

## Face to Face with the Law: *Moutia Elzahed & Anors v Commonwealth of Australia and State of NSW (2016)*

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This article explores issues in *Moutia Elzahed & Anors v Commonwealth of Australia and State of NSW (2016)*<sup>1</sup> It addresses the clash of rights between an accused and the practice of religion and to give evidence, including the right to confrontation, whether seeing the face of a witness is vital to determining credibility, exceptions to the standardised rules of witness testimony and the debate regarding full-face veils.

In a claim that came before the NSW District Court in 2016, it was alleged that on the night of 18 September 2014, a violent police raid conducted on the home of Ms Moutia Elzahed subjected her to undue assault, battery and persistent humiliation.<sup>2</sup> These allegations were against the AFP and the NSW police department and rested primarily on Ms Elzahed's testimony, which, as is common practice, was expected to be delivered in trial. The plaintiff asked permission to testify wearing her full-face veil.<sup>3</sup> The legal issue was whether a witness may testify while wearing a full-face covering or whether an accused's right to a fair trial would be jeopardised by sanctioning this request.<sup>4</sup> The judge stated as follows:

I must take into account whether I would be impeded in my ability to fully assess the reliability and credibility of the evidence of the first plaintiff if I am not afforded the opportunity of being able to see her face when she gives evidence. I am well aware that the demeanour of a witness and the viewing of their face is not the only way in which credibility is assessed. In some cases the demeanour of a witness may be misleading. However, neither of those considerations can, in my view, mean that I should be completely deprived of having the assistance of seeing her face to assess her credibility.<sup>5</sup>

The plaintiff was offered the option to give evidence in a private room with her face uncovered. This offer was refused by Ms Elzahed on the grounds that

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<sup>1</sup> [2016] NSWDC 353. Hereafter '*Elzahed*'.

<sup>2</sup> *Moutia Elzahed & Anors v Commonwealth of Australia and State of NSW* [2016] NSWDC 327 1, [8].

<sup>3</sup> Renae Barker, 'Niqabs in the Court Room: The Need for Judicial Sensitivity and Imagination (Religion and Ethics)' ABC Radio 5 December 2016, <http://www.abc.net.au/religion/articles/2016/12/05/4587052.htm>. The burqa is the most concealing of all Islamic veils: it is a one-piece veil that covers the face and body, often leaving just a mesh screen to see through. The niqab is a veil for the face that leaves the area around the eyes clear. A hijab is used to describe the headscarves worn by Muslim women. The type most commonly worn in the West covers the head and neck but leaves the face clear.

<sup>4</sup> *Moutia Elzahed & Anors v Commonwealth of Australia and State of NSW* [2016] NSWDC 327 1 [4].

<sup>5</sup> *Moutia Elzahed & Anors v Commonwealth of Australia and State of NSW* [2016] NSWDC 327 1 [6] (Balla DCJ).

male counsel would still view her visage. With options exhausted, the judge held ‘I decline to permit her to give evidence with her face covered’.<sup>6</sup> The accused’s right to a fair trial trumped Ms Elzahed’s request to retain her veil.<sup>78</sup>

This case illuminates a range of issues. While many commentators and pundits were quick to rush to judgement and launch accusations of islamophobia, racism, colonialism and sexism,<sup>9</sup> a more temperate response can nevertheless discern here something of a clash between (at the very least) courtroom protocol and religious observance. Moreover, as shall be shown during this study of *Elzahed*, its ramifications extend to matters of general legal and cultural concern.

### Legal Conformity

Despite the judge’s order in *Elzahed* being subject to scrutiny,<sup>10</sup> it was in line with previous decisions. In a Western Australian Case,<sup>11</sup> a witness known as ‘Tasnim’, like Ms Elzahed, requested to retain her full-face veil while giving evidence.<sup>12</sup> The prosecution argued that the witness would feel extreme stress in removing this item of clothing in public as she had not done so for over 19 years,<sup>13</sup> and that such stress would undermine and devalue her testimony.<sup>14</sup> The defence argued on the other hand that witnesses’ faces must be visible for credibility to be properly assessed. As there was no Australian precedent to be relied upon, the judge turned to other jurisdictions for advice on how to proceed.<sup>15</sup>

The reasoning from the New Zealand case *Police v Razamjoo*<sup>16</sup> was extensively considered. In this case, it was asserted that as Islam does not explicitly require women in the Qur’an to wear a facial covering,<sup>17</sup> women may not avail themselves of human rights protections for religious belief.<sup>18</sup> It was also contended that to allow women to remain veiled during cross-

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<sup>6</sup> Ibid 1 [7].

<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

<sup>9</sup> Ghena Krayem and Helen McCue, ‘The Burqa Ban Call Only Creates Division’, *ABC News* (Sydney), 2 October 2014, 1 [20].

<sup>10</sup> Ibid 1 [19]; Michael Brull, ‘Whose Laws are Archaic? When Standing in Court Matters More than Violence Against Women’, *New Mathilda* (online), 13 December 2016, 1[25]; Ursula Malone, ‘Islamic State Recruiter’s Wife Moutia Elzahed Charged for Refusing to Stand in Court’, *ABC News* (Sydney), 8 May 2017, 1 [9].

<sup>11</sup> *Sayed v The Queen* [2012] WASCA 17.

<sup>12</sup> David Weber, ‘Judge Orders woman to Remove Veil’, *ABC NEWS* (Sydney), 19 August 2010, 1 [2]-[3].

<sup>13</sup> Bonnie Malkin, ‘Australian Court Orders Muslim Witness to Testify without Burka’, *Telegraph* (London, 19 August 2010) 1 [4].

<sup>14</sup> Aja Styles, ‘Death Threats in Burqa Court Case’, *WA News* (Perth, 5 August 2010) [6].

<sup>15</sup> Renae Barker, ‘The Full Face Covering Debate: An Australian Perspective’ (2012) 36(1) *University of Western Australia Law Review* 7.

<sup>16</sup> [2005] DCR 408.

<sup>17</sup> But see, *The Police v Abdul Zohoor Razamjoo* [2005] NZDC CRN 30044039397-8 [110]. It was subsequently held that it is irrelevant whether Islam requires women to wear full-face veils.

<sup>18</sup> David Griffiths, ‘Pluralism and the Law: New Zealand Accommodates the Burqa’ (2006) 11(2) *Otago Law Review* 52.

examination would prevent the defence and the trier of fact from assessing facial expression and hence from establishing an important criterion of reliability.<sup>19</sup> It was stressed that the circumstances of the individual case must be considered to decide if a jury needs see the witness's face. As 'Tasnim' was giving evidence against a man accused of fraud, the judge ultimately concluded that the jury required the assistance of seeing her to assess her credibility.<sup>20</sup> On this basis, 'Tasnim' was prohibited from giving evidence in her full-face veil.<sup>21</sup>

In other common law countries, similar issues have been emerging. In an English case, despite a witness fearing severe intimidation while giving evidence with her face uncovered, it was held that seeing her face was of 'cardinal importance'.<sup>22</sup> In a landmark Canadian case, a victim of repeated sexual assaults was required to remove her full-face veil while testifying against her assailants.<sup>23</sup> Here, the judge asserted that to allow her to testify unveiled would create a 'real and substantial risk' to the rights of the men accused.<sup>24</sup>

### **Justice Covered?**

This article will address the main issue emerging from *Elzahed*. This is the clash of rights between an accused to undertake a sufficient cross-examination of a witness, and the rights of a victim to practice their religion and to give evidence. First, the right to confrontation will be discussed and the exceptions to the standard rules of witness testimony will be outlined. Second, whether seeing the face of a witness is vital to determining credibility will be examined. Third, whether the exceptions to the standardised rules of witness testimony may be extended at the court's discretion to certain Muslim women will be evaluated. This will lead to a discussion of the debate regarding full-face veils, an analysis of the decision in regard to guaranteed human rights and will lead to my recommendations for the future.

#### **(i) The Right to Confrontation**

In *Elzahed* an accused's access to a fair trial was considered vital. The concept of a fair trial includes the English common law principle of the right to confront an adverse witness.<sup>25</sup> This right to confrontation allows the accused to know the identity of their accuser,<sup>26</sup> permits the accused to be present

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<sup>19</sup> David Griffiths, 'There's No Art to Find the Mind's Construction in the Face': Some Thoughts on the Burqa Case in New Zealand' (2005) 1(2) *New Zealand Post Graduate Law E-Journal* 4.

<sup>20</sup> Barker, above n 15, 7.

<sup>21</sup> *Ibid* 9, 2.

<sup>22</sup> Martin Evans and Stevan Swinford, 'Muslim Woman Rebekah Dawson Must Remove Niqab While Giving Evidence, Judge Rules', *Daily Telegraph* (London, 16 September 2013), 1.

<sup>23</sup> Megan O'Toole, 'After Years and a Sharply Divided Supreme Court Decision, Judge Rules Woman Must Remove Niqab to Testify', *National Post* (Toronto, 24 April 2013), 1.

<sup>24</sup> *Ibid*.

<sup>25</sup> *R v Taylor* [1994] TLR 484.

<sup>26</sup> *R v Hughes* [1986] 2 NZLR 129, 148-149 (Richardson J) cited in, David Lusty, 'Anonymous Accusers: An Historical & Comparative Analysis of Secret Witnesses in Criminal Trials' (2002) 17 *Sydney Law Review* 1.

during their testimony and grants the right to test their evidence through cross-examination.<sup>27</sup>

Foundational and crucial claims have been made for this right: Justice Richardson has claimed that it is ‘basic to any civilised notion of a fair trial’;<sup>28</sup> Justice Murphy has described it as ‘a fundamental right to a fair trial’;<sup>29</sup> and pursuant to a leading US case, it is a ‘fundamental human right’.<sup>30</sup>

The right, however, has mainly been conceived as a defendant-centric right, that is, as primarily, if not exclusively, based on ensuring fairness to the defendant.<sup>31</sup> An important, often overlooked, aspect is that it should be also considered from the points of view of the victim, the plaintiff and the wider community.<sup>32</sup> This extension of the fair trial principle that goes beyond the interests of the defendant<sup>33</sup> has been enshrined and protected in numerous international law treaties and conventions.<sup>34</sup>

While the right to confrontation is viewed as fundamental to the administration of justice, nonetheless, courts and legislatures have introduced measures to curtail the right<sup>35</sup> as a response to the growing concern over witness intimidation on national security.<sup>36</sup> Such measures include withholding the identities of prosecution witnesses from the accused, permitting witnesses to testify anonymously and prohibiting cross-examination that may reveal the identities of at-risk witnesses.<sup>37</sup> This allows the so-called ‘vulnerable’ witnesses to provide testimony in a host of different ways to meet their specific needs.<sup>38</sup> These exceptions go against the standardised rules of evidence<sup>39</sup> and have led to the right being circumvented in numerous instances. These cases include ones involving sexual assaults, juveniles, gang murders and undercover police officers.<sup>40</sup> The rationale behind the exceptions frequently tend towards witness protection. For example, children are often offered the option of giving evidence in private through video-link,<sup>41</sup> to reduce trauma,<sup>42</sup> and the New Zealand ‘Jhia murder trial’

<sup>27</sup> David Lusty, ‘Anonymous Accusers: An Historical & Comparative Analysis of Secret Witnesses in Criminal Trials’ (2002) 17 *Sydney Law Review* 2.

<sup>28</sup> *R v Hughes* [1986] 2 NZLR 129, 149 (Richardson J).

<sup>29</sup> *Whitehorn v The Queen* (1983) 152 CLR 657, 661 (Murphy J).

<sup>30</sup> *Pointer v Texas* (1965), 380 US 400, 404.

<sup>31</sup> Phoebe Bowden, Terese Henning and David Plater “Balancing Fairness to Victims, Society and Defendants in the Cross-examination of Vulnerable Witnesses: An impossible Triangulation?” (2014) 37(3) *Melbourne Law Review*, 1.

<sup>32</sup> Christine Eastwood, ‘The Experiences of Child Complainants of Sexual Abuse in the Criminal Justice System’ (Research Report No 205, Australian Institute of Criminology, May 2003) 5, quoting Patricia Eastale, *Less Than Equal: Women and the Australian Legal System* (Butterworths, 2001) 231.

<sup>33</sup> Bowden, Henning and Plater, above n 31, 2.

<sup>34</sup> Eastwood, above n 32, 5, quoting Patricia Eastale, *Balancing the scales: Rape, Law Reform and Australian Culture* (Federation Press, 1998) 206.

<sup>35</sup> Lusty, above n 27, 2.

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*

<sup>38</sup> Australian Law Reform Commission, *Fair Trial*, Report No 127 (2015) 10.

<sup>39</sup> Law Reform Commission of Western Australia, *Evidence of Children and Other Vulnerable Witnesses*, Reform Implementation Report No 87 (2002) 1.

<sup>40</sup> Griffiths, above n 19, 10.

<sup>41</sup> Australian Law Reform Commission, *Children’s Evidence*, Report No 84 (1997) 22.

permitted 22 witnesses to provide evidence anonymously as a response to the threat of gang retaliation.<sup>43</sup>

This shows that fair trial rights can be secured even in circumstances where the defence is unable to see the face of witnesses. While there is the presumption that evidence should be given in an open court, the presumption can - and has been - set aside. This makes it difficult to claim that a state interest or public policy is being served when witnesses like Ms Elzahed are forced to unveil pursuant to the fundamental right to confrontation.<sup>44</sup>

## (ii) Facial Demeanour – Not Necessary?

As emphasised by the judge in *Elzahed*, it is essential for jurors to be able to assess the credibility of a witness.<sup>45</sup> The question is whether an adequate assessment may be made in circumstances where the face of a witness is hidden. Concealing one's face would appear to restrict the capacity of others to assess credibility. This was indeed the opinion of the judge in the previously mentioned New Zealand case, *Police v Razamjoo*.<sup>46</sup> Here, it was held that visual indicators, even those apparently trivial, are important: 'for example, an abrupt change in facial expression, a change from making eye contact to refusing to do so and even a look of downright hatred at counsel'.<sup>47</sup> This furthers the argument of the judge in *Elzahed*, that to give evidence in a full-face veil would breach the accused's right to confrontation and thus their right to a fair trial.<sup>48</sup>

However, the argument that credibility can be determined in part through seeing and then interpreting the facial demeanour of a witness, relies on two assumptions.<sup>49</sup> The first is that the information gained through assessing a witness's facial expressions and demeanour aids in an accurate interpretation of what has been verbally communicated.<sup>50</sup> The second is that those viewing such facial expressions - jurors and judges, most importantly - can accurately and consistently interpret them. Both these assumptions are at best questionable and potentially erroneous.

First, there are many aspects of a person's demeanour which are non-visual yet are equally important and relevant. Such non-visual 'clues' may indeed interfere and counteract facial evidence. The pitch, timbre and perceived quality of the voice, for example.<sup>51</sup> These may intrude upon, assist, augment,

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<sup>42</sup> Eastwood, above n 32, 16.

<sup>43</sup> Phil Reid, 'Secret Witnesses 'Crucial' to Jhia Trial', *The Dominion Post* (Wellington, 31 January 2009) 2.

<sup>44</sup> Griffiths, above n 19, 10.

<sup>45</sup> *Moutia Elzahed & Anors v Commonwealth of Australia and State of NSW* [2016] NSWDC 327, 1.

<sup>46</sup> [2005] DCR 408.

<sup>47</sup> *Police v Razamjoo* [2005] DCR 408, [78] (Judge Moore).

<sup>48</sup> Karl Laird, 'Confronting Religion: Veiled Witnesses, the Right to a Fair Trial and the Supreme Court of Canada's Judgment in *R v N.S.*' (2014) 77(1) *Modern Law Review* 1.

<sup>49</sup> New South Wales Law Reform Commission, *Blind or Deaf Jurors*, Report 114 (2006) 62.

<sup>50</sup> *Ibid* 62.

<sup>51</sup> Royal Blind Society, Submission no 4 to New South Wales Law Reform Commission, *Blind or Deaf Jurors*, February 2004, 62.

contradict or otherwise modify the impression made by a simple, non-voiced expression. This explains the development of the movement seeking to implement 'demeanour warnings' to jury members. Such warnings, it is suggested, would be in place to caution jurors from relying on demeanour when assessing guilt.<sup>52</sup>

The argument against the need to see witness testimony can be further demonstrated by the Parliamentary inquiries to amend the laws restricting the visually impaired from being a juror.<sup>53</sup> At present, there is a broad restriction curtailing persons with 'disabilities' in Schedule 2 of the *Jury Act 1977* (NSW) from being a jury member. While this encompasses the visually impaired, the law has been subject to increasing criticism in recent years. In 2006, the NSW Law Reform Commission published a report recommending amendments to the *Jury Act*.<sup>54</sup> Recommendation 1(a) stated, 'that people who are blind...should be qualified to serve on juries, and not be prevented from doing so on the basis of that physical disability alone'.<sup>55</sup> While these recommendations have not yet amended legislation, the campaign for reform continues.

Second, there is the assumption that facial demeanour can provide ready and reliable clues, and that observers possess the ability to properly interpret the demeanour of a witness. Extensive psychological studies however have concluded that when facial expressions, conduct and demeanour are analysed, they cannot lead to a proper determination of truthfulness from deception.<sup>56</sup> This is because when hazarding a guess of credibility from facial demeanour, humans are both unreliable and inaccurate.<sup>57</sup> Barely two out of three people were able in a 1968 study (since replicated) to detect from the demeanour of a witness whether he or she was telling a lie.<sup>58</sup> The accuracy rate was even lower (at just 57%) when experienced judges were used as the participants in this experiment on truth detection.<sup>59</sup> Policemen and correction officers, notwithstanding their experience and training, scored no better than the average layperson.<sup>60</sup> These findings confirm that there is no such thing as 'a

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<sup>52</sup> Richard Taylor, *At Face Value: Should a Jury Warning About the Risks of Assessing Credibility From Demeanour be Mandatory in Criminal Jury Trials?* (Honours Degree, Victoria University of Wellington, 2014) 17.

<sup>53</sup> Australian Law Reform Commission, *Access to Justice*, Discussion Paper 81 (2014) 6.

<sup>54</sup> *Jury Act 1977* (NSW).

<sup>55</sup> NSW Law Reform Commission, *Blind or Deaf Jurors*, Final Report No 114 (2006) rec 1(a).

<sup>56</sup> Taylor, above n 52, 5.

<sup>57</sup> Olin Wellborn, 'Demeanour' (1991) 76 *Cornell Law Rev* 1075, cited in Griffiths, above n 19, 9.

<sup>58</sup> Norman Maier and Jessica Thurber, 'Accuracy of Judgements of Deception When an Interview is Watched, Heard and Read' (1968) 21(1) *Personnel Psychology* 23, cited in Wellborn, above n 57.

<sup>59</sup> Aldert Vrij and Simon Easton, 'Fact or Fiction? Verbal and Behavioural Clues to Detect Deception' (2002) 70 *Medico-Legal Journal* 29.

<sup>60</sup> Andreas Kapardis, *Psychology and Law a Critical Introduction* (Cambridge University Press, 3<sup>rd</sup> ed, 2003).

typical deceptive response,<sup>61</sup> as ‘there really is no Pinocchio's nose’ in lies and truths.<sup>62</sup>

The inaccurate results from the studies arise first of all because we rely on incorrect visual cues to determine truth.<sup>63</sup> For example, the perception that nervousness is an indication of a lie is wrong as findings indicate it is completely unrelated.<sup>64</sup> In the second place, stereotypes are often used to determine deception which are ‘worthless but pervasive’.<sup>65</sup> For example, the belief held by both professional lie catchers and lay individuals in Australia and abroad, is that most liars avert their gaze when answering a question.<sup>66</sup> But a comprehensive worldwide study<sup>67</sup> has concluded that gaze behaviour is in fact completely unrelated to deception, and people telling the truth ‘look away’ as often as liars.<sup>68</sup> Thirdly, cultural differences play a role. For example, in Aboriginal<sup>69</sup> and Chinese cultures, it is considered impolite to maintain eye contact.<sup>70</sup>

It is well-known that members of a jury are seldom able to consider ‘only the facts’.<sup>71</sup> They are swayed by the rhetoric of counsel, by their own prejudices and by the dynamics of the jury room post-trial discussion.<sup>72</sup> Even were demeanour useful under natural circumstances to help determine credibility (which it is not), under stressful and adversarial courtroom environments it proves even more ineffective.<sup>73</sup> These studies indicate that a case can be made for decisions concerning credibility to be based on accurate and unadorned transcripts of testimony rather than in the heat of battle in the courtroom.<sup>74</sup>

### (iii) Can Veiled Women be Exempt?

<sup>61</sup> Vrij and Easton, above n 59, 29, quoted by New South Wales Law Reform Commission, *Blind or Deaf Jurors*, Report 114 (2006) 52.

<sup>62</sup> Laura Zimmerman, ‘Deception Detection’ (2016) 47(3) *American Psychological Association* 3.

<sup>63</sup> Aldert Vrij, Par Granhag and Stephen Porter, ‘Pitfalls and Opportunities in Nonverbal and Verbal Lie Detection’ (2010) 10 *Association for Psychological Science* 98.

<sup>64</sup> *Ibid* 91.

<sup>65</sup> Ian Coyle, ‘How do Decision Makers Decide When Witnesses are Telling the Truth and What can be Done to Improve their Accuracy in Making Assessments of Witness Credibility?’ (Report to the Criminal Lawyers Association of Australia and New Zealand, 3 April 2013) 10.

<sup>66</sup> Ned Kock, *Emerging E-Collaboration Concepts and Applications* (Cybertech Publishing, 2007) 295.

<sup>67</sup> The Global Deception Research Team, ‘A World of Lies’ (2006) 37(1) *Journal of Cross-Cultural Psychology*, cited in Coyle, above n 65, 10.

<sup>68</sup> Coyle, above n 65, 10.

<sup>69</sup> Cultural Capability Team, *Communicating Effectively with Aboriginal and Torres Strait Islander People* (September 2015) Queensland Health <[https://www.health.qld.gov.au/\\_\\_data/assets/pdf\\_file/0021/151923/communicating.pdf](https://www.health.qld.gov.au/__data/assets/pdf_file/0021/151923/communicating.pdf)>.

<sup>70</sup> James Chan, *What to do and How to Behave in China: 18 Practical Tips* (2012), Asia Marketing and Management <http://www.asiamarketingmanagement.com/howtobehaveinchina.html>.

<sup>71</sup> Jeffrey Abramson, *We, the Jury: The Jury System and the Ideal of Democracy* (Harvard University Press, 2000).

<sup>72</sup> *Ibid*.

<sup>73</sup> Wellborn, above n 57, 12.

<sup>74</sup> James Timony, ‘Demeanor Credibility’ (2000) 49(4) *Catholic University Law Review* 904.

There are several verses in the Qur'an that relate to the appropriate dress for Muslim women in general, but the most commonly cited verse is Súra Núr, 24:31:<sup>75</sup> '[a]nd say to the believing women that they should lower their gaze and guard their modesty'.<sup>76</sup> Whether Islam truly requires women to wear full-face veils is open to interpretation and is a point of theology shaped by centuries of cultures in different nations.<sup>77</sup> Nevertheless as the verse targets women,<sup>78</sup> many devout Muslims, male and female, believe that full-face veils are a symbol of modesty and respectability, and that for women to remove them is to defy God.<sup>79</sup> Many Afghani women forced to wear full-face veils in public under the Taliban continued to wear them, even after their country's liberation.<sup>80</sup> This may have been because asking an Islamic woman to remove her full-face veil, whether it be worn by choice or by force, has been equated to the 'mutilation of one's personhood'.<sup>81</sup> As such, it is understandable that some Muslim women fear that they would feel such a grave sense of shame, humiliation and ridicule while taking the stand without their full-face veils, that they would rather forfeit their rights to give evidence as a result.<sup>82</sup> For this reason, the same reasoning that warrants the exceptions for vulnerable witnesses to give evidence, could be applied in certain instances to veil-wearing women.

It is probable that Ms Elzahed feared her accused (representatives of the state) - after all, she alleged that she was degraded and assaulted and that such attacks were against her religion. It is of course possible to doubt Ms Elzahed's sincerity on this point. A cynical interpretation would be that her protestation against removing her full-face veil was motivated principally by her contempt for the Australian legal system. This contempt would, on this reading, have been part and parcel of her Islamic faith and would have been accentuated by her husband's conviction on terrorism charges. Tempting though it may be to follow this line of analysis, there is no evidence to support either of these suppositions.

The rationale behind allowing children the right to testify in private is that they may feel more secure and safe.<sup>83</sup> If Ms Elzahed could testify in her full-face veil, she would be protected from fear, and the quality of her testimony could have been both secure and secured.<sup>84</sup> The approach of the North American courts is to place weight on evaluating the sincerity of one's

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<sup>75</sup> Justice and the Law Society, 'Debate on the Burqa' on Justice and the Law Society, *Justice and the Law Society* (31 October 2014) <<http://www.jatl.org/blog/2014/10/19/debate-on-the-burqa>>.

<sup>76</sup> Abdullah Yusuf Ali, *The Holy Qur'an: Text, Translation and Commentary* (Tahrike Tarsile Qur'an, 2005) 904-905.

<sup>77</sup> Anthony Gray 'Section 116 of the Australian Constitution and Dress Restrictions' (2011) 16(2) *Deakin Law Review* 297.

<sup>78</sup> Farinaz Zamani and Paula Gerber, 'Burqa: Human Right or Human Wrong?' 24(4) *Alternate Law Journal* 2.

<sup>79</sup> Lila Abu-Lughod, 'Muslim Women' *Eurozine* (9 January 2006)

<sup>80</sup> *Ibid.*

<sup>81</sup> Leon Wieseltier, 'Faces and Faiths', *Washington District* (Washington, 27 July 2010) 1.

<sup>82</sup> Kapardis, above n 60, 97.

<sup>83</sup> See, eg, *R v Teariki* (1999) 16 CRNZ 540, 543. The principal reason for allowing children to give alternative mode testimony is so they feel more secure.

<sup>84</sup> Griffiths, above n 19, 11.



religious belief.<sup>85</sup> This approach should be adopted in Australia. As Ms Elzahed never removes her full-face veil in public, this strongly demonstrates her devout adherence to Islam. As for the prejudice of jurors towards Muslim women, that needs to be combatted through other means than compelling such women to unveil in court.

## The Debate

The full-face veil debate divides not only secular Australians, but Muslims, scholars and the governments of Muslim nations.<sup>86</sup> While there are many Muslim countries that have not made veil-wearing by women obligatory in public in the presence of men, there are some that have. Those that do are associated with other laws which from the viewpoint of the West are illiberal, intolerant and a means of compelling the wearer to adhere to patriarchal codes of conduct.<sup>87</sup> This being so, in Australia we tend to associate the wearing of the veil - which of course is not mandatory - as either the expression of a woman's subjugation and oppression or as suggesting that such a woman is signalling her acceptance of values inimical to the West. As such, wearers of the full-face veil in Australia continue to bear the brunt of public and institutional opposition to their religious dress,<sup>88</sup> yet at the same time, they continue to face sanction from their community, God and faith when their veils are removed in public.<sup>89</sup>

Another approach to the debate is to consider that as we in Australia celebrate difference, and the richness of cultural mixture is encouraged,<sup>90</sup> the wearing of different clothing, including the full-face veil, should therefore be welcomed. But as our multicultural ethos is to encourage difference, it could in contrast be argued that the full-face veil encourages uniformity, and the culture of Islam denies the value of multiculturalism.

As we have seen, these viewpoints are beset with complications. They are rarely satisfactorily resolved and solutions seem to depend on where one places one's priorities, on the contexts in which legal judgments occur, and on the cultural values at play in any jurisdiction. These difficult issues arise at the intersection of culture, morality and the law and this has been well illustrated in the case of *Elzahed*, a case one might say of veiled justice.

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<sup>85</sup> See, *Fazee v Illinois Department of Employment Security* (1989) 489 US 829, 834 (White J) It was stated that it was merely necessary to prove that conduct is 'based on a sincerely held belief'.

<sup>86</sup> Justice and the Law Society, 'Debate on the Burqa' on Justice and the Law Society, *Justice and the Law Society* (31 October 2014) <<http://www.jatl.org/blog/2014/10/19/debate-on-the-burqa>>.

<sup>87</sup> Fareen Parvez, 'Debating the Burqa in France: the Antipolitics of Islamic Revival' (2011) 34(2) *Qualitative Sociology* 1.

<sup>88</sup> Natasha Bakht, 'Objection, Your Honour! Accommodating Niqab-Wearing Women in Courtrooms' (Islamic Law and Law of the Muslim World Paper No 60, University of Ottawa, 19 September 2009) 1.

<sup>89</sup> Nesrine Malik, 'I was Forced to Wear the Veil and I Wish No Other Woman has to Suffer it', *The Daily Telegraph* (London, 20 September 2013) 4.

<sup>90</sup> Raihan Ismail, 'The Burqa Debate: Lifting the Veil on Islamophobia in Australia' *The Sydney Morning Herald* (Sydney, 1 October 2014) 1.

## Freedom of Religion

What is clear is that while debate continues to rage about the place of full-face veils in public in liberal European societies, in Australia, the campaign to 'ban the burqa' is no longer active.<sup>91</sup> The concerns in Australia now revolve around full-face veils and their place on the witness stand. As demonstrated, the approach of the Australian courts has been to restrict women from testifying with their face covered. This prompts the question of whether this restriction is a violation on one's fundamental human right to freedom of religion. This is a right guaranteed in numerous treaties Australia has ratified: Article 18 of the *International Covenant on Civil and Political Rights (ICCPR)* states that 'everyone shall have the right to freedom of thought, conscience and religion ... to manifest his [sic] religion or belief in worship'.<sup>92</sup> It is widely accepted that expressing a religious belief may be undertaken through wearing religious attire. As such, it may be said that full-face veils, which serve as powerful symbols of a woman's religion, are manifestations of her beliefs.<sup>93</sup>

This freedom conferred to worship or practice religion, however, is 'subject to limited exceptions' pursuant to Article 9 (1) of the *European Convention on Human Rights*.<sup>94</sup> There has been no court ruling that held religious freedom can function without limitations or restraints.<sup>95</sup> When Parliament's inherent right to interfere in religious worship was confirmed in the *Grace Bible Church Case*,<sup>96</sup> it highlighted that when law and religion intersect, the former prevails.<sup>97</sup> Furthermore, Article 81 (3) of the *ICCPR* explicitly states that banning a religious practice may be justified on the grounds that it is necessary for the 'fundamental rights and freedoms of others'.<sup>98</sup> This provision makes it difficult to assert there may have been a breach of Ms Elzahed's religious freedom in denying her the right to practice her religion.

The primacy of law over the right to freedom of religion may be demonstrated from rulings that found that Jehovah's Witnesses could not prevent their children from receiving blood transfusions in the name of religion.<sup>99</sup> Likewise, Rastafarians who wish to smoke marijuana in accordance with the practice of their religion, have been found not to be exempt from Australian drug laws.<sup>100</sup> Nonetheless, judges do of course recognise that people from a wide variety of religions participate in court. As such there are instances where judges have utilised their discretion to allow religious belief to override courtroom protocol when they have conflicted.<sup>101</sup> For example, rules that require men to

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<sup>91</sup> Barker, above n 15, 3.

<sup>92</sup> *International Covenant on Civil and Political Rights* Art 18.

<sup>93</sup> Zamani and Gerber, above n 78, 4 [7].

<sup>94</sup> *European Convention on Human Rights* art 9(1).

<sup>95</sup> Australian Law Reform Commission, *Freedom of Religion*, Report No 129 (2016) 1.

<sup>96</sup> *Grace Bible Church v Reedman* (1984) 36 SASR 376.

<sup>97</sup> *Ibid* 385.

<sup>98</sup> *International Covenant on Civil and Political Rights* art 18(3).

<sup>99</sup> Australian Law Reform Commission, *Freedom of Religion*, Report No 129 (2016) 117.

<sup>100</sup> Carolyn Evans, *Legal Aspects of the Protection of Religious Freedom in Australia* (Comparative Constitutional Studies, Melbourne Law School, 2009) 45.

<sup>101</sup> *Ibid* 67.

remove their headwear in court often do not apply to wearers of the Jewish yarmulke or the Sikh turban.<sup>102</sup>

## The Future

This article has shown that the notion that witnesses need to present their faces to examiners for their 'reliability' to be assured is erroneous. Evidence cited shows that to the contrary, the face is a very poor 'window on the soul' and humans are very poor readers of facial demeanour, as far as establishing truth or falsity is concerned. A case may therefore be made for the discretionary approach adopted in dealing with courtroom protocols to be implemented when determining whether women may testify in full-face veils. The sincerity of the religious belief of a witness, whether there is motive against the accused and whether there is a high likelihood of fear and shame need to be taken into consideration in determining whether a woman may testify fully-veiled.

While I believe that full-face veils should be able to be worn by vulnerable witnesses and that this will not impede the search for facts, it must be noted that society is experiencing a surge in negative stereotypes of Muslims.<sup>103</sup> In this respect, it appears that a call for more discretion to be used when assessing whether a witness may testify fully-veiled may prove insufficient. 'Tasnim' and Ms Elzahed would indeed have satisfied the 'sincerity test' and they still were not permitted to testify. Moreover, the extreme cases outlined from our common-law counterparts, England and Canada, show that even in instances in which women genuinely fear intimidation or are repeated sexual assault victims, have still been prohibited from testifying in their full-face veils. This indicates that a broader scope of discretion would perhaps not in itself deal with the problem.

Consequently, law reform is required to amend the laws of witness testimony. The exemptions to the general rules should be extended to expand the scope of vulnerable witnesses. Ultimately, this would reduce the serious risks that would otherwise result from restricting wearers of the full-face veils from testifying. No one wishes to hinder Muslim women from coming to court. No one wishes to segregate them from society. No one wishes to create a divide between Muslim women and the secular population. The danger of intimidation and shaming a witness out of giving evidence must be given serious consideration. Fairness to all should not be an impossible equation, and fairness to the accused must not come at the expense of the victim, the witness or the community.

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<sup>102</sup> Ibid 34.

<sup>103</sup> Ron Csillag, 'Survey Find Deep Mistrust of Muslims in Canada', *Washington Post* (Washington, 26 March 2012) [1].