# Islamic Dress in English Schools: Reconciling Conflicting Interests

***Paul Meredith****

## Introduction

The wearing in schools of dress or insignia distinctive of particular religious affiliation has now given rise to a significant volume of conflict and concern in England, reflecting a growing sense of unease over the extent to which school authorities have been able and prepared to meet the conflicting claims presented in this context by individual pupils and by the broader communities served by particular schools, and potentially by the pupils' parents, families and religious and cultural communities. The issues and conflicts over religiously affiliated dress have arisen in England primarily as local rather than national issues, given that in education law in England the responsibility for determining policy in respect of school dress is devolved to the level of individual school authorities – the head teacher and the governing body. The state does not at national level prescribe or prohibit any particular forms of religiously affiliated dress to be worn by students or staff in educational institutions, taking the view that these are matters that are best determined locally in the light of consideration by the institutions concerned of the nature and complexion of the local community, following appropriate local consultation. This is felt to be the most appropriate and sensitive approach in a highly diverse multi-faith and multicultural society.

Furthermore, the devolution of policy and decision-making over dress reflects the absence in England of any fundamental legal or constitutional principle of secularity in state educational institutions. Indeed, in English maintained schools religious education is regarded as an important element within the basic curriculum[1] (although it does not form part of the national curriculum), and collective worship is a significant element within the overall ethos of the school. Both are however subject to a right of parental withdrawal,[2] and sixth form pupils now have a right to be withdrawn from collective worship.[3] The presence of religious education and collective worship even in non-denominational schools was indeed a fundamental feature of the Education Act 1944, the foundation statute of the present system of maintained schools in England, although in practice the content of religious education and collective worship has since 1944 changed considerably in the light of the changing religious and ethnic complexion of society.[4] While under the School Standards and Framework Act 1998 an element of centrality for Christianity is provided, a considerable element of flexibility is permitted under the Act, and practice varies greatly according to the nature of the community served by the school.[5] There is also within English maintained schools considerable diversity in terms of the provision of different types of school: while the majority of maintained primary and secondary schools are non-denominational in character and are designated as community schools, the government encourages the provision of faith schools with public funding within the maintained sector. Faith schools have the status of voluntary aided, voluntary controlled or foundation schools, but fall within the broader family of maintained schools. While the majority of these schools are Anglican or Roman Catholic, the government favours the establishment of other faith schools, and a range of other Christian denominations as well as Jewish, Muslim and Sikh schools

* Reader in Law at the School of Law of the University of Southampton.

1 Education Act 2002, s. 80(1)(a), and School Standards and Framework Act 1998, Schedule 19.

2 School Standards and Framework Act 1998, s. 71(1).

3 Education and Inspections Act 2006, s. 55.

4 See Meredith, P. (2006), 'Religious Education and Collective Worship in State Schools: England and Wales', in: Lopez-Muniz, J.L.M., De Groof, J. and Lauwers, G. (eds), *Religious Education in Public Schools: Study of Comparative Law*, Springer, Dordrecht, pp. 155-69; Harris, N. (2006), *Education, Law and Diversity*, Hart Publishing, Oxford, pp. 429-441.

5 Education Act 1996, s. 375(3), and School Standards and Framework Act 1998, Schedules 19 and 20.

are now represented within the maintained school community, in addition to the provision of many faith schools within the independent sector.[6]

In the absence of central prescription or prohibition by the government, it falls to the governing body and head teacher of individual maintained schools to consider and formulate the school's policies in respect of dress, including dress which is reflective of religious affiliations, as an integral part of their wider responsibilities for the general conduct and discipline of pupils. It would thus be open to the governors and head teacher to require or to prohibit particular forms of dress, but any such policy may be open to challenge by way of judicial review by aggrieved pupils on a range of grounds, including claims that the school's policy conflicted with rights arising under the European Convention on Human Rights (ECHR). It was entirely predictable that such a challenge would in due course be brought in relation to the school dress policy adopted by a maintained school in England, and this has now happened in the leading case of R (Begum (By her Litigation Friend, Rahman)) v. Head Teacher and Governors of Denbigh High School[7] (referred to hereafter as 'the *Begum* case'), a case which was appealed as far as the House of Lords. The dispute in this case arose in relation to the dress policy adopted by the governors and head teacher of a community secondary school in Luton, a town with a high ethnic and religious minority population. This was not the first case in England involving a dispute as to the wearing of religiously affiliated dress in a school to reach the House of Lords: a not dissimilar case in terms of its facts arose as long ago as 1982/1983, involving the refusal by the head teacher of an independent school to permit a male Sikh pupil to wear a turban while attending school, on the basis that this might have accentuated religious and social distinctions within the school. This case, Mandla v. Dowell Lee,[8] was, however, brought on the basis of unlawful discrimination under the Race Relations Act 1976,[9] and the key issue in the case was whether the Sikh community constituted an 'ethnic group' qualifying for protection under the Act, or whether Sikhs were properly to be regarded as a religious group outside the protection of the Race Relations Act. In the *Mandla* case the House of Lords, overturning the decision of the Court of Appeal, decided that the Sikh community should indeed be regarded as an ethnic group, given their long shared history and cultural traditions. The *Mandla* case pre-dated the enactment of the Human Rights Act 1998, and thus it was not open to the pupil in that case to rely directly in the English courts on his rights arising under the ECHR.

While the factual background of the *Mandla* and *Begum* cases were somewhat similar, the *Begum* case was argued not on the basis of unlawful discrimination but on the basis principally that the claimant's right to manifest her religious convictions under Article 9 of the ECHR had been infringed. The *Begum* case raises fundamental issues relating to the balance to be struck between the interests of individual pupils in manifesting their religious convictions, a qualified right protected by Article 9 of the ECHR, and the rights of the broader community, represented in particular by the other pupils attending the school but also by teachers and the community served by the school in terms of enjoying a peaceful, harmonious, positive and constructive learning environment within the school. This encapsulates one of the core conflicting issues arising from the case.

A further important consideration arising from the *Begum* case is that, as the primary arguments were based upon Article 9 and the claimant pupil's right to manifest her religious beliefs, the case focuses essentially on the rights of the *child* as the right holder rather than on those of the *parents* or the family. In this very important respect, the *Begum* case shifts the primary focus of discussion from parental to children's rights, in contrast to the majority of cases raising educational issues in both domestic law and before the European Court of Human Rights, where the discussion has given primacy to parental rights, relegating children's rights to a rather lower level of concern. Such cases have focused mainly on such issues as *parental* choice of school, or the right of *parents* to withdraw their children from religious or sex education, or the right of *parents* to challenge their child's statement of special educational needs. The potential for conflict between the rights of the child and parental rights has long been recognised, and, while in the *Begum* case itself there is no clear evidence of such conflict between the pupil concerned and her family, cases of this nature can readily give rise to such tensions: a pupil may be placed under an element of parental or family pressure to dress in a particular way in order to conform to certain religious or cultural traditions or values, possibly against the pupil's own wishes. Schools may indeed be placed in a very difficult position here in terms of formulating a dress code which seeks to reconcile or minimise such conflicts.

6 See Harris, *op. cit.* note 4 above, pp. 6-7.

7 [2004] EWHC 1389 (Admin), [2004] ELR 374 (Administrative Court); [2005] EWCA 199, [2004] ELR 198 (Court of Appeal); [2006] UKHL 15, [2006] ELR 273 (House of Lords).

8 [1982] 3 All ER 1108, CA; [1983] 1 All ER 1062, HL.

9 S. 1(1)(b).

The *Begum* case also raises issues under the first sentence of Article 2 of the First Protocol to the ECHR. This again focuses on the child as right holder, in contrast to the majority of cases under Article 2 of the First Protocol which have focused on the right of *parents* to have their religious and philosophical convictions respected by the state, under the second sentence of the Article. This aspect of the case is, however, subsidiary to the key issues under Article 9.
This article will first explore the background to the *Begum* case and then go on to discuss the conflicting issues arising from it.

## Background to the *Begum* case

### Background to the school and the adoption of its dress code

The *Begum* case involved a dispute between a 13 year-old female Muslim pupil and the head teacher and governors of the school she was then attending, Denbigh High School in Luton. Denbigh High School was a maintained secondary community (non-denominational) school taking pupils of both sexes aged from 11 to 16 years. The background of the pupils was diverse: pupils came from some 21 different ethnic groups, with representation from some 10 religious groups. Although almost 80 per cent of the pupils were Muslims, Denbigh High School was not a designated faith school. As a community maintained school it fell under the legal requirements of Schedules 19 and 20 of the School Standards and Framework Act 1998 in respect of the provision of religious education and collective worship. However the school, in view of the religious background of the majority of its pupils, had obtained a dispensation from the normal obligation of community maintained schools to hold a daily act of collective worship which was 'wholly or mainly of a broadly Christian character.'[10]

The governing body and head teacher took considerable care in the formulation of a school uniform policy which would meet the needs and preferences of their ethnically and religiously diverse school population. In particular, they consulted parents, pupils and members of the wider community, including local Imams, as to an acceptable dress code, and indeed, pupils were themselves directly involved in the design of the uniform. The school uniform was seen as a significant factor in maintaining standards of behaviour and developing cohesion, loyalty and inclusiveness within the school community. As commented by Lord Bingham in his opinion in the House of Lords:

> 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.[11]

The uniform was thus seen as playing an important social and educational role rather than being merely a matter of practical convenience. The promotion of cohesion was seen as crucial: the school wanted to adopt a dress code for female Muslim pupils that was reflective of mainstream views of appropriate dress for maturing female Muslim pupils, avoiding other forms of dress that might be seen as reflecting some more radical elements within the Muslim community.

The school offered a range of choices of uniform, of which the one in issue in this case was the shalwar kameeze: this comprised the kameeze, a sleeveless smock-like dress, worn with the shalwar, loose trousers tapering at the ankles. A long sleeved shirt was worn with the kameeze.[12] The shalwar kameeze was worn not only by some Muslim pupils but also by some Hindu and Sikh pupils. The governors also from 1993 permitted female pupils to wear Islamic headscarves if they wished. The primary concern of the governors in approving and adopting this dress code was to satisfy the requirement of modesty for female Muslim pupils, and they were careful before adopting it to consult local Imams who saw no objection to it.[13] In addition to careful consultation, the governors and head teacher adopted and implemented a policy of fully explaining the dress code to prospective parents and pupils well in advance of the pupils' admission to the school.

[10] Such dispensations are available under School Standards and Framework Act 1998, Schedule 20, para. 4.
[11] [2006] ELR 273 at p. 279, para. 6.
[12] This description of the uniform is taken from the opinion of Lord Bingham: *ibid.*, para. 16.
[13] *Ibid.*, para. 13.

### Shabina Begum and her wish to wear the jilbab

On the first day of the new school year in September 2002, Shabina Begum, who had already attended the school with her older sister for two years, arrived at school wearing a jilbab – a loose fitting cloak reaching to the ankles. Shabina was on this occasion accompanied by her older brother and on arrival they asked to speak to the head teacher, who happened at that time to be away. In the event they spoke to the deputy head, who told Shabina to go home, change into the approved school uniform, and return to school. Shabina, supported by her brother, made it clear that she was asserting a right to manifest her religious convictions, and that she was not prepared to compromise over the issue. The head teacher on the same day wrote to Shabina's mother explaining that she regarded the correct uniform as important for the good order and discipline of the school, and that the uniform had been agreed by the governing body following wide consultation, taking due account of religious and cultural concerns. The head teacher made it quite clear that Shabina was not being excluded from the school – on the contrary, the school was anxious that she should return to school as soon as possible, but dressed in accordance with the school dress code.

In the event, Shabina did not return to school, and the head teacher therefore referred her case to the local education authority education welfare service (which dealt with enforcement of school attendance). The issue became increasingly conflictual, and Shabina's family referred the matter to their solicitor who wrote to the head teacher contending that Shabina had been excluded as a consequence of her refusal to wear the approved uniform, and emphasising that she considered that she was, by virtue of her religious convictions, under an absolute obligation to wear the jilbab covering her entire body in order to meet the strict requirement of modesty for Muslim women. She asserted that her exclusion was in breach of her rights under, *inter alia*, Article 9 and Article 2 of the First Protocol to the ECHR.[14] Both the Begum family and the school authorities consulted a range of Muslim authorities as to whether the shalwar kameeze was consistent with requirements of modesty under the Islamic dress code for women. The school was assured by the Imams of two mosques in Luton, the Central London Mosque Trust and the Islamic Cultural Centre that it was consistent; the Begum family obtained contrary opinions.

In the meantime, while Shabina was out of school, the school offered her help with her studies, although the evidence was to the effect that she returned little work during this period.[15] Shabina was also offered help with transferring to another school in the area where she would be permitted to wear the jilbab, but again this opportunity was not taken up.[16] Attempts by the school to persuade Shabina to return to school wearing the approved uniform failed, and it became clear that the Begum family were not prepared to compromise, regarding the matter as one of fundamental rights. The school for its part was also not prepared to compromise, and the head teacher's position was strongly supported by the school's governing body.[17] The head teacher was particularly concerned about the fact that a number of female pupils had expressed fears over wearing the jilbab as it was associated in some pupils' minds with more radical Muslim groups. Furthermore, the head teacher feared that it might bring about an 'undesirable differentiation between Muslim groups according to the strictness of their views'.[18] The school had in the past suffered from some conflict between different racial groups, and permitting further variation in school dress might bring about a recurrence of such problems.[19]

## The legal challenge

### The legal challenge in the Administrative Court

Shabina Begum through her older brother as litigation friend brought a claim for judicial review in the Administrative Court,[20] seeking a number of declarations, in particular that the school's actions amounted to her unlawful exclusion in contravention of the statutory procedures;[21] that she had been denied access to suitable education in breach of Article 2 of Protocol 1 of the ECHR; and that the school had denied her the right to manifest her religious beliefs contrary to Article 9 of the ECHR. The judge,

14 [2006] ELR 273 at p. 280, para. 12.
15 *Ibid.*, para. 17.
16 *Ibid.*, paras 15,-16.
17 *Ibid.*, para. 16.
18 *Ibid.*, para. 18.
19 *Ibid.*
20 [2004] EWHC 1389 (Admin), [2004] ELR 374.
21 Under ss 64-68, School Standards and Framework Act 1998 and/or s. 52, Education Act 2002, and the Education (Pupils Exclusions and Appeals) (Maintained Schools) (England) Regls 2002.

Bennett J, held, first, that the school had not excluded Shabina: she had been given a clear option to return to school wearing the approved uniform, and indeed the school had strongly encouraged her to do so. Secondly, the judge held that, although her refusal to abide by the uniform code had been *motivated* by her religious beliefs, if she *had* been excluded then that exclusion had been for her refusal to wear the approved uniform rather than on account of her religious beliefs as such. No breach of Article 9(1) had therefore been shown.[22] The judge went on to hold that, if there had been any interference with Shabina's freedom of religion under Article 9(1), then it had been prescribed by law for the purposes of Article 9(2) as having been part of the school's uniform policy and fully disseminated and understood by parents and pupils, and that the policy pursued a legitimate aim and was proportionate. The limitations on her right had been necessary for the protection of the rights and freedoms of other pupils at the school, as an integral part of the school's overall disciplinary code, promoting a positive and constructive ethos among the pupils and avoiding outward distinctiveness and division. Potentially damaging divisions within the school community between those who wore the shalwar kameeze and those who wore the jilbab were avoided by the policy; and the possibility of pupils feeling pressure to wear the jilbab, as representing 'better Muslims,' was avoided. The school had consulted widely before adopting the policy, and taken advice from representatives of the Muslim community. The policy was reasoned, balanced and proportionate.[23] It was held, further, that there had been no breach of Article 2 of the First Protocol: Shabina had not been denied her right to education as there were other appropriate secondary schools in the area to which she could have transferred and where she would have been permitted to wear the jilbab.[24]

### The Court of Appeal decision

Shabina Begum appealed against Bennett J's decision to the Court of Appeal on the grounds that she had indeed been unlawfully excluded from the school, that she had been denied her right to manifest her religion, and that she had been denied her right to education. The Court of Appeal judges took a radically different approach from the Administrative Court: first, they held that Shabina *had* been excluded from school on disciplinary grounds, by virtue of her having failed to comply with the discipline of adherence to the prescribed school uniform policy, and that this exclusion had been unlawful on the basis that the school had failed to follow the formal statutory procedures required for school exclusions. Shabina had in effect been placed in a form of 'limbo' by being sent home without the formal procedures having been followed, a position of uncertainty which was unknown to education law in England.[25] Secondly, the Court of Appeal held that the school's actions did have the effect of limiting Shabina's right to manifest her religious beliefs under Article 9(1): hence it fell to the school to justify this limitation under Article 9(2). Most importantly, the school had approached the issue in the wrong way: instead of starting from the premise that Shabina had a right that was recognised in law and that the onus lay on the school to justify interfering with that right, the school had on the contrary started from the premise that its uniform policy was there to be obeyed, and that if Shabina did not like it, she could transfer to a different school.[26]

The Court of Appeal considered that the school authorities, faced with Shabina's request on religious grounds to wear the jilbab, should have adopted a structured decision-making process which first addressed the question as to whether she had established a right protected by Article 9(1) of the ECHR; second, whether, subject to any justification under Article 9(2), her right had been infringed; third, whether the interference had been prescribed by law and whether it had a legitimate aim; fourth, what were the considerations to be balanced against each other in determining whether the interference was necessary in a democratic society for the purpose of achieving that aim; and finally whether the interference was justified under Article 9(2).[27] The Court of Appeal considered that, as the school had failed to approach the issue in this highly structured way, and indeed, in the Court's view had approached it from entirely the wrong direction, and failed to attribute to Shabina's beliefs the weight they deserved, the school could not resist the declarations she was seeking.[28] The Court of Appeal thus reversed the Administrative Court's decision, but in doing so it was careful to say that it would be possible for the school authorities to review its approach to Shabina's claim to wear the jilbab by adopting the structured decision-making mechanism outlined and to reach the conclusion that its uniform policy was justified as

22 [2004] ELR 374, para. 74.
23 *Ibid.*, paras 90,-91.
24 *Ibid.*, para. 103.
25 [2004] ELR 198, para. 24.
26 *Ibid.*, paras 76,-77.
27 *Ibid.*, para. 75.
28 *Ibid.*, para. 78.

being in accordance with the law, promoting a legitimate aim, and a proportionate response to the difficult and sensitive problem of ensuring a cohesive and disciplined school community.[29]

In sharp contrast to the approach taken by the Administrative Court, the Court of Appeal thus found for Shabina essentially on the procedural ground that the school authorities had approached the issues in the wrong manner without applying the appropriately structured approach which the Court considered essential in such cases, rather than on the basis that the school's uniform policy was substantively wrong. Indeed, the Court of Appeal avoided any substantive appraisal of the school's uniform policy, expressly leaving open the possibility that it might pass the proportionality test. The school's approach was fatally flawed by virtue of its failure to consider the issues following the correct procedural stages. As stated by Scott Baker LJ:

> What went wrong in this case was that the school failed to appreciate that by its action it was infringing the claimant's Article 9(1) right to manifest her religion. It should have gone on to consider whether a limitation of her right was justified under Article 9(2) in the light of the particular circumstances of the school. As it did not carry out this exercise, it is not possible to conclude what the result would have been.[30]

### The House of Lords

The school appealed to the House of Lords from the decision of the Court of Appeal, the Department for Education and Skills intervening in support of the school's position. The judges in the House of Lords were unanimously of the view that the Court of Appeal had been wrong to focus on the procedural approach taken by the school authorities: on the contrary, they were of the view that what mattered in cases raising rights protected by the ECHR was whether those rights had been substantively interfered with or limited, and, if so, whether such interference or limitation was justified. The procedural steps by which the public authority – here, the school authorities – had reached its decisions were of secondary importance. The Court of Appeal had been wrong to avoid discussion of the substantive justifications put forward by the school in this case, simply saying that it would not be impossible for the school, on reconsideration of its approach following the structured decision-making process laid down by the Court of Appeal, to conclude that its policy was balanced and proportionate.

*(i) Interference with the right to manifest religion*

In the House of Lords,[31] the foremost issue was whether Shabina's right to manifest her religion had been limited or subject to interference by the school's uniform policy. Three of the five judges in the House of Lords concluded that it had not, but they nonetheless all went on to consider the issue of justification under Article 9(2). The majority founded their conclusion that there had been no interference partly by reference to the case law of the European Court and Commission of Human Rights relating to the scope of the right to manifest religious belief. As Lord Bingham commented:

> 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.[32]

Lord Bingham supported this comment by reference to Karaduman v. Turkey,[33] in which the applicant had been denied a certificate of graduation because the University authorities required a photograph of her without wearing a headscarf, which she was unwilling for religious reasons to provide. The Commission found that there had been no interference with her right to manifest her religion because,

> 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

[29] *Ibid.*, paras 81 and 87,-88.
[30] *Ibid.*, para. 94.
[31] [2006] ELR 273.
[32] *Ibid.*, para. 23.
[33] (1993) 74 DR 93.

> restrictions as to place and manner intended to ensure harmonious coexistence between students of different beliefs.[34]

Similarly, in Valsamis v. Greece[35] a child who had been punished for failing to take part in a National Day parade on the basis that to do so would have been contrary to her beliefs as a Jehova's Witness was unsuccessful in her application under Article 9, as it was held that Article 9 did not confer exemption from disciplinary rules of general application applied in a neutral manner, and that there had been no interference with her right to manifest her religion or belief.[36]

In a very different context, in Jewish Liturgical Association Cha'are Shalom Ve Tsedek v. France,[37] the applicants' challenge to processes of ritual slaughter in France that did not accord with their religious standards was rejected by the Commission on the basis that they could without undue difficulty have obtained supplies of meat that did satisfy their standards from Belgium, or come to an agreement with the slaughterers to produce meat according to their specifications.[38]
Lord Scott in the *Begum* case concluded that:

> 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.[39]

The majority in the House of Lords in the *Begum* case were of the view that there had been no interference with Shabina's right to manifest her religion. They were clearly influenced, firstly, by the fact that her family had expressly chosen to send her to Denbigh High School – a school in whose catchment area the family did not live; and secondly, that there were other appropriate secondary schools in the area which she could have attended. The right to manifest one's religious beliefs – unlike the right to hold such beliefs – was not absolute, but might well properly involve an expectation of 'accommodation, compromise and, if necessary, sacrifice.'[40] Furthermore, it was emphasised that, in determining what constitutes an interference with the right to manifest religion, context is all important. Lord Hoffman referred to an earlier comment by Lord Nicholls in the case of *Williamson* that:

> What constitutes interference [with the manifestation of religious belief] depends on all the circumstances of the case, including the extent to which the individual can reasonably expect to be at liberty to manifest his beliefs in practice.[41]

The majority of the judges of the House of Lords in *Begum* concluded, therefore, that there had been no interference with Shabina's Article 9(1) right to manifest her religion. While it was recognised that the Strasbourg authorities may possibly have adopted a somewhat restrictive view of what constituted interference,[42] they nonetheless felt that no interference had been established in this case. Lord Bingham commented that:

> 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.[43]

Two of the House of Lords judges – Lord Nicholls and Baroness Hale – dissented on this point, however. Lord Nicholls, in a very brief opinion, expressed the view that the conclusion of the majority may

34 *Ibid*., p. 108, quoted by Lord Bingham [2006] ELR 273 at p. 284, para. 23.
35 (1997) 24 EHRR 294.
36 [2006] ELR 273, para. 23, per Lord Bingham.
37 (2000) 9 BHRC 27.
38 {2006] ELR 273, para. 23, per Lord Bingham. See also comments of Lord Hoffman at para. 51 and Lord Scott at para. 87.
39 *Ibid*., para. 87.
40 [2006] ELR 273, per Lord Hoffman at p. 292, para. 54.
41 *R (Williamson) v. Secretary of State for Education and Employment* [2005] UKHL 15, para. 38, quoted by Lord Hoffman in *R (Begum) v. Denbigh High School* [2006] ELR 273, para. 55.
42 See Lord Bingham [2006] ELR 273, para. 24, commenting on criticisms made by the Court of Appeal of these and other European cases in *Copsey v. WWB Devon Clays Ltd* [2005] EWCA Civ 932.
43 [2006] ELR 273, para. 24.

have over-estimated the ease with which Shabina could have moved to another school where she would have been permitted to wear the jilbab, and under-estimated the extent of the disruption to her education this would have caused.[44] Baroness Hale took the view that there had been an interference with Shabina's right on the basis of an unease about accepting simply that Shabina had chosen to attend Denbigh High School knowing full well what the uniform policy was, and had subsequently changed her mind about what her religion required of her. Baroness Hale argued that the initial choice of school had been made at a time when Shabina had been on the brink of, but had not yet reached, adolescence, and when the issue of dress requirements may not yet have been crucial for her. It would not be surprising that she might in due course have changed her mind over such a critical issue in relation to religious conviction and the manner in which her religion may be manifested. Critical changes in a child's physical, cognitive and psychological development take place during adolescence which may lead to a significant shift in a child's approach to such important matters. These considerations led Baroness Hale to conclude that there had been interference.[45]

*(ii) Consideration of the questions of justification and proportionality*

Although the majority of the judges concluded that there had been no interference, and this would have been sufficient to dispose of Shabina's Article 9(1) claim, in view of the importance of the issue as a matter of principle they nonetheless all went on to consider whether, if there had been interference, that interference had been justified under Article 9(2).

The judges in the House of Lords had little difficulty in concluding that the school's uniform policy had been prescribed by law and that it had a legitimate aim.[46] It had been clearly promulgated by the school's governing body – the authority entrusted with the organisation and running of the school and with setting the school's disciplinary policy. Furthermore, the uniform policy was designed to secure good discipline among the pupils and to protect possibly vulnerable pupils from pressure to wear dress which they might feel reflective of more radical Muslim views with which they disagreed. The uniform policy therefore served the legitimate purpose of protecting the rights and freedoms of others.

The main issue for the House of Lords was, however, whether the school's actions in forbidding Shabina from attending school wearing the jilbab were proportionate. Lord Bingham was in no doubt that they were. He concluded that the school was fully justified in acting as it did and that:

> 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.[47]

Lord Bingham rejected the argument put on behalf of Shabina that, given that the school did permit pupils to wear the headscarf, it made no sense to disallow the jilbab: the school had permitted the headscarf from 1993 following consultations and in response to pressure from pupils. Furthermore, there was no evidence of any opposition to the headscarf. On the other hand, there had been no demand from pupils to allow the jilbab, with the sole exception of Shabina. There had also been opposition from the student community to allowing the jilbab on the basis that it was felt to be divisive, singling out wearers of the jilbab as 'better' Muslims.[48] Lord Bingham concluded that the school had approached the formulation of its uniform policy in a balanced and responsible manner and that the policy was proportionate. Lord Bingham commented that:

> It would in my opinion be irresponsible for 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.[49]

The location under education law in England of the responsibility for taking decisions as to school uniform in individual school authorities – the head teacher and the governing body – was clearly a matter which was central to the House of Lords' consideration of the question of proportionality. The position

44 *Ibid.*, para. 41.
45 *Ibid.*, paras 92,-93.
46 *Ibid.*, para. 26, per Lord Bingham.
47 [2006] ELR 273, para. 34.
48 *Ibid.*, para. 33. See also para. 65, per Lord Hoffman.
49 *Ibid.*, para. 34.

in England was very different from that in countries where such matters were determined at national level. A contrast was drawn between the position in the *Begum* case and the position in a country such as Turkey where the matter is determined centrally: in Turkey, the Islamic headscarf is prohibited by the national authorities in educational institutions by virtue of the constitutional principle of secularism. In the case of Sahin v. Turkey,[50] the European Court of Human Rights considered that the prohibition on wearing the Islamic headscarf in Turkish Universities was justified under Article 9(2), taking the view that national authorities should be accorded a margin of appreciation in this context. The European Court of Human Rights commented that:

> Where questions concerning the relationship between state and religions are at stake, on which opinions 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'.[51]

This decision was subsequently endorsed by the Grand Chamber of the European Court of Human Rights.[52] The European Court's view, as expressed in the *Sahin* case, of the importance of according national authorities a margin of appreciation in the context of the wearing of religious symbols was regarded by Lord Hoffman in *Begum* as being reflected in England in Parliament's decision to delegate decision-making in this context to individual school authorities.[53] Lord Hoffman commented that:

> 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 UK, 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.[54]

Lord Hoffman concluded that the justification for the prohibition of the jilbab in the *Begum* case had therefore to be found at the local level, and that an area of judgment, comparable to the margin of appreciation, had to be accorded to the school authorities.[55] The school itself was in the best position to weigh and consider the issues.[56]

Lord Scott and Baroness Hale both agreed that the school's policy was justifiable. Lord Scott stressed the point that a rule of a particular public institution requiring or prohibiting certain behaviour on the part of people who avail themselves of its services does not amount to an infringement of the individual's right to manifest their religion simply because the rule in question is at variance with their religious beliefs. This is particularly true – as in Shabina Begum's case – where the individual has a choice as to whether to use the services of that institution, where there are other institutions in the area offering similar services without such restrictive rules.[57]

Baroness Hale's conclusion that the policy was justified was based on a wider consideration of the role of a school in educating children from diverse families and communities, with the core task of helping all their pupils to achieve their full potential. The school had a central role in fostering cohesion and harmony, and its dress code played an important role in eradicating ethnic, religious and social divisions among pupils and in promoting individual freedom and equality. Baroness Hale commented that:

---

50 [2004] ELR 520.
51 *Sahin v. Turkey* [2004] ELR 520, paras 101,-102.
52 [2006] ELR 73.
53 [2006] ELR 273, para. 62.
54 *Ibid.*
55 *Ibid.*, para. 64.
56 *Ibid.*, para. 65.
57 *Ibid.*, para. 87.

> 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 live 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.[58]

There is a fundamental balance to be struck between respect for the autonomy of the family – in some cases involving a patriarchal control – and supporting and enabling pupils who may view such a family context as restricting. Striking this balance appropriately may involve the accommodation of complex considerations. Baroness Hale in her judgment quoted an important passage from an article by Professor Frances Radnay discussing the possibly conflicting policy priorities faced by schools seeking to strike this balance, in the particular context of female Muslim pupils wearing the veil:

> 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.[59]

The balance to be struck here is plainly one of immense difficulty, and will depend on the particular complexion of the community served by the school. Baroness Hale concluded that Denbigh High School was genuinely and quite properly seeking to strike that balance in devising and implementing its uniform policy in this case. It was 'a thoughtful and proportionate response to reconciling the complexities of the situation.'[60]

*(iii) The House of Lords' criticism of the Court of Appeal's approach*

The judges in the House of Lords were thus clearly of the view that the school's uniform policy was proportionate and that any interference with Shabina's right under Article 9(2) was justified. Their entire approach to the issues was radically different from the approach taken by the Court of Appeal, of which they were highly critical. As discussed above, the Court of Appeal did not reach a concluded view as to the questions of justification and the proportionality of the school's policy, taking the view that, as the school had approached the issues in a defective procedural manner, the Court was unable to resist Shabina's application for declarations that her rights had been infringed. The Court of Appeal had left the substantive issues clearly open, stating that it would be quite possible for the school, on reconsideration of the issues in the light of the Court of Appeal's decision and, in particular, of its guidance as to the correct procedural approach, to pursue the very same policy with regard to dress.[61]

They thus considered that the school's policy might well be justifiable and proportionate, but that it had been procedurally flawed.

In the House of Lords, however, there was considerable criticism of this approach on the ground that the focus in cases coming before the European Court of Human Rights has never been on whether the decision or action under challenge had been taken following a defective decision-making process, but rather on whether the claimant's substantive Convention rights had been infringed.[62] Furthermore, Lord Bingham emphasised that the European Court's focus on substance rather than procedure was reflected in the Human Rights Act 1998, section 6(1) of which proscribed action on the part of public authorities which was incompatible with a Convention *right*.[63] Lord Bingham was also of the view that the Court of Appeal's approach, requiring the school authorities or other bodies responsible for public

58 *Ibid.*, para. 97.
59 *Ibid.*, para. 98, quoting Radnay, F. (2003), 'Culture, Religion and Gender', *International Journal of Constitutional Law* 663.
60 *Ibid.*, para. 98.
61 [2005] ELR 198, para. 81, per Brooke, LJ. See also para. 88, per Mummery, LJ.
62 [2006] ELR 273, para. 29, per Lord Bingham.
63 *Ibid.*

administration in different contexts – not themselves legally expert bodies – to approach the issues in the highly structured legalistic manner ordained by the Court of Appeal, would import a wholly unnecessary and highly undesirable formalism into administrative decision-making processes.[64] As Lord Bingham commented:

> 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.[65]

Lord Hoffman expressed himself in similar terms:

> 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.[66]

The Court of Appeal's decision that Shabina must be granted the declarations sought without reaching a concluded view as to whether the school's policy had been justified and proportionate was thus seriously criticised by the House of Lords. It felt strongly that the Court of Appeal's imposition of such a legally structured approach upon the school authorities was unjustified and that, if applied generally in the world of public administration, it would lead to excessive legal formalism and judicialisation of the administrative process. As commented by Thomas Poole:

> School managers were asked, in effect, to make decisions in areas where rights are in play in the manner of judges charged with applying Convention rights. It is not at all clear that this approach represents the best possible course of action. There is no good reason why the same test should apply both to courts reviewing decisions for their compatibility with the Convention and to public authorities making those decisions in the first place.[67]

*(iv) Denial of the right to education: Article 2 of the First Protocol*

The House of Lords dealt only briefly with Shabina Begum's claim that she had been denied her right to education under the first sentence of Article 2 of the First Protocol to the Convention. The House was clear that there had been no such denial: Lord Bingham concluded that, although Shabina had been out of school for some two years, this had been because of her unwillingness to comply with a uniform rule to which the school had been entitled to impose.[68] Lord Hoffman emphasised that Article 2 conferred no right to attend any particular school, and that it would be infringed only if the claimant had been unable to obtain education from the system as a whole.[69]

## Conclusions: reconciling conflicting interests

Of central importance in this case is the qualified nature of the right to manifest religious convictions under Article 9(1) of the ECHR: as was emphasised strongly by Lord Hoffman in his opinion in the House of Lords, the right to manifest one's religious convictions may have to be accompanied by an element of 'accommodation, compromise and, if necessary, sacrifice.'[70] The intensity and sincerity of the conviction, and the nature of the manifestation may be of some relevance, but the fact that the conviction or belief has a religious rather than, say, a traditional, cultural, political or even a social foundation will not alter its qualified nature: it does not necessarily 'trump' the interests of others within the community, whose interests and concerns must be weighed in the balance as competing considerations.

64 See also Poole, Thomas (2005), 'Of Headscarves and Heresies: the *Denbigh High School* Case and Public Authority Decision-Making Under the Human Rights Act', *Public Law* 685.
65 [2006] ELR 273, para. 31.
66 *Ibid*., para. 68.
67 Poole (2005), *op. cit*., note 64 above, p. 692.
68 [2006] ELR 273, para. 36, per Lord Bingham.
69 *Ibid*., para. 69. See also per Lord Scott, para. 90.
70 *Ibid*., para. 54.

This is clearly reflected in the need for protection of the 'rights and freedoms of others' enshrined within Article 9(2) itself. In this case, the rights and freedoms of other pupils at the school, and the ethos of the school as an active and positive learning environment in which discipline, good order and harmony are central, were perceived as the main competing considerations to be weighed in the balance alongside Shabina Begum's qualified right. While the Court of Appeal refrained from reaching a conclusion as to whether the school had struck that balance in a justifiable and proportionate way, all of the other judges accepted that the school had done so. Important factors leading to this conclusion appeared to be the care with which the school had formulated its policy, and the school's concern that, if the jilbab were to be permitted, pupils might feel under pressure to wear it as it might be viewed as reflecting a greater commitment on their part to the Islamic faith as 'better Muslims', and that this might lead to tension and social and cultural conflict within the school community. Accordingly, the school decided to pursue a dress policy which permitted the shalwar kameeze (and the headscarf) but prohibited the jilbab, thereby perhaps satisfying the preferences of 'mainstream' Muslim opinion. This policy was adopted following consultations by the school authorities with a number of Imams and members of Muslim groups, who indicated that in their opinion the shalwar kameeze met the requirement of modesty for adolescent and mature Muslim females.

The school thus sought to steer a middle course, and to ensure from a procedural point of view that had taken all appropriate consultative measures in formulating its policy. This may well have been a broadly sensible and pragmatic approach, but it can nonetheless be countered that the school's policy was in a real sense discriminatory in that it favoured one particular sector of Muslim opinion (the 'mainstream' Muslim view), while it failed to satisfy another entirely legitimate and respected Muslim view, identified by some as more radical, which took a significantly different view as to appropriate dress for adolescent and mature Muslim females. This more radical interpretation was, furthermore, supported by Imams consulted by the Begum family. Where a school permits certain forms of distinctive religiously affiliated dress but not others, such arguments of discrimination are, however, perhaps inevitable.

One justification for the school's policy was based on the view that pupils such as Shabina Begum who wished to wear the jilbab could transfer to another school where this was allowed: this may, however, fail to acknowledge the many compelling reasons upon which choice of school may be founded. Shabina herself (and her family) had expressly chosen Denbigh High School, a school located outside their normal catchment area. We do not know the reasons for their particular choice, but it clearly was deliberate and express. In Shabina's case, the fact that her older sister was already a pupil at the school may have been a factor. It is true that, at the time when Shabina first chose to attend Denbigh High School, she and her family were fully aware of the school's dress code, and that Shabina complied with the dress code for her first two years of attendance at the school. This, however, does not in any way lessen the force of her religious conviction in respect of appropriate dress as from September 2002: it is entirely legitimate and, indeed, quite to be expected, that a maturing adolescent will alter his or her position with regard to important aspects of religious convictions during this highly sensitive period of human development. For the school simply to respond that Shabina could now go elsewhere was arguably a quite inadequate response, and failed to recognise the importance of choice in education and the extent of the educational and psychological disruption likely to result from a change of school at this important stage in a child's development.

The justification for the school's policy based on pressure upon individual pupils, whether from their peers, their parents and families or from their religious or cultural community, is perhaps more compelling. Parental or family pressure may be of particular significance here. It is arguable that a state school does have a legitimate role in balancing competing interests as between a pupil on the one hand and his or her parents or family and religious or cultural community on the other. This may be of particular importance where pupils come from certain religious or cultural communities which may seek to limit the pupil's exposure to experiences and influences commonly found in wider society. Attendance at a state school may offer such pupils the opportunity of exposure to wider experiences and influences which other pupils take for granted. On the other hand, it may be argued that a state school should respect the autonomy of a pupil's parents, family and religious or cultural background in such matters. These are questions which are most likely to arise in the curricular context, and may be of particular concern in the context of such sensitive areas as the provision of sex education,[71] but are also of considerable relevance in the context of formulating a school dress code which permits certain forms of religiously affiliated dress but not others. While there was no evidence that Shabina Begum was herself placed under any

[71] See Meredith, Paul (2005), 'Some Shortcomings in the Provision of Sex Education in England', in: Harris, Neville and Meredith, Paul (eds), *Children, Education and Health: International Perspectives on Law and Policy*, Ashgate, Aldershot, pp. 105-128.

pressure by her family or religious community to come to school wearing the jilbab, it is entirely possible that some pupils might in similar circumstances find themselves under such pressure. A school might thus feel justified in formulating a dress policy, following appropriate consultation, which sought to steer a middle course by permitting forms of religiously affiliated dress acceptable to 'mainstream' opinion within the relevant religious group, but prohibiting more radical form of such dress. A school policy that seeks to pursue a 'mainstream' course expressly in order to protect its pupils from parental or family pressure to wear more radical forms of dress is, however, fraught with danger as it may be accused of unwarranted intrusion into parental or family autonomy.[72] This is a fundamental conflict of interest at the heart of education in a multi-cultural and multi-religious society which is extremely hard to reconcile. Interference by schools beyond a limited measure with such autonomy runs the risk of alienating important sectors of the community and leading them in some cases to withdraw their children from state education. This would be a highly regrettable consequence and damaging to the goal of cohesion and tolerance within society.

[72] See [2006] ELR 273 at paras 97,-98, per Baroness Hale.