THE VEIL AND THE MYTH OF PINOCCHIO'S NOSE: - IS THE VEIL AN IMPEDIMENT TO FACT FINDING IN AN ADVERSARIAL TRIAL? AN ANALYSIS OF *R v D*

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Introduction

The United Kingdom as a secular, multicultural, democracy aims to tolerate and accommodate manifestations of religion. This is, in part, achieved by ensuring that those who choose to manifest their religion are able to engage in those processes and with those institutions through which the state discharges its functions, without requiring those manifestations to be compromised (unless necessary for certain, defined, objectives). Such a right is currently enshrined within the law of the UK by the incorporation of article 9 of the European Convention on Human Rights (the ECHR) into primary legislation via the Human Rights Act 1998. Where there are competing rights, in the absence of intervention from the legislature, it becomes the role of the judiciary to reconcile these conflicts. One such area of tension is the right of women of the Muslim faith to wear the face covering referred to as the Niqaab. The UK respects the right of women of the Muslim faith to wear the Niqaab in public, and unlike some other jurisdictions (such as France[1]) has not sought to prohibit it. There has been judicial consideration (in the House of Lords) of cases where public bodies (such as schools) have limited access to their services to those who do not comply with certain preconditions, even if those preconditions require the removal of objects or clothing believed by the wearer to be a necessary manifestation of religious belief. [2] There is,

[1] Loi 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l'espace public [Law 2010-1192 of Oct. 11, 2010 Prohibiting the Concealment of the Face in Public], Journal Officiel de la République Française [J.O.] [Official Gazette of France], Oct. 12, 2010, p. 18344.
[2] For example, *R(Begum) v Headteacher and Governors of Denbigh High School* [2006] UKHL 15, [2007] 1 AC 100.

however, no precedent or legislative guidance as to whether it is permissible to restrict the right of an individual to manifest their religion in order to comply with the rules of an institution (such as the court system) that he or she has little or no choice but to engage with. Those who are involved in court proceedings often do so under compulsion. In criminal cases this is either because, if appearing as defendants, they are required to attend on bail with criminal sanctions attached if they do not attend,[3] and if attending as witnesses, they can be required to attend under the compulsion of a witness summons with the threat of a custodial penalty in event of non-compliance.[4] In non-criminal matters, an individual who appears as a party in litigation does so, often because that is the only means by which they can enforce or defend a right afforded to them by the state. When a woman wearing a Niqaab attends court, the judiciary have often considered it necessary (either on the request of a party or of their own volition) to adjudicate on whether it is appropriate to ask her to remove it or not. This could be regarded as being a direct order made by the state to remove the veil in prescribed circumstances. In the absence of clear guidance from the legislature, the courts have been forced to construct their approach to determining this issue on an *ad hoc* basis. Although the number of cases where this issue has arisen is small it represents, in the public mind, a test of how the beliefs of an individual minority faith can influence the evolution of procedures that are perceived as being emanations of the state. A, primarily conservative, objection to permitting a witness to retain a Niqaab whilst testifying is that it represents the erosion of an established hierarchy for the benefit of a minority. A, primarily liberal, objection to compelling an individual to remove a Niqaab is that it represents an unwarranted interference with an individual's autonomy for the purposes of absolutism. The conflict in approaches is exemplified by the difference in coverage of the issue in articles published in the traditionally

[3] Bail Act 1976 (c63) s6.
[4] Criminal Procedure (Attendance of Witnesses) Act 1965 (c69) s2.

conservative *Daily Telegraph*[5] and the traditionally socially liberal *Guardian* newspapers[6] - the former framing its reporting in terms of judges "banning" the veil in court, the latter as "permitting" it. It would however be wrong to categorise this as a purely binary political debate as within liberal, and in particular, feminist discourse there is the frequently expressed opposition that veils and masks 'degrade women by regarding them as primarily sexual creatures, but severely controlled ones.'[7] In western society arguments surrounding the Niqaab are often aligned to wider debates on immigration and national security which further politicises and polarises the debate on the subject.[8] As Edwards summarises;

> The face veil, more than any other item of clothing or religious or cultural symbol is caught in its own web of religious and sectarian struggle and also in a web of politics, power and the law. [9]

In the absence of either legislative guidance or binding precedent, courts have resolved questions involving the wearing of the Niqaab on a case by case basis, in a manner which suffices to resolve the immediate case being tried before it. Such an approach, whilst pragmatic, is unsatisfactory in a common law jurisdiction which places the rule of law at the heart of its constitutional foundations, as it creates uncertainty for all parties and avoids clear resolution of the matter. This difficulty was recognised by HHJ Murphy who, in September 2013, was charged with managing and trying a case where a defendant wished to wear the Niqaab for the

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[5] Telegraph view, 'Veils in court are barrier to justice' *The Telegraph* (London, 16 September 2013) <http://www.telegraph.co.uk/comment/telegraph-view/10312765/Veils-in-court-are-abarrier-to-justice.html> accessed 25 September 2015.

[6]Zoe Williams, 'Lifting the veil: Do we all have to dance to UKIP's tune?'*The Guardian* (London, 20 September 2013) <http://www.theguardian.com/theguardian/2013/sep/20/zoe-williams-veil-niqaab-personal-choice> accessed 25 September 2015.

[7] Yasmin Alibhai-Brown, *Refusing the veil: (Provocations)* (1st edition, Biteback Publishing 2014) 14.

[8] K Malik. 'The random Muslim scare factor generator: separating fact from fiction' *The Guardian* (London, 12 May 2015) <http://www.theguardian.com/world/2014/may/12/muslim-scare-stories-media-halal-sharia-niqaab> Accessed 27 February 2015.

[9] Susan Edwards, 'Proscribing unveiling – Law: a chimera and an instrument in the political agenda' in Eva Brems ed., *The experiences of face veil wearers in Europe and the Law*. (Cambridge University Press, 2014) .

entirety of criminal proceedings brought against her for witness intimidation.[10] In a much discussed and debated judgment, he concluded that it was a proportionate, and necessary limitation on the defendant's right to manifest her religion, to refuse to allow her to testify in her own defence unless she removed her Niqaab (he permitted her to retain it for the remainder of the trial). Notwithstanding the fact that this ruling was made by a judge at first instance, it has been widely accepted as clearly expressing the approach that courts should take when confronted with such an issue.[11] Following the ruling Lord Thomas CJ, announced that judges needed clear guidance and that a practice direction would be issued for consultation. He stressed that 'the basic principle will be that it will be that it must be for the judge in a case to make his (or her) own decision.'[12] No such consultation document had been released, from which it can be tentatively inferred that there is no significant concern amongst the legislature or judiciary about the wider adoption of the approach in *R v D*. In his 2015 press conference, Lord Thomas CJ indicated that although the review was continuing it was not considered to be a 'major problem' and so other matters were taking priority.[13]

In this article I will analyse the judgment of HHJ Murphy in *R v D* and, (whilst recognising that it was a carefully considered, sensitively reasoned and meticulously researched summary of the jurisprudence of the courts), consider whether the judge attached too much weight to the notion that a trier of fact needs to assess the demeanour of a witness in order to gauge credibility. I shall review whether the judgment breached the defendant's right under article 9 of the ECHR as well as her right to a fair trial under article 6. I will suggest that the matter

[10] *R v D* [2014] 1 LRC 629.
[11] See for example the commentary in Richardson (2015*) Archbold* at para 4-167a p427.
[12] Thomas LCJ, Transcript of the Lord Chief Justice's annual press conference 5th November 2013 <www.judiciary.gov.uk/wp-content/.../lcj-press-conference-2013.pdf> accessed 27th February 2015.
[13] Thomas LCJ, Press Conference held by The Lord Chief Justice Of England And Wales on Tuesday 05 November 2013 (*Judiciarygovuk*, 17 November 2015) <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/lcj-press-conference-2015.pdf> accessed 14 January 2016.

could have been resolved by an alternative approach, namely through a judicial direction in summing up.

I do not, in this article, intend to discuss at length the questions of whether or not the observance of Niqaab is a manifestation of religion for the purposes of article 9 ECHR or whether Islamic law permits the removal of it by a woman who is required to give evidence. Neither of these positions are settled, but HHJ Murphy reached his decision on the basis that by wishing to remain veiled for the purposes of proceedings the defendant genuinely believed she was manifesting her religion.[14] The Qu'ran itself does not require the wearing of the Niqaab, (requiring only modesty in dress)[15] and for many of the faith it is considered unnecessary.[16] Even amongst those who do believe it to be a religious requirement, guidance suggests that it may be removed in the presence of a judge.[17] However there are some adherents whose faith is such that they believe that their face may not be uncovered in the presence of males outside of their immediate family in any circumstances, including whilst testifying in a court of law. The House of Lords in *Regina v. Secretary of State for Education and Employment and others (Respondents) ex parte Williamson (Appellant) and others*[18] clearly warned courts against embarking on an investigation on anything more than the question of whether an individual genuinely held that belief with Lord Nicholls stating;

> [I]t is not for the court to embark on an inquiry into the asserted belief and judge its 'validity' by some objective standard such as the source material upon which the claimant founds his belief or the orthodox teaching of the religion in question or the extent to

[14] *R v D* (n 10) [20].
[15] The Qu'ran 24:30-31
[16] Islamqainfo, " (Islamqainfo,) <http://islamqa.info/en/21134> accessed 25 September 2015
[17] Islamqainfo, " (Islamqainfo,) <http://islamqa.info/en/21134> accessed 25 September 2015 (referred to in R v D)
[18] *Regina v. Secretary of State for Education and Employment and others (Respondents) ex parte Williamson (Appellant) and others* [2005] UKHL 15, [2005] 2 AC 246.

which the claimant's belief conforms to or differs from the views of others professing the same religion.[19]

There is no evidence to suggest that the defendant in *R v D* did not genuinely hold the belief she claimed and therefore the extent to which it may, or may not, represent orthodox religious teaching is irrelevant to this discussion.

Despite having referred to the 'Niqaab' thus far I shall hereinafter refer to the 'veil' (save where quoting from elsewhere, where in doing so I shall retain whichever variant of the spelling is used in the original text). I adopt this practice for the reasons cited by Bakht, namely that this generic approach has 'pervaded the literature and it is thus difficult to extract specific objections.'[20] Within this definition I include any form of covering of the facial features but I do not include the *hijab* which traditionally only covers the hair and chest

The approach of the courts in England and Wales prior to R v D

Until *R v D*, very little attempt had been made to definitively resolve the legal issues relating to the wearing of the veil in court and the approach which the courts took was determined by the nature of the hearing, the issue which was raised and the facts of the case.

In *R v M*, (7 November 2001, Nottingham magistrates' court),[21]District Judge Peter Nuttall refused an application made by the defence that a prosecution witness be compelled to remove her veil prior to testifying. He directed a course, by which she was invited, in open court, to remove the veil but was told that the choice was hers to make. He indicated that in assessing the prosecution evidence he would be deprived of the opportunity of relying on her demeanour and that he would make no assumptions which were favourable to the prosecution in this

[19] Ibid. [22].
[20] Natasha Bakht, Objection Your Honour! Accommodating *Niqaab* wearing women in Courtrooms on R. Grillo et al eds., *Law, Practice and Cultural Diversity*. (Ashgate publishing 2009) pp 115 -133.
[21] Unreported. Prosecuted by the author of this paper.

respect. The trial proceeded on this basis with the victim being permitted to retain the veil. The approach taken by the district judge appeared to strike a balance between protecting the right of the defendant to a fair trial and the complainant. It is of course important to note that as a district judge (magistrates' court) he acted as both tribunal of fact and of law. As such in determining the potential impact of the veil, he was able to take into account his own assessment of how the veil would interfere (or otherwise) with his own ability to assess the facts; a position which differs from that of a circuit judge who has to speculate on the approach a jury might take. Implicit within the judge's decision is the idea that cues from demeanour had the potential to assist as a corroborative factor in deciding whether the prosecution had discharged their evidential burden, but that it was not central to the decision making process.

In *SL v MJ,*[22] a case from the Family Division of the High Court, Mrs Justice Macur, hearing a petition for nullity of a marriage, permitted the case to be heard so that the petitioner was allowed to give evidence without her veil, but in such a way that no male could see her. It was possible to make such an order as the only male present in court was the petitioner's own counsel who consented to a barrier being placed between himself and the petitioner during such time as her veil was removed. Macur J observed;

> The ability to observe a witness' demeanour and deportment during the giving of evidence is important and, in my view, essential to assess accuracy and credibility. It is a matter of extreme importance that witnesses in such sensitive cases as this should be permitted to present their case to the satisfaction of the court but also observing their religious observance of dress. In my view, the facility of screens and the ability, if at all possible, to list these cases before a female judge, would obviate the objections of

[22] [2006] EWHC 3743 (Fam).

litigants or witnesses subject to an assessment of the genuine nature of their unwillingness to appear before the court without the veil.[23]

It is, perhaps, of significance that the allegation made by the petitioner (and accepted by Macur J as being the truth) was that she had been the victim of a forced marriage and was now in genuine fear of honour based violence as result of her actions in seeking to divorce the respondent. There is a clearly expressed public policy[24] which seeks to ensure that victims of forced marriage can seek assistance from the courts. There is no evidence available as to whether Macur J's suggestion of routine listing of such cases before a female judge has been adopted. It is an approach which resolved the difficulty presented to the judge in a manner which did not compromise the petitioner's faith whilst still allowing the judge to assess her demeanour. The petitioner bore the persuasive burden of satisfying the judge that the marriage should be annulled, and therefore credibility was an issue in the case although in the absence of any challenge to her evidence the extent to which demeanour needed to be assessed was, negligible. Although, superficially, this approach appears to have reconciled the conflicting interests of the parties, it is questionable whether the proposals for case managing such cases in the future were sustainable, especially those where the evidence was contested by the respondent. The idea that a particular type of case can only be heard by a female judge is an unusual one which may of itself be perceived by critics to be a modification of the court administration process for the benefit of a small number of individuals.

In November 2006, Immigration Adjudicator George Glossop ordered the adjournment case in which the legal adviser was wearing a veil on the grounds that it rendered her inaudible, requesting that a different representative attend in her place.[25] The matter was referred to the

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[23] Ibid..
[24] Recognised for example in Home Affairs Committee, *Domestic violence, forced marriage and "honour-based" based violence*, 20 May 2008, HC 263 of 2007-08 .
[25] BBC News 'Muslim women "can wear veils in court."' BBC News" (London, 10 November 2006) <http://news.bbc.co.uk/1/hi/uk/6134804.stm> accessed 25 September.

chair of the Asylum and Immigration Tribunal (Hodge J) who overturned the decision and issued interim guidance directing immigration judges only to request the removal of the veil if it was necessary in the interests of justice.

As a result of this case the Lord Chief Justice, Lord Phillips, referred the issue to the Judicial Studies Board Equal Treatment Advisory Committee.[26]Guidance was issued in 2007 and was adopted within the "Equal Opportunities Bench Book"[27] at Rule 3.3. The guidance stated *inter alia*;

> It is important to acknowledge from the outset that for Muslim women who do choose to wear the niqab, it is an important element of their religious and cultural identity. To force a choice between that identity (or cultural acceptability), and the woman's involvement in the criminal, civil justice, or tribunal system (as a witness, party, member of court staff or legal office-holder) may well have a significant impact on that woman's sense of dignity and would likely serve to exclude and marginalise further women with limited visibility in courts and tribunals."
>
> <u>As a witness or defendant</u>
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> For a witness or defendant, similarly, a sensitive request to remove a veil, with no sense of obligation or pressure, may be appropriate, but careful thought must be given to such a request.
>
> The very fact of appearing in a court or tribunal will be quite traumatic for many, and additional pressure may well have an adverse impact on the quality of evidence given. Any request to remove a veil should be accompanied by an explanation by the judge of their concern that, where there are crucial issues of credit, the woman might be at a

[26] Ibid.
[27]Judicial Studies Board, 2007. *Equal Treatment Bench Book*, 2007 (Judicial Studies Board 2007).

> disadvantage if the judge or jury is not able to assess her demeanour or facial expressions when responding to questions. The witness or party may wish to discuss the matter with her legal representative or witness support worker. It is worth emphasising that while it may be more difficult in some cases to assess the evidence of a woman wearing a niqab, the experiences of judges in other cases have shown that it is often possible to do so, depending on all the circumstances– hence the need to give careful thought to whether the veil presents a true obstacle to the judicial task. Can it be said of the particular case, that the assessment will be different where the judge is able to see the witness's face? In a criminal case, the position should be explained in the absence of the jury and the possibility considered of offering the use of permitted special measures, for example a television link. Where identification is an issue, then it must be dealt with appropriately, and may require the witness to make a choice between giving evidence in the case while showing her face, and not being able to be a witness.

R v D

The defendant in *R v D* was charged with witness intimidation and sent to the Blackfriars Crown Court. Her case was listed before HHJ Murphy for a Plea and Case Management hearing on 22 August 2013. She answered her bail dressed in a veil which covered the entirety of her face apart from her eyes. The judge requested that she remove her veil, she declined asserting that her faith required that she should not reveal her face in the presence of men. The judge adjourned the matter to 12 September 2013 for both parties to file skeleton arguments on the issue. The judge heard argument and deferred judgment, to the 16 September 2013 when he gave directions for the remainder of proceedings.[28]

[28] *R v D* (n 10) [1].

At the outset of his ruling Judge Murphy made clear that his judgment dealt solely with the position of a defendant and not that of an advocate, witness or juror, and also only directed towards cases being tried by a jury.[29] He acknowledged the guidance offered by the Bench Book but disagreed with the view expressed that it was matter of "judicial discretion" and proceeded on the basis it was matter of law which needed to be approached with clarity and consistency.[30] He acknowledged the sensitivity of the task he faced and the importance of proper guidance being issued at a higher level.[31]

Having decided therefore that any ruling would proceed on the basis that the defendant was sincerely manifesting her religion, the judge proceeded to review the legal principles and directed himself that there were three principles underlying the practice of the Crown Court; the rule of law, open justice and the adversarial trial.[32] In respect of the latter he added that; 'It is essential to the proper working of an adversarial trial that all involved with the trial – judge, jury, witnesses, and defendant – be able to see and identify each other at all times during the proceedings.'

His rationale for this was primarily due to the need for the jury to be able to assess the credibility of a witness through their demeanour. He noted that this was a principle acknowledged by both the common law and the European Court of Human Rights (a point I shall discuss later). He catalogued the circumstances in which this principle could be derogated from but noted that these were specific statutory exceptions.[33]

Having reviewed the principles which governed criminal proceedings, the judge moved onto an analysis of the European jurisprudence in relation to article 9. He observed that the right to

[29] *R v D* (n 10) [7]–[8].
[30] *R v D* (n 10) [11].
[31] *R v D* (n 10) [12].
[32] *R v D* (n 10) [27].
[33] *R v D* (n 10) [33]

manifest religion or belief by virtue of article 9(2) was a qualified right which could be balanced against the public interest in public safety, public order, health or morals or the protection of the rights and freedoms of others: as long as any limitation is prescribed by law, necessary in a democratic society, and proportionate. In applying this to the case before him he ruled that; 'the protection of the rights and freedoms of others include, in my judgment, the rights of persons who come before the court as complainants, witnesses and jurors.'[34]

The judge then conducted a wider review of the approach taken by the domestic courts to alleged infringements of article 9 and identified the wide margin of appreciation which the European Court had granted in this respect.[35]

The judge moved to an analysis of the case before him. He acknowledged that a 'rule prohibiting the wearing of the Niqaab in court would cause the defendant some degree of discomfort…The court may however be able to mitigate that in some ways' but also stated that he also needed to consider the rights and freedoms of others whose participation was essential. At paragraph 59 he expressed this is stark terms;

> It is unfair to ask a juror to pass judgment on a person he cannot see. It is unfair to expect that juror to try and evaluate the evidence given by a person whom she cannot see, deprived of an essential tool for doing so: namely being able to see the demeanour of the witness; her reaction to being questioned; her reaction to other evidence as it is given. These are not trivial or superficial invasions of the procedure of the adversarial trial. At best they require a compromise of the quality of criminal justice delivered by the trial process. At worst they go to its very essence, and they may render it impotent to deliver a fair and just outcome.[36]

[34] *R v D* (n 10) [30].
[35] *R v D* (n 10) [31]–[41].
[36] *R v D* (n 10) [59].

Having recognised the importance of article 9, the judge concluded that it was not necessary for the defendant to remove her veil for the majority of the trial, as he was not satisfied that the need of the jury to be able to assess her demeanour during this time was of such importance that it required the article 9 right to be limited. He determined however that he would refuse to permit her to give evidence in her own defence unless she removed her veil prior to doing so.[37]

Having decided that he was placing a limitation upon an article 9 right, HHJ Murphy then scrutinised that limitation against the criteria which permits the qualification of rights protected by the ECHR. He concluded there was a basis in law derived from the inherent power of a trial judge to regulate proceedings to ensure that proceedings are fair.[38]He found there to be a legitimate aim in maintaining the fair and effective operation of the criminal courts[39] and that there was a necessity in limiting the right to ensure the 'rights and freedoms of the public, the press, and other interested parties such as the complainant in the proper administration of justice.'[40] In turning to the question of proportionality he addressed whether there was a less restrictive approach which enabled the court to resolve the conflict.[41] He suggested that although a defendant would be free to wear a veil throughout a trial she should be advised by the judge of the potentially prejudicial consequences of doing so. At the point where she came to testify she would be told to remove the veil and, if she refused, she would not be permitted to give evidence. If this situation arose the jury would be directed in summing up in accordance with the Bench Book, namely that they would be permitted (if certain preconditions were met) to draw inferences from her failure to testify. If a defendant did give evidence without the veil measures would be put in place to shield her face from the gaze of the public gallery so that

[37] *R v D* (n 10) [74].
[38] *R v D* (n 10) [76].
[39] *R v D* (n 10) [77].
[40] *R v D* (n 10) [77].
[41] *R v D* (n 10) [79].

her face was only seen by the judge, advocates and jury.[42]He gave case management directions in these terms and the case was adjourned for trial.

By way of post script, the defendant subsequently stood trial. She did not testify. The jury were unable to reach a decision in respect of her or her co-defendant but prior to a re-trial a guilty plea was tendered.

The ruling in *R v D* attempts to resolve a lacuna in the law in manner which balances the rights of all parties. It has potentially far reaching consequences. Although the judge, at the outset of the ruling stated that he only intended to deal with the position of defendants, it is clear that his reasoning flows from the potential effect of the veil upon the jury's assessment of the evidence. It must, therefore, be the case that this reasoning applies equally to all witnesses called by either party. Judges routinely direct juries that they must consider the evidence of the defendant in the same fair way they consider the evidence of all other witnesses and if the problem is a purely an evidential one, there can be no justification to limit its application to just the defendant. It is perfectly foreseeable that a jury could be asked to try a case in which both the prosecution witness and defendant wished to wear a veil and a rule which differentiated between them simply by virtue of the party on whose behalf they testify is likely to offend the principle of 'justice not only being done, but being seen to be done.'[43]

A perspective from other jurisdictions

The courts in England and Wales are not alone in having to consider the wearing of the veil in court, although it appears that only one common law jurisdiction (Canada) has promulgated a binding superior court authority on the point. The absence of appellate court decisions is perhaps due to the difficulty in establishing a nexus between the removal of the veil and the

[42] *R v D* (n 10) [83].
[43] *R v Sussex Justices, Ex parte McCarthy* [1924] 1 KB 256.

defects in the ultimate decision under review. The fact that there is little case law on the point so does not, however, make the issue unimportant. The courts are the fora in which the rights of an individual are defined and a democracy which upholds the rule of law must ensure that all parties are equal before the courts. The issue of the treatment of an individual before the courts in which their cause is litigated can be divorced from the decision ultimately reached in that matter. A legal system which requires, without just cause, an individual to compromise their rights in order to obtain justice from the courts is not one which can be said to fully uphold the rule of law.

In *NS v The Queen*[44] the appellant was the main prosecution witness in the trial of two family members (M---d S and M---l S) who were accused of sexually assaulting her. She was called to testify at a preliminary hearing and a defence application was made that she remove her veil. The judge at first instance made a finding of fact that she did not sincerely hold that belief and ordered the removal of her veil. She appealed to the Superior Court of Justice where Marocco J quashed the order,[45] holding that N.S. should have been allowed to testify wearing a veil if she asserted a sincere religious belief for doing so, but that the trial judge had the option to exclude her evidence if it impeded cross examination. N.S. appealed to the Court of Appeal and M---d S. cross appealed.[46] The Court of Appeal adopted an approach which permitted the wearing of the veil unless the rights of the defendant to fair trial could not be reconciled with this right. The Court of Appeal cited a number of factors to be taken into account including the nature of the trial, the nature of the evidence and societal interests. N.S. appealed. The appeal was dismissed (Abella J dissenting) and the matter remitted to the lower courts.

[44]*NS v The Queen* [2012] 3 SCR 726.
[45]Ibid. [19].
[46]Ibid. [5].

In giving the judgment of the majority, Maclachlan CJ accepted that N.S. had a right to wear the veil under clause 2 (a) of the Canadian Charters of Rights and Freedoms and that assertion of that right was based upon 'sincerity' or belief rather than strength.[47] She further acknowledged that requiring her to remove that veil would interfere with that freedom. She also examined the defendant's right to a fair trial and concluded;

> The common law, supported by the provisions of the Criminal Code, R.S.C. 1985, c C-46, and judicial pronouncements, proceeds on the basis that the ability to see a witness's face is an important part of a fair trial. While not conclusive, in the absence of negating evidence this common law assumption cannot be disregarded lightly.[48]

Having identified this conflict the court sought to identify means of accommodate both rights. Although not reaching a conclusion on this matter and directing that it was a matter for the judge at first instance to determine, the court stated that it would be possible to proceed without an order requiring the removal of the veil.[49]

In the final stage of the analysis, Maclachlan CJ moved to consider whether the deleterious effects of requiring the witness to remove the veil outweighed the salutary effects. Whilst once again deferring decision of this matter to the judge at first instance she ventured that 'where the liberty of the accused is at stake, the witness's evidence is central to the case and her credibility vital, the possibility of a wrongful conviction must weigh heavily in the balance, favouring the removal of the niqab.'[50]

In her dissenting judgment, Abella J, agreed with the approach to be taken but disagreed with the conclusion that the balancing test in the final stage favoured the removal of the veil. She

[47] Ibid. [12] – [14]
[48] Ibid. [21].
[49] Ibid. [33].
[50] Ibid. [44].

queried the value of demeanour as a tool for assessing credibility before highlighting the risks that vulnerable witnesses would be deterred from testifying if they were compelled to remove their veil. She concluded that 'not being able to see a witness' whole face is only part of an imprecise measuring tool of credibility, we are left to wonder why we demand full "demeanour access" where religious belief prevents it.'[51]

Other common law jurisdictions have approached matters in a similar way. In New Zealand a prosecution witness was required, upon a defence application, to remove her veil due to the risk of the defendant's right to a fair trial under the New Zealand Bill of Rights being compromised.[52] In Australia, in the case of *R v Anwar Sayed*, a similar ruling was made by the trial judge, HHJ Deane[53] who appeared to reject the notion (advanced by the prosecution) that the fact the witness was testifying on a peripheral matter was a relevant factor in her decision, thus appearing to adopt an approach that mandated the removal of the veil in every case.

Judicial consideration of the issue of the veil has not only been restricted to criminal cases. In the USA the issue arose in a contractual dispute heard in the Hamtrack small claims court, Michigan.[54] At the outset of the hearing, Judge Paul Parul invited the claimant in the action to remove her veil as he believed it to be a 'custom thing' and not a religious observation. On the claimant's refusal he dismissed the claim without prejudice as he could not determine the veracity of her testimony.[55]Following this ruling the Michigan Supreme Court invited the

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[51] Ibid. [108].
[52]*Police v Razmajoo* [2005] DCR 408.
[53] Cited in Jessica Walker, '"I will not take off my clothes" the application of international obligations and the wearing of the niqab in Australian court.'http://www.culturaldiplomacy.org/academy/content/pdf/participant-papers/2011-11-lihrc/I-will-not-take-off-my-clothes-the-application-of-international-obligations-and-the-wearing-of-the-niqab-in-Australian-courts-Dr.-Jessica-Walker.pdf> accessed 25 May 2015.
[54] Muhammad v Enter. Rent-A-Car, No.06-41896 (Dist.Ct.Mich.Oct 11 2006), cited in; Schwartzbaum, A. Comment: The Niqab in the Courtroom: Protecting Free Exercise of Religion in a Post-Smith World. 159 U. Pa. L.Rev 1533.
[55] Cited in A Williams 'The Veiled Truth: Can the Credibility of Testimony Given by a Niqaab wearing Witness be Judged without the Assistance of Facial Expressions?', University of Detroit Mercy Law Review, 85 U.Det.Mercy L.Rev. 273.

public to comment, and as a result amended Rule 611 of the Michigan Rules of Evidence to read as follows;

> Appearance of Parties and Witnesses. The court shall exercise reasonable control over the appearance of parties and witnesses so as to (1) ensure that the demeanor of such persons may be observed and assessed by the fact-finder and (2) ensure the accurate identification of such persons.[56]

Muhammed brought a claim against the judge for violation of her rights but ultimately withdrew her claim before oral argument.[57] The decision at first instance has been widely criticized with Schwartzbaum observing that 'for a religious Muslim woman like Muhammad, the ban on the niqab in Michigan courtrooms is the functional equivalent of a courthouse without a ramp or an elevator for a paraplegic.'[58]

It does appear however that the approach taken by the judge has, following public comment, received the retrospective approval of the Michigan Supreme Court and created a legislative rule that seeks to preserve the special status of demeanour.

At the heart of all the case law, both in England and Wales and internationally, is the notion that 'demeanour' is central to the fact finding process and that without being able to assess the non-verbal communication of a witness a fact finder will be hindered in his or her job. But does 'demeanour' deserve such prominence as a judicial decision making tool?

Assessing credibility from demeanour

At the heart of the adversarial trial is the notion that one or more questions of fact will need to be resolved. Where the parties present differing versions of the facts, a judge or jury will

[56] Michigan Rules of Evidence.
[57] Adam Schwartzbaum, 'The Niqab in the Courtroom: Protecting Free Exercise of Religion in a Post Smith World [2011] University of Pennsylvania Law Review 1533.
[58] Ibid.

have to assess the credibility of the witnesses called by each party and, in doing so, will look at the entirety of their evidence. A florid expression of the perceived importance of demeanour can be seen in *Police v Razmajoo* where the judge at first instance stated;

> …[T]here are types of situation…in which the demeanour of a witness undergoes quite a dramatic change in the course of his evidence. The look which says "I hoped not to be asked that question" sometimes even a look of downright hatred at counsel by a witness who obviously senses he is being trapped can be expressive. [59]

As both HHJ Murphy in *R v D*, and the Chief Justice in *NS v The Queen* commented, the Court of Appeal frequently observes that the court at first instance had the 'opportunity to see and hear the witnesses.' An example of such comment can be seen in *Onassis v Vergottis,*[60] where Lord Pearce stated;

> A Court of Appeal should never interfere unless that both the judgment ought not to stand and that the divergence of view between the trial judge and the Court of Appeal has not been occasioned by any demeanour of the witnesses or truer atmosphere of the trial (which may have eluded an appellate Court) or by any of those other advantages a trial judge possesses.

It is doubtful however whether these pronouncements are serving any greater purpose than reminding appellate courts (and those who seek to argue before them) of the wider principle that the purpose of an appeal is to consider the legality of decisions, and not the findings of fact which underpin them.

The prevalence of comments appearing to uphold the importance of demeanour is not, however, indicative of a consensus on this point. A number of experienced trial judges and

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[59] *Police v Razmajoo* [2005] DCR 408.
[60] *Onassis v Vergottis* [1968] 2 Lloyds Rep 403 (HL) at p431.

jurists have expressed contrary views on the subject. Lord Devlin doubted his own abilities in this field stating that;

> The great virtue…is usually said to be the opportunity it (the trial) gives to the judge to tell from the demeanour of the witness whether he or she is telling the truth. I think that this is overrated…it is the tableau which constitutes the big advantage, the text with the illustrations rather than the demeanour of a particular witness.[61]

These concerns have also been expressed in Australia where Sir Richard Eggleston QC identified the nature of the problem thus;

> Many judges think they can tell from the demeanour of the witness when he is lying, but in the course of my practice at the Bar there were several occasions on which witnesses who I firmly believed to be honest and to be telling the truth, displayed evident signs of embarrassment and discomfort in the witness box, sufficient to make them appear to be lying.[62]

Reflecting on these views Lord Bingham, writing in 1985, leant his support to those who 'question the value of demeanour - even of inflexion, or the turn of an eyelid, as a guide.' He crystallised the problem as being that 'to rely on demeanour is in most cases to attach deviations from a norm when the truth is there is no norm.'[63]

Although these observations were framed in the context of single judges sitting as triers of fact in civil cases, they must also be applicable to lay juries sitting in criminal cases, in part because of the relative lack of experience of a juror in assessing credibility in a trial setting but

[61] Quoted in Thomas Bingham, (Lord Bingham of Cornwall) *The Business of Judging*. (OUP 2011) 9.
[62] Ibid. pg 9.
[63] Ibid. pg 10.

also because of the greater need for accuracy in their decision making as they determine the liability of an individual to criminal sanction.

Scientific research has given credence to those who doubt the ability of lay persons to accurately use demeanour to assess credibility. Ekman and O Sullivan conducted an experiment in which 509 individuals including law enforcement officers (including police officers, members of the secret service and FBI), judges, psychiatrists, college students and working adults were shown a videotape showing 10 people describing their feelings. Participants were asked to decide whether each speaker was telling the truth or lying. The results showed that those employed by the secret service demonstrated the highest degree of accuracy in identifying liars (100% were correct more than 40% of the time and 53% more than 60%), the remainder of the group produced results which were consistent with those which would be expected if the decisions were being made on the basis of pure guesswork (for example of the 110 trial judges sampled, 93% were correct more than 40% of the time and 34% more than 70% of the time;7% were wrong more than 60% of the time). [64]

This is not say that it is not possible to detect deceit via analysis of verbal and non-verbal behaviour. A study conducted by Portsmouth University in which nursing students were asked to tell the truth or lie about a video they had watched, indicated that there were some behavioural traits which were more evident in the group who were lying than in those who were telling the truth. In the context of the veil, it is noteworthy that those behaviours where the difference was most pronounced, were those which would not be masked by the wearing of a veil (for example speech pattern and hand movement). The study noted however that its participants were being asked to create a completely false account in a short period of time and accepted this may be different to the situation where a witness was giving a partially true

[64] P. Ekman, .M O'Sullivan 'Who can catch a liar?' September (1991) American Psychologist pp 913.

account and therefore were dealing with a lower 'cognitive load.'[65]This study supported previous research which concluded that untrained observers hold false beliefs about those behaviours which may be clues to deceit. Vrij and Semin found that 75% of professional investigators believed gaze aversion to be a reliable indicia of deceit whereas their research suggested there is no proven correlation between the two. [66] The inescapable conclusion from research in this area is that accurate lie detection through demeanour is possible, but that it can only be undertaken reliably by trained observers in controlled conditions and not via the determination of a randomly selected jury.

The idea that liars betray themselves through their demeanour is predicated on the assumption that there is a single set of behaviours which are detectable and of universal application but in the words of Vrij,'no theory predicts the existence of cues uniquely related to deception, like Pinocchio's growing nose and, indeed, no such cue has been found to date.' [67]

Although there is some evidence to suggest that the cognitive burden involved in the telling of lies produces cues which might be detectable, other emotions may also produce similar cues. Keltner and Harker[68] identify a set of behavioural traits including gaze aversion and posture constriction which are consistent with shame. This shame derives not only from a realisation that one has transgressed against a law, but also from a perception that one has failed to meet a personal moral standard.

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[65] A Vrij, 'Detecting Deceit via Analysis of Verbal and Non Verbal behaviour' , (2000) Journal of Non-verbal Behavior , 2393.
[66] A Vrij, A and G Semin, 'Lie Experts' beliefs about nonverbal indicators of Deception.' (1996) Journal of Non-verbal Behaviour.

[67] A.Vrij, 'Detecting Deception in Legal Contexts' in Heaton – Armstrong, Shepherd, Gudjonsson and Wolchover (eds), *Witness Testimony – Psychological, Investigative and Evidential Perspectives*,(OUP 2006).
[68]D Keltner, and L Harker,' Forms and functions of the nonverbal signal of shame'. in Gilbert, P. and Andrews, B. (eds.) *Shame: Interpersonal Behavior, Psychopathology and Culture* (OUP 1999)

The reasons that a woman would chose to wear a veil are complex but are summarised by Brems as 'a desire to reach a higher level of piety.' [69]The requirement that a witness be required to remove her veil in the presence of men compels an individual to compromise their own moral and religious codes. Doing so is apt to increase that feeling of shame and produce those cues which are prone to be misinterpreted as signs of guilt. Indeed it is perhaps important to remember that the first act that a religious adherent will be asked to undertake on removing her veil is to swear an oath upon her holy book.[70] Although the act of swearing an oath can be said to have 'rationalized from a declaration that a witness is answerable to their deity to a formal procedure with legally defined elements'[71] there remains a requirement that the oath is binding on the conscience of a witness.[72] A witness who is required to compromise their piety in one respect, whilst affirming it another is arguably more likely to experience those feelings of shame with a greater risk of this manifesting itself in non-verbal behaviour. Indeed in *R v D* it appears to have been explicitly submitted on D's behalf that she would experience 'upset' and attempt to mask it by placing her hands to her face.[73]

Other factors relevant to a witness in court may produce traits which could be mistaken for evidence of deceit. De Paulo et al[74] identify other factors which may produce behaviours which may be mistaken for deceit including a desire for a truthful story to be believed and a nervousness at speaking in public. The risk of these behaviours being present and misinterpreted is, of course, present when any witness gives evidence and in the normal course of a trial no specific attention would be drawn to them (indeed the summing up of the evidence

[69] Eva Brems, 'The Belgian "Burqa Ban" and Insider Realities' in E.Brems ed., *The experiences of face veil wearers in Europe and the Law*. ☹Cambridge University Press, 2014).
[70] Oaths Act 1978, s1.
[71] Willen, 'Rationalization of Anglo-Legal Culture: The Testimonial Oath' (1983) 34 British Journal of Sociology 109.
[72] *R v Kemble*, 91 Cr.App.R.178, (CA).
[73] *R v D* (n 10) [61].
[74] De Paulo et al, 'Cues to Deception' (2003), Vol.129. No 1 Psychological Bulletin, 74.

concentrates on the words spoken and not their delivery). However by requiring an individual to remove their veil purely for the purposes of giving her evidence there is the risk that the jury is subliminally directed that there is weight to be attached to their assessment of demeanour and this in turn risks a greater importance being attached to it than is justified. This, coupled with the fact that there is a greater risk of the wearer manifesting their shame or embarrassment in a manner which might be interpreted as guilt, increases the danger that the credibility of a witness may be determined erroneously by the finder of fact due to an overreliance on an attempted assessment of demeanour.

It seems that these findings and the work of others who have built upon it were not fully before HHJ Murphy who mentioned them briefly;

> Both Ms Meek and Professor Edwards argue that the value of seeing a witness in the process of evaluating her evidence can be overstated…I recognise that there is a school of thought to that effect, and I do not mean to suggest that other factors, including the substance of the evidence are not of great importance.[75]

In *NS v The Queen*, although reference was made to research in this area it was not tendered in expert evidence[76] and therefore the Supreme Court was not prepared to depart from established practice, although the Chief Justice commented that 'future cases will doubtless raise other factors, and scientific exploration of the importance of seeing a witness's face to cross examination and credibility may enhance or diminish the force of the arguments made in this case.'[77]

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[75] *R v D* (n 10)[34]
[76] *NS* (n 44)_ [20]
[77] *NS* (n 44) [44.]

This hints at a future receptiveness by the Canadian judiciary to revisiting this position and determining these arguments on the basis of scientific principle rather than the engrained belief of the judiciary.

Was the ruling a breach of article 9?

There is no doubt that requiring the removal of the veil worn for religious reasons engages article 9 of the ECHR. What determines the lawfulness, or otherwise, of the decision is whether the requirement is a 'limitation' permitted by the legislation or a 'breach' which is not. It is therefore necessary to consider (as HHJ Murphy did) the criteria which must be met under article 9(2) before a limitation will be permitted.

Article 9 (2) states that;

> 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.

Is the limitation 'prescribed by law'?

The test for analysing whether an act was prescribed by law was set out by the European Court of Human Rights in *The Sunday Times v The UK;*[78]

> In the Court's opinion, the following are two of the requirements that flow from the expression 'prescribed by law'. Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must

[78] *Sunday Times v UK* [1979] E.C.H.R 6538/74

> be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty.

The European Court of Human Rights accepted that there was no requirement for the law to be based in statute and that it could be the product of judicial precedent.

In applying this part of the test, HHJ Murphy acknowledged that certain materials in the public domain (in particular the Bench Book) "might lead a reader to suppose that there is a limited right to wear the veil" but stated that these materials did not have the force of law. He stated that in his view;

> a reader who considers all relevant material in the public domain about the practice would be clear about the essential elements of a criminal trial…moreover that reader would also be aware that a trial judge has an inherent power to regulate the conduct of proceedings to ensure that no abuse of the Court occurs, and to ensure that the proceedings are fair to all parties…It is a matter on which a person could receive accurate advice from a competent solicitor.[79]

The cautionary approach the Equal Treatment Bench Book advises in respect of the veil attempts to identify and reconcile disparate strands of principle and draw them together so that individuals are treated in a consistent manner. In the absence of legislative guidance the experienced solicitor may well turn to the Bench Book for guidance and whilst it urges care and sensitivity it clearly anticipates situations when removal of a veil will be appropriate. It is likely that this would suffice for the purposes of assessing whether the limitation was 'prescribed by law' and regardless of the position prior to *R v D*, the incorporation of that

[79] *R vide* (n 10) [76].

judgment into legal literature makes it inevitable that any future arguments on that point would be certain to fail.

Is the limitation "in pursuit of a legitimate aim"?

In order to fulfil this second limb of the test the purpose of the limitation must be to advance one of the legitimate aims identified within the text of the convention. HHJ Murphy expressed this objective as;

> The fair and effective operation of the criminal courts which act in the interests of victims of crime and the public generally, is…an important vehicle for the prevention of disorder and crime, and an important vehicle for the protection of the rights and freedom of persons including the victims of crime and the public at large.[80]

It is right to say that the operation of the courts unarguably fits within the legitimate aims expressed in article 9 of the European Convention on Human Rights of 'protection of public order and protection of the rights and freedoms of others.' The question that requires greater analysis is 'does allowing the retention of the veil prevent the fair operation of the courts?' If it does not then the limitation cannot be said to be 'necessary.'

Was the limitation 'necessary'?

The definition of "necessary" (adopted by HHJ Murphy) is taken from *Sunday Times v UK*[81] where it was stated that "whilst the adjective 'necessary', within the meaning of Article 10 (2), is not synonymous with "indispensable", neither has it the flexibility of such expressions as "admissible", "ordinary", "useful", "reasonable" or "desirable" and that it implies the existence of a "pressing social need."'

[80] *R v D* (n 10) [77]
[81] *Sunday Times v UK* [1979] E.C.H.R 6538/74

The judge concluded that the 'adverse effect produced on the adversarial trial' of not asking the defendant to remove her veil necessitated the order he was making. However as discussed previously, the evidence that such an "adverse effect" exists is not compelling. In *R v Shayler*, Lord Hope stated that there was a burden upon an authority seeking to justify a restriction to impose to show that the means imposed were no greater than necessary. [82] No evidence was presented which demonstrated an actual, rather than perceived, adverse effect upon the trial in *R v D* and indeed the research cited above would suggest that evidence, if presented would not support the judge's conclusion.

Wherever possible the criminal litigation system does try and ensure that a witness's evidence is given in view of the fact finder and this finds recognition in legislation. For example the legislation which allows the use of screens for vulnerable witnesses makes express provision for the witness to see and be seen by the judge, jury and advocates[83] and similar provisions exist in the witness anonymity provisions of the Coroners and Justice Act 2009.[84] The judgment in *R v D* proceeds on the basis that there is a 'pressing social need' for fact finders to see the demeanour of the witness, however examples can be found within the criminal justice system of departures from this principle.

The adversarial system does not preclude those who are unable to see the demeanour of a witness due to visual impairment from acting as triers of fact. There is no prohibition on those who are blind or partially sighted sitting as jurors or magistrates. There is at least one blind circuit judge trying criminal cases[85] and at least one blind deputy district judge trying civil cases in the county court.[86] There is no suggestion that they are unable to discharge their duties

[82] *R v Shayler* [2002] UKHL 11 [2003] 1 AC 247 [59].
[83] Youth Justice and Criminal Evidence Act 1999, s23.
[84] Coroners and Justice Act 2009 (c.29) s8.
[85] HHJ Lafferty <http://www.sightsavers.net/about_us//governance/trustees/11894.html> accessed 20 May 2015.
[86] Deputy District Judge Afzal http://news.bbc.co.uk/1/hi/england/leicestershire/7453816.stm accessed 20 May 2015.

properly. In the case of the juror or the magistrate trying a criminal case they are part of a larger group which requires the vote of a majority to make a decision. But there would seem to be no reason why a person who is blind could not be appointed to try criminal cases alone as a district judge in the magistrates 'court. It could be argued that a judge sitting alone is unlikely to try a criminal case at the Crown Court, however it is perfectly possible that a judge could be asked to make a significant finding of fact based on the credibility of a witness in determining whether to admit or exclude a crucial piece of prosecution evidence in a *voir dire* or stay proceedings as an abuse of process. A district judge in the civil courts may, in the exercise of his or her powers to commit for contempt, impose a sentence of imprisonment having resolved a question of conflicting evidence. If such a finding of fact were to be made by a person who is blind it would seem that the principle that an appeal court should not interfere with the fact finder's assessment of the evidence would prevent these decisions being re-evaluated on appeal.

The discussions surrounding the issue of demeanour have often taken place in a context which assumes that the covering of the face is a 'choice' which can be overruled by the courts. If, however, demeanour is of such centrality to the trial process, this means that, by extension in cases where the witness has no 'choice' over the covering of his or her face, then the court system would be compelled to accommodate this above all other considerations. The following hypothetical, but not impossible, scenario illustrates the difficulty with that approach.

A defendant is charged with a serious offence against a child victim. The case is listed for trial. Six weeks prior to the trial, the defendant is involved in a road traffic accident causing him serious facial injuries. He is required to wear bandages over his face, but is otherwise deemed fit to attend the trial. Counsel for the defence makes an application for the trial to be adjourned so that his demeanour can be properly assessed by the jury at trial. This will result in the trial being delayed by several months. It is almost certainly the case, that in these circumstances, the judge hearing the application would conclude that the interests of justice

require that, if the defendant is fit to attend trial, then the trial process could accommodate the inability to assess the facial expressions of the defendant and conclude that the interests of the victim in having the case heard at the earliest opportunity prevail. If the reasoning in *R v D* is correct however, the judge would have no such discretion, as the importance of assessing demeanour must take precedence and the case would have to be adjourned until such time as it could properly be displayed. This would be placing too great a restriction on the discretion of the courts for too little a benefit.

There is also statutory basis upon which evidence can be admitted and assessed without observing the demeanour of the witness. The provisions of the Criminal Justice Act 2003 allow for the admission of hearsay evidence to be given when a witness is unable to attend court and be cross examined. Such evidence is usually presented via a statement being read by the advocate to the court. In these circumstances the trier of fact has no opportunity to observe the witness. Hearsay evidence is admissible in a wide variety of circumstances including the broad 'interests of justice' test.[87] These provisions have been held to be consistent with a defendant's right to a fair trial under article 6, as long as sufficient safeguards are in place and a cautionary direction is given to the jury.[88] The statutory regime and subsequent procedural safeguards assume that specific situations may place the need of party to admit evidence in pursuance of a fair trial above the need to assess the demeanour of the maker of the statement. Statute has, by retaining an interests of justice test, not sought to circumscribe the circumstances in which this might arise, an approach which recognises the inherent unpredictability of the criminal justice system and the need for flexibility of approach.

It would therefore seem that the best that can be said of the need to ensure the finder of fact can see the demeanour of the witness is that the law recognises is it as 'preferable' or 'highly

[87] Criminal Justice Act 2003 s114 *et seq*.
[88] R v Horncastle [2009] UKSC 14, [2010] 2 A.C. 373.

desirable' but not 'necessary.' The justice system although seeking to achieve best practice can demonstrate the flexibility to accommodate fact finding without observing the demeanour of a witness. In the case of the blind fact finder the public policy in maintaining a diverse judiciary takes precedence, in the case of hearsay evidence, the public policy which takes priority is that parties should not be hampered in the presentation of their case by factors outside their control. There is an equally compelling public policy argument that women who wear the veil should have confidence that they can seek justice before the courts without having to compromise their religious beliefs and the criminal court system should be able to deliver a fair trial to all parties whilst accommodating this.

Was the ruling 'proportionate'?

In assessing proportionality it is necessary to look at the consequences of the order made. If *R v D* is adopted it means that a defendant who both wishes to assert her right to manifest her religious belief to wear a veil in the presence of men, cannot also testify in her own defence.

A defendant in a criminal trial is competent although not compellable to give evidence.[89]As the judge noted 'there is rarely, if ever a case where the Defendant's evidence could be described as unimportant.'[90]It seems clear from the discussions in *R v D*, that the defendant was seeking to advance a positive defence which contradicted elements of the prosecution case and which would, if accepted as true (or possibly true), result in her acquittal.

If evidence is relevant it is, *prima facie*, admissible and the judge may only exercise an exclusionary discretion in respect of relevant evidence where it being tendered by the prosecution.[91] The judge does have the power to prevent a defendant adducing irrelevant material or to exclude a defendant from court when their behaviour is such that it is disrupting

[89] Criminal Evidence Act 1898 (61 & 62 Vict., c.36) s1.
[90] *R v D* (n 10) [70].
[91] Murphy and Glover *Murphy on Evidence*, 12th ed. (OUP 2011) .

the trial (although in the latter case they will be invited to return to court to testify and will only be excluded if their misbehaviour continues).[92] There is little to support the suggestion that there is a basis in law for preventing a defendant from tendering admissible, relevant evidence. HHJ Murphy cited the, now repealed, alibi provisions of the Criminal Justice Act 1967[93] as being an example of such an exclusionary power. However those provisions can be readily distinguished for a number of reasons; they were clearly set out in statute, they amounted to a prohibition on the defendant calling positive evidence in support of an alibi but did not prevent testifying *per se* (a defendant could still deny the offence on sworn evidence) and the behaviour which resulted in the sanction was not an assertion of a protected right. These provisions have been replaced with the provisions of the Criminal Procedure and Investigation Act[94] which, although intended to be more onerous in terms of the burdens of defence disclosure, removed the power of the court to refuse to admit alibi evidence of which the Crown has not been notified and have replaced it with provisions which allow the jury to draw inferences from such failure.

The ability of a defendant to be able to call evidence in their own defence does not only exist through the absence of exclusionary powers but is also a positive right encompassed by article 6 of the ECHR.[95] It has long been an established principle of law that allowing a party to put their case is an essential component of a fair trial. As Bingham LJ has commented;

> While cases may no doubt arise in which it can properly be held that denying the subject of a decision an adequate opportunity to put his case is not in all the circumstances unfair, I would expect these cases to be of great rarity.[96]

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[92] Ormerod, *Blackstone's Criminal Practice 2015* (OUP 2015) at para 1585.
[93] Criminal Justice Act 1967, s11.
[94] Criminal Procedure and Investigations Act 1996 s6A.
[95] *R v D* (n 10).
[96] *R v Chief Constable of the Thames Valley, ex parte Cotton* [1990] IRLR 344 (CA).

Article 6 of the ECHR includes amongst the minimum rights of a defendant in a criminal case the right to 'obtain the attendance and examination of witnesses on his behalf.' In testifying as to his or her defence, a defendant is acting as a witness on his own behalf and by preventing their evidence being heard there is a breach of this minimum right.

It is correct to note that the House of Lords decided in *R v Jones* that a trial which takes place in the absence of a defendant's evidence due to their absconding does not offend the right to a fair trial but this is predicated on the basis that the defendant has, through their nonattendance, voluntarily waived his or her right to be present and give evidence.[97] In *R v D* the judge goes beyond this, directing that should the defendant refuse to remove her veil not only should she be prohibited from giving her evidence, but also that the jury should be given a direction as to her failure to testify (with appropriate, unspecified, modifications). This direction, which derives from s35 of the Criminal Justice and Public Order act 1994, permits the jury to draw an inference as to guilt if they conclude there is a case to answer and there is no good reason for the failure to testify. Although there is no detail as to how the direction would be modified, the judgment intimates that any discussions regarding the veil will take place in the absence of the jury and so it is unclear whether they would be (and were) made aware of the reasons for the failure to testify. The rule as expressed in statute relates to a defendant who, having heard the evidence adduced by the Crown, volunteers not to offer an explanation and not to one who wishes to offer an explanation but is prohibited from doing so. In *R v Hamidi and Cherazi*[98]the Court of Appeal accepted that it was not permissible to allow inferences to be drawn against a defendant who had voluntarily absented himself from the trial. Therefore a jury trying a case where a defendant has breached bail and failed to attend would be directed not to draw inferences from that defendant's absence. HHJ Murphy's ruling places a defendant who asserts

[97] *R v Jones (Anthony)* [2002] UKHL 5, [2003] 1 AC 1.
[98] *R v Hamidi and Cherazi* [2010] EWCA Crim 66.

her right to manifest her religion in court in a more disadvantageous position than one who voluntarily absconds.

Whilst HHJ Murphy was no doubt understandably concerned about use of the veil being abused by defendants who sought to avoid cross examination there was no evidence that was so in D's case. The combination of the prohibition on giving evidence, coupled with the subsequent risk of an inference, takes a defendant's decision to remove or not remove her veil beyond the scope of a simple case management direction and elevates it into an evidential issue which can be used by the jury in their determination of the case and in doing so it has the potential to strengthen the prosecution case.

It was also necessary for the judge to be satisfied that the orders made which limited the defendant's rights were no more than necessary to achieve the legitimate aims he identified. It was for this reason that he permitted her to retain the veil during the remainder of proceedings and to be shielded from the public view for such time as her veil was removed. The judge posed himself the rhetorical question 'is there a less restrictive approach which would be equally effective in achieving the aim?'[99] He did not, however, answer this question by considering the efficacy of alternative approaches but resolved it simply by minimising the duration of time for which the veil removed and restricting the number of males who could see her unveiled face. The judgment does not discuss alternatives to the removal of the veil whilst testifying nor assess the proportionality of permitting an evidential inference being drawn if she was willing to testify but chose not to do so without her veil. It is perhaps understandable that having begun the judgment with a consideration of the right to remain veiled both whilst in the dock as a defendant and in the witness box, and then having resolved matters in a manner which accepted the primacy of the defendant's right for those parts of the trial where she was not required to

[99] *R v D* (n 10) [79].

testify that the judge did not go on to revisit this part of the decision. But having decided that the problem was an evidential one, then the possibility of the conflict being resolved through a direction to the jury needed to be discounted before the request to remove the veil could be considered proportionate.

Could a judicial direction have resolved the matter?

One alternative approach that could have been considered is allowing the defendant to testify whilst wearing her veil but giving a direction to the jury in summing up that the defendant was exercising a protected right and that they should draw no inferences from this. One of the functions of the directions given by a trial judge to a jury is to direct them what matters they should and should not take into account. In certain cases the jury may inadvertently hear matters which are deemed inadmissible and prejudicial and be discharged, but in others they are trusted to accept the judge's directions and consider the evidence in accordance with it. Juries are directed not to speculate on evidence not before them and to form their own view of the evidence regardless of any view the judge may appear to have. In cases where hearsay evidence is admitted due to the non-availability of the speaker, the exemplar direction given in the Bench Book reads as follows;

> You have seen, in the course of the trial, several witnesses take the oath or affirm and give evidence in person. …You do not have that advantage in the case of Mr A... You have not, therefore, as in the case of other witnesses, seen and heard his evidence under oath or affirmation tested in cross examination. You do not know how he might have responded and you must not speculate. [100]

There are a number of difficulties which a party who is unable to challenge a contested witness face when that witness's evidence is read to the court. Primarily these concern the

[100] Judicial Studies Board, 2010 at page 216.

inability to extract additional oral evidence which might support the opponent's or undermine the proponent's case. Many of these difficulties are absent with a witness who is present in court and can answer questions under cross examination. If it is accepted that a direction can cure such a substantial departure from the normal convention on the presentation of witness evidence then, by extension, it should be able to rectify a change in departure from convention which is less substantial. A direction which reminded the jury that a witness (prosecution or defence) has a right to wear a veil and they should draw no inferences, favourable or unfavourable, from her doing so would have addressed the issue directly in a manner which is proportionate to the perceived harm it was causing. The judge did warn the jury at the outset of the trial not to be prejudiced against the defendant[101]but also made it clear that she would have to remove the veil if testifying. This approach, although no doubt well intentioned was unhelpful as it not only drew the jury's attention to the issue but, without further clarification, created a risk that the jury would see the defendant's decision not to testify as her making a simple choice between asserting her innocence and removing a piece of material. Without further explanation as to the potential importance to the defendant of retaining the veil, her exercise of choice in favour of it may have been interpreted by the jury as indicative of a lack of interest in establishing her innocence. If a judicial direction can cure the potential imbalance in the evidence of the parties when a witness is absent, it must by extension, be sufficient to cure the difficulties where a witness is present but does not wish to remove the veil. It is of course the case that the deliberations of the jury are confidential[102] and the extent to which judicial directions are followed or ignored remains a matter of conjecture. The courts can however only proceed on the basis that they are followed unless and until the contrary is proven. In the absence of any evidence that a jury could not comply with such a direction, it

[101]Anon 'Judge warns jury of wrongful prejudice over defendant's Muslim face veil' *The Guardian* (London 22 January 2014)). <http://www.theguardian.com/law/2014/jan/22/judge-warns-prejudice-defendants-muslim-veil> accessed 2nd March 2015.
[102] Contempt of Court Act 1981, s8.

should have been assumed that a judicial direction would have been complied with in the same way as any other direction and the jury could have determined the case on the basis of all the evidence before them, without speculating on that which was absent. This being so then there was a less restrictive alternative to the removal of the veil and the requirement that it be removed was not a legitimate limitation under article 9.

Conclusion

The role of the courts is to ensure that laws and rights are maintained based on accurate findings of fact. Perhaps more so than any other institution, a court is the place where the dividing line between the rights of the individual and the power of the state is tested. The rule of the judiciary is to decide where this line lies and not to move it. Where there is a genuine risk of the accuracy of the fact finding process being compromised then the judiciary should take only those steps that are reasonable and proportionate to address this. Addressing those issues should not have the effect of imposing a greater burden on any particular party than is prescribed by law. It should be remembered that the adversarial system has adapted to take into account the inherent variability of the process of giving evidence. The fact that demeanour has traditionally been regarded as a reliable of way of ascertaining the veracity or otherwise of a witness does not mean that it is necessarily essential to the fact finding process and evidence can be found that the court system has permitted flexibility in respect of this in certain circumstances.

The UK has not as a matter of primary legislation sought to outlaw the wearing of the veil in public. It has also accepted that a right to manifest religious beliefs is a right which is worthy of legal protection. If the UK wishes to restrict this it should do so through primary legislation and then, only with the utmost of caution.

The issues in *R v D* may be seen through the lens of the veil wearer being a defendant who, with hindsight, is known to be guilty of the offence she was charged with. However if it is

equally conceivable (as *NS v The Queen* demonstrates) that the veil wearer could be the victim of violent or sexual abuse. If we adopt an approach which places assessment of demeanour at the core of the decision making process, then the risk of a victim of crime not seeking to engage the assistance and protection of the criminal justice system becomes significant as the vulnerable party will have to make a choice as to whether to engage in the process or compromise their religion. The creativity which the adversarial system has shown over time in ensuring that evidence is heard fairly should be deployed to ensure that removal of the veil is a truly exceptional course. Judges may well be concerned about the possible prejudice that a witness wearing a veil may inflict upon her parties case, but an approach which seeks to intervene through any means stronger than the giving of advice represents an unwarranted interference with an individual's identity and autonomy and in doing so may marginalise the rights of those in need of the greatest protection.