

# Cultural factors not mitigating on sentence



[By Jacob Stilman](#)

A recent decision of the Court of Appeal ought to put to rest, once and for all, any notion that cultural factors can serve to mitigate sentences in cases of domestic violence and sexual assault.

In the reported case of *R. v. H.E.* [2015] OJ 3733, the court reviewed a custodial sentence of 18 months, which the trial judge imposed on a man convicted of sexual assault on his spouse, and physical assaults on his spouse and young children. The Court increased the sentence to four years.

While there were several areas wherein the judge was found to have erred, the strongest language was reserved for the trial judge's passing comments on the significance of "cultural factors," which appeared to be taken into account to mitigate the sentence.

The accused and his family were immigrants from Iran, and had lived in Canada for three years at the time that he was charged. He had been married for a total of 16 years, and there were two children from the marriage. The allegations were serious as they entailed years of repeated forced intercourse and beatings and threats to his wife, as well as multiple assaults on his children.

In imposing the 18-month sentence the trial judge wrote:

"In my considerations, I ask how much weight [should] the cultural impact of moving from Iran to Canada be given. [The respondent's wife] testified in Iran if she complained about any abuse she would be ignored. It is a different culture, it is a different society. As far as I'm able to ascertain from the evidence those cultural differences moved with them from Iran to Canada. It is only a factor in my deliberations, and not a sentencing principle."

The Court of Appeal was unimpressed, putting the issue in no uncertain terms:

"Second, and more importantly, cultural norms that condone or tolerate conduct contrary to Canadian criminal law must not be considered a mitigating factor on sentencing. (...)

"A cultural practice that is criminal in Canada does not mitigate the perpetrator's conduct for sentencing purposes. Cultural differences do not excuse or mitigate criminal conduct. To hold otherwise undermines the equality of all individuals before and under the law, a crucial Charter value. It would also create a second class of person in our society — those who fall victim to offenders who import such practices. This is of particular significance in the context of domestic violence. All women in Canada are entitled to the same level of protection from abusers. The need to strongly denounce domestic violence is in no way diminished when that conduct is the product of cultural beliefs that render women acceptable targets of male violence. If anything, cultural beliefs may be an aggravating factor enhancing the need for specific deterrence in cases where the sentencing judge is satisfied that the offender continues to maintain those views at the time of sentencing."

While this is hardly a new principle, and the court has repeatedly articulated a strong denunciatory position with respect to domestic assault and sexual assault, the blunt language of this decision sends a clear message to trial judges who have occasionally endorsed arguments, which have resorted to "cultural relativism" as explanatory or mitigating.

It is interesting to observe, however, that when applied in other contexts the accommodation of different cultural and religious practices has been recognized by the courts — see for example the Supreme Court decision in *R v. N.S.* [2012] SCJ 72, as well as in the citizenship context in *Ishaq v. Canada (Citizenship and Immigration)* [2015] FCJ 158.

Both of these cases considered the place of the niqab (Muslim full facial veil) within Canadian society; in *N.S.* the court attempted to navigate the issue of how to accommodate a witness who was to testify fully veiled, and in *Ishaq* the litigant challenged the government policy preventing the taking of an oath of citizenship while veiled.

Although the considerations are different it would seem that the firm posture of the courts when contemplating issues of cultural

diversity has been to apply a progressive and egalitarian, if not feminist, approach to their analysis.

Cultural norms which are regressive, paternalistic, and harmful to women and children will get no traction in the courts, while those which appear to be volitional and represent the bona fide diversity which had been established in Canada will be accommodated and recognized.