CASE NOTES

- **S.A.S. v France, Joanna Whiteman**

"Vivre ensemble"? S.A.S. v France

European Court of Human Rights, Application No. 43835/11

Joanna Whiteman[1]

The European Court of Human Rights is rightly respected, revered and valued as an institution. Sometimes, however, even our most valued institutions get it wrong. The Court's ruling in *S.A.S. v France* that France's blanket ban of face covering in public complied with its human rights obligations was one such occasion. The decision has received widespread, albeit not universal, criticism amongst human and minority rights organisations and activists. In the author's view, aside from having real and negative consequences for a group of Muslim women, the judgment was an opportunity lost. The time was ripe, especially in light of the ever growing wave of Islamophobia in Europe, for the Court to send a clear message that laws or policies which discriminate against minorities must pass the strictest scrutiny in order to be justified. Instead we have a judgment which not only "abandons" considerations of the proportionality of the ban by giving the state a wide margin of appreciation but, even more concerning, accepts that it is legitimate to restrict a minority religious right in the pursuit of the dubious aim of "living together" as a society.[2] The decision is one of several recent rulings on equality issues in which the Court appears to have given limited consideration to Article 14.

1. Facts

In 2010, after much consideration and debate, France passed a law which prohibited people from concealing their face in public other than in a small number of exempted contexts including sports and festivities. As a consequence, it is unlawful for Muslim women to wear the full-face veil in public in France. The applicant in this case is a French national living in France who describes herself as a devout Muslim. She wears the niqab and burqa (two forms of full-face veil) out of choice, without any pressure, according to her religious faith, culture and personal convictions. In her application to the Court, she claimed that the ban violated a number of her rights under the European Convention on Human Rights (ECHR) including her rights to a private life (Article 8), freedom of religion (Article 9) and freedom from discrimination (Article 14).

1 Joanna Whiteman is Head of Litigation at the Equal Rights Trust. In preparing this case note she has benefitted from the case summary of this judgment published by the Equal Rights Trust on 11 July 2014, which forms the basis for sections 1 and 2 of this note. However, all commentary in this note is the author's own and cannot be taken to represent the views of the Trust. The author would like to thank Jade Glenister, Fawzi Barghouthi, Nicola Whiteman and Amal de Chickera for providing comments on a draft.

2 See Dr Shaheed's comments about the abandonment of the proportionality consideration in his interview with the Equal Rights Trust, *Equal Rights Review,* Vol. 14, 2015.

2. Decision

By a 15–2 majority, the Court held that the law did not violate the ECHR rights of the applicant. The case raised a number of issues. However, of key importance for the Court was whether the restriction that the law placed on the applicant's right to a private life (which includes personal choices as to her appearance as this relates to the expression of her personality) and right to freedom of religion was justified in accordance with Articles 8(2) and 9(2) ECHR. These Articles state respectively that:

> *8(2) There shall be no interference by a public authority with the exercise of [the right to a private life] except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*
>
> *9(2) Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.*

In order to make its determination, the Court focussed in particular on whether any of the state's declared aims were legitimate and fell within Articles 8(2) and 9(2) and on whether the measures where necessary in a democratic society. In its assessment of the first consideration, the Court examined France's four declared aims in passing the legislation, to:

i. protect public safety by making it possible to identify persons, which prevented danger to person and property and combatted identity fraud;
ii. protect the rights and freedoms of others by ensuring "respect for the minimum set of values of an open and democratic society" (le "vivre ensemble") including a need for faces to be shown;
iii. promote gender equality as the requirement to wear a veil in public denies women individuality; and
iv. promote human dignity to which the face veil is an affront as it results in women being "effaced" in public.

The Court rejected the government's purported aims of promoting gender equality and human dignity. In relation to gender equality, the Court did not accept the notion that the state could be promoting gender equality by banning a practice that was, in fact, defended and supported by women. In relation to human dignity, the Court stated that, although the clothing is perceived as strange by many, it is an expression of cultural identity which contributes to pluralism. Moreover, there is no evidence that, by wearing it, women offend the dignity of others. However, the Court accepted that the other two aims legitimately fell within the scope of Article 9(2). The first, protecting public safety, is explicitly referenced in Article 9(2).

With respect to the second, the Court held that an aim of ensuring "the respect for the minimum requirements of life in society" – or everyone "living together" – could, under certain circumstances, be linked with the legitimate aim of the protection of the rights and freedoms of others.

The Court went on to consider whether the ban was necessary in a democratic society in pursuit of the two accepted aims. It reiterated what it saw as the general principles concerning Article 9, which included the need for pluralism, tolerance and broadmindedness in a democratic society. It stated that the ECHR had a subsidiary role and that the direct democratic legitimacy of the national legislature meant the Court would give a wide margin of appreciation to the government when considering whether limitations on the right to manifest one's belief were "necessary".

The Court held that the blanket ban contained in the law could only be considered necessary for the protection of public safety where there was a general threat. This had not been shown to be the case and so the ban was not necessary in pursuit of the aim of public safety. However, applying a wide margin of appreciation, the Court accepted that the state may find it essential to give weight to interaction between individuals and "may consider this to be adversely affected" by people concealing their faces in public. France saw the protection of such interaction as being fundamental to pluralism, tolerance and broadmindedness and so the Court had a duty of restraint. Accordingly, the law fell within the restrictions permitted under the ECHR and there was no violation of Articles 8 or 9.

Disappointingly (for reasons discussed below), the Court's judgment focussed on the case as being one which required detailed examination from the perspectives on Article 8 and 9 taken alone but not also in conjunction with the Article 14 right to freedom from discrimination. The majority judgment's assessment of Article 14 was limited to a brief paragraph in which it noted that, although the ban could be seen as discriminatory given that the applicant "as a Muslim woman who for religious reasons wishes to wear the full-face veil in public" was "particularly exposed" to the ban in question and the sanctions which follow from a violation, this was not the case as the ban had an objective and reasonable justification for the reasons given during its consideration of Articles 8 and 9.

Judges Nussberger and Jäderblom delivered a joint partially dissenting opinion, in which they doubted that the concept of "living together" was a legitimate aim. They made some compelling arguments. The concept of "living together" was, they said, "far-fetched and vague".[3] It was unclear what rights of others were infringed by the law – it could "hardly be argued that an individual has a right to enter into contact with other people, in public places, against their will".[4] In any case, it was difficult to argue that any rights of others outweighed the interference with the rights of those like the applicant. The judges accepted that the state

3 Joint partly dissenting opinion of Judges Nussberger and Jäderblom, Para 5.

4 *Ibid.,* Para 8.

must ensure tolerance but felt that "the blanket ban could be interpreted as a sign of selective pluralism and restricted tolerance".[5] They continued:

> *[B]y banning the full-face veil, the French legislature has done the opposite [to ensuring tolerance]. It has not sought to ensure tolerance between the vast majority and the small minority, but has prohibited what is seen as a cause of tension.*[6]

Further, the dissenting judges did not agree with the majority that the state should be given a wide margin of appreciation. Among other things, in reaching that conclusion, they cited the broad consensus across member states, 45 out of 47 of which do not have such a ban. They also noted the significantly adverse consequences of the law for the affected women and their concern that the government had provided no explanation why less intrusive measures would not have sufficed. However, disappointingly, the judges did not dissent on the question of a violation of Article 14 taken together with Article 8 or 9 of the Convention and gave no explanation for this in their judgment.

3. Comment

At its heart, this is a case about discrimination. Not, as the French government would have us believe, a case about legislating to protect women from discrimination. But rather a case about a state's discrimination against women members of a religious minority: Muslims in France.

Equality and non-discrimination recognise and indeed celebrate that human beings are different from each other; with different personalities, desires and identities. The right to equality requires that every member of this diverse population is respected equally and has an equal opportunity to participate in society. Gone are the days of pursuing "formal equality" – treating everyone the same. We now recognise the importance of "substantive equality" and the need to address any disparate impacts on different groups of the majority-defined structures in our society. Crucially, equality is not achieved by the majority dictating its terms. It demands that all voices are represented, with a particular focus on ensuring that the most marginalised are heard. In the author's view, France's ban on face covering falls far short of these equality standards.

The facts in the case and the government's purported justifications for the ban raise a number of concerns from a discrimination perspective. Each concern raises questions about the nature of equality which demand detailed exploration. This Note only skims the surface of three of them.

Firstly, a closer look at the legislative history of the law illuminates the real motivation behind it. From the outset, there appears to have been a particular focus on fears of "Islamic

5 *Ibid.*, Para 14.

6 *Ibid.*, Para 14.

extremism" and "terrorism". On the whole this focus is largely borne out of fear and prejudice rather than fact. The initial proposal for a law banning the full-face veil was rejected after expert opinions given to the government indicated that this was likely to breach human rights law. It was only after this advice that the law was expanded to cover all face-covering in public, with a handful of exceptions. The discrimination and prejudice which fuels the narrative of Islamophobia has been much discussed.[7] And yet the signs of discriminatory motivation in the legislative history were not discussed by the Court. Indeed, in reaching its decision, the Court judgment emphasised that the law did not "expressly" refer to the full-face veil. In Europe we are constantly dealing with governments presenting approaches to "tackling extremism" which discriminate against the Muslim minority and we need to be ready to deconstruct these arguments and shine a light on their flaws.

A second tell-tale sign of the religious discrimination at the heart of this case is the discussion around gender equality. Given that this note is concerned with the equality dynamic in *S.A.S.*, this discussion demands particular consideration. Much of the debate on the topic of the full-face veil in France, both from within the government and the mainstream media, falls into the dominant discourse that Muslim women need to be "saved" from the subjugation they face at the hands of Islam (or Islamic men).[8] The fixation is often on how Muslim women dress with a presumption made that "just because Muslim women dress in a certain way, they are not agentic (sic) individuals or cannot speak for themselves".[9] Of course, women are used to being told how they should behave, look and dress. It is an unfair and discriminatory pressure which we face on a daily basis in a patriarchal society. As Nussbaum has pointed out, there is a suffusion in society of "other symbols of male supremacy which treat women as objects".[10] Are we "bikini-body ready?"; is it time for plastic surgery; after all our naked bodies are sexual. Arguing that banning the full-face veil is discriminatory does not equate to accepting discrimination faced by women due to patriarchy. Such discrimination is patently unacceptable. But our concern as equality activists should be that the reason the full-face veil is singled out as a unique "problem" to be addressed, is discrimination on grounds of religion. This inconsistency in approach betrays "a fear of the different that is discriminatory and unworthy of a liberal democracy".[11] It is a further example of restricting women's freedom (going so far

7 An interesting starting point is the *Islamophobia Studies Journal*, a collection funded by the Islamophobia Research and Documentation Project, Center for Race and Gender, University of California, Berkeley. See in particular, Grosfoguel, R., "The Multiple Faces of Islamophobia", *Islamophobia Studies Journal,* Vol. 1, Issue 1, 2012, pp. 9–33 and Sayyid, S., "A Measure of Islamophobia", *Islamophobia Studies Journal,* Vol. 2, Issue 1, 2014, pp. 10–25.

8 For a powerful insight into the life of "the Muslim woman"; the "disjuncture" between the author's experiences and public attitudes; and for a compelling critique of the dominant discourse around this "sad" and "subjugated" woman, see Abu-Lughod, L., *Do Muslim Women Need Saving?*, Harvard University Press, 2013.

9 *Ibid,* p. 9.

10 Nussbaum, M., "Veiled Threat?", *The New York Times*, Opinion Pages, 11 July 2010.

11 *Ibid.*

as to criminalise them) and stifling their agency, apparently for their own protection: the antithesis of equality.[12] Most lamentable, the restriction is felt by a particularly marginalised female minority – Muslim women – for whom multiple discrimination on grounds of sex and religious belief is an ever-present reality.

Thirdly and finally, the "problematic",[13] "far-fetched and vague"[14] concept of "living together", interpreted as it is by France, can be seen as a way to maintain structural inequality. Brems has stated that a little deconstruction illuminates the notion of "living together" as a "cover for majority prejudice", allowing, as it does, dominant groups to "claim control over the entire public sphere".[15] Judges Nussberger and Jäderblom were rightly concerned that the ban did not pursue tolerance between the vast majority and a small minority but rather sought to remove tension.[16] The source of tension that the state was seeking to remove from the public sphere resulted from prejudicial stereotype - from Islamophobia. The blanket ban removes the tension by effectively removing any signs of the troublesome minority population from the public space. And as the most easily targeted "sign" is understood to be the full-face veil, it is Muslim women who suffer, feeling torn for reasons of conscience between removing themselves from the public sphere and breaking the law.[17] The right to equality, properly applied, is there precisely to protect minorities from such responses to prejudice. Prejudicial majority views about what is normal and necessary in society must be strictly scrutinised. As Brems explains, this demands that guardians of human rights, such as the European Court of Human Rights, should not "accept (…) philosophical rhetoric" but rather "decent evidenced-based reasoning".[18] Important questions were not asked. For example, what were the evidential bases for the state's conclusion that face-to-face interaction was necessary? And on what basis did the state conclude that this face-to-face interaction was not, however, necessary in the context of sport and festivities? Perhaps as a result, the Court has overlooked the majoritarian dynamic behind the notion of "living together", which is what makes it such a worrying tool for the marginalisation of a visible religious minority.

It is given the centrality of discrimination in the narrative of this case that it is so disappointing for Article 14 not to be central in the Court's judgment and reasoning. This is not

12 A particularly odious example of this common narrative is the suggestion that one way to combat rape is for women not to get drunk. See for example "Police apologise for warning women they could be raped if they got drunk", *The Telegraph,* 3 August 2012, available at: http://www.telegraph.co.uk/news/uknews/law-and-order/9449990/Police-apologise-for-warning-women-they-could-be-raped-if-they-got-drunk.html.

13 See Eva Brems, interview with the Equal Rights Trust, *Equal Rights Review,* Vol. 14, 2015.

14 See above, note 3.

15 See above, note 13.

16 See above, note 3.

17 Judges Nussberger and Jäderblom noted that "ample evidence" of this dilemma was provided to the Court in *S.A.S.*, above, note 3, Para 21.

18 See above, note 13.

the first time that the Court has opted not to consider an equality case first and foremost from the perspective of Article 14.[19] The right to non-discrimination contained in Article 14 is of critical importance as it is a right, in particular, for disadvantaged individuals who are usually situated at the margins of society. It is critical, in scenarios such as those in *S.A.S.*, that we remain focussed on the minority status of the affected applicants. An Article 14 analysis can illuminate important aspects of why the law in question is what it is but also what its specific effects are and for whom. Most crucially, if properly applied, Article 14 ensures that we hold governments to the highest evidential standards when they take actions or pass laws which disproportionately impact on a minority.

19 For a background and discussion of other examples in addition to a tracking of patchy progress see O'Connell, R., "Cinderella comes to the Ball: Article 14 and the right to non-discrimination in the ECHR", *Legal Studies,* 2009, pp. 211–229.