters wore the niqab between 1995 and 2004 and that the claimant wore it briefly for a school photograph unknown at the time to the school in 2005/2006 but also the following relevant points:

> (a) In the period from about July 2004 until September 2006, there were about 120 Muslim girls at the school out of a total of 1360 pupil. The Muslim pupils were allowed to wear hijabs in certain prescribed colours but this was not specified in any of the school's written uniform codes;
>
> (b)It is highly unlikely that any girl other than the claimant's three sisters wore the niqab at the school from 1994 onwards;
>
> (c) No girl had worn the niqab at the school since one of the claimant's sisters C had left in summer 2004;
>
> (d) During the four year period from the present head teacher's appointment in September 2002 , no girl other then the claimant's sisters had worn the niqab at the school prior to the decision of the claimant to wear the niqab in September 2006;
>
> (e) The school had a thorough revision of its uniform policy in 2001/2002 and again in 2003 and thereafter the school attached great importance to complying with its uniform requirements;

(f) The school's uniform regime applied for all years other than when the girls in the sixth form which was during the last two years of a pupil's time at the school when there was no uniform policy.

(g) The sixth form at the school was "very separate from the rest of the school" in the words of a previous deputy head of the school, who left in August 2002;

(h) The last time before September 2006 when a pupil not in the sixth form and so subject to a uniform regime wore a niqab was in July 2002 when the claimant's next eldest sister C was about to go into the last two years of her time at the school;

(j) The head teacher of the school would have had overall control of a decision as to whether it was permissible for a pupil to wear a niqab and there was a change of head teacher in September 2002;

(k) No girl, who had not previously worn a niqab before the present head teacher arrived at the school, started to do so during her time in office before the claimant tried to do so four years later in September 2006;and

(l) The new head teacher had her own views on uniform as was shown by her own review carried out in 2003 and she had resolved to enforce the uniform policy more rigorously. This policy did not expressly permit the wearing of niqabs

106. A striking feature of those factors is that the niqab had not been worn at the school from July 2004 onwards by any of the 130 Muslim girls and in the previous two years then it was worn by only one girl C, the claimant's sister, who was then in the sixth form which did not have a uniform regime and which was according to the very significant but undisputed evidence of the school's former deputy head teacher "*very separate from the rest of the school"*. Thus, there was very limited wearing of niqabs and this is significant because the new head teacher had not stated what her attitude was to the wearing of niqab by those subject to the uniform regime. There must in all those circumstances, at the lowest have been considerable uncertainty about whether in the circumstances prevailing in 2005 or 2006, a niqab was permitted to be worn especially as during her time in office first nobody subject to the uniform regime had started to wear it and second nobody in the period from July 2002, who was subject to the uniform regime had worn the niqab at all as the claimant's youngest sister was then in the sixth form and so outside uniform control.

107. It follows that in the words of Laws LJ in **Nadarajah** (supra), the school had not by September 2005 or September 2006:

> "*adopted a practice which represents how it proposes to act in relation to [the wearing of niqab by any girl in the part of the school outside the sixth form which was not subject to the uniform regime]"*.

108. If, which is not the case, I was in any doubt about this conclusion, I would have reached the same conclusion by focussing:

(a) on all the girls in the school because there was not a practice how the school in 2005 or 2006 would act under the new head teacher in the light of the circumstances prevailing at the time in relation to the wearing of the niqab. At that time no girl had worn the niqab for over a year and no girl had started wearing it since 1998 or 1999 when C had started to wear it. There must have been at least uncertainty as to what the new head teacher would do; or

(b) solely on girls who were as young as 12 years old as this was the claimant's age in September 2006. The age of the student can be relevant because as I have explained in paragraph 64(c) any obligation on Muslim females to cover their faces with a niqab applied only to "*Muslim women*" and the head teacher said that she did not consider a person of 12 years of age to be a "*woman*". The last time before September 2006 when any girl aged 12 years of age wore the niqab at the school would have been when the claimant's next oldest sister C was at that stage and that would have been in about 1999. So that would have meant that as at September 2006, no girl of the claimant's age in September 2006 would have worn the niqab for about 7 years. During that period, as I have explained, there had been a change of headmistress and reviews of uniform. So there must have been uncertainty and certainly not a practice.

109. In those circumstances, there could not have been a practice (let alone "a regular practice") in either September 2005 or September 2006 that permitted the wearing of the niqab at the school. This means that the case of the claimant based on legitimate expectation must fail on either the basis set out in paragraph 108 or the basis stated in paragraphs 106 and 107 above. As I have heard submissions on other aspects of the reasonable expectation claim, I will comment on them briefly.

(iii) Was there evidence that the claimant had an expectation induced by the school that she would be allowed to wear the niqab?

110. Mr. Squires point out the claimant states that she had this expectation induced by the school's policy of allowing her sister to wear the niqab during their time as pupils there. Mr. Oldham contends that this is not so but I have no reason to doubt the evidence of the claimant that:

> "*I thought that I would be able to wear the niqab at[Y] school because all three of my elder sisters had done so".*

111. This belief was according the claimant induced by the school because they did not prevent the claimant's sisters from wearing the niqab and again I have no reason not to accept this evidence.

(iv) Can the claimant show any detrimental reliance?

112. Mr. Oldham contends that that the claimant cannot show any detrimental reliance but I am unable to agree. The claimant says in her witness statement that if she had known that she would not have been allowed to wear the niqab when she decided to go to the school, then in those circumstances,: *"I would have gone to another school, which would accept me and allow me to practice my religion"*

(v) If the claimant had a legitimate expectation, was it lawfully extinguished by the statutory duties of the school's governors?

113. Both sides seek to drive assistance from another part of the judgment of Laws LJ in **Nadarajah ...**supra) when he explained that:

> *"68… Accordingly a public body's promise or practice as to future conduct may only be denied, and thus the standard I have expressed may only be departed from, in circumstances where to do so is the public body's legal duty, or is otherwise, to use a now familiar vocabulary, a proportionate*

response (of which the court is the judge, or the last judge) having regard to a legitimate aim pursued by the public body in the public interest. The principle that good administration requires public authorities to be held to their promises would be undermined if the law did not insist that any failure or refusal to comply is objectively justified as a proportionate measure in the circumstances".

69.…Of course there will be cases where the public body in question justifiably concludes that its statutory duty (it will be statutory in nearly every case) requires it to override an expectation of substantive benefit which it has itself generated…"

114. Mr. Oldham contends that any legitimate expectation of the claimant was extinguished by section 21 (1) of the **Education Act 2002** which provides that *"subject to any other statutory provisions, the conduct of the maintained school shall be under the directions of the school's governing body"* and its predecessor section (section 38(1) of the **School Standards and Framework Act** 1998) which was in identical terms. It is said that the rules on niqab were made pursuant to these provisions.

115. I cannot agree for two main reasons. First, the approach of Laws LJ in **Nadarajah** (supra) was that the relevance of a statutory duty was (with my emphasis added) that " 69 *…there will be cases where the public body in question justifiably concluded that its statutory duty… **requires** it to override an expectation of substantive benefit which it itself generated"* The relevant statutory provisions in this case are, as I have shown, merely permissive and so they did not *require* the school to do anything and certainly not to override an expectation.

116. Second, if Mr. Oldham was right and these statutory provisions trumped any legitimate expectation, the consequences would be surprising and disturbing because it would mean that the governors of a school could use these statutory provisions to override any legitimate expectation. So if Mr. Oldham' submission was right, the governors of the school would for example, be entitled to change overnight its long established written uniform requirements and then to insist that on the following day that girls would be only permitted to attend the school in some new and extremely expensive uniform; that cannot be what Laws LJ intended should occur.

(vi) If the claimant had a legitimate expectation, was it lawfully extinguished by the school's pursuance of legitimate aims and were the steps proportionate?

117. Mr. Squires contends that as there has been detrimental reliance by the claimant who would not have gone to the school if she had known that she could not wear the niqab, this constitutes an obstacle for the school and he points out correctly in my view that this submission is supported by the what Laws LJ stated in **Nadarajah** (supra) which was that:

"69…Otherwise the question in either case will be whether denial of expectation is in the circumstances proportionate to a legitimate aim pursued. Proportionality will be judged, as it generally is to be judged, by the respective force of the competing interests arsing in the case. Thus where ...there Is detrimental reliance…these are instances where denial of the expectation is likely to be harder to justify as a proportionate measure…"

118. I will keep that factor very much in mind in the claimant's favour when considering how to approach the issue. According to Mr. Squires, the evidence shows that the claimant is happy and settled at the Y school where she has made friends and so she wants to stay there and not to move to another school where she would be allowed to wear the niqab. It is also said that the school could allow only the claimant and no other pupil to wear the niqab and at the same

time make it clear that nobody else would be allowed to wear the niqab. Thus it is said that the claimant should be the only person allowed to wear the niqab.

119. To allow one girl to wear the niqab is not an acceptable solution because of (a) the importance attached to the school for the girls to wear identical uniform for the reasons which I have outlined in paragraph 64 (a) above;(b) the educational reasons which I summarised in paragraph 64 (f) to (i) above and which significantly apply with particular force to the claimant because of her particular difficulties as a shy and a very quiet pupil; and (c) the security factors to which I referred in paragraph 64(f).

120. Any of those factors would in my opinion be sufficient by itself to justify rejecting the suggestion of allowing the claimant to be the only girl allowed now or in the future to wear the niqab even apart from the fact that this solution was not raised or suggested at the time when the decision under challenge was made. In addition if this solution was adopted, there may, as the head teacher fears be pressures from peers or family for other girl to follow that course. It is necessary to recall that it was explained in the **Begum** case that the girls at the school subsequently expressed their concern that if the manifestation of religion in that case was to be allowed, they would face pressure to adopt it even though they did not wish to do so and that was considered to be of crucial importance by Baroness Hale (see paragraph 98); the head teacher had material to justify her fears on this front. Furthermore if the school allowed only one girl (namely the claimant) but no other girl to wear the niqab, then the school might well find itself facing first an irrationality claim based on dissimilar treatment for girls in a similar position similar to the claim made against the school and set out in paragraph 130 below and second perhaps a claim based on an infringement of article 14 in relation to the other pupil's article 14 rights. The school also has a margin of discretion.

121. It is necessary to repeat again that these are matters in respect of which the school is entitled to a margin of discretion , as was explained in **Begum** for the reasons to which I have referred in paragraph 48 to 50 above. Indeed the adverse consequences of complying with the claimant's demands are matters which in Lord Bingham considered in **Begum** that:

> "*it would be irresponsible of any court, lacking the experience, background and detailed knowledge of the head teacher, staff and governors, to overrule their judgment on a matter as sensitive as this"* [34].

122. Mr. Squires then submits that in order to justify a failure to comply with an expectation, the school has to justify its change of policy. In my view, there is not a requirement for a defendant to justify a change of policy or to do anything other than, again in Laws LJ's words in **Nadarajah** (supra), to establish

" *a proportionate response (of which the court is the judge, or the last judge) having regard to the legitimate aim pursued by the public body in the public interest*"([68] and also see [69]).

123. I reject the notion that in order to avoid being liable for a representation leading to an expectation that something will happen or be done, a public authority has to show a change of circumstance and not merely a proportionate response. First, this requirement has not been referred to in **Nadarajah** or in any case cited to me . Second, it is in conflict with the accepted approach which is that there is a wide category of circumstances which can justify a public body not complying with somebody's legitimate expectation. I have already quoted what Laws LJ has said on this in paragraphs 113 and 117 above. Third, if a change of circumstance has to be shown to explain why an expectation cannot be relied on, it is difficult to see how, for example, many changes in school uniform or school rules could be justified in the face of an expectation that they would remain unchanged. Even if this conclusion is wrong and the school has to show a change of circumstances, then in my view it could satisfy that requirement because the evidence of the head teacher shows that matters have moved on during this period with a greater number of Muslim girls at the school and increased concern

for security. In addition, the experience of members of staff at the school was that they considered that they were impeded in teaching the sisters of the claimant because they wore the niqab as I have explained in paragraphs 84 and 87 above.

124. I return to the reasons put forward by the school to justify the policy for not allowing the claimant to wear a niqab and in doing so, I bear in mind the well known rules on proportionality. Mr. Squires attaches importance to the fact that the claimant would suffer if she was required to move schools as she has settled into school Y. There is no expert or other evidence adduced by the party relying on it- namely the claimant- to show that this disruption to the claimant will be anything other than minimal and of short duration but I will nevertheless take this matter into account even though the claimant has not been to the school for more than four months and according to her witness statement has not remained in contact with her friends.

125. The school puts forward a number of grounds to justify the policy of requiring the claimant not to wear the niqab. As I have already set them out, I will merely summarise them as being;

> (a) the educational factors in respect of which I have summarised the evidence in paragraph 64(e) to (i)above. Mr. Squires contends that it is strange that this is a matter of concern to the defendants when other schools permit the wearing of the niqab, such as the selective entry school Q where the claimant has a place if she decides to leave school Y. He also submits that if the claimant had to remove her niqab, this might undermine her confidence and that the claimant wearing the niqab would have to be prompted more Mr. Squires does not agree with what the teachers at the school say were the problems caused by the claimant's sisters wearing veils. I am not in a position in the absence of cross-examination or expert evidence to disagree with what the teachers at the school have said and as I have explained, the decision in **ex parte Cram** means that for the purpose of the present hearing, I have to assume that the defendants' evidence is correct. This shows that I must not, and do not, reject the argument based on the cogency of these educational factors;
>
> (b) the cohesive and equality factors of having a uniform with which all students comply and I have summarised the evidence in respect of this in paragraph 64(a) above. This again is a factor which I should not seek to overrule in the absence in this case of cogent rebutting evidence or cross-examination;
>
> (c) the security factors, which I summarised in paragraph 64(j) above and where I have commented on the objections. Again this is an issue on which there has been no cross-examination or cogent contradictory evidence;
>
> (d) the pressure which would be applied to other Muslim girls to wear a niqab if the claimant was allowed to do so is a concern which I have dealt with in paragraph 64 (l) above. This is a matter on which there is no cogent contradictory expert evidence which would have been required to answer the evidence of the head teacher.

126. I must also stress the great relevance to each of these four issues of the statement of Lord Bingham in **Begum** set out in paragraph 51 which was that it would be *"irresponsible*" for me as a judge to overrule the evidence of the staff on these sensitive educational issues especially as I unlike the defendants have no knowledge or experience of running a school. Indeed, in my view, each of these factors constitutes a legitimate aim for a school to follow. Educational standards and security factors are clearly important and relevant aims for a school to pursue. Similarly the cohesive and equality factors are also important and sensible aims for school to strive for as is their concern relating to pressures applied to other Muslim girls if the wearing of niqabs was permitted.

127. I have considered whether the response of the school was proportionate to frustrate the claimant's reliance on the school's previous policy and I have come to the firm conclusion that it was because:

> ...a) each of the objectives of the defendants in not permitting the claimant to wear the niqab was first sufficiently important to justify limiting a fundamental right and any prior reliance on the school's previous policy. I have explained why in the case of the educational factors (see paragraphs 70 to 78 above) , security factors (see paragraphs 79 to 83 above) educational factors (see paragraphs 83 to 88 above) and pressure on other girls (see paragraphs 90 to 92 above);
>
> (b) the rule prohibiting the wearing of the niqab was rationally connected to each of these objectives; and
>
> (c) the means necessary to achieve this aim were no more than necessary to achieve this objective. They were not severe and further the claimant has an offer of a place at the selective entry girls' grammar school Q with its good academic record where she would be able to wear the niqab.

128. It is noteworthy that the head teacher made a considerable and commendable number of inquiries about the significance of the niqab, as I explained in paragraph 64(b) to (e) above, before concluding that its use in the school was not be permitted for the claimant . All in all, the head teacher carried out a careful balancing exercise taking account of the relevant factors before reaching the decision under challenge. I stress that, as with the challenge under article 9, the claimant's case additionally fails to take account of the margin of appreciation due to the school authorities as the experts on each of these matters, which all fall well outside the knowledge of judges.

(vii) Conclusions

129. The claim based on the breach of the claimant's legitimate expectation fails because first there was not a practice (let alone a regular practice) amounting to a representation that the defendants would permit the claimant to wear a niqab at school and second that if there was such a representation, it was departed from by the defendants for good reasons which were a proportionate response having regard to the legitimate aims pursued by the school in the public interest.

V. The Similar Treatment Claim

130. The thrust of this complaint is that the claimant's three older sisters A,B and C were in a similar position to the claimant but they, unlike the claimant, had been allowed to wear the niqab at school. It is said by Mr. Squires that it is axiomatic to rational decision-making that identical cases should be treated in an identical way unless there is some good reason not to do so. The claimant's case is that there was no good reason for the school to change its policy on the wearing of niqabs in the way that it did and thereby to treat the claimant differently from her sisters, A, B and C.

131. Mr. Squires says that if there had been any reason to distinguish the claimant from her sisters this should have been explained but that has not occurred. He says that the fact that there had been a change of uniform is irrelevant because the special clothing in the form of the hijab, which Muslim girls were allowed to wear was not referred to in any of the written revisions of the uniform policy. Essentially this point is based on the fact that there is according to Mr. Squires no explanation as to why it was permissible for the school to permit the claimant's three sisters A , B and C to wear the veil but yet not permissible for the claimant to do so.

132. In support of this claim, Mr. Squires points out that in **Matadeen v Pointu** [1999] 1 AC 98, Lord Hoffmann explained at page 109 that:

> "*..treating like cases alike and unlike cases differently is a general axiom of rational behaviour. It is, for example, frequently invoked by the courts in proceeding for judicial review as a ground for holding some administrative decision to have been irrational"*

133. In response, Mr. Oldham contends that the position of, on the one hand, the claimant and, on the other hand, her sisters are very different and that explains their different treatment. Indeed just after the passage which I have quoted from **Matadeen** (supra) Lord Hoffmann explained that:

> *"..of course persons should be uniformly treated unless there is some valid reason to treat them differently…The reasons for not treating people uniformly often involve...questions of social policy"*

134. In support of his claim that the claimant is not entitled as of right to the same treatment as her sisters, Mr. Oldham stresses that there are three valid reasons for considering them differently. First, the claimant entered the school many years after her sisters. As I have explained whereas the claimant entered the school in September 2005, her next youngest sister C had entered the school in September 1998 and she was no longer subject to the school's uniform rules in July 2002. The claimant's case seems to assume that since that time, conditions in the world had stood still while the evidence of the head teacher shows that matters have moved on with a greater number of Muslim girls at the school and increased concern for security. In addition, the experience of members of staff at the school was that they considered that they were impeded in teaching the sisters of the claimant because they wore the niqab as I have explained in paragraphs 84 and 87 above. This time gap between the time when the claimant and her sisters were at the school justifies the different treatment of their wishes to wear the niqab.

135. Second, during that time interval, there had been changes in the school as the head teacher had changed. Third, there had been changes in policy, which the school was entitled to introduce especially as it was not in breach of the legitimate expectation of the parties, which I have just explained is not the case. Those changes in policy are in essence the matters to which I specified in paragraph 64 above and in respect of which the school was entitled to make these changes

136. In my view, each of these three factors by themselves would have justified the decision to treat the claimant differently from her sisters but if I had been in any doubt about this, I would have taken into account two further factors which each separately would have justified my decision. The first is the substantial margin of discretion to which the head teacher was entitled because of her particular knowledge of the difficult policy matters involved and also what was required in this school in this town at this time.

137. The second is that in my view the court should not be reluctant to find what Lord Hoffmann considered "*some valid reason to treat them differently"* because it must always be remembered that the basis of this claim is irrationality, which has a high threshold and it is often associated with **Wednesbury** unreasonableness. In this case the case put forward by the claimant on this point falls a long way short of reaching the threshold which would entitle the claimant to succeed on this issue.

138. Therefore this head of claim based on irrationality and the failure to treat like cases alike must fail.

VI. Delay and Alternative Remedies

139. Mr. Oldham raised two points which he contends were additional reasons why the claim had to be rejected. As I will be dismissing the claims for the reasons which I have sought to explain, these two points cease to be of practical importance.

140. On the delay point, I ought to say that my initial view is that the claim should not fail on that point as this case was brought within the prescribed three-month period and the claimant's solicitors could not have brought this case earlier as they had not received their public funding for it. In any event, as I have indicated in paragraph 21 above, I believe that the decision which should have been the subject of the present challenge as being the one which stated that the claimant could not attend school wearing a niqab was taken later than 14 September 2006 which is the date on the claim form.

141. As the consequence of my conclusions is that the claim must be dismissed, I do not propose to express a view on the defendants' contention that as the claimant had been offered a place at another school Q, she had an alternative remedy available to her and for that reason the claim should be rejected.

VII Conclusion

142. For the reasons which I have explained, this claim must be dismissed. It might be some consolation to the claimant and her family to know that their case has been put forward with commendable skill by Mr. Squires as has the rival case by Mr. Oldham. Everybody involved in this case will be anxious to ensure that the claimant can return to a school as soon as possible especially as she has been away from school for more than four and a half months and this is not surprisingly depressing her. She is apparently only receiving 3 hours tuition each week which compares with about 30 hours which she would be receiving if she were to be still at school. I hope that she and her parents give very serious consideration to the offer of a place from the Q school which has the appropriate academic standing and to which the local authority will provide transport for the claimant. No reason has been put forward as to why this school is unsuitable for the claimant and if it is not accepted , the claimant can expect at best a further substantial period away from school.