

## WEARING HIJAB

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### OPINION

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#### **Introduction :**

- 1.** (i) In any country not governed in accordance with the teachings of Islam, two inter-related questions arise:
  - (a) To what extent are the beliefs and practices of Islam recognised and protected by the law of the land?
  - (b) To what extent is discrimination against Muslims because of their religious beliefs and practices either legally tolerated or legally prohibited or discouraged?
- (ii) The answers to these two questions vary from country to country. The situation in Turkey, for example, is very different to that in the United Kingdom.
- (iii) This opinion is concerned with the situation in England and Wales.
- 2.** Although some of the principles set out in the following pages can be applied equally to other practices of Islam, this opinion is concerned primarily with the practice of wearing hijab by Muslim women. It considers the following questions :
  - (i) To what extent is the practice of wearing hijab by Muslim women:
    - (a) an integral part of the teachings and practices of Islam, and
    - (b) protected by law as being a manifestation of their religious belief?
  - (ii) What legal remedies are available to a Muslim woman if she is discriminated against because she wears a hijab?
  - (iii) Can Muslim religious organisations make it a condition of employment that its female employees wear hijab?
- 3.** In the event of this opinion being read by someone who is unfamiliar with what Islam is, it should be emphasised at the outset that Islam is an established world religion which involves a combination of belief and action based on that belief. It has already been long recognised as such by the law of England and Wales, especially in the context of the law of charities.
- 4.** It should be noted that the applicable law of England – and therefore its interpretation – is in the process of change. Some of this law is relatively new law which has not yet been considered in the present context by any court of law. Some of it is law which is to be enacted within the next three years.
- 5.** The interpretation and application of existing law and the formulation of new law is usually subject to some form of policy or other – whether it be executive, legislative or judicial, or a combination of these. Since the practice of Islam is still a relatively new phenomenon both in the United Kingdom and in Europe (whose laws are increasingly being introduced into UK domestic law), policies as regards Muslims in the UK and in Europe are still in the process of being defined and formulated. It follows that, depending on how such policies evolve, the law which exists today may not be interpreted exactly as anticipated – and the law which is created tomorrow may not turn out as expected – although every attempt has been made to ensure that the arguments which follow are rational, reasonable, balanced and accurate.

6. As regards the present situation, Muslims in England and Wales have no remedy at law if they are either directly or indirectly discriminated against on religious grounds. It is sometimes but not always possible to argue successfully that such discrimination constitutes indirect discrimination for the purposes of the *Race Relations Act 1976* ('the RRA') – as long as the victim belongs to an ethnic minority – and/or the *Sex Discrimination Act 1975* ('the SDA') – as long as the victim is a woman. Any men belonging to an ethnic majority who are subjected to religious discrimination are unlikely to be helped by either the RRA or the SDA.
7. The *Human Rights Act 1998* ('the HRA') has introduced into UK domestic law the rights secured by the *European Convention for the Protection of Human Rights and Fundamental Freedoms* ('the ECHR'). The HRA may afford some protection for those who are subjected to religious discrimination in some situations – and provided the discrimination is by a public authority, since the Act makes it unlawful for public authorities to act in a way which is incompatible with ECHR rights – although such an act is not unlawful if it is the effect of primary legislation. *Articles 9 and 14 of the ECHR* and *Article 2 of Protocol 1 to the ECHR* are the most relevant in relation to religious discrimination. *Section 13 of the HRA* makes special provision for freedom of religion as regards religious organisations. The significance of these provisions is considered in greater detail below.
8. There are also various anti-discrimination Directives promulgated under *Article 13 of the EC Treaty*, as introduced by the *Treaty of Amsterdam*. As a result, a law against religious discrimination in some areas has been promised by the government of the day – and indeed preparatory work has already been carried out by the Home Office prior to forthcoming religious discrimination legislation being enacted.

### The Meaning of the Word 'Hijab' :

9. The Arabic word *hijab* literally means a veil or a curtain. Its verbal root means 'to cover', 'to shut out'. The word is commonly used by Muslims to refer to a woman's head wear – and it is also used in a broader sense to indicate the metaphysical. For example, it is said, "The creation is a veil which hides the Creator, so if you find the creation beautiful, imagine how beautiful the One behind the veil is!"
10. Muslim women normally wear hijab when in public as a protection. The teachings of Islam discourage the sexes from mixing freely after the age of puberty, except amongst family members. After the age of puberty, Muslim women should not be alone with a man to whom they are not related by blood or by marriage or by suckling – and when in public or in prayer they should dress modestly and cover their hair with a head-covering ('hijab'). When in a family or all female environment it is not necessary to wear full hijab, which would be the case if males are present who are not related by marriage or blood or suckling. This relative separation of the sexes is a religious requirement which in fact protects young women when they are at their most vulnerable – and which protects the Muslim family. Where this religious requirement is followed, relationships between young girls and boys which are unlikely to lead to a stable marriage are avoided – and sexual relations outside marriage, unwanted pregnancies and adultery are virtually non-existent.

11. The existential justification for the Islamic rationale behind this approach is provided by those who do not follow it. While Islam as a way of life promotes a stable family life which expressly prohibits sexual relations outside marriage, national statistics in the public domain confirm that communities which encourage the free mixing of the sexes throughout adolescence and thereafter are characterised by a lifestyle which results *inter alia* in an abortion taking place every few minutes and one-parent families as a norm. Part of the Muslim way of life involves separate education for Muslim girls and boys once they have reached adolescence and before they reach adulthood. Muslims are encouraged to marry young – but not before they are ready.
12. In order to ascertain, for legal purposes, whether or not wearing a hijab is a manifestation of religious belief – and if so, then the degree of importance and obligation attached to wearing hijab – it will be necessary to consider the sources and requirements of the *Shari'ah* of Islam and the *Sunnah* of the Prophet Muhammad and his Family and Companions and Followers, may the blessings and peace of Allah be on him and them.
13. The definitions of Arabic terminology appearing in *paragraphs 15 and 17 below* are taken from *A Glossary of Islamic Terms* by Aisha Bewley, (Ta-Ha Publishers, London, 1998). The quotations from the Qur'an which appear below are taken from *THE NOBLE QUR'AN – a New Rendering of its Meaning in English* by Abdalhaqq and Aisha Bewley, (Bookwork, Norwich, 1999). The *hadith* which are quoted below are taken from *Al-Muwatta* of Imam Malik translated by Aisha Bewley and Yaqub Johnson (Diwan Press, Norwich, 1982) and the *Sunan* of Imam Abu Dawud translated by Professor Ahmad Hasan (Sh. Muhammad Ashraf, Publishers, Lahore, 1984).

#### Sources of Islamic Law :

14. The Arabic word *Islam* means 'peace', 'safe and sound', 'submission' to the will of God. Muslims believe that there is only one God and that the Prophet Muhammad, blessings and peace be on him, was the last Messenger sent by God to man. The Arabic word *Allah* literally means 'the God'. Muslims believe that by following the example of the Messenger of Allah and his companions and sincere followers and by obeying what is commanded in the *Qur'an*, the divine revelation revealed to him via the Angel Gabriel, they are thereby submitting to God's will – and will therefore be at peace and safe and sound both in this world and in the next. Muslims believe that it is necessary to worship God as if you see Him, knowing that although you do not see Him, He sees you, since there is no time or place where God is not present.
15. There are two key terms which it is necessary to understand: *firstly*, the practice of the *Sunnah* – which can be defined briefly as: 'the customary practice of a person or group of people. It has come to refer almost exclusively to the practice of the Messenger of Allah and to the first generation of Muslims;' and *secondly*, the requirements of the *Shari'ah* – which can be defined briefly as: 'lit. road, the legal modality of a people based on the Revelation of their Prophet. The final *Shari'ah* is that of Islam.' Islam can be defined briefly as: 'submission to the will of Allah, the way of life embodied by all of the Prophets, given its final form in the guidance brought by the Prophet Muhammad, may Allah bless him and grant him peace. The five pillars of Islam are:

the affirmation of the *shahada*, performing the prayer or *salat*, paying the *zakat*, fasting the month of Ramadan, and performing the *Hajj* once in a lifetime if you are able to do so.’

- 16.** The *Shari’ah* requires Muslims to treat as permitted what Allah has permitted and to treat as forbidden what Allah has forbidden. The *Sunnah* shows Muslims how to do this. The *Sunnah* also indicates what behaviour is recommended but not obligatory as well as what behaviour is discouraged but not forbidden. The requirements of the *Shari’ah* are obligatory and it is not permissible for Muslims to redefine what Allah has permitted and what Allah has forbidden. The norms of the *Sunnah* are followed because it is believed that there is no better way of doing things than following the example of the Prophet Muhammad. Thus practising Muslims feel obliged to follow the *Shari’ah* and are unwilling not to follow the *Sunnah*.
- 17.** As well as the direct human transmission of the teachings and practices of Islam from person to person, the main written sources of Islamic law and customary practice are first and foremost the *Qur’an* – which can be defined briefly as: ‘the Holy Book, the Living Miracle, revealed from Allah as a guidance to mankind via the angel Jibril to the Prophet Muhammad, may Allah bless him and grant him peace. The Revelation began in 610 and continued until shortly before the death of the Prophet in 11/632;’ and then the *hadith* – which can be defined briefly as: ‘reported speech of the Prophet.’

#### **Requirements of the Shari’ah and the Sunnah :**

- 18.** As already mentioned the teachings of Islam discourage the sexes from mixing freely after the age of puberty, except amongst family members:

Say to the muminun that they should lower their eyes  
and guard their private parts.  
That is purer for them.  
Allah is aware of what they do.

Say to the mumin women that they should lower their eyes  
and guard their private parts  
and not display their adornments –  
except for what normally shows –  
and draw their head-coverings across their breasts.

They should only display their adornments to their husbands  
or their fathers or their husbands’ fathers,  
or their sons or their husbands’ sons  
or their brothers or their brothers’ sons  
or their sisters’ sons  
or other women  
or those they own as slaves  
or their male attendants who have no sexual desire  
or children who still have no awareness  
of women’s private parts.

Nor should they stamp their feet  
so that their hidden ornaments are known.

Turn to Allah every one of you, muminun,  
so that hopefully you will have success.

(*Qur’an* : 24. 30-31)

[*muminun* is the plural of *mumin*; a *mumin* is someone who possesses *iman*; *iman* is belief, faith, acceptance in the heart of Allah and His Messenger. *Iman* consists of believing in Allah, His angels, His Books, His Messengers, the Last Day, the Garden and the Fire, and that everything, both good and bad, is by the decree of Allah.]

“Safiyah, daughter of Shaibah, said that ‘A’isha mentioned the women of the Ansar, praised them and said good words about them. Then she said, ‘When *Surat an-Nur* came down, they took the curtains, tore them and made head-covers from them.’” (*Sunan of Imam Abu Dawud*: 27.1533.4089).

[the *Ansar*, lit. the ‘Helpers’ were the people of Madina who welcomed and aided the Prophet and the *Muhajirun* when they made *hijra* from Makka; the *Muhajirun* were the Companions of the Messenger of Allah who accepted Islam in Makka and made *hijra* to Madina; *hijra* is leaving one place and travelling to another for the sake of Allah and the establishment of His *deen*; *deen* means life-transaction, religion in the broadest sense; the *deen* of Allah and the Muslim community is Islam but every society and cultural grouping have a *deen* which they follow.]

- 19.** As already mentioned, after the age of puberty, Muslim women should not be alone with a man to whom they are not related by blood or by marriage or by suckling – and when in public or in prayer Muslim women should dress modestly and cover their hair with a hijab:

O Prophet! Tell your wives and daughters  
and the women of the *muminun*  
to draw their outer garments closely round themselves.  
This makes it more likely that they will be recognised  
and not be harmed.

Allah is Ever-Forgiving, Most Merciful.

(*Qur’an* : 33. 59)

“Umm Salamah said, ‘When the verse “to draw their outer garments closely round themselves” was revealed the women of the Ansar came out as if they had crows over their heads by wearing outer garments.’” (*Sunan of Imam Abu Dawud*: 27.1533.4090).

Yahya related to me from Malik that he had heard that ‘A’isha, the wife of the Prophet, may Allah bless him and grant him peace, used to pray in a shift and head-covering. (*Al-Muwatta* of *Imam Malik* : 8.10.36).

“‘A’isha reported the Prophet, may Allah bless him and grant him peace, as saying, ‘Allah does not accept the prayer of a woman who has reached puberty unless she wears a veil.’” (*Sunan of Imam Abu Dawud*: 2.236.641).

- 20.** As already mentioned, women are not obliged to wear full hijab in a family or all female environment – except when they are doing the prayer – which would be the case if males were present who were not related by marriage or by blood or by suckling to the women present. In other words, in an all female environment, although still required to dress with modesty, it is not necessary for girls and women to wear a head-covering because they are ‘in private’. It is only when ‘in public’ or when doing the prayer, that it is necessary to wear the full hijab.

21. Another of the established practices of Islam is that both men and women should not gaze at members of the opposite sex to whom they are not married or related by blood or suckling, but should lower their eyes:

“Buraidah reported the Messenger of Allah, may Allah bless him and grant him peace, as saying to ‘Ali, ‘Do not give a second look, ‘Ali, for while you are not to blame for the first, you have no right to the second.’”  
(*Sunan of Imam Abu Dawud*: 5.710.2144).

In public and in a work environment, however, many non-Muslim men are not aware of this requirement, while there are Muslim men who, being human, either forget or are unable to lower their gaze. It is for this reason that many Muslim women insist on wearing their hijab when out in public and at work.

22. Underlying these religious requirements regarding dress and behaviour between men and women is the prohibition by Allah of sexual relations outside marriage :

Today all good things have been made halal for you.  
And the food of those given the Book is also halal for you  
and your food is halal for them.  
So are chaste women from among the muminun  
and chaste women of those given the Book before you,  
once you have given them their dowries in marriage,  
not in fornication or taking them as lovers.  
But as for anyone who rejects iman,  
his actions will come to nothing  
and in the akhira he will be among the losers.

(*Qur’an* : 5. 5)

[*halal* means lawful in the *Shari‘ah*; its opposite, *haram*, means unlawful in the *Shari‘ah*. The *akhira* is the next world, what is on the other side of death; its opposite, *dunya*, is this world, not as cosmic phenomenon, but as experienced.]

Yahya related to me from Malik from Ibn Shihab from ‘Abdullah and Hasan, the sons of Muhammad ibn ‘Ali ibn Abi Talib from their father, may Allah be pleased with him, that the Messenger of Allah, may Allah bless him and grant him peace, forbade temporary marriage with women and [eating] the flesh of domestic donkeys on the Day of Khaybar. (*Al-Muwatta of Imam Malik* : 28.18.41).

23. Thus the limits which Allah has ordained as regards what relations between men and women are permitted – and what are not – are clear. The *Shari‘ah* forbids sexual relations between men and women outside marriage. The *Sunnah* which involves what behaviour between men and women is acceptable – and what is not – is well known and established by those who embody it. The wearing of hijab by Muslim women when in public is an integral part and an established practice of the *Sunnah*. This has been the religious and cultural norm for Muslim women for the last fourteen hundred years – and indeed it is a continuation of the practice of the followers of Moses and Jesus, whose mother has always traditionally been depicted wearing a hijab, peace be on them.

24. As we have seen above, as far as Muslims are concerned, following the way of Islam is not a matter of ‘customer preference’ but rather submission to the will of God – other than whom there is no higher authority. Muslims accept that because the pull between the opposite sexes can be so strong, the context and circumstances in which they meet has to be regulated – if the results are to be beneficial – and that this regulation should be in accordance with God’s guidance, which Muslims regard as safe and sound given that God is the Creator of everything including the opposite sexes and accordingly knows better than anyone how they are, and how they behave, and what living conditions are best for them. In this context, every action which forms part of this pattern of life is in fact part of the pattern of Islamic worship. There is no separation between the way of life and the way of worship.
25. Of course there are those who follow some of the practices of Islam such as wearing hijab and eating halal meat because as far as they are concerned they are cultural norms – and there are those who perceive themselves in general terms as ‘Muslims’ but who choose not to follow such cultural norms, just in the same way that there are ‘Christians’ who only go to church to be christened, married and buried – but on the whole those Muslim women who pray and fast regularly also wear the hijab when in public.
26. Since instances of Muslim women who wear the hijab being discriminated against occur regularly – for example by being refused employment or dismissed if they insist on or persist in wearing a hijab – it is now necessary to consider what legal rights such victims of religious discrimination may have and what legal remedies may be available to them, bearing in mind that at present direct religious discrimination is not regarded as unlawful under English law.

**Sex Discrimination Act 1975 and Race Relations Act 1976 :**

27. As regards the SDA, a Muslim woman can sometimes ‘prove’ to an Employment Tribunal that wearing the hijab is part of her being a woman, that by being told to remove her hijab she has been subjected to a requirement with which considerably fewer of her gender group can comply as compared to the male gender group in her work place, that she has suffered a detriment as a result – and that therefore she has been subjected to indirect discrimination. Her chances of success depend very much on the particular circumstances of her work place. If, for example, she was the only Muslim woman there and twenty other female colleagues had no difficulty in being required not to wear a hijab, then she would be less likely to succeed in her claim than if half of them also could not comply with that requirement.
28. As regards the RRA, a Muslim woman who happens to belong to an ethnic minority can sometimes ‘prove’ to an Employment Tribunal that wearing the hijab is part of her cultural ethnicity, that by being told to remove her hijab she has been subjected to a requirement with which considerably fewer of her female racial group can comply as compared to another majority female racial group in her work place, that she has suffered a detriment as a result – and that therefore she has been subjected to indirect discrimination. Again, her chances of success depend very much on the

particular circumstances of her work place. If for example, she was the only Muslim woman there and there were twenty other female employees from the same racial group who did not wear the hijab because they were not practising Muslims, and who therefore had no difficulty in being required not to wear a hijab, then she would be less likely to succeed in her claim than if half of them also could not comply with that requirement.

- 28.** In both cases, even if she could ‘prove’ that indirect sex or race discrimination had occurred, she would only be entitled to compensation if the employer could not prove that he was not aware of what the consequences of imposing the requirement would be. In other words there is little protection against religious discrimination under the SDA and the RRA – which were not drafted with religious discrimination in mind, but rather in order to combat sex and race discrimination respectively.
- 29.** It is now necessary to consider:
- (i) the religious rights of Muslims under the HRA and the ECHR; and
  - (ii) how these rights may affect the interpretation and application of legislation such as the RRA and the SDA and associated regulations :

### **Human Rights Act 1998 and the European Convention on Human Rights :**

**30.** *Section 1 of the HRA* provides for the enforcement in UK courts and tribunals of the rights secured by the ECHR:

(i) As regards the religious rights of Muslims and other religious groups, *Article 9* of the *ECHR* guarantees everyone living in Europe including the UK the right to *choose* their religion and the right to *practise* their 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 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.

(ii) *Article 2* of the *First Protocol* to the *ECHR* which is also incorporated into UK domestic law by *section 1 of the HRA* guarantees everyone living in Europe including the UK the right to have their children educated in accordance with their religious beliefs:

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

The UK has entered the following reservation in relation to this Article:

... in view of certain provisions of the Education Acts in the United Kingdom, the principle affirmed in the second sentence of Article 2 is accepted by the United Kingdom only in so far as it is compatible with the provision of efficient instruction and training, and the avoidance of unreasonable public expenditure.



(iii) *Article 14 of the ECHR* which is also incorporated into UK domestic law by *section 1 of the HRA* states:

14 The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

At present this is not a free standing right against discrimination, but can only be invoked in conjunction with one of the other ECHR rights.

31. The Council of Europe recently adopted *Protocol No. 12 to the ECHR* on the 4th November 2000. *Article 1* of this Protocol provides for a general prohibition on discrimination:

(1) The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

(2) No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

The UK has neither signed nor ratified Protocol No. 12, but if it does so in the future, then the Secretary of State could amend the HRA so as to reflect its effect, subject to approval by Parliament, by making an Order under *section 1(4) of the HRA* – at which point it would become relevant, since its effect would be to oblige a ratifying state to secure protection against discrimination on all the proscribed grounds, including religion.

32. As regards European cases concerning *Article 9* rights :

(i) The European Commission for Human Rights held in *Arrowsmith v UK* [1978] 19 DR 5; [1978] 3EHRR 110, that : “when actions of individuals do not actually express the belief concerned they cannot be considered to be as such protected by *Article 9(1)*, even when motivated by it.”

(ii) The European Commission for Human Rights held in *Appl. 10358/83, C v the United Kingdom, D & R 37* [1984], p. 142, that only acts : “which are aspects of the practice of a religion or belief in a generally recognised form are protected by *Article 9*.”

33. In my opinion :

(i) For the reasons given above, wearing a hijab is a clear expression of religious belief in a generally recognised form – based on the *Shari‘ah* of Islam and the *Sunnah* of the Prophet Muhammad, blessings and peace be on him – and therefore is entitled as such to be protected by *Article 9*.

(ii) Muslim women have the right under *Article 9(1)* to wear hijab.

(iii) This Islamic practice *is* in the interests of public safety and for the protection of public order, health and morals and therefore the proviso in *Article 9(2)* should not be applied so as to limit this right.

34. The question therefore arises : If the right to wear a hijab is protected by the HRA, what remedy is there if that right is either directly or indirectly violated – for example

if an employer requires her to remove it? The answer is, at present, **none** – although the government of the day is under a duty (as it has been for the last fifty years) to secure that right:

35. As a signatory to the *ECHR*, the British government is under a duty (under *Article 1*) to secure the rights which the Convention seeks to uphold and protect, and it is also under a duty (under *Articles 13 & 14*) to ensure that there is an effective remedy before a national authority for *everyone* whose Convention rights are violated:

(a) *Article 1* of the *ECHR* states:

**1** The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

(b) *Article 13* of the *ECHR* states:

**13** Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

(c) *Article 14* of the *ECHR* states:

**14** The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

36. It follows that even though Articles 1 and 13 of the *ECHR* have not been specifically incorporated into the *HRA*, if the British government does not secure (by passing secondary legislation where necessary) *inter alia* the rights to have religious belief, put that belief into practice, and educate one's children in accordance with that belief – and if it does not ensure that there is an 'effective remedy' in the English courts 'without discrimination on any ground' for anyone whose rights, including *inter alia* these rights, are violated – then clearly the British government will be in violation of its duties under the Convention – in effect it will itself by default be guilty of religious discrimination – and unless any such breach is remedied, it will eventually and inevitably find itself before the Court of Human Rights in Strasbourg. This could take a long time.

37. The question therefore arises : Since we have been told that the *HRA* is meant to 'bring *ECHR* rights home' so that it is no longer necessary to exhaust all domestic remedies – and the complainant! – before going to Strasbourg, is there any way that the *HRA* can be invoked so as to secure *Article 9* rights in the lower courts and tribunals? The answer is, perhaps there is, using the following reasoning, although there is no case law on this approach at present:

38. (i) Any tribunal or court is obliged to interpret and apply primary and subordinate legislation (including the *SDA* and the *RRA*) in line with the *HRA* and the *ECHR*, including *Articles 1, 13 and 14 of the ECHR*, by virtue of *section 3 of the HRA* :

### 3 Interpretation of legislation

(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

[There is a further subsection in *section 3 of the HRA*, but the above suffices for the purposes of this Opinion.]

It follows, therefore, that where a Muslim woman's *Article 9* right has been either directly or indirectly violated, any court or tribunal should apply the SDA and RRA so as to ensure that the *Article 9* right is secured by providing an effective remedy for its violation. This means that where there is a certain degree of flexibility in satisfying the threefold test for indirect discrimination which has to be made out under these two Acts, any discretion should tend to be exercised by the court so as to satisfy *section 3 of the HRA*.

(ii) In this context the case of *London Underground -v- Edwards (No. 2)* [1998] IRLR 364 CA is helpful, since it confirms that the notion of a 'considerably smaller' proportion of a group being able to comply is to be flexibly interpreted by the UK courts and tribunals so as to permit judicial notice to be taken of social facts without the need for elaborate statistical evidence. In this case, only one in twenty women was not able to comply with the requirement in question, as compared to none in the male gender group, and yet the Court of Appeal held that the 'considerably smaller' test had been satisfied and disproportionate impact proved.

**39.** In applying *section 3 of the HRA*, and by virtue of *section 2 of the HRA*, the court or tribunal can be referred to certain authorities emanating from Europe :

## **2 Interpretation of Convention rights**

(1) A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any —

- (a) judgement, decision, declaration or advisory opinion of the European Court of Human Rights,
- (b) opinion of the Commission given in a report adopted under Article 31 of the Convention
- (c) decision of the Commission in connection with Article 26 or 27(2) of the Convention, or
- (d) decision of the Committee of Ministers taken under Article 46 of the Convention,

whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen.

[There are two further subsections in *section 2 of the HRA*, but the above suffices for the purposes of this Opinion.]

**40.** In drawing any court's or tribunal's attention to its obligations under *sections 2 and 3 of the HRA*, its attention can also be drawn to the fact that since *section 6 of the HRA* applies to the court or tribunal itself, where it has a discretion, it is unlawful for that court or tribunal to act in a way which is incompatible with a Convention right (for example by failing to secure it by providing an effective remedy, or by ignoring it) :

## **6 Acts of public authorities**

(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

(2) Subsection (1) does not apply to an act if—

- (a) as a result of one or more provisions of primary legislation, the authority could not have acted differently; or

- (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.
- (3) In this section “public authority” includes —
  - (a) a court or tribunal,
  - (b) any person certain of whose functions are functions of a public nature,

but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.

[There are three further subsections in *section 6 of the HRA*, but the above suffices for the purposes of this Opinion.]

41. Clearly *section 6 of the HRA* would also be relevant in any situation where any respondent employer discriminating against a Muslim woman is a public authority.
42. (i) If a public authority acts in a way which is incompatible with a Convention right, then anyone who is a victim of that unlawful act is entitled to bring proceedings by virtue of *section 7 of the HRA* :

**7. Proceedings**

(1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may—

- (a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or
- (b) rely on the Convention right or rights concerned in any legal proceedings,

but only if he is (or would be) a victim of the unlawful act.

(2) In subsection (1)(a) ‘appropriate court or tribunal’ means such court or tribunal as may be determined in accordance with rules; and proceedings against an authority include a counterclaim or similar proceeding.

[There are eleven further subsections in *section 7 of the HRA*, but the above suffices for the purposes of this Opinion.]

(ii) In any such proceedings, any tribunal or court – including any appellate court – would be obliged to interpret and apply the relevant laws in line with the HRA and the ECHR, including *Articles 1, 13 and 14 of the ECHR*, by virtue of *section 3 of the HRA*.

43. To summarise:

(i) Although there is at present no remedy for either direct or indirect religious discrimination provided by the HRA, it is nevertheless now possible to invoke the HRA in any court or tribunal and to argue that where it has a discretion, the court or tribunal is obliged to give effect to existing legislation – including the SDA and the RRA – in a way which is compatible with the complainant’s *Article 9* and *Article 14* ECHR rights.

(ii) This argument it is hoped may result in the balance being tipped in the complainant’s favour, when giving effect to the law concerning indirect sex and race discrimination.

(iii) It should no longer be possible for the respondent to simply argue that religious discrimination is not unlawful and that there is no remedy in law for victims of religious discrimination, no matter what injury to feelings or consequential loss the complainant has suffered.

44. It is now necessary to consider any relevant EU Directives and any forthcoming religious discrimination legislation:

**EU Directives and Forthcoming Religious Discrimination Legislation :**

45. For the purposes of this opinion, *Council Directive 2000/78/EC of 27th November 2000* (on the implementation of the principle of equal treatment in employment and occupation without discrimination “on grounds of religion or belief, disability, age or sexual orientation”) is significant. This Directive (‘the employment directive’) must be implemented by the UK by the 2nd December 2003 in respect of religion or belief, so as to be compatible with the rights set out in the European Convention on Human Rights (‘the ECHR’).

46. (i) Since any court or tribunal, is regarded as an ‘emanation of the State’, and since European Directives have vertical direct affect and are directly applicable to them, any court’s or tribunal’s attention can be brought to the definition of indirect discrimination in *Article 2(2)(b)* of the employment directive – which is not the same as those contained in the SDA and the RRA – and which reads as follows :

“Indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons, unless:

(i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving it are appropriate and necessary ...

(ii) This reflects the criteria applied in the case of *Abdulaziz, Cabales and Balkandali v UK* [1985] 7 EHRR 47:

“A difference of treatment is discriminatory if it has no objective and reasonable justification, that is, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aims to be realised.”

47. (i) If any court or tribunal accepts the argument that the employment directive has direct vertical effect and should therefore be applied now, then in effect it could be used – in conjunction with reference to the HRA and to the complainant’s ECHR *Article 9* and *Article 14* rights – to ‘prove’ that the complainant had been subjected to indirect *religious* discrimination, even before any race discrimination legislation has come into force.

(ii) It could then be argued that as regards compensation, the same principles as those governing the award of compensation in cases of indirect sex and race discrimination should apply.

(iii) In the event of the employer being a public authority, reference could also be made to *section 8 of the HRA* :

## 8 Judicial Remedies

(1) In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.

[There are five further subsections in *section 8 of the HRA*, but the above suffices for the purposes of this Opinion.]

48. (i) In view of its duty under *Articles 1, 13 and 14 of the ECHR* to secure *inter alia Article 9* rights and provide an effective remedy if they are violated – and in view of its obligation to implement the employment directive by the 2nd December 2003 in respect of religion or belief – the British government has already been involved in preparatory work, which has been commissioned by the Home Office, prior to the forthcoming religious discrimination legislation being enacted.
- (ii) Although the forthcoming religious discrimination legislation is not due to come into force for another two years, with reference to *paragraph 5 above*, it is nevertheless relevant to consider the policies which will to some extent define it – and no doubt inform judicial opinion – as evinced by relevant Home Office publications. Of these, perhaps the most significant to date are:
- (a) *Religious Discrimination in England and Wales*, Paul Weller, Alice Feldman and Kingsley Purdam, Home Office Research Study 220, February 2001;
  - (b) *Tackling Religious Discrimination: practical implications for policy-makers and legislators*, Bob Hepple QC and Tufayl Choudhury, Home Office Research Study 221, February 2001.

The former is concerned primarily with the forms that religious discrimination takes, while the latter is concerned primarily with possible legal solutions in dealing with it.

(iii) There are several possibilities as regards the form that the forthcoming religious discrimination legislation will take. Whatever form it does take, it should at the very least provide a means of identifying both direct and indirect religious discrimination, as well as providing effective remedies for those who have been subjected to it. Its scope should be at least as wide as that of the SDA and the RRA.

49. It is now necessary to consider briefly the position of Muslim religious organisations which when acting as employers might well make it a requirement that the hijab – rather than having to remove it – be worn by its female employees :

### Muslim Religious Organisations :

50. If a religious organisation wishes to preserve its particular religious ethos, can it legally require its employees to fulfil certain conditions which would otherwise be regarded as discriminatory? For example, in the context of this opinion, can an Islamic Centre require its female staff to wear a hijab as a condition of employment? The short answer to this question is, ‘Most probably yes.’
51. In my opinion, the word ‘ethos’ includes two main elements which jointly distinguish one way of life from another: one element concerns inward belief and perception of existence – while the other element concerns outward action. The second element is

usually based on the first element. For example, since Muslims believe that there is no god except Allah and that Muhammad is the Messenger of Allah, it is their ethos to manifest that inward belief by outwardly worshipping and obeying Allah by following the example and teachings of His Messenger, blessings and peace be on him.

52. (i) As regards any religious organisation, the HRA requires any courts or tribunal to have ‘particular regard’ to the right to freedom of thought, conscience and religion in the determination of any question arising under the Act that might affect its exercise of that ECHR right:

**13. Freedom of thought, conscience and religion**

(1) If a court’s determination of any question arising under this Act might affect the exercise by a religious organisation (itself or its members collectively) of the Convention right to freedom of thought, conscience and religion, it must have particular regard to the importance of that right.

(2) In this section ‘court’ includes a tribunal.

(ii) The Home Secretary explained at the Committee stage of the Bill [HC Debates, 20 May 1998, cols. 1023-24] that the purpose of this clause was to reassure religious organisations “against the Bill being used to intrude upon genuinely held religious beliefs or practices based on their beliefs.”

(iii) This means that where situations arise where there is a conflict rights – for example, between religious rights and other rights – in applying the proportionality test any such tribunal or court would also have to take into account *section 13 of the HRA*. In other words, where there is such a conflict of rights – for example, between the right to freely practice one’s religion on one hand, and on the other hand, the right not to be treated less favourably because of one’s gender or sexual orientation – there is a statutory requirement to pay particular regard to the former rather than the latter.

53. (i) Article 4(1) of *Council Directive 2000/78/EC of 27th November 2000* states:

**Occupational requirements**

**4 (1)** ... Member States may provide that a difference of treatment which is based on a characteristic related to any of the discriminatory grounds referred to in Article 1 [this includes religion or belief] shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational qualification, provided that the objective is legitimate and the requirement is proportionate.

The proposals in an earlier draft of article 4(1) were found by the House of Lords Select Committee to provide “sufficient safeguards for religious organisations”. [House of Lords, Select Committee on the European Union, Session 1999-2000, Ninth Report, EU Proposals to Combat Discrimination, HL 68, at para 111. The report was debated in the house of Lords in June, see : HL Deb, 30 June 2000, cols. 1178-1235.]

(ii) Concern was expressed during the debate on the Report of the House of Lords Committee on the EU proposals that the provision relating to genuine occupational requirements (above) would not provide a sufficient exemption for religious organisations. [HL Deb, 30 June 2000, col. 1186.] In response to this the government said

that they would “press for amendments to the Directive to ensure that there is no question of religious organisations being forced to employ people who are not members of the relevant faith”. [HL Deb, 30 June 2000, col. 1238.] Article 4(2) of the Directive was substantially amended before adoption of the Directive to provide that:

“(2) Member States may maintain national legislation in force at the date of the adoption of this Directive or provide for future legislation incorporating national practices existing at the date of the adoption of this Directive pursuant to which, in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person’s religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person’s religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation’s ethos. This difference of treatment shall be implemented taking account of Member States’ constitutional provisions and principles, as well as the general principles of Community law, and should not justify discrimination on another ground. Provided that its provisions are otherwise complied with, this Directive shall thus not prejudice the right of churches and other public or private organisations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation’s ethos.”

(iii) Article 4(1) of *Council Directive 2000/78/EC* is concerned mainly with the situation in which it is a requirement that things are done in a certain way – ‘by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out’ – in order to conform with a particular belief or religious teaching. This is concerned primarily with outward action. For such a requirement not to constitute discrimination, it must constitute a ‘genuine and determining qualifying occupation’ and the objective must be ‘legitimate’ and the requirement must be ‘proportionate’.

(iv) Article 4(2) of *Council Directive 2000/78/EC* is concerned mainly with the situation in which it is a requirement that someone will not be employed in a post unless he or she is a member of a particular faith. This is concerned primarily with inward belief. For this requirement not to constitute discrimination, it must constitute ‘a genuine, legitimate and justified occupational requirement, having regard to the organisation’s ethos’.

(v) Whether or not the requirement to wear a hijab would satisfy these tests would depend on the particular circumstances of each particular case.

### Conclusion:

54. (i) The issue of religious discrimination is a relatively new one. It is largely as a result of representations made to the UK government by the Muslim community during the last 10 years concerning the genuine need for protection from religious discrimination – whether direct or indirect – that steps are now at last being taken to introduce appropriate legislation. This has been prompted largely by the fact that Muslims in the United Kingdom have been discriminated against regularly for many years because of their religious beliefs and practices without having any legal remedy – which is clearly unjust.



(ii) It is to be expected, therefore, that when the religious discrimination legislation is drafted it will harmonise with existing legislative provisions which are concerned with religious beliefs and practices while also extending them further. In doing so, it will inevitably have to consider the needs of the different religious communities, each of which has its own particular ethos. On the one hand Parliament will be obliged to protect and secure an individual's right to freedom of belief and practice based on it. On the other hand Parliament will be obliged to protect the right of various religious communities and organisations to retain their religious ethos, even if this means that other rights of others may have to be curtailed.

(iii) Above all, and just as with sex and race discrimination, victims of religious discrimination – whether direct or indirect – will have to be provided with effective remedies. Only then will it be possible to assert that their *Article 9* and *Article 14* ECHR rights have been secured.

(iv) Given the precedence which is granted by :

(a) *section 13 of the HRA* to “the exercise by a religious organisation (itself or its members collectively) of the Convention right to freedom of thought, conscience and religion”, and by

(b) *section 3(1) of the HRA* that “so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights”,

and given the requirement – by virtue of *section 19 of the HRA* – that future legislation should be compatible with ECHR rights, it is only natural to expect that the forthcoming religious discrimination legislation will reflect this.

55. (i) As can be appreciated, the various kinds and levels of law which are relevant and applicable to the issues discussed above are diverse and complex. Up to now, most of them have not been specifically considered by any court of law – nor, I suspect, by those responsible for drafting the laws now in force!

(ii) As regards the questions raised in *paragraph 1 above*, clearly the situation of Muslims in England and Wales is far better than that of the Muslims in Turkey – where, for example, in spite of the ECHR having been incorporated into Turkish domestic law, a Muslim woman is legally prohibited from going to university or working for the government if she wears a hijab – and may even be prosecuted for treason and jailed for several years if she attempts to do so!

(iii) As regards the questions raised in *paragraph 2 above*, and the specific issue of wearing hijab, it should soon be the case that this is not only judicially recognised as being an essential practice of Islam entitled to protection under *Articles 9 and 14* of the ECHR by virtue of the HRA, but also – by virtue of the forthcoming religious discrimination legislation – that any Muslim woman who is discriminated against – whether directly or indirectly – for wearing a hijab has access to a legal remedy which is not only straightforward but also includes the right to compensation.