

Chapter 3.3

Religious dress

The JSB's Equal Treatment Advisory Committee (ETAC) produced the following guidance in early 2007, drawing on the wide range of expertise available to it through its membership.

It did so conscious of the pressing need to give guidance to the judges, magistrates and tribunal members who deal increasingly with issues relating to religious dress, and in particular the wearing of the *niqab* in court. A further update to the guidance in December 2007 took into account a series of helpful comments from the Senior Presiding Judge, Lord Justice Leveson, designed to provide practical assistance to magistrates, particularly where there is disagreement among the panel members about the extent to which the wearing of the *niqab* has an impact on their approach to weighing up the evidence of a defendant or witness.

The JSB remains very interested in receiving comments on the substance of the guidance, and, as with all guidance given on issues within ETAC's remit, will have regard to those comments in reviewing and updating the material in the usual way. Any such comments should be directed in the first instance to: publications@jsb.gsi.gov.uk.

A person's religion or belief can influence the way they dress and present themselves in public. In most instances, such clothing will present few, if any, issues for judges. In practice, there are very few real clashes between the court process and different cultural practices within the UK. There is room for diversity, and there should be willingness to accommodate different practices and approaches to religious and cultural observance.

While there are other examples of religious items of clothing (the Jewish skullcap – the *kippah* or *yarmulke* – is one; the Sikh turban another), the issue of religious dress is one that is most likely to arise in relation to the *niqab*, or full veil, sometimes worn by Muslim women. As the *niqab* involves the full covering of the face, the judge may have to consider if any steps are required to ensure effective participation and a fair hearing, both for the woman wearing the *niqab* and other participants in the proceedings. Some useful guidance on the background to and religious significance of the wearing of different styles of Muslim headscarf can be found at http://news.bbc.co.uk/1/hi/world/middle_east/5411320.stm.

The following general guidance is designed to assist judges in relation to the matters that should be borne in mind if presented with this issue in courts and tribunals. While there are a range of different possible approaches, depending on the circumstances of the

particular case and the individual concerned, the interests of justice remain paramount. In essence, it is for the judge, in any set of circumstances, to consider what difference, if any, would be made to those interests by the *niqab* being worn. It may well be, that after consideration, there is no necessity to take any steps at all.

A number of judges have provided helpful accounts as to how they have dealt with such situations themselves, and to which we have had regard in formulating the following guidance. It is not possible to give advice here on any specific situation. It is possible, however, to give some indication of the factors to be taken into account in different types of case, and where the woman concerned is fulfilling different roles in the proceedings. It is worth re-emphasising that on this issue, as in so many areas of courtroom practice, there are rarely 'model answers' in terms of a response to a given set of circumstances. Judges may find it helpful to contact Circuit Community Liaison Judges or the judicial members of ETAC if they wish to discuss further any of the issues raised.

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. This is of particular concern for a system of justice that must be, and must be seen to be, inclusive and representative of the whole community. While there may be a diversity of opinions and debates between Muslims about the nature of dress required, for the judicial system the starting point should be respect for the choice made, and for each woman to decide on the extent and nature of the dress she adopts.

Different roles

As in all walks of life, the justice system should encourage practices which will enable as many people as possible to participate and engage with judicial processes as effectively as possible in whatever position, whether as witnesses, complainants, jurors, judicial office-holders, advocates or court staff. Each situation should be considered individually in order to find the best solution in each case.

Essentially, any consideration concerning the wearing of the *niqab* should be functional; that is, on the basis that the *niqab* prevents a person from seeing a woman's face. The primary question that needs to be asked by any judicial office holder before coming to a decision is: What is the significance of seeing this woman's face to the judicial task that I have to fulfil? How does being capable of observing her facial expressions impact on the court's decision-making, given her particular role in the proceedings? A distinction can be made, therefore, between situations where this may be useful or important (for

example, when assessing the evidence of a witness, particularly whose evidence is in dispute), situations where it is essential (for example, for purposes of identification), and other situations where it may not be of any relevance (for example, arguably, for court clerks or ushers).

As a judge. It is where the woman concerned is providing the 'face' of justice - as a judge, magistrate or tribunal member - that the question of the 'transparency of justice' might be said most obviously to come into play. Is the constituency which is served by the courts entitled to see the person dispensing justice? In reality, it will be rare for a set of circumstances to arise in which another judicial office-holder is called upon to make a decision on this point. Questions relating to the appointment of judges and the terms under which they hold office are matters for the Lord Chief Justice or other appropriate members of the senior judiciary, to whom the matter should be referred if the question arises.

As a juror. There may be circumstances where a judge has to hear a challenge for cause on the inclusion of a woman wearing the full veil as a member of a jury. The judge may feel the challenge justified and excuse her from serving on that jury, with the proviso that she may serve on another where no such challenge is made. Here, the decision must depend to a degree on the view of the parties to the particular case. But caution needs to be exercised, as in all such challenges, that there is a genuine and legitimate basis for such a challenge, based on the particular circumstances of the case. There may well be situations in which such a juror would be welcomed by the parties, or one party at least, as having some insight which may be relevant to the task of the jury in the case.

Steps are under way to enable the JSB to give guidance on what judges should say in summing up to a jury, where one of the witnesses or the defendant is wearing a *niqab*.

As a victim or complainant. The primary aim is, as stated before, to ensure a fair hearing. What needs to be considered, therefore, is: What is required to enable a woman wearing a *niqab* to participate in the legal process, to facilitate her ability to give her best evidence and to ensure, so far as practicable, a fair hearing for both sides? It should not automatically be assumed that any difficulty is created by a woman in court, in whatever capacity, who chooses to wear a *niqab*. Nor should it ever be assumed without good reason that it is inappropriate for a woman to give evidence in court wearing the full veil. Where, for example, the case involves domestic abuse or the possible abuse of her children, the judge may consider it contrary to the interests of justice to make her choose between giving evidence to secure a conviction and wearing the full veil.

Generally speaking, a woman who wears a *niqab* would do so because it enables her to participate in a public space, such as a court. In situations where a fair hearing may require a woman to remove her *niqab*, or where she feels she may be able to participate more effectively without her *niqab*, however, there are a whole variety of special

measures available to the court (e.g. live link, screens, clearing the public gallery) that may be considered. The most appropriate course will depend on the issues in the case. As with any consideration of the permitted special measures in a criminal or family case, this is a point on which a decision should ideally be reached after discussion at a preparatory or preliminary hearing, rather than at a final hearing in open court.

As with all practices, the response must be thoughtful and sensitive. If having considered the nature of the case, the nature of the evidence and the prevailing circumstances, it is the view of the judicial office holder that he or she cannot properly ensure fairness or record the evidence fully in a way that will do justice to the case, then careful consideration will need to be given to asking the woman concerned whether she would remove simply that part of the veil that covers the main part of her face. It should be fully explained what the difficulty is, and why the judge considers that he or she will be in difficulty in properly fulfilling the judicial decision-making task and in ensuring fairness to all sides. Having given that explanation, one option might be to allow a short adjournment to enable the woman concerned to seek guidance or advice or possibly to enable her to attend court differently attired, or perhaps for the court to be cleared of anyone other than those directly involved with the case.

As a witness or defendant. 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 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. Responses, behaviour and manner in which a person delivers evidence can be affected anyway by a range of matters, including social and cultural background and ethnicity or the effects of injury or disability. It will always be necessary to have regard to these factors in assessing the extent to which a person's demeanour or the way in which they give evidence otherwise assists in weighing or evaluating their evidence. Can it be said, in the circumstances of the particular case, that any 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 TV 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 whilst showing her face, and not being able to be a witness.

Whilst not exact analogies, there are, of course, other circumstances in which a judge will take evidence without being able to see the face of the witness – for example, where evidence is taken on the phone, or where the judge is visually-impaired.

Sitting as a magistrate, or on other judicial tribunals of more than one member. Sitting as a magistrate, and therefore as one of a panel of three, can raise its own issues. The aim is, of course, the same – that is, to weigh and accurately evaluate the evidence of every witness appearing in the magistrates' court. As in the Crown Court, that assessment is based upon a number of different factors, and the degree to which it is relevant or necessary to that assessment to see a woman's face may depend on the type of case, and the nature of the evidence that the witness gives.

Taking all this into account (and the effect that a range of matters may have on the manner in which a person delivers their evidence, as acknowledged above), there may still be a concern about hearing and weighing the evidence from a woman whose face is veiled and whose expression is invisible.

It is possible that not all the panel will agree on the best way of proceeding. If any one of the magistrates is of the view that he or she may be disadvantaged in assessing the witness, then the magistrates should retire and discuss the most appropriate course of action. This is not to be decided on a majority decision because each magistrate must be faithful to his or her oath. If, following discussion, the question of a veil remains a matter for concern, such a course of action may well include asking the defendant or witness to remove that part of the veil which covers her face and to consider what might be done to facilitate a resolution to the difficulty.

If the court does decide to ask a defendant or witness to remove that part of the veil which covers the face, it should be fully explained that the reason for the request is that the role of the magistrates is to weigh and evaluate the evidence presented in court and that, in order to make that evaluation, magistrates draw on the full range of information available to them. This includes the oral evidence of witnesses whether called by the prosecution or the defence. In relation to witnesses (and the defendant generally), that evaluation also involves, to some extent, an assessment of the way in which the person gives that evidence, how each responds or reacts to questions to even to other people in court. In every case, magistrates will always try their best to do justice in the case before them and while the way in which evidence is given may only be part of the assessment, in certain cases they may feel that they cannot be assured that they can provide a fair and just assessment of all the evidence without seeing the defendant/witness's face during the course of the hearing, thereby potentially creating disadvantage. This is

because the magistrate will not have had the benefit of what they consider to be the best evidence and as a result they may feel that their ability to ensure fairness to all sides is affected. It would need to be made clear that, whilst demeanour and facial expressions will not be allowed to over-influence the consideration given to any case, these features may be able to assist magistrates when weighing up the evidence.

As an advocate. In the case of those who wish to practise as an advocate different considerations should be borne in mind. A general policy enabling the judiciary to decide whether the wearing of the *niqab* should be permitted or refused on a case by case basis would place Muslim women advocates, and their clients, at a disadvantage where the woman concerned felt unable to appear in a court or tribunal without her veil. This is because she would be unable to say in advance of any hearing whether the judge would allow her to appear in her *niqab*. The starting point should therefore be that she is entitled to appear as an advocate when wearing it.

Once again the interests of justice will be paramount and the judge may need to consider whether, in any particular circumstances which arise, the interests of justice are being impeded by the fact that the advocate's face cannot be seen. In reality, in the absence of any question relating to identification, there are few instances where an advocate or representative appearing in a *niqab* would be likely to present any real issue. Such concerns would be likely to centre round the fact that the woman could not be heard, rather than seen. So long as the advocate can be heard reasonably clearly it is unlikely that the interests of justice will be impeded. Just as in any case where a judge might have difficulty in hearing any party, witness or advocate, sensitively enquiring whether they can speak any louder or providing other means of amplification should suffice and such measures should be considered with the advocate before asking her to remove her veil.

Judge craft

As with so much guidance in this bench book, the best way of proceeding comes down to basic good judge craft. There is room for diversity in our system of justice, and there should be willingness to accommodate different practices and approaches to religious and cultural observance. A good understanding of the special measures that may be of use in the particular case, and of the need to identify the need for such adaptations at a preliminary hearing, are key.

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