

THE VEILED LODGER – A REFLECTION ON THE STATUS OF *R v D*

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At the time of writing this article (January 2016) some 28 months have elapsed since His Honour Judge Peter Murphy gave judgment in the case of *R v D*.¹ His judgment, requiring a female defendant of the Muslim faith to remove her niqaab if she wished to give evidence in her own defence, was lauded as a paradigm of common sense by some and, an unwarranted interference with protected rights by others. The conservative press celebrated the fact that the institutional supremacy of the court had been preserved² whilst the liberal press noted the judge had respected an individual's right to wear the veil for the remainder of the proceedings.³ Despite HHJ Murphy having reservations about circuit judges being seen to set a precedent and his request that the issue be clarified at a higher level, *R v D* appears to have become settled as a statement of principle. This article will suggest that the implications and unanswered questions of *R v D* are such that the failure of the senior judiciary or legislature to intervene is unsatisfactory and that guidance, based on a robust evidence base is necessary.

Background to R v D

The defendant in *R v D* was charged with witness intimidation and sent to be tried at 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.⁴ The judge requested that she remove her veil, but through her counsel, she declined asserting that her faith prevented her from revealing 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. On 12 September the judge heard argument and considered an expert report on 'Gender and Islamic Dress' from Professor Susan Edwards. Having considered the issues the judge drafted a judgment, handed down on 16 September 2013, which provided directions for the remainder of proceedings. The judge acknowledged that requiring the defendant to remove her veil would amount to an infringement of her right to freedom of religion as protected by article 9 of the European Convention of Human Rights⁵ and, insofar as the majority of the proceedings were concerned, concluded that requiring her to remove her veil would be disproportionate to the aim to be achieved. However if the defendant wished to present her defence on oath to the jury, he concluded that the right of the jury to assess the defendant's demeanour outweighed her article 9 right and unless she removed her veil she would not be allowed to testify. In the event of her not testifying, the jury would be invited to draw adverse inferences as to her guilt. If she did remove her veil during evidence, screens would be erected so that her exposure to males who were unrelated to her was limited.

Following this ruling the case was adjourned for trial. The defendant did not testify at the trial and the jury were able to reach a verdict. They were subsequently discharged

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¹ [2014] 1 LRC 629.

² See for example, Telegraph View, 'Veils in Court are a Barrier to Justice' (*The Telegraph Online* 16th Sept 2013) <<http://www.telegraph.co.uk/comment/telegraph-view/10312765/Veils-in-court-are-a-barrier-to-justice.html>> accessed 25 September 2015.

³ Zoe Williams, 'Lifting the Veil. Do We All Have to Dance to UKIP's Tune?' (*The Guardian Online* 20th Sept 2013) <<http://www.theguardian.com/theguardian/2013/sep/20/zoe-williams-veil-niqab-personal-choice>> accessed 15th March 2016.

⁴ Hereinafter I shall refer to the 'veil' unless quoting directly as this approach dominates the writing in this area.

⁵ ECHR.

but, prior to the retrial, the defendant tendered a guilty plea to the indictment and proceedings against her co-defendant were dropped. The tendering of the plea extinguished any possibility of the case being referred for consideration of the Court of Appeal and so despite prompting much debate, the judgment has received no further review by the senior courts.

Media response to the judgment

HHJ Murphy's ruling divided opinion in both the popular and legal press. Many commentators were in favour of the ruling, primarily on the grounds that it upheld the fairness of the trial process. Gerry described it as 'common sense'⁶ and Hewson observed that "political statements of identity are all very well but they are not a basis to remodel our system of open justice".⁷ Some, including Rozenburg, argued that the ruling did not go far enough and expressed concern that the jury would be deprived of the opportunity to assess the defendant's demeanour as evidence was called against her.⁸ Other commentators felt the ruling was wrong with Gardner describing it as "mistaken in practical terms, wrong in liberal principle and wrong in law."⁹

Despite the concerns expressed about the judgment, there is some evidence that it reflects popular and professional opinion. A poll conducted by YouGov (commissioned by *The Sun* newspaper) indicated that between 70% and 85% of the public supported a ban on witnesses wearing a veil whilst testifying, and that between 76% and 88% believed that defendants should be made to remove the veil.¹⁰ Amongst the legal profession, a survey of over 400 barristers, commissioned by *The Times*, indicated that 91% favoured a ban on a defendant wearing veil whilst giving evidence.¹¹

Government and Judicial response

In delivering his ruling, HHJ Murphy expressed clear reticence at being the final arbiter of the issue. At paragraph 12 of his judgment he comments that:

The relegation of such important issues to the sphere of 'judge craft' or 'general guidance' has resulted in widespread judicial anxiety and uncertainty and to a reluctance to address the issue . . . Trial judges need, not only general guidance, however helpful, but a statement of the law. It is my intent to attempt to provide such a statement in this judgment, but as may be imagined, I do so with some misgivings. I am a male judge dealing with an issue which mainly affects female Muslim defendants, and does so in an intimate way; though I make clear at the outset that everything I say in this judgment is intended to apply to defendants of either gender and to those of any religious faith, or none, in analogous situations. I am conscious also of the place of the Crown Court in the hierarchy of legal authority, and I express the hope that Parliament or a higher court will review this question sooner rather than later and provide a definitive statement of the law to trial judges¹².

⁶ Felicity Gerry, 'No Face Veils in Court' (*The Huffington Post UK*, 15 December 2014) <http://www.huffingtonpost.co.uk/felicity-gerry/no-face-veils-in-court_b_6318766.html> accessed 14 January 2016.

⁷ B Hewson, 'Veils In Court – Should They Be Allowed?' (*Legal Week* 19th Sept 2013). <<http://www.legalweek.com/legal-week/blog-post/2295686/veils-in-court-should-they-be-allowed>> accessed 14 January 2016.

⁸ Joshua Rozenburg, 'Veils in Court: This Compromise Ruling Struck the Wrong Balance' (*The Guardian*, 17 September 2013) <<http://www.theguardian.com/law/2013/sep/17/veil-court-ruling-wrong-balance>> accessed 14 January 2016.

⁹ Carl Gardner, 'Even in a Niqab, The Defendant must be Heard' (*Head of Legal*, 19 September 2013) <<http://www.headoflegal.com/2013/09/19/even-in-a-niqab-the-defendant-must-be-heard/>> accessed 14 January 2016.

¹⁰ You.gov.co.uk, 'Most Still Want to Ban the Burka in Britain' (*YouGov: What The World Thinks*, 18 September 2013) <<https://yougov.co.uk/news/2013/09/18/most-still-want-ban-burka-britain/>> accessed 14 January 2016.

¹¹ Frances Gibb, 'Ban The Veil In Courts, Say Barristers' (*The Times*, 2 November 2013) <<http://www.thetimes.co.uk/tto/law/article3911405.ece>> accessed 14 January 2016.

¹² (n1).

Following his retirement from the bench he reiterated these views extra-judicially in a letter to *The Times* commenting that:

To leave the law uncertain risks conflicting and apparently arbitrary decisions. It is unfair to women who wear the veil, who have no way of knowing how they will be treated in a particular court or by a particular judge; and it is unfair to judges who are trying to make principled, consistent decisions.¹³

In the days and weeks that followed the ruling it seemed that his request for guidance would be met. On 29 September 2013, in an interview with the BBC, David Cameron indicated that, whilst opposing an outright ban, he would consider issuing new guidelines to judges telling them when they can ask people to remove the veil.¹⁴ He repeated this view again in January 2016.¹⁵ In response to a question asked at his annual press conference held on the 5 November 2013, the Lord Chief Justice announced that;

We consider the best way of dealing with this is to make a Practice Direction. The basic principle is that it must be for the individual judge to make his (or her own) decision but we will give clear guidance. We hope to be able to issue a draft for consultation in the very near future, and I do not want to anticipate, beyond what I have just said, what will go there.¹⁶

Following this, other members of the senior judiciary expressed, extra judicially, support for removal of the veil in court. In an interview with the London Evening Standard, Baroness Hale was reported as saying that “there must come a point where judges insist veils are lifted”.¹⁷ In 2015, a comment from Lord Neuberger that judges must have an “understanding as to how people from different cultural, social, religious or other backgrounds think and behave” was widely reported as indicating his support for the wearing of the veil in court.¹⁸ This prompted the Supreme Court to issue a response indicating that “Lord Neuberger would like to emphasise that he did not say that Muslim women should be allowed to wear a full-face veil while giving evidence in court.”¹⁹

Despite the obvious media interest in the subject matter, at the time of writing, the draft Practice Direction has not materialised. When questioned about it in his 2015 press conference, the Lord Chief Justice responded thus:

The current position is this. When I had the first of these two conferences two years ago, I thought I had a major problem on my hands. Actually, the last two years have shown that it is not a major problem. There have been no problems but we do have a number of other problems . . . so one would love to be able to do everything at once but that is not sensible.

¹³ Letter to *The Times*, 10 February 2016.

¹⁴ James Kirkup, ‘David Cameron Supports Muslim Veil Ban in Schools and Courts’ (*The Telegraph Online*, 29 September 2013) <<http://www.telegraph.co.uk/news/politics/david-cameron/10342501/David-Cameron-supports-Muslim-veil-ban-in-schools-and-courts.html>> accessed 14 January 2016.

¹⁵ Dominiczak and Swinford, ‘David Cameron Backs Bans on Muslim Face Veils as Tories Plan Crackdown on Gender Segregation’ *The Telegraph* (18th January 2016); ‘David Cameron: I Will Back Schools and Courts which Ban Face Veils’ (*The Telegraph Online*, 19 January 2016) <<http://www.telegraph.co.uk/news/religion/12106833/David-Cameron-I-will-back-schools-and-courts-which-ban-face-veils.html>> accessed 21 January 2016.

¹⁶ Press conference held by The Lord Chief Justice of England and Wales on Tuesday 5 November 2013 (*Judiciary.gov.uk*, 5 November 2013) <<https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/lcj-press-conference-2013.pdf>> accessed 14 January 2016.

¹⁷ Martin Bentham, ‘Top Judge Calls for Rules Which Force Women to Take off Veils when Giving Evidence in Court’ (*Evening Standard*, 12 December 2014) <<http://www.standard.co.uk/news/uk/top-judge-calls-for-rules-which-force-women-to-take-off-veils-when-giving-evidence-in-court-9920224.html>> accessed 14 January 2016.

¹⁸ BBC, ‘Top Judge Calls For Respect For Veiled Women In court’ (*BBC News*, 17 April 2013) <<http://www.bbc.co.uk/news/uk-32347761>> accessed 14 January 2016.

¹⁹ The Supreme Court, ‘Response To Media Coverage Of Lord Neuberger’s lecture “Fairness in the courts”’ (*Supreme Court*, 18 April 2015) <<https://www.supremecourt.uk/news/response-to-media-coverage-of-lord-neuberger-lecture-fairness-in-the-courts.html>> accessed 14 January 2016.

So it has actually gone to the back of the queue. At the moment, there is not a problem. We will keep it under review. There are very strong views that are held about it in many countries of the world and we listen to those, we monitor what goes on and we may proceed but if it is not a problem, it may be better just to stay where we are.²⁰

This response is somewhat opaque in defining what is considered a ‘major problem’. It is not clear whether the Lord Chief Justice is referring to the fact that, as no other cases are reported as having come before the courts, it is of such rarity that it does not justify the allocation of resources to it. Alternatively it could be interpreted as meaning that *R v D* enunciates the position with sufficient clarity so as to obviate the need to promulgate any further guidance.

Either of these interpretations leaves the law in an unsatisfactory position. It may well be the case that in England and Wales no further cases have come before the criminal courts and so no judge has been confronted with the difficult decision faced by HHJ Murphy. It is certainly the case that statistically these cases should occur infrequently. There is no data available as to how many women wear the veil but the numbers are thought to be very low. A study in France in 2009 suggested that only 0.1% of Muslim women wore the full face veil.²¹ However to proceed on the basis that the absence of cases is indicative of an absence of a problem is potentially misguided, as it ignores the possibility that the publicity surrounding *R v D* has led to a fear amongst women who chose to wear the veil, that if they report crimes against them to the police they will have to compromise their religious integrity should they be called upon to testify in court. This perception may deter those adherents who become victims of crime seeking the assistance of the authorities and marginalise an already potentially vulnerable sector of society. Data suggests that women who wear the veil are disproportionately more likely to be the victim of violent crime than other members of society. In the year from November 2014 to 2015, the Metropolitan Police reported that Islamophobic attacks increased by 171% - from 60 to 163.²² In the seven days following the terrorist shootings in Paris on 13 November 2015, 115 Islamophobic attacks were reported to the police.²³ In analysing Islamophobic attacks, Littler and Feldman²⁴ identified that a high proportion of the victims were women whose attackers were white males, and that in 80% of cases these victims were identified to their attackers as Muslims by their clothing, predominantly the veil.

Given these statistics it is, perhaps, surprising that a court in England and Wales has not encountered this issue since *R v D*, and it seems unlikely that this will remain the case for long. In *R v D*, HHJ Murphy explicitly stated that his ruling only applied to defendants and should not be extended to prosecution witnesses,²⁵ however it is difficult to see how, if his reasoning his correct any distinction could be drawn. His rationale for compelling the removal of the veil in *R v D* was that the need to observe the demeanour of the witness was such a crucial element to the working of an adversarial trial that it justified the restriction of Article 9.²⁶ It would be hard to see how if a defendant invoked this argument against a prosecution witness, and *R v D* was applied, any sensible distinction

²⁰ Press Conference (n 16).

²¹ Channel4.com, ‘Britain’s Niqab: Unveiling the Facts’ (*Channel4.com*, 24 October 2013) <<http://blogs.channel4.com/factcheck/britains-niqab-unveiling-facts-factcheck/16232>> accessed 14 January 2016.

²² Metropolitan Police Crime figures, available at http://www.met.police.uk/crimefigures/textonly_month.htm.

²³ ‘Islamophobic Attacks Triple in London Following Paris Attacks – Met Police’ (*RT International*, 4 December 2015) <<https://www.rt.com/uk/324769-islamophobic-attacks-london-paris/>> accessed 15 January 2016.

²⁴ M. Littler and M. Feldman, *Tell MAMA Reporting 2014/2015: Annual Monitoring, Cumulative Extremism, and Policy Implications* (Teesside University Press 2015).

²⁵ (n1) para 7.

²⁶ (n1) para 77–79.

could be drawn (indeed given that in *R v D* the need to see the witness overrode the defendant's right to give evidence it would be hard to conceive how a judge following the reasoning in that case could resist an application made by the defendant). It would be troubling if victims of Islamophobic attacks were being deterred from giving evidence because they believed they would be forced to compromise their dress to give evidence or if those who had committed such offences were able to cause further discomfort and anxiety to the victims of their crime by applying that the veil be removed at court. An example of the difficulty which can be caused is, at the time of writing, being played out in Scotland where the trial of a man charged with racially abusing a woman wearing a veil has been adjourned for legal arguments after the complainant indicated she would refuse to testify if she was compelled to remove her veil.²⁷ It is important to note that whilst the offence is denied and the defence advocate is making a proper application in law, that the absence of clear guidance has required each party to make argument on the point and there is a real possibility of the case not proceeding if the witness refuses to testify without her veil. If the Sheriff refuses the defence application and the defendant is ultimately convicted the issue may well be relitigated on appeal. Whichever decision is ultimately made will have profound effect on one party or the other, regardless of the merits of the evidence and it is desirable that judges confronted with this decision have the benefit of clear guidance from either Parliament or the senior judiciary. If, as seems to have been the case in 2013, the Lord Chief Justice recognises that guidance is needed, that need does not diminish simply because no other cases have arisen, such an absence of cases may make the need for guidance of greater importance.

Alternatively, it could be said that the Lord Chief Justice is expressing the view that *R v D* settles the position with sufficient clarity and no further intervention is necessary. The judgment was disseminated widely and adopted into the legal literature. For example amendments were made to four different sections of Archbold, the main practitioner text on criminal practice, to accommodate and alert advocates and the judiciary to the principles that flowed from it.²⁸ Without any further intervention, it is likely that these principles will be followed in subsequent cases. However simply leaving *R v D* to reflect the status quo would also be an unsatisfactory solution. The judgment does not address the position of prosecution witnesses nor parties in any other tribunal apart from the Crown Court and before a jury. It does not, for example, address whether a district judge in the Magistrates' Court can permit the veil to be retained whilst directing him or herself that they have not been able to assess demeanour.²⁹ It does not help with the question of whether petitions for nullity of marriage should be heard only by female judges, allowing the petitioner to remove their veil.³⁰ Perhaps more significantly, treating *R v D* as the final position fails to recognise HHJ Murphy's own concerns about a single judge having been left to determine a sensitive issue, with much wider ramifications. In the public mind, the decision made in *R v D* represents the delineation of a boundary between the rights of a minority group and the authority that society vests in the judiciary. Such decisions are of such importance that the burden of making them should not rest with the ad hoc determinations of individual judges at first instance whose role is to decide cases on the facts before them.

²⁷ Gary Fitzpatrick, 'Trial Adjourned After Woman Refuses to Give Evidence without the Veil', (*Scottish Herald* 15 December 2015) <http://www.heraldsotland.com/news/14145051.Trial_adjourned_after_witness_refuses_to_give_evidence_without_a_veil/> accessed 26 April 2016.

²⁸ James Richardson QC, Archbold: Criminal Pleading Evidence and Practice 2016 (2016 edition, Sweet & Maxwell 2016) at paras 4-167a, 8-41a, 16-83, 16-156.

²⁹ The approach taken in *R v M* (Nottingham Magistrates' Court, 7th November 2001) unreported, prosecuted by the author of this paper.

³⁰ The approach suggested by Macur J in *SL v MJ* [2006] EWHC 3743 (Fam).

The veil is undoubtedly an emotive and controversial subject and, as the surveys quoted above indicate, one on which views are sharply divided. For the political right it represents a visible manifestation of the perceived Islamification of the UK. For the liberal left it is indicative of a patriarchal subjugation of women. The decision a judge must make in assessing whether a witness may retain the veil whilst testifying must revolve purely around the potential consequences of the decision to the fairness of the trial process and should operate to implement and not create public policy. The rationale for requiring the veil's removal is usually expressed in terms of it acting as an impediment to assessment of demeanour when assessing credibility although these arguments are often based on perception and restatement of traditional practice without evidence to corroborate their value. As the Canadian Supreme Court noted (whilst directing that a witness should remove her veil to allow her demeanour to be assessed):

[F]uture 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.³¹

The idea that this is an area which is capable of exploration should not be ignored and before promulgating such guidance there are two issues on which evidence can and should be obtained;

- (1) Does the wearing of a veil by a witness impede a fact finder's ability to assess the credibility of that witness?
- (2) Would the knowledge that she may be compelled to remove her veil to testify, potentially deter a victim of crime from reporting that crime to the police?

Unless there is evidence which establishes the first of these questions in the affirmative, then there is no evidence that the fairness of the trial being compromised, and so no legitimate reason to compromise the protected Article 9 right of a witness. There is already a body of research which doubts the ability of lay observers to accurately discern credibility from facial expression³² and this needs to be very carefully considered before the conclusion can be reached that there is actually a problem which needs addressing. The issue of the veil adversely affects the audibility of a woman wearing it has been dismissed through experimental research at the University of York³³ and any further conclusions on the effect of the veil on the trial process should be reached on the basis of academically robust reasoning rather than assumption. If there is evidence which supports the first proposition then consideration needs to be given to the second. If it is the case that even a small proportion of those women who adopt the veil would be deterred from asserting or defending their rights through law enforcement bodies if they believed they would be forced to expose their face in public, then adopting a rule of law which created such an obstacle potentially offends against the UK's obligation under article 9 of the 2012 EU Directive on the rights of the victim which requires member states to ensure that:

[V]ictims of crime should be recognised and treated in a respectful, sensitive and professional manner without discrimination of any kind based on any ground such as race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age, gender, gender expression, gender identity, sexual orientation, residence status or health. In all

³¹ *NS v The Queen* [2012] 3 SCR 726 [44].

³² For example P. Ekman and M O'Sullivan 'Who Can Catch a Liar?' (1991) 46(9) *American Psychologist* 913.

³³ C Llamas, P Harrison, D Donnelly, and D Watt, 'Effects Of Different Types Of Face Coverings On Speech Acoustics and Intelligibility' (2008) *York Papers in Linguistics Series* 2(9) 80.

contacts with a competent authority operating within the context of criminal proceedings, and any service coming into contact with victims, such as victim support or restorative justice services, the personal situation and immediate needs, age, gender, possible disability and maturity of victims of crime should be taken into account while fully respecting their physical, mental and moral integrity. Victims of crime should be protected from secondary and repeat victimisation, from intimidation and from retaliation, should receive appropriate support to facilitate their recovery and should be provided with sufficient access to justice.³⁴

If the answer to both of the propositions above is ‘yes’ then consideration needs to be given to adopting steps which ensure the fairness of the trial process whilst permitting the victim to assert her right to manifest her religion. The adversarial trial process has shown itself able to adapt to allow evidence to be admitted in different forms. Contested evidence is, when the appropriate circumstances are met, now permitted by hearsay provided that the jury are directed that they have not been able to observe the witness under cross-examination.³⁵ Changes in attitude to court room advocacy towards vulnerable witnesses have led to a change of approach in the questioning of children and those with disabilities. In order for the court to be able to interfere with the article 9 right of citizen it must first establish that it is ‘necessary’ to do so. If alternative, less intrusive, means of presenting the evidence are available then there can be no justification for requiring the wearer of a veil to compromise her belief.

The UK is a pluralist, multicultural society which explicitly supports the right to manifest religion. The court system is the mechanism by which an individual can assert and enforce their rights. Any requirement that an individual must satisfy a condition before engaging with the legal process has the potential to deter individuals from seeking relief. Where that requirement is more onerous to a section of society identifiable by gender and religion then the rule of law is jeopardised. To adopt the trenchant language of Abella J giving the dissenting judgment in the Canadian authority, “to those affected, this is like hanging a sign over the courtroom door saying ‘Religious minorities not welcome’”.³⁶ This is not to say that situations cannot arise where an interference is justifiable but such interference, however short lived, must be objectively justified and for a legitimate purpose. Compelling a witness in a trial to remove her veil to give evidence is such an interference. Although, the overall number of cases in which the issue must be addressed is very small, the consequences, both for the individuals involved as witnesses and defendants, but also in demarcating the extent to which the state can interfere with an individual’s genuinely held religious belief, are great. Indeed it is the relative lack of experience that judges and advocates will have in dealing with such cases that makes clarity imperative. This issue deserves attention and guidance from either parliament or the senior judiciary and such guidance should be clear, of universal application and justified. The decision making process should not be informed by personal perceptions or public opinion but by through evidence which identifies firstly whether there is any harm in conducting a trial with a veiled witness and, if this is the case, whether this problem can be solved without marginalising a potentially vulnerable section of society.

³⁴ Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 *Establishing Minimum Standards On The Rights, Support And Protection Of Victims Of Crime, and Replacing Council Framework Decision 2001/220/JHA* [2012] OJ 2 315/57.

³⁵ Criminal Justice Act 2003 c.44 s. 114–118.

³⁶ (n30) para 94.