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Commentary on

R (on the application of Begum) v Governors of Denbigh High School

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1. Background to the *Begum* case

It is more than 10 years since the decision of the House of Lords (HL, as it was then) in *Begum*,[1] but it remains as contentious and relevant as ever. In *Begum*, religion, age, gender, culture, and socio-economic background conflate, raising issues of equality, tolerance, autonomy, diversity, and respect.[2] The decision alerts us to the way in which a range of socio-cultural variables affect children's lives.

Shabina Begum – the main actor in the case – started Denbigh High School (the School) in 2000, aged 11. The School catered to a student population ethnically, religiously and culturally very diverse, and so adopted its uniform policy after wide consultation with the community and religious leaders.[3] One of the uniform options for girls was religiously inspired, and included the shalwar kameeze and headscarves.[4] After two years of abiding by the School's uniform policy, Begum went to School one morning, accompanied by her older brother and a friend of his, dressed in a jilbab, a long coat-like garment.[5] The brother and his friend requested, in allegedly rather forceful terms, that Begum be allowed to attend School wearing the jilbab, thus in contravention of the School's uniform policy.[6]

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[1] *R (on the application of Begum) v Governors of Denbigh High School Governors* [2006] 2 All ER 487, [2007] 1 AC 100, [2006] HRLR 21, [2006] 1 FCR 613, [2006] UKHL 15, [2006] UKHRR 708, [2006] 2 WLR 719.

[2] H. Cullen, 'Commentary on R (on the Application of Begum) V Governors of Denbigh High School', in R. Hunter, C. McGlynn, and E. Rackley (eds.), *Feminist Judgments: From Theory to Practice* (Oxford / Portland, Oregon: Hart, 2010), 329-35 at 329.

[3] Above n 1 at [6]-[7].

[4] *R (on the application of Begum) v Governors of Denbigh High School Governors* [2004] EWHC 1389 (Admin), [2004] ELR 374 [26], [41].

[5] Above n 1 at [10].

[6] *Ibid*.

The Department for Education and Skills (DfES) guidance (the Guidance) at the time encouraged schools to accommodate the needs of different cultures, races and religions, explicitly including 'allowing Muslim girls to wear appropriate dress'.[7] The School was of the opinion that its policy conformed with such guidance and did not believe it was under an obligation to accede to Begum's request. The School thus asked Begum to change clothes to adhere to the School's uniform policy. Begum did not conform to these instructions and initiated a judicial review of the School's decision.

2. The judicial decisions

Begum claimed that her freedom of religion (protected under Article 9 of the European Convention on Human Rights, ECHR) and right to education (protected under Article 2 of First Protocol to the ECHR) had been violated.

The High Court's decision, led by Bennett J, refused both claims.[8] Bennett J relied especially on the 'contracting out' doctrine, developed by the European Court of Human Rights (ECtHR), which established that individuals contract out of the right to manifest their religious beliefs in certain ways when they engage with particular employment relationships or roles – in this case, the role of pupil at a particular school – that are not compatible with those religious manifestations.

Begum appealed. Contrary to the High Court, the Court of Appeal found that Begum had in effect been excluded from School and that there had been an insufficient assessment of Begum's right to religious freedom.[9] By reversing the High Court's decision, the Court of Appeal submitted that the School should have carried out a much more detailed analysis of the requirements in Article 9 ECHR, including the scope of justification of interferences under Article 9(2).[10] This type of detailed analysis, however, was criticised by scholars as an excessive and inappropriate burden on schools,[11] and undue judicialisation of public decision-making.[12] The School was not satisfied either and appealed.

In 2006 came the final stage of this four-year judicial saga: in a decision led by Lord Bingham of Cornhill, the House of Lords reversed the Court of Appeal's decision for unduly burdening the School with a detailed assessment of the issues raised under Article 9,[13] and determined that the School had acted lawfully. Although only two members of the Court found that Article 9 ECHR had been engaged (Lord Nicholls and Lady Hale of Richmond), all five members found that there had been no violation of Begum's religious freedom, as any interference could be justified under Article 9(2) ECHR and was within the UK's margin of appreciation. The overall tone of the decision is respectful of and deferential to Begum's

[7] Department for Education and Skills, *Uniform Guidance 0264/2002*; above n 4 at [22].
[8] Above n 4.
[9] *R (on the application of Begum) v Governors of Denbigh High School Governors* [2005] EWCA Civ 199, [2005] 1 WLR 3372.
[10] *Ibid*, [81].
[11] T. Poole, 'Of Headscarves and Heresies: The Denbigh High School Case and Public Authority Decision-Making under the Human Rights Act', (2005) *PL* 685.
[12] M. Malik, 'House of Lords, Regina (SB) v Governors of Denbigh High School [2006] UKHL 15', in R. Hunter, C. McGlynn, and E. Rackley (eds.), *Feminist Judgments: From Theory to Practice* (Oxford / Portland, Oregon: Hart, 2010), 336-45.
[13] Above n 1 at [28]-[29].

religious beliefs,[14] but that was not enough to deprive the School of its autonomy in uniform policy matters. There was no violation of Begum's right to education either, as there was no intention to exclude Begum and the onus was on her to secure admission to another school.[15]

3. A children's rights critique of *Begum*

The alternative, dissenting judgment written by Moscati adopts a children's rights perspective in substance, as well as a child-friendly tone. The *Begum* decision was not indifferent to children's rights; Baroness Hale's Opinion highlighted the need to ensure that adolescents are able to develop their own moral and religious views.[16] Nonetheless, even Baroness Hale concluded that any interference with Article 9 ECHR could be justified in order to promote a sense of community and cohesion.[17] Children of school age are thus expected to postpone a fuller assertion of their rights and beliefs until they leave school.

The re-written judgment explicitly uses the CRC as the fundamental framework to reach an appropriate – the best possible – outcome. Although not domestically incorporated into UK law, the UK Supreme Court has applied CRC norms directly in its decisions – albeit via the ECHR and Human Rights Act 1998.[18] The legal tools available to the Judiciary in these cases were already available to the House of Lords in *Begum,* and thus to Moscati in the re-written dissenting judgment, particularly in terms of placing considerable importance on a child claimant's best interests when carrying out a proportionality exercise.

The HL considered three key arguments: first, whether Begum 'contracted out' her right to manifest her religion by having enrolled onto the school in question; second, the potential effect that allowing Begum to wear the jilbab could have on other female pupils; third, whether Begum acted on her free will.

3.1 Contracting out one's right to (express one's) freedom of religion

Following Lord Bingham's famous 'no more, no less' approach in relation to the application of the ECHR in the UK context,[19] the HL relied on the broad margin appreciation afforded by the ECtHR case law,[20] even though that case law and the 'no more, no less' approach are wholly criticisable.[21] In justifying any interference with Begum's freedom of religion, Lord

[14] *Ibid*, [21], per Lord Bingham.
[15] *Ibid*, [36].
[16] *Ibid*, [93]. See also N. Ferreira, 'Putting the Age of Criminal and Tort Liability into Context: A Dialogue between Law and Psychology', *International Journal of Children's Rights,* 16/1 (2008), 29.
[17] *Ibid*, [97]-[98].
[18] *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4, especially at [23]; *R (on the application of SG) and Others v Secretary of State for Work and Pensions* [2015] UKSC 16, especially at [83] and ff.
[19] See, for example, N. Ferreira, 'The Supreme Court in a Final Push to Go Beyond Strasbourg', (2015) *PL* 367.
[20] *Sahin v Turkey*, Application No 44774/98, 10 November 2005, unreported.
[21] See, for example, K. Altiparmak and O. Karahanoğullari, 'After Şahin: The Debate on Headscarves Is Not over, *Leyla Şahin v. Turkey*, Grand Chamber Judgment of 10 November 2005, Application No. 44774/98', *European Constitutional Law Review,* 2/2 (2006), 268-92; and J. Marshall, 'Freedom of Religious Expression

Bingham highlighted that: Begum and her family had chosen a school outside their own catchment area; she knew from the start that that School did not allow the jilbab; there were three other schools in the area that did allow the jilbab; and the School had taken immense pains to devise a uniform policy that 'respected Muslim beliefs … in an inclusive, unthreatening and uncompetitive way'.[22] The HL thus found that Begum was free to change her beliefs, but as a consequence it would not have been too much of an inconvenience to require her to change schools.[23]

Although it is true that the ECtHR's case law places emphasis on choice and voluntariness through its 'contracting out' doctrine, both the ECtHR and UK courts recognise that there are limits to this doctrine when the consequences become unreasonable.[24] Baroness Hale's Opinion in *Begum* also suggests that the 'contracting out' doctrine may not be appropriate in the context of compulsory education, as often it is not the child choosing the school and there may not be any alternative for the child due to a range of difficulties (lack of own transport, lack of financial means, etc).[25] Indeed, Begum confirms that:

> once I lost my case in the High Court the Local Education Authority (LEA) helped me to get in into a school which was very far from my house. It used to take me 1 hour and 20 minutes to get there by bus. (…) and that school was [a] very under-achieved school.[26]

Similarly, Cherie Booth QC states that:

> I also felt that some of the judges were extremely insensitive to the reality of what this choice was (…) it completely underestimates how a family basically on benefits, how can she just get to another school, it was her nearest and local school, to go anywhere else would be a lot more costly…[27]

These difficulties are compounded by gender, age and religious dimensions, as being a Muslim female adolescent could render the range of options more limited.[28]

In contrast to the rewritten feminist judgment of *Begum* (which, despite advocating a more critical use of the 'contracting out' doctrine, shared the outcome of the HL judgment),[29] the children's rights judgment focuses squarely on Begum's status as a school-age female, Muslim child. By contextualising more thoroughly Begum's experience and what could be expected of Begum in her circumstances, Moscati reaches the conclusion that there has been an unjustified interference with Begum's religious freedom: Begum had not 'contracted out' her right to express her religion.

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and Gender Equality: Şahin V. Turkey', *Modern Law Review,* 69/3 (2006), 452-61; and on the 'no more, no less' approach, see Ferreira, above n 19.

[22] Above n 1, [25] and [34].

[23] *Ibid*. At [41] Lord Nicholls of Birkenhead, however, finds that it may have not been so easy for Begum to move to another school.

[24] See *Darby v Sweden* (1991) 13 EHRR 774, *Copsey v WWB Devon Clays Ltd* [2005] EWCA Civ 932, [2005] ICR 1789.

[25] Above n 1, [92].

[26] Interview with Shabina Begum on 24 February 2016.

[27] Interview with Cherie Booth QC on 12 November 2015.

[28] Above n 12, at 339 ff.

[29] *Ibid*; above n 2, 329-35.

3.2 A balancing rights exercise

The second key argument in *Begum* was the School's claim that allowing Shabina to wear the jilbab might result in other female pupils, who did not wish to wear the jilbab, feeling pressured to do so.[30] Baroness Hale also accepted that 'protecting the rights and freedoms of others' was a legitimate aim of the School's uniform policy, but rightly asks whether the policy was proportionate to that aim.[31] She concludes that the policy was proportional, thus lawful.

Tobin found this decision struck the right balance between restricting Begum's right and the protection of the freedom of religion of the other children not directly involved with the proceedings.[32] This is, however, contentious, as it seems to place too much emphasis on the rights of children who are not involved with the proceedings, who had not been affected by the proceedings, and who would not necessarily suffer any detriment even if the HL had found in favour of Begum. On this matter, Begum states the following:

> I find this really absurd, patronising, when someone says 'maybe other girls can feel pressured to doing that'. When we have a problem in society; when girls have been pressured to do things that they don't want to do, the solution isn't to prevent other people (…) stopping other people from practicing their religion, because these things do happen, girls may feel pressured even to wear the headscarf. And to tackle that you have groups, you have mediation, you talk to them, you give children, girls, men, women, everyone the confidence to do what they want in society, freedom to do what they want. (…) You can't infringe somebody's rights just because somebody else feels threatened.[33]

Similarly, Cherie Booth QC rightly points out that:

> [when] hearing French feminists [saying] 'I'm offended, or I'm frightened when I see a woman wearing [the veil], covered up in the street', and I'm thinking, 'well, on what basis is my fear or my offence a reason to restrict the other person's religious belief?'[34]

More fundamentally, the whole basis for such concerns seems to be unfounded, as Begum asserts that:

> I honestly believe that [the claim that other pupils felt threatened] was false, because I remember at that time I had a petition among the other girls about who wants to wear the jilbab and a lot of girls [said] they would wear it. (…) a lot of children, when

[30] Above n 1, [18].
[31] *Ibid*, [94].
[32] J. Tobin, 'Courts and the Construction of Childhood: A New Way of Thinking', in M. Freeman (ed.), *Law and Childhood Studies: Current Legal Issues* (14; Oxford: Oxford University Press, 2012), at 10-11.
[33] Above n 26.
[34] Above n 27.

> [they] go to college [they] wear the jilbab. So, if people felt threatened, why they don't feel threatened when they go to college?[35]

Law should rightly protect children from any sort of oppression and maximise their autonomy, but that should not be done for the sake of unsubstantiated limitations to those children's rights and freedoms or at the expense of the actual exercise of another child's substantive right. Consequently, the re-written judgment concentrates on actual limitations to Begum's rights, not hypothetical and unfounded violations of other pupils' rights.

3.3 Questioning Begum's autonomy

The third key argument in the HL relates to the extent to which this challenge to the School's uniform policy was genuinely dictated by Begum's own religious beliefs or if it had been instigated by Begum's older brother, who acted as her litigation friend. Bennet J, in the High Court decision, wondered why it was the brother, and not Begum herself, presenting the evidence regarding her change of views on the required dress code.[36] Moreover, the brother apparently stated that he was not prepared to let his sister attend School without wearing a long skirt.[37] Begum's autonomy was thus questioned in several, intertwined ways throughout this judicial saga.

Some have attempted to explain the brother's role on the basis that Begum's father had died many years before and the mother did not speak English.[38] Begum's own account of the facts is refreshingly prosaic:

> [My family] were very scared and nervous [about starting a lawsuit]. Some of them didn't support me. (…) I am not sure why my brother keeps being mentioned because obviously I had to take an adult with me when I go to see a lawyer and I speak with somebody. When I spoke with the Head Teacher I had to take my brother with me obviously because I was scared of them saying something to me, I had to. But ultimately between me and my brother, I know that this was my decision and what I wanted to do.[39]

On Begum's autonomy, Cherie Booth QC asserted the following:

> I was trying to be satisfied in my own mind that she knew what she was doing and she wanted to do this … but I was pretty quickly convinced that she was quite a determined young woman and she definitely knew in her own mind that it was her religious beliefs that she wanted to express… There was an assumption there that this wasn't Shabina's choice, and … how do they know that? They didn't know that, they never met her.[40]

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[35] Above n 26.
[36] Above n 4 at [68].
[37] Above n 1 at [11], [81].
[38] Above n 2 at 331.
[39] Above n 26.
[40] Above n 27.

With regard to Begum's procedural autonomy (i.e. the scope for Begum to steer the judicial proceedings and make her voice heard in court), it is in the nature of judicial review cases – such as *Begum* – to generally only rely on written statements,[41] hence Begum not having been heard by courts involved in this case. Furthermore, children filing judicial claims in England and Wales are represented by litigation friends.[42] Although the courts in this case cannot be reproached for either of these procedural obstacles, more care could have been taken to ensure that Begum's voice – through her litigation friend and/or counsel – was acknowledged and respected.

With regard to Begum's substantive autonomy (i.e. the scope for Begum to reach her own decisions and act upon them), the fact that Begum's older sister had always abided by the School's uniform policy also suggests that Begum's desire to wear a jilbab was an individual, genuine wish, unrelated to that of her relatives'.[43] One may always suggest that Begum was, nevertheless, led (perhaps unconsciously) to this choice of dress code owing to her personal, family or community circumstances and (limited?) range of choices. This phenomenon – termed 'adaptive preferences' – may well be detrimental to (fuller) individual autonomy,[44] but may not justify paternalistic judicial reactions. All individual decisions are – to a greater or lesser extent – a product of compromises with other individuals, one's family context, socio-economic background, gender, religion, age, etc. That relational dimension of one's decisions may qualify the extent of one's autonomy, but may not disqualify one from taking decisions, unless there are strong and clear evidence of oppressive practices.

The re-written judgment thus highlights Begum's right to participation under Article 12 CRC. Indeed, it ensures that Begum's voice is heard and carefully considered. Cherie Booth QC also argues that the House of Lords should have guaranteed greater respect for Begum's autonomy: 'I think there should be more of an acknowledgement of Shabina as an individual, who had made an individual choice'. A focus on Begum's rights – including to participation – would not, in itself, require that the re-written judgment found in favour of Begum. Indeed, a 'substantive children's rights approach'[45] to cases involving not only children but other actors as well (for example, the State) does not necessarily require a decision in favour of the children in question, as the outcome may tip in favour of the rights and interests of the other actors. Moreover, the right to participation does not require that a child's views be determinative, but simply avoid that children's voices be silenced or subject to interpretation of other individuals.[46] Still, according to a children's rights-based approach, it would have been appropriate for the Court to not only respect Begum's (procedural) right to participation to its fullest, but also to focus on the actual harm caused to Begum's rights, thus enhancing her (substantive) autonomy.

[41] Treasury Solicitor's Department, *The Judge over Your Shoulder*, 2006, 4th edition, at 35.
[42] Rule 21.2 of the Civil Procedure Rules.
[43] Above n 1, [9].
[44] B. Colburn, 'Autonomy and Adaptive Preferences', *Utilitas,* 23/1 (2011), 52-71.
[45] Above n 32 at 12.
[46] J. Tobin, 'Understanding a Human Rights Based Approach to Matters Involving Children: Conceptual Foundations and Strategic Considerations', in A. Invernizzi and J. Williams (eds.), *The Human Rights of Children: From Visions to Implementation* (Farnham: Ashgate, 2011), 61-96 at 71.

4 Conclusion

The decision in *Begum* and its critique are linked to a certain vision of what schools should be entitled to impose in terms of uniforms, of what pupils should be allowed to claim in terms of education, and of what individuals – in particular girls – should be allowed to demand in terms of religious dress. Yet, for Begum, it was all quite straightforward:

> This case was about my education – I wanted to study, I wanted to go to school. While doing that I wanted to practice my religion and I felt the school didn't accept me; didn't accept me as a person and accept me to practice my religion.[47]

The Department of Education reacted to the decision in *Begum* by publishing a revised Guidance on school uniforms soon after the judgment, expressly referring to the jilbab as an acceptable (but not necessarily allowed) form of dress in schools.[48] The current version of the Guidance may also be interpreted as leading to the same outcome, always with the school being entitled to reach its own reasoned uniform policy.[49] The decision in *Begum* can thus be said to have led to the clarification of the policy in this field. Although the final outcome was certainly unfavourable to Begum, she can at least have the satisfaction of having enacted her citizenship through the judiciary, thus overcoming to some extent children's limited democratic voice.[50]

One of the aims (and perhaps the ultimate aim) of human rights law – including children's rights – is to enhance individuals' dignity and autonomy.[51] So, the test the HL judgment in *Begum* needs to pass is whether it has been successful in enhancing Begum's dignity and autonomy. The re-written judgment seems to make that better than the original decision, even if at the cost of the School's leeway to impose a uniform policy. Alas, *Begum* is likely to remain 'good law' for many years to come in the UK, to the detriment of a more appropriate interpretation and application of children's rights.

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[47] Above n 26.
[48] Above n 2 at 335.
[49] Department for Education, *School Uniform: Guidance for Governing Bodies, School Leaders, School Staff and Local Authorities*, September 2013.
[50] A. Nolan, 'The Child as "Democratic Citizen" – Challenging the "Participation Gap"', *PL,* Winter (2010), 767-82.
[51] Above n 2 at 335.