Neutral Citation Number: [2008] EWHC 1865 (Admin)

Case No: CO/11435/2007

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29 July 2008

Before :

MR JUSTICE SILBER

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Between :

The Queen on the application of Sarika Angel Watkins-Singh (A child acting by Sanita Kumari Singh, her Mother and Litigation Friend)	**Claimant**
- and -	
The Governing Body of Aberdare Girls' High School	**Defendant**
And	
Rhondda Cynon Taf Unitary Authority	**Interested Party**

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Helen Mountfield (instructed by **Liberty**) for the **Claimant**
Jonathan Auburn (instructed by **Evans Quartermaine** of **Caerphilly**) for the **Defendant**
The Interested Party was neither present nor represented

Hearing dates: 17-19 June 2008
Numerous further written submissions from 20 June 2008 until 11 July 2008

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Judgment

Mr Justice Silber :

I. Introduction

1. The issue raised on this application is whether on the particular facts of this case a particular school was entitled as a matter of public law to refuse to allow a Sikh girl to wear at School the Kara, which is a plain steel bangle which has a width of about 50 millimetres which is about one-fifth of an inch and which has great significance for Sikhs. This judgment is fact-sensitive and it does not concern or resolve the issue of whether the wearing of the Kara should be permitted in the schools of this country. Indeed, that is not a question that a court could or should be asked to resolve. Nothing that appears in this judgment seeks to resolve or to throw any light on this problem or the circumstances in which a Kara should be permitted to be worn in schools or any other arena in this country. Indeed it follows that nothing in this judgment is intended to be any comment on the traditions or the requirements of the Sikh or indeed any other religion and community.

2. In recent years, a number of school girls have sought unsuccessfully to challenge rules made by their schools which prevented them from wearing items which they considered necessary as part of their religious faith. Decisions of governors have been upheld which prevented pupils in certain schools wearing the Jihab which is a long coat-like garment (**R (on the application of Begun) v Head Teacher and Governors of Denbigh High School** [2007] 1 AC 100- "Begum"), the wearing of the Niqab veil (**R (on the application of X v Head Teacher and Governors of Y School** [2008] 2 All E.R. 249- "X v Y ") and a Silver Ring Thing purity ring (**R (on the application of Playfoot) v Governing Body of Millais School** [2007] ELR 484- "Playfoot").

3. Each of those applications has been founded largely, if not solely, on the provisions of the Human Rights Act 1998 but in this case the claim is based mainly on the totally different provisions of the Race Relations Act 1976 ("RRA") as amended and the Equality Act 2006 ("EA"), which are provisions on which the claimants in the previous three cases were unable to rely but on which the claimant can and does rely.

4. This present application concerns the wearing of a Kara, which is a small plain steel bangle worn by Sikhs as a visible sign of their identity and faith. It is 5 millimetres wide and is therefore much narrower than a watch strap and many ordinary bangles. As I observed in court, it cannot be seen when the claimant is wearing a long-sleeved sweater.

5. The handing-down of the judgment has been delayed as I wanted to receive (and did receive) submissions from Miss Helen Mountfield counsel for the claimant and from Mr Jonathan Auburn counsel for the defendant on the recent detailed decision of Munby J in **R (E) v Governing Body of JFS etc** [2008] EWHC 1535 (Admin), which was handed down after the hearing in the present case ended. In addition, there were many post-hearing developments about the race equality policy of the school.

II The Facts

6. In the present case, Sarika Angel Watkins-Singh ("the claimant"), who is acting though her mother and litigation friend, is a 14 year-old Sikh school girl of Punjabi-Welsh heritage, who challenges a decision made on 26 October 2007 and which is continuing by her school Aberdare Girls' High School ("the school") and which has prevented her from wearing a Kara at her school. The claimant contends that these decisions of the Governing Body of the school ("the defendant") were based on errors of law.

7. The school is a maintained girls' non-denominational school in Wales. The Interested Party is the local authority which maintains the school but it has not played any part in these proceedings.

8. The claimant, who was born on 20 September 1983, entered the school in September 2005. Her father was Welsh but he died when she was a year old and when she was five years old, her mother married her step-father. He is an observant Sikh and the person who the claimant regards as her father. The claimant, who was given a choice as to which religion, if any, she wishes to follow, has selected the Sikh religion, which has become particularly important to her since her visit to India in March 2005.

9. The claimant's school reports have been generally good and she enjoyed being at her school until towards the end of 2006 when she became a victim to various incidents of racial bullying, which she believed that the Head Teacher and the governors did not treat as a serious issue. As at May 2007, the claimant was a prefect and on 4 May 2007, the Head Teacher of the school had written to the claimant's mother congratulating her on the claimant's academic performance.

10. In April 2007, a teacher at the school observed the claimant wearing a bangle, which was her Kara. The teacher asked the claimant to remove it because it contravened the school's uniform policy; which permitted only one pair of plain ear studs and a wrist watch to be worn by pupils. It is not disputed that from April 2007 when the school first sought to prevent the claimant from attending school wearing the Kara, she was and remains an observant, although a non-initiated, Sikh.

11. When the claimant refused to remove, it she sought an exemption from the policy because she stated that wearing her Kara was a matter which was central to her ethnic identity and religious observance as a Sikh. Miss Rosser, who was the Head Teacher at the school, told the claimant's mother in a letter dated 2 May 2007 that *"I have no problem with [the claimant] wearing her bracelet if governors agree"*. She added that if the school were to allow the claimant to wear the Kara until the matter was resolved by the defendant, this would constitute discrimination against many other pupils who were not allowed to wear a cross because of the school's jewellery policy, which was contained in the School's Code of Conduct which provides that:

> *"Jewellery often poses a health and safety hazard to school activities. Pupils are allowed to wear a wrist watch and one pair of plain metal studs in the ear. No other jewellery is permitted. All jewellery must be removed for PE and swimming. Body piercing is not permitted. Adhesive jewellery to teeth or any part of the body is not allowed. Pupils will have excess or unacceptable jewellery confiscated".*

12. The claimant's mother provided information about the Kara to the school but the meeting of the defendant was delayed pending receipt by the defendant of some unspecified national guidance.

13. A meeting of the defendant took place on 13 June 2007 at which it was decided to postpone again the decision as it was thought necessary to obtain advice from the local education authority ("LEA"). In the meantime, the claimant's mother was asked

not to allow the claimant to wear the Kara at school but instead she, that is the claimant, should carry it in her bag. The claimant's mother said that she would let the claimant decide whether she wished to do so but the claimant did not return to school until 12 July 2007 after the intervention of the LEA's welfare officer.

14. Upon her return to school, the claimant was interviewed by Miss Rosser and she was told that she would be permitted to attend the school wearing her Kara but only on the condition that she would be taught in isolation and that she would be kept socially segregated from other pupils. Miss Rosser explained this in a letter to the claimant's parents of 12 July 2007. The segregation was strictly enforced and she was even accompanied to the toilet by a member of staff, who waited outside.

15. The defendant refused the request for an exemption and that the claimant would not be allowed to wear the Kara at school. The reasons given for the refusal in the decision letter on 20 July 2007, which arrived at the claimant's home shortly after the end of the Summer term, were that:

> *"1. The panel has not been convinced that, as part of her religion, it is a requirement that Sarika wears the Kara (bangle) on her wrist. It is suggested that, as an alternative, it is possible that it could be worn/carried elsewhere on her person.*
>
> *2. If it was to be allowed as an exception to the school rules, it is felt that there is a possibility that Sarika may be singled out as being different from her peers and that such actions may result in bullying or similar repercussions.*
>
> *3. The wearing of the Kara would give rise to health and safety issues. This would require a risk assessment being conducted prior to a variety of lessons being undertaken, this assessment may require the removal of the item which again would single the pupil out".*

16. It is not disputed that those were the defendant's genuine three reasons for refusing the request for an exception. I should add that the claimant has said that she is quite prepared to compromise and remove or cover the Kara with a wrist sweat band during any lessons such as Physical Education where health and safety might be an issue. The claimant's parents appealed against that decision. The claimant meanwhile returned to school on 5 September 2007 but she was unable to wear the Kara because her wrist was swollen. However, when the claimant wore it on 6 September 2007, she was immediately placed in seclusion and I will describe the effect of the seclusion on her in paragraphs 126 to 134 below.

17. The claimant's request for an exemption was finally refused on appeal by the Appeals Committee of the defendant, which met in the absence of the claimant's parents on 26 October 2007 after that committee had refused to postpone the meeting so that a representative of the Valley Race Equality Council could attend. The reasoning of the Appeals Committee of the defendant was merely that "*article 9 of the ECHR does not require that one should be allowed to manifest one's religion at any time and place of one's choosing*". Surprisingly no reference was made to the provisions of the RRA or the EA, which are the basis of the present application. As I will explain in paragraph 119 below, it appears that the defendant did not consider the racial and religious aspect of their decision.

18. When the claimant returned to the school after the half term break on 5 November 2007 wearing the Kara, she was the subject of a series of fixed-term exclusions first on 5 November 2007 for one day and second on 6 November 2007 for 5 days. The claimant was not formally told of these exemptions or her right of appeal but her mother indicated by a letter dated 8 November 2007 that she wished to exercise her rights to make representations but on 13 November 2007 the claimant was told that she was being excluded for a fixed term by the Head Teacher of the school.

19. After 5 days of exclusion in any academic term, a pupil is formally entitled to appeal. On 15 November 2007, which was a day after the claimant's sixth day of consecutive fixed-term exclusions had ended, she was told by Miss Rosser, Head Teacher in a letter that she would not be permitted to attend the school wearing the Kara but that this was not an exclusion because the claimant could attend school if she was dressed compatibly with the school's uniform policy. When asked, Miss Rosser explained that she had not decided for how long this exclusion would last. It will be necessary to consider in paragraphs 141 to 153 below whether this was an exclusion and whether the defendant acted lawfully.

20. The claimant continued to feel unable to remove the Kara because of her identity as a Sikh and the present proceedings were commenced on 19 December 2007. The claimant's solicitors unsuccessfully sought interim injunctive relief requiring the school to admit her wearing the Kara pending the outcome of these proceedings.

21. On 22 January 2008, the defendant's Disciplinary Committee held a meeting to consider the claimant's fixed term exclusions on 5 and 6 November 2007. On the following day, the defendant rejected the claimant's appeal. It is also common ground that the reasons that the defendant governing body decided to uphold Miss Rosser's decisions to exclude the claimant were that they considered her actions to be *"open, deliberate and persistent defiance of the school's authority"*. I will return in paragraph 120 below to consider whether the defendant acted in accordance with its duties under section 71 of the RRA when it reached that conclusion.

22. The position is that since 21 February 2008 and pending the outcome of the present proceedings, the claimant is being educated at a different school namely Mountain Ash School which permits her to wear a Kara. Her case is that this has had a disruptive effect on her education and that she wishes to return to be educated at the school provided that she can wear the Kara.

III. The Significance of the Kara to Sikhs

23. There are a number of issues which have to be resolved in this case. It is common ground between the parties that a large number of factual issues need not be resolved but one which I have to deal with is the significance of the Kara to Sikhs. Professor Eleanor Nesbitt, Professor in Religions and Education at the Institute of Education in The University of Warwick, has written extensively about Sikhism and has made an informative witness statement.

24. In her witness statement she explained that: Guru Gobind Singh (the tenth Guru) is believed to have instructed his first initiates to adopt the "5 K's" in 1699. The 5 Ks are the outward signs required of a Sikh and these are Kesh (uncut hair), Kangha (comb), Kirpan (sword), Kachh (cotton breeches) and Kara (steel or iron bangle).

25. The 5 Ks are important as they are intended to distinguish Sikhs from both their Muslim and Hindu contemporaries. In their origin they are closely associated with armed combat and the Sikhs' history of struggle. When Sikhs learn about these martyrs of Sikh identity, they are told about the readiness of some Sikhs to lose their

lives rather than to sacrifice their kesh, and this courage-to the point of martyrdom – is emphasised. Thus, the five Ks are regarded as demonstrating both loyalty to the Gurus' teaching and the bravery to be counted at times when even their lives are endangered by this visibility.

26. The Kara is in origin likely to have been a defence for the sword arm. Sikhs explain its symbolism as a circle that reminds them of God's infinity and speak of their being linked ("handcuffed") by it to God. For many it is a reminder to behave in accordance with religious teaching. Hiding the five Ks is a matter of deep sensitivity. It is important that the Ks be visible, but even more important (even if circumstances necessitate that the Kara be temporarily hidden from view) that the Sikh concerned continues to wear it on his/her right arm/wrist.

27. In practice, it is the initiated or amritdhari Sikhs, who observe all 5 Ks and there are of course different levels of devoutness and observance amongst Sikhs. Only a small minority of Sikhs undergo the initiation ceremony or ever intend to. In Professor Nesbitt's extensive experience of working with and studying Sikhs, she has concluded that of the 5 Ks, the Kara is the symbol most commonly worn by Sikhs as an external identification of Sikhism.

28. There has been evidence adduced by the defendant from Mr Jagwinder Singh which purports to be expert evidence on the significance to Sikhs of the Kara. His evidence, which purports to be expert evidence, deals with such matters of his experience of teenagers and how they regard religion as well as the significance of the Kara. Mr. Singh explains that the priority of teenagers, including Sikh teenagers, is that "*friends and social groups are a clear first priority…with religion and heritage coming significantly down the pecking order of importance*". Miss Mountfield quite correctly points out that even though this purports to be an expert's report, it fails to comply with the provisions of the CPR in important respects. The witness statement of Mr Singh fails to contain the very important statement of truth required from an expert (CPR 35Practice Direction paragraph 2.3 and 2.4) and details of his qualifications, instruction and material considered (ibid paragraph 2.2).

29. In those circumstances, I am bound to conclude that I cannot attach any weight to his evidence and Mr. Auburn did not ask me to do so in his oral submissions. Indeed in so far as Mr. Singh's report purports to undermine or contradict Professor Nesbitt's evidence, it has failed to show why her well-reasoned and thoughtful witness statement is in any way erroneous. So my conclusion is that although the claimant is not obliged by her religion to wear a Kara, it is clearly in her case extremely important indication of her faith and this is a view shared for good reason by very many other Sikhs.

30. There are a number of disputes between the claimant and the defendant on factual issues but the only one which is of importance relates to what the effect was on the claimant of being placed in segregation at the school which I will consider in paragraphs 124 to 137 below when considering whether her rights under article 8 of the ECHR have been infringed.

IV The Issues

31. The claims made by the claimant are that:

    a) the decisions of the school (whether by the Hearing Panel of the defendants on 20 July 2007 and or the Appeal Panel on 26 October 2007 or subsequently) to refuse to allow the claimant to wear the Kara at school was unlawful as indirect,

unjustified race and religious discrimination **(Issue A)** (see paragraphs 32 to 92 below);

b) the defendant has not complied with its obligations under sections 71 of the RRA in adopting, maintaining and enforcing a uniform policy which had "due regard" to the need (i) to discrimination unlawful racial discrimination; and (ii) to promote equality of opportunity and good relations between persons of different racial groups **(Issue B)** (see paragraphs 93 to 123below);

c) the imposition of the disciplinary sanctions and in particular the internal segregation and isolation imposed on the claimant contravened her rights under Articles 8 and or 14 when read with Article 8 of the ECHR**(Issue C**) (see paragraphs 124 to 137 to below);

d) the exclusions imposed and the procedure devised by the defendant in November 2007 failed to follow the requisite procedures required by law and were procedurally unfair **(Issue D)** (see paragraphs 138 to 153 below);

e) the Head Teacher of the school failed to take into account of the Guidance on Exclusions from Schools and Pupil Referral Units 2004 ("the 2004 Guidance") and/or failed to follow it and or failed to give reasons for departing from it in reaching her decisions formally and informally to exclude the claimant **(Issue E)** (see paragraphs 154 to 159 below); and

f) the conduct of the Discipline Committee's hearing of 22 January 2008 breached the requirement of the regulations, departed from the Statutory Guidance without good reason, and breached natural justice.The defendant correctly accepted that this complaint was justified with the consequence that there has to be a further hearing and so I need not say anything more about it.

V Issue A Indirect discrimination

(i) Introduction

32. The concept of racial discrimination in the RRA was widened by section 1(1A) of the RRA, which was introduced in order to give effect to the European Directive, Council Directive 2000/43/EC of 29 June 2000 ("the 2000 Directive"), which implemented the principle of equal treatment between persons irrespective of racial or ethnic origin. In essence the Directive stated that there should be no direct or indirect discrimination based on racial or ethnic origin. It is noteworthy that Article 6 of the Directive provided that the 2000 Directive should not constitute grounds for reduction in the level of protection against discrimination.

33. The Preamble to the 2000 Directive refers to the International Covenant on the Elimination of All Forms of Racial Discrimination. Article 1(1) of that Covenant makes discrimination unlawful on grounds of race, colour, descent or national or ethnic origin which has the effect or purpose of nullifying or impairing the recognition, enjoyment or exercise of human rights or fundamental freedoms.

34. Section 1(1A) of the RRA provides that:

> *"(1A) A person also discriminates against another if, in any circumstances relevant for the purposes of any provision referred to in subsection (1B), he applies to that other as provision, criterion or practice which he applies or would apply equally to*

persons not of the same race or ethnic or national origins as that other, but –

(a) which puts or would put persons of the same race or ethnic or national origins as that other at a particular disadvantage when compared with other persons.
(b)which puts that other at that disadvantage, and
(c)which he cannot show to be a proportionate means of achieving a legitimate aim".

35. The claimant contends that as a Sikh, she has been subjected to unlawful indirect discrimination on the grounds of race and religion. In **Mandla v. Dowell Lee** [1983] 2AC 548, the House of Lords held that Sikhs were a racial group defined by ethnic origins for the purpose of the RRA. It is an agreed fact that the claimant is a Sikh and as such she forms part of a "race" for the purposes of the RRA.

36. The claim is also brought under Part II of the EA, which prohibits discrimination on grounds of religion or belief in protected activities and it is not disputed that the claimant is a Sikh by religion as well as by race. Section 44(a) of the EA defines "*religion*" as meaning "*any religion*". Section 45(3) EA defines indirect discrimination on grounds of religion or belief. It provides that:

"A person ("A") discriminates against another ("B") for the purposes of this Part if A applies to B a provision, criterion or practice-

(a)which he applies or would apply equally to persons not of B's religion or belief;
(b)which puts persons of B's religion or belief at a disadvantage compared to some or all others (where there is no material difference in the relevant circumstances).
(d)which puts B at a disadvantage compared with some or all persons who are not of his religion or belief (where there is no material difference in the relevant circumstances) and
(e)which A cannot reasonably justify by reference to matters other than B's religion or belief."

37. Section 49(1) of the EA provides that:

"it is unlawful for the responsible body of an educational establishment listed in the Table to discriminate against a person –

(*a) in the terms on which it offers to admit him as a pupil,*
(b) by refusing to accept an application to admit him as a pupil, or
(c)where he is a pupil of the establishment –
(i) in the way in which it affords him access to any benefit, facility or service,
(ii) by refusing him access to a benefit, facility or service,

(iii) by excluding him from the establishment, or
(iv) by subjecting him to any other detriment".

38. It is common ground that in considering the claimant's case on grounds of indirect discrimination whether under the RRA or the EA, it is necessary to go through the following steps, which are:

a) to identify the relevant "provision, criterion or practice" which is applicable;
b) to determine the issue of disparate impact which entails identifying a pool for the purpose of making a comparison of the relevant disadvantages;
c) to ascertain if the provision, criterion or practice also disadvantages the claimant personally; and
(d) whether this policy is objectively justified by a legitimate aim; and to consider (if the above requirements are satisfied) whether this is a proportionate means of achieving a legitimate aim.

(ii) What is the relevant "provision, criterion or practice"?

39. It is common ground that the relevant "provision, criterion and policy" in this case is the school's uniform policy which is made up of the written policy, details of how it was applied and the school's approach to the recognition of exceptions to its general policy. There is also no dispute that the relevant "*provision, criterion or practice*" was that only one pair of plain stud ear rings was allowed to be worn and that no jewellery beyond that was allowed unless the item was required to be worn as a compulsory requirement of the pupil's religion or culture.

40. The ban on jewellery only applied to the wearing of items and so it did not restrict, for example, the displaying of the item by attaching it to a school bag or carrying it about one's person. There was also nothing to prevent a pupil wearing any item of jewellery outside school and outside school hours although of course the claimant would spend a large part of her waking hours on weekdays at school in term time.

(iii) Which is the pool for the purpose of making a comparison of the relevant disadvantages?

41. The case for the defendant in its written skeleton argument was that there are two possibilities as to who could constitute the *pool* for the purpose of making a comparison of the relevant disadvantages. They are first that it comprised all pupils at the school who wish to wear jewellery and the second alternative is that consisted of all pupils in the school. The school suggest that the first group is the most appropriate by reason of the nature of the "*provision, criteria or practice"* to which I referred to in the preceding two paragraphs.

42. In the case of **BMA v. Chaudhary**, [2007] IRLR 800, the issue was whether there was indirect racial discrimination against the claimant who was a member of the BMA of Asian origin and who, in common with all other members, was entitled to advice and assistance except for the purpose of supporting claims of racial discrimination. The Court of Appeal determined that the findings, there was such a requirement or condition was perverse and it overturned the decision that the requirement or condition constituted indirect racial discrimination. The Court then went on to consider what the situation would have been if there had been such a requirement or condition. It rejected an argument that the pool was all members of the BMA, who might want the support and advice of BMA in proceedings, with

Mummery LJ explaining (with my emphasis added) why a wider pool was the appropriate comparator that:

> *"202… The wider pool brings into the exercise of comparison people who have no interest in the particular advantage who will actually want the particular benefit in question".*

43. Applying that principle to the present case, those "*who have no interest in the particular advantage or actually want the particular benefit in question*" (which is to wear a Kara or other religious jewellery because of its great importance to them) are those whose cultural beliefs or religious practices are not compromised by the uniform code at the School. This approach is fortified by the conclusions of the House of Lords in **Shamoon v Chief Constable of the RUC** [2003] 2 All ER 26 in which Lord Nicholls of Birkenhead said in a case of sex discrimination that:

> *"4…The situation must be such that, gender apart, the situation of the man and the woman are in all respects the same".*

44. It is noteworthy that this was the approach adopted by the Constitutional Court of South Africa in **MEC for Kwazulu-Natal, School Liaison Officer and others v. Pillay (**CCT 51/06 [2007] ZACC 21) in which it was held that a rule preventing a Tamil-Hindu girl from wearing a nose stud which was central to her cultural and religious identity was discriminatory on religious and cultural grounds. The court rejected an argument similar to the one put forward in this case that the refusal to offer the girl an exemption to the uniform code was justified to promote uniformity and acceptable conventional among students.

45. In that case, Langer CJ held that the comparator group which was treated better than the claimant was those pupils:

> *"44… whose sincere religious cultural beliefs or practices, or religious beliefs or practices are not compromised by the [Uniform] Code, as compared to those whose beliefs or practices are compromised".*

46. I agree with Miss Mountfield that a similar approach should be adopted in this case and that the comparators to the claimant should be those pupils whose religious beliefs or racial beliefs are not compromised by the uniform code on the issue of the Kara or any other similar item of jewellery, which is required to show the pupil's intimate association with his or her religion or race. During his submissions, Mr. Auburn ultimately accepted correctly in my view that this was the proper approach.

(iv) Disparate Disadvantage or Detriment?

47. It will be recollected that section 1(1A) of the RRA requires the person claiming discrimination to show that he or she has been placed "*at a particular disadvantage*". Section 45(3) of the EA requires a claimant to show that he or she has been placed "*at a disadvantage compared with some or all persons who are not*

of his religion or belief (where there is no material difference in the relevant circumstances)". Similarly, section 49(1) of the EA refers to a *"detriment"*.

48. In this case, it is not disputed that the inability to wear a Kara is the only detriment or the disadvantage which is only suffered by the claimant. Significantly, it is not suffered by the comparators to whom I referred in paragraph 46 above and they are those pupils whose religious beliefs or racial beliefs are not compromised by the uniform code on the issue of the Kara or any other similar item of jewellery which is required to show the pupil's intimate association with the religion or the race concerned. The reason for that is those comparators do not suffer any disadvantage or detriment by the refusal of the defendant to grant an exemption from the uniform policy.

49. So the issue which I have to resolve can now be refined to being a consideration of whether the claimant is placed under a great "*disadvantage*" or has suffered a "*detriment"* because she was unable to wear the Kara which she regarded as a manifestation of her religion and race of exceptional importance.

50. The case for the defendant is that the claimant's case does not reach the threshold of showing the appropriate degree of "disadvantage" because it was not a *compulsory* requirement of the claimant's religion or race to wear the Kara. It is also said in the written skeleton argument that it is impossible for the court to conduct an assessment of the importance to the claimant of not being permitted to wear the symbol.

51. I am unable to accept the contention that there will *only* be "*a particular disadvantage"* or "*detriment"* where a member of the group is prevented from wearing something which he or she is *required* by his or her religion to wear. In my view, this threshold is too high for five reasons, which I will set out in no particular order of importance.

52. First, the words used in the statutory provisions do not suggest that they require such a high threshold as the defendant contends is the position. The New Shorter Oxford Dictionary defines the word "*disadvantage"* as "*lack of advantage; an unfavourable condition or circumstance" and* the word "detriment" is defined as *"loss sustained by or damage done to a person or thing"*. Neither of the these definitions of "*a particular disadvantage"* or "*detriment"* indicates that the adverse consequences in question have to reach a particularly high threshold and, in particular not as the defendant contends the position to be, that it has to be an inability to comply with a *requirement* of a religion or race.

53. The second reason why I do not consider that there will *only* be "*a particular disadvantage"* or " *detriment"* where a member of the group is prevented from wearing something which he or she is *required* by his or her religion or race to wear is that such an interpretation would mean rewriting the legislative provisions so that after each of the words "*a particular disadvantage"* or "*detriment",* it would be necessary to insert the words *"in the form of not being able to comply with a requirement of his or her race/* religion" . This is not a permissible step for a court to take.

54. Third, the words "*a particular disadvantage"* and "*detriment"* have to be construed in the light of, and not be inconsistent with, the approach in the recent decision of the Grand Chamber of the European Court of Human Rights in **DH & others v Czech Republic** [2008] ELR in which it was stated that :

> *"181.. in Chapman,… the court also observed that there could be said to be an emerging international consensus amongst the contracting states of the Council of Europe recognising the special needs of minorities and an obligation to protect their security, identity and lifestyle, not only for the purpose of safeguarding the interests of the minorities themselves but to preserve a cultural diversity of value to the whole community".*

55. Fourth, there is no statutory provision or in any authority from either Strasbourg or the domestic courts which I have seen which shows or suggests that these words ("*a particular disadvantage"* or "*detriment")* require proof of a religious or a racial requirement. Fifth, there is no valid reason of principle put forward by Mr. Auburn which shows why the threshold for "*a particular disadvantage"* or "*detriment"* has to be as high as being a requirement of a religion or of race.

56. A. So it becomes necessary to decide if the claimant suffered "*a particular disadvantage"* or "*detriment"* when she was precluded from wearing her Kara at school and this entails consideration of how important the Kara is to the claimant. That means reaching a fact-sensitive decision in every case of considering whether the disadvantage identified by a claimant amounts to "*a particular disadvantage"* or "*detriment"*. So I do not need to, and will not set out, in this judgment definitive and a comprehensive test because the words "*a particular disadvantage"* or "*detriment*" are ordinary English words.

56. B On the facts of this case, I believe that there would be a "*a particular disadvantage"* or "*detriment"* if a pupil is forbidden form wearing an item when (a) that person genuinely believed for reasonable grounds that wearing this item was a matter of *exceptional* importance to his or her racial identity or his or her religious belief and (b) the wearing of this item can be shown objectively to be of *exceptional* importance to his or her religion or race, even if the wearing of the article is not an actual requirement of that person's religion or race.

57. I stress that I am not saying that there will *only ever* be "*a particular disadvantage"* or "*detriment"* if these elements are proved as obviously there will be other cases in which these requirements are satisfied in different ways. There is therefore both a subjective element in (a) and an objective element in (b). My conclusion is that on the facts of this case, I believe that because elements (a) and (b) are satisfied, there will be a" *a particular disadvantage"* or "*detriment"* if the claimant is not allowed to wear the Kara.

58. That leads on to the question of how a court should decide if a claimant is genuinely contending that the wearing of an item is of exceptional importance to him or her for religious reasons. Assistance in resolving such a question is to be found in the authorities which throw light on the court's role in identifying a religious belief calling for protection under Article 9 of the ECHR. It is noteworthy that in **R (Williamson and others) v Secretary of State for Education** [2005] 2AC 246 Lord Nicholls of Birkenhead (with whom the other members of the Appellate Committee agreed) explained in paragraph 22 that:

> *(a)"…when the genuineness of a claimant's professed belief is in issue in the proceedings, the court will inquire into and decide this issue as an issue of fact…";*

> *(b)"…the court is concerned to ensure an assertion of religious belief is made in good faith 'neither fictitious, nor capricious and that it is not an artifice'…";*
>
> *(c)"..emphatically it is not for the court to embark on an inquiry into the asserted belief and judges its "validity" by some objective standard such as the source material upon which the claimant founds his belief or the orthodox teaching of the religion in question or the extent to which the claimant's belief conforms to or differs from the views of other professing the same religion…";* and that
>
> *(d)"…the relevance of objective factors such as source material is, at most, that they may throw light on whether the professed belief is genuinely held".*

59. Applying those factors in this case, I have little doubt that the claimant genuinely and honestly attaches exceptional importance to wearing her Kara and thereby satisfies the subjective requirement in paragraph 56 (a) above. First, the claimant explains in her witness statement that it is not a piece of jewellery but that it is in her mind "*one of the defining physical symbols of being a Sikh"* as "*it signifies the eternity of life and the bond between a Sikh and his or her Guru"*. Second, the claimant considers that it is worn on the wrist "*as a constant reminder to do good with the hands*" and is a religious symbol "*which both demonstrates and reminds me of my faith".*

60. Third, she has said that wearing the Kara is "*extremely important to me".* She explains that she has:

> *"a sense of duty to wear the Kara …as well as an expression of my race and culture".*

61. Nothing has been suggested to undermine the truthfulness of these comments which I accept as correct and as showing the *exceptional* importance that the claimant attaches to wearing the Kara. Furthermore I am fortified in reaching that conclusion by the fact that the claimant continued to wear the Kara even though when she was isolated from her friends at school, she must have fully appreciated the problems that had been caused for by wearing the Kara.

62. I interject to say that it has never been suggested that the claimant insisted on wearing the Kara merely because she was engaged in challenging the authorities at her school. Indeed, as I have explained, until the problems arose with the Kara, she was a school prefect and on May 4 2007, the school had written to the claimant's parents congratulating them on the claimant's achievements. Therefore, I can reject the possibility that she is insisting on wearing the Kara in order to be rebellious or just to defy authority. Indeed, I do not believe that the claimant would have taken the stand which she did if she had not come to the considered decision that wearing the Kara was of exceptional importance to her.

63. That leads on to the second requirement set out in paragraph 54 (b) above which is for there to be "*a particular disadvantage"* or "*detriment"*, there must be shown *objectively* that the wearing of a Kara can be shown objectively to be of exceptional importance to his or her religion or race, even if wearing it was not a requirement imposed on the claimant by her religion or race. This entails considering the views of

an expert although I appreciate as Lord Nicholls said in the passage set out in paragraph 58 above, objective factors such as source material:

> *"at most ... may throw light on whether the professed belief is genuinely held".*

64. The evidence of Professor Nesbitt, which I accept stresses, as I have explained in paragraphs 23 ff above, the significance of wearing the Kara to Sikhs and that hiding the Kara is a matter of deep sensitivity as is the question is of removing it from the wrist. Professor Nesbitt concludes that:

> *"in my extensive experience of working with and studying Sikhs, of the 5 Ks the Kara is a symbol most commonly worn by Sikhs as an external identifier of Sikhism".*

65. It is noteworthy that Professor Nesbitt explains that the significance of the Kara to Sikh pupils in schools is recognised in the guidance issued by Redbridge, Birmingham and Swansea Council areas, which are areas which have large Sikh populations.

66. Thus I conclude that the claimant suffers a "particular *disadvantage"* or a *"detriment"* by not being allowed to wear her Kara at school; the reason for that the wearing of this item can be shown subjectively and objectively to be of exceptional importance to her religion and race as a Sikh even if not a requirement of the religion or race. Of course this is not a "*particular disadvantage*" or a "*detriment*" suffered by a comparator who I have described in paragraph 46 above.

67. I conclude that by not being allowed to wear the Kara the claimant is suffering "*a particular disadvantage"* or "*detriment"*. I am fortified in coming to this conclusion by the reasoning in the recent decision of the Grand Chamber of the European Court of Human Rights in **DH & others v Czech Republic** (a part of which I referred to in paragraph 54 above) in which it is worth repeating that it was stated that :-

> *"181.. in **Chapman**, the court also observed that there could be said to be an emerging international consensus amongst the contracting states of the Council of Europe recognising the special needs of minorities and an obligation to protect their security, identity and lifestyle, not only for the purpose of safeguarding the interests of the minorities themselves but to preserve a cultural diversity of value to the whole community";* and
>
> *"186... the court has noted in previous cases that applicants may have difficulties in proving discriminatory treatment. In order to guarantee those concerned the effective protection of their rights, less strict evidential rules should apply in cases of alleged indirect discrimination".*

68. Both those passages assist the claimant because they show that the court should not impose too high a threshold in seeking to establish prima facie discrimination as to do so would undermine the intension of the legislation.

69. I agree with Miss Mountfield that a policy which imposes, as the school's policy on Kara's does, "a painful choice" for a devout Sikh, like the claimant, between, on the one hand, complying with the customs of a minority ethnic group who values their identity as a member of it and, on the other hand, attending a school which she wishes to attend and which consistently with its rules impose *"a particular disadvantage"* or a "*detriment*" on that member of a minority ethnic group.

70. Of course, a person who simply wishes to disobey a rule for another reason unconnected with an identity protected by the RRA or the EA is not subject to the same kind of disadvantage. Thus I reject as incorrect the suggestion that if the claimant is allowed to wear the Kara, other pupils will be entitled to wear jewellery; that argument ignores the need for the "*a particular disadvantage"* or "*detriment"* to be of "*exceptional importance*" to the religion and race of the pupil concerned as I explained in paragraph 56 above. Indeed to equate the claimant's desire to wear a Kara with a desire of another pupil to wear some other form of jewellery is not to compare like with like which is what the Strasbourg Court requires as was explained in **Thlimmenos v Greece** (2001) 31 E.H.R.R 50 [44]. So it follows therefore that the claimant has discharged the obligation of showing there was a "*particular disadvantage"* or a "*detriment"*.

71. Finally, I must deal with the approach of the defendant because in a witness statement, Mr. Peter Scott a Governor of the school explained that he chaired the meeting on 13 June 2007 and he explained that wearing the Kara was seen as *"roughly similar"* to displaying the Welsh flag because "*that is something which engenders emotion, perhaps strong emotion but is not something which either her religion or culture requires her to wear"*. I regard this as a seriously erroneous comparison because it totally ignores the critically important religious significance of wearing the Kara which is not shared by wearing the Welsh flag. I have already explained its objective significance in paragraphs 63 to 65 and its significance subjectively to the claimant in paragraphs 59 to 62 above.

(v) Proportionality and Justification

72. The first matter which has to be considered is what precisely has to be justified. The defendant contends it is their uniform policy whilst the claimant submits that it is the failure to grant an exemption from that policy so as to permit the claimant to wear the Kara. I have no doubt that the claimant's submission is correct because what is said to be discriminatory in the present case is not the uniform policy itself but the decision of the defendant not to grant an exemption in respect of the Kara. Indeed if this exemption had been granted, the claimant would have had no complaint about the uniform policy.

73. It is common ground between counsel that the operative test for justification was explained by Balcombe LJ in **Hampson v Department of Education and Science** [1989] ICR 179 at 191 F in a judgment (with which Nourse and Parker LJ agreed at pages 196H and 207D) when he said that:

> *"in my judgment "justifiable" requires an objective balance between the discriminatory effect of the condition and the reasonable needs of the party who applies the condition"*.

74. It is settled law that the onus is on the person, who is alleged to have discriminated to justify the discriminatory treatment, and as Mummery LJ recently explained (with my emphasis added in a judgment with which Arden and Longmore LJJ agreed) that:

> *"the standard of justification in race discrimination is the more exacting EC test of proportionality... the objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end. So it is necessary to weigh the need against the seriousness of the detriment to the disadvantaged group. It is not enough that [the party discriminating] could reasonably consider the means chosen as suitable for attaining that aim"* (**R (Elias) v Secretary of State for Defence** [2006] 1WLR 3213 at 3249 [151]).

75. The reason for these requirements is not difficult to ascertain because both the domestic and the Strasbourg courts have drawn attention to the exceptionally serious effects for society as a whole and the psychological well-being of the individuals of race discrimination and segregation in the educational context. The reasons are, for example, set out by Arden LJ in **Elias** (supra) where she explains very persuasively why the adverse effect of unlawful discrimination are manifold at pages 3267-8 [269 – 270] and in **DH** (Supra). Lord Hoffmann explained in **R (Carson) v Secretary of State for Work and Pensions** [2006] 1AC 173 at 182- 183 [16] in respect of characteristics such as race, cast, noble birth (with my emphasis added) that:

> *"..the courts as guardians of the right of the individual to equal respect, will <u>carefully</u> examine the reasons offered for any discrimination."*

76. The burden of justification on the defendant means in the words of Munby J in the **JFS case** (supra) (but with references omitted) that: the defendant must show:

> *"164…that the measure in question corresponds to a "real need" and that the means adopted must be "appropriate" and "necessary" to achieving that objective. There must be a "real match" between the end and the means. The court must "weigh the justification against its discriminatory effect" with a view to determining whether the seriousness of the alleged need is outweighed by the seriousness of the disadvantage to those prejudiced by the measure always bearing in mind that the more serious the disparate impact the more cogent must be the objective justification"*

77. Applying those principles to this case, what must be justified by the defendant is the discriminatory means to achieve the aim of having a uniform policy with its advantages. In order to discharge that burden, Mr Auburn seeks to derive assistance from decisions on justification which were successfully used by schools in the **Begum, X v Y School** and **Playfoot** cases to which I referred in paragraph 2 above in which the courts found in respect of claims brought under article 9 of the ECHR that the schools were entitled to prevent pupils wearing some piece of uniform. There is a very sharp distinction between those cases and the present case as many of the aspects of justification relied on in those cases are related to the extremely clearly visible and very ostentatious nature of the religious dress sought to be worn by the claimants in those cases. For example the niqab (which is the large veil which covers the pupil's face except for her eyes) in the **X v Y School** case was clearly at other end of the spectrum from the Kara which is not only 50 millimetres wide but is only visible if the claimant is not wearing long sleeves. By the same token the jihab (which is a long coat –like garment) in the **Begum** case is infinitely more visible than the Kara.

78. So the niqab and the jihab are many times more visible to the observer than the very small and very unostentatious Kara. In consequence, many of the arguments which were accepted by the courts as justifying prohibiting the wearing at school of the niqab and the jihab do not apply to the Kara. Those arguments include:

    a. the contention that allowing pupils to wear a Kara causes substantial difficulties because they stand out. There is no question of being unable to identify and notice a pupil wearing a Kara whilst somebody wearing the niqab or the jihab is very noticeable;

    b. the point that the decision not to grant an exemption from the uniform policy for the claimant to wear the Kara would assist in minimising difference of wealth and style and the pressures which result from marking differences of wealth. Miss Rosser explains that it avoids social pressures and competition; the suggestion in **Playfoot** that the restriction preventing the wearing of a ring in that case minimised pressures resulting from differences of wealth and style. These arguments do not apply in the present case because the Kara is such a small piece of steel that it cannot be perceived as costing much especially when its cost is compared with the cost of the watches which pupils are allowed to wear;

    c. the justification for decision not to permit the claimant to wear the Kara is that the uniform policy fosters a community spirit among the girls whilst also promoting their identity as part of an individual school. Miss Rosser, who makes that point, also explains that it maintains discipline and preserves respect. I readily agree that these matters can in the appropriate case justify a particular uniform policy (see **Begum** [44]and [58], **X v Y School** [70] and **Playfoot**) but I do not accept that they apply to the very unostentatious Kara which is small and usually hidden from view by the claimant wearing a long-sleeved garment. Apart from wearing the Kara, the claimant is quite content to conform with all aspects of the school's uniform policy; and

    d. a "floodgates" argument by saying that if non-compulsory items (such as the Kara) were allowed to be worn by pupils, then other pupils would all demand to be allowed to wear all other manner of items. I am unable to accept this argument because the claimant in this case falls in an exceptional category because it was a matter of exceptional importance to her as a Sikh to wear the Kara; She has reasonable grounds for her genuine belief that wearing the Kara is a matter of exceptional importance to her when the wearing of it can be shown to be objectively of exceptional importance to her religion or race and where it

has a deep significance for adherers of that religion or members of that race even if not a requirement of that religion or race. Miss Rosser refers to the wearing of a crucifix as being of similar importance to wearing the Kara but there is no evidence that the wearing of it is regarded in the same way as the wearing of the Kara. In other words the school is not justified in having any fear that granting an exemption to the claimant to allow her to wear the Kara would create any further exceptions. Again it is worth repeating that there are many schools in which the wearing of a Kara is permitted to be worn.

79. There are three further matters which the defendant contends constitute justification of its decision not to allow the claimant to wear the Kara. They are first that the rigid uniform policy (which precludes a dispensation being given to the claimant to wear the Kara) prevents bullying; second that according to Miss Rosser that it would be "very difficult" to explain to girls at the school why an exception to the rule should be made in favour of the claimant; and third if the defendant had acceded to the claimant's request to wear the Kara, this would constitute discrimination against other pupils at the school, who cannot wear jewellery.

80. I cannot understand why a decision to prevent the claimant from wearing the Kara would prevent bullying or would be difficult to explain. The only reason might be ignorance on the part of other pupils at the school first about the importance of a Kara to Sikhs and second in understanding why a decision by the claimant to wear it should be treated with respect. There are at least three reasons why these factors must be unreservedly and categorically refuted.

81. First, the obligation of bodies like the school to educate was explained clearly by the Strasbourg Court in its decision in **Serif v Greece** (2001) 31 EHRR 561 at Page 573 when it said that:

> *"53…Although the Court recognises that it is possible that tension is created in situations where a religious or any other community becomes divided, it considers that this is one of the unavoidable consequences of pluralism. The role of the authorities in such circumstances is not to remove the cause of tension by eliminating pluralism but to ensure that competing groups tolerate each other".*

82. Second, as I will explain in paragraphs 93 ff below the defendant has a clear and important obligation under section 71 of the RRA when carrying out its functions (which must include deciding what uniform can be worn) to:

> *"have due regard to the need- (a) to eliminate unlawful racial discrimination; and (b) to promote equality of opportunity and good relations between persons of different racial groups".*

83. Third, the school has now in place a Race Equality Policy which states (with my emphasis added) that :

> *(a)"it is committed to working towards race equality, promoting approaches to differences and fostering respect for people of all cultural backgrounds". The policy goes on to state that at the school they encourage pupils "to respect the values of cultures and which [sic] they are unfamiliar. We ensure that every pupil develops a sense of identity that is receptive and respectful to other cultures".*
>
> and (b) that:
>
> *"our curriculum promotes the respect for other cultures, celebrates diversity and educates against racism, our teaching challenges racial prejudice and stereotypes and fosters a critical awareness of biased, inequality and injustice".*

84. Therefore, there is a very important obligation imposed on the school to ensure that its pupils are first tolerant as to the religious rites and beliefs of other races and other religions and second to respect other people's religious wishes. Without those principles being adopted in a school, it is difficult to see how a cohesive and tolerant multi-cultural society can be built in this country. In any event, in so far as the intention of the uniform policy is to eliminate bullying, there is no rational connection between this objective and eliminating signs of difference.

85. This shows clearly first that the defendant and the school should not have sought to remove the potential cause of tension by refusing to allow the claimant to wear the Kara but second that instead it should have taken steps to ensure that the other pupils understood the importance of wearing the Kara to the claimant and to other Sikhs so that they would then tolerate and accept the claimant when wearing the Kara.

86. There is no validity in Miss Rosser's final point that to allow the claimant to wear the bangle meant that *"all other pupils in the school were being discriminated against"*. I am bound to say that I agree with Miss Mountfield that this contention shows a worrying lack of understanding of the need for equality of respect for those with different ethnic or religious beliefs and that this may mean taking reasonable steps to alter the "usual" rules so as to enable different situations to be dealt with differently. The stark fact is, as I explained in paragraph 78 (d) above, that the other pupils in the school, who are not allowed to wear jewellery are in a totally different position from the claimant as they (unlike the claimant) do not suffer a *"particular disadvantage"* or *"detriment"* for reasons of race or religion by not being allowed to wear jewellery.

87. For the purpose of completeness, I should repeat that the health and safety factors relied on by Miss Rosser as justifying her decision are not valid reasons for refusing to allow the claimant to wear the Kara as the claimant has said that she is quite prepared to compromise and to remove or cover the Kara with a wrist sweat band during any lessons such as Physical Education where health and safety might be an issue.

88. None of the arguments put forward by Mr Auburn either individually or cumulatively justify the refusal of the defendant to permit the claimant to wear a Kara at the school and thereby indirectly discriminate against her as a Sikh on grounds of race and religion. In reaching that conclusion I have not overlooked the fact that the school was

willing to recognise exceptions to its uniform policy if the items concerned were mandatory requirements of a pupil's religion or culture.

89. In my view, this is far too high a threshold because if a pupil considers for objectively reasonable grounds that the Kara was *"one of the defining physical symbols of being a Sikh"* and *"which both demonstrates and reminds me of my faith"*, the pupil should be allowed to wear it especially as in this case there is powerful objective evidence which shows that that view is strongly supported within the religion concerned. As I have explained in paragraphs 51to 55 above, no cogent reason was put forward to show the threshold for being permitted to wear a non-uniform item should be higher in that it would have to be a requirement of the religion.

90. So if I apply the test for determining if the defendant has discharged the burden of justifying its conduct as I set out in paragraphs 73 to 76 above, it seems clear that the attitude of the defendant in discriminating against the claimant on ground of her Sikh race and religion cannot be justified. This attitude is neither necessary nor appropriate to achieving any of the school's objectives. In my view the absence of any acceptable justification for the decision of the defendant to refuse to allow the claimant to wear the Kara shows that there is no justification for the claimant's policy or put in another way, the discriminatory effect far outweighs any justification for the discriminatory treatment of the claimant.

91. I have come to the clear conclusion that one of the reasons why the claimant has been the subject of unlawful discrimination on grounds of her Sikh religion and race has been the total failure of the defendant to comply with its important duties under section 71 of the RRA which I will explain in paragraphs 93 ff below. Indeed this failure would constitute additional grounds for holding that the decision of the defendant was not justified or proportionate.

(vi) Conclusion on indirect discrimination

92. For all those reasons I have come to the conclusion that the decision of the defendants not to grant a waiver to the claimant to permit her to wear the Kara constitutes indirect discrimination on grounds of race under the RRA and on grounds of religion under the EA. If the claimant is permitted to wear the Kara at school, this will be creating an extremely limited exception because at present it is not obvious that there will be other pupils of whatever religion or race who can invoke this exception which is dependent on two matters. The first is the belief of the pupil justified by objective evidence that the wearing of the article is a matter of *exceptional* importance as an expression of her race and culture. The second factor is the unobtrusive nature of the Kara being 50 mm wide and made of plain steel. The fears of the school that by permitting the claimant to return to school wearing her Kara, it will make great inroads into its uniform policy with many other girls wearing items to show their nationality, political or religious beliefs is in my view unjustified.

VI Issue B. Section 71

(i) Introduction

93. The claimant contends that the defendant has failed in its duties to have an appropriate racial equality policy as required by section 71 of the RRA which states that has the heading *"Specified authorities: general statutory duty"*. It provides (with my emphasis added) that:

> *"(1) Everybody or other person specified in Schedule 1A or of a description falling within that Schedule shall, in carrying out its functions, have*

due regard to the need-

(a) to eliminate unlawful racial discrimination; and

(b) to promote equality of opportunity and good relations between persons of different racial groups.

(2) The Secretary of State may by order impose, on such persons falling within Schedule 1A as he considers appropriate, such duties as he considers appropriate for the purpose of ensuring the better performance by those persons of their duties under subsection (1)".

94. Schedule 1A RRA Part 1 paragraph 46 includes "*governing bodies of educational establishments maintained by local authorities*". So the board of governors of the school, which is the defendant in this case, is covered. Article 3 of the **Race Relations Act 1976 (Statutory Duties) Order 2001** (SI2001/3458) ("the 2001 Order") made under section 71(2) of the RRA provides that:

> *"(1) A body specified in Part I or II of Schedule 2 to this Order shall, before 31st May 2002,*
> *(a) Prepare a written statement of its policy for promoting race equality (referred to in this article as its "race equality policy") and*
> *b) Have in place arrangements for fulfilling, as soon as is reasonably practicable, its duties under paragraphs (3) or (4) as the case may be.*
> *(2) Such a body shall,*
> *(a) Maintain a copy of the statement, and*
> *(b) Fulfil those duties in accordance with such arrangements.*
> *(3) It shall be the duty of a body specified in Part 1 of Schedule 2 to this order to –*
> *(a) Assess the impact of its policies, including its race equality policy, on pupils, staff and parents of different racial groups, including, in particular, the impact on attainment levels of such pupils, and*
> *(b) Monitor, by reference to their impact on such pupils, staff and parents, the operation of such policies, including in particular their impact on the attainment levels of such pupils…"*

95. Part I of Schedule 2 of the 2001 Order includes the governing body of an educational establishment maintained by a Local Education Authority and so the defendant as the governing body of the school was obliged to comply with the 2001 Order and with section 71 of the RRA.

96. To understand this issue, it is necessary now to stress the clear purpose of section 71 of the RRA, which is to require public bodies to whom that provision applies to give advance consideration to issues of race discrimination before making any policy decision that may be affected by them. As Arden LJ explained in **Secretary of State for Defence v Elias** [2006] EWCA Civ 1293 at paragraph 274;

> *"it is the clear purpose of section 71 to require public bodies to whom that provision applies to give advance consideration to issues of race discrimination before making any policy decision that may be affected by them. This is a salutary requirement, and this provision must be seen as an*

integral and important part of the mechanisms for ensuring the fulfilment of the aims of anti-discrimination legislation…"

97. The duties under section 71 must be fulfilled whenever a decision is taken which may have an impact on matters contained in it. Compliance should not be treated as a *"rearguard action following a concluded decision", but as an "essential preliminary to such decision, inattention to which is both unlawful and bad government"*. (**R (BAPIO Action Ltd) v Secretary of State for the Home Department** [2007] EWCA Civ 1139 per Sedley LJ [3]).

98. The case for the claimant is that the defendant did not have a policy prior to the introduction of the new policy *"having due regard to the need – (a) to eliminate unlawful racial discrimination; and (b) to promote equality of opportunity and good relations between persons of different racial groups"* . In consequence, the defendant first did not have due regard to those needs when dealing with the claimant's wish to wear the Kara at school and second did not assess the impact of its race equality policies on the wish of the claimant as a devout Sikh to wear the Kara at school.

99. The defendant contends that it has complied with its duties and it refers to a policy document from which I have quoted in paragraph 83 above and which I will refer to as "*the new policy*". It is said that it has been in force since July 2007 and so it would cover many events with which this claim is concerned, which occurred after the end of the summer term of 2007. As I will explain, the picture that has emerged during the hearing is of a confused state of affairs in which the policies which the school said were in place in July 2007 were not approved by its governors until December 2007 and that previously, there had been no clear race equality policy in place.

100. There is a dispute between the claimant and the defendant as to when the new policy was implemented. The decision had to be implemented by the Board of Governors and they only did this at their meeting in December 2007 after the present claim was instituted. Nevertheless the evidence of the defendant is that in practice it was adopted with effect from July 2007.

101. In order to resolve this dispute, it is common ground that I have to follow the course adopted in **R v. Camden LBC, ex party Cran** [1995] 94 LGR8 at 12 , which is that the court has to proceed on the factual basis put forward by the defendant or to resolve any disputes of fact in a defendant's favour. Accordingly I will have to assume that the policy was brought into effect in July 2007 which accords with the evidence of the defendant and that the operative day was 1 July 2007.

102. Before that time when the new policy was adopted, the school had on its file only an unsigned and incomplete policy guidance document from the neighbouring authority of Merthyr Tydfil ("the Merthyr Tydfil draft") which, as I will explain, does not satisfy the requirements of section 71.

103. I must now consider whether the defendant complied with its duty separately both before and after 1 July 2007 when I must regard the new policy as having been introduced. I bear in mind Dyson LJ's instruction that "*to see whether the duty has been performed, it is necessary to turn to the substance of the decision and its reasoning*" (**R (Baker) v Secretary of State for Communities** [2008] EWCA Civ 141 [37).

(iii)The steps taken by the defendant to comply prior to the implementation of the new policy which is to be assumed to be on 1 July 2007

104. The first witness statement of Miss Maureen Keating, the clerk to the Governors asserted that:

> *"14….We … have a Race Equality Policy at the school. This was originally adopted in July/July 2002 [sic]. It was then reviewed with regard to all pupils and the whole school community in July 2005, October 2005, and March 2006. A new draft was published in July 2007 and this is due to be reviewed annually the next occasion being summer 2008."*

105. Prior to the coming into force of the new policy, the position according to a witness statement made by Miss Keating was that in 2000/2001 the school wanted to put in place a race equality policy and so it contacted the Local Education Authority for further guidance on the subject. The school was informed that its neighbouring authority namely Merthyr Tydfil County Borough Council had a comprehensive policy already in existence and the school obtained a copy of it, which was the Merthyr Tydfil draft.

106. According to Mrs Keating, the defendant considered this policy which was the Merthyr Tydfil draft and adopted it in July 2002 and that it remained in force until the new policy was drafted but that it was reviewed from time to time. Surprisingly, there is no minute of any meeting at which this policy was discussed. The Merthyr Tydfil draft was entitled "*Equal Opportunities Draft Race Equality policy for Merthyr Tydfil Schools"*. In spite of its title, this document is not a policy document but merely sets out how a policy could be prepared. Indeed headings of it include sections titled:

> "*Preparing your race equality policy and keeping it up to date*",
> *"Steps to preparing your race equality policy"* and
> "*Steps to maintaining your race equality policy over time"*.

107. So the position before the new policy was adopted in 2007 was that the School had on its file only an unsigned, incomplete policy guidance document from a neighbouring authority Merthyr Tydfil, which was the Merthyr Tydfil draft and which had apparently never been discussed at a governors' meeting. This is the document of which Miss Keating says in her second witness statement made on the first day of the hearing on 17th June 2008 with my emphasis added that:

> *"3…our Governors considered .. decided was appropriate .. and adopted in July of 2002. … I can confirm that <u>the policy in question was adopted and used at the school from that date until Summer 2007 when a new policy was drafted</u>***".**

108. The so-called *" policy"* which the governors had, according to Miss Keating "*decided was appropriate … and adopted*" at material times which was not in fact a policy at all as must have been clear from even a very cursory reading of it. In my view, the Merthyr Tydfil draft is nothing more than a useful draft guidance for Merthyr Tydfil schools on *how* to prepare a race equality policy and keep it up to date with a proposed framework for a draft policy attached; the gaps in it show that it was not a complete policy which could have been used. Indeed I will explain that there is no evidence to show that it was ever referred to or taken into account when the claimant was seeking to be allowed to wear a Kara and the defendant and the Head Teacher were considering and determining the request.

109. The Merthyr Tydfil draft document provides with comments added in block capitals

that:

> *"**4. Leadership, Management and Governance**.*
>
> ***Commitment***
> *The School's commitment to equality for all is reflected in our Equal Opportunities Summary and the school's mission statement:*
> *`… **[LEFT BLANK BY DEFENDANT]** …'.*
>
> ***Governing Body.***
> *... The Governing Body includes Equalities issues (including Race Equality) as an item on the agenda of all Governing Body meetings and has a governor with responsibility for Equalities, who is (… **[LEFT BLANK BY DEFENDANT]** …)*
>
> …
>
> ***People with specific responsibilities***
>
> *… The named person with responsibility for dealing with reported incidents of racism and racial harassment is **(…[LEFT BLANK BY DEFENDANT]** …)*
>
> …
>
> *The Equal Opportunities Co-ordinator is (… **[LEFT BLANK BY DEFENDANT]** …)"*

110. The Merthyr Tydfil draft proceeds to state that that "*all policies and strategies are regularly monitored, reviewed and evaluated for their effectiveness in 1) eliminating race discrimination, 2) promoting racial equality and 3) promoting good race relations"*. It should be noted that despite requests for relevant notes of meetings, there is no evidence of any review of the school's uniform policy in the light of the coming into force of s71 RRA in May 2002 or of the Merthyr Tydfil draft.

111. As there is no evidence that the Merthyr Tydfil draft was ever the subject of review, I must assume that it continued to be the basis on which the defendant sought to comply with its section 71 duty and its duty to have a race equality policy. It clearly fails to comply with the duty and the policy because of the gaps to which I referred and because there is no race equality policy of the kind set out in article 3 of the 2001 Order.

112. What is much more serious is that the defendant did not take into account:
    a. the need to reconsider the uniform code in the light of the obligations in section 71(1) or the race equality policy at any time before the claimant tried to wear the Kara to school;
    b. the fundamental importance of wearing the Kara to the claimant's religion and race. The defendant and the School (i) did not consider the obligations in section 71(1) or the race equality policy and (ii) did not appreciate but should have appreciated that by not allowing the claimant to wear the Kara because it was not a requirement of being a Sikh, they were not "having regard" to those obligations and that policy;
    c. that the wearing of the Kara was a matter of exceptional importance because (i) the claimant genuinely believed for reasonable grounds that wearing this item

was a matter of exceptional importance to her racial identity or her religious belief and (ii) the wearing of this item can be shown objectively to be of exceptional importance to her religion or race, even though the wearing of the article is not an actual requirement of that person's religion or race. In a witness statement, Mr. Peter Scott a Governor of the school stated that he chaired the meeting on 13 June 2007 concerning the claimant's application to wear the Kara and he explained that wearing the Kara was seen as *"roughly similar"* to displaying the Welsh flag because *"that is something which engenders emotion, perhaps strong emotion but is not something which either her religion or culture requires her to wear"*. I regard this as a seriously erroneous comparison because it totally ignored the critically important religious and racial significance of the Kara as described in paragraphs 24 to 27]above and it shows a disregard for the basis and rationale of section 71; and

d. valid reasons for permitting the claimant to wear the Kara but instead the defendant decided not to permit the claimant to wear the Kara for reasons which I explained in paragraphs 77 to 86 have no validity.

113. It is unfortunate that the defendant did not appear to regard the matters set out in section 71 or in the race equality policy in dealing with the claimant prior to the deemed implementation of the new policy in July 2008. Indeed, as I will now explain, the reasons given by the defendant and the school when dealing with the claimant's application for dispensation to wear the Kara show that no consideration was given to section 71 or the race equality policy.

114. Thus, in the letter of 2 May 2007 referred to in paragraph 11 above, Miss Rosser explained that to allow the claimant to wear *"her bracelet"* while the defendant considered the matter, would be discrimination against other pupils who wanted to wear a cross. Similarly at the meeting of the "Hearing Committee of the Governing Body" on 13 June 2007, Miss Rosser said that allowing the claimant to wear the Kara would have meant that she would have *"discriminated against 95.6% of the school population who were not allowed to wear jewellery*". I have also explained in paragraph 111 (c) the attitude of Mr Scott. I am bound to conclude that this approach, which must be based on a failure to appreciate the exceptional significance to devout Sikhs (like the claimant) of the need to wear the Kara, shows a failure on the school's part to comply with the section 71 duty to *"promote equality of opportunity and good relations between persons of different racial groups"*. I stress that there had been no special consideration of the significance of the Kara and the need for the claimant to wear it as described by Professor Niblett as is shown by the defendant's attitude of regarding the Kara as only a piece of jewellery. I believe that the school had failed to consider properly the exceptional significance for racial and religious reasons to the claimant as a devout Sikh of actually wearing the Kara.

(iv) The steps taken by the defendant to comply after the implementation of the new policy which has to be assumed to be on 1 July 2007.

115. In the letter from Mrs Keating of 20 July 2007 to the claimant's mother and step-father the reason given for refusing the claimant's request to wear the Kara in the letter of 20 July 2007 (which are set out in paragraph 15]above) do not show any regard for the new policy. It is said that if the claimant was to be allowed to wear the Kara

> *"it is felt that there is a possibility that [she] may be singled out as being different from her peers and that such actions may result in bullying or similar repercussions"*.

116. In my view, this approach shows an inability to implement a race equality policy and to foster good relations between pupils of different racial groups. The school should have regarded itself under a clear obligation to avoid bullying by explaining to all pupils why it was so important to the claimant to wear the Kara and why they should be tolerant of her. There is nothing in which I have seen in this case which proves to my satisfaction that the teaching staff or the defendant regard it as their duty to fulfil this important obligation. Indeed it does not appear to have been considered by the Head Teacher when she said in her first witness statement that the claimant's education at the school wearing the Kara could not continue even on an interim basis pending the outcome of the present proceedings because it would be difficult to explain this accommodation to different groups to the pupils at the school.

117. A further and continuing breach after the new policy must be regarded as having come into effect in July 2007 was the repeated failure of the school to consider the important aspects of it which I have referred to in paragraph 83 above. In particular the school and the defendants failed in its duty of (a) *"fostering respect for people of all cultural backgrounds*"; (b) *"respect"[ing] the values of cultures [with] which they are unfamiliar"*; (c) *"ensure [ing] that every pupil develops a sense of identity that is receptive and respectful to other cultures";* (d) *"promote [ing] the respect of other cultures, celebrates diversity and educates against racism, our teaching challenges racial prejudice and stereotypes and fosters critical awareness of biased, inequality and injustice".*

118. In her witness statement, Miss Keating explained that on 17 July 2007 she convened a meeting with the governors between the Government Support Officer from the Local Education Officer, Mr. Graham Thomas and their legal officer Mr. Paul Nicholls and at this meeting *"the Governors received detailed advice from both officers"*. I would have expected the major issues for discussion to have been first compliance with section 71, and possible unlawful discrimination on grounds of race and religion. All that Miss Keating says was discussed was *"various issues such as human rights, religious manifestation, health and safety, previous cases and Sarika's representations"*. The witness statement records that the governors said after the meeting that they had then received detailed "*legal authority and legal advice on the subject*" and they would combine it with their own research to come to a decision. It would seem from the description by Miss Keating that the advice was about the Human Rights Act 1998 and surprisingly no mention was made of section 71 or the possibility of there being unlawful discrimination on grounds of race and religion.

119. As I have explained, he claimant's request for an exemption was finally refused on appeal by the Appeals Committee of the defendant, which met in the absence of the claimant's parents on 26 October 2007 after that committee had unfortunately refused to postpone the meeting so that a representative of the Valley Race Equality Council could attend. The reasoning of the Appeals Committee of the defendant was merely that *"article 9 of the ECHR does not require that one should be allowed to manifest one's religion at any time and place of one's choosing"*. Surprisingly no reference was made to the provisions of the RRA or the EA, which are the basis of the present application. I have concluded that the defendant did not consider the racial aspect of their decision and above all totally ignored its obligations under the new policy referred to in paragraph 117 and the provisions of section 71 of the RRA.

120. Indeed the attitude of the school and the defendant was to regard race issues as completely distinct from uniform policy. The defendant's own notes of the meeting of the Discipline Committee on 22 January 2008 indicated that race equality considerations were irrelevant despite advice on the contrary from the claimant's solicitors and Mr Williams from the Local Education Authority. Mr Lloyd, who chaired the committee, expressly refused to give any regard to section 71 (1) matters

in the context of the exclusion hearing in connection with the enforcement of the uniform policy by stating that *"the issue was due to a matter of uniform not race"*. The fact that there was no consideration of the new policy or the section 71 obligations of the school is shown by the fact that the defendant duly informed the claimant's mother and step-father by a letter dated 23 January 2008 that the claimant's exclusion would be upheld explaining merely that:

> *"The Panel decided that [the claimant] had displayed persistent and open defiance of the school's uniform policy when all other avenues for solving the uniform dispute had been exhausted"*

(iv) Conclusions on section 71

121. During most of the relevant time until July 2007, the school had a Race Equality Policy (if at all) only in the most technical sense, and certainly not as a living instrument over which any member of the school community had any ownership, or to which any member of it had displayed any commitment. Surprisingly there is no consideration of section 71 or the race equality policy at any stage and I assume that when the School quite properly sought advice, its attention was not drawn to section 71 or the RRA or the EA. The defendant clearly failed to comply with its section 71 obligations and race equality issues as unfortunately those issues played no part (although they should have played a prominent part) in its decision- making in relation to the claimant's wish to wear a Kara. If, which is not the case, I had been in any doubt on this conclusion, I would have reached it on the basis of the comment of Stanley Burnton J (as he then was) that *"if there had been a significant examination of the race relations issues involved…there would have been a written record of it"* (**R (BAPIO Action Limited) v Secretary of State for the Home Department** [2007] EWHC 199 (Admin) 199 [69]).

122. I should add that there have been serious complaints made during and after the oral hearings in this case about the way in which the defendant put forward and then had to radically change its evidence relating to how it might have complied with its section 71 obligations and in particular whether it had a written policy. I am quite satisfied first that there was no wish on the part of the defendant or any representative or adviser of the school to mislead the court and second that the unsatisfactory way in which the evidence on this issue was adduced by the defendant was simply a result of the failure of those involved at the school to understand and to give proper consideration to section 71 matters or the race equality policy. I seriously doubt if the school, its teachers or its governors had prior to the hearing in this case been informed let alone instructed on the significance and of the relevance of the RRA and the EA generally and more particularly to this dispute.

123. In my view, the school totally failed to appreciate its obligations under section 71. Therefore its governors and teachers did not even know what policy (if any) that it had or how it ought to have complied with these statutory obligations. It goes without saying that I expect that the school will now take active steps to ensure that every decision it now takes which falls within the ambit of section 71 takes fully into account the new policy at every stage.

VI. Issue C Article 8

(i) Introduction

124. A further claim by the claimant is that she was taught in segregated conditions over a period of months and ultimately excluded from the school thereby violating her rights

under Article 6 of the ECHR or alternatively her rights under Article 14 of the ECHR when read with Article 8. The wording of Article 8 is well known and it requires Member States to afford *respect* to private life, family life, home and correspondence as well as preventing public authorities from interfering with this right. It is settled law that *"private life"* in this context includes *"the right to establish and develop relationships with others"* (**Niemietz v Germany** (1992) 16 EHRR 97 paragraph 29). Since Article 8 is potentially a protean right, a failure to accord respect for private life must attain a level of seriousness to fall within the ambit of Article 8 (see **Secretary of State for Work & Pensions v. M** [2007] AC. [83]).

125. The case for the claimant is that the steps taken by the defendant in order to punish the claimant for non-compliance with the uniform policy by means of internal seclusion achieved the level of seriousness so as to violate Article 8. The defendant disagrees as their case is that the claim does not reach the level of severity to engage article 8 and that in any event it can invoke the defences in article 8 (2) . It is common ground that the decision of the House of Lords in **R (L) v School Governors** [2003] 2 AC 663 means that teaching of a child in segregated circumstances is not an exclusion.

(ii) Is Article 8 engaged?

126. There is a dispute about the effect of the internal seclusion on the claimant and in particular whether it reached the level of seriousness to fall within the ambit of Article 8. A critical feature in determining this issue is the effect of the wrongful treatment on the person subjected to it. The claimant was placed in isolation in school from 12 July 2007 until the end of the summer term on 20 July 2007 save for 2 days when pupils were not required to wear school uniform and then the claimant could mix with the other pupils, she was also placed in isolation in the Autumn Term of 2007. The claimant's evidence was that when she was placed in isolation, she was set work to carry out alone in a separate room from other students. She says that she was prohibited from talking to them during break and lunch time when she had to sit outside a teacher's office.

127. According to the claimant, she was not permitted to go to the toilet without being accompanied by a teacher who waited outside and she was also supervised on a rota basis by two teaching assistants who collected work through her regular classes and brought it to her to carry out. The claimant, unlike the other pupils, was not given any letters or other documents to take home which related to events like charity fund-raising, non-school uniform days or the school newsletter. She, unlike her contemporise, was not taken to the Middle School to meet their new teachers in advance as she and her contemporaries prepared to move up to Year 9 in September 2007. Her evidence was that as a consequence of this treatment, she was crying every night and most days and that she continued having serious headaches and nightmares which she had not had before.

128. The claimant was also placed in isolation from 6 September 2007, which was the second day of the Autumn term and the first day on which she had worn the Kara because on the previous day the swelling of her wrist had prevented her from doing so. This isolation continued until 26 October 2007. The claimant explained that if any student tried to talk to her, they were reprimanded and she was not allowed to communicate with her friends. In other words she was completely segregated. Work was given to her but she said that she had much less homework than she had previously been given.

129. According to the claimant, much work required working with a partner and she did not have anyone to work with because she was in isolation. The claimant also said

that she was unable to get clarification or assistance if she did not understand something in the work given to her and that she was precluded from taking part in any school activities which brought her into any contact with other pupils. In addition she could not play netball and that she was not able to take advantage of discussions with career staff.

130. She said that she was very worried and upset about her performance at school because she was isolated and she said that:

> "*When I was in isolation I felt very unhappy, singled out and alone*".

131. The claimant stated that her isolation continued through October 2007 because as I have explained after she returned from her half-term holiday wearing the Kara, she was excluded by the school for the rest of the day. She claimed that she was also subjected to an intrusive and humiliating interrogation.

132. The defendant and the School reject the picture which the claimant seeks to paint concerning the effect on the claimant of being placed in isolation. For example the Head of the Lower School Miss Lisa Woodrow described the claimant's manner as being:

> "*usually very content and again she never displayed any visible signs of emotion to indicate to me that she was upset about her being in isolation. She seemed perfectly normal to me and was quite happy within herself. During lunchtimes usually I and another member of staff would have our lunch in a different room with her and again she seemed very content"*.

133. The clerk to the governors Miss Maureen Keating who worked in the school's office, where the claimant spent some of her time, explained that the claimant was:

> *"a very nice young lady. She is chatty, friendly and seemed quite content...I remember conversations that we used to have about her interests and hobbies… she presented as a polite, well adjusted girl who was happy despite the circumstances prevailing at the time*".

134. In answer to the contention that the claimant received less attention from teachers than she would have done, Miss Rosser explained that in these circumstances teachers are directed to assist the pupil more than they would do in a classroom environment as a pupil receives one to one teaching. There is therefore a major conflict in evidence relating to the effect of the claimant on being put in isolation.

135. The only appropriate resolution is to follow the course adopted in **R v. Camden LBC, ex party Cran** [1995] 94 LGR8 at 12 which prescribes that the court must proceed on the factual basis as put forward by the defendant or resolve any disputes of fact in a defendant's favour. That principle has been frequently applied.

136. It is not disputed that I should apply that principle in this case which means that I must proceed on the basis that the claimant was content and happy whilst at school during the period of segregation. Miss Mountfield says that even in that event, the

claimant's article 8 rights have still been infringed because of her unhappiness at home which is a matter that the school and the defendant have been unable to challenge because they were not there.

137. I am unable to accept that submission because the claimant's case on this issue depends on her being unhappy at home as well as being unhappy at school but the basis of her complaint falls away when, as I have explained, it is necessary to proceed on the basis that she was content at school. In any event, I have doubts as to whether her unhappiness at home would be sufficient to infringe her Article 8 rights. For those reasons I reject the Article 8 claim which in any event I do not consider adds anything to the claim for unlawful discrimination which I have already upheld. I ought to add that even if the claimant could show that her article 8 rights had been engaged and that the defendant could not rely on article 8(2), it is quite probable that I would have regarded this as a case for "*just satisfaction*" and not awarded the claimant any damages.

VII. Issue D Procedural unfairness concerning fixed-term exclusion

138. In the light of my finding that the decision not to permit the claimant to wear her Kara at school was unlawful, this issue and the following issues are only of academic interest and so I will deal with them relatively briefly. Miss Mountfield contends that because of the Head Teacher's failure to notify the claimant personally of the fact of exclusion from school on 5 November 2006 for 1 day and on 6 November 2006 for 5 days with the information specified in the Guidance as required by regulation 4 of the Education (Pupil Exclusions Appeals) (Maintained Schools) (Wales) Regulations 2003 ("the 2003 Regulations") for which the defendant is responsible, the defendant acted procedurally unfairly and unlawfully.

139. Regulation 4 of the 2003 Regulations states that where the Head Teacher of a maintained school (such as the school in this case) excludes any pupil:

> *"The head teacher must without delay take reasonable steps to inform the relevant person of the following matters –*
>
> i)*the period of the exclusion or; if the pupil is being permanently excluded that he or she is being so excluded;*
> ii) *the reasons for the exclusion;*
> iii) *that he or she may make representations about the exclusions to the governing body and that the excluded pupil may also make representations about the exclusion to the governing body where the pupil is not the relevant person; and*
> iv) *the means by which such representations may be made".*

140. The term *"the relevant person"* means that in respect of the exclusion of a pupil who is aged 11 or over (which of course means the claimant); both that pupil and a parent of hers must be informed. The defendant correctly accepts that it was in breach of these obligations.

141. The next allegation relates to the fact that from 13 November 2006 the defendant refused to permit the claimant to attend school. When the number of days of exclusion in the term had reached 6 days, the school changed the nature of the prohibition upon the claimant attending the school wearing the Kara because she was told by a letter of 15 November 2007 that she may not attend school wearing the Kara but that this was *"not an exclusion"*. .The claimant's case is that this was a device adopted by the defendant to prevent the claimant from having the right of access to an independent appeal tribunal as is provided for by the 2003 Regulations in the case of an exclusion. Mr Auburn says that all the school was doing was asking the claimant to attend in conformity with the school rules and so this was not an exclusion.

142. I agree with Mr Auburn that for the treatment of the claimant to fall within the concept of *"exclusion"*, there need to be at least two elements, which were (i) a direction to the pupil to stay away and (ii) a direction taken on disciplinary grounds under the Education Act 2002 section 52 (10) as otherwise there would be an *"exclusion"* where, for example, a direction was given to a pupil to stay away because he or she was contagious.

143. As to (i), the case for the defendant is first that there was no direction to the claimant to stay away but instead the school wanted her to attend but only in conformity with school rules and second that that is not an exclusion. Mr Auburn submits that the Court of Appeal in **Spiers v Warrington** [1954] 1QB 61 had held that not to be an exclusion. According to Mr. Auburn, **Spiers** is a long-standing authority for the proposition that where a pupil arrives at school but not in compliance with school rules and is then refused admission, then he or she cannot say that the school has expelled him or her because the pupil is being expected and encouraged to return to school.

144. The **Spiers** case was a successful appeal by way of case stated by the school authority against a decision allowing an appeal by a parent from his conviction for failing to ensure that his child attended school regularly. The reason why the child had not attended at school was that she repeatedly turned up in trousers contrary to the dress code of the school. There was first no suggestion that the dress code was unlawful in any way or second, unlike the present case any suggestion that the school had acted wrongfully.

145. Lord Goddard CJ said in a judgment with which Sellers and Havers JJ agreed at page 66 that:

> *"The head mistress did not suspend this child at all. She was always perfectly willing to take her in; all that she wanted was that she should be properly dressed. Suspending is refusing to admit to the school; in this case the head mistress was perfectly willing to admit this girl but was insisting that she be properly dressed"*.

146. The only other authority to which I was referred was the **Begum** case in which two members of the Appellate Committee made observations which, according to Miss Mountfield, were made without the benefit of counsel's submissions but even so, that does not prevent them from being of great value. It is true that in the **Begum** case, the submissions related to the alleged breach of human rights and not to the question of

whether there had been a failure to comply with domestic statutory procedure (see Lord Hoffmann [57].) Indeed the claimant in **Begum** was not subject to exclusion and the facts of that case were very different from the present case but two members of the Appellate Committee made some comments relevant to the applicability of **Spiers.**

147. First, Lord Bingham having quoted the passage from the **Spiers** case, which I have set out in paragraph 145 above, then said that:

> *"39. To the [pupil], of course, the case appeared differently: she was being effectively shut out from attending the school by the school's insistence on her compliance with an unjustified rule with which it knew she could not comply. That is not a view of the case which I have accepted, but had it been the correct view (as in another case, on quite different facts, it might) there could be a force in the contention that she was, de facto, excluded. It may be, and of course one hopes, the situation of this kind is a very rare occurrence. I am not, however, sure that it is adequately covered by the existing rules."*

148. Second, Lord Scott explained that the decision not to allow the pupil to attend school:

> *"82 …was, in my view a decision taken on disciplinary grounds. The [pupil] was not prepared to abide by the school uniform rules. The decision was taken for that reason. But, none the less, it was not, in my opinion, an "exclusion" of [pupil] for section 64 purposes. A section 64 exclusion is a direction to the pupil to stay out of school. No such direction was ever given to [the pupil]. She was not directed to stay away: she was directed, and encouraged, to return wearing the school uniform. The decision that she would not return was her decision (or that of members of her family), not that of the school. In contrast to a pupil subject to a section 64 exclusion [the pupil] could at any time have returned to the school. This was not in my opinion, a section 64 exclusion".*

149. There is a stark difference between the present case and the **Spiers** case because in the **Spiers** case, there was no successful challenge to the legality of the rule of the school which led to the pupil staying away while in the present case for the reasons which I have explained, the way in which the rule was applied amounted to indirect racial and religious discrimination and was the consequence of a failure by the defendant to comply with its duties under section 71 of the RRA.

150. So the issue is whether the approach in **Spiers** and its reasoning set out in paragraph 145 above applies where the school rule which precludes a pupil from attending is unlawful. There are four significant factors which have led me to the conclusion that

the reasoning in **Spiers** does not apply to the present case. First there was no finding or even a suggestion in that case that the uniform policy was unlawful and so that is different from the present case. Second the courts should not do anything to enforce or permit any entity to enforce an unlawful policy. Third, it is instructive to consider the consequence of permitting a school to enforce an unlawful uniform policy. So if, for example, a school imposed a rule for no justifiable reason that its existing female pupils (but not its existing male pupils) had to shave their heads and that it then suspended any female pupils who arrived at school with unshaven heads. I do not believe that any court would allow that school to rely on what had been said in **Spiers** to prove that its actions set out in the last sentence did not amount to an exclusion. Adopting the words of Lord Goddard in **Spiers,** "*suspending is refusing to admit to the school"* but this applies only in respect of rules made in accordance with the law or, perhaps in Lord Bingham's words in **Begum,** a rule which was not "*unjustified"*.

151. Finally if the **Spiers** reasoning applied to the present case, a school could deliberately have rules or it construe its rules in such a way that it would always be able to contend that the **Spiers** decision meant that a pupil was never excluded or suspended because he or she was being required to agree to such a rule with the consequence that if the pupil did, then the pupil could return to school. I am, of course, not suggesting that in this case, the school was *deliberately* seeking to avoid the claimant being able to avoid being able to invoke the remedies of being excluded in this way. I am merely giving this example to show the possible alarming consequences of regarding the decision in **Spiers** as applying to unlawful uniform policy. Mr. Auburn suggests is appropriate.

152. Once the school rule which is said to justify not allowing the pupil to attend was not lawful, the basis of the decision in **Spiers** no longer applies and this would be one of those situations where in Lord Bingham's words again in Begum that "*there could be a force in the contention that she was, de facto, excluded"*. Indeed I respectfully believe that the same reasoning applies in the present case and so I conclude that the defendant cannot rely on the **Spiers** case when it gave a direction (which I have found to be unlawful for the reasons set out in Part V above) for the claimant to stay away unless she stopped wearing her Kara at school.

153. It therefore becomes necessary to move on to the next stage, which is stage (ii) as described in paragraph 142 above and which is to consider if the direction to exclude the claimant was taken on disciplinary grounds. As I have explained, from 15 November 2007 the claimant was told that she could not attend the school unless she stopped wearing the Kara and complied with the school's dress code. In my view, that was an exclusion for disciplinary reasons and that was after all the decision of the Appeal Committee in January 2008. Therefore for the reasons, which I have explained, the school's conduct constitutes an exclusion with the consequence that the claimant can invoke the appropriate appeal procedure. This also means that the remaining issue is only of very limited academic interest.

VIII Issue E Failure to follow exclusion guidance or to give reasons for departing from it

154. I stress that this issue is only of very limited academic importance in the light of my other conclusions and so I will deal with it shortly. Under section 52 (4) of the Education Act 2002, Head Teachers and governing bodies (among others) must by law have regard to the relevant guidance which in Wales is, as I explained in paragraph 31 (e) above, the 2004 Guidance.

155. The 2004 Guidance states in paragraph 1 that:

"There is an expectation that the guidance will be followed unless there is a good reason to depart from it".

156. The case for the claimant is that there is no evidence to suggest that the Head Teacher had any proper regard to the 2004 Guidance at the point of excluding the claimant formally and informally from the school. Miss Mountfield contends that if the Head Teacher had given regard to the 2004 Guidance, she would have been aware of the requirement in the Regulations that the claimant herself has to be formally informed of the exclusion under regulation 4 (1) of the 2004 Regulations and for the right to appeal and of the required form of a notification letter. Thus it is said that the Head Teacher failed to take a relevant consideration into account in reaching her decision to exclude both formally and informally the claimant.

157. I have already explained in paragraphs 149 to 152] above that as a result of the **Spiers** case, I consider that there was a formal exclusion. I accept that the claimant was not formally informed of the exclusion or her right to appeal.

158. One allegation that is made is that the school by failing to give any due regard to the requirements in the RRA in permitting the claimant to be excluded from school it acted in breach of paragraph 15.2 which reminds schools that they are required to take steps to ensure that they will not discriminate against pupils on racial grounds when making a decision about whether to exclude a pupil. I have already explained that I consider this complaint to be justified for the reasons set out in section V above.

159. In my view, this complaint is justified and in those circumstances there is no need to deal with other complaints because the defendant will have to make further decisions in the light of my judgment.

VIII Conclusion

160. I have concluded that the claimant was the subject of acts of indirect discrimination on the grounds of race and religion which were committed by the defendant when it refused to allow her to attend at school wearing the Kara. In addition, the defendant has failed to comply with its duties under section 71 of the RRA. I have also decided that the defendant excluded the claimant when the school sought to suspend her and this was done in a procedurally unfair manner. Furthermore, the school failed to follow the 2004 Guidance in dealing with the claimant. I reject the claimant's claim that the imposition of disciplinary sanctions and of internal segregation contravened her rights under Articles 8 and or 14 when read with Article 8 of the ECHR.

161. The defendant quite correctly accepted during the hearing that the conduct of its Disciplinary Committee's hearing of 22 January 2008 is defective with the result that another hearing has to take place. After the draft judgment was circulated, Mr. Auburn informed me that the claimant would be permitted to return to the school in September 2008 wearing her Kara but that the defendant sought permission to appeal, which I have refused. Mr. Auburn stated that in those circumstances, the defendant would consider whether to make a renewed application to appeal

162. I must stress that if the claimant is permitted to wear the Kara at school, this will constitutes an extremely limited exception because at present it is not obvious that there will be other pupils of whatever religion or race who can invoke this exception which is dependent on two matters on the very unusual facts of this case. The first is the honest belief of the claimant justified by objective evidence that the wearing of the article is of exceptional importance to her for racial or religious reasons. The second factor is the unobtrusive nature of the Kara being 50 mm wide and made of plain

steel. The fear of the school that permitting the claimant to return to school wearing her Kara will lead to an end of its uniform policy with many other girls wearing items to show their nationality, political or religious beliefs is totally unjustified.

163. If they consider that they should permit the claimant to return to school wearing her Kara, I hope that the school will take all possible steps to ensure first that the claimant can become quickly assimilated again within the school and second that there will no bullying of her for racial or religious reasons. This school will no doubt wish to invoke its new policy on racial matters, which is now in force so as to ensure that this conduct does not occur. By the same token, the claimant and her family hopefully will not boast about their apparent success in the present litigation..

164. One of the Governors (Mr. Scott) says in his witness statement that he would welcome guidance on how to handle this type of case. I hope that I have done so but I would stress how important it is to apply the new race equality policy whenever it can be relevant and also to appreciate what defences to a claim of indirect discrimination on grounds of race and religion cannot be maintained.

165. I feel sympathy for all the parties in this case. The claimant deserves very great sympathy for the problems that have been caused to her education by decisions of the school which I consider wrongful. The decision-makers at the school are entitled to some sympathy as I suspect they have acted honestly and that they could not have been instructed properly on the effect of the RRA and the EA.

166. Finally I must express my gratitude to counsel for the admirable written and oral submissions which have been of the highest quality. Although the defendant and the school will be disappointed with the result, they can take consolation from the fact that Mr Auburn argued with commendable skill and fairness all the submissions open to him especially in the light of the confusion over what race or equality policy (if any) the school had at the relevant times.

SUMMARY

Mr. Justice Silber

1. **<u>This is a summary of the judgment which I am about to hand down. It is not part of the judgment and is only being given because of the interest in this case.</u>**
2. The main issue raised on this application is whether on the facts of this case, a particular school, (namely Aberdare Girls High School) was entitled as a matter of public law to refuse to allow a 14 year old Sikh pupil Sarika Angel Watkins-Singh to wear on her wrist at school the Kara. It is claimed that the decision to refuse to allow this has resulted in indirect discrimination against Sarika on the grounds of race and religion.

3. The Kara at the centre of the present dispute is a plain steel bangle which has a width of about 5 millimetres which is about a half of an inch. It is worn by Sikhs as a visible sign of their identity and faith.

4. This judgment is fact-sensitive and it does not concern or resolve the issue of whether the wearing of the Kara should be permitted in our schools. Indeed that is not a question that a court could or should be asked to resolve. Nothing that appears in this judgment seeks to resolve or to throw any light on this problem or the circumstances in which a Kara should be permitted to be worn in other schools. It follows that

nothing in this judgment is intended to be any comment on the traditions or the requirements of the Sikh religion or race or any other religion or race.

5. There are a number of exceptional features of this case. First, as I have explained, the Kara is 5 millimetres or ½ inch wide and therefore it is much narrower than a watch strap and many ordinary bangles. Second it cannot be observed if the wearer of it is wearing a long-sleeved garment. Third, this is not a case of a pupil not wearing the school uniform but merely wanting to wear the Kara as well as wearing all her uniform. Fourth, wearing the Kara on a wrist is regarded universally by observant Sikhs as a matter of exceptional importance and it symbolises their loyalty to the teaching of their Gurus. Fifth, Sarika readily agrees to cover the Kara for physical education sessions and any activity in which the wearing of the Kara could cause health and safety issues. Finally there are many schools in which the wearing of the Kara is permitted.

6. Sarika is a 14 year old Sikh schoolgirl of Punjabi-Welsh heritage who challenges a decision made last year by her school which is Aberdare Girls High School which has prevented her from wearing a Kara at her school, The school is a maintained girls' non-denominational school in Wales and its governing body is the defendant in the action.

7. The school defends its decision by saying that it has a uniform policy which on the topic of jewellery only allows its pupils to wear ear studs and wrist watches but no other jewellery. The case for Sarika is that the school erred in making this decision because first to her as an observant Sikh wearing the Kara was matter of exceptional importance for religious and racial reasons and second that the school's decision amounts to indirect discrimination on the grounds of race and religion in the light of the provisions of the Race Relations Act 1976 as amended and the Equality Act 2006

8. Sarika entered the school in September 2005. Her father was Welsh but he died when she was a year old and when Sarika was 5 years old her mother married her step-father who is an observant Sikh and who she regards as her father. Sarika was given a choice as to which religion, if any, she wishes to follow and she has selected the Sikh religion which has become particularly important to her since her visit to India in March 2005. There is no dispute that she is an observant Sikh

9. Sarika's school reports have been good and she was a prefect .On 4 May 2007 the Head Teacher of the school wrote to the parent of Sarika stating the school was:

> *"very pleased with Sarika's progress and she should be congratulated for her achievements".*

10. In April 2007, a teacher at the school observed Sarika wearing a bangle, which was her Kara. The teacher asked Sarika to remove it because it contravened the school's uniform policy which permitted only one pair of plain ear studs and a wrist watch to be worn by pupils.

11. When Sarika refused to remove it, she sought an exemption from the uniform policy because she stated she was wearing her Kara as something which was central to her ethnic identity and to her religious observance as a Sikh. The school deferred making a decision on Sarika's request to wear the Kara pending receipt by the school of some unspecified national guidance. The governing body at a meeting on 30 June 2007 at which it again decided to postpone making the decision. In the meantime, Sarika's mother was asked not to allow Sarika to wear the Kara but that she should carry it in her bag. Sarika's mother said that she would let Sarika decide but she did not return

to school because of the continuing prohibition on her wearing the Kara until 12 July 2007 after the intervention of the local education authority's welfare officer.

12. When Sarika returned to school, she was interviewed by the Head Teacher and she was told that she was not permitted to attend the school wearing the Kara but that she would be taught in isolation and that she would be kept socially segregated from all the other pupils. The segregation was strictly enforced and she was kept socially segregated from other pupils. Sarika was even accompanied to the toilet by a member of staff who waited outside.

13. By a letter dated 20 July 2007 which was about 3 months after Sarika had first requested an exemption, the governing body eventually refused her request for an exemption. Sarika's parents appealed against that decision.

14. When Sarika returned to school at the start of the autumn term 2007 and when she wore the Kara, she was immediately placed in seclusion. Sarika's request for an exemption was finally refused on appeal by the Appeals Committee of the governing body on 26 October 2007 .The reasoning of the appeals committee was merely that *"Article 9 of the ECHR does not require that one should be allowed to manifest one's religion at any time and place of one's choosing"*. Surprisingly no reference was made to the provisions of the Race Relations Act or the Equality Act both of which should have been of crucial importance to the governing body in reaching its decision but which were not of such importance.

15. When Sarika returned to school after the half-term break on 5 November 2007 wearing the Kara, she was the subject of fixed-term exclusions first on 5 November 2007 for one day and second on 6 November 2007 for 5 days. Sarika was not formally told of her right of appeal but her mother indicated by a letter dated 8 November 2007 that she wished to exercise her right to make representations. On 13 November 2007, not withstanding this request Sarika was told that she was being excluded for a fixed term by the Head Teacher of the school.

16. After 5 days of exclusion in the academic term, a pupil is formally entitled to appeal and on 15 November 2007 which was a day after Sarika's sixth day of consecutive fixed term exclusions had ended, she was told by Miss Rosser the Head Teacher in a letter first that she would not be permitted to attend the school wearing the Kara but second that this was not an exclusion because Sarika could attend school if she was dressed compatibly with the school's uniform policy that is without wearing the Kara. In answer to a request the Head Teacher said that she had not decided for how long this exclusion of Sarika would last.

17. Sarika felt unable because of her identity as a Sikh to remove the Kara and the present proceedings were commenced. On 22 January 2008, the defendant's disciplinary committee held a meeting to consider Sarika's fixed term exclusion on 5 and 6 November 2007. The following day the school rejected Sarika's appeal on the grounds of Sarika's *"open, deliberate and persistent defiance of the school's authority"*. The school accept that the way in which it conducted this appeal was unfair.

18. The position is that since 21 February 2008 pending the outcome of the present proceedings Sarika is being educated at a different school which permits her to wear a Kara. She remains determined to return as a pupil at Aberdare Girls High School but provided of course that she can wear the Kara.

19. The claim of Sarika that she has been subjected to unlawful indirect discrimination has to be considered against the background of the importance to an observant Sikh like Sarika of wearing the Kara. Professor Eleanor Nesbitt a Professor in Religion at the University of Warwick has explained that Sikhs have to adopt the 5 Ks which have been part of their religion since 1699. The 5 Ks are outward signs of a Sikh and they include not only Kesh which is uncut hair but also the Kara which is the bangle. In Professor Nesbitt's extensive experience of working and studying Sikhs, she has concluded that of the 5 Ks, the Kara is the symbol most commonly worn by Sikhs as an external identification of Sikhism even though it is not an actual requirement for people not being initiated like Sarika to wear it.

20. Professor Nesbitt explained that the Kara is a circle that reminds Sikhs of God's infinity and it shows that they are linked in other words, they are handcuffed by it to God. Her evidence was that it is important for Sikhs continue to wear the Kara on his or her right arm or wrist.

21. The main claim of Sarika is that the continuing decision of the school not to allow her to wear the Kara at school amounts to discrimination on grounds of religion and race. The first issue was whether when compared with pupils whose religious beliefs or racial beliefs were not compromised by the uniform code on the issue of the Kara or any other similar item of jewellery Sarika was placed in the words of the statutes "*at a particular disadvantage*" or suffered a "*detriment*" by not being allowed to wear the Kara.

22. Although it was not a requirement of Sarika's religion or race to wear a Kara, I am quite satisfied that it would be a "*particular disadvantage*" or "*detriment*" for an observant Sikh like Sarika to be forbidden for wearing an item which she genuinely believes for reasonable grounds was a matter of exceptional importance to her racial identity or her religious belief and that the wearing of this item can be shown objectively to be of exceptional importance to her religion or race as a Sikh.

23. In this case there is very clear evidence which has not been disputed that the Kara was not a piece of jewellery but to Sarika it was and remains "*one of the defining physical symbols of being a Sikh*" and "*a constant reminder to do good with the hands*". Sarika stress that wearing the Kara was "*extremely important to her*".

24. Obviously the views of a pupil would not and should not be of definitive importance especially if they were not supported by objective evidence showing the exceptional importance to Sarika of wearing the Kara. As I have explained Professor Nesbitt provides this supporting evidence. Indeed the significance of the wearing of the Kara to Sikh pupils in schools is recognised in the guidance issued by other education authorities.

25. I must stress two points. First there was no evidence adduced of any other bracelet or other religious jewellery which would fall into this very exceptional category in which the Kara falls

26. Second the school's attitude in refusing to allow Sarika to wear the Kara was explained by one of their governors when he said that wearing the Kara was seen as "*roughly similar*" to displaying the Welsh flag because "*that is something which engenders emotion and perhaps strong emotion but is not something which either Sarika's religion or culture requires her to wear*". I am afraid I regard this as a seriously erroneously comparison because it totally ignores the critically important *religious* significance of a Kara which is not shared by the Welsh flag.

27. The school sought to justify its decision to prevent Sarika from wearing the Kara because of its general uniform policy. It pointed to decisions of this court which enabled schools in support of their uniform policy to prevent girls wearing the Moslem niqab which is the veil which covers the vast majority of a pupil's face and the jihab which is a long coat like garment.

28. I have concluded that there is an enormous difference between these very noticeable garments and the unostentatious Kara which is very small and still permits the wearer to wear every other aspect of the uniform policy. Again I reject the attempt of the school to justify its decision to prohibit Sarika from wearing the Kara on the grounds that the wearing of the Kara might be seen as a symbol of affluence but its cost must be minimal when compared with the cost of the watches which all pupils are allowed to wear.

29. Another form of justification put forward by the school was that if Sarika was allowed to wear the Kara it would be widely misunderstood in the school. Even if that were the case, the school has a clear obligation as is indeed set out in its own racial equality policy which includes being committed to *"fostering respect for people of all cultural backgrounds"* and having a curriculum which *"celebrates diversity and educates against racism"* .

30. I have concluded that none of these justifications succeeded and that the claim for indirect discrimination on grounds of race and religion succeeds.

31. There were other claims made by Sarika . Of those I found that the school failed to comply with its very important obligations under section 71 of the Race Relations Act 2002 which required it in considering its uniform policy to have "*due regard"* to the need to end unlawful racial discrimination and promote equal opportunity and good relations between persons of different racial groups. In addition I dismissed the claim brought under the Human Rights Act that Sarika's rights under Article 8 of the European Convention on Human Rights had been infringed.

32. Thus at the end of the day Sarika's claim for discrimination on grounds of race and religion succeeds. After the draft judgment was circulated the School agreed to allow Sarika to return as a pupil in September and to wear her Kara. She will then be entering year 10 and starting her preparations for her GCSE courses. I very much hope that the school will take all possible steps to ensure first that Sarika can become quickly assimilated again within the school and secondly that there will be no bullying of her for racial or religious reasons. By the same token, I hope that Sarika and her friends will not boast over their success in this action.
33. I have refused an application by the defendant for permission to appeal but the Governors of the School have intimated that they will consider making a further application for permission to appeal. I very much hope that if they do make such an application or reach a decision not to do so, they do so speedily as it is clearly in the interests of the claimant that she knows as soon as possible if this litigation is finished or if it is continuing..

34. Finally I must express my sympathy for all parties in this case Sarika deserves great sympathy for the problems that have been caused to her education by the unlawful decisions. The decision-makers at the school sought to act fairly and they are entitled to some sympathy as they could not have been instructed properly on the effect of the Race Relations Act and the Equality Act.

35. I stress again that what I have just said is not part of the judgment which I now hand down