Fatimah bte Sihi & Ors v Meor Atiqulrahman bin Ishak & Ors (minors, suing through Syed Ahmad Johari bin Syed Mohd)

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO 01–76 OF 1999
GOPAL SRI RAM, ABDUL AZIZ AND MOHD GHAZALI JJCA
11 DECEMBER 2004

Constitutional Law — Fundamental liberties — Freedom of religion — Right to wear serban in school — Whether an integral part of religion of Islam — Whether sufficient evidence adduced to justify such an act — Refusal by school principal to allow students to wear a serban in school — Students expelled after insisting to do so — Whether a violation of right to profess and practise religion of Islam — School uniform — Appropriateness — Whether a matter within discretion of educational institution —Federal Constitution Art 11

Administrative Law — Exercise of administrative powers — Disciplinary action — Refusal by school principal to allow students to wear a serban in school — Students expelled after insisting to do so — Whether a violation of right to profess and practise religion of Islam — School uniform — Appropriateness — Whether a matter within discretion of educational institution

The first appellant was the principal of a public school attended by the three respondents. She had disallowed the respondents from coming to school dressed in a serban. When the respondents insisted, she expelled them. Dissatisfied, the respondents commenced an action against the appellants, seeking to restore their status as pupils of the said school. They contended that as Muslims, their fundamental right of freedom of religion guaranteed by Art 11(1) of the Federal Constitution had been infringed because they had been prevented from entering school wearing a serban which is part of their religious right. The High Court judge allowed the respondents' application. Hence, this appeal by the appellants.

The main issue before this court was whether the right to wear a serban is an integral part of the religion of Islam.

Held, allowing the appeal:

(1) Whether the wearing of a serban forms an integral part of the religion of Islam involves a question of evidence and it was for the respondents to adduce sufficient relevant admissible material to prove that the wearing of a serban was mandatory in Islam. This, they failed to do. However, it was in evidence that merely, it was permissible for a male Muslim to wear a serban (see paras 10–11).

(2) At common law, every educational institution is entitled to prescribe the appropriate uniform that is to be worn by its pupils and maintain discipline. The court is ill-equipped to enter into such issues save where

there is plainly a duty to act fairly and that duty is breached. Each case depends on its own facts and it is neither feasible nor desirable to attempt to lay down any fixed principle that is meant to govern all cases. Where observances as to dress, food, ceremonies and modes of worship are regarded as integral parts of a religion, and these are denied by State action, then and then only could a complaint under Art 11(1) legitimately be made (see paras 12–14).

[**Bahasa Malaysia summary**

Perayu pertama merupakan pengetua sekolah kerajaan yang dihadiri oleh ketiga-tiga responden. Dia telah melarang responden-responden daripada hadir ke sekolah memakai serban. Bilamana responden-responden berkeras untuk berbuat begitu, mereka dibuang sekolah. Terkilan dengan keputusan tersebut, pihak responden telah memulakan tindakan terhadap pihak perayu, dalam usaha mereka untuk mendapatkan kembali status mereka sebagai pelajar sekolah tersebut. Mereka menghujah bahawa sebagai orang Muslim, hak asasi kebebasan agama mereka yang diperuntukkan oleh Art 11(1) Perlembagaan Persekutuan, telah dilanggar oleh sebab mereka telah dihalang daripada memasuki sekolah dengan memakai serban yang merupakan sebahagian daripada hak agama mereka. Hakim Mahkamah Tinggi telah membenarkan permohonan pihak responden. Maka, rayuan ini oleh pihak perayu.

Isu utama di hadapan mahkamah ini adalah sama ada hak untuk memakai serban merupakan suatu keperluan di dalam agama Islam.

Diputuskan, membenarkan rayuan tersebut:

(1) Sama ada pemakaian serban termasuk sebagai suatu aspek yang wajib di dalam agama Islam melibatkan persoalan keterangan dan pihak responden seharusnya memajukan material untuk membuktikan bahawa pemakaian serban adalah mandatori di sisi agama Islam. Ini tidak dibuat oleh mereka. Sebaliknya, terdapat bukti bahawa pemakaian serban oleh seorang lelaki Muslim bukan suatu perkara yang diwajibkan (lihat perenggan 10–11).

(2) Di bawah *common law*, setiap institusi pengajian dibenarkan menentukan pakaian seragam yang sesuai dipakai oleh murid-muridnya dan mengekalkan disiplin. Mahkamah tidak berupaya untuk melibatkan diri di dalam isu-isu tersebut melainkan terdapat kewajipan untuk berlaku secara adil dan kewajipan tersebut dilanggar. Setiap kes bergantung pada faktanya sendiri dan adalah tidak munasabah atau dihasratkan untuk mencuba menetapkan apa-apa prinsip yang merangkumi semua keadaan. Di mana amalan berkenaan dengan pakaian, makanan, adat-istiadat dan cara-cara untuk bersembahyang dianggapkan sebagai keperluan asas sesuatu agama, dan

ia telah dilarang oleh tindakan Kerajaan, maka pada ketika itulah suatu aduan boleh dibuat dengan sah di bawah Art 11(1) (lihat perenggan 12–14).]

Notes

For cases involving expulsion of students from school, see 1 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 745–747

For cases on exercise of administrative powers, see 1 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 28–90

For cases on freedom of religion, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 1257–1263

For freedom of religion, see 2 *Halsbury's Laws of Malaysia* (1999) paras [20.189]–[20.191]

Cases referred to

Commissioner of Police v Acharya Jagadishwaranada Avadhuta [2004] 2 LRI 39 (refd)

Hajjah Halimatussaadiah bte Hj Kamaruddin v Public Services Commission Malaysia & Anor [1994] 3 MLJ 61 (refd)

Javed v State of Haryana AIR 2003 SC 3057 (refd)

Meor Atiqulrahman bin Ishak & Lain-lain lwn Fatimah binti Sihi & Lain-lain [2000] 5 MLJ 375 (overd)

Sardar Syedna Taher Saifuddin Saheb v State of Bombay AIR 1962 SC 853 (refd)

The Commissioner, Hindu Religious Endowments, Madras v Sri Lakshmindra Thirtha Swamiar AIR 1954 S C 282 (refd)

Legislation referred to

Constitution of India [India] Arts 25, 26

Federal Constitution Art 11(1), (4)

Abdul Rahim bin Uda SFC (AG's Chambers) for the appellants

Mohd Hanipa Maidin (Abdullah Abd Karim with him) (Mohamed Hanipa & Associates) for the respondents

Appeal from: Civil Suit No 22–13 of 1998 High Court (Seremban)

Gopal Sri Ram JCA (delivering judgment of the court):

[1] A few words about the parties to this appeal and the dispute between them. The first appellant in this case is the principal of a school. It is the Sekolah Kebangsaan Serting (Felda). The second appellant is the Secretary-General of the Ministry of Education. The third appellant is the Government of Malaysia. The school in question is a public school. It is under the control and administration of the third appellant. The respondents are all pupils at the school. They are Muslims. They wanted to come to school dressed in a serban which is a headgear not usually worn by Muslims in this country. The first

appellant refused to permit the wearing of the serban. The respondents insisted. The principal had no choice. She acted in the only way open to her. She expelled the respondents. I think that she acted properly. And very sensibly. After all, it was a question of discipline.

[2] The respondents were unhappy. They took out a writ against the appellants. They said that their fundamental right of freedom of religion guaranteed by Art 11(1) of the Federal Constitution had been infringed because they had been prevented from entering school wearing a serban which is part of their religious right. The judge agreed with them. He granted them the relief they sought, namely, their restoration as pupils of the school. This appeal is directed against that decision.

[3] The main issue and indeed the only issue canvassed before us — in this appeal is whether a constitutionally guaranteed right under Art 11(1) had been infringed by what the principal did. That Article is in the following terms:

> Every person has the right to profess and practise his religion and, subject to clause (4), to propagate it.

[4] For present purposes, the reference in the Article to cl (4) is not relevant. As I have already said, what is relevant is whether by refusing the respondents permission to attend school wearing a serban, the appellants had violated their "right to profess and practise" the religion of Islam. That would depend on whether the right to wear a serban is an integral part of the religion of Islam. This, in my judgment, is the correct test to apply whenever any person of any religion claims a violation of his Art 11(1) right. I am supported in the view I take by a number of authorities.

[5] The first is *The Commissioner, Hindu Religious Endowments, Madras, v Sri Lakshmindra Thirtha Swamiar* AIR 1954 S C 282 where the Supreme Court of India had to deal with Art 25 which is the Indian equipollent of our Art 11(1) and which confers on a person "freedom of conscience and free profession, practice and propagation of religion". K Mukherjea J who delivered the judgment of an unusually strong Constitution Bench of the Indian Supreme Court said:

> A religion undoubtedly has its basis in a system of belief or doctrines which are regarded by those who profess that religion as conductive to their spiritual well being, but it would not be correct to say that religion is nothing else but a doctrine or belief. A religion may not only lay down a code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship which are regarded *as integral parts of the religion, and these forms and observances might extend even to matters of food and dress.*
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> The guarantee under our Constitution not only protects the freedom of religious opinion but it protects also acts done in pursuance of a religion and this is made clear by the use of the expression 'practice of religion' in Art 25. Latham CJ of the High Court of Australia while dealing with the provision of s 116, Australian Constitution which *inter alia* forbids the Commonwealth to prohibit the 'free exercise

of any religion' made the following weighty observations — *vide Adelaide Company v The Commonwealth* 67 CLR 116 at p 127 (H):

> It is sometimes suggested in discussions on the subject of freedom of religion that, though the civil government should not, interfere with religious 'opinions', it nevertheless may deal as it pleases with any 'acts' which are done in pursuance of religious belief without infringing the principle of freedom of religion. It appears to me to be difficult to maintain this distinction as relevant to the interpretation of S. 116. The Section refers in express terms to the 'exercise' of religion, and therefore it is intended to protect from the operation of any Commonwealth laws acts which are done in the exercise of religion. Thus the Section goes far beyond protecting liberty of opinion. It protects also acts done in pursuance of religious belief as part of religion.
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> (Emphasis added.)

[6] In *Sardar Syedna Taher Saifuddin Saheb v State of Bombay* AIR 1962 SC 853, Das Gupta J when delivering judgment on behalf of himself and, Sarkar and Mudholkar JJ enunciated the two principles governing Arts 25 and 26 of the Indian Constitution. He said:

> The first is that the protection of these articles is not limited to matters of doctrine or belief, they extend also to acts done in pursuance of religion and therefore contain a guarantee for rituals and observances, ceremonies and modes of worship which are integral parts of religion. The second is that what constitutes an essential part of a religion or religious practice has to be decided by the courts with reference to the doctrine of a particular religion and include practices which are regarded by the community as a part of its religion.

[7] I would merely pause to observe that Das Gupta J's second principle is based on a substratum of fact. It requires the court to determine as a fact based purely on relevant and admissible evidence placed before it as to whether the religious practice in question is an integral part of the particular religion.

[8] The next authority is *Javed v State of Haryana* AIR 2003 SC 3057, where RC Lahoti J (now Chief Justice of India), a most learned judge whose judgments are entitled to great respect, also laid down a similar test. His lordship said:

> The meaning of religion — the term as employed in Article 25 — and the nature of protection conferred by Article 25 stands settled by the pronouncement of the Constitution Bench decision in *Dr M Ismail Faruqui and others v Union of India and others* (1994) 6 SCC 360. The protection under Articles 25 and 26 of the Constitution is with respect to religious practice which forms an essential and integral part of the religion. *A practice may be a religious practice but not an essential and integral part of practice of that religion. The latter is not protected by Article 25.* (Emphasis added.)

[9] Very recently in *Commissioner of Police v Acharya Jagadishwaranada Avadhuta* [2004] 2 LRI 39, AR Lakshmanan J (in a judgment delivered on 11 March 2004) said:

> It is only those practices which are integral part of religion that are protected. What would constitute an essential part of the religion or religious practice is to be determined with reference to the doctrine of a particular religion which includes practices which are regarded by the community as part and parcel of that religion. The test that has to be applied by the courts whether a particular religious practice is regarded by the community practicing that particular practice is an integral part of the religion or not. It is also necessary to decide whether the particular practice is religious in character or not and whether the same can be regarded as an integral or essential part of religion which has to be decided based on evidence.

[10] The question then arises as to whether the wearing of a serban is an integral part of the religion of Islam. This, as I have already said, is really a question of evidence and it was for the respondents to adduce sufficient relevant admissible material to prove that that is indeed the case. But there is no such evidence. In *Hajjah Halimatussaadiah bte Hj Kamaruddin v Public Services Commission Malaysia & Anor* [1994] 3 MLJ 61 the Supreme Court has held that the wearing of a *purdah* by a female Muslim was not an integral part of the religion of Islam. This is what Dzaiddin SCJ said:

> It is trite that Art 11(1) of the Constitution guarantees the freedom of religion, where every person has the right to profess and practise his religion. However, such right is not absolute as Art 11(5) provides that this article does not authorize any act contrary to any general law relating to public order, public health or morality. In the context of Service Circular 2 of 1985 prescribing the mode of dress and prohibiting the wearing of an attire covering the face by a lady officer in the public services during work, we are of the opinion that such prohibition does not affect her constitutional right to practise her religion. First, we accept the opinion of Dato' Mufti Wilayah Persekutuan that Islam as a religion does not prohibit a Muslim woman from wearing, nor requires her to wear a *purdah*.

[11] It is pertinent to note that both in *Commissioner of Police v Acharya Jagadishwaranada Avadhuta* and in *Hajjah Halimatussaadiah bte Hj Kamaruddin v Public Services Commission Malaysia & Anor* the court acted on evidence establishing a point of practice of a particular religion. In the present case, the only evidence is that of PW3, Ustaz Abdul Ghani bin Shamsuddin, who testified merely that it was permissible for a male Muslim to wear a serban. There was not a shred of evidence before the learned judge confirming that the wearing of a serban is mandatory in Islam and is therefore an integral part of Islam. Accordingly, the learned judge appears to have acted on his own intuition instead of on the evidence. His decision is therefore vulnerable to appellate correction.

[12] That brings me to the point sought to be made by learned senior federal counsel about the power vested in the appellants to prescribe the appropriate dress code for school-going children under regulations passed for that purpose. I do not propose to go into this argument at any length as the only issue raised before us is that pertaining to the alleged infringement of Art 11. Suffice to say that even in the absence of any such regulations it is my judgment that at common law, every educational institution is entitled to prescribe the appropriate uniform that is to be worn by its pupils.

[13] It is also my judgment that such matters as the appropriate uniform to be worn to school and the maintenance of discipline are best left to the Department of Education and to the individual school principal who has to deal with them on a daily basis. The court is ill-equipped to enter into such issues save where there is plainly a duty to act fairly and that duty is breached. Each case depends on its own facts and it is neither feasible nor desirable to attempt to lay down any fixed principle that is meant to govern all cases.

[14] Where observances as to dress, food, ceremonies and modes of worship are regarded as integral parts of a religion, and these are denied by State action, then and then only can a complaint under Art 11(1) may legitimately be made. The present instance is not such a case. In my judgment, the appellants acted entirely in accordance with the Constitution and the relevant regulations in expelling the respondents. The learned judge was plainly wrong in holding otherwise.

[15] For the reasons already given, this appeal was allowed at the conclusion of arguments on 22 November 2004 and those orders made that are usually made consequent upon a successful appeal.

[16] My learned brothers Abdul Aziz Mohamad and Mohd Ghazali Mohd Yusoff JJCA have seen this judgment in draft and have expressed their agreement with it.

Appeal allowed.

Reported by M Maheswaran