

CASE COMMENTARY

NO BURQAS WE'RE FRENCH! THE WIDE MARGIN OF APPRECIATION AND THE ECtHR BURQA RULING

SAS v France (application no 43835/11) Unreported, July 1, 2014 (ECtHR)
Grand Chamber

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BACKGROUND

In the 1970s in parts of the Middle East and in the Gulf, (United Arab Emirates, Oman and Qatar especially), the burqa or niqab when worn was worn by women from tribal regions only. Otherwise known as a “batoola” this garment is a head and face covering with an area of mesh covering the eyes, another variation is provided by a mask covering the face and nose. Jonathan Raban in 1979 observed such sights in London “...it was on the Earl’s Court Road that I first saw the strange beak shaped foil masks of Gulf women...”¹ There has been a modernist revival in these once rare face coverings for a multiplicity of reasons and correspondingly the wearing of them contain several meanings. The burqa is worn for political, religious and other reasons, but also although not exclusively it is a garment intended to keep women in subjection. Stuart Hall in interpreting the work of Frantz Fanon’s 1960’s writings on the burqa (then called the veil) for Algerian women, explained “no sign is fixed in its meaning”² emphasising the fluidity of the burqa and also its capacity for appropriation by others. This is also true when considering the symbolic significance of the burqa today. Wearing it is defended as a right to choose, albeit in parts of Asia, for example in Afghanistan in the tribal regions, the burqa is a requirement for women.

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¹ Jonathan Raban, *Arabia* (Picador 1979) 11.

² Frantz Fanon, *Studies in a Dying Colonialism* (New York, Monthly Review Press, 1965). See also *Frantz Fanon: Black Skin, White Mask* / directed by Isaac Julien, (Video Pal Format) 1996; Rita Faulkner, ‘Assia Djebar, Frantz Fanon, Women, Veils, and Land’ (1996) 70 *World Literature Today*, 847.

Whilst in some parts of Africa and the Middle East wearing the burqa is expressly prohibited. In the West and on the streets of London (following recent patterns of migration) the burqa is an increasingly common sight, and whilst it might have been worn by a woman who was subject to the norms of her own society and merely visiting the United Kingdom, many women who choose to settle in the United Kingdom and desire United Kingdom nationality are also wearing the burqa. This demonstration and visible representation of otherness has created anxiety, provoked public debate and criticism, and in France and Belgium, prohibition.

The arguments against the burqa are several including, amongst others, that the burqa is imposed, that it is oppressive and demeaning and contravenes gender equality, and that it poses a threat to national security. The argument for the freedom to wear the burqa aligns with the obligation to preserve and protect multi-culturalism and a belief that dress choice is a fundamental human right. Feminists urging gender equality and respect for human rights are divided, some regard the burqa as a vile manifestation of brutal patriarchy arguing that the pursuit of gender equality trumps any other individual rights such that its prohibition is justified. Others contend that whatever the burqa may represent the state has no right to interfere with individual rights. The majority (fifteen votes to two) judgment, in the case of *SAS v France*,³ held that the objective of “living together” and the overriding need for effective social communication rendered the prohibition necessary, and ruled that the French prohibition on the burqa in public places fell within the margin of appreciation and therefore was not in breach of European Convention on Human Rights (ECHR). They declared unanimously, the complaints, concerning Articles 8, 9 and 10 of the Convention, taken separately and together with Article 14 of the Convention, admissible and the remainder of the application inadmissible; and held by fifteen votes to two, that there had been no violation of Article 8 of the Convention; by fifteen votes to two, that there had been no violation of Article 9 of the Convention; unanimously, that there had been no violation of Article 14 of the Convention taken together with Article 8 or with Article 9 of the Convention; and unanimously, that no separate issue arises under Article 10 of the Convention, taken separately or together with Article 14 of the Convention. The two dissentient judges, Judges Nussberger and Jäderblom, contended that the social objective of tolerance within a democratic society protected and of necessity embraced the right to wear the burqa irrespective of its intrinsic meaning for the individual concerned.

³ *SAS v France* Application no 43835/11 (Unreported, ECHR 1 July 2014) Grand Chamber.

THE LEGAL BACKGROUND - THE FRENCH LAW

In October 2010, the French Parliament introduced a law, No 2010-1192, to “prohibit the act of aiming to conceal the face in public” (Nul ne peut, dans l’espace public, porter une tenue destinée à dissimuler son visage). The law came into force on 11 April 2011.

“Article 1 – No one shall, in any public space, wear clothing designed to conceal the face. Article 2 (I) – For the purposes of the application of Section 1, the public space shall be composed of the public highway and premises open to the public or used for the provision of a public service. (II) – The prohibition set forth in Section 1 herein above shall not apply if such clothing is prescribed or authorised by legislative or regulatory provisions, is authorised to protect the anonymity of the person concerned, is justified for health reasons or on professional grounds, or is part of sporting, artistic or traditional festivities or events. Article 3 – Failure to comply with the prohibition set forth in Section 1 shall be punishable by the fine envisaged for offences of the second category. The duty to attend a citizenship course as referred to in 8 of Article 131-16 of the Penal Code may be ordered at the same time as, or in lieu of, the payment of a fine. Article 4 – Whosoever shall, by means of threats, duress or constraint, undue influence or misuse of authority, compel another person, by reason of the sex of said person, to conceal their face shall be liable to a punishment of one year’s imprisonment and a fine of €30,000. When the offence is committed against a minor, the punishment shall be increased to two years’ imprisonment and a fine of €60,000.”

A similar prohibition was introduced in Belgium. On 28 April 2011, Art 563 bis of the Belgian Criminal Code established that persons, “Will be punished with a fine of 15 to 25 Euro and/or detention of 1 to 7 days, those who, except for contrary legal provisions, are present in places that are accessible to the public with their faces completely or partially covered or hidden, such as not to be recognisable.”

Women in France who wished to wear the burqa, including those who considered the prohibition an affront to personal freedom, protested and several women who wished to wear the burqa refused to comply with the law. Since the passing of this law, whilst precise figures are difficult to establish, it is estimated that over 500 women have been prosecuted across France with

some women mounting challenges under the ECHR.⁴ Hind Ahmas was one such litigant, who when stopped by police said she was willing to confirm her identity but refused to remove her face veil. She was brought before the Tribunal de Grande Instance (Court of First instance for civil and criminal matters) and sentenced to a 15 day citizenship course.⁵ She appealed the decision, to the Cour de Cassation in pursuance of exhausting domestic remedies (a requirement of Art 35(1) of the ECHR). The Ahmas case (no 12-808091) was referred to in the judgment of SAS.

“The Court of Cassation was called upon to examine an appeal on points of law (no 12-808091) against a judgment of the Community Court of Paris, dated 12 December 2011, in which a woman had been ordered to follow a two-week citizenship course for wearing the full-face veil with the aim of protesting against the Law of 11 October 2010 in the context of a demonstration for that purpose outside the Elysée Palace. Examining the arguments submitted by the appellants under Article 9 of the Convention, the Criminal Division found as follows on 5 March 2013:

‘..whilst the Community Court was wrong to disregard the religious reasons for the impugned demonstration, the judgment should not be overruled in so far as, although Article 9 of the Convention ... guarantees the exercise of freedom of thought, conscience and religion, paragraph 2 thereof stipulates that this freedom is 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; ... this is the case for the Law prohibiting the full covering of the face in public places, as it seeks to protect public order and safety by requiring everyone who enters a public place to show their face; ...’⁶

⁴ See for example, Alison Hird, ‘One Year of France’s Burqa Bans Yields 20 Fines and No Men Prosecuted’ (*RFI*, 11 April 2012)

<<http://www.english.rfi.fr/france/20120411-one-year-frances-burka-ban-yields-20-fines-and-no-men-prosecuted>> accessed 10 August 2014. See also the case of Cassandra Belin, AFP, ‘Woman Convicted for Wearing Burqa in France’ (*Dawn*, 8 January 2014) <<http://www.dawn.com/news/1079182>> accessed 10 August 2014>

⁵ See Angelique Chrisafis, ‘France’s Burqa Ban: Woman are ‘Effectively under House Arrest’’ (*The Guardian*, 19 September 2011)

<<http://www.theguardian.com/world/2011/sep/19/battle-for-the-burqa>>.

⁶ SAS (n 3) [34].

THE CASE FOR SAS BEFORE THE ECtHR

SAS is a 24 year old French citizen originally from Pakistan, and a (Sunni) Muslim. She said that she wished to wear the burqa in public. She refuted the French Government's several arguments that the burqa prohibition had the legitimate aim of public safety; that for women to cover their faces was incompatible with the principle of gender equality; and that women who wore the burqa were either forced to do so, or did so in order to proselytise others. In contradistinction, she contended that wearing the burqa was instead a mark of women's emancipation, self-assertion and essentially participation in society. She submitted that as a devout believer her faith was an essential element of her life and asserted that "a truly free society was one which could accommodate a wide variety of beliefs, tastes, pursuits, customs and codes of conduct, and that it was not for the State to determine the validity of religious beliefs."⁷ She alleged a violation of Articles 3, 8, 9, 10 and 11, of the ECHR, taken separately, and together with Article 14.

It may be helpful to rehearse the substance of these Articles. Article 3 of the Convention, states: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment." It was, she contended, degrading for her to be required to remove the veil in public places and as such that article had been or would be violated. She contended a breach of Article 8 which states: "1. Everyone has the right to respect for his private and family life, his home and his correspondence." She claimed that her right to religious belief and manifestation of that belief under Article 9 had been infringed. "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." Article 10 which secured the right to speech asserts. "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority" she claimed had also been violated as had Article 11 the right to assembly. She argued that wearing the burqa was an aspect of her right to speech and that in prohibiting her from wearing a burqa in public she was prevented from association with others. Article 14 of the Convention was also violated, she contended: "The enjoyment of the rights and freedoms set forth in [the] 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."

⁷ Ibid [78].

Her case was considered in public on 27 November 2013, significantly, she was represented by United Kingdom lawyers, and six third party interveners were joined marking the importance that this case had generated within the human rights community across Europe. The Belgian Government was the only intervener expressing support for the ban pointing out that a law prohibiting the wearing of any “clothing entirely or substantially concealing the face” had also been passed in Belgium. The remaining five interveners all opposed the ban, albeit presenting slightly different arguments. Amnesty International submitted, “In the third party’s submission it is an expression of gender-based and religion-based stereotyping to assume that women who wear certain forms of dress do so only under coercion; ending discrimination would require a far more nuanced approach.”⁸ ARTICLE 19 submitted that the rights protected under the ECHR did not support general prohibitions on covering the face in public and expressed the concern that such a ban may lead to, “confinement of the women concerned in the home,” and “their exclusion from public life and marginalisation”⁹ and might “expose Muslim women to physical violence and verbal attacks.”¹⁰ The Human Rights Centre of Ghent University was concerned that such a ban would result in the targeting of such woman and to negative stereotyping.¹¹ Liberty also shared this concern.¹² The Open Society Justice Initiative considered that there was no consensus on the issue in Europe and that blanket bans were disproportionate.¹³

Admissibility

Legal argument was heard with regard to whether the claim of SAS was admissible (see also *Er and Ors v Turkey*)¹⁴ and (1) whether she had exhausted her remedies in the domestic courts under the principle of subsidiarity as is required under Art 35(1) (see *Varnarva and Others v Turkey*,¹⁵ and (2) whether she was in fact a victim (see *Ouardiri v Switzerland and Ligue des musulmans de Suisse v Switzerland*).¹⁶

⁸ Ibid [91].

⁹ Ibid [92-3].

¹⁰ Ibid [93].

¹¹ Ibid [95].

¹² Ibid [99].

¹³ Ibid [102].

¹⁴ Application no 23016/04 (ECHR 31 July 2012) Grand Chamber.

¹⁵ Application nos 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90 (ECHR 18 September 2009) Grand Chamber.

¹⁶ Application no 65840/09 and 66274/09 2009 (ECHR 28 June 2011) ‘the minarets case’.

CASE COMMENTARY

“The Government argued that, in the absence of any domestic proceedings, the application should be declared inadmissible for failure to exhaust domestic remedies. The ECtHR did not agree and held the application to be admissible since there was no evidence leading the Court to draw the conclusion that, the applicants conduct, had hindered the proper functioning of the Court.”¹⁷

The interpretation of these two requirements has been well rehearsed by the European Court of Human Rights (ECtHR). The French government contended that the *SAS* case was an abuse of an individual application, and under Article 35(3)(a) made an application to the Court for a declaration of inadmissibility. Further, the French government described her application as containing:

“...a totally disembodied argument, lodged on the very day the prohibition on concealing the face in public came into force by an applicant who ha[d] not been the subject of domestic proceedings and of whom nothing [was] known, except what she [had] seen fit to say about her religious opinions and about her uncertain way of expressing them in her behaviour.”¹⁸

They also noted impliedly disapprovingly that further applications had also been made by the United Kingdom lawyers who were representing the applicant. Notwithstanding this criticism the Grand Chamber of the ECtHR concluded that her application amounted to an *actio popularis*, that is to say an action brought by a member of the public on a point of public order. The Court concluded that victim status is not the exclusive preserve of those whose rights have already been breached but as case law demonstrates may also include putative or potential victims.¹⁹

THIN AND VEILED - THE COURTS REASONING

On the side of the applicant, the Court accepted that the drafting of the French law may have “upset” some sections of the Muslim community and recognised as valid the concerns that the ban may give rise to Islamophobia but rejected the argument of the Government that the ban was necessary for

¹⁷ *SAS* (n 3) [59].

¹⁸ *Ibid* [62].

¹⁹ *Ibid* [53]. See *Dudgeon v the United Kingdom* Application no 7525/76 (22 October 1981) Series A no 45, Court Plenary, *Norris v Ireland* Application no 10581/83 (26 October 1988) Series A no 142, Court Plenary, and *Modinos v Cyprus* Application no 15070/89 (22 April 1993) Series A no 259. Court Chamber.

public security.²⁰ The Court accepted that there had been, an “interference” with or a “limitation” of the exercise of the applicant’s rights protected by Articles 8 and 9 of the Convention²¹ and gave what it described as a “detailed examination” of whether the aim was legitimate.²² In considering this the Court took into account the arguments concerning the need to see the face in social interaction and said this:

“The Court is therefore able to accept that the barrier raised against others by a veil concealing the face is perceived by the respondent State as breaching the right of others to live in a space of socialisation which makes living together easier. That being said, in view of the flexibility of the notion of ‘living together’ and the resulting risk of abuse, the Court must engage in a careful examination of the necessity of the impugned limitation.”²³

When considering the obligation of furthering the objective of “living together” it said this:

“Consequently, having regard in particular to the breadth of the margin of appreciation afforded to the respondent State in the present case, the Court finds that the ban imposed by the Law of 11 October 2010 can be regarded as proportionate to the aim pursued, namely the preservation of the conditions of ‘living together’ as an element of the ‘protection of the rights and freedoms of others.’”²⁴

However, at the same time the Court said that “Pluralism, tolerance and broadmindedness are hallmarks of a ‘democratic society’”²⁵! Partly dissenting opinion was offered by Judges Nussberger and Jäderblom who both doubted whether the ban pursued a legitimate aim, and declared it unnecessary in a democratic society, arguing that the alleged fears about the burqa were created by the philosophy attaching to dress codes and its symbolic meaning.²⁶ They said:

²⁰ SAS [148], [149] and [139] respectively.

²¹ Ibid [110].

²² Ibid [114].

²³ Ibid [122].

²⁴ Ibid [157].

²⁵ Ibid [128].

²⁶ Ibid [6].

CASE COMMENTARY

“Nevertheless, we cannot share the opinion of the majority as, in our view, it sacrifices concrete individual rights guaranteed by the Convention to abstract principles. It is doubtful that the blanket ban on wearing a full-face veil in public pursues a legitimate aim (B). In any event, such a far-reaching prohibition, touching upon the right to one’s own cultural and religious identity, is not necessary in a democratic society (C). Therefore we come to the conclusion that there has been a violation of Articles 8 and 9 of the Convention (D).”²⁷

COMMENTARY

This of course may be the first case where the question of criminalisation of the burqa has come before the ECtHR, but domestic case law across several jurisdictions has frequently considered whether the burqa may be worn by school pupils,²⁸ or teachers²⁹ and more recently whether the burqa may be worn in court,³⁰ as well as women fleeing from the imposition of the burqa³¹ and also those fleeing to the United Kingdom so they may wear the burqa.³²

Tolerance and shock in dissent

Judges Nussberger and Jäderblom asserted that even if the French governments interpretation of the burqa was correct “...there is no right not to be shocked or provoked by different models of cultural or religious identity, even those that are very distant from the traditional French and European life-style”³³ since, as the Court has previously conceded, the Convention protects not only those opinions “that are favourably received or regarded as

²⁷ Ibid [A2].

²⁸ See *X v Y School* [2007] EWHC 298 (Admin), [2008] 1 All ER 249.

²⁹ *Azmi (Appellant) v Kirklees Metropolitan Borough Council (respondent)* [2007] IRLR 484.

³⁰ In Canada see *R v NS* [2012] SCC 72 (CanLII), in the United Kingdom see *R v D (R)* [2013] Eq. L.R. 1034, [2014] 1 LRC 629. See also *AAN (Veil)* [2014] UKUT 00102 (IAC). See also commentaries on these cases for example, Susan Edwards, ‘Proscribing Unveiling: Law - a Chimera and an Instrument in the Political Agenda’ in Eva Brems (ed), *The Experiences of Face Veil Wearers in Europe and the Law* (Cambridge University Press 2014) 278-297.

³¹ *R (On the Application of Shakeel) v Secretary of State for the Home Department* [2012] EWHC 1169 (A), CO/4528/2010.

³² *R (on the application of Baradaran) v Secretary of State for the Home Department*, Court of Appeal (Civil Division) 24 June 2014 [2014] EWCA Civ 854; (2014) 164 (7613) NLJ 18; Times, July 15, 2014.

³³ *SAS* [B7].

inoffensive or as a matter of indifference, but also ... those that offend, shock or disturb” (see *Mouvement Raëlien Suisse v Switzerland* [GC],³⁴ and *Stoll v Switzerland* [GC]).³⁵ In this sense the dissentient judgments return us to the Court in *Handyside v the United Kingdom*³⁶ which held that information and ideas which “offend, shock or disturb the State or any sector of the population” must be allowed to circulate in order to safeguard the “pluralism, tolerance and broad-mindedness without which there is no democratic society.” Furthermore, elsewhere the Court has held:

“Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position.”³⁷

However the spirit of tolerance, pluralism and promotion of multi-culturalism did not result in the Court’s refusal to uphold the ban. In an anti-pluralist stance the burqa ban has sought to eradicate a source of tension or difference within French society. The French ban and the opinion of the ECtHR sends out the message that matters of interest and habit that may characterise a minority, where disapproved of by the majority, will in fact not be tolerated but simply eradicated and erased and extinguished.

Proscribing “Living together”

The central precept in the French government’s reasoning was at least for the Court a new concept of “living together”. Surprisingly, neither the French government nor the Court really had much to say on this concept albeit that it became the guiding justification for the ban. Certainly the Court spent much time reviewing other arguments and justifications for previous Strasbourg jurisprudence in which the Court had upheld state bans on religious dress, but such discussions lent nothing to clarifying the central justificatory concept of “living together.” It did however assist in examining how the margin of appreciation had been applied in such cases.

“However, for their part, the Government indicated that it was a question of responding to a practice that the State deemed

³⁴ Application no 16354/06 (ECHR, 13 July 2012) 48.

³⁵ Application no 69698/01 (ECHR, 10 December 2007) 101.

³⁶ Application no 5493/72 (7 December 1976) Series A no 24, 49.

³⁷ *Young, James and Webster v the United Kingdom* Application no 7601/76, 7806/77 (13 August 1981) 63.

CASE COMMENTARY

incompatible, in French society, with the ground rules of social communication and more broadly the requirements of ‘living together’. From that perspective, the respondent State is seeking to protect a principle of interaction between individuals, which in its view is essential for the expression not only of pluralism, but also of tolerance and broadmindedness without which there is no democratic society (see paragraph 128 above). It can thus be said that the question whether or not it should be permitted to wear the full-face veil in public places constitutes a choice of society.”³⁸

The concept of “living together” finds a place in a document published by the Council of Europe on the media³⁹ but not in the Strasbourg jurisprudence. The new concept of “living together” whatever this means is insufficiently defined thus permitting an extremely wide interpretation.

If the French government accorded such a central place to banning the burqa in the pursuance of the objective of “living together” the reality on the ground is in fact the reverse across Europe where whilst some very different communities do indeed live together, many prefer to live apart. Looking to the experience of the United Kingdom as an example, it is certainly true that a diversity of groups are now practising and declaring their faith in a way that would simply not have been possible in the United Kingdom’s avowedly Christian country of the 1970’s. Mirza, Senthilkumaran and Ja’far in research published by the Policy Exchange found that many British born Muslims in a search for community and identity are turning to Islam.⁴⁰ In London’s Southall 83% of the community are ethnic minorities largely originating from the Asian Subcontinent.⁴¹ Elsewhere, the Haredi Jewish Community of Stamford Hill in North London (Haredi means “fearful,”) are in fact 90% of the community. In furtherance of their Haredic faith in 2003 the local council permitted an “eruv” - which is a symbolic enclosure or symbolic walled city within which religious observances must be kept. It has a boundary 11 miles long and encloses an area of 6.5 square miles covering Hendon, Golders Green and Hampstead Garden Suburb, together with parts of Child’s Hill, Cricklewood, East Finchley, Finchley and Mill Hill. Clearly some communities prefer to live apart and practice their faith within their

³⁸ SAS (n 3) [153].

³⁹ See *Living Together*, Yasha Lange (ed), (Council of Europe, April 2009) <http://www.coe.int/t/dghl/standardsetting/media/doc/livingtogether_en.pdf>.

⁴⁰ Munira Mirza, Abi Senthilkumaran and Zein Ja’far, *Living Apart Together: British Muslims and the paradox of multiculturalism*, (Policy Exchange 2007).

⁴¹ See <http://www.visitsouthall.co.uk/Local_Info/southall_middlesex.php>.

communities. Bikhu Parekh⁴² observes that if some cultures wish to live within their own communities we should respect them for that. And the dissenting judgments in SAS echo this: “Furthermore, it can hardly be argued that an individual has a right to enter into contact with other people, in public places, against their will. While communication is admittedly essential for life in society, the right to respect for private life also comprises the right not to communicate and not to enter into contact with others in public places – the right to be an outsider.”⁴³

France - a land of intolerance

Parekh argues that at the heart of multi-cultural society lies the requirement of tolerance.⁴⁴ Therefore we should tolerate living together in diversity and also living apart. Over the past three years we have witnessed European leaders expressing a view that prioritises the host state above those of minorities.⁴⁵ Where is tolerance then in the decision of the Court or indeed in French society and government policy? In the language of the Universal Declaration on Human Rights, the opening clause of its preamble, upholds and affirms human dignity: “Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.” Article 1 recognises that, “All human beings are born free and equal in dignity and rights.” It also states that “8....tolerance and respect for the equal dignity of all human beings constitute the foundations of a democratic, pluralistic society” (see *Gündüz v Turkey*).⁴⁶ Tolerance however is something that French society has decided to set aside in favour of an enforced “living together” but in accordance with the dominant norms of French society. This enforced “living together” is nuanced in such a way that there are disturbing echoes of France’s colonialist past where the forcible unveiling of Algerian women in a claim to liberate them at the same time allowed the ulterior motive of domination and conquer to burgeon. Again the assault on the Arab female body is more about alterity cast in a paternalistic benevolent feigned motive and desire to live together, when the reality is to enforce the subaltern under and beneath.

⁴² Bikhu Parekh, *Rethinking Multiculturalism: Cultural Diversity and Political Theory* (Harvard University Press, 2000).

⁴³ SAS n 3 [8].

⁴⁴ Parekh n 42 168.

⁴⁵ Rimvydas Ragauskas, 'Paradox of Multiculturalism: Tolerance for the Intolerant?' (*GeoPolitika*, 10 September 2012) accessed on <<http://euromdialogue.eu/Paradox-Of-Multiculturalism-Tolerance-For-The-Intolerant>>.

⁴⁶ Application no 35071/97 (14 June 2004) 40.

CASE COMMENTARY

The French path to this “living together” has been one of cultural genocide where anxiety about “the other” has resulted in oppression, domination and enforced assimilation. The history of France’s treatment of “the other” has been marked by intolerance. As far back as 1925, *Les Cahiers du Mois* sent out a questionnaire to its readership in which it explored, with over a 100 questions, its perceptions of “the Orient”, including questions which addressed the concern that the Orient was a dangerous place.⁴⁷ The Court was eager to be seen to promoting harmony.

“The Court reiterates that remarks which constitute a general, vehement attack on a religious or ethnic group are incompatible with the values of tolerance, social peace and non-discrimination which underlie the Convention and do not fall within the right to freedom of expression that it protects (see, among other authorities, *Norwood v the United Kingdom* (dec), no 23131/03, ECHR 2004-XI, and *Ivanov v Russia* (dec), no 35222/04, 20 February 2007).”⁴⁸

Fuelling intolerance

So what about the arguments advanced by four of the interveners that the ban would actually increase the problem of Islamophobia and what about the Courts acceptance that this would indeed be the effect of such a ban? Clearly the decision reflects the assimilationist thrust of France. Parekh argues that societies and cultures are also moral systems and society needs to show that diversity whatever that may be, provided it does not harm others, is justified and to be defended.⁴⁹ Indeed, there is much evidence that hate crimes against women wearing burqas are becoming increasingly prevalent. It was also emphasised by the Court “that a State which enters into a legislative process of this kind takes the risk of contributing to the promulgation of stereotypes and intolerance, when it has a duty, to promote tolerance.”⁵⁰

Certainly data from the *Criminal Statistics England and Wales* for 2011/12 and 2012/13,⁵¹ estimated an average of 70,000 incidents of

⁴⁷ Nathaniel Berman, ‘The Appeals of the Orient: Colonized Desire and the War of the Riff’ in Karen Knop (ed), *Gender and Human Rights* (Oxford University Press 2004) 194.

⁴⁸ SAS n 3 [149].

⁴⁹ Parekh (n 42) 166.

⁵⁰ SAS n 3 [149].

⁵¹ See *An Overview of Hate Crime in England and Wales* (Home Office, Office for National Statistics and Ministry of Justice December 2013)

<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/266358/hate-crime-2013.pdf> accessed 12 August 2014.

religiously motivated hate crime annually⁵² with Muslim adults the most likely to be a victim of religiously motivated hate crime.⁵³ In 2012/13, the police recorded 1,573 religious hate crimes, around one-quarter (24%) of religious hate crimes were recorded by the police as violence against the person and of these violent crimes, 64 per cent involved injury.⁵⁴

Refugees fleeing from intolerance

France will become an increasingly inhospitable place for women who wish to wear the burqa. Already applications have been made by women for sanctuary in the UK fleeing France because of the criminalisation of those should they wear the burqa. In *B and M v Secretary of State for the Home Department*,⁵⁵ the father and daughter were Iranian nationals and practising Muslims, they arrived in France claiming asylum and later entered the United Kingdom. The question for the Court was whether they should be returned to France as the first country of arrival. They contended that they could not return to France because of the burqa ban already in force. The Secretary of State responded by refusing the third country claim. B and M appealed on the basis that the decision to remove them to France violated their rights under art 8 and art 9 with art 14 of the Convention so that the decision was unlawful, and was made in breach of the Borders, Citizenship and Immigration Act 2009 s 55. They also argued a violation of art 3. The Court of Appeal in *R (on the application of Baradaran) v Secretary of State for the Home Department*⁵⁶ held that their claim under Articles 8, 9 and 14 of the Convention failed since the applicant would be permitted to wear her burqa at home and at places of worship.

The ECtHR in SAS has expressed some anxiety about the French prohibition since such a prohibition creates a climate of exclusion. Indeed, this state sponsored justification for stigmatisation and exclusion permitted by a wide margin of appreciation troubled the Court who recognise the damage that will be done to community relations and ask what mechanisms will be put in place to address the fallout from this ruling.

“In this connection, the Court is very concerned by the indications of some of the third-party interveners to the effect that certain Islamophobia remarks marked the debate which preceded the adoption of the Law of 11 October 2010 (see the observations of the Human

⁵² Ibid Appendix Table 1.01.

⁵³ Ibid Appendix Table 1.14.

⁵⁴ Ibid, Figure 4; Appendix Table 2.03.

⁵⁵ [2013] EWHC 2281 (Admin).

⁵⁶ *R (on the application of Baradaran)* (n 32).

CASE COMMENTARY

Rights Centre of Ghent University and of the non-governmental organisations Liberty and Open Society Justice Initiative, paragraphs 98, 100 and 104 above). It is admittedly not for the Court to rule on whether legislation is desirable in such matters. ...⁵⁷

Notwithstanding their concern, the enormously wide margin of appreciation in this case results in a somewhat troubled ECtHR upholding the ban. France must simply be urged to put in place strategies to prevent the explosion in hate crime that will inevitably follow.⁵⁸

⁵⁷ *SAS* (n 3) [1].

⁵⁸ See the evidence of hate crime related to dress, “‘Maybe we are Hated’”: The Experience and Impact of Anti-Muslim Hate on British Muslim Women’ (University of Birmingham 2013) which found that of hate crimes reported 58% were against women and of those 83% were against women wearing a niqab or hijab. See also Commission on British Muslims and Islamophobia, ‘Islamophobia: A Challenge for us all’ (The Runnymede Trust 1997).