

Justice is not blind: judgment on the niqaab in *R v D (R)*

Nick Fry, solicitor, Bindmans LLP, considers the implications of HH Judge Peter Murphy's judgment in relation to the wearing of the niqaab by defendants during proceedings in the Crown Court. The judgment was handed down after a preliminary hearing addressed this specific issue on September 13, 2013 at Blackfriars Crown Court. He expresses concerns that although the judgment does not set a precedent for other courts to follow, it sends a message that the wearing of the niqaab during court proceedings is incompatible with the proper administration of justice.

Introduction

The defendant in this case was a Muslim woman accused of witness intimidation. She attended the initial plea and case management hearing on August 22, 2013 wearing a burq'a and niqaab which covered her whole face except for her eyes. When asked to remove her niqaab for the purposes of identification she declined; she said her Muslim faith prohibited her from revealing her face in the presence of men. Judge Murphy adjourned the hearing and asked counsel to submit skeleton arguments so that

the issue of whether the defendant should be required to remove her niqaab during the proceedings could be dealt with at the outset.

The judgment

The judgment is, according to the judge, the first of its kind in the UK criminal courts. It contains a review of related case law from the domestic and European courts and additionally draws on the judgment of the Supreme Court of Canada in *R v NS 2012 SCC 72*, [2012] 3

S.C.R. 726, which directly addressed the question in relation to prosecution witnesses. In the 35-page judgment Judge Murphy seeks to decide the extent to which a defendant's right to wear the niqaab under Article 9 of the European Convention of Human Rights can be limited in the context of criminal proceedings in the Crown Court. Article 9(2) provides:

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

The judgment asserts that it is in the public interest and in the interests of the proper disposal of adversarial trials for the defendant's face to be visible; it specifically refers to 'the protection of public order' and 'the protection of the rights and freedoms of others' asserting that it is unfair on jurors, witnesses and judges to expect them to fulfil their roles in the proceedings without being able to 'observe the demeanour of the witness'.¹

The judgment asserts that while the potential 'discomfort' caused to a defendant cannot be overlooked 'the invasions of the procedure of the adversarial trial' that would be caused if the niqaab could not be removed would 'drive a coach and horses through the way in which justice has been administered in the courts of England and Wales for centuries'.² Although the whole judgment is not couched in such dramatic terms – and the full legal test is applied to the lawfulness of the proposed restriction (i.e. is the restriction prescribed by law? is it in pursuit of a legitimate aim? is it necessary in a democratic society? and is it proportionate?) – the prevailing objective appears to be justifying a decision to restrict the wearing of the niqaab in criminal proceedings.

The judgment's starting point is that requiring the removal of the niqaab is a legitimate aim and this is before any explanation has been given as to why. It would certainly be unusual for a Crown Court judge to hear evidence from a defendant wearing a niqaab but it does not follow that the wearing of the niqaab impairs the effectiveness of the proceedings. The judgment refers to the long history of 'adversarial trial in open court' in England and Wales and asserts that 'the wearing of the niqaab necessarily hinders' the openness and communication demanded by adversarial trial and has an 'adverse effect'.³ However, as the judgment points out there

is no specific law requiring an individual to show their face while giving evidence in their defence in the Crown Court, and the question of the importance of observing a witness's facial expressions in evaluating the veracity of their evidence remains problematic. There is in fact much evidence suggesting that observing a person's demeanour is not generally a reliable means of assessing whether they are telling the truth (for example, see Professor Hazel Genn's paper *Assessing Credibility*⁴). This is not to say that observing a witness's demeanour is not important, but the position is overstated in the judgment and based significantly on convention rather than direct analysis.

The ruling on principles to be applied in Crown Court proceedings

Perhaps unsurprisingly the judgment concludes that it is lawful to limit a defendant's Article 9 right by requiring her to remove her niqaab while giving evidence. It prescribes a set of principles to be applied whenever a defendant in the Crown Court asserts the right to wear the niqaab during the proceedings. In general terms, they are:

- a) the defendant should be asked to remove the niqaab for identification purposes and, if she refuses, an officer or other reliable female witness can examine the defendant's face in private and give evidence to the court;
- b) the defendant should be permitted to wear the niqaab during the trial, except when giving evidence, but should be advised of the possible consequences of not removing the niqaab and invited to remove it; and
- c) the defendant must remove the niqaab for the duration of her evidence and if she refuses should not be permitted to give evidence. Where a defendant agrees to give evidence the court may use its inherent powers to alleviate discomfort, for example with the use of screens.⁵

Equal Treatment Bench Book

Although the judgment clarifies that there may be circumstances where it is not necessary to require the defendant to remove the niqaab while giving evidence, it strongly disagrees⁶ with the guidance in the Equal Treatment Bench Book (ETBB) (Judicial Studies Board 2004, Chapter 3.3, 2007) that 'the best way of proceeding comes down to basic good judge craft'. That guidance goes

1. R v D (R) [2013] EqLR 1034, para 47 and 59

2. Ibid, para 58-59

3. Ibid, para 58 and 78

4. <http://www.judiciary.gov.uk/Resources/JCO/Documents/Tribunals/17%20Assessing%20credibility%20-%20Genn.pdf>

5. R v D(R) [2013] EqLR 1034, para 80-84

on to say:

When an issue relating to the wearing of the niqab does arise, the judicial office-holder must reach a decision on how to proceed having regard to the interests of justice in the particular case. This will include combining sensitivity to any expressed wish not to remove the niqab with a clear explanation, where appropriate, of the reasons for any request for its removal, and the disadvantages for the judge of not removing it. In many cases, there will be no need for a woman to remove her niqab, provided that the judge is of the view that justice can be properly served.

It is disappointing that the judgment departs from the spirit of this guidance to establish a different principle weighted against the wearing of the niqab. While it is correct to assert that the lawfulness of any restriction on the Article 9 right is a question of law and not just a matter of ‘judge craft’⁷ the guidance in the ETBB does not advocate a different approach; it merely emphasises that judges should consider the issue on a case by case basis and must have good reason to interfere with the right.

Legal implications of the judgment

The direct legal implications of the judgment are limited; the judgment is not binding on other criminal courts so judges are free to ignore the principles. However, in practice we may find that the principles are adopted more widely and possibly by higher courts. There is a risk if the principles are more widely adopted that the interests of justice will be negatively affected. The fairness of trials could be damaged where defendants forego their right to give evidence because they feel unable to compromise their religious practice, or where a defendant’s evidence becomes distorted on account of the impact on their behaviour of having to expose their face in public.

The judgment is not binding on employment tribunals, family or civil courts and is unlikely in my view to influence those proceedings directly where, as Judge Murphy points out, very different sets of judicial and procedural considerations are likely to apply.⁸

Cultural implications of the judgment

However, the judgment is likely to have cultural implications. Legal conflicts around the wearing of the niqab remain a sensitive and divisive issue within politics and the media and those who absolutely and strongly oppose the wearing of the niqab are likely to feel encouraged by this judgment.

Whilst the judgment clearly distances itself from any

kind of prejudice against the wearing of the niqab,⁹ the message that the public, large parts of the media and parts of the wider legal and political community will take away is that the wearing of the niqab is incompatible with the proper administration of criminal justice because to assess a defendant’s evidence we must be able to see her face. Evidence suggests this is not the case and therefore that removing the niqab is not necessarily a legitimate aim in every case.

Conclusion

The law adequately sets out the approach to be taken by the criminal courts in these circumstances; a defendant is permitted to manifest their religion in so far as that manifestation does not unlawfully conflict with the interests of public safety, the protection of public order, health or morals, or the protection of the rights and freedoms of others, and the ETBB guidance on the issue reflects that law.

The first question to be answered, as stated in the ETBB guidance, is what are the reasons for requesting the removal of the niqab and the disadvantages of not removing it? If a judge is satisfied that in the circumstances of the particular proceedings it is necessary for the defendant to reveal their face for a specific legitimate aim, it should then proceed to determine what is the least restrictive means of achieving that aim with regard to the nature of the particular proceedings.

It would have been preferable for the Crown Court in the present case to concentrate on this question as it applied to the issues to be determined in the case, instead of seeking to establish a rule to be applied in all cases. The fact that this is the first judgment of its kind is an indication of the frequency with which this situation arises in the criminal courts. Given the controversy surrounding the wearing of the niqab it would have been preferable for the matter to have been addressed by one of the higher courts on appeal or better still by parliament following proper consultation.

At the trial of this case on January 30, 2014 the defendant decided not to give evidence to avoid having to remove her niqab, but subsequently reversed her plea and admitted the charge of witness intimidation. Only time will tell whether the principles set down in *R v D (R)* will be more widely adopted and if so, how many defendants will forgo their right to give evidence in their defence to protect their religious integrity.

6. Ibid, para 11

7. Ibid

8. Ibid, para 7

9. Ibid, para 67