Neutral Citation Number: [2016] EWCA Civ 451

Case No: C5/2013/3079
C5/2013/3080

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (IAC)
UPPER TRIBUNAL JUDGE WARR
IA277702011 & IA27727/2011

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/05/2016

Before :

LORD JUSTICE MOORE-BICK
VICE-PRESIDENT OF THE COURT OF APPEAL, CIVIL DIVISION
LADY JUSTICE GLOSTER
and
LORD JUSTICE DAVID RICHARDS

- -

Between :

SB (INDIA) and CB (INDIA)	**Appellants**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Mr S. Chelvan and Ms V. Hutton (instructed via the **Bar Council Public Access Scheme**) for the **Appellants**
Miss Samantha Broadfoot and Mr Andrew Byass (instructed by **Government Legal Department**) for the **Respondent**

Hearing date: Thursday 14 January 2016

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Approved Judgment

Lady Justice Gloster:

Introduction

1. This case raises the issue whether, in the particular circumstances of this case, the Secretary of State's decision to sanction the removal of a married lesbian couple back to India, was a flagrant violation or complete denial of their rights to family life under article 8(1) of the European Convention of Human Rights ("the Convention"), and, if so, whether nevertheless her decision to remove them was proportionate under article 8(2).

Factual and procedural background

2. The appellants, CB and SB, are nationals of India. SB was born on 29 May 1979 and CB was born on 10 September 1980. They met in India in May 2007 and subsequently became "extremely close". They state that in Delhi they suffered "verbal abuse and jokes from the general work force because our close friendship was noticed" and that they were "ostracised and discredited in a way that heterosexual couple [sic] who worked together were not". They decided to come to the United Kingdom where they lived together and began their relationship. On 17 June 2008 they entered into a civil partnership with each other in the UK. On 27 February 2015 they entered into a marriage in Glasgow. Under section 11(2)(b) of the Marriage and Civil Partnership (Scotland) Act 2014 they are treated as having been married to each other since 17 June 2008, the date of their civil partnership.

3. CB first came to the UK as a student on 19 September 2007 on a student visa that was valid from 17 September 2007 until 31 January 2009; she was then granted further leave to remain as a student until 16 September 2009, with SB as her dependent; CB was then granted further leave to remain to undertake post-study work from 15 September 2009 until 15 September 2011, again with SB as her dependant. SB first came to the UK in May 2004 on a student visa. She returned to India in June 2006 and then, in September 2007, returned on a student visa and subsequently became authorised to remain as CB's dependent as stated above. From September 2007 they lived together in the UK. Following completion of their Masters Degrees at the Robert Gordon University in Aberdeen, both were employed by British Gas.

4. On 19 July 2011 the appellants made applications to the Secretary of State for the Home Department ("the respondent") for leave to remain in the UK pursuant to article 8 of the Convention on the basis of their relationship and their family life, and in particular their concerns about the difficulties which they would encounter living as a lesbian couple if they returned to India. They also made representations that the harm which they might suffer if returned to India would breach their rights under article 3 of the Convention.

5. On 12 September 2011, by letter and notices of that date, the respondent refused their applications both in relation to the article 8, and in relation to the article 3, grounds. The respondent accepted that the appellants enjoyed family life with each other but did not accept that their removal from the UK would amount to an interference with their right to respect for their private and family life. The letter stated:

> "the key facts of your client's [sic] immigration history that we have considered are as follows:
>
> - Your client came to the UK in a temporary category (student) and therefore should never had [sic] any expectations to stay here indefinite [ly].
>
> - Your clients continued there [sic] relationship in full knowledge that they would have to leave the UK when there visa's [sic] expired. Whilst we appreciate the decision to refuse [CB's] application would create some upheaval, we do not feel refusal would breach her family life as her family will be refused together. They can continue their family life in outside the UK.
>
> …...
>
> Even accepting that your clients have been in the United Kingdom since 2007, given the factors considered above and the circumstances of your clients [sic] particular case we are of the opinion that requiring them to return to India is a justifiable and proportionate course of action in pursuit of the legitimate aim of effective immigration control."

6. Both appellants lodged notices of appeal on 27 September 2011 pursuant to section 82 (e) of the Nationality, Immigration and Asylum At 2002 ("the 2002 Act"). Their appeal only related to the article 8 ground. Thus they did not seek to argue before the First-Tier Tribunal ("FTT") that the risk to their personal safety if they returned to India would be sufficient to engage their rights under article 3.

7. The appellants' appeals against the respondent's decisions were dismissed by the FTT (First-tier Tribunal Judge Rowlands) in two judgments both dated 15 December 2011. The FTT found that the appellants would continue to live together as a couple in India and could not be prevented from doing so there, even if they could not have as open a lifestyle as they did in the UK or enjoy a status having legal recognition, such as a civil partnership, under Indian law. Whilst the FTT accepted that the appellants shared family life with each other, it decided that their removal would not have such an effect on their family life as even to engage article 8; it also held that the interference with their family life was in accordance with law and necessary in the interests of the economic well-being of the country and that such interference would not be disproportionate.

8. On 13 January 2012 the Upper Tribunal granted the appellants permission to appeal against the FTT decisions. Permission to appeal was granted by Judge Pearl on 13 January 2012 on the basis of an arguable error in dealing with the appellants' civil partnership and "bearing in mind *HJ Iran* [2010] UKSC 31".

9. Their appeals were subsequently dismissed by the Upper Tribunal in a decision dated 30 August 2013 (Upper Tribunal Judge Warr). The Upper Tribunal held that no error of law had been made by the FTT. The appellants sought permission to appeal,

pursuant to section 13 of the Tribunals, Courts and Enforcement Act 2007 ('the 2007 Act'). On 30 September 2013 the Upper Tribunal refused permission to appeal.

10. On the appellants' application for permission to appeal to the Court of Appeal against the Upper Tribunal's decision, Davis LJ, by an order dated 3 December 2013, refused permission on the papers. Apart from concluding that the second appeals test was not satisfied, he observed:

> "It is not, per se, an infringement of article 8 to sanction the removal of the same sex couple in a civil partnership under English law to a jurisdiction which does not recognise civil partnerships (cf *EM (Lebanon)).* I certainly am prepared to accept that article 8 is capable of being engaged in this present context. Nevertheless I can see no error of law here in the assessment of proportionality; and the Upper Tribunal judge was justified in so concluding on that aspect of the case."

11. Permission to appeal was granted by Elias LJ following an oral renewal hearing on 26 March 2014. He said:

> "2. … An important feature of the case which seems to me to be potentially highly relevant is that since the determination of the First Tier Tribunal and Upper Tier Tribunal decisions, and indeed even since the order made by the Right Honourable Davis LJ refusing permission on the paper application, the Supreme Court in India has now overturned a ruling of the Delhi High Court which had found the law which made homosexual activity criminal in India was unconstitutional. The Supreme Court have said this it is a constitutional law, and that plainly changes the position, potentially, for this couple on return.
>
> 3. In addition I am told that there has been no case which has considered the position of lesbians who have entered into a civil partnership and the court will have the opportunity to look at that wider issue."

Offer made by the respondent which was subsequently withdrawn

12. Following the grant of permission by Elias LJ and in light of the observations of Davis LJ, the respondent proposed, in open correspondence, that this matter should be remitted to the Upper Tribunal for the appeal to be re-determined on the basis that the FTT erred in its approach to article 8. This proposal was not agreed by the appellants. However, on 25 July 2014, the respondent, having considered this matter further, withdrew that offer and submitted to this court that, on a proper analysis, there was in fact was no material error of law in the FTT's determination and that the Upper Tribunal was correct so to find.

Evidence relating to the treatment of gay men and women in India and the applications to adduce further evidence

13. The respondent made an application to adduce further evidence dated 25 July 2014. This comprised the UK Border Agency's "Country of Origin Information Reports: India" dated respectively March 2012 and May 2014.The appellants made an application to adduce further evidence dated 1 May 2015. This largely comprised their marriage certificate, letters from their employers and various information which it was claimed demonstrated that "the worldwide legal landscape has evolved in terms of the legal recognition of same-sex marriage and same-sex civil unions". By the time it came to the hearing there was no opposition by either side to the admission of this further evidence. Notwithstanding that, on a strict analysis, some of the materials might not have complied with the requirements for the admission of further evidence on an appeal, we allowed the further evidence to be admitted into evidence and relied on.

14. In light of the fact that one of the reasons given by Elias LJ, in granting permission to appeal, was that the Supreme Court in India had, since the Tribunal rulings and the decision of Davis LJ, overturned a ruling of the Delhi High Court, which had found the law which made homosexual activity criminal in India was unconstitutional, it is necessary to refer to certain aspects of the evidence relating to the treatment of gay men and women in India. This evidence includes not only evidence that was before both Tribunals, but also evidence which the respondent sought to adduce as additional evidence before this court in response to the appellants' stated intention to rely on the subsequent decision of the Supreme Court overturning the ruling of the Delhi High Court.

15. Section 377 of the Indian Penal Code ("IPC") provides as follows:

> "377. Unnatural offences.
>
> Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.
>
> Explanation - Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section."

16. According to the evidence before the FTT:

    i) A 2001 report entitled "Human rights violations against sexuality minorities in India" stated that, between 1862 when the IPC was enacted and 1992, there have been very few, namely 30, reported cases under Section 377 in the higher courts, "with most of the persecutions (sic) being for non-consensual acts of sodomy (including sexual assault of minor)."

    ii) On 2 July 2009, in the case of *Naz Foundation (India) Trust v Government of NCT Delhi*, the Delhi High Court ruled as follows:

> "We declare section 377 of IPC in so far as it criminalises consensual sexual acts of adults in private, as violative of articles 14, 21 and 15 of the Constitution. The provisions of section 377 IPC will continue to govern non-consensual penile non-vaginal sex and penile non-vaginal sex involving minors. By "adult" we mean everyone who is 18 years and above. ……This clarification will hold, till of course, Parliament chooses to amend the law to effectuate the recommendation of the Law Commission of India in its 172nd Report which we believe removes a great deal of confusion."

The court ruled that section 377 should continue to be applied in cases of non-consensual sex and sex involving minors. The High Court's judgment (as quoted in paragraph 10 of the subsequent Supreme Court's decision) stated as follows:

> "Moral indignation, howsoever strong, is not a valid basis for overriding individuals' fundamental rights of dignity and privacy. In our scheme of things, constitutional morality must outweigh the argument of public morality, even if it be the majoritarian view. In Indian context, the latest report (172nd) of Law Commission on the subject instead shows heightened realization about urgent need to follow global trends on the issue of sexual offences. In fact, the admitted case of Union of India that Section 377 IPC has generally been used in cases of sexual abuse or child abuse, and conversely that it has hardly ever been used in cases of consenting adults, shows that criminalization of adult same-sex conduct does not serve any public interest. The compelling state interest rather demands that public health measures are strengthened by de-criminalization of such activity, so that they can be identified and better focused upon."

iii) The 172nd report of the Law Commission referred to by the High Court, entitled "Review of Rape Laws", was produced in March 2000, and so has been in the public domain for more than 16 years. It recommends that Section 377 of the IPC be repealed.

17. The FTT had before it other evidence relating to the treatment of gay men and women in India. The FTT based its decision as to the circumstances which the appellants would experience in India upon a number of matters. In summary, the FTT's judgment records that, having looked at a "wealth of evidence", the picture in India as a whole for lesbians was poor, but that it was also improving. As to the situation in Delhi, while the judge recorded the fact of the Delhi High Court's decision, reference was also made to objective evidence showing that it is an urban centre where the appellants "are more likely to be accepted". I quote paragraphs 15-24 of the judgment where the FTT's evidential conclusions are set out:

> "15. I have been presented with a wealth of evidence which I have considered which paints a very poor picture for lesbians in India. Indeed it suggests that they are hardly visible at all other

than in more enlightened urban areas and that the reality for lesbians in India is a lifetime of hiding their real sexuality from their families and public. However, without a doubt it paints a picture of an improving situation, one where there is beginning to be some more openness and admission that lesbians even exist. I do accept however, that the lifestyle of the appellants in the United Kingdom would be far more open than it would be in India and that they are more likely to be able to live the kind of lifestyle that they want here than they would there. That does not necessarily mean that their appeal must succeed.

16. I have considered the decision in the case of *EM (Lebanon vs SSHD)* (2008) UKLH64 because this is relevant in this case where the couple will be removed together. Lord Bingham set out the test so that a flagrant breach would be required such as would completely deny or nullify the right in the destination country "serious discriminatory interference when the right would be insufficient". [sic]

17. The truth is the evidence suggests that, wherever they live, these people will live as a couple. I have not seen any evidence that Indian society would in any way be able to prevent this. Removing them to India would not stop them living together and in that respect will not destroy their family life.

18. The appellants say they are a couple and that both are determined to remain so. One says that she would not succumb to pressure from their family to marry a man and the other says that she would. Frankly I do not accept that argument. They are both mature intelligent women and are [sic] both long since left home having lived in Delhi long before they came to the United Kingdom. Pressure they [sic] may be but I do not believe that they would succumb to it.

19. The appellants' argument is that, as a same sex couple, they have rights which they would be denied in India but which they can exercise in the United Kingdom. They argue that they have a right to adopt a child/children, that they have a right to seek IVF treatment, that they have a right to be considered next of kin, have joint banking and own property together. I do not accept that these rights exist and certainly not that they were ever intended to be protected by the Convention.

20. Whatever they say, they have entered into a civil partnership and that will continue however long they want it to. Discriminatory views will <u>not</u> change that as a fact. I can see no reason and have not been presented with a shred of evidence to confirm that they would not be allowed to have a bank account in their joint names nor to have property in their joint names. Indian law is based very much on English law. As to their next of kin status I consider it to be completely irrelevant. There is

no reason why they could not make mutual wills to deal with that issue.

21. I do not accept that they have a right to adopt or seek IVF any more than any other couple. Adoption is about the best interests or rights of children not childless couples. There is no evidence of the inability to own property jointly either.

22. I accept that they have a far more open relationship here than they would in certain areas of India but they can, after all, return to Delhi which is where they came from. Delhi is of course the area where the penal codes were altered nearly two years ago to make homosexuality no longer a crime. It is also, according to the objective evidence, somewhere where they are more likely to be accepted. I accept there may be discrimination in some form but that does not mean to say that they will not be able to continue their family life together. I do not believe their removal would have such an effect on their family life as to even engage article 8. Their private life together would continue and although they have obviously made some friends here there is why they could not continue to keep in touch with them in the usual ways. Their private life seems to be totally consisting of work colleagues and friends that they have made here whilst they were students. They have completed their studies and would expect to return and all their friends would expect them to be returning at the end of their studies. There is no reason why they can't keep in touch as I have already said.

23. I believe that questions 3 and 4 can be easily answered in favour of the Respondent. The interference is clearly in accordance with the law and necessary in the interests of the economic well-being of the country as otherwise all students would simply remain here at the end of their time. Although I do not consider it necessary I have also considered the question of proportionality.

24. Is it reasonable to expect these two to carry on family life such as it is in India. I believe it is. Attitudes in India will only ever change if there are young couples such as these two who are prepared to effectively come out and show the Indian people how honourable and beautiful a same sex relationship is. They came to the United Kingdom to further their studies and have been fortunate in being able to complete that. They have achieved what appears to be their goal in declaring their love for each other through a legal civil partnership. As I have already stated that will always be the case whatever they attitudes they face in India. So far as most if not all of the other things that they fear is concerned there are ways around them which they as educated and modern women should be able to deal with. I consider their removal to be totally proportionate."

18. Following the Delhi judgment, the Supreme Court of India was petitioned by 16 individuals and organisations. The cases were grouped together under the name *Koushal & Others v Naz Foundation and others [SLP(C) 15436/*2009]. The appeal to the Supreme Court was not supported by the Government of India. Argument was heard by the Supreme Court from 23 February to 27 March 2012. Subsequently, on 11 December 2013 (i.e. after the hearing before the Upper Tribunal), the Supreme Court gave a ruling upholding the constitutionality of Section 377 and setting aside the Delhi High Court's decision. The Supreme Court held that Section 377 was not in breach of India's written constitution. The Supreme Court indicated in its judgment that it was deferring to the will of Parliament in the matter, i.e. that it should be up to Parliament to determine whether or not Section 377 was to be amended or repealed.

19. At paragraph 56 of the Supreme Court's judgment, the court said this:

> "56. While parting with the case, we would like to make it clear that this Court has merely pronounced on the correctness of the view taken by the Delhi High Court on the constitutionality of Section 377 IPC and found that the said section does not suffer from any constitutional infirmity. Notwithstanding this verdict, the competent legislature shall be free to consider the desirability and propriety of deleting Section 377 IPC from the statute book or amend the same as per the suggestion made by the Attorney General."

20. According to paragraph 2.1.7 of the UK Border Agency's Country of Origin Information Report: India dated 18 July 2014, on or about 20 December 2013 the Government of India and certain NGOs filed petitions in the Supreme Court, requesting the court to review its decision of 11 December 2013. The Government stated that "the position of the central government on this issue has been that the Delhi High Court verdict is correct". On 28 January 2014 the Supreme Court rejected the Government's and all other review petitions. On 3 April 2014, however, it was announced that a three-judge panel of the Supreme Court had in fact agreed to consider a "curative petition" in relation to the Supreme Court's judgment of 11 December 2013. Activists were reported in January 2014 as saying that many gay people had "come out" since the Delhi High Court's ruling in 2009; the activist said that there would be "no turning back" in their campaign to abolish Section 377.

21. At some date after the Supreme Court's judgment of 11 December 2013, the Upper Tribunal (Upper Tribunal Judges Eshun and O'Connor) promulgated its country guidance decision in *MD (same-sex oriented males: risk) India CG* [2014] UKUT 65 (IAC). This decision specifically addressed the consequences of the Supreme Court decision. It did not make findings as to the experiences of lesbians.

22. On 18 December 2015 the Indian Legislature rejected a Private Members Bill which sought to repeal section 377.

23. After the hearing of this appeal, on 1 February 2016 the Upper Tribunal (Upper Tribunal Judges Gleeson and Southern) gave judgment in the case of *AR and NH (lesbians) (CG)* [2016] UKUT 66 (IAC) (1 February 2016), which contained country guidance in relation to treatment of lesbians in India. Neither counsel supplied the

court with a copy of this judgment. That was unfortunate since it was an important country guidance case of obvious relevance. I found it as a result of an internet search.

24. According to newspaper reports published since the hearing of the appeal in this case, which the court has accessed of its own motion on the internet, on 2 February 2016 the three-judge Bench of the Supreme Court hearing the curative petitions (including the Chief Justice of India and two other Supreme Court Justices) referred the petitions to a five-judge Constitution Bench on the grounds that the matter was of such importance that it should go to a five-judge Bench. According to one report in *The Hindu* on 3 February 2016,

> "Chief Justice Thakur told senior advocate Anand Grover, appearing for petitioner Naz Foundation, that the new Bench may not limit itself to the narrow confines of the curative law — the Curative Bench will only entertain if petitioners prove that its review verdict violated principles of natural justice and the judges were biased — and opt for a comprehensive hearing of the arguments placed for the protection of the dignity and rights of the LGBT community."

Representation on the appeal

25. On the appeal, Mr S. Chelvan and Ms V. Hutton appeared as counsel on behalf of the appellants; Miss Samantha Broadfoot and Mr Andrew Byass appeared as counsel on behalf of the respondent. Mr Chelvan had appeared before the Upper Tribunal, but not before the FTT. None of the other counsel had appeared below.

The appellants' arguments on the appeal

26. The appellants' grounds of appeal (as somewhat reformulated by me) were effectively that:

    i) Ground One: the FTT materially erred in law in finding that the proceedings did not engage article 8 of the Convention;

    ii) Ground Two: the FTT made erroneous findings of fact and came to the wrong factual conclusion that the appellants' removal to India would not involve a flagrant denial of their article 8 rights to family life;

    iii) Ground Three: both Tribunals materially erred in law in concluding that the appellants' removal to India would not be disproportionate, but would be in accordance with law and necessary in the interests of the economic well-being of the country; the interference with the appellants' family life by removal to India could not, in the circumstances, be regarded as proportionate, given the hardship it would cause them to be living in a country without any legal recognition or protection of their marriage or civil partnership, and the fact that they could not live openly in India and would suffer other disadvantages.

27. In support of the appellants' first ground of appeal, Mr Chelvan submitted that the FTT erred in finding that article 8 was not engaged. The basis of the FTT's error was said to be the failure to recognise that family life could exist between same-sex

couples just as it could between different-sex couples. In support of this submission Mr Chelvan submitted:

i) When the case came before the FTT in December 2011, it was a matter of law that same-sex couples who were cohabiting, came within the protection of family life within article 8 of the Convention; see *Schalk and Kopf v Austria* (Application 1598/06) (2011) 53 E.H.R.R. 20, judgment 24th June 2010), at paragraph 94.

ii) The decision in *Schalk* was a fundamental shift from that which had previously been a matter of European consensus which omitted inclusion of same-sex relationships from the protection afforded to family life by article 8 of the Convention; see *Krasniqi v Secretary of State for the Home Department* [2006] EWCA Civ 391.

iii) The UK (except Northern Ireland) enacted legislation in 2013, and 2014, which recognises that the bar on equal marriage for same-sex couples, is an affront to the principles of human dignity and equality[1]. Whilst this journey began with the Civil Partnership Act 2004, as at 2016, the UK accepts the premise that all couples, irrespective of their sexual identity, have a right to enter into a legally recognised, and protected relationship. The UK has adopted, within the margin of appreciation, legislation which reflects a democratic mandate to place same-sex couples with equal legal parity to opposite sex-couples, irrespective of sexual identity.

iv) Following the non-discrimination guidance of the Supreme Court in *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31; [2011] 1 A.C. 596, an opposite-sex couple, who had legally entered into a marriage in the UK, would find removal to a country, where not only would their UK marriage not be recognised, but they will not be able to enter into *any* form of legally recognised, and protected relationship, even though they were consenting adult parties to such a contract, to be a flagrant breach of their article 8 family life rights. In line with the *HJ (Iran)* comparator principle, the same must be said for these appellants, who are legally married, but on return to India, will have no access to any legal protection or recognition of their genuine and subsisting relationship. Thus the central question for the court on the appeal is whether a straight married couple (used as a comparator), if removed to a country where their marriage was not recognised and they had no route to such legal recognition or protection, would suffer a flagrant breach of their article 8 rights.

v) In the recent 2013 Administrative Court case of *Re: G* [2013] EWHC 134 (Fam); [2013] 1 F.L.R. 134, Baker J held at paragraph 113:

> "It is now established beyond doubt that the relationship between a same-sex couple constitutes 'family life' for the purposes of article 8."

[1] Northern Ireland has not enacted legislation enabling marriage between same-sex couples. Nevertheless, Northern Ireland does enable same-sex couples to enter into civil partnerships.

vi) Although trite law, it was important to recognise that the standard of proof as to whether a party's article 8 rights were to be breached was the finding of 'substantial grounds'; i.e. a lower standard than the balance of probabilities, but one indicating grounds which are "compelling' in the form of something approaching international consensus; se*e Kapri v HM Advocate* [2014] HCJAC 33; [2015] JC 30, at paragraph 124.

vii) In July 2015, the European Court of Human Rights ("the ECtHR") in *Oliari and Others v Italy* (Application nos. 18766/11 and 36030/11) addressed the factual and legal developments since the landmark judgment in *Shalk and Kopf.* At paragraph 178, the court held that the tipping point had been reached where the majority of Council of Europe nations (24 out of 47) legislated in favour of legal recognition of same-sex couples, noting the "continual international movement towards legal recognition, to which the Court cannot but attach some importance". The cases demonstrate an international consensus moving towards recognising the right of same sex couples for legal recognition of, and protection for, their relationship. In particular, paragraphs 172 to 174 of the judgment in *Oliari* recognise and underline this core right for same-sex couples within article 8 of the Convention.

viii) In this context, and in relation to the United States, Mr Chelvan also referred to *Obergefell et al v Hodges* (2015) 576 U.S, in which the United States Supreme Court held that same-sex couples may exercise the fundamental right to marry in all states of the United States and that there was no lawful basis for a state to refuse to recognise a lawful same-sex marriage performed in another state on the grounds of its same-sex character. The majority opinion of the Supreme Court highlighted the elevated position marriage has in a society which respects a '*fundamental right inherent in the liberty of a person'.*

ix) In reliance on the Supreme Court's decision in *R (Bibi) v Secretary of State for the Home Department* [2015] UKSC 68; [2015] 1 WLR 5055, (where the Supreme Court analysed relevant jurisprudence on marriage and article 8 and highlighted that article 8 does not include an obligation on contracting states to respect the choice by married couples of their country of matrimonial residence), the appellants submitted that it was significant that there was no 'matrimonial residence' for the appellants in India, as there was no legal recognition or protection of their relationship on return. The undisputable facts were that the *only* country in these proceedings where matrimonial residence could occur, was the United Kingdom. Viewed through the prism of *Oliari*, the appellants' removal to India, where their legal status would be nullified, would result in a flagrant breach of their article 8 rights to a private and family life.

x) The FTT failed to recognise that the appellants' relationship amounted to 'family life' as was clear from paragraph 22 of the judgment where the judge held:

> "I do not believe their removal would have such an effect on their family life as to even engage article 8. Their private life together would continue and although they have obviously

> made some friends here there is no reason why they could not continue to keep in touch with them in the usual ways."

xi) It was likewise surprising that the Upper Tribunal found at paragraph 41 of their determination that:

> "[O]ne can understand why in that context the judge found that article 8 was not even engaged."

In light of the reasoning of the Strasbourg Court in *Schalk* and the Administrative Court in *Re: G,* it was a clear misdirection of law to state that article 8 was not even engaged. The determination of the Upper Tribunal, and consequently the First-Tier Tribunal must be set aside and remade.

28. In support of the second ground of appeal (erroneous factual findings), in summary Mr Chelvan submitted that:

i) It was well established that the approach to whether there had been, or would be, a breach of a party's article 8 rights was highly fact-sensitive; see *Huang and Kashmiri v Secretary of State for the Home Department* [2007] UKHL 11; [2007] 2 A.C. 167.

ii) But in failing to conclude that the appellants' return to India would involve a flagrant breach or denial of their article 8 rights, the FTT made numerous erroneous findings of fact with which the Upper Tribunal did not properly engage. The latter wrongly found that there were no material misdirections on the facts by the FTT; see paragraph 41 of the Upper Tribunal's determination. That was a procedural error which meant that both determinations should be set aside and remade.

iii) The FTT's erroneous findings of fact included the following:

a) The failure to appreciate, that, although the appellants had "achieved what appears to be their goal in declaring their love for each other through a legal civil partnership", it would not be the case that their "civil partnership …… will continue however long they want it to", since on removal to India their civil partnership (now marriage) had no legal status, and there would therefore be no legal recognition, or protection of the appellants' relationship, on removal.

b) The FTT's finding at paragraph 17 of the determination that the case rested on the ability to cohabit, failed to address the core of the appellants' claim. Thus the statement by the FTT that:

> "The truth is the evidence suggests that, wherever they live, these people will live as a couple. I have not seen any evidence that Indian society would in any way be able to prevent this. Removing them to India would not stop them living together and in that respect will not destroy their family life."

demonstrated a failure to engage with the appellants' actual case, namely that in India they will not be afforded any legal recognition or protection of their relationship.

c) The above finding was also arguably contrary to other findings made by the FTT, in particular at paragraph 15 of its determination (as to which see above) where it found that the country background evidence:

> "paints a very poor picture for lesbians in India. Indeed it suggests that they are hardly visible at all other than in more enlightened urban areas and that the reality for lesbians in India is a lifetime of hiding their real sexuality from their families and public. However, without a doubt it paints a picture of an improving situation, one where there is beginning to be some more openness and admission that lesbians even exist. I do accept however that the lifestyle of the appellants in the United Kingdom would be far more open than it would be in India and that they are more likely to be able to live the kind of lifestyle that they would want here than they would there. That does not necessarily mean that their appeal must succeed."

d) The appellants criticised other findings in the judgment in particular in relation to paragraph 19 and the FTT's conclusion that:

> "The appellants' argument is that, as a same sex couple, they have rights which they would be denied in India but which they can exercise in the United Kingdom. They argue that they have a right to adopt a child/children, they have a right to seek IVF treatment, they have a right to be considered next of kin, have joint banking and own property together. I do not accept that these rights exist and certainly not that they were ever intended to be protected by the Convention."

e) Likewise they criticised the FTT's failure to appreciate that, as a lesbian, neither appellant would under Indian law be entitled to apply to adopt a child, to have IVF in order to conceive, to have next of kin rights if the other appellant were hospitalised or lost mental capacity.

f) At paragraph 15 of the FTT determination, the highest the judge placed the country background evidence was:

> "[T]here is beginning to be some more openness and admission that lesbians even exist."

This finding, regarding recognition of existence, did not go to show that the appellants could live openly as a lesbian couple in India, especially given the other findings of the judge in that same paragraph.

g) The final findings at paragraph 24 of the FTT's determination, were that:

> "So far as most if not all of the other things that they fear is concerned there are ways around them which they as educated and modern women should be able to deal with."

Given the lack of legal recognition and protection of the appellants' marriage that statement was clearly false, and the belief that these women could somehow 'deal with' the issues amounted to a material error of law. The reality was that the appellants would have to live secret lives in India hiding the true nature of their relationship.

iv) When looking at the question of proportionality, the FTT wrongly looked to the future in assessing circumstances in India, instead of focussing on the circumstances on the day of the hearing. The judge was wrong to say, at paragraph 24 of his judgment, that:

> "It is reasonable to expect these two to carry on family life such as it is in India. I believe it is. Attitudes in India will only ever change if there are young couples such as these who are prepared to effectively come out and show the Indian people how honourable and beautiful a same sex relationship is."

That approach was purely speculative. Looking to the future in assessing proportionality was a material error of law. None of the evidence supported a finding that both appellants would 'come out' and openly express their sexual identity in India. It was clear from the evidence filed on behalf of the respondent herself in these proceedings, that there was no positive change to alter the lack of legal status of the gay population in India. In support of this submission Mr Chelvan referred to articles in the Indian press, both of which were published after the successful Delhi High Court litigation which ruled that section 377 of the Indian Penal Code, which criminalised same-sex conduct for consenting adults in private, was unconstitutional.

v) However, given that the Supreme Court of India in December 2013 in *Suresh Kumar Koushal & Ors.* v. *Naz Foundation & Ors.*(SLP (c) 15436/2009), 11 December 2013, had now reversed the earlier Delhi High Court ruling, the reliance by the FTT judge at paragraph 22 of the determination on that ruling to suggest that Delhi was "of course the area where the penal codes were altered nearly two years ago to make, homosexuality no longer a crime" was plainly wrong. As at of the date of the appeal, the Indian Supreme Court judgment had not been set aside, irrespective of the good intentions highlighted by the respondent in her additional evidence.

29. In relation to the third ground of appeal (flawed proportionality assessment), in summary Mr Chelvan submitted:

i) The FTT carried out a flawed proportionality assessment. It did not cite or engage with the importance of *Shalk* in relation to these proceedings. The

FTT failed to engage with the fact that, as explained in that case at paragraph 105, there was an emerging European consensus towards legal recognition of same-sex couples.

ii) Notwithstanding the fact that the consensus had changed, the fact that the UK has introduced Civil Partnerships from December 2005, through the Civil Partnership Act 2004, which has afforded these appellants legal recognition and protection since June 2008, and has now recognised same-sex marriage through the Marriage (Same Sex Couples) Act 2013 and the Marriage and Civil Partnership (Scotland) Act 2014, goes to the core of how "flagrant breach" should be understood in this case. Parliament has acted in a manner to recognise and provide equal dignity to same-sex couples, within the margin of appreciation. This illustrates an approach which readily distinguishes the restrictive approach (in 2004) of the ECtHR in *F v the United Kingdom* (C-17341/03) as the UK since December 2005, has recognised the family life rights of same-sex couples.

iii) Now that the appellants' relationship was a marriage, and in light of the prohibition on discrimination in article 14 of the Convention, the appellants' situation had to be considered as analogous to a different-sex married couple being removed to a country where their union would not be recognised and protected in law. The Strasbourg cases on same-sex marriage had dealt with the inability of certain same-sex partners to marry. They had not, however, considered a situation where a couple's marriage was recognised in a country where they had established a private and family life, but would not be recognised in law or protected in a country to which they were to be removed. In *HJ(Iran), HT(Cameroon) v Secretary of State for the Home Department* [2010] UKSC 3262 the Supreme Court highlighted the importance of considering a straight comparator. The inability to live freely and openly in India to avoid discrimination was a flagrant denial of the appellants' article 8 rights.

iv) In the present case, the appellants had no legal protection for their article 8 rights to family life. That was demonstrated by the relevant background material (which the case of *Kapri v Lord Advocate* [2013] UKSC 48 made clear that the court must fully and properly assess.). The Indian courts would not even recognise let alone protect the appellants' family life.

v) The Upper Tribunal at paragraph 41 of its judgment, and the FTT at paragraph 24 of its judgment, wrongly attached no weight to the effect of the exercise of the margin of appreciation by the UK in favour of legal recognition and protection of same-sex civil partnerships, elevating civil partnerships to a protected status over and above informal personal relationships.

vi) None of the reported cases dealing with 'flagrant breach' had been concerned with the way the test is to be applied where the complaint is of complete lack of legal recognition. The most recent decision of the Court of Appeal dealing with 'flagrant breach' was *SS (Malaysia) v Secretary of State for the Home Department* [2013] EWCA Civ 888. Even in that case, there was some visitation access under Sharia law for the mother, but this was held to be ineffective in the exercise of family life.

vii) For all these reasons, the Tribunals, in carrying out the proportionality exercise, should have given far greater weight to the flagrant denial of their family rights if they were returned to India, given the absence of any recognition of, and protection afforded to, the appellants' marriage and civil partnership in that country, and the hardship which they would suffer if they were required to live there.

viii) Accordingly, the determinations of the FTT and the Upper Tribunal should be set aside and remade by the Court of Appeal, as neither Tribunals below placed any weight on this point of public policy which favours protection of the appellants' article 8 (family life) rights. The appeal against the respondent's decision should accordingly be allowed.

The respondent's submissions on the appeal

30. Miss Broadfoot in summary submitted as follows:

i) The appellants were wrong to contend, by their first ground, that the FTT erred in finding that article 8 was not engaged. This was a "foreign case", i.e. a case where the allegation was that the conduct of the UK, as a Convention member state, in removing a person from its territory to another non-Convention territory would lead to a violation of the person's Convention rights in that other territory.

ii) That being the case, the issue for the FTT was whether the appellants were at risk of suffering a "flagrant denial" of their article 8 rights if returned to India, in the sense of their rights being "completely denied or nullified", per Lord Bingham in *R (Ullah) v Special Adjudicator* [2004] 2 AC 323 at paragraph 24.

iii) The appellants' case wrongly conflated the first two questions articulated by Lord Bingham in *R (Razgar) v Home Secretary* [2004] 2 AC 368 at paragraph 17. It failed to appreciate that for article 8 to be *engaged* in a foreign case, as per the second *Razgar* question, it must be shown that removal would amount to a flagrant denial of the appellants' article 8 rights.

iv) The FTT was right, and entitled, to conclude that the lack of recognition in India of civil partnership status did not amount to a flagrant denial of the appellants' article 8 family life rights. That conclusion was based upon the correct finding that the appellants would be able to continue living together in India.

v) The appellants relied upon *HJ (Iran)* to submit that they would be unable to live openly and free from fear if returned to India. *HJ (Iran)* was a case concerned with the circumstances in which the inability to live in such a manner will demonstrate a well-founded fear of persecution under the Refugee Convention. There was no claim of risk of persecution in the present case.

vi) At its highest, therefore, the relevance of *HJ (Iran)* was only as a basis for a submission that an inability to live freely and openly to avoid discrimination amounted to a flagrant denial of the appellants' article 8 rights. That proposition was considered and rejected in *Ullah*. In the context of the other

objective evidence before the FTT, the subsequent decision of the Indian Supreme Court in *Koushal*, even if admissible, would not have had made any difference to the FTT's factual findings such as to have made a difference to the FTT's decision. *Koushal* does not demonstrate that the FTT made a mistake of fact giving rise to unfairness: see *E and R v Secretary of State for the Home Department* [2004] Q.B. 1044 at paragraph 66.

vii) The alleged errors about the legal consequences of the appellants' civil partnership were matters principally going to the question of whether the lack of recognition of these matters in India would result in a flagrant denial of the appellants' family life rights. The FTT was right to hold that these matters did not go to the very essence of the appellants' family life rights, including in light of the findings as to the extent to which these matters would in fact be affected.

viii) The FTT's consideration of proportionality in the alternative only arose for review if the Court of Appeal were to conclude that the FTT erred in concluding that article 8 was not engaged. If this stage were reached, then the FTT's conclusion that it was proportionate to remove the appellants contained no error of law. Read as a whole, the FTT's assessment balanced the accepted finding of discrimination against lesbians in the context of the finding that the appellants could and would continue to be able to live together. The FTT's assessment was not materially infected, as submitted by the appellants, by the FTT's statement that attitudes in India will only change if persons such as the appellants demonstrate how loving their relationship is.

ix) The Upper Tribunal's determination that the FTT's determination contained no error of law was plainly correct. Accordingly the appeal should be dismissed

Discussion and determination

Article 8 of the Convention

31. Article 8 of the Convention provides as follow:

> **Right to respect for private and family life**
>
> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

The legal approach

32. The decision of the House of Lords in *Razgar* established that, on an appeal against a decision to remove by the Secretary of State on article 8 grounds, the reviewing court must ask itself essentially the questions which would have to be answered by an adjudicator. Lord Bingham[2] defined these as follows at paragraph 17 of his opinion:

> "17. In a case where removal is resisted in reliance on article 8, these questions are likely to be:
>
> (1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?
>
> (2) If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8?
>
> (3) If so, is such interference in accordance with the law?
>
> (4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?
>
> (5) If so, is such interference proportionate to the legitimate public end sought to be achieved?"

33. *Razgar* was not a "foreign case", i.e. a case

> "in which it is not claimed that the state complained of has violated or will violate the applicant's Convention rights within its own territory, but in which it is claimed that the conduct of the state in removing a person from its territory (whether by expulsion or extradition) to another territory will lead to a violation of the person's Convention rights that other territory;"

see per Lord Bingham at paragraph 9 of his opinion in *Ullah*[3]. In paragraphs 41 to 43 and 65 of her opinion in *Razgar*, Baroness Hale explained how the "gravity" test, as articulated in the second *Razgar* question, came into play in a part foreign, part domestic case, in the context of the proportionality exercise. Her comments are also instructive as to the stringency of the test in a foreign case, and the reasons for it. She said:

> "41. In his opinion in the cases of *Ullah* and *Do*, my noble and learned friend, Lord Bingham of Cornhill, draws a distinction

[2] Lord Steyn and Lord Carswell agreed with Lord Bingham that the Secretary of State's appeal should be dismissed. Although Lord Walker and Baroness Hale dissented, and would have allowed the appeal, they agreed with Lord Bingham with his articulation of the relevant principles but not as to their application in that particular case.

[3] *Ullah* and *Razgar* were heard sequentially by the same constitution of the House of Lords and judgment was given on the same day.

between 'domestic cases' and 'foreign cases'. He defines the former as cases 'where a state is said to have acted within its own territory in a way which infringes the enjoyment of a Convention right by a person within that territory' (paragraph 7). He defines the latter as cases 'in which it is claimed that the conduct of the state in removing a person from its territory (whether by expulsion or extradition) to another territory will lead to a violation of the person's Convention rights in that other territory' (paragraph 9). Another way of putting this distinction is that in domestic cases the contracting state is directly responsible, because of its own act or omission, for the breach of Convention rights. In foreign cases, the contracting state is not directly responsible: its responsibility is engaged because of the real risk that its conduct in expelling the person will lead to a gross invasion of his most fundamental human rights. *Ullah* and *Do* were foreign cases which failed to meet that test. "

42. The distinction is vital to the present case. In a domestic case, the state must always act in a way which is compatible with the Convention rights. There is no threshold test related to the seriousness of the violation or the importance of the right involved**. Foreign cases, on the other hand, represent an exception to the general rule that a state is only responsible for what goes on within its own territory or control. The Strasbourg court clearly regards them as exceptional. It has retained the flexibility to consider violations of articles other than articles 2 and 3 but it has not so far encountered another case which was sufficiently serious to justify imposing upon the contracting state the obligation to retain or make alternative provision for a person who would otherwise have no right to remain within its territory. For the same reason, the Strasbourg court has not yet explored the test for imposing this obligation in any detail. But there clearly is some additional threshold test indicating the enormity of the violation to which the person is likely to be exposed if returned. *Ullah* and *Do* on their facts came nowhere near meeting that test.** It is, for the reasons given both by Lord Bingham and Lord Steyn, extremely unlikely that a failure to respect religious freedom which fell short of persecution within the meaning of the Refugee Convention would do so.

43. This case, however, is concerned with article 8. In that context, Lord Bingham also refers to a third or hybrid category. Here 'the removal of a person from country A to country B may both violate his right to respect for his private and family life in country A and also violate the same right by depriving him of family life or impeding his enjoyment of private life in country B' (paragraph 18). On analysis, however, such cases remain

> domestic cases. **There is no threshold test of enormity or humanitarian affront. But the right to respect for private and family life, home and correspondence, which is protected by article 8, is a qualified right which may be interfered with if this is necessary in order to pursue a legitimate aim. What may happen in the foreign country is therefore relevant to the proportionality of the proposed expulsion.**
>
> ……
>
> 65. For those reasons, I would hold that the Secretary of State was entitled to reach the conclusion he did on the material before him and would therefore allow this appeal. I appreciate that this may seem a harsh conclusion to draw. But this is a field in which harsh decisions sometimes have to be made. **People have to be returned to situations which we would find appalling. The United Kingdom is not required to keep people here who have no right to be here unless to expel them would be a breach of its international obligations. It does the cause of human rights no favours to stretch those obligations further than they can properly go.** In my view, those obligations are not such as to require the United Kingdom to refrain from returning Mr Razgar to Germany in accordance with the Dublin Convention."

34. The approach to be taken by the courts in assessing an alleged breach of article 8 in a foreign case has been the subject of two decisions of the House of Lords: *Ullah* and *EM (Lebanon) v Secretary of State for the Home Department* [2009] 1 AC 1198.

35. In *Ullah* the matters giving rise to the claim to remain in the UK did not amount to persecution[4], but were alleged to amount to a breach of article 9 and the right to freedom of religion. The point of principle which the House of Lords was called upon to determine was whether a claim under article 9 could be made at all, when there was no claim which could be made under article 3. Following comments made in a number of Strasbourg judgments to the effect that there was an obligation to protect against breach of qualified rights in foreign cases, the House of Lords answered that question in the affirmative. That issue is not in contention in the present case.

36. As Lord Bingham[5] also made clear, successful reliance in a foreign case on articles other than article 3 demands presentation of a very strong case:

> "24. While the Strasbourg jurisprudence does not preclude reliance on articles other than article 3 as a ground for resisting extradition or expulsion, it makes it quite clear that successful reliance demands presentation of a very strong case. In relation to article 3, it is necessary to show strong grounds for believing that the

[4] It is to be emphasised that in the present case there is no reliance upon article 3 or any claim based upon alleged persecution in India.
[5] With whom Lord Steyn, Lord Walker, Baroness Hale and Lord Carswell agreed.

> person, if returned, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment: *Soering*, paragraph 91; *Cruz Varas*, paragraph 69; *Vilvarajah*, paragraph 103. In *Dehwari*, paragraph 61 (see paragraph 13 above) the Commission doubted whether a real risk was enough to resist removal under article 2, suggesting that the loss of life must be shown to be a "near-certainty". **Where reliance is placed on article 6 it must be shown that a person has suffered or risks suffering a flagrant denial of a fair trial in the receiving state: *Soering*, paragraph 113 (see paragraph 10 above); *Drodz*, paragraph 110; *Einhorn*, paragraph 32; *Razaghi v Sweden*; *Tomic v United Kingdom*. Successful reliance on article 5 would have to meet no less exacting a test. The lack of success of applicants relying on articles 2, 5 and 6 before the Strasbourg court highlights the difficulty of meeting the stringent test which that court imposes. This difficulty will not be less where reliance is placed on articles such as 8 or 9, which provide for the striking of a balance between the right of the individual and the wider interests of the community even in a case where a serious interference is shown[6].** This is not a balance which the Strasbourg court ought ordinarily to strike in the first instance, nor is it a balance which that court is well placed to assess in the absence of representations by the receiving state whose laws, institutions or practices are the subject of criticism. On the other hand, the removing state will always have what will usually be strong grounds for justifying its own conduct: the great importance of operating firm and orderly immigration control in an expulsion case; the great desirability of honouring extradition treaties made with other states. The correct approach in cases involving qualified rights such as those under articles 8 and 9 is in my opinion that indicated by the Immigration Appeal Tribunal (Mr C M G Ockelton, deputy president, Mr Allen and Mr Moulden) in *Devaseelan v Secretary of State for the Home Department* [2002] IAT 702, [2003] Imm AR 1, paragraph 111:
>
> > "The reason why flagrant denial or gross violation is to be taken into account is **that it is only in such a case - where the right will be completely denied or nullified in the destination country - that it can be said that removal will breach the treaty obligations of the signatory state** however those obligations might be interpreted or whatever might be said by or on behalf of the destination state".

37. The reason why there is a requirement for a stringent test was also underlined by Lord Carswell at paragraph 63 of his opinion in *Ullah* where he said:

> "I do regard it as important, however, that member states should not attempt to impose Convention standards on other

[6] All emphasis in this judgment is added.

> countries by decisions which have the effect of requiring adherence to those standards in those countries."

38. As Miss Broadfoot submitted, and as I accept, it is at the point of the court's determination whether article 8 is even engaged that the flagrant denial or gross violation test is invoked. In *Razgar* Lord Bingham explained the second question, namely whether an identified interference with article 8 is of such gravity as potentially to engage the operation of article 8, in the following terms:

> "18... Question (2) reflects the consistent case law of the Strasbourg court, holding that conduct must attain a minimum level of severity to engage the operation of the Convention... "

39. Importantly, the judgments make clear that the assessment of the severity of the treatment in the receiving state does not depend on an assessment of *the relative protection* afforded to rights in the receiving state as compared with the protection afforded in the removing state. Thus Lord Bingham said at paragraph 4 of his opinion in *Razgar*:

> "… removal cannot be resisted merely on the ground that medical treatment or facilities are better or more accessible in the removing country than in that to which the applicant is to be removed. This was made plain in *D v United Kingdom* (1997) 24 EHRR 423, paragraph 54. Although the decision in *Henao* is directed to article 3, I have no doubt that the Court would adopt the same approach to an application based on article 8. **It would indeed frustrate the proper and necessary object of immigration control in the more advanced member states of the Council of Europe if illegal entrants requiring medical treatment could not, save in exceptional cases, be removed to the less developed countries of the world where comparable medical facilities were not available.** I do not understand the Court of Appeal to have proposed a test based on relative standards of treatment … **If there is any doubt on this point, it should be dispelled. The Convention is directed to the protection of fundamental human rights, not the conferment of individual advantages or benefits."**

40. Likewise Baroness Hale said at paragraph 59

> "Although the possibility cannot be excluded, it is not easy to think of a foreign health care case which would fail under article 3 but succeed under article 8. There clearly must be a strong case before the article is even engaged and then a fair balance must be struck under article 8(2). **In striking that balance, only the most compelling humanitarian considerations are likely to prevail over the legitimate aims of immigration control or public safety. The expelling state is required to assess the strength of the threat and strike that balance. It is not required to compare the adequacy of the health care available in the two countries. The question**

> **is whether removal to the foreign country will have a sufficiently adverse effect upon the applicant. Nor can the expelling state be required to assume a more favourable status in its own territory than the applicant is currently entitled to**. The applicant remains to be treated as someone who is liable to expulsion, not as someone who is entitled to remain

41. In *EM (Lebanon)* the issue was whether article 8 could be relied upon in circumstances where the return of a mother and child to Lebanon would result in their separation, because Lebanese law required the child to be placed into the custody of his father notwithstanding that he had spent all of his life with his mother. It was argued both that this separation would amount to a flagrant denial of EM and her child's family life, but also that the family law in Lebanon was arbitrary and discriminatory and so fell foul of both article 8 and article 14.

42. The House of Lords held that, on the particular facts, the separation of EM and her child would amount to a flagrant denial of their family life. However, it rejected the arguments addressed to the discriminatory effect of Lebanese family law *per se*. The headnote is instructive. It reads as follows:

> "Held, allowing the appeal, that article 8 of the Convention would not be engaged in relation to the removal of an alien from a contracting state unless the treatment which she would receive in the destination state would amount to a flagrant breach of article 8 such as would completely deny or nullify the very essence of the right to respect for her private and family life; that there was no pre-determined model of family or family life to which the article had to be applied, but it required respect to be shown for the right to such family life as was or might be enjoyed by the particular applicant bearing in mind the participation of other members who shared in it; that since the claimant and her child had constituted a family for the entirety of the child's life, without any contact with the father or his family, and since any contact between the claimant and her child after return would be limited to occasional supervised visits, the effect of return would be to destroy the family life of the claimant and her child as it was now lived, particularly when the effects on the child were taken into account; and that, accordingly, in those exceptional circumstances article 8 of the Convention precluded the claimant's removal …….*R (Ullah) v Special Adjudicator* [2004] 2 AC 323, HL(E) and dicta of Judges Bratza, Bonello and Hedigan in *Mamatkulov and Askarov v Turkey* (2005) 41 EHRR 494, 537–539, GC applied.
>
> Per Lord Hope of Craighead, Lord Bingham of Cornhill, Lord Carswell and Lord Brown of Eaton-under Heywood. **Although it is plain that the arbitrary and discriminatory character of the family law applied in Lebanon would fall foul of both article 8 and article 14, Lebanon is not a party to the**

> **Convention and the United Kingdom has no general mandate to impose its own values on other countries who do not share them. It is doubtful whether it would have availed the claimant to rely on the arbitrary and discriminatory character of the Lebanese custody regime had she not shown that return to Lebanon would flagrantly violate her and the child's right to respect for their family life together. The return of a woman who arrives here with her child simply to escape from the system of family law of her own country, however objectionable that system may seem in comparison with our own, will not violate article 8 read with article 14…….. .**Decision of the Court of Appeal [2006] EWCA Civ 1531; [2007] 1 FLR 991 reversed. "

43. The following comments of their Lordships in relation to the impact of the discriminatory nature of the law in the foreign state are particularly relevant to the present appeal. Thus Lord Hope, drawing an analogy with the article 3 medical cases, said:

> "7. It seems to me that the Strasbourg court's jurisprudence indicates that, **in the absence of very exceptional circumstances, aliens cannot claim any entitlement under the Convention to remain here to escape from the discriminatory effects of the system of family law in their country of origin.** There is a close analogy between this case and *N v United Kingdom* (Application No 26565/05) (unreported) 27 May 2008 which followed the decision of this House in *N v Secretary of State for the Home Department (Terrence Higgins Trust intervening)* [2005] 2 AC 296.
>
> ...
>
> 10. That was a case about article 3, not one of the qualified Convention rights. Yet even in such a case, where there was a very real risk that the harm that would result from the applicant's expulsion to the inferior system of health care in her country of origin would reach the severity of treatment prescribed by that article, the court held that, other than in very exceptional cases, there was no obligation under the Convention to allow her to remain here. **This was because it was not the intention of the Convention to provide protection against disparities in social and economic rights. To hold otherwise, even in an article 3 case, would place too great a burden on the Contracting States.** Similar observations about the limits that must be set on practical grounds to the qualified obligations that they have undertaken in the area of civil and political rights are to be found in *F v United Kingdom* (Application No 17341/03) (unreported) 22 June 2004 and *Z and T v United Kingdom* (Application No 27034/05) (unreported) 28 February 2006. These decisions were not available to the House when it was considering the

cases of *Ullah* [2004] 2 AC 323 and *Razgar* [2004] 2 AC 368, the judgments in which were delivered on 17 June 2004.

11. In *F v United Kingdom* the applicant was an Iranian citizen who had claimed asylum here on the basis that he feared persecution as a homosexual. His application for asylum was rejected. But he claimed that there would be a breach of article 8 if he were to be removed to Iran because a law in that country prohibited adult consensual homosexual activity. His application was declared inadmissible by the Strasbourg court. At p 12 of its decision the court observed that its case law had found responsibility attaching to Contracting States in respect of expelling persons who were at risk of treatment contrary to articles 2 and 3 of the Convention. It said that this was based on the fundamental importance of these provisions, whose guarantees it was imperative to render effective in practice: *Soering v United Kingdom* (1989) 11 EHRR 439, para 88. But it went on to say this:

'Such compelling considerations do not automatically apply under the other provisions of the Convention. On a purely pragmatic basis, it cannot be required that an expelling Contracting State only return an alien to a country which is in full and effective enforcement of all the rights and freedoms set out in the Convention.

……

14. As this case shows, the principle that men and women have equal rights is not universally recognised. Lebanon is by no means the only state which has declined to subscribe to article 16(d) of the United Nations Convention on the Elimination of All Forms of Discrimination against Women of 18 December 1979 which declares that States Parties shall ensure, on a basis of equality of men and women, the same rights and responsibilities as parents, irrespective of their marital status, in all matters relating to their children and that in all cases the interests of the children shall be paramount. For the time being that declaration remains in most, if not all, Islamic states at best an aspiration, not a reality**. As the court said in *Soering*, para 91, there is no question of adjudicating on or establishing the responsibility of the receiving state, whether under general international law, under the Convention or otherwise. Everything depends on the extent to which responsibility can be placed on the Contracting States. But they did not undertake to guarantee to men and women throughout the world the enjoyment without discrimination of the rights set out in the Convention or in any other international human rights instrument. Nor did they undertake to alleviate religious and cultural differences between their own laws and the family law of an alien's**

> **country of origin, however extreme their effects might seem to be on a family relationship.**
>
> 15. **The guidance that is to be found in these decisions indicates that the Strasbourg court would be likely to hold that, except in wholly exceptional circumstances, aliens who are subject to expulsion cannot claim an entitlement to remain in the territory of a Contracting State in order to benefit from the equality of treatment as to respect for their family life that they would receive there which would be denied to them in the receiving state. The return of a woman who arrives here with her child simply to escape from the system of family law of her own country, however objectionable that system may seem in comparison with our own, will not violate article 8 read with article 14**. Domestic violence and family breakdown occur in Muslim countries just as they do elsewhere. So the inevitable result under Shari'a law that the separated mother will lose custody of her child when he reaches the age of custodial transfer ought, in itself, to make no difference. **On a purely pragmatic basis the Contracting States cannot be expected to return aliens only to a country whose family law is compatible with the principle of non-discrimination assumed by the Convention.'**"

44. Thus, as Lord Hope said at paragraphs 14 - 15, quoted above, there is no obligation on member states bound by the Convention to guarantee to citizens of foreign non-member states, who visit the removing member state, that they will not be removed to their own state, unless that latter state affords them the enjoyment without discrimination of the rights set out in the Convention. That is so even where the other country's laws may have damaging effects on a family relationship. To similar effect is: Lord Bingham at paragraph 42: "This country has no general mandate to impose its own values on other countries who do not share them"; Lord Carswell at paragraph 52; and Lord Brown at paragraph 60.

45. This is an important consideration to bear in mind when addressing the arguments presented by Mr Chelvan on the issues in the present case.

The first Razgar question

46. Mr Chelvan's arguments under the appellants' various grounds of appeal were wide-ranging, and did not focus on the questions which *Razgar* requires a reviewing court to answer. However, I propose to structure my analysis by reference to those questions.

47. In relation to the first question, namely whether the proposed removal would be an *interference* with the exercise of the appellants' rights to respect for their family life under article 8, the thrust of Mr Chelvan's criticisms appeared to be that:

    i) the FTT erred in finding that article 8 was not engaged;

    ii) the basis of its error was:

a) the failure to recognise that family life can exist between same-sex couples, just as it can between different-sex couples, in reliance upon, inter alia, *Schalk and Kopf* and *Re G;* and

b) the failure to recognise that respect for family life included *legal recognition and protection* of the appellants' marriage and civil partnership status and the consequential rights that flowed from such status, as emphasized in *Oliari*.

48. I do not accept that these arguments justify allowing an appeal on the first of the appellants' amended grounds of appeal.

49. First, Mr Chelvan's submissions wrongly conflated the first two questions in *Razga*r; the first *Razgar* question simply identifies whether removal will result in *any* interference with article 8, whereas the second question requires it to be demonstrated that the interference is of *sufficient gravity* to *engage* article 8. Second, it is clear from its judgment that the FTT accepted that, as a same-sex lesbian couple, the appellants shared family life for the purposes of article 8 and that their removal to India would indeed constitute an interference with those rights. The judge made repeated reference to the appellants' "family life" and "interference" at paragraphs 17, 22, 23 and 24. Third, the judge clearly had in mind the need to address each of the *Razgar* questions in turn, since he made an express reference to those questions at paragraph 14. It is perhaps not surprising that the judge did not expressly mention *Schalk and Kopf*, since that case does not appear to have been referred to – at least in the appellants' written submissions.

50. However, the FTT can, in my judgment, be criticised, at least with the benefit of hindsight, in the light of later cases such as *Oliari*, for not expressly identifying, as an important incident of the appellants' rights to family life, the right to legal recognition and protection of their relationship.

51. *Oliari* was a case where the ECtHR had to decide *inter alia* in circumstances where two Italian men had no opportunity to enter into a civil union or registered partnership (in the absence of marriage) in Italy, whether Italy, at the date of the analysis of the court in 2015, had failed to comply with a positive obligation to ensure respect for the applicants' private and family life, in particular through the provision of a legal framework allowing them to have their relationship recognised and protected under domestic law. In deciding that there had indeed been a breach of article 8 on the part of Italy, the ECtHR said:

> "185. In conclusion, in the absence of a prevailing community interest being put forward by the Italian Government, against which to balance the applicants' **momentous** interests as identified above, and in the light of domestic courts' conclusions on the matter which remained unheeded, the Court finds that the Italian Government have overstepped their margin of appreciation and failed to fulfil their positive obligation to ensure that the applicants have available a specific legal framework providing for the recognition and protection of their same-sex unions."

Paragraphs 163-178 of the court's judgment emphasize the court's views as to the importance of legal recognition and protection of same-sex relationships, albeit recognizing that member states retain a margin of appreciation. Reliance was also placed by the court on the developing world-wide picture. I cite by way of illustration paragraphs 174-178:

> "174. In view of the above considerations, the Court considers that in the absence of marriage, **same-sex couples like the applicants have a particular interest in obtaining the option of entering into a form of civil union or registered partnership, since this would be the most appropriate way in which they could have their relationship legally recognised and which would guarantee them the relevant protection - in the form of core rights relevant to a couple in a stable and committed relationship - without unnecessary hindrance.** Further, the Court has already held that such civil partnerships have an intrinsic value for persons in the applicants' position, irrespective of the legal effects, however narrow or extensive, that they would produce (see *Vallianato*s, cited above, paragraph 81). This recognition would further bring a sense of legitimacy to same-sex couples.
>
> 175. The Court reiterates that in assessing a State's positive obligations regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole. Having identified above the individuals' interests at play, the Court must proceed to weigh them against the community interests.
>
> 176. Nevertheless, in this connection the Court notes that the Italian Government have failed to explicitly highlight what, in their view, corresponded to the interests of the community as a whole. They however considered that "time was necessarily required to achieve a gradual maturation of a common view of the national community on the recognition of this new form of family". They also referred to "the different sensitivities on such a delicate and deeply felt social issue" and the search for a "unanimous consent of different currents of thought and feeling, even of religious inspiration, present in society". At the same time, they categorically denied that the absence of a specific legal framework providing for the recognition and protection of same-sex unions attempted to protect the traditional concept of family, or the morals of society. The Government instead relied on their margin of appreciation in the choice of times and the modes of a specific legal framework, considering that they were better placed to assess the feelings of their community.
>
> 177. As regards the breadth of the margin of appreciation, the Court notes that this is dependent on various factors. While the Court can accept that the subject matter of the present case may

> be linked to sensitive moral or ethical issues which allow for a wider margin of appreciation in the absence of consensus among member States, it notes that the instant case is not concerned with certain specific "supplementary" (as opposed to core) rights which may or may not arise from such a union and which may be subject to fierce controversy in the light of their sensitive dimension. In this connection the Court has already held that States enjoy a certain margin of appreciation as regards the exact status conferred by alternative means of recognition and the rights and obligations conferred by such a union or registered partnership (see *Schalk and Kopf*, cited above, paragraph 108-109). Indeed, the instant case concerns solely the general need for legal recognition and the core protection of the applicants as same-sex couples. The Court considers the latter to be facets of an individual's existence and identity to which the relevant margin should apply.
>
> 178. In addition to the above, of relevance to the Court's consideration is also the movement towards legal recognition of same-sex couples which has continued to develop rapidly in Europe since the Court's judgment in *Schalk and Kopf*. To date a thin majority of CoE States (twenty-four out of forty-seven, see paragraph 55 above) have already legislated in favour of such recognition and the relevant protection. The same rapid development can be identified globally, with particular reference to countries in the Americas and Australasia (see paragraphs 65 and 135 above). **The information available thus goes to show the continuing international movement towards legal recognition, to which the Court cannot but attach some importance** (see, mutatis mutandis, *Christine Goodwin*, paragraph 85, and *Vallianatos*, paragraph 91, both cited above)."

52. However, notwithstanding the FTT's lack of emphasis on the importance of the appellants' rights to legal recognition and protection of their relationship, it clearly took the absence of such recognition and protection of the appellants' civil partnership, and its consequences, into account, when it came to consider, in relation to the second *Razgar* question, whether there had been a flagrant nullification or denial of the appellants' rights. Whether the FTT afforded sufficient weight to that matter is a question for this court's determination under that second question.

53. Accordingly, I reject Mr Chelvan's submission that the FTT somehow failed to recognise that same-sex couples can fall within the notion of "family life" and for that reason found that article 8 was not engaged. The FTT clearly recognised that the appellants, as a same-sex couple in a civil partnership, had a right to family life. The FTT's determination that article 8 was not engaged did not relate to this conclusion in relation to the first *Razgar* question, but rather to the second, i.e., whether it "renders removal to a country of origin where there exists no legal recognition of same-sex relationships disproportionate as it involves a flagrant denial or nullification of the

relevant rights: see e.g. paragraph 22 of the judgment. That is the question to which I now turn.

The second Razgar question

54. The appellants' case in relation to the second *Razgar* question (and indeed the fifth *Razgar* question), as raised in their second and third grounds of appeal, was in summary that the FTT erred in its determination that their removal would not result in a flagrant denial of their article 8 family life rights because:

    i) the positive recognition of legal rights for lesbian couples in the UK "pursuant to civil partnership legislation, renders removal to a country of origin where there exists no legal recognition of same-sex relationships disproportionate as it involves a flagrant breach of article 8" and means that "this right to a family life, as expressed in the UK as a civil partnership, is nullified on removal to India"; (see paragraphs 5 and 43 of the amended grounds of appeal); and

    ii) the decision of the Indian Supreme Court in *Koushal*, which post-dates the FTT's determination, together with other country material, shows that the appellants could not live openly in India.

55. It was the first of the above matters which the appellants contended raised an important point of principle for the purposes of this appeal.

56. I cannot accept Mr Chelvan's submission that the mere fact that the UK has passed the Civil Partnership Act 2004, the Marriage and Civil Partnership Scotland Act 2014 and the Marriage (Same Sex Couples) Act 2013, recognising its Convention obligations, and in line with "continuing international movement towards legal recognition [of same-sex couples], to which the Court cannot but attach some importance"[7], predicates that any removal of a same-sex couple to their country of origin, where legal protection is not afforded to such relationships, necessarily involves a flagrant breach or denial of article 8 rights. The passages which I have cited earlier in this judgment from *Razgar, Ullah* and *EM (Lebanon)* make it clear that there is no obligation on member states bound by the Convention to guarantee to citizens of foreign non-member states, who visit the removing member state, that they will not be removed to their own state, unless that latter state affords them the enjoyment - without discrimination - of the rights set out in the Convention. That is so even where the other country's laws may, for example, have damaging effects on a family relationship or deny equal status to women. That remains the position irrespective of the developing international jurisprudence in many countries recognising the fundamental right of same-sex couples to legal recognition of their status by marriage or civil partnership, of which the decision in *Obergefell et al v Hodges* (2015) 576 U.S is but one example.

57. It follows that I do not accept the appellants' arguments that the absence in India of any legal recognition of, or protection for, their civil partnership, now marital, status, goes to the very essence of their article 8 rights to family life. Family life can and does exist outside legal arrangements that formally recognize relationships. That is confirmed by *Schalk and Kopf*, at paragraph 94. The fact that, in Convention

[7] See paragraph 178 of *Oliari.*

countries, a married couple or a couple in a civil partnership may enjoy greater rights than those of a cohabiting couple[8], does not mean that the absence of formal recognition of marital status necessarily involves a flagrant violation or denial of rights. Nor did I obtain any assistance in this context from Mr Chelvan's argument that it was necessary to look at a "straight comparator", in reliance upon Lord Rodger's dictum in paragraph 76 of *HJ (Iran) v Secretary of State* [2011] 1 AC 596. One could imagine that a similar situation might well arise in the removal of a married couple to their state of origin, where, for example, the receiving state did not recognise second marriages, or marriages between couples who were of different religions.

58. In coming to this conclusion I endorse the views expressed to similar effect by the experienced Upper Tribunals in *LH and IP (gay men: risk) Sri Lanka (CG)* [2015] UKUT 73 (IAC) at paragraphs 120-122; and in *AR and NH (lesbians) India (CG)* [2016] UKUT 66 (IAC) at paragraph 85. Same-sex couples no doubt have a deep and genuine grievance that, in countries such as India, there is no official recognition of their deeply felt relationship. But, as the Upper Tribunal said in *LH and IP (gay men: risk) Sri Lanka (CG),* the authorities show that:

> "It is a grievance well short of the standard explained in cases such as *EM (Lebanon)* and *SS (Malaysia),* that of a flagrant breach of a core human right."

59. The question for the FTT was simply whether the lack of recognition in India of civil partnership status amounts, *in the circumstances of this case*, to a flagrant denial or violation of the appellants' article 8 family life rights. Each case necessarily depends upon its own facts. In my judgment, the FTT's conclusion that it was not a flagrant denial or violation, so far as these particular appellants were concerned, principally based upon its finding that the appellants would be able to continue living together as a couple in India, was one which, on the evidence before the court, the FTT was clearly entitled to reach. In summary, the appellants are well-educated women who are able to return to live in Delhi, where the evidence showed that attitudes were much more tolerant of members of the LBGT community. There was no basis for any conclusion on the evidence that they would not be able to find appropriate employment. The judge was entitled to conclude that there was no flagrant denial or violation, notwithstanding what might be said to be his failure to attach what I regard as appropriate significance to the lack of any formal recognition and protection afforded by state-approved marriage or formal civil partnership.

60. The appellants' circumstances can be clearly distinguished from the appellants in *EM (Lebanon).* In that case, it was not the discriminatory legal system that resulted in a finding of flagrant denial of human rights, but rather the exceptional circumstances involving the potential separation of EM from her child, thereby rupturing the only family relationship ever known to the child, who had had no contact with his father. By way of contrast, the appellants' complaint in this appeal is not directed at laws which will bring about their separation, but only about laws operating against them in a discriminatory manner. It was those arguments which were rejected in *EM.*

[8] See e.g. *MW v United Kingdom* (Appln. no. 11313/02, 23 June 2009) at page 5.

61. The appellants also complain that the FTT made errors in its factual findings in relation to the further legal consequences of the appellants' not being recognised in India as being in a marriage or in a civil partnership, with all the incidents of that status which they would enjoy in the UK.

62. The first complaint was that the FTT was wrong to find that:

> "Whatever they say, they have entered into a civil partnership and that will continue however long they want it to"

because, on removal to India, the civil partnership (now marriage) would have no legal status, and there would therefore be no legal recognition, or protection, of the appellants' relationship, on removal. The appellants submitted that, only if the civil partnership were recognised and operative in India, which would lead to a status and provide benefits and protection, could it be said to continue. They would have no matrimonial life in India. It was said that this error was repeated at paragraph 32 of the UT determination.

63. I disagree. The appellants' relationship is recognised by UK law. That is an undeniable fact. They are now a married couple. They will continue to live as such, for so long as they choose to stay together, notwithstanding that Indian law does not recognise their relationship as one of marriage or legal civil partnership. In the passage complained of the FTT was doing no more than affirming that basic proposition. The judge clearly understood, and took account of the fact, in his determination of the second *Razgar* question, that their legal relationship (at that time a civil partnership) would not be recognized upon removal to India. The Upper Tribunal reached a similar conclusion; see paragraph 32 of its judgment.

64. So far as the other alleged errors by the FTT about the legal consequences of their civil partnership status in the UK were concerned, as compared with the lack of any advantages in India, it could perhaps be said that the FTT - in concluding that these were not rights at all - did not attach sufficient weight to the facts that, as a same-sex couple, the appellants had entitlements in the UK (which could not apparently be enjoyed in India):

i) to be considered as potential adopters under section 29 of the Adoption and Children Act 2002;

ii) to be considered as next of kin, whether under the Mental Capacity Act 2005, or otherwise, in the event of mental incapacity or hospitalisation of one partner; and

iii) to become pregnant by means of IVF treatment.

65. The FTT could also perhaps be criticised for speculating that both appellants would 'come out' and openly express their sexual identity in India, since the evidence did not support such a finding.

66. However, in my judgment, those errors, even if they were errors, do not undermine the FTT's ultimate conclusion that the lack of legal recognition of these matters, as well as the appellants' civil partnership, in India would not result in a flagrant denial

or violation of the appellants' rights to family life. There was, for example, no evidence to suggest that A.I.D. treatment (artificial insemination by donor) would not be available to the appellants in India, or that they could not travel abroad to obtain the relevant treatment.

67. The other principal matter upon which the appellants relied in support of their appeal was their inability to live openly in India to avoid discrimination, particularly in the light of section 337 and the recent decision of the Indian Supreme Court in *Koushal.* In this context the appellants relied upon *HJ (Iran) v Secretary of State.*

68. None of Mr Chelvan's submissions in relation to this issue persuaded me that the FTT was wrong to conclude that the conditions which the appellants would face on their return to India would *not* amount to a flagrant denial or violation of their article 8 rights.

69. First, *HJ (Iran) v Secretary of State, HT (Cameroon)* were cases which addressed whether the circumstances prevailing in Iran and Cameroon gave rise to a well-founded fear of (state) persecution under the Refugee Convention. There is no claim of risk of persecution in the present case, whether from the state or the appellants' families. As Miss Broadfoot submitted, at its highest, therefore, the relevance of *HJ (Iran)* could only be to support a submission that an inability to live freely and openly to avoid discrimination amounted to a flagrant denial of the appellants' article 8 rights.

70. But in my judgment, on the extensive evidence before it, briefly summarised by the judge at paragraphs 15, 17, 18, 20 and 22, the FTT was clearly entitled to reject that submission as not being applicable to these appellants living together as a couple in an "enlightened urban area" such as Delhi, "where they were more likely to be accepted". The judge found as a fact that they would not be bullied by their parents into giving up their relationship and that, although in many respects the situation for lesbians and gays in India was "very poor", the situation for them was definitely improving. Moreover, his views are supported and endorsed by the recent India country guidance cases to which I have referred above.

71. In my judgment, the subsequent decision of the Supreme Court in *Koushal* cannot possibly be regarded as having such an effect on the position of gays or lesbians in India as retrospectively to demonstrate that the FTT was wrong to reach the conclusion which it did in relation to the appellants' ability to live in India as a lesbian couple, and that there would be no nullification or flagrant violation of their rights to family life on their return to India. Nor can the decision be relied upon to demonstrate that it "would probably have had an important influence on the result of the case". The original decision was simply one relating to the issue whether section 377 was in breach of the constitution and contained the express proviso that no views were being expressed about any proposed amendments to the IPC. Moreover, as recited above, the appeal to the Supreme Court was not supported by the Government of India, the judgment itself referred to helpful submissions by the Attorney General and the Supreme Court has recently agreed to refer the curative petitions to a five judge constitution of the Court. All those facts underscore the basis for the FTT's finding that the situation in India for lesbians is improving, in part due to the visible public debate as to the rights of same-sex couples.

72. In this context, if, as Mr Chelvan submitted, this court should have regard to further materials in making its decision, then in my view it is also relevant to refer to the conclusions reached by the Upper Tribunal in the recent country guidance case of *AR and NH (lesbians) India (CG),* where it gave extensive consideration to the expert and other evidence before it relating to the position of lesbians in India, including the effect of the previous country guidance case relating to gay men in India. The judgment is instructive.

73. The appeal concerned two lesbian women of Indian citizenship who had entered into a civil partnership in the United Kingdom. They appealed against the Secretary of State's decision to remove them to India after refusing them refugee status, humanitarian protection or leave to remain in the UK on human rights (i.e. article 8) grounds. I quote the relevant parts of the Upper Tribunal's determination:

> "**Existing country guidance**
>
> 4. On 12 February 2014 the Upper Tribunal gave guidance dealing with the position of non-heterosexual males in India, in *MD (same-sex oriented males: risk) India CG* [2014] UKUT 65 (IAC), in the following terms:
>
> "*a. Section 377 of the Indian Penal Code 1860 criminalises same-sex sexual activity. On 2 July 2009 the Delhi High Court declared section 377 IPC to be in violation of the Indian Constitution insofar as it criminalises consensual sexual acts between adults in private. However, in a judgment of 11 December 2013, the Supreme Court held that section 377 IPC does not suffer from the vice of unconstitutionality and found the declaration of the Delhi High Court to be legally unsustainable.*
>
> *b. Prosecutions for consensual sexual acts between males under section 377 IPC are, and have always been, extremely rare.*
>
> *c. Some persons who are, or are perceived to be, same-sex oriented males suffer ill treatment, extortion, harassment and discrimination from the police and the general populace; however, the prevalence of such incidents is not such, even when taken cumulatively, that there can be said in general to be a real risk of an openly same-sex oriented male suffering treatment which is persecutory or which would otherwise reach the threshold required for protection under the Refugee Convention, Article 15(b) of the Qualification Directive, or Article 3 ECHR.*
>
> *d. Same-sex orientation is seen socially, and within the close familial context, as being unacceptable in India. Circumstances for same-sex oriented males are improving, but progress is slow.*
>
> *e. It would not, in general, be unreasonable or unduly harsh for an open same-sex oriented male (or a person who is perceived to be such), who is able to demonstrate a real risk in his home area because of his particular circumstances, to relocate internally to a major city within India.*

f. *India has a large, robust and accessible LGBTI activist and support network, mainly to be found in the large cities.* "

The country guidance issue

5. The Upper Tribunal in *MD* did not receive evidence or give guidance about the position of women homosexuals (lesbians). We note that in (f) the Upper Tribunal did make a generic finding as to the LGBTI community which may be applicable to these appellants, but as regards the position of lesbians in general, there is a lacuna in the *MD* analysis which merits further consideration.

6. We also consider the effect on risk to lesbians arising from the decision of the Indian Supreme Court in *Koushal and another v Naz Foundation and Others* (Civil Appeal No. 10972 of 2013), which held that section 377 of the Indian Penal Code (IPC) which criminalised homosexual sex was not unconstitutional and said that it was a matter for the Indian legislature to determine how, if at all, that controversial provision should be amended. ……

Discussion

62. The provisions in the IPC relied upon by the appellants are section 368 [kidnapping and abduction] and 377:

63. The mere existence in national legislations of criminal provisions prohibiting LGBTI sexual activity does not amount to persecution. The approach to be taken was set out by the Court of Justice of the European Union in *Minister voor Immigratie en Asiel v X, Y & Z* [2013] EUECJ C-199/12:

> "1. Article 10(1)(d) of Council Directive 2004/83/EC of 29 April 2004 ... must be interpreted as meaning that the existence of criminal laws, such as those at issue in each of the cases in the main proceedings, which specifically target homosexuals, supports the finding that those persons must be regarded as forming a particular social group.
>
> 2. Article 9(1) of Directive 2004/83, read together with Article 9(2)(c) thereof, must be interpreted as meaning that the criminalisation of homosexual acts per se does not constitute an act of persecution. However, a term of imprisonment which sanctions homosexual acts and which is actually applied in the country of origin which adopted such legislation must be regarded as being a punishment which is disproportionate or discriminatory and thus constitutes an act of persecution.

> 3. Article 10(1)(d) of Directive 2004/83, read together with Article 2(c) thereof, must be interpreted as meaning that only homosexual acts which are criminal in accordance with the national law of the Member States are excluded from its scope. When assessing an application for refugee status, the competent authorities cannot reasonably expect, in order to avoid the risk of persecution, the applicant for asylum to conceal his homosexuality in his country of origin or to exercise reserve in the expression of his sexual orientation."

64. We begin by noting that both parties accept that there have **been no prosecutions of lesbians under section 377 at all, and that in practice, section 377 is perceived in Indian law as inapplicable to lesbians**. In February 2014, when MD was decided, the effect of the *Naz Foundation* judgment handed down by the Indian Supreme Court on 11 December 2013 was too recent for any long-term effects to be reliably established. We recall that the legal position set out in the *Naz Foundation* judgment went no further than finding that section 377 was not unconstitutional.

65. The Supreme Court's reasoning in the *Naz Foundation* judgment is based upon section 377 as it stood when the case was heard, some 2 years before the judgment was handed down. Amendments to the law of rape in sections 375-376 made by the Criminal Law (Amendment) Act 2013 did not include promised amendments to section 377, which was considered to be sub judice pending the outcome of the *Naz Foundation* appeal in the Supreme Court.

66. The *Naz Foundation* decision remains under challenge: although a number of review petitions filed against the decision were dismissed by the Supreme Court on 28 January 2014, in March 2014, the Naz Foundation filed a curative petition against the judgment, which, if successful, would result in the December 2013 Supreme Court judgment being set aside and remade by a different constitution of the Court. On 23 April 2014, a four-judge bench of the Court gave permission for the curative petition to proceed to oral argument. No indication of the outcome is before us.[9]

67. The curative petition relies on the failure to take account of the changes wrought by the Criminal Law (Amendment) Act 2013 to the definition of rape in section 375, which was amended to include penile penetration, by any means, of

[9] As I have already mentioned, on 2 February 2016 the three-judge Bench of the Supreme Court hearing the curative petitions (including the Chief Justice of India and two other Supreme Court Justices) referred the petitions to a five-judge Constitution Bench.

women as well as men, and on the perceived incompatibility of the *Naz Foundation* judgment with the more human rights-based approach in the judgment of the Indian Supreme Court on 15 April 2014 in *National Legal Services Authority v Union of India and others*, Writ Petition (Civil) no.400 of 2012 (the *NLSA* judgment) which is referred to in the 2014 US State Department Report published on June 24 2015.

68. We are entitled to have regard to the *NLSA* judgment as indicative of the legal approach which the Indian Supreme Court may adopt in future, if the curative petition succeeds. The NLSA judgment is supportive of the position taken by the Upper Tribunal in its existing country guidance and adopts a rights-based international approach to the position of transgender persons (TGs) in India, directing that they be given legal and human rights as a 'third sex' in Indian law. In contrast to the lukewarm support for section 377 in the *Naz Foundation* judgment, Justice K.S. Radhakrishnan in his judgment in NLSA said this:

> "119. The role of the Court is to understand the central purpose and theme of the Constitution for the welfare of the society. Our Constitution, like the law of the society, is a living organism. It is based on a factual and social reality that is constantly changing. Sometimes a change in the law precedes societal change and is even intended to stimulate it. Sometimes, a change in the law is the result in the social reality. ...It is the denial of social justice which in turn has the effect of denying political and economic justice. ...
>
> 122. It is now very well recognized that the Constitution is a living character; its interpretation must be dynamic. It must be understood in a way that intricate [sic] and advances modern reality. The judiciary is the guardian of the Constitution and by ensuring to grant legitimate right that is due to TGs, we are simply protecting the Constitution and the democracy inasmuch as judicial protection and democracy in general and of human rights in particular is a characteristic of our vibrant democracy."

69. We have regard to the evidence of Professor Shahani. In his own evidence**, both written and oral, he accepted that there were places in India where lesbians could live in open relationships, particularly where they are what he described as 'middle class' and have financial independence**. We note the evidence he gave about the problems experienced by a number of lesbian couples over the years, which strikingly (given the lack of any recognition of

same-sex marriage in India) often arose after the couple had eloped and tried to marry, in a variety of ceremonies both civil and religious. In most, but not all the cases cited, the problems had come from the women's families.

70. We also note Professor Shahani's evidence about the range of social networks within India, but that will of course be a question of fact in each case. He was unaware of many recent examples and the instances in his report were many years old, in most cases. Professor Shahani's personal knowledge of life for LGBTI persons in India appeared to be limited to the position, particularly for male non-heterosexuals, in his home city, Mumbai. Professor Shahani conceded that the evidence before the Tribunal did not amount to reliable evidence of a pattern of police misconduct to lesbians. **We note that same-sex couples have difficulty in legally adopting children, but given that single women may adopt or undergo IVF, such couples do not need to be childless and we do not consider that legal restriction to be capable of reaching the persecution threshold.**

71. We have considered the Fernandez-Gomathy case study. The width of their definition of 'violence' includes many circumstances normally considered to be harassment or discrimination, rather than violence, which makes the study less helpful, but it is the only systematic study available concerning the circumstances of lesbians in India. The Fernandez-Gomathy case study is not new: it was finalised in 2003, long before the liberalisation which the Delhi High Court judgment in Naz Foundation began. The principal risk identified by the women studied came from their family members, and from silent shame, social stigma, and ostracism in their home areas.

72. The press reports before us are striking: they speak of difficulties for lesbian couples who eloped or married each other without their family members' approval. We note, in particular, that a lesbian couple who fled Mumbai for Delhi in 2011 received protection from the Delhi Police from overzealous officers of the Mumbai police, after theft charges were laid by family members in Mumbai. In May 2012, a police post in Ambala arranged protection and the family dispute went before the Civil Court for a decision as to whether the families should be made to accept their daughters' sexuality. Another report, which may concern the same lesbian marriage, reflects police protection ordered by the Punjab and Haryana High Court and formal disinheriting of one of the women by her family.

73. Reports after the *Naz Foundation* judgment reflect public pressure on both sides of the argument and political manoeuvring as the new Indian BJP government decides how

to approach the question. **We do not accept the submission of Ms Hashmi that the evidence is that the BJP is implacably opposed to LGBTI rights.** We note that immediately after the Indian Supreme Court's decision in December 2013 in the Naz Foundation case, a BJP spokesman said in a live interview that homosexuality was unnatural and that the party supported section 377. In March 2014, members of the BJP's ideological fount, Rashtriya Swayamsevak Sangh (RSS) expressed a firm anti-LGBTI stance ahead of the election in which the BJP won power. Since that election, other BJP leaders such as Arun Jaitley and Harsh Vardhan have spoken in favour of decriminalising homosexuality. We do not consider that the evidence demonstrates that there is a fixed overall BJP position on the issue.

74. The Indian government has begun collecting statistical data on arrests of homosexuals in many, but not all, Indian states. The population of India was last recorded in 2014 at over 1.2 billion people. The records in the bundle before us indicate that in 2014 there were 778 arrests of homosexuals nationally, but not whether the arrests were followed by a prosecution, nor whether those arrested were non-heterosexual men or lesbians. We do not consider that this amounts to reliable evidence of arrests of lesbian women or prosecution of lesbian women, at a level capable of amounting to a real risk of persecution or serious harm.

75. We remind ourselves of the guidance on transgender or 'third sex' persons given by the Supreme Court in the *NLSA* case, just a few months after the *Naz Foundation* judgment, and the ongoing challenges to the *Naz Foundation* decision. We also recall that the Indian government is to bring in legislation in the next Parliament, following the success of the private members' bill. **We cannot on that basis regard the effect of *the Naz Foundation* judgment as a re-criminalisation of homosexual activity, still less of lesbian sexual activity.**

76. Since there have been no prosecutions of lesbians in India, we agree with Ms Hashmi that the real issue is the risk to lesbians arising out of the activities of non-state actors. Ms Hashmi conceded, as did Professor Shahani, that the evidence does not support a finding of endemic police complicity in harassment or other ill-treatment of lesbian couples or individuals.

77. Even if there were an individual risk of persecution or serious harm in a lesbian woman's home area, given the size and enormous population of India, in many cases there will be an internal relocation option The question of internal relocation will be one of fact for the decision maker in each individual case where in the home area a real risk of persecution or serious

harm is found to exist. [Following paragraphs excluded as relating to persecution].

78. We bear in mind all of the evidence before us, and we give the following country guidance:

(7) The guidance in MD (same-sex oriented males) India CG [2014] UKUT 65 (IAC) stands. The guidance at (a) - (f) in MD (India) applies equally to lesbians.

(8) A risk of persecution or serious harm for a lesbian woman in India, where it exists, arises from her family members, and the extent of such risk, and whether it extends beyond the home area, is a question of fact in each case.

(9) The risk of persecution or serious harm is higher for uneducated lower class lesbian women in rural areas, who remain under the control of their family members and may not be permitted to leave the home to continue meeting their lesbian partners.

(10) Where family members are hostile to a lesbian woman's sexuality, they may reject her completely and sometimes formally renounce her as a member of that family. In such a case, whether relocation to a city is unduly harsh will be a question of fact, depending on the ability of such a lesbian woman to survive economically away from her family and social networks.

(11 If a lesbian woman's family wishes to pursue and harm her in the place of internal relocation, their ability to do so will depend on the reach of the family network, how persistent they are, and how influential. The evidence indicates that there is normally sufficient state protection for women whose families seek to harm them in their place of internal relocation.

(12) In general, where there is a risk of persecution or serious harm in a lesbian woman's home area, for educated, and therefore 'middle class' women, an internal relocation option is available. They are likely to be able to relocate to one of the major cities in India and are likely to be able to find employment and support themselves, albeit with difficulty, and to live together openly, should they choose to do so. In general, such relocation will not be unduly harsh.

The individual appellants

79. Applying the principles set out above, we now turn to the circumstances of these appellants.

……

> 83. It is not in dispute that the appellants wish to continue living together as a couple, if they are returned to India. We accept that both of them have rejected, and been rejected by their families. We find that these appellants have an internal relocation option to cities in other states such as Mumbai, Delhi or Bangalore and that it would not be unduly harsh to expect them to exercise that option. The appellants are highly educated and both accepted in their evidence was that their qualifications would get them good jobs in an Indian city, such that they would be able to live together and would be able to pay for accommodation, food and so on.
>
> 84. **As regards Article 8 ECHR, the appellants have family life together, which would be unaffected by their return to India. Their private life in the United Kingdom can be given little weight since it has all developed while their presence here was either precarious or unlawful (see sections 117B(3) and 117B(4) of the Nationality, Immigration and Asylum Act 2002 (as amended)). It has not been suggested that the appellants could meet the requirements of paragraph 276ADE and Appendix FM of the Immigration Rules.**
>
> 85. Nor are there any Nagre exceptional circumstances in either appeal. **The absence of recognition for their civil partnership is not of itself sufficient to amount to a breach of Article 8 ECHR, still less to persecutory treatment or serious harm (see *LH and IP (gay men: risk) Sri Lanka (CG*) [2015] UKUT 73 (IAC) at [120]-[122]). The evidence of their private life, if any, in the United Kingdom remains slender and is insufficient to outweigh the United Kingdom's right to control immigration, as both First-tier Tribunal Judges found in their decisions. We do not consider that removing these appellants to India would be disproportionate on Article 8 grounds**.

74. The decision in *AR and NH (lesbians) (CG)* demonstrates that there is no realistic basis for challenging either the FTT's or the Upper Tribunal's decision in this case on the basis of the Supreme Court's judgment in *Koushal* dated 11 December 2013. I would however have come to the same conclusion, for similar reasons, even in the absence of the recent decision of the Upper Tribunal in *AR and NH (lesbians) (CG). Koushal* does not retrospectively demonstrate that the FTT made a mistake of fact giving rise to unfairness.

75. In all the circumstances, there is, in my judgment, no basis for the appellants' attack on the FTT's conclusion that their removal would not give rise a flagrant denial or violation of the appellants' article 8 rights, notwithstanding possible discriminatory treatment in India. The FTT made no error of law in concluding that article 8 was not engaged.

The fifth Razgar question - the allegedly flawed proportionality assessment

76. There was no separate challenge to the FTT's approach to the third and fourth *Razgar* questions, namely that the interference was in accordance with the law and necessary in the economic well-being of the country. The complaint was that in circumstances where, as the appellants contended, the removal gave rise to a flagrant denial or violation of their article 8 rights, such interference was not proportionate to the legitimate public end sought to be achieved.

77. This issue strictly only arises if the FTT was wrong in its conclusion that article 8 was not engaged. But in the alternative I would also hold, if necessary, that, on the particular facts of this case, and even on the assumption (contrary to my conclusion) that a removal would give rise to a flagrant denial or violation of their rights to family life, such removal was nonetheless proportionate. This was a case where, having already become "extremely close friends" in India, the appellants had chosen to come to this country and to enter into a civil partnership, when their presence here was, so far as the future was concerned, necessarily precarious. There is no evidence to support any risk of violence to them on their return, or any risk of prosecution, and whilst, no doubt, the family and societal discrimination which they might encounter on their return would be unpleasant, and something which they would not experience in this country, that would not be sufficient to outweigh the need for the UK to maintain proper immigration controls in the economic interests of the country.

Disposition

78. For the above reasons, I would dismiss this appeal.

Lord Justice David Richards:

79. I agree.

Lord Justice Moore-Bick:

80. I agree that the appeal should be dismissed for the reasons given by Gloster L.J.