

Niqab, Burka and Giving Evidence in Court

I often get asked by solicitors if their lay clients are permitted to wear a *Niqab* or *Burka* whilst giving evidence in Court.

A *Niqab* is a veil for the face that leaves the area around the eyes clear and worn with an accompanying head scarf. A *Burka* is usually a one piece veil that covers the face and body, often leaving a mesh screen to see through. A *hijab* refers to a headscarf which covers the head and back and leaves the face clear. The *Hijab* does not cause any difficulty as the face can be seen.

The Equal Treatment Bench Book (ETBB) recognises that an issue may arise if the face cannot be seen as a result of wearing a *Niqab* or *Burka* and provides some guidance as to what can be done in a pragmatic way without Judges seeking to resolve any doctrinal conflict as to whether the face veil is mandatory in Islam.

In non-criminal cases a Judge is permitted to ask anyone giving evidence to take off her veil whilst the evidence is being given, BUT only if a fair trial requires it and the Judge reasonably believes it is necessary in the interests of justice. Judges must consider whether effective evidence can be given without removal.

The wearing or otherwise of the veil should be addressed at pre-trial stage and/or at the start of the hearing. A short adjournment and conference before the hearing can often allow the lay client time to reflect and consider their position and seek advice on this issue. Where removal is considered in the interests of justice, a Judge must consider arrangements such as limiting observers in the courtroom and the consideration of giving evidence behind a screen.

Tension arises where the court must balance the right to religion and right to a fair trial. The main objection to wearing a face veil whilst giving evidence is that the witness's credibility cannot be properly assessed without being able to see the witness's face. The Court of Appeal in *SS (Sri Lanka) v Secretary of State for the Home Department [2018] EWCA Civ 1391 [41]* has provided guidance in relation to demeanour of witnesses and what, if any, weight to attach to the impression which may be formed. Leggatt LJ stated:

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No doubt it is impossible, and perhaps undesirable, to ignore altogether the impression created by the demeanour of a witness giving evidence. But to attach any significant weight to such impressions in assessing credibility risks making judgments which at best have no rational basis and at worst reflect conscious or unconscious biases and prejudices. One of the most important qualities expected of a judge is that they will strive to avoid being influenced by personal biases and prejudices in their decision-making. That requires eschewing judgments based on the appearance of a witness or on their tone, manner or other aspects of their behaviour in answering questions. Rather than attempting to assess whether testimony is truthful from the manner in which it is given, the only objective and reliable approach is to focus on the content of the testimony and to consider whether it is consistent with other evidence (including evidence of what the witness has said on other occasions) and with known or probable facts.

This guidance goes some way in assisting the Judiciary in reconciling any conflict as to evidence being given with the *Niqab* or *Burka* on. The most important part of a witness's evidence is the content rather than the manner in which it is conveyed.

Post pandemic case law further assists. It has become the daily diet of practitioners to consider whether a remote hearing is suitable for their clients and the ensuing discussions have resulted in a number of cases that discuss the importance of evaluating content in witness evidence. The Court in *A Local Authority v The Mother & Others* [2020] EWHC 1233 (Fam) [42-43] discusses this:

...the credibility of a witness and the truthfulness of their account in the vast majority of cases is reliant principally upon the evaluation of the content of their evidence rather than the evaluation of their demeanour. That is not to say there may not be rare cases where demeanour may be of some importance, particularly where there is no or little contemporaneous or other evidence which bears upon their account... Thus, the evaluation of the credibility of a witness' account will usually take place against a backdrop where consistency can be judged against earlier accounts, against contemporaneous evidence and against the evidence of others. It is also now well recognised that memory is a fallible instrument. Thus in judging demeanour how does one distinguish between the confident liar, the confident but genuinely mistaken witness and the confident truth teller or alternatively

the hesitant and anxious truth teller, the hesitant and anxious but genuinely mistaken witness and the hesitant and anxious liar?

Emerging case law and circumstances suggest that the ETBB must be revised in light of our post pandemic court sphere. It is still a matter for the trial judge to consider whether evidence can be given whilst wearing a *Niqab* or *Burka* but with the assistance of emerging case law on witness content and a host of civil trials which have been conducted on the telephone and other remote platforms it is hoped that we are all better equipped to deal with witnesses wearing a veil.

Lord Neuberger said some years ago when addressing this issue that judges require an "understanding of different cultural and social habits" and added that "it is necessary to have some understanding as to how people from different cultural, social, religious or other backgrounds think and behave and how they expect others to behave." Thus, if the decision is taken to ask the witness to remove the veil, then it must be done in this vein.

I recently came across an article about Sir John Fielding, Chairman of the Middlesex Magistrates in 1754 and prolific social and penal reformer. His portrait currently hangs in Court 1 at the Supreme Court. He was known as the 'blind beak of bow Street' and could recognise 3000 criminals by the sound of their voices. Sir John was blind and some 268 years ago successfully conducted his duties without the need to view a witness's face.

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