HOUSE OF LORDS SESSION 2005–06
[2006] UKHL 15

on appeal from[2005] EWCA Civ 199

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

R (on the application of Begum (by her litigation friend, Rahman)) (Respondent)
v.
Headteacher and Governors of Denbigh High School (Appellants)

Appellate Committee

Lord Bingham of Cornhill
Lord Nicholls of Birkenhead
Lord Hoffmann
Lord Scott of Foscote
Baroness Hale of Richmond

Counsel

Appellants:
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Simon Birks
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Respondents:
Cherie Booth QC
Carolyn Hamilton
Eleni Mitrophanous
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Intervener
Jonathan Crow (instructed by Treasury Solicitor) for the Secretary of State for Education and Skills

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LORD BINGHAM OF CORNHILL

My Lords,

1. The respondent, Shabina Begum, is now aged 17. She contends that the appellants, who are the head teacher and governors of Denbigh High School in Luton ("the school"), excluded her from that school, unjustifiably limited her right under article 9 of the European Convention on Human Rights to manifest her religion or beliefs and violated her right not to be denied education under article 2 of the First Protocol to the Convention. Bennett J, ruling on the respondent's application for judicial review at first instance, rejected all these contentions: [2004] EWHC 1389 (Admin); [2004] ELR 374. The Court of Appeal (Brooke, Mummery and Scott Baker LJJ), reversing the judge, accepted each of them: [2005] EWCA Civ 199; [2005] 1 WLR 3372. The appellants, with support from the Secretary of State for Education and Skills as intervener, submit that the judge was right and the Court of Appeal wrong.

2. It is important to stress at the outset that this case concerns a particular pupil and a particular school in a particular place at a particular time. It must be resolved on facts which are now, for purposes of the appeal, agreed. The House is not, and could not be, invited to rule whether Islamic dress, or any feature of Islamic dress, should or should not be permitted in the schools of this country. That would be a most inappropriate question for the House in its judicial capacity, and it is not one which I shall seek to address.

The agreed facts

3. The school is a maintained secondary community school taking pupils of both sexes aged 11-16. It has a very diverse intake, with 21 different ethnic groups and 10 religious groupings represented. About 79% of its pupils are now Muslim, the percentage having fallen from 90% in 1993. It is not a faith school, and is therefore open to children of all faiths and none. Its high percentage of Muslim pupils is reflected in its exemption from the ordinary duty of maintained schools to secure an act of collective worship each day wholly or mainly of a broadly Christian character.

4. The governing body of the school always contained a balanced representation of different sections of the school community. At the time of these proceedings, four out of six parent governors were Muslim, the chairman of the Luton Council of Mosques was a community governor and three of the LEA governors were also Muslim. The school makes a significant contribution to social cohesion in a catchment area that is racially, culturally and religiously diverse.

5. The head teacher, Mrs Yasmin Bevan, was born into a Bengali Muslim family and grew up in India, Pakistan and Bangladesh before coming to this country. She has had much involvement with Bengali Muslim communities here and abroad, and is familiar with the codes and practices governing the dress of Muslim women. Since her appointment as head teacher in 1991, when it was not performing well, the school has come to enjoy an outstanding measure of success.

6. The head teacher believes that school uniform plays an integral part in securing high and improving standards, serving the needs of a diverse community, promoting a positive sense of communal identity and avoiding manifest disparities of wealth and style. The school offered three uniform options. One of these was the shalwar kameeze: a combination of the kameeze, a sleeveless smock-like dress with a square neckline, revealing the wearer's collar and tie, with the shalwar, loose trousers, tapering at the ankles. A long-sleeved white shirt is worn beneath the kameeze and, save in hot weather, a uniform long-sleeved school jersey is worn on top. It has been worn by some Muslim, Hindu and Sikh female pupils.

7. In 1993 the school appointed a working party to re-examine its dress code. The governors consulted parents, students, staff and the Imams of the three local mosques. There was no objection to the shalwar kameeze, and no suggestion that it failed to satisfy Islamic requirements. The governors approved a garment specifically designed to ensure that it satisfied the requirement of modest dress for Muslim girls. Following the working party report the governors, in response to several requests, approved the wearing of head-scarves of a specified colour and quality.

8. The school went to some lengths to explain its dress code to prospective parents and pupils. This was first done in the October of the year before a pupil would enter, and again at an open evening in the July before admission. A letter written to parents reminded them of the school's rules on dress.

9. The respondent is Muslim. Her father died before she entered the school, and at the material times she lived with her mother (who did not speak English and has since died), a sister two years older, and a brother (Rahman), five years older, who is now her litigation friend. The family lived outside the school's catchment area, but chose it for the respondent and her elder sister, and were told in clear terms of the school's uniform policy. For two years before September 2002 the respondent wore the shalwar kameeze happily and without complaint. It was also worn by the respondent's sister, who continued to wear it without objection throughout her time at the school.

10. On 3 September 2002, the first day of the autumn term, the respondent (then aged nearly 14) went to the school with her brother and another young man. They asked to speak to the head teacher, who was not available, and they spoke to the assistant head teacher, Mr Moore. They insisted that the respondent be allowed to attend the school wearing the long garment she had on that day, which was a long coat-like garment known as a jilbab. They talked of human rights and legal proceedings. Mr Moore felt that their approach was unreasonable and he felt threatened. He decided that the respondent should wear the correct school uniform and told her to go home, change and return wearing school uniform. His previous experience in such situations, with one exception, was that pupils always complied. He did not believe he was excluding the respondent, which he had no authority to do, but did not allow her to enter the school dressed as she was, this being (it was said) the only garment which met her religious requirements because it concealed, to a greater extent than the shalwar

kameeze, the contours of the female body, and was said to be appropriate for maturing girls. The respondent then left with her brother and the other young man. The young men said they were not prepared to compromise over this issue.

11. On the same day the head teacher, who had been informed of the incident, wrote to the respondent's mother and brother. After setting out an account of the incident, she stated that the uniform had been agreed with the governing body, and that it was her view, and that of the LEA, that the school's uniform rules were more than reasonable in taking into account cultural and religious concerns. She noted that the respondent had not attended school because she had been removed by those representing her and stated that the respondent was required to attend school dressed in the correct uniform. She further stated that the matter would be referred to the Education Welfare Service (the "EWS") should the respondent fail to attend. The letter concluded by inviting the respondent to raise the issue with the chair of the governors if the family had any further concerns. The school was anxious to establish contact with the respondent's guardian and accordingly, on 4 September 2002, a member of the support team telephoned her house and spoke to a male member of the family who said that the respondent had seen her solicitor and was going to sue the school. On 5 September 2002 Mr Moore telephoned and spoke to the respondent's brother. Mr Moore inquired why the respondent was not in school. The respondent's brother told Mr Moore that he (the brother) was not prepared to let the respondent attend school unless she was allowed to wear a long skirt. On 11 September 2002 the school sent a letter concerning the respondent's non-attendance to the family and on 27 September 2002 the school referred the matter to the EWS.

12. On 22 October 2002 solicitors on behalf of the respondent wrote to the head teacher, the governors and the LEA, contending that the respondent had been "excluded/suspended" from school "because she refused to remove her Muslim dress comprising of a headscarf and long over garment". The letter contended that the respondent believed that it was an absolute obligation on her to wear that dress and she was not prepared to take it off. It also alleged that the school's decision to exclude the respondent breached her human rights under UK and European human rights law. Articles 9, 8 and 14 and Article 2 of Protocol 1 of the Convention were set out and reasons given explaining why the school's actions had breached the respondent's human rights. On 23 October 2002 Mr Ahmed of the EWS met the respondent and her brother and emphasised the importance of the respondent attending

school. Other attempts were made by the EWS to get the respondent back into the school.

13. In December 2002 the appellants and the LEA sought independent advice on whether the school uniform offended against the Islamic dress code. Two mosques in Luton, the London Central Mosque Trust and the Islamic Cultural Centre advised that it did not. On behalf of the latter two institutions Dr Abushady wrote, in a letter of 18 December 2002, that although there were many schools of thought the views he had expressed reflected the general consensus of opinion among the vast majority of Muslim scholars. The appellants' solicitor informed the respondent's of this advice, said that the respondent's religious views had been considered and provision made to accommodate them and strongly urged that she return to school. In February 2003 the EWS further sought to persuade the respondent to attend the school. Between March and June 2003 various attempts were made to find her a place at another school. A meeting was held at the school on 16 May 2003 between the respondent, her brother and two members of the EWS, in order to persuade her to return to the school, but she insisted that she would not return unless the school changed its position.

14. The respondent instructed new solicitors. On 31 May 2003 Mr Basharat Ali of Messrs Adams (later Aman) wrote to the Islamic authorities previously consulted by the appellants, seeking their advice on the respective merits of the shalwar kameeze or the jilbab from an Islamic perspective. He also wrote to the LEA contending that the shalwar kameeze contradicted Islamic dress rules. He asserted that the respondent had been constructively excluded from the school and sought to initiate the complaints procedure. The suggestion that the respondent had been constructively excluded was rejected by the appellants' solicitor: she remained on the school roll, she had throughout been able to attend but had preferred to absent herself. Various compromises were discussed in June and September 2003, but were rejected by one or other party.

15. The respondent's solicitor obtained opinions from three sources (two of them Imams previously consulted by the appellants) to the effect that the jilbab was the appropriate dress for mature Muslim women. This advice was passed on to the appellants, who did not accept it but repeatedly urged the respondent to return to school. The chairman of the governors reviewed the matter and supported the action of the head teacher. The appellants reiterated that the respondent had not been

excluded, that she had a place at the school but that she must wear one of the school's approved uniforms. The EWS met the respondent in September 2003 and offered her their help in getting a place at another school if that was what she wanted. In the same month there was forwarded to the school a statement made by the Muslim Council of Britain on the "Dress code for women in Islam": there was no recommended style; modesty must be observed at all times; trousers with long tops or shirts for school wear were "absolutely fine".

16. In October 2003 a committee of the governors met and considered this matter. It gave a lengthy decision upholding the head teacher's decision. The respondent was urged to return, or to seek a place at another school. The EWS again offered help in making a transfer if that was what the respondent wanted. She made an application to one school, but it was full. She was told of two other schools where she could wear the jilbab, but she did not apply to them. An approach by her solicitor to the DfES for a direction under sections 496-497 of the Education Act 1996 was fruitless.

17. During this period, according to the school, work was set by the school for the respondent to do at home and when returned by her was duly marked and sent back to her. But it was said that she returned little. There was some dispute about this evidence, which was never explored in the courts below and no finding can accordingly be made.

18. The respondent issued her claim for judicial review on 13 February 2004. Since then, according to the appellants, a number of Muslim girls at the school have said that they do not wish to wear the jilbab and fear they will be pressured into wearing it. A demonstration outside the school gates by an extreme Muslim group (unconnected with the respondent) in February 2004, protesting against the education of Muslim children in secular schools, caused a number of pupils to complain to staff of interference and harassment. Some pupils were resistant to wearing the jilbab as unnecessarily restrictive and associated with an extremist group. The head teacher and her assistant, and also some parents, were concerned that acceptance of the jilbab as a permissible variant of the school uniform would lead to undesirable differentiation between Muslim groups according to the strictness of their views. The head teacher in particular felt that adherence to the school uniform policy was necessary to promote inclusion and social cohesion, fearing that new variants would encourage the formation of groups or cliques identified by their clothing. The school had in the past suffered the ill-effects of groups of pupils defining themselves along

racial lines, with consequent conflict between them. The school uniform had been designed to avoid the development of sub-groups identified by dress.

19. In these proceedings the respondent sought leave to challenge (1) the decision of the head teacher and governors not to admit her to the school whilst wearing the jilbab, and (2) the decision of Luton Borough Council not to provide her with education whilst she was denied access to education by the head teacher. She was granted leave to pursue the first of these claims but not the second. She renewed her application to pursue the second claim before Bennett J, but leave was refused for reasons which he gave in para 107 of his judgment.

Article 9 of the Convention

20. So far as relevant to this case article 9 provides:

> "*Freedom of thought, conscience and religion*
>
> 1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
> 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society . . . for the protection of the rights and freedoms of others."

The fundamental importance of this right in a pluralistic, multi-cultural society was clearly explained by my noble and learned friend Lord Nicholls of Birkenhead in *R (Williamson) v Secretary of State for Education and Employment* [2005] UKHL 15, [2005] 2 AC 246, paras 15-19, and by the South African Constitutional Court in *Christian Education South Africa v Minister of Education* [2001] 1 LRC 441, para 36. This is not in doubt. As pointed out by my noble and learned friend in para 16 of the passage cited, article 9 protects both the right to hold a belief, which is absolute, and a right to manifest belief, which is qualified.

21. It is common ground in these proceedings that at all material times the respondent sincerely held the religious belief which she professed to hold. It was not the less a religious belief because her belief may have changed, as it probably did, or because it was a belief shared by a small minority of people. Thus it is accepted, obviously rightly, that article 9(1) is engaged or applicable. That in itself makes this a significant case, since any sincere religious belief must command respect, particularly when derived from an ancient and respected religion. The main questions for consideration are, accordingly, whether the respondent's freedom to manifest her belief by her dress was subject to limitation (or, as it has more often been called, interference) within the meaning of article 9(2) and, if so, whether such limitation or interference was justified under that provision.

Interference

22. As my noble and learned friend pointed out in *Williamson*, above, para 38, "What constitutes interference depends on all the circumstances of the case, including the extent to which in the circumstances an individual can reasonably expect to be at liberty to manifest his beliefs in practice". As the Strasbourg court put it in *Kalaç v Turkey* (1997) 27 EHRR 552, para 27,

> "Article 9 does not protect every act motivated or inspired by a religion or belief. Moreover, in exercising his freedom to manifest his religion, an individual may need to take his specific situation into account."

The Grand Chamber endorsed this paragraph in *Sahin v Turkey*, (Application No 44774/98, 10 November 2005, unreported), para 105. The Commission ruled to similar effect in *Ahmad v United Kingdom* (1981) 4 EHRR 126, para 11:

> ". . . the freedom of religion, as guaranteed by Article 9, is not absolute, but subject to the limitations set out in Article 9(2). Moreover, it may, as regards the modality of a particular religious manifestation, be influenced by the situation of the person claiming that freedom."

23. The Strasbourg institutions have not been at all ready to find an interference with the right to manifest religious belief in practice or observance where a person has voluntarily accepted an employment or role which does not accommodate that practice or observance and there are other means open to the person to practise or observe his or her religion without undue hardship or inconvenience. Thus in *X v Denmark* (1976) 5 DR 157 a clergyman was held to have accepted the discipline of his church when he took employment, and his right to leave the church guaranteed his freedom of religion. His claim under article 9 failed. In *Kjeldsen, Busk Madsen and Pedersen v Denmark* (1976) 1 EHRR 711, paras 54 and 57, parents' philosophical and religious objections to sex education in state schools was rejected on the ground that they could send their children to state schools or educate them at home. The applicant's article 9 claim in *Ahmad,* above, paras 13, 14 and 15, failed because he had accepted a contract which did not provide for him to absent himself from his teaching duties to attend prayers, he had not brought his religious requirements to the employer's notice when seeking employment and he was at all times free to seek other employment which would accommodate his religious observance. *Karaduman v Turkey* (1993) 74 DR 93 is a strong case. The applicant was denied a certificate of graduation because a photograph of her without a headscarf was required and she was unwilling for religious reasons to be photographed without a headscarf. The Commission found (p 109) no interference with her article 9 right because (p 108) "by choosing to pursue her higher education in a secular university a student submits to those university rules, which may make the freedom of students to manifest their religion subject to restrictions as to place and manner intended to ensure harmonious coexistence between students of different beliefs". In rejecting the applicant's claim in *Konttinen v Finland* (1996) 87-A DR 68 the Commission pointed out, in para 1, page 75, that he had not been pressured to change his religious views or prevented from manifesting his religion or belief; having found that his working hours conflicted with his religious convictions, he was free to relinquish his post. An application by a child punished for refusing to attend a National Day parade in contravention of her beliefs as a Jehovah's Witness, to which her parents were also party, was similarly unsuccessful in *Valsamis v Greece* (1996) 24 EHRR 294. It was held (para 38) that article 9 did not confer a right to exemption from disciplinary rules which applied generally and in a neutral manner and that there had been no interference with the child's right to freedom to manifest her religion or belief. In *Stedman v United Kingdom* (1997) 23 EHRR CD 168 it was fatal to the applicant's article 9 claim that she was free to resign rather than work on Sundays. The applicant in *Kalaç*, above, paras 28-29, failed because he had, in choosing a military career, accepted of his own accord a system of military discipline that by its nature implied the possibility of special limitations on certain rights and

freedoms, and he had been able to fulfil the ordinary obligations of Muslim belief. In *Jewish Liturgical Association Cha'are Shalom Ve Tsedek v France* (2000) 9 BHRC 27, para 81, the applicants' challenge to the regulation of ritual slaughter in France, which did not satisfy their exacting religious standards, was rejected because they could easily obtain supplies of meat, slaughtered in accordance with those standards, from Belgium.

24. This line of authority has been criticised by the Court of Appeal as overly restrictive (*Copsey v WWB Devon Clays Ltd* 2005 EWCA Civ 932, [2005] 1CR 1789, paras 31-39, 44-66), and in *Williamson*, above, para 39, the House questioned whether alternative means of accommodating a manifestation of religions belief had, as suggested in the *Jewish Liturgical* case, above, para 80, to be "impossible" before a claim of interference under article 9 could succeed. But the authorities do in my opinion support the proposition with which I prefaced para 23 of this opinion. Even if it be accepted that the Strasbourg institutions have erred on the side of strictness in rejecting complaints of interference, there remains a coherent and remarkably consistent body of authority which our domestic courts must take into account and which shows that interference is not easily established.

25. In the present case the respondent's family chose for her a school outside their own catchment area. It was a school which went to unusual lengths to inform parents of its uniform policy. The shalwar kameeze, and not the jilbab, was worn by the respondent's elder sister throughout her time at the school, and by the respondent for her first two years, without objection. It was of course open to the respondent, as she grew older, to modify her beliefs, but she did so against a background of free and informed consent by her and her family. It is also clear that there were three schools in the area at which the wearing of the jilbab was permitted. The respondent's application for admission to one of these was unsuccessful because the school was full, and it was asserted in argument that the other two were more distant. There is, however, no evidence to show that there was any real difficulty in her attending one or other of these schools, as she has in fact done and could no doubt have done sooner had she chosen. On the facts here, and endeavouring to apply the Strasbourg jurisprudence in a reasonable way, I am of opinion that in this case (unlike *Williamson*, above, para 41, where a different conclusion was reached) there was no interference with the respondent's right to manifest her belief in practice or observance. I appreciate, however, that my noble and learned friends Lord Nicholls and Lady Hale of Richmond incline to a different opinion. It follows

that this is a debatable question, which gives the issue of justification under article 9(2) particular significance.

Justification

26. To be justified under article 9(2) a limitation or interference must be (a) prescribed by law and (b) necessary in a democratic society for a permissible purpose, that is, it must be directed to a legitimate purpose and must be proportionate in scope and effect. It was faintly argued for the respondent that the school's uniform policy was not prescribed by law, but both the judge (para 78) and the Court of Appeal (paras 61, 83 and 90) held otherwise, and rightly so. The school authorities had statutory authority to lay down rules on uniform, and those rules were very clearly communicated to those affected by them. It was not suggested that the rules were not made for the legitimate purpose of protecting the rights and freedoms of others. So the issue is whether the rules and the school's insistence on them were in all the circumstances proportionate. This raises an important procedural question on the court's approach to proportionality and, depending on the answer to that, a question of substance.

27. In para 75 of his leading judgment in the Court of Appeal, Brooke LJ set out a series of questions to be asked and answered by a decision-maker resolving an issue raised under article 9. He observed (para 76) that the school did not approach the matter in that way at all. Since, therefore, the school had approached the issues from an entirely wrong direction, it could not resist her claim for declarations that it had wrongfully excluded her, that it had unlawfully denied her the right to manifest her religion and that it had unlawfully denied her access to suitable and appropriate education in breach of article 2 of the First Protocol to the Convention (para 78). But (para 81) nothing in the judgment should be taken to mean that it would be impossible for the school to justify its stance if it were to reconsider its uniform policy in the light of the judgment and decide not to alter it in any significant respect. He offered guidance (para 81) on matters the school would need to consider. Mummery and Scott Baker LJJ (paras 88, 90, 92) expressly associated themselves with this approach.

28. The Court of Appeal's procedural approach attracted the adverse criticism of some informed commentators: see Poole, "Of headscarves and heresies: The *Denbigh High School* case and public authority decision making under the Human Rights Act" [2005] PL 685; Linden

and Hetherington, "Schools and Human Rights" [2005] Educational Law Journal 229; and, for a more ambivalent appraisal, Davies, "Banning the Jilbab: Reflections on Restricting Religious Clothing in the Light of the Court of Appeal in SB v Denbigh High School (2005) 1.3 European Constitutional Law Review 511. This procedural approach also prompted the Secretary of State to intervene in order to correct what he boldly described, in his written case, as a fundamental misunderstanding of the Human Rights Act. The school also, endorsing the criticisms made in the first two articles cited, have submitted that the Court of Appeal erred in failing to decide the proportionality issue on the merits. For the respondent, it was argued that the Court of Appeal was right to approach the proportionality issue on conventional judicial review lines, and to quash the decision (irrespective of the merits) if the decision-maker was found to have mis-directed itself in law. Attention was drawn to other cases in which the Court of Appeal had adopted a similar approach, such as *Samaroo v Secretary of State for the Home Department* [2001] EWCA Civ 1139, [2001] UKHRR 1150, paras 19-24, *R(D) v Secretary of State for the Home Department* [2003] EWHC Admin 155, [2003] 1 FLR 979, paras 20-23, and *R (Goldsmith) v Wandsworth London Borough Council* [2004] EWCA Civ 1170, (2004) 148 Sol Jo LB 1065. The House was referred to *Chapman v United Kingdom* (2001) 33 EHRR 399, para 92, where the Strasbourg court said:

> "In particular, [the court] must examine whether the decision-making process leading to measures of interference was fair and such as to afford due respect to the interests safeguarded to the individual by Article 8."

29. I am persuaded that the Court of Appeal's approach to this procedural question was mistaken, for three main reasons. First, the purpose of the Human Rights Act 1998 was not to enlarge the rights or remedies of those in the United Kingdom whose Convention rights have been violated but to enable those rights and remedies to be asserted and enforced by the domestic courts of this country and not only by recourse to Strasbourg. This is clearly established by authorities such as *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37, [2004] 1 AC 546, paras 6-7, 44; *R (Greenfield) v Secretary of State for the Home Department* [2005] UKHL 14, [2005] 1 WLR 673, paras 18-19; and *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2005] UKHL 57, [2005] 3 WLR 837, paras 25, 33, 34, 88 and 92. But the focus at Strasbourg is not and has never been on whether a challenged decision or action is the product of a defective decision-making process,

but on whether, in the case under consideration, the applicant's Convention rights have been violated. In considering the exercise of discretion by a national authority the court may consider whether the applicant had a fair opportunity to put his case, and to challenge an adverse decision, the aspect addressed by the court in the passage from its judgment in *Chapman* quoted above. But the House has been referred to no case in which the Strasbourg Court has found a violation of Convention right on the strength of failure by a national authority to follow the sort of reasoning process laid down by the Court of Appeal. This pragmatic approach is fully reflected in the 1998 Act. The unlawfulness proscribed by section 6(1) is acting in a way which is incompatible with a Convention right, not relying on a defective process of reasoning, and action may be brought under section 7(1) only by a person who is a victim of an unlawful act.

30. Secondly, it is clear that the court's approach to an issue of proportionality under the Convention must go beyond that traditionally adopted to judicial review in a domestic setting. The inadequacy of that approach was exposed in *Smith and Grady v United Kingdom* (1999) 29 EHRR 493, para 138, and the new approach required under the 1998 Act was described by Lord Steyn in *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26, [2001] 2 AC 532, paras 25-28, in terms which have never to my knowledge been questioned. There is no shift to a merits review, but the intensity of review is greater than was previously appropriate, and greater even than the heightened scrutiny test adopted by the Court of Appeal in *R v Ministry of Defence, Ex p Smith* [1996] QB 517, 554. The domestic court must now make a value judgment, an evaluation, by reference to the circumstances prevailing at the relevant time (*Wilson v First County Trust Ltd (No 2)* [2003] UKHL 40, [2004] 1 AC 816, paras 62-67). Proportionality must be judged objectively, by the court (*Williamson*, above, para 51). As Davies observed in his article cited above, "The retreat to procedure is of course a way of avoiding difficult questions". But it is in my view clear that the court must confront these questions, however difficult. The school's action cannot properly be condemned as disproportionate, with an acknowledgement that on reconsideration the same action could very well be maintained and properly so.

31. Thirdly, and as argued by Poole in his article cited above, pages 691-695, I consider that the Court of Appeal's approach would introduce "a new formalism" and be "a recipe for judicialisation on an unprecedented scale". The Court of Appeal's decision-making prescription would be admirable guidance to a lower court or legal tribunal, but cannot be required of a head teacher and governors, even

with a solicitor to help them. If, in such a case, it appears that such a body has conscientiously paid attention to all human rights considerations, no doubt a challenger's task will be the harder. But what matters in any case is the practical outcome, not the quality of the decision-making process that led to it.

32. It is therefore necessary to consider the proportionality of the school's interference with the respondent's right to manifest her religious belief by wearing the jilbab to the school. In doing so we have the valuable guidance of the Grand Chamber of the Strasbourg court in *Sahin*, above, paras 104-111. The court there recognises the high importance of the rights protected by article 9; the need in some situations to restrict freedom to manifest religious belief; the value of religious harmony and tolerance between opposing or competing groups and of pluralism and broadmindedness; the need for compromise and balance; the role of the state in deciding what is necessary to protect the rights and freedoms of others; the variation of practice and tradition among member states; and the permissibility in some contexts of restricting the wearing of religious dress.

33. The respondent criticised the school for permitting the headscarf while refusing to permit the jilbab, for refusing permission to wear the jilbab when some other schools permitted it and for adhering to their own view of what Islamic dress required. None of these criticisms can in my opinion be sustained. The headscarf was permitted in 1993, following detailed consideration of the uniform policy, in response to requests by several girls. There was no evidence that this was opposed. But there was no pressure at any time, save by the respondent, to wear the jilbab, and that has been opposed. Different schools have different uniform policies, no doubt influenced by the composition of their pupil bodies and a range of other matters. Each school has to decide what uniform, if any, will best serve its wider educational purposes. The school did not reject the respondent's request out of hand: it took advice, and was told that its existing policy conformed with the requirements of mainstream Muslim opinion.

34. On the agreed facts, the school was in my opinion fully justified in acting as it did. It had taken immense pains to devise a uniform policy which respected Muslim beliefs but did so in an inclusive, unthreatening and uncompetitive way. The rules laid down were as far from being mindless as uniform rules could ever be. The school had enjoyed a period of harmony and success to which the uniform policy was thought to contribute. On further enquiry it still appeared that the

rules were acceptable to mainstream Muslim opinion. It was feared that acceding to the respondent's request would or might have significant adverse repercussions. It would in my opinion be irresponsible of any court, lacking the experience, background and detailed knowledge of the head teacher, staff and governors, to overrule their judgment on a matter as sensitive as this. The power of decision has been given to them for the compelling reason that they are best placed to exercise it, and I see no reason to disturb their decision. After the conclusion of argument the House was referred to the recent decision of the Supreme Court of Canada in *Multani v Commission scolaire Marguerite-Bourgeoys* [2006] SCC 6. That was a case decided, on quite different facts, under the Canadian Charter of Rights and Freedoms. It does not cause me to alter the conclusion I have expressed.

Article 2 of the First Protocol

35. The House has considered article 2 of the First Protocol to the Convention in some detail in *Abdul Hakim Ali v Head Teacher and Governors of Lord Grey School* [2006] UKHL 14. I would refer to, but need not repeat, that analysis.

36. The question is whether, between 3 September 2002 and the date, some two years later, of the respondent's admission to another school, the appellants denied her access to the general level of educational provision available in this country. In my opinion they did not. A two-year interruption in the education of any child must always be a subject for profound regret. But it was the result of the respondent's unwillingness to comply with a rule to which, as I have concluded, the school were entitled to adhere, and, since her religious convictions forbade compliance, of her failure to secure prompt admission to another school where her religious convictions could be accommodated.

Exclusion

37. In para 60 of his judgment the judge said:

> "What to my mind is abundantly clear is that the [school] earnestly and sincerely wanted the [respondent] to attend school. It put no impediment or obstacle in the way of the [respondent]. What the [school] did insist on was that

> when the [respondent] came to school she was dressed in accordance with the school uniform policy, as indeed she had been happy to do for the two years prior to September 2002. The reality of the situation was and still is that the [respondent], entirely of her own volition, chose not to attend Denbigh High School unless the [school] agreed to her wearing the jilbab. The [school] did not so agree. The [respondent] had a choice, either of returning to school wearing the school uniform or of refusing to wear the school uniform knowing that if she did so refuse the [school] was unlikely to allow her to attend. She chose the latter. In my judgment it cannot be said the actions or stance of the school amounted to exclusion, either formal, informal, unofficial or in any way whatsoever."

The Court of Appeal, in para 24, held that "The school undoubtedly did exclude the [respondent]". Since nothing in my opinion turns on this question I will address the question very briefly.

38. It is, however, clear that the school did not intend to exclude the respondent in the statutory sense of that word, nor believe that it was doing so. It is therefore entirely unsurprising that it did not in any way invoke the statutory procedures to which reference is made in *Ali's* case. For the school the situation was analogous to that considered in *Spiers v Warrington Corporation* [1954] 1 QB 61, 66, where Lord Goddard CJ said:

> "The headmistress did not suspend this child at all. She was always perfectly willing to take her in; all that she wanted was that she should be properly dressed. Suspending is refusing to admit to the school; in this case the headmistress was perfectly willing to admit the girl but was insisting that she be properly dressed."

39. To the respondent, of course, the case appeared differently: she was being effectively shut out from attending the school by the school's insistence on her compliance with an unjustified rule with which it knew she could not comply. That is not a view of the case which I have accepted, but had it been the correct view (as in another case, on quite different facts, it might) there could be force in the contention that she was, de facto, excluded. It may be, and of course one hopes, that a

situation of this kind is a very rare occurrence. I am not, however, sure that it is adequately covered by the existing rules.

40. For these reasons, and those given by Lord Hoffmann, with which I agree, I would allow the appeal, set aside the order of the Court of Appeal, and restore the order of the judge. I would invite written submissions on costs within 14 days.

LORD NICHOLLS OF BIRKENHEAD

My Lords,

41. I have had the advantage of reading in draft the speeches of my noble and learned friends Lord Bingham of Cornhill and Lord Hoffmann. Your Lordships would allow this appeal. So would I. Your Lordships' reasons are twofold: (1) the school's refusal to allow Shabina Begum to wear a jilbab at school did not interfere with her article 9 right to manifest her religion and, even if it did, (2) the school's decision was objectively justified. I agree with the second reason. I am not so sure about the first. I think this may over-estimate the ease with which Shabina could move to another, more suitable school and under-estimate the disruption this would be likely to cause to her education. I would prefer that in this type of case the school is called upon to explain and justify its decision, as did the Denbigh High School in the present case.

LORD HOFFMANN

My Lords,

42. Shabina Begum, whom I shall call Shabina, is a Muslim, born in the United Kingdom to parents who came from Bangladesh. In September 2000, at the age of nearly 12, she enrolled at the Denbigh High School in Luton. It is a maintained secondary school for children of both sexes. Although the family lived outside the school's catchment area, her elder sister went there and so Shabina joined her.

43. About 80% of the children at the school are Muslim but a number of other religions and ethnic groups are represented. Yasmin Bevan, who comes from a Muslim Bengali family, has been head teacher since 1991. Under her leadership, standards of education and behaviour at the school have greatly improved. She has consistently been supported by the governors, among whom Muslims are strongly represented.

44. The head teacher considers that a school uniform promotes a sense of communal identity which helps to maintain standards. In devising a suitable uniform, the school went to immense trouble to accommodate the religious and cultural preferences of the pupils and their families. There was consultation with parents, students, staff and the Imams of the three local mosques. One version of the uniform was the shalwar kameez (or kameeze), a sleeveless smock-like dress with a square neckline, worn over a shirt, tie and loose trousers which taper at the ankles. A lightweight headscarf in navy blue (the school colour) was also permitted.

45. For her first two years at the school, Shabina wore the shalwar kameez without complaint. At some stage, however, she decided that it did not accord with her religious beliefs. It appears from the interesting discussion of Muslim theology which extends over 17 paragraphs of the judgment of Brooke LJ in the Court of Appeal that this is a minority but, among its adherents, sincerely and strongly held opinion.

46. The evidence does not make it clear when Shabina decided that wearing a shalwar kameez would be unacceptable. Her brother Shuweb Rahman says that "as Shabina became older she took an increasing interest in her religion" and through her interest in religion "discovered that the shalwar kameez was not an acceptable form of dress for Muslim women in public places." But the school administration knew nothing of her discovery until 3 September 2002, the first day of the school year, when she, escorted by her elder brother and another man, turned up at school wearing a long shapeless black gown known as a jilbab. They asked to see the head teacher. She was not available and they were referred to the assistant head teacher Mr Moore, who teaches mathematics. He, one would imagine, was having a busy morning but the men told him at length and in forceful terms that Shabina was entitled under human rights law to come to school wearing a jilbab and that unless she was admitted they would sue the school. Mr Moore told Shabina to go home and change.

47. Shabina left and did not return. The school wrote to her family explaining that she was obliged by law to attend school but would not be admitted to Denbigh High unless she wore the school uniform. The result was stalemate. There was a lengthy and fruitless correspondence between solicitors. The school said that the uniform complied with Muslim rules and Shabina's lawyers said that it did not. The Educational Welfare Officer tried unsuccessfully to persuade Shabina to accept the uniform and go back. In October 2003, when she had been out of school for a year, she applied to Challney Girls' School, a single sex school where wearing a jilbab would not have been a religious necessity. But she had left it late and the school was full. She was offered a right of appeal and the Educational Welfare Officer offered to support it but her brother says he decided that there was no point in appealing. The Educational Welfare Officer also offered to support applications to Putteridge High School and Rebia Girl's School, two other local schools where she could have worn a jilbab, but the offer was declined. Shabina remained out of school until September 2004, when she enrolled at Putteridge High School.

48. On 13 February 2004 Shabina commenced judicial review proceedings against the head teacher and governors of Denbigh High, claiming that the decision not to admit her while wearing a jilbab was unlawful because it infringed two of her Convention rights: the right to "manifest [her] religion … in … practice and observance" (article 9) and the right not to "be denied the right to education" (article 2 of the First Protocol). Bennett J dismissed the claim but the Court of Appeal made a declaration that her rights under article 9 had been infringed: [2005] 1 WLR 3372. The school appeals to your Lordships' House and the Secretary of State for Education and Skills has been given leave to intervene and had made submissions in support of the appeal.

49. The first question is whether Shabina's right to manifest her religion was infringed. If it was infringed, the school would have to justify the infringement on one of the grounds listed in article 9.2:

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

On the other hand, if there was no infringement, no justification is required.

50. I accept that wearing a jilbab to a mixed school was, for her, a manifestation of her religion. The fact that most other Muslims might not have thought it necessary is irrelevant. But her right was not in my opinion infringed because there was nothing to stop her from going to a school where her religion did not require a jilbab or where she was allowed to wear one. Article 9 does not require that one should be allowed to manifest one's religion at any time and place of one's own choosing. Common civility also has a place in the religious life. Shabina's discovery that her religion did not allow her to wear the uniform she had been wearing for the past two years created a problem for her. Her family had chosen that school for her with knowledge of its uniform requirements. She could have sought the help of the school and the local education authority in solving the problem. They would no doubt have advised her that if she was firm in her belief, she should change schools. That might not have been entirely convenient for her, particularly when her sister was remaining at Denbigh High, but people sometimes have to suffer some inconvenience for their beliefs. Instead, she and her brother decided that it was the school's problem. They sought a confrontation and claimed that she had a right to attend the school of her own choosing in the clothes she chose to wear.

51. The jurisprudence of the European Court is in my opinion clear that in such circumstances there is no infringement of article 9. In *Jewish Liturgical Association Cha'are Shalom Ve Tsedek* (2000) 9 BHRC 27 an association of ultra-orthodox Jews complained that their rights under article 9 had been infringed because French law did not allow them to slaughter animals in accordance with their particular opinion of what Jewish ritual required. They could however have imported suitably slaughtered meat from Belgium or come to an agreement with the ordinary Jewish ritual slaughterers to produce meat according to their specifications. The opinion of the majority of the Grand Chamber was that there had been no infringement:

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

52. "Impossible" may be setting the test rather high but in the present case there is nothing to show that Shabina would have even found it difficult to go to another school. Until after the failure of her application for judicial review before Bennett J on 15 June 2004 she did not seriously try because she and her family were intent upon enforcing her "rights".

53. Likewise in *Kalaç v Turkey* (1997) 27 EHRR 552 a judge-advocate in the Turkish air force was compulsorily retired because he had involved himself in the activities of a religious sect, inconsistently with his duties under military law to guarantee the secular character of the Turkish state. The European Court found that there had been no infringement of his rights under article 9. He was free to manifest his religion in any way he pleased but not as a member of the armed forces.

54. The same expectation of accommodation, compromise and, if necessary, sacrifice in the manifestation of religious beliefs appears from the cases on employees who found their duties inconsistent with their beliefs. For example, Tuomo Kottinnen worked on the Finnish Railways. After five years he became a Seventh Day Adventist and declared that he could not work after sunset on Fridays. After several incidents when he left with the early setting of the Finnish winter sun, his employers dismissed him. The Commission held that there had been no infringement of his rights under article 9: *Kontinnen v Finland* (1996) 87 DR 68. It said (at p. 75) that "having found his working hours to conflict with his religious convictions, the applicant was free to relinquish his post." The same principle has been applied in other cases: see *Ahmad v United Kingdom* (1981) 4 EHRR 126 and *Stedman v United Kingdom* (1997) 23 EHRR CD 168. In *Copsey v WWB Devon Clays Ltd* [2005] ICR 1789, a case in which a Christian employee objected to a new shift system which involved Sunday working, the Court of Appeal examined these cases very carefully. The members of the court expressed some disquiet about the application of these cases when the employer had introduced new duties inconsistent with the practice of the employee's religion or where the manifestation of his beliefs could easily have been accommodated. I say nothing about such cases because Shabina's family had chosen to send her to a school which required uniform to be worn and her wish to manifest her religious belief could not have been accommodated without throwing over the entire carefully crafted system.

55. I therefore agree with Bennett J (at paras 73-74) that there was no infringement of Shabina's rights under article 9. In the Court of Appeal

Brooke LJ disagreed but did not explain why. He simply said (at para 49) that because Shabina's belief was theologically tenable, it followed that her freedom to manifest her religion was being limited and it was for the school to justify that limitation. He made no reference to any of the European cases to which I have mentioned or to the following highly relevant observations of Lord Nicholls of Birkenhead in *R (Williamson) v Secretary of State for Education and Employment* [2005] 2 AC 246, 262, para 38:

> "What constitutes interference [with the manifestation of religious belief] depends on all the circumstances of the case, including the extent to which in the circumstances an individual can reasonably expect to be at liberty to manifest his beliefs in practice. In the language of the Strasbourg jurisprudence, in exercising his freedom to manifest his beliefs an individual 'may need to take his specific situation into account' see *Kalaç v Turkey* (1997) 27 EHRR 552, 564, para 27. There a judge advocate in the air force was subjected to compulsory retirement on the ground he was known to have 'unlawful fundamentalist tendencies' which infringed the principle of secularism on which the Turkish nation was founded. The court held this did not amount to an interference with his rights guaranteed by article 9. In choosing to pursue a military career Kalaç accepted of his own accord a system of military discipline which by its nature implied the possibility of limitations incapable of being placed on civilians."

56. Mummery LJ did refer to *Ahmad v United Kingdom* (1981) 4 EHRR 126 and *Stedman v United Kingdom* (1997) 23 EHRR CD 168 but distinguished them on the ground that it was not relevant to compare Shabina's position with that of an employee who was free to leave his employment. He said, at p 3391, para 84:

> "It is irrelevant to the engagement of article 9 that the claimant could have changed to a school which accommodated her religious beliefs about dress. Education at the school or at another school was not a contractual choice. There was a statutory duty to provide education to the pupils. The school did not follow the proper statutory procedure for excluding her from education".

57. I must admit to finding this passage confusing. What does it matter whether going to another school was a "contractual choice"? It was a choice which she could have made. It is true that there is a statutory duty to provide education, but not at any particular school: see the decision of your Lordships' House delivered today in *Abdul Hakim Ali v Head Teacher and Governors of Lord Grey School*: [2006] UKHL 14. As for the statutory procedure, I shall return in due course to the question of whether Shabina was "excluded" from the school. But this case has at all times been argued on the question of whether her Convention rights were infringed and not on whether there had been a failure to comply with domestic statutory procedures.

58. Even if there had been an infringement of Shabina's rights under article 9, I would, like the judge, have been of opinion that the infringement was justified under article 9.2. The school was entitled to consider that the rules about uniform were necessary for the protection of the rights and freedoms of others. Bennett J had ample material for saying (at para 90):

> "Denbigh High School is a multi-cultural, multi-faith secular school. The evidence adduced on behalf of the [school]…clearly establishes that the school uniform policy promotes a positive ethos and a sense of communal identity… [T]here is no outward distinction between Muslim female pupils. Thus any division between those who wear the jilbab and those who wear the shalwar kameez is avoided. Furthermore, it is clear from the evidence that there are a not insignificant number of Muslim female pupils at Denbigh High School who do not wish to wear the jilbab and either do, or will, feel pressure on them either from inside or outside the school. The present uniform policy aims to protect their rights and freedoms…"

59. The Court of Appeal was referred to the decision of the European Court in *Sahin v Turkey* (2005) 41 EHRR 8, decided shortly after the judgment of Bennett J, which appeared strongly to support his decision. Ms Sahin was excluded from lectures and examinations in the medical school of the University of Istanbul because she insisted upon wearing an Islamic headscarf, an item of clothing forbidden by the University regulations. The Chamber presided over by Sir Nicholas Bratza unanimously dismissed the complaint. It assumed in her favour that her rights under article 9 had been infringed (there was no other Turkish

university which did not have the same rule) but held that the prohibition was justified under article 9.2. The court laid stress (at p 131-132, paras 100-102) upon the margin of appreciation accorded to the national authorities:

> "The Court observes that the role of the Convention machinery is essentially subsidiary. As is well established by its case law, the national authorities are in principle better placed than an international court to evaluate local needs and conditions. It is for the national authorities to make the initial assessment of the 'necessity' for an interference, as regards both the legislative framework and the particular measure of implementation...
>
> Where questions concerning the relationship between state and religions are at stake, on which opinion in a democratic society may reasonably differ widely, the role of the national decision-making body must be given special importance. In such cases it is necessary to have regard to the fair balance that must be struck between the various interests at stake: the rights and freedoms of others, avoiding civil unrest, the demands of public order and pluralism.
>
> A margin of appreciation is particularly appropriate when it comes to the regulation by the Contracting States of the wearing of religious symbols in teaching institutions, since rules on the subject vary from one country to another, depending on national traditions, and there is no uniform European conception of the requirements of 'the protection of the rights of others' and of 'public order'."

60. The Court went on to say that the Turkish Constitutional Court was entitled to consider the headscarf prohibition necessary to safeguard the principle of secularism which guaranteed freedom of individual conscience, equality before the law, protection from external pressures and the rights of women. Since the judgment of the Court of Appeal, the decision in *Sahin v Turkey* has been confirmed by the Grand Chamber (10 November 2005).

61. Brooke LJ considered the decision but said that the United Kingdom was very different from Turkey. It was not a secular state and had no written constitution. Schools were under a statutory duty to provide religious instruction and (unless exempted) a daily collective act of worship.

62. These observations about the differences between the United Kingdom and Turkey seem to me to miss the point. Turkey has a national rule about headscarves, based on its constitution. Its justification for the assumed interference with the manifestation of religious belief was therefore considered at the national level. In the United Kingdom, there is no national rule on these matters. Parliament has considered it right to delegate to individual schools the power to decide whether to impose requirements about uniforms which may interfere with the manifestation of religious beliefs. From the point of view of the Strasbourg court, the margin of appreciation would allow Parliament to make this choice.

63. In applying the Convention rights which have been reproduced as part of domestic law by the Human Rights Act 1998, the concept of the margin of appreciation has, as such, no application. It is for the courts of the United Kingdom to decide how the area of judgment allowed by that margin should be distributed between the legislative, executive and judicial branches of government. As Lord Hope of Craighead said in *R v Director of Public Prosecutions, Ex p Kebilene* [2000] 2 AC 326, 380-381:

> "The doctrine of the 'margin of appreciation' is a familiar part of the jurisprudence of the European Court of Human Rights. The European Court has acknowledged that, by reason of their direct and continuous contact with the vital forces of their countries, the national authorities are in principle better placed to evaluate local needs and conditions than an international court… This technique is not available to the national courts when they are considering Convention issues arising within their own countries. But in the hands of the national courts also the Convention should be seen as an expression of fundamental principles rather than as a set of mere rules. The questions which the courts will have to decide in the application of these principles will involve questions of balance between competing interests and issues of proportionality. In this area difficult choices may have to be made by the executive or the legislature between the rights of the individual and the needs of society. In some circumstances it will be appropriate for the courts to recognise that there is an area of judgment within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body or person whose

act or decision is said to be incompatible with the Convention."

64. In my opinion a domestic court should accept the decision of Parliament to allow individual schools to make their own decisions about uniforms. The decision does not have to be made at a national level and national differences between Turkey and the United Kingdom are irrelevant. In applying the principles of *Sahin v Turkey* the justification must be sought at the local level and it is there that an area of judgment, comparable to the margin of appreciation, must be allowed to the school. That is the way the judge approached the matter and I think that he was right.

65. In criticizing the school's decision, Miss Booth QC (who appeared for Shabina) said that the uniform policy was undermined by Muslim girls being allowed to wear headscarves. That identified them as Muslims and it would therefore make no difference if they could wear jilbabs. But that takes no account of the school's wish to avoid clothes which were perceived by some Muslims (rightly or wrongly) as signifying adherence to an extremist version of the Muslim religion and to protect girls against external pressures. These are matters which the school itself was in the best position to weigh and consider.

66. In the end, however, the Court of Appeal did not decide that the school could not justify its uniform policy. Brooke LJ said, at para 81, that the judgment "should [not] be taken as meaning that it would be impossible for the school to justify its stance if it were to reconsider its uniform policy in the light of this judgment". But he thought that the school had infringed Shabina's rights under article 9 because it had not reached its decision by an appropriate process of reasoning. It should have set itself an examination paper with the following questions:

1. Has the claimant established that she has a relevant Convention right which qualifies for protection under article 9(1)?
2. Subject to any justification that is established under article 9.2, has the Convention right been violated?
3. Was the interference with her Convention right prescribed by law in the Convention sense of that expression?
4. Did the interference have a legitimate aim?

5. What are the considerations that need to be balanced against each other when determining whether the interference was necessary in a democratic society for the purpose of achieving that aim?
6. Was the interference justified under article 9.2?

67. The school's method of working out the problem, as disclosed in the witness statements filed on its behalf, did not suggest that it had adopted this procedure at all. It had decided that a uniform policy was in the general interests of the school and then tried to devise a uniform which satisfied as many people as possible and took into account their different religions. When Shabina refused to wear the uniform, they did not "explore the reasons why [she] sincerely believed that she must wear [the jilbab]". They simply said that the policy was in place and that if she wanted to come to school she must wear the uniform.

68. Quite apart from the fact that in my opinion the Court of Appeal would have failed the examination for giving the wrong answer to question 2, the whole approach seems to me a mistaken construction of article 9. In domestic judicial review, the court is usually concerned with whether the decision-maker reached his decision in the right way rather than whether he got what the court might think to be the right answer. But article 9 is concerned with substance, not procedure. It confers no right to have a decision made in any particular way. What matters is the result: was the right to manifest a religious belief restricted in a way which is not justified under article 9.2? The fact that the decision-maker is allowed an area of judgment in imposing requirements which may have the effect of restricting the right does not entitle a court to say that a justifiable and proportionate restriction should be struck down because the decision-maker did not approach the question in the structured way in which a judge might have done. Head teachers and governors cannot be expected to make such decisions with textbooks on human rights law at their elbows. The most that can be said is that the way in which the school approached the problem may help to persuade a judge that its answer fell within the area of judgment accorded to it by the law.

69. I can be brief in dealing with the claim of denial of the right to education guaranteed by article 2 of the First Protocol. As your Lordships have decided today in *Abdul Hakim Ali v Head Teacher and Governors of Lord Grey School* [2006] UKHL 14, that article confers no right to go to any particular school. It is infringed only if the claimant is unable to obtain education from the system as a whole. In the present

case, there is nothing to suggest that Shabina could not have found a suitable school if she had notified her requirements in good time to the local education authority.

70. Finally, there was some debate over whether it could be said that Shabina was "excluded" from Denbigh High. "Exclusion" is a term of art in English education law because there is a code (now contained in the the Education (Pupil Exclusions and Appeals) (Maintained Schools) (England) Regulations 2002 (SI 2002/3178)) which must be followed before a child can be excluded from a school "on disciplinary grounds". That code was not followed in the present case and I have discussed in my speech in the *Abdul Hakim Ali* case the difficulties of applying it in cases which do not involve the straightforward commission of a disciplinary offence. In the present case, for example, the school did not think it appropriate to take steps to exclude Shabina under the code because they did not want to exclude her. They wanted her to come wearing her uniform. But I do not need to discuss whether it should have been applied because, as I have said when discussing the judgment of Mummery LJ in the Court of Appeal, no one in this case has suggested that it was about anything except Convention rights or that compliance with the code was relevant to whether those rights had been infringed or not.

71. I would therefore allow the appeal and restore the judgment of Bennett J.

LORD SCOTT OF FOSCOTE

My Lords,

72. I find myself unable to accept that the respondent, Shabina Begum, was subjected to an unlawful exclusion from school. Nor can I accept that her school's refusal to allow her to attend school dressed in a jilbab denied her "the right to education" (see article 2 of the First Protocol to the Convention) or was an infringement of her right to manifest her religion or beliefs (see article 9 of the Convention). To explain these conclusions I must refer to some of the facts of the case.

73. Let me start with the school, Denbigh High School in Luton. It is a maintained secondary school whose pupils, both boys and girls, range from 11 to 16 years of age. Most of the pupils are Moslem and most are of Bangladeshi or Pakistani heritage. The remainder are of diverse religious groups and heritages. In 1993 90 per cent of the pupils were Moslem. In 2004, when the present proceedings were begun 79 per cent of the pupils were Moslem. The school is a secular school. But it is not open to doubt that very many of its pupils, and their parents, will be believing and practising adherents to the Moslem faith.

74. It is, therefore, appropriate that Moslems are well represented in the management structure of the school. When the present proceedings were begun four out of six parent governors were Moslem, three of the LEA governors were Moslem and the Chair of the Luton Council of Mosques was a Community Governor. Moreover the head teacher, Mrs Yasmin Bevan, who had been appointed in 1991, was born into a Bengali Moslem family and brought up in the sub-continent before moving to this country. It is agreed that the school "makes a significant contribution to social cohesion in a catchment area that is racially, culturally and religiously diverse" (para 4 of the agreed Statement of Facts) and that "the School uniform has contributed to social cohesion and harmony amongst pupils, who are from a very wide range of faiths and backgrounds" (para 10 of the agreed Statement of Facts).

75. The head teacher's background confirms she well understands the Moslem dress code for women. This understanding has no doubt played a part in her approach to the school uniform that the girls at the school should wear. Her approach is set out in paragraph 6 of the agreed Statement of Facts.

> "The head teacher believes that a school uniform forms an integral part of the school's drive for high standards and continuous improvement. It was designed carefully to take account of a range of considerations and to be inclusive in serving the needs of a diverse community. … It also ensures that students do not feel disadvantaged because they cannot afford the latest designer clothes and makes them less vulnerable to being teased because of the clothes they are wearing."

76. Before a prospective pupil starts at the school, the pupil and his or her parents are given a careful explanation of the school uniform

policy. The school uniform requirements are spelled out in written, and graphic, form. One of the documents provided to prospective parents is entitled "Does Denbigh have a school uniform" and says that

> "All pupils must wear:
> V-neck jumper (available only from school)
> School Tie (available only from school)
> Plain white shirt
> Black shoes

and, in relation to girls, that

> "Girls should wear either navy blue trousers or an A line or pleated knee length navy skirt
> or navy blue shalwar kameeze
> (made to the school pattern)."

Another document gives more details about the shalwar kameeze

> "Shalwar: tapered at the ankles, not baggy. Kameeze: between knee and mid-calf length, not gathered or flared. Fabric must be cotton or poplin not shiny, silky or crinkly"

and also about headscarves

> "Girls who wish to wear headscarves may do so as long as they conform to the requirements listed below:
> 1. The fabric should be lightweight and navy blue.
> 2. The headscarves should cover the head, be folded under the chin, taken round to the back of the neck and the ends tucked in, this conforms to health and safety requirements.
> 3. Headscarves should be worn so that the collar and tie can be seen."

77. The details of the items of school uniform to be worn by the female pupils at the school make it apparent that considerable thought had been given to what would be suitable. The shalwar kameeze,

coupled with a headscarf, was obviously intended to cater for the dress requirements of 11 to 16 year old Moslem girls. The shalwar kameeze was confirmed in 1993, following a working party report, as a suitable school uniform for Moslem girls, or for any other female pupils who chose to wear it. The specific design of the shalwar kameeze school uniform was approved by the school governors after consultation with pupils, parents, staff and the Imams of three local mosques. There was no suggestion that the uniform did not conform to the Islamic dress code.

78. The respondent, Sabina, was born in September 1988. Her father died in 1992 and when she entered the school in September 2000 she was living with her mother (who was unable to speak English and who died in 2004) and an elder brother and sister. The family home was outside the school's catchment area but the family decision to send her to Denbigh High was, I expect, attributable at least in part to the fact that her sister was already a pupil at the school. For two years after her entry to the school in September 2000 Shabina wore the shalwar kameeze school uniform. So too, it may be assumed, did her sister during the whole of her (the sister's) time at the school. There is no evidence of any complaint to the school being made by either of them about the uniform. Nor is there any evidence of whether, during those first two years, Shabina wore the authorised headscarf as a complement to the shalwar kameeze.

79. On 3 September 2002, the first day of the new school year, Shabina arrived at the school wearing not the shalwar kameeze but a jilbab. She was accompanied by her brother and another young man. The two men insisted that Shabina be allowed to attend school wearing the jilbab, a long shapeless dress ending at the ankle and designed to conceal the shape of the wearer's arms and legs. A jilbab is worn by many mature Moslem women in order to comply with their understanding of Koranic injunctions regarding women's dress. The two men addressed their insistence to Mr Moore, the assistant head teacher. His evidence was that their insistence verged on the threatening. It is common ground that they supported their insistence by speaking of human rights and legal proceedings. But Mr Moore told Shabina to go home, change into the proper school uniform and return to school properly dressed. The agreed Statement of Facts records that "The three went away, with the young men saying that *they* were not prepared to compromise over the issue" (para 16, emphasis added).

80. The quite unnecessarily confrontational character of the arrival at the school on 3 September 2002 of Shabina and the two men is evident. Shabina was a girl of 13, some two weeks short of her fourteenth birthday. It may be accepted, for there is no challenge, that she had a genuine belief that the tenets of Islam required her, in her approach to womanhood, to wear a jilbab when in public and that the school shalwar kameeze did not suffice. But she and her family knew very well of the school uniform rules and had had the long summer holiday to discuss with the school her (or their) doubts about the suitability of the shalwar kameeze. The confrontational nature of the peremptory manner in which the jilbab issue was raised with the school, a manner which is very unlikely to have been chosen by Shabina, not yet 14 years of age, set the tone for how the issue then developed.

81. On the same day Mrs Bevan, having been informed of the incident, wrote to Shabina's mother and brother encouraging Shabina to attend school wearing correct school uniform. But when a member of the School Support Team telephoned on the following day, 4 September, she was told that Shabina had seen her solicitor and was going to sue the school. And the following day, when Mr Moore telephoned to ask why Shabina was not at school, he was told by Shabina's brother that he, the brother, was not prepared to let her attend school unless she was allowed to wear a jilbab. Later in the month, when Shabina had still not returned to school, the matter was referred to the Education Welfare Service (the "EWS") who made a number of efforts to get Shabina back into the school. But these efforts all foundered on the rock of the insistence by Shabina and her family that Shabina would not return unless allowed to wear the jilbab.

"Exclusion" from school

82. The first question is whether, in the circumstances I have described, Shabina was subjected to an exclusion from school that was unlawful under ordinary domestic law. Sections 64 to 68 of the School Standards and Framework Act 1998 deal with exclusions of pupils from school on disciplinary grounds. Procedures are prescribed which must be followed if the exclusion is to be lawful. In the opinion I prepared in the *Ali* appeal, heard immediately before this appeal was heard and by the same appellate committee, I expressed the view that Mr Ali had not been subjected to a section 64 exclusion because the decision to keep him away from school had not been taken on disciplinary grounds. The present case is different. The decision not to allow Shabina to attend school unless she was prepared to wear the school uniform was, in my

view, a decision taken on disciplinary grounds. Shabina was not prepared to abide by the school uniform rules. The decision was taken for that reason. But, nonetheless, it was not, in my opinion, an "exclusion" of Shabina for section 64 purposes. A section 64 exclusion is a direction to the pupil to stay out of the school. No such direction was ever given to Shabina. She was not directed to stay away; she was directed, and encouraged, to return wearing the school uniform. The decision that she would not return was her decision (or that of members of her family), not that of the school. In contrast to a pupil subjected to a section 64 exclusion, Shabina could at any time have returned to the school. This was not, in my opinion, a section 64 exclusion.

83. In my opinion, therefore, the direction to Shabina to attend school wearing the proper school uniform can only be attacked as an unlawful direction under domestic law if the school uniform rules that she was being required to obey were themselves so unreasonable as to be unlawful, or if the decision to insist upon Shabina observing the school uniform rules was similarly unreasonable. I regard both contentions as being virtually unarguable. Schools are entitled to have school uniform rules for all the reasons so cogently expressed by Mrs Bevan (see para 7 of her witness statement and paras 6 and 10 of the agreed Statement of Facts). The care taken by the school to try and ensure that the shalwar kameeze school uniform was acceptable for female Moslem pupils is impressive. There was no unnecessary rigidity. The white shirt to be worn could have short or long sleeves. So Moslem girls who wanted (or whose parents wanted) their arms to be covered could wear long sleeved shirts. The sleeves could be as baggy as would be consistent with the garment still being a shirt. The contours of the arms could, therefore, be concealed. The shalwar had to be tapered, not baggy, at the ankles, but above the ankle could be loose fitting. And the hemline of the kameeze could brought down to mid calf length. The contours of the legs could, therefore, be concealed. The notion that the shalwar kameeze school uniform would not accord with essential requirements of Islamic modesty for teenage girls seems to me an extraordinary one. There was nothing unreasonable, and therefore nothing unlawful, about the school's uniform policy.

84. As to the school's refusal to relax the uniform rules so as to allow Shabina to attend school wearing the jilbab, that too seems to me to have been well within the margin of discretion that must be allowed to the school's managers. There is not much point in having a school uniform policy if individual pupils can decide for themselves what they will wear. I conclude that the decisions taken by the school with regard to Shabina were unimpeachable by the standards of ordinary domestic law.

But did they constitute infringements of any of Shabina's Convention rights?

The Convention rights

85. There were two Convention rights that, it is contended, were infringed; first, Shabina's "freedom to manifest her religion" (article 9.2 of the Convention), and, second, Shabina's "right to education" (article 2 of the First Protocol).

Article 9.2

86. "Freedom to manifest one's religion" does not mean that one has the right to manifest one's religion at any time and in any place and in any manner that accords with one's beliefs. In *Kalaç v Turkey* (1997) 27 EHRR, 552, para 27, the Strasbourg court said that

> "… in exercising his freedom to manifest his religion, an individual may need to take his specific situation into account."

And in *Ahmad v United Kingdom* (1981) 4 EHRR 126, para 11, the Commission said that

> "… the freedom of religion … may, as regards the modality of a particular religious manifestation, be influenced by the situation of the person claiming that freedom."

87. Several striking examples of this approach to the article 9.2 freedom to manifest one's religion can be found among the Strasbourg court's decisions. *Karaduman v Turkey* (1993) 74 DR 93 arose out of the insistence by a university in Turkey that every certificate of graduation must have affixed to it a photograph of the graduate. The purpose of this was to prevent any other person passing himself or herself off as the graduate. The photograph had to show the full face of the graduate and, therefore, female graduates had to be photographed without wearing headscarves. The applicant, a Moslem lady, was for

religious reasons unwilling to be photographed without a headscarf. So she was unable to obtain a certificate of graduation. Her complaint that the university rule infringed her freedom to manifest her religion was rejected. This and several other examples of the Strasbourg approach to alleged article 9.2 infringements are referred to in para 23 of Lord Bingham's opinion and I need not labour the point. The cases demonstrate the principle that a rule of a particular public institution that requires, or prohibits, certain behaviour on the part of those who avail themselves of its services does not constitute an infringement of the right of an individual to manifest his or her religion merely because the rule in question does not conform to the religious beliefs of that individual. And in particular this is so where the individual has a choice whether or not to avail himself or herself of the services of that institution, and where other public institutions offering similar services, and whose rules do not include the objectionable rule in question, are available.

88. The present case involves a secular school that has tried to accommodate the dress requirements of its female Moslem pupils. But a similar issue might arise in a reverse situation. Article 9 guarantees the right to freedom of "thought" and "conscience" as well as freedom of religion and article 9.2 refers to freedom to manifest one's "beliefs" as well as to freedom to manifest one's religion. Take the case of a faith school that required its pupils each day to participate in a form of collective religious worship. It may be assumed that each pupil on entry to the school would be content to participate in the daily religious service. If a pupil, having become a convinced atheist, decided that he or she could no longer in conscience take part in an act of worship that was inconsistent with the new beliefs that he or she had recently acquired and asked to be excused from attending the daily religious service, Strasbourg jurisprudence would not permit the school's refusal to accept this request to be represented as infringing the pupil's article 9 rights unless, perhaps, the institution offered an essential service not obtainable elsewhere.

89. So, too, in my opinion, Shabina's disinclination to comply with the school uniform rules cannot be represented as a breach by the school of her article 9 right to manifest her religion. There are, as Shabina has discovered, schools in the Luton area whose rules would permit her to wear a jilbab. Arrangements could have been made for Shabina to transfer to one or other of these schools but she did not take up the chance of doing so (see para 33 of the judgment of Bennett J). In these circumstances, in my opinion, the contention that Denbigh High infringed her article 9 rights must be rejected.

90. As to Shabina's right to education, the school referred the problem of her non-attendance at Denbigh High to the EWS on 27 September 2002 and the EWS thereafter made a number of attempts to persuade her to return to Denbigh High. But she remained unwilling to return on the only basis on which she could return, namely, wearing the school uniform. If the conclusion that the school was entitled to have a school uniform policy that did not allow Shabina to wear a jilbab is right, as in my opinion it is, it must follow that the school did not by requiring her to wear the school uniform commit any breach of her Convention right to education.

91. In my opinion, therefore, and in full agreement with the reasons given by my noble and learned friends Lord Bingham of Cornhill and Lord Hoffmann, this appeal should be allowed.

BARONESS HALE OF RICHMOND

My Lords,

92. I too agree that this appeal should be allowed. Most of your lordships take the view that Shabina Begum's right to manifest her religion was not infringed because she had chosen to attend this school knowing full well what the school uniform was. It was she who had changed her mind about what her religion required of her, rather than the school which had changed its policy. I am uneasy about this. The reality is that the choice of secondary school is usually made by parents or guardians rather than by the child herself. The child is on the brink of, but has not yet reached, adolescence. She may have views but they are unlikely to be decisive. More importantly, she has not yet reached the critical stage in her development where this particular choice may matter to her.

93. Important physical, cognitive and psychological developments take place during adolescence. Adolescence begins with the onset of puberty; from puberty to adulthood, the 'capacity to acquire and utilise knowledge reaches its peak efficiency'; and the capacity for formal operational thought is the forerunner to developing the capacity to make autonomous moral judgments. Obviously, these developments happen at different times and at different rates for different people. But it is not at all surprising to find adolescents making different moral judgments from

those of their parents. It is part of growing up. The fact that they are not yet fully adult may help to justify interference with the choices they have made. It cannot be assumed, as it can with adults, that these choices are the product of a fully developed individual autonomy. But it may still count as an interference. I am therefore inclined to agree with my noble and learned friend, Lord Nicholls of Birkenhead, that there was an interference with Shabina Begum's right to manifest her religion.

94. However, I am in no doubt that that interference was justified. It had the legitimate aim of protecting the rights and freedoms of others. The question is whether it was proportionate to that aim. This is a more difficult and delicate question in this case than it would be in the case of many similar manifestations of religious belief. If a Sikh man wears a turban or a Jewish man a yamoulka, we can readily assume that it was his free choice to adopt the dress dictated by the teachings of his religion. I would make the same assumption about an adult Muslim woman who chooses to wear the Islamic headscarf. There are many reasons why she might wish to do this. As Yasmin Alibhai-Brown (*WHO do WE THINK we ARE?*, (2000), p 246) explains:

> "What critics of Islam fail to understand is that when they see a young woman in a *hijab* she may have chosen the garment as a mark of her defiant political identity and also as a way of regaining control over her body."

Bhikhu Parekh makes the same point (in "A Varied Moral World, A Response to Susan Okin's 'Is Multiculturalism Bad for Women'", *Boston Review*, October/November 1997):

> "In France and the Netherlands several Muslim girls freely wore the hijab (headscarf), partly to reassure their conservative parents that they would not be corrupted by the public culture of the school, and partly to reshape the latter by indicating to white boys how they wished to be treated. The hijab in their case was a highly complex autonomous act intended to use the resources of the tradition both to change and to preserve it."

Hence I have found the dissenting opinion of Judge Tulkens in the case of the Turkish University student, *Leyla Sahin v Turkey*, Application No 44774/98, Judgment of 10 November 2005, very persuasive.

95. But it must be the woman's choice, not something imposed upon her by others. It is quite clear from the evidence in this case that there are different views in different communities about what is required of a Muslim woman who leaves the privacy of her home and family and goes out into the public world. There is also a view that the more extreme requirements are imposed as much for political and social as for religious reasons. If this is so, it is not a uniquely Muslim phenomenon. The Parekh Report on *The Future of Multi-Ethnic Britain* (Runnymede Trust, 2000, at pp 236-237, para 17.3), for example, points out that:

> "In all traditions, religious claims and rituals may be used to legitimise power structures rather than to promote ethical principles, and may foster bigotry, sectarianism and fundamentalism. Notoriously, religion often accepts and gives its blessing to gender inequalities."

Gita Saghal and Nira Yuval-Davis, discussing "Fundamentalism, Multiculturalism and Women in Britain" (in *Refusing Holy Orders, Women and Fundamentalism in Britain*, (2000), p 14) argue that the effect of and on women is

> ". . . central to the project of fundamentalism, which attempts to impose its own unitary religious definition on the grouping and its symbolic order. The 'proper' behaviour of women is used to signify the difference between those who belong and those who do not; women are also seen as the 'cultural carriers' of the grouping, who transmit group culture to the future generation; and proper control in terms of marriage and divorce ensures that children who are born to those women are within the boundaries of the collectivity, not only biologically but also symbolically."

According to this view, strict dress codes may be imposed upon women, not for their own sake but to serve the ends of others. Hence they may be denied equal freedom to choose for themselves. They may also be denied equal treatment. A dress code which requires women to conceal all but their face and hands, while leaving men much freer to decide what they will wear, does not treat them equally. Although a different issue from seclusion, the assumption may be that women will play their part in the private domestic sphere while men will play theirs in the public world. Of course, from a woman's point of view, this may be a

safer and more comfortable place to be. Gita Saghal and Nira Yuval Davis go on to point out that, at p 15:

> "One of the paradoxes . . . is the fact that women collude, seek comfort, and even at times gain a sense of empowerment within the spaces allocated to them by fundamentalist movements."

96. If a woman freely chooses to adopt a way of life for herself, it is not for others, including other women who have chosen differently, to criticise or prevent her. Judge Tulkens, in *Sahin v Turkey*, at p 46, draws the analogy with freedom of speech. The European Court of Human Rights has never accepted that interference with the right of freedom of expression is justified by the fact that the ideas expressed may offend someone. Likewise, the sight of a woman in full purdah may offend some people, and especially those western feminists who believe that it is a symbol of her oppression, but that could not be a good reason for prohibiting her from wearing it.

97. But schools are different. Their task is to educate the young from all the many and diverse families and communities in this country in accordance with the national curriculum. Their task is to help all of their pupils achieve their full potential. This includes growing up to play whatever part they choose in the society in which they are living. The school's task is also to promote the ability of people of diverse races, religions and cultures to live together in harmony. Fostering a sense of community and cohesion within the school is an important part of that. A uniform dress code can play its role in smoothing over ethnic, religious and social divisions. But it does more than that. Like it or not, this is a society committed, in principle and in law, to equal freedom for men and women to choose how they will lead their lives within the law. Young girls from ethnic, cultural or religious minorities growing up here face particularly difficult choices: how far to adopt or to distance themselves from the dominant culture. A good school will enable and support them. This particular school is a good school: that, it appears, is one reason why Shabina Begum wanted to stay there. It is also a mixed school. That was what led to the difficulty. It would not have arisen in a girls' school with an all-female staff.

98. In deciding how far to go in accommodating religious requirements within its dress code, such a school has to accommodate some complex considerations. These are helpfully explained by

Professor Frances Radnay in "Culture, Religion and Gender" [2003] 1 International Journal of Constitutional Law 663:

> ". . . genuine individual consent to a discriminatory practice or dissent from it may not be feasible where these girls are not yet adult. The question is whether patriarchal family control should be allowed to result in girls being socialised according to the implications of veiling while still attending public educational institutions. . . . A mandatory policy that rejects veiling in state educational institutions may provide a crucial opportunity for girls to choose the feminist freedom of state education over the patriarchal dominance of their families. Also, for the families, such a policy may send a clear message that the benefits of state education are tied to the obligation to respect women's and girls' rights to equality and freedom . . . On the other hand, a prohibition of veiling risks violating the liberal principle of respect for individual autonomy and cultural diversity for parents as well as students. It may also result in traditionalist families not sending their children to the state educational institutions. In this educational context, implementation of the right to equality is a complex matter, and the determination of the way it should be achieved depends upon the balance between these two conflicting policy priorities in a specific social environment."

It seems to me that that was exactly what this school was trying to do when it devised the school uniform policy to suit the social conditions in that school, in that town, and at that time. Its requirements are clearly set out by my noble and learned friend, Lord Scott of Foscote, in para 76 of his opinion. Social cohesion is promoted by the uniform elements of shirt, tie and jumper, and the requirement that all outer garments be in the school colour. But cultural and religious diversity is respected by allowing girls to wear either a skirt, trousers, or the shalwar kameez, and by allowing those who wished to do so to wear the hijab. This was indeed a thoughtful and proportionate response to reconciling the complexities of the situation. This is demonstrated by the fact that girls have subsequently expressed their concern that if the jilbab were to be allowed they would face pressure to adopt it even though they do not wish to do so. Here is the evidence to support the justification which Judge Tulkens found lacking in the *Sahin* case.

99. In agreement with your lordships, therefore, I would allow this appeal and restore the order of the trial judge.