Upper Tribunal
(Immigration and Asylum Chamber)

MD (same-sex oriented males: risk) India CG [2014] UKUT 00065 (IAC)

THE IMMIGRATION ACTS

Heard at Field House
On 24 February 2012 & 10 October 2013

Determination promulgated

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Before

UPPER TRIBUNAL JUDGE ESHUN
UPPER TRIBUNAL JUDGE O'CONNOR

Between

MD
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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.*

Representation:

For the Appellant: Mr A Eaton, instructed by B.H.T. Immigration Legal Services

For the Respondent: Ms A Athi (24/2/12) and Ms A Everett (10/10/13), Senior Home Office Presenting Officers.

DETERMINATION AND REASONS

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Introduction

1. This appeal concerns a male national of India born in January 1986. The appellant entered the United Kingdom lawfully on 21 February 2007 and applied to the Secretary of State to be recognised as a refugee on 7 November 2007. This application was refused by way of a lengthy decision letter of the 22 November 2007. On the same date a decision was made to remove the appellant from the United Kingdom. The appellant appealed this decision to the then Asylum and Immigration Tribunal. Immigration Judge Mahmood dismissed the appeal on all grounds in a determination dated 12 February 2008. Senior Immigration Judge Jarvis subsequently made an order for reconsideration on 13 March 2008 and a panel of the Asylum and Immigration Tribunal (Designated Judge Barton and Immigration Judge James) thereafter reconsidered the appellant's appeal but dismissed it in a determination of the 31 October 2008.

2. After an oral hearing Lord Justice Sedley granted the appellant permission to appeal to the Court of Appeal, notice to this effect being sealed on 10 November 2010. By way of a further notice, sealed on 23 December 2010, Lord Justice Sullivan ordered that the appellant's appeal be allowed to the extent that it be remitted to the Upper Tribunal for reconsideration pursuant to paragraph 12 of Schedule 4 to the Transfer of Functions of the Asylum and Immigration Tribunal Order 2010 (SI 2010/21). The attached Statement of Reasons reads as follows:

> "1. …[T]he AIT made a finding that the appellant was a homosexual and noted (sic) accepted that anti-homosexual laws existed but that there are also areas and clubs where open displays of affection are accepted.
>
> 2. The appellant sought permission to appeal to the Court of Appeal. The matter was stayed for a period, awaiting the judgment in *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31. Permission was granted by Lord Justice Sedley on 10 November 2010.
>
> 3. The respondent accepts that the appellant's case will have to be reconsidered by the Upper Tribunal in light of *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31.
>
> 4. For this reason, the parties are agreed that the matter being remitted back to the Upper Tribunal of the Immigration and Asylum Chamber for rehearing of the reconsideration hearing by a Tribunal."

3. The appeal next came before Upper Tribunal Judge Gleeson on 24 February 2012. After hearing from both Mr Eaton and Ms Athi, Judge Gleeson concluded as follows:

> "5. The Court of Appeal having identified the error of law by the AIT in 2008, which may be summarised as its failure to anticipate the restatement of the correct approach to return to concealment in HJ and HT, I set aside the legal analysis in the First-tier Tribunal's determination but the findings of fact and credibility are to be preserved."

4. Judge Gleeson further identified this case as one in which the Tribunal could give country guidance on the risk to homosexuals returned to India. The case has thereafter been prepared on such basis. The hearing of the appeal was delayed in order to await the decision of the Indian Supreme Court in Koushal and another v Naz Foundation and Others (Civil Appeal No. 10972 of 2013) regarding the application and scope of section 377 of the Indian Penal Code of 1860, the provision in Indian law which criminalises, amongst other things, same-sex sexual activity. The proceedings were completed in March 2012. Given the length of delay it was eventually agreed between the parties, and by the Tribunal, that the hearing should proceed in the absence of such decision.

5. By this route, the appeal has come before us to re-make the decision. As it turned out the decision of the Indian Supreme Court was handed down on 11 December 2013. As a consequence we gave both parties opportunity to file written submissions in relation to the judgment, which we summarise below.

6. As indicated above the "findings of fact and credibility" of the AIT panel were preserved by Judge Gleeson. A Statement of Agreed Facts was prepared by the parties prior to the hearing of the appeal. As a consequence we heard only limited evidence from the appellant and his British citizen partner. We also heard oral evidence from an expert, Dr Akshay Khanna.

7. The *UNHCR Guidelines on International Protection No. 9 – Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees* (23 October 2012) uses the term "LGBTI" [lesbian, gay, bisexual, transgender and intersex] in preference to the term "homosexuals"; and the terms "gays" and "lesbians" in preference to "homosexual males" and "homosexual women". Whilst we have generally sought to follow such preferences this has not been possible throughout because we have also had to reflect the language used in the evidence and submissions before us. Dr Khanna, the expert who provided evidence to the tribunal, uses the terms "Homosexuals", "LGBT", "LGBTIQ" [lesbian, gay, bisexual, transgender, intersex and questioning], "same-sex desiring males" and "queer folk".

8. For cultural reasons the terms "gay man" and "homosexual male" are not apt to describe, as a generality, males in India with a same-sex orientation. We have used the term "same-sex oriented males" when reference is being made to the group which incorporates gay persons and other male by birth local Indian sexual and gender identities, such as *Hijra* and *Kothi*. In the very simplest of terms *Hijras* are physiological males who adopt feminine gender roles (many of whom have been castrated). Many *Hijras* live in well-defined *Hijra* communities often in the poorest urban areas of India, and they often work in the sex industry. They have no exact match in the western identification of sexual orientation. An effeminate male who

takes a "receptive" role in sexual activity with a man will often identify as a *Kothi*. *Kothis* are to be distinguished from *Hijras,* although they often live within *Hijra* communities; doing so with a degree of subservience. Both *Hijra* and *Kothi* have their own identifiable social spaces in India and generally live at the margins of society with a very low status.

9. We make findings in this determination only in relation to same-sex oriented males, and those perceived as such, whether they self identify as gay or not. Dr Khanna confirms that his evidence is not intended to relate to the experiences of women or other females assigned at birth and we are not satisfied we have a sufficiently complete picture to make findings as to the risk to any group other than same-sex oriented males; neither were we asked to make such findings.

Preserved and agreed facts

10. The findings of fact made by the AIT panel in its determination of 31 October 2008 were detailed and closely reasoned. Its conclusions are summarised in paragraphs 111-112 of the determination:

> "111. The following findings have been made by the Tribunal to the reasonable degree of likelihood standard: that the appellant is gay (that is, he is homosexual and likes to wear make up, but he makes no claim that he is a cross-dresser, Hijra and transgendered); that he did not openly express his sexual preferences when he was in India prior to his arrival in the UK, and that he was aware of discriminatory practices and social stigma of homosexuality, as well as the presence of homosexuals, in his home country; there was a serious family argument about the educational funding and sexual orientation of the appellant necessitating him leaving the family home; the appellant was sacked from the restaurant in Mumbai and lost his accommodation which was connected to his employment; it is accepted the appellant was reported for prostitution by Shiv Sena to the police, which led to his arrest and detention by the police; it is accepted the appellant was beaten by the police which led to bruising; that the appellant was detained for a few days by police; he returned from India to the UK using his own identity and passport to resume his life as an openly gay man in Brighton.
>
> 112. We reject the account of the appellant having received serious ill treatment by the Mumbai police, that he required hospital treatment, that he remained in custody during hospitalisation, that he escaped from custody with the help of a doctor, that he was able to leave India only by employing a disguise, and that there continued police interest in him and a warrant for his arrest. "

11. The Statement of Agreed Facts reads:

> a. The Appellant is a homosexual man from India.
>
> b. The Appellant freely expresses his sexual identity through relationships, personal appearance.
>
> c. The Appellant was engaged in a serious family argument which resulted in him leaving his family home.

d. The Appellant lost the employment he subsequently secured as a result of wearing make up.

e. The Appellant was reported to the police for prostitution.

f. The Appellant was subsequently arrested, detained and beaten by the police, an assault which resulted in the Appellant sustaining injuries.

g. The Appellant enjoys an openly gay life style in Brighton, Sussex and has no wish to hide his sexual orientation.

Evidence

12. In addition to the evidence of the appellant, his partner RD and the expert Dr Khanna, there was also a considerable amount of documentary evidence before us, a schedule of which is attached. We have had regard to all of this material when coming to our conclusions, whether referred to specifically in the body of the determination or not.

Dr Akshay Khanna – Country background evidence

13. Dr Khanna provided the Tribunal with lengthy written evidence in the form of a report dated 15 September 2013. He also made himself available to provide oral evidence, for which we express our gratitude.

14. Dr Khanna is a Research Fellow working with the Participation, Power and Social Change Team at the Institute of Development Studies, University of Sussex. He has a doctorate in Social Anthropology from the University of Edinburgh, a Masters in Medical Anthropology from the School of Oriental and African Studies, University of London as well as a degree in law from the National Law School of India University, Bangalore, India. He is currently the convener of the Sexuality and Development Programme at the Institute of Development Studies and lead on international research programmes related to sexuality, law, poverty, HIV/AIDS and human rights relating to sexual minorities in the global South including India, Uganda and Brazil. The focus of Dr Khanna's doctoral research, and his subsequent research, has been on the challenges faced by people identifying as lesbian, gay, bisexual, transgender, *Kothi*, *Hijra*, *Aravani*, *Jogappa* and other local sexual and gender identities, and by the "Queer movement" in India. He is currently engaged in research examining the relationship between law and violence faced by sexual and gender minorities in India and Uganda.

15. Dr Khanna describes his relevant on the ground experience in the following terms in his written report of 15 September 2013:

> "I have been working on issues of discrimination and violence against, and the human rights of sexual and gender minorities in India since 1998. After my degree in Law, I worked as a human rights lawyer with The Lawyers Collective, a leading NGO in India. I have worked as a research officer on issues relating to domestic violence, and was responsible for the first draft of what is now the law relating to domestic, familial

and intimate violence against women. This has given me a deep understanding of the conditions of familial violence in India. Between the years 2000 and 2002 I worked with a project dealing with legal, ethical and rights issues arising out of the HIV/AIDS epidemic. In addition to the provision of legal services to communities with an exacerbated vulnerability to HIV/AIDS due to social, political and economic marginalisation (working especially closely with groups of men who have sex with men, commercial sex workers and injecting drug users), this work involved designing, implementing and co-ordinating research projects on the vulnerability of most-at-risk populations, with a special focus of the role of criminal law in exacerbating such vulnerability. It is relevant here to note that this included working closely with the Queer movement in India and that I have been involved in providing legal, social and other support to people facing violence on the basis of their sexual orientation and identity and their gender non-conformity for several years. Since then, as a person associated with the movement, I have had the experience of supporting and working with people fleeing from extreme violence and discrimination due to their sexual or gender non-conformity. This experience has been based primarily the state of Delhi, but has also included working with groups in Bangalore, Calcutta/Kolkata, Bombay/Mumbai and other parts of the country.

[3] I have been engaged in various capacities (as a lawyer, a member of the Queer community, and as a researcher) in the ongoing litigation challenging the Constitutional validity of Section 377 of the Indian Penal Code of 1860, the anti-sodomy law that has been the primary law used in the negation of the human and fundamental rights of sexual minorities, right from the inception of the legal challenge. I am a founder-member of the Delhi-based sexual rights group 'Prism' which is a member of the civil society coalition 'Voices Against 377', which is a party to the litigation in the Supreme Court of India."

16. His last visit to India prior to the hearing of the appeal was between December 2012 and January 2013, during which time he interviewed lawyers engaged in the Supreme Court case referred to earlier in the determination. He also attended hearings at the Supreme Court of India.

17. Section A of Dr Khanna's report provides a brief description of the cultural and political conditions of same sex desire in India. It is observed that there are 1.2 billion people living in India with a "confounding range of religious, ethnic, linguistic communities and identities". Historically there has been a broad acceptance of sexual and gender diversity in several parts of India including the states of Tamil Nadu, Karnataka and Maharashtra. However, unlike in the Euro-North American context, the nature of desire does not historically define the [self] identity of a person, a point emphasised by Dr Khanna on a number of occasions within his report as well as during his oral evidence. In recent years the connection between desire and identity has been made and the idea that there are categories of people based on sexual preferences has become a reality. This, Dr Khanna suggests, implies the recognition of non-normative sexual desires as being different, stigmatised and criminalised. Dr Khanna refers to the fact that "Queerness, in the sense of multiple genders and forms of sexualness, is far from marginal to India Society". There are a large and increasing number of people in India identifying as "gay".

18. In section B of his report Dr Khanna responds to specific questions asked of him by the appellant's representatives. This evidence can be summarised as follows:

    a. Same-sex sexual activity was present, recognised and in some cases celebrated in pre-colonial India. British colonisation 'heterosexualised' India. The British introduced section 377 of the Indian Penal Code of 1860, which has been used to target male homosexuals and working class identities such as the *Hijra* and *Kothi*.

    b. The actual extent to which section 377 has been used against same-sex desiring males since its inception is difficult to ascertain. There is no centralised register for offences in India. The law is used most often as a threat rather than for actual prosecution. In the higher courts there is record of only 131 cases in 140 years, a large number of which relate to child sexual abuse or non-consensual sex. That is not to say that the provision has not been used in the lower courts.

    c. LGBT groups had formed in most big cities in India by the late 1990's. The 1990's also saw the emergence of an ultra conservative, religious fundamentalist movement of Hindu nationalism, under the banner of 'Hindutva' who argued, with demonstrations of violence, that homosexuality was a 'western evil';

    d. Dr Khanna's report sets out the history of the section 377 litigation; including the arrest, detention and ill treatment in Lucknow of four workers from the Naz Foundation International [an NGO], and its sister organisation, in July 2001 which led to section 377 becoming a matter for the national media; the subsequent lodging of a *vires* challenge to section 377 in the High Court of Delhi in September 2001, the dismissal of such challenge in 2004 on the basis that it was an 'academic question'; the overturning of the dismissal by the Supreme Court of India which directed that the application must be determined on its merits; and, finally, the decision of the Delhi High Court in July 2009 that section 377 must be read down so as to exclude consensual sex acts between adults in private. Dr Khanna observes that during the course of the litigation, support groups and "Queer activist collectives" engaged in the collection of evidence of human rights violations against LGBT people across the country and at the same time there were "concerted homophobic campaigns carried out by political groups", leading to "activist groups … almost constantly having to provide shelter, legal, economic and emotional support to a large number of LGBT people escaping extreme violence and death threats";

    e. The 2009 judgment of the High Court of Delhi has been appealed to the Supreme Court of India, although not by the government of India. The proceedings were completed in March 2012 and the judgment was reserved. The judgment has yet to be handed down, and the principal

Justice is due to retire in December 2013. If the judgment is not delivered by this date, it is expected that the matter will be reheard by a new constitution of the Court. The Justices of the Supreme Court are thought of by the legal community in India as being conservative.

f. The jurisdiction of the Delhi High Court is limited to the State of Delhi. However there are conflicting positions as to whether the judgment in the section 377 case has applicability outside Delhi. There have been no cases involving section 377 in the higher courts in India since the Delhi High Court's judgment. Dr Khanna refers to reports of four instances, since the Delhi judgment, where section 377 has been used in the lower courts in the context of adult consensual sex.

g. Dr Khanna states that although LGBT activists can now speak as equal citizens there continue to be instances directed against them of extreme violence, discrimination and exclusion socially. The violence faced by LGBT people who fall outside the network of support groups and NGOs goes largely unrecorded. People who join such networks live under a constant threat of violence, especially from the police. Where there is the presence of a strong movement, poor LGBT people are less vulnerable, but this cannot be said of most cities. Dr Khanna then summarises (i) a fact-finding report authored by the People's Union for Civil Liberties published in 2001, (ii) a further report from the same organisation published in 2004, (iii) Human Rights Watch reports from (a) 2002, relating to police harassment of outreach workers, (b) 2007, regarding the arrest of four men who had been falsely alleged to have engaged in "unnatural sex in a picnic spot" and the subsequent "entrapment" and arrest of gay men by an undercover police officer, (c) 2008, regarding a concerted campaign of eviction against more than 100 members of the *Hijra* community in Bangalore and subsequent arrest of 45 sexuality rights activists who had been protesting against the evictions (iv) affidavits presented in the section 377 litigation relaying (a) information about the torture of a *Hijra* in Bangalore in 2004, (b) the unjust arrest of 10-12 *Khojas* in Bangalore in 2006 and (c) the custodial rape of an LGBT person in Delhi in 2006, (v) a judgment of the High Court of Chennai relating to police torture, and subsequent suicide, of an *Aravani* in Tamil Nadu in 2006, (vi) newspaper stories relating to the suspension from his employment, and eviction from his university accommodation in 2010, of Professor Ramchandra Shrinivas Siras, after he was filmed having consensual sex with a rickshaw puller – the High Court suspended the effect of such decision but Dr Siras passed away shortly thereafter and (vii) reports of the murder of a gay man in north-east India in 2006 and of subsequent death threats made against other LGBT persons in area.

h. Blackmail is a common experience for LGBT persons across India, irrespective of class; cases of blackmail having been reported in the social media almost every month, if not every week, in recent years. The

preponderance of cases relate to entrapment by police personnel; the most recent example being the assault and blackmail of a gay man in Mumbai by two plain clothed police officers reported in March 2013;

i. The culture of ridicule and shaming of LGBT persons in India is pervasive. "Working class Queer males tend to face violence at the hands of … masculine petty criminals who often work in gangs." There is no recourse to justice in such circumstances because approaching the police might result in further violence, although the common experience of those who approach the police is to be "laughed at, sexually teased and dismissed off-hand, with no action taken and no report filed."

j. There is discrimination against LGBT persons in the workplace, as evidenced by Dr Siras' case and several other cases. Information about the latter cannot be divulged because it is sensitive and could lead to further discrimination. Obtaining employment is particularly difficult for working class effeminate males.

k. There are several well-documented cases of discrimination against LGBT persons in the provision of healthcare. "…[m]en who have sex with men, and other stigmatised communities such as sex workers and injecting drug users are either refused treatment, given differential treatment, or made to wait until all other patients have been treated." There is prevalence for the use of aversion therapy as a treatment for homosexuality amongst mental health practitioners in India; including electro-shock therapy and the use of psychotropic drugs in an attempt to 'cure' individuals, although such practices are not approved by the Indian Psychiatrists Association.

l. According to Dr Khanna, there are differences in the levels of police violence against LGBT persons as between states. Tamil Nadu has been at the forefront of establishing a positive legal and policy stance towards third gender identities. In Karnataka there is a very strong movement especially in the cities. In some cities, such as Bangalore, movement has grown strong enough to demand accountability from the police in relation to this violence. However, Kerala is notorious for higher levels of violence against LGBT persons. In the north, Uttar Pradesh has the most public instances of concerted campaigns against homosexuals. In Delhi there is a pattern of migration from neighbouring states of Punjab and Haryana, again related to the high levels of violence in those states. There is an emergence of the phenomenon of moral policing in several cities in India, typically when high-level police functionaries are of the Hindu right wing affiliation. There is the possibility of the most militant Hinduvta taking power in the coming general elections in 2014.

19. Dr Khanna acknowledges in his report that because of the diversity of the experience of sexuality in India, it is difficult to arrive at generalisations as to the type of

personal characteristics of an individual that might heighten the risk of ill treatment as a consequence of such person's sexuality. Upper caste Hindu groups are most averse to homosexuality, the Hindutva groups representing a certain upper caste Hindu ideology. Various Christian groups have also been publicly opposed to sexuality rights whereas the reactions of Muslim groups have been less vociferous.

20. The expert continues by commenting that the question of class is crucial; low caste poor and working-class LBGT persons, especially effeminate males, face the most extreme forms of exclusion, violence and discrimination. This is partly related to the fact that working class and poor people cannot afford privacy and thus intimacies are forced into the public sphere. Exclusion of LGBT persons from the family, as well as the difficulty in getting employment, leads to further vulnerability, abuse and violence. "*There has been a long disjuncture between upper class Gay men and working class queer males, such as Kothis. While the upper class Gay man is in a position to reap the benefits of the Delhi High Court judgment by performing 'good citizenship' in a way so as to fit in with the conservative elite, he does so by pushing the working class Kothi further to the edges, further into precarity.*" As more morality emerges where there is legitimate homosexual sex in private, the sexuality of those who cannot afford privacy is deemed even more illegitimate and morally reprehensible.

21. There is limited evidence available on the issue of violence in villages (as opposed to cities), but LGBT groups are constantly engaged in providing support to LGBT persons running away from extreme violence from small towns. In Dr Khanna's opinion the problem of homophobia is primarily an urban phenomenon, although he accepts that further research is required on this matter.

22. Dr Khanna responds to the question of whether there are any areas within India which would provide a safe haven for any gay man, by stating that, in so far as the person does not belong to the community concerned, it is possible for a gay person to make a life in India, but it is not an easy task if one does not have the financial means. He continued by stating that if one is able, and willing, to suppress the public expression of one's sexuality and gender so as to make it invisible then this is a possibility. There is also the possibility of finding a community that might provide support, including housing and employment. There are several groups in several cities that one can access in this regard; although in Dr Khanna's view this would be particularly difficult if one has experienced extreme violence in the past and therefore has difficulty trusting strangers. He confirms that if one is explicit about being gay, and is not upper class, it would be difficult to find both housing and employment. The main cities where people facing violence tend to migrate to are Bangalore, Delhi, Calcutta and Mumbai. If one is able to make a connection with the LGBT community in any city this might ease relocation.

23. When asked whether gay couples cohabit in India Dr Khanna confirmed that they do, "but with difficulty." If one is upper class and property-owning this is easier. Obtaining housing as a middle-class same-sex couple is also possible but under the guise of friendship. Renting a property as an openly gay couple would be very

difficult in middle-class urban India and would often require alienation from the biological family.

24. India is the first country in the world to recognise gender plurality; there being three options for gender (male, female and other) - this is true in the electoral roll, on official identity documents such as passports and in the census.

25. In oral evidence Dr Khanna attested to the accuracy of his written report and expanded further on matters raised therein. He observed that LGBT support groups are generally informal collectives of people, most of whom have been rejected by their own families. They are groups of people that gather in urban areas to provide support networks for the LGBT community. HIV or human rights NGOs assist with the provision of space for group meetings. Contact with these support groups can be made through HIV NGO's, who often have outreach programs in particular spaces, such as public parks.

26. These support networks assist persons to stay on the run from the police, provide emotional and financial support until a person is able to stand on their own feet and provide assistance in obtaining employment through community contacts. Such support is generally provided for a maximum of six months by which time hopefully the person being supported had established themselves within the community and found regular employment. People often move to different cities for support. Most people in the support communities have to juggle employment with their support work. There are some interesting initiatives underway in India such as the attempt in Gujarat to set up homes for old age LGBT persons because the usual social networks do not exist.

27. Dr Khanna emphasised the information provided in his report about the ongoing section 377 litigation, and the prospect of the matter having to be reheard. He also gave additional evidence of the situation in Bangalore, indicating that there is a political sense to the LGBT movement in that city, it deriving from the trade unions and untouchable castes; whereas as in other cities the movements have been instigated by civil society or NGO's not political collectives. Consequently there is a difference to the way police accountability can be demanded. In Bangalore if there is an instance of extreme violence the community can be mobilised quickly. Despite all this however the attitudes of the police on the ground in Bangalore have not changed.

28. When asked what he meant by the use of the phrase "good citizenship" [as referenced in paragraph 19 above] Dr Khanna confirmed that an upper-class gay man would be able to present himself as a tax paying citizen. The idea of a ‘gay person’ emerged from the mainstream media after the section 377 judgment. This idea relates to an upper-class gay person and any action that militates against this “normality” of a gay person becomes even more illegitimate. There have been instances in which upper-class gay persons have acted aggressively towards *Kothi* for tarnishing the name of gay persons.

29. Dr Khanna then confirmed that in his opinion upper-class gay couples can cohabit in India but persons outside of this group would have to present themselves as friends and "perform the idiom of bachelorhood". He personally knows several persons who were evicted from their accommodation the minute there was a hint of homosexuality. It is possible for non-upper-class gay couples to cohabit but they would either have to be careful to make people think they were just heterosexual friends living together, find a "queer landlord", or alternatively find space in a slum close to a *Hijra* community, which has its own dangers.

30. Dr Khanna was asked to comment on the Secretary of State's assertion that his report cited only a few instances of police misconduct, mostly from 2006-2007, but offered no background evidence as to the overall incidence of such conduct by the police in relation to LGBT persons. In response he stated that it was impossible to provide detailed evidence of overall incidence, because nobody is doing research on such experiences. During the section 377 litigation NGOs would travel around India and document the experiences. Public records are actively silent about homophobic violence. The LGBT activist groups do not have the resources. The lack of evidence does not point to an absence of violence. He accepted the assertion that LGBT persons are not the only victims of police corruption in India.

31. As to the comments made in his report about aversion therapy, Dr Khanna confirmed that he knows some people who have gone through such treatment. People end up in such therapy after having been taken by their parents or having referred themselves to therapy because of an internal self-hatred. He accepted that such therapy was undertaken on a purely voluntary basis.

32. Under cross-examination Dr Khanna was invited to comment on whether a *Kothi* could obtain assistance from a support group. In response he stated that it depended on the city they were in, not all cities having organisations with sufficient resources. He was uncertain as to the extent such a person would fall within the radar of a support group. *Kothi* tend to live where there are *Hijra* communities and they access protection in this way. In exchange they "perform subservience" to the *Hijra* community. Access to privacy would lessen the risk but *Kothis* tend to live in shared spaces with other people and consequently would have limited privacy. It is the same in general for gay persons because in all likelihood their families would have thrown them out. In a heterosexual household matters are arranged in such a way that individuals and couples would have "private time" at home.

33. Working class vendors face police violence and extortion but this is exacerbated if somebody is visibly "queer". Dr Khanna noted that in Delhi there are checkpoints every couple of kilometres; if you look normal you will not be stopped, but if you look "queer" you will be stopped. There are checkpoints on the outskirts of the slums and people need to pay a bribe to get past. He then clarified the comments made in his report that the support groups assist in helping people stay on the run from the police; stating that by this he had had in mind circumstances where a family had made a complaint that their son had been kidnapped by a certain type of person and consequently the police would be looking for the son.

34. Dr Khanna accepted that people do relocate away from areas where they have had problems, and that there are patterns of migration in this respect. He emphasised however that the problem with relocating is the need to retain the support of the community in the place of relocation.

35. Dr Khanna finally confirmed that the support communities grow by people establishing themselves during the time they are being supported and thereafter becoming part of the community which provides support to the next person. He thought it typical that a supported person would either find employment or move elsewhere prior to the end of the six month period of support.

Dr Khanna – evidence relating to the appellant

36. In Section C of his report Dr Khanna considers the personal circumstances of the appellant. He observes that the claimed reaction of the appellant's father to disclosure of the appellant's homosexuality is plausible and a very common experience in India, as is the appellant's arrest at the behest of the local Shiv Sena group, and the fact that he would have been put under guard whilst in hospital.

37. As to the risk to the appellant should he return to India, the expert confirms that it is not plausible that the appellant remains a person of interest to the authorities or that he would be identified at the airport. There is a probability however of the appellant suffering from extreme violence from his family, who could also reactivate the machinery of the law. Dr Khanna asserts that it would be difficult for the appellant to obtain employment or housing without community support and, consequently, that returning to sex work on the streets might be his only option. He could start life afresh, but this would require him *"to get the support of local groups, a relevant skill set and the confidence to take on a difficult challenge."*

38. In oral evidence, Dr Khanna confirmed that having interviewed the appellant he believed him to be a middle-class person from a small town in India. It would be possible for him to relocate; however, the difficulties he would have in doing so would depend on his ability to hide the fact that he is a homosexual. When asked why the appellant would need to hide his homosexuality Dr Khanna responded by stating that this was because he was not connected to a community. In order to be openly gay one either has to be upper-class and propertied or culturally intelligible as an effeminate man, such a *Kothi* or *Hijra*. The appellant is neither and consequently he would have to hide the fact that he is gay, for example when seeking to rent a property, even in Bangalore.

39. When asked whether the appellant could simply access initial support from a community group in Bangalore, Dr Khanna did not think this to be impossible but was of the opinion that the appellant would not fall within the category of persons to whom support would be provided because "he does not make sense"; his sexual identity having developed during the lengthy period he has lived in the United Kingdom. The gay male space in India is an upper-class space and the appellant is not upper-class.

40. Dr Khanna thought it difficult to imagine the appellant obtaining employment, even in a western owned business, such businesses not being run by westerners. The appellant would have to find employment in a business where a gay person had risen to a managerial position and then be discreet as to his homosexuality. As to the self-employed economy, there are opportunities to make a livelihood in large Indian cities and LGBT activists have started self-help groups in this regard.

41. Dr Khanna finally gave evidence that in his opinion it would also be difficult for the appellant to find accommodation; this being the case generally for gay people and Muslims. *Hijra* have their own community space.

Other Country Information

42. The most recent Home Office Country of Origin Report (COIR) for India, dated March 2012, sets out, under the heading "Lesbian, Gay, Bisexual and Transgender (LGBT) persons – Legal Rights", passages relating to the Delhi High Court's judgment on section 377 from reports and articles authored, *inter alia*, by Human Rights Watch, the US State Department, BBC News and the International Gay and Lesbian Human Rights Commission. The fact and terms of the judgment, as well as the fact of the subsequent appeal, are noted and it is further noted that Human Rights Watch are of the belief that although the judgment applies purely to Delhi it is likely to influence the legal establishment across the nation.

43. The US State Department report for 2012 (dated April 2013) observes that:

> "Although LGBT groups were active throughout the country, sponsoring events and activities including rallies, gay pride marches, film series, and speeches, they faced discrimination and violence throughout society, particularly in rural areas. Activists reported that transgender persons who were HIV positive often had difficulty obtaining medical treatment. Activists also reported that some employers fired LGBT persons who were open about their sexual orientation or gender identity. LGBT persons also faced physical attacks, rape, and blackmail. Some police committed crimes against LGBT persons and used the threat of arrest to coerce victims not to report the incidents. Several states, with the aid of NGOs, offered police education and sensitivity training."

44. More generally, the US State Department report cites continuing societal violence against persons with HIV and on religious grounds [generally against Muslims], the existence of discrimination in employment, education and access to health care against persons with physical and mental disabilities and instances of unlawful killings and torture by state bodies of persons, particularly in the conflict areas of Jammu and Kashmir, the North-eastern States and the Naxalite belt, as well as the rape of women in detention. Such matters are also reflected in the March COI report, which cites further reports detailing widespread police impunity.

45. An article published in the Times of India on 3 July 2010 noted some significant changes affecting the LGBT community in the 12 months since the judgment of the Delhi High Court, observing in particular that activists had stated that there had been a spurt of gay activity in the open, and that some of the stigma about being gay had

been taken away, although the judgment "*…[d]id not automatically bring with it a change in societal attitudes*". In a July 2011 report from the Times of India [cited in the Australian Refugee Review Tribunal's Country Advice on India of 12 January 2012: headed "*India: IND39685 –Homosexuals – Sikhs – Relocation"*] reference is made to the emergence of at least half a dozen "gay clubs" in the engineering, medical and journalism colleges in Chennai. In addition, Mumbai now has an LGBT store, dedicated LGBT websites, an LGBT film festival, a Pride week and LGBT nights at popular bars and clubs [report from the Research Directorate of the Immigration and Refugee Board of Canada 2 May 2012: titled "*India: Treatment of sexual minorities, including legislation, state protection, and support services (April 2009-March 2012*)"].

46. One of India's first gay weddings took place in a small township in central India in 2001. Kolkata saw its first march by gay men in June 2003 and the first Gay Pride march took place in Mumbai in December 2003 [report from the Research Directorate of the Immigration and Refugee Board of Canada, 13 May 2004 titled; "*India: Update…on the situation of homosexuals (26 June 1999-April 2004)*]. A significant number of the major cities in India now have annual Gay Pride marches [Al Jazeera, 5 July 2011; referenced in the report from the Research Directorate of the Immigration and Refugee Board of Canada 2 May 2012], and New Delhi, Calcutta, Bangalore and Mumbai held events to mark the anniversary of the Delhi High Court's judgment. The organiser of an event in Mumbai to mark this anniversary is quoted as stating that there had been a reduction 'in the incidents of police harassment' since the judgment [Associated Press, July 2010: cited in Australian Refugee Review Tribunal's Country Advice of 12 January 2012].

47. In a speech of the 12 February 2011, Mr Justice Sathasivam, Justice of the Indian Supreme Court, observes that India's transsexuals have been "listed as 'others', distinct from males and females, on electoral rolls and voter identity cards since 2009". In April 2010, according to 2010 US State Department report, Tamil Nadu hosted a week long transgender festival to facilitate the acceptance of transgender persons into mainstream society. The state also established a Transgender Welfare Board in 2008.

48. According to paragraph 22.21 of the Secretary of State's Country Information of Origin report (COI), the Indian Network for Sexual Minorities (INFOSEM) website lists organisations in India that offer counselling and support to sexual minorities. Further, the Naz Foundation, based in Lucknow and a party to the ongoing section 377 proceedings, provides advocacy and support to LGBT communities and its website has links to organisations and institutions working on issues of gender, sexualities and HIV.

49. In its Country Advice on India of the 12 January 2012 the Australian Refugee Review Tribunal state that:

> "Homosexuals in India continue to be subject to various forms of mistreatment, including harassment, violence and issues with accessing employment. There are reports which indicate that the level of police harassment has dropped, although there is also information available which refers to it continuing…

There is contrasting information available regarding the recent treatment of homosexuals by Indian security forces…

Homosexuals may experience discrimination in hiring, promotion, assignment of work duties, compensation and termination, as well as various forms of harassment. Some employers have reportedly fired gay men who do not hide their sexual orientation, although specific examples were not located to describe where and in which industries this is most prevalent. In 2011, the organisers of a public celebration in Delhi to mark the second anniversary of the Delhi High Court decision regarding Section 377 distributed a pamphlet which called for an end to employment discrimination. The aforementioned January 2012 *Deccan Herald* report refers to claims from Mitr members that they were denied employment "because employers are uncomfortable with their social identities."

50. In its report of 2 May 2012, the Research Directorate of the Immigration and Refugee Board of Canada, states, *inter alia,* as follows:

"Al Jazeera notes that "homosexuals have slowly gained a degree of acceptance in a few parts of India, especially in big cities" (5 July 2012). A *Wall Street Journal* (WSJ) article on its India Real Time blog indicates that Mumbai is "arguably the least hostile environment for the LGBT community in the country" (9 Mar. 2012). According to the article, Mumbai has an LGBT store, which is temporarily in Goa, as well as six local websites and media platforms, an LGBT film festival, a pride week, and LGBT nights at popular bars and clubs (WSJ 9 Mar. 2012)…

Country Reports 2010 indicates that, although LGBT groups were active throughout India, "they faced discrimination and violence in many areas of society, particularly in rural areas" (US 8 Apr. 2011, Sec. 6). Similarly, a UN report by the Special Rapporteur on the situation of human rights defenders, based on a mission to India from 10 to 21 of January in 2011, states that LGBT rights defenders in India "face discrimination, stigmatization and threats reportedly from many parts of society, especially in rural areas" (UN 6 Feb. 2012, para. 122). The UN report also notes that "[o]n some occasions, the police attacked LGBT activists for raising issues pertaining to the situation of the LGBT community" (ibid.)…

Section 377 has been used against LGBT people in India to "target" (South Asia LGBT Network Feb. 2011, 41; US 8 Apr. 2011, Sec. 6), "harass" (Al Jazeera 5 July 2011; US 8 Apr. 2011, Sec. 6), and "punish" them (ibid.). In a lecture on transgender rights delivered to civil judges on 12 February 2011, Supreme Court judge P. Sathasivam noted that Section 377 "has been extensively used by the law enforcers to harass and exploit homosexuals and transgender persons" (12 Feb. 2011, 3). Similarly, the Associate Professor noted that the police use the law to "blackmail" LGBT persons (16 Apr. 2012)…

Sangini [i.e. Sangini (India) Trust, an organization that works primarily with women attracted to women and individuals dealing with issues around their gender orientation] stated that there are no government services or protection specifically offered to sexual minorities (14 Apr. 2012). Similarly, the Associate Professor [at York University and a faculty associate at York's Centre for Feminist Research] noted that the government does not offer protection to sexual minorities…

Sangini also indicated that when LBT individuals decide to leave their parental home and live with their partner, there have been instances of forced repatriation to the parental

> home through police intervention, false cases have been put on people, so that the police can intervene. It is relatively easy for the parents/families to convince the police to support them in the search for their daughter. Then emotional blackmail is used to force the [individual] back to his/her parents, partners often face charges of abduction…
>
> According to the South Asia LGBT Network report, "India has a robust and effective LGBT activist movement, and largely supportive civil society and mass media that supports LGBT rights" (Feb. 2011, 41). The Associate Professor explained that the main purpose of LGBT NGOs in India is to provide a "social space" where sexual minorities can meet and organize, as well as education on health and sexual minorities (16 Apr. 2012). She added that NGOs can also respond to cases in which LGBT persons have been arrested or affected by the law; however, they cannot provide assistance in cases of LGBT discrimination affecting employment or housing (Associate Professor 16 Apr. 2012). The Associate Professor also noted that NGOs are not able to provide protection for LGBT members on an "ongoing basis" (ibid.)…"

51. On 17 July 2012 the World Bank issued a discussion paper titled "*Charting the Programmatic Roadmap for Sexual Minority Group in India*". Its title page indicates that the information provided therein comes with the significant caveat that (i) the 'findings, interpretations and conclusions expressed' therein do not necessarily reflect the views of The World Bank or its affiliate organisations and (ii) that The World Bank does not guarantee the accuracy of the data in the report. The report refers to the Delhi High Court's judgment on section 377 and postulates that the LGBT community in India stands at a cross roads. It further refers to the existence of violence and discrimination against the LGBT community in India, as well as poor access to health services and education. It is also said that the World Banks consultation process revealed that most cases of discrimination against LGBT persons went unreported or "took place…covertly".

Appellant's evidence

52. The appellant relied upon the contents of a statement signed on 23 September 2013.

53. In this statement he asserts that he first met RD at the end of 2005, and thereafter enjoyed a brief relationship with him until about June 2006. Upon his (the appellant's) return to the United Kingdom from India in February 2007 (he having left the United Kingdom in January 2007) he contacted RD and subsequently lived for a short period with RD in RD's parents' house. Sometime in 2008 or 2009 he and RD entered into a 'proper' relationship, which continues to this day.

54. RD has financially supported the appellant since his return to United Kingdom. He presently pays the appellant's rent of £95 per week (which includes all household bills) and also provides the appellant with additional monies which allows him to buy personal items such as toiletries and clothes.

55. The appellant maintains that he loves RD, and observes that RD is generous, caring, honest and funny. He cites a number of RD's mannerisms which he finds "adorable". It has not been possible for him and RD to be entirely open about their relationship in the United Kingdom because RD lives with his parents and who were born in Iran

and retain certain "conservative values". The appellant visits RD's family house approximately twice per month, usually having a meal whilst there. He gets on well with RD's parents and is now able to speak Farsi fluently. There is never any physical contact between the appellant and RD in front of RD's family and they have never mentioned to RD's family that they are in a relationship. RD's family have never commented on the nature of the appellant's relationship with RD, although the appellant is sure that they are aware of the relationship.

56. RD has recently completed a law degree, and also owns his own pizza business. He intends to study at the law school in London from September 2014 onwards and the plan is that the appellant and RD live together in London at this time. It is their intention to get married but they have yet to fix a date for this. They have discussed the possibility of adopting, although this is not something that will happen in the immediate future.

57. The appellant's evidence continues by stating that *"apart from actually living together we do everything that a normal couple in a long-term relationship would do. I see him almost every single day. We try to have at least one meal together every day… I don't stay overnight at his family home but he spends around two nights a week in my room. We'll go out together at the weekend to pubs and clubs in Brighton. Sometimes we will go to London for a weekend. We also take day trips together… and go to the gym together regularly… There is no doubt in my mind that my relationship with RD is a permanent one. I am really looking forward to us growing old together…"*

58. The appellant gives further evidence in his statement that RD would not want to give up his pizza business and legal career in the UK to move to India. He (the appellant) does not want to go back to India given the bad experiences he had there in the past. He has not had contact with anyone in India for a long time. He wrote to his sister in November 2012 but has not received a response.

59. The appellant also gave oral evidence to the tribunal, adopting the contents of his witness statement when doing so. He confirmed that he wrote to his sister because she was the closest member of his family to him. He has not spoken to any member of his family since 2007.

60. Turning to his relationship with RD, he stated that RD gives him cash for his rent, which he then passes on to the landlord. He intends to move to London next September with RD, at which time RD and he will enter into a civil partnership.

61. Under cross-examination the appellant accepted that it was not possible to be open about his sexuality in the United Kingdom either with RD's family or whilst within the Iranian community. When asked why he and RD were waiting until next September to enter into a civil partnership, the appellant stated that as RD still lives with his parents he has to have a reason to move out of the family house; in his culture one cannot simply move out of the family house without good reason. He will have such a reason next September. The appellant continued by stating that he thought that RD's parents already knew about the relationship.

62. The appellant finally stated that if he were not successful in his appeal, and he therefore had to return to India, RD would send him money and also assist him with his application to return to the United Kingdom.

Evidence of RD

63. RD relies on the contents of statements drawn in his name on 4 May 2012 and 23 September 2013, as well as a statement previously provided to the First-tier Tribunal dated 23 January 2008.

64. In his 2012 statement RD confirms that he is an Iranian national by the birth, but was naturalised as a British citizen in 2004. At that time he saw the appellant two to three times a week, staying over at the appellant's house. He confirmed that he fully supports the appellant financially, paying his rent and providing him with small amounts of cash for his personal needs. In addition to the ownership of the pizza takeaway he was, at that time, studying for a law degree.

65. It has been difficult for himself and the appellant to openly express and celebrate their relationship because of the background he (RD) comes from. Being gay is not something that it is considered normal in the Iranian community. His parents know that he is gay but do not talk about it; indeed they still ask when he will settle down with a wife and child. He would be surprised if his parents did not know the appellant was his boyfriend although they never openly talked about this fact. The appellant has never been introduced in that manner. When he and the appellant go out together they are careful not to behave in an overtly physical or friendly way as they do not want to be seen to be gay by members of the Iranian community. If they want a 'proper' night out together they go to London.

66. RD believes the appellant to be an honest and reliable person and very committed to the relationship. The long-term plan is for him and the appellant to move in together in London when he (RD) moves there to do the Legal Practice Course. He and the appellant want to enter a civil partnership. There is no doubt in their minds that they will be together for the long term.

67. If the appellant were to be sent back to India it would be heartbreaking. The appellant would have serious problems there and it would probably mean the end of the relationship or, at the very least, a significant period of separation. RD confirmed that he has never been to India and that all of his family live in the United Kingdom. If the appellant were returned to India RD would do all he could to ensure that he could return legally to United Kingdom.

68. In his statement made shortly before the hearing, RD confirmed that he had now completed his law degree and postponed attending law school until September 2014. He still lives with his family and continues to enjoy a relationship with the appellant, whom he now sees every day. They have had serious talks about entering into a civil partnership but it has been decided that it is better to wait until they are living in London together because they would need to be secretive. The relationship is still kept "low-key" because of his (RD's) family and members of the Iranian community.

69. RD has no doubts that he wants to spend the rest of his life with the appellant. They have researched the possibility of adopting a child and this is something that they would very much like to do in the future. If the appellant were to be sent back to India, RD would not follow him there because (i) he has nothing in that country, (ii) it is a very difficult place for gay couples to live and (iii) he has his studies and business in the United Kingdom and he wants to make a career.

70. In his oral evidence RD adopted the contents of the above statements as being true and accurate. He further confirmed that he pays cash to the appellant for his rent and that it is his intention to enter into a civil partnership next September, at which time he and the appellant will start a new life living together in London. They cannot be open about their relationship at present because of his (RD's) family background. Whilst the family are aware that he is gay, they do not talk about it. RD informed his sister few years ago and she was not happy.

71. Under cross-examination RD stated that his family believe the appellant to be a good friend. He would not tell his family about entering into a civil partnership with the appellant. He could not live with the appellant in Brighton because of his (RD's) family and community culture. In Iranian culture the child does not move out of the family house until marriage, however, moving to London for the Legal Practice Course would provide a good excuse for RD to move out.

72. RD finally indicated that he had not thought about whether he would support the appellant financially in India, although he could afford to do so.

Submissions

73. The parties submitted detailed skeleton arguments, which we summarise below. Each supplemented their skeleton argument with oral submissions.

74. During the hearing both parties made submissions as to the relevance of the opinion of Advocate General Sharpston in the cases which are now referenced as Court of Justice of the European Union decision X, Y and Z v Minister voor Immigratie en Asiel [C-199, 200 and 201/12]. The decision of the CJEU in these matters was handed down after the close of the hearing before us, on the 7 November 2013. As a consequence we gave the both parties an opportunity to provided further written submissions in relation to this judgment. Additionally, as identified above, the Supreme Court of India also handed down its judgment in the section 377 litigation (Koushal) after the close of the hearing before us, on the 11 December 2013. Again, we gave both parties opportunity to make further written submission in relation to this judgment.

Respondent's submissions

75. In summary, Ms Everett observed and submitted that:

    a. The Naz Foundation Trust, the principal respondent in the section 377 Supreme Court case, have advised that they are not aware of any persons being tried and

convicted under section 377, in a case involving adult consensual sex, in any Indian state in the past couple of years. The foundation also confirms that it has seen a lot more openness in relationships in urban areas and that *"many couples are living together"*;

b. There is no real evidence in Dr Khanna's report to show that there is still violence perpetrated against same-sex desiring males, or that such violence is, or ever has been, widespread;

c. Detailed information has not been made available to the COI service pertaining to the examples given in paragraph 28 of Dr Khanna's report that since the Delhi High Court judgment section 377 has been used in the context of cases involving adult consensual sex;

d. Dr Khanna's report cites only a few incidents of police misconduct, mostly from 2006 to 2007, and offers no background evidence as the overall incidence of such conduct by the police in relation to LGBT persons. There are several thousand police stations in India and the states and union territories have their own police forces and law courts. LGBT persons are not the only victims of police corruption in India;

e. The propositions drawn by the expert from the case of Professor Ramchandra Siras are "sweeping";

f. Dr Khanna's report does not provide any evidence to support the conclusion that aversion therapy is "prevalent";

g. Dr Khanna appears to accept that there are certain states within India in which there is a more enlightened and positive attitude towards LGBT communities.

76. Attention is also drawn in her skeleton argument to the fact that *"according to the National Crime Records Bureau, there were 275,165 violent crimes reported in India in 2012, including 34,434 murders"* and that a Humsafar Trust survey, quoted by the Dr Khanna, shows that, amongst 'transgender' respondents (to the 'community survey'), 54% felt that the Delhi High Court judgment had affected their lives; 75% thought that the change in law had made the state acknowledge the presence of sexual minority communities, 98% felt an increased sense of belonging to the community and felt that Indian cinema had begun portraying gay characters better, 96% reported feeling more confident going to a counsellor and felt that gay issues were more openly discussed, 98% perceived other community members being more approachable, and 90% reported that they could talk to the police to stop harassment.

77. The skeleton argument further addresses the position of the appellant, submitting that:

a. Even if the appellant had been pursued under section 377 in the past it is not likely that he would be so pursued again given the evidence of the Naz Foundation;

b. It is no longer plausible that section 377 can be effectively used by police or others for extortion or blackmail purposes;

c. 70% of working people in India are self-employed, and consequently the appellant would not need to maintain a low profile in terms of his sexuality in order to earn a living;

d. The appellant and his partner maintain a low profile in terms of their sexuality in United Kingdom, for social reasons. The appellant could, therefore, be expected to do so in India;

e. If necessary the appellant could access support in India and start his life afresh;

f. In relation to Article 8 ECHR, it would not be disproportionate to require the appellant to return to India and make an entry clearance application to return as RD's partner, should he wish to do so. In any event, any interference with their relationship would not be disproportionate to the legitimate aim pursued.

78. In her oral submissions, Ms Everett relied upon the contents of her skeleton argument and submitted that it was clear that the appellant could not make out a claim that all openly gay people are ill-treated in India. She drew attention to passages within the report of the expert which, she asserted, demonstrate that it is difficult to identify a coherent set of risk factors for gay people in India given the vastness and diversity of the country. Same-sex relationships are a part of the culture of the population. There has been a change on the ground for LGBT persons as a consequence of the Delhi High Court's decision in relation to section 377.

79. Ms Everett further asserted that clear evidence had been provided that there are accessible support groups for LGBT persons in India. If an individual does have a problem in any particular area of the country internal relocation is available to places such as Tamil Nadu or Bangalore where there are more politicised LBGT movements that hold the police accountable for their actions.

80. As to the assertion that an openly gay person would find it almost impossible to find employment in India, she submitted that (i) this was not borne out by the evidence and, in any event (ii) the vast majority of Indian people are self-employed and there is no satisfactory evidence to support the proposition that an openly gay person could not earn a living from being self-employed. She further asserted that in relation to accommodation a gay person could, in the worst case scenario, find this with a gay-friendly landlord, whether independently or via a support group; alternatively, accommodation could be found within the *Hijra* communities.

81. Ms Everett submitted that it is inconceivable, given the appellant's skill set, that he would not be able to access support if he were to return to India. In addition, she observed that the expert had given evidence that the appellant could relocate within India. It was further submitted that, given that the appellant was discreet in the United Kingdom for social reasons, he could be expected to be so in India. It would not therefore be known that he is a gay person and consequently the difficulties

detailed by the expert in his report regarding access to employment and accommodation for openly gay people were not present themselves to this appellant.

82. As to the article 8 grounds, Ms Everett accepted that the appellant was in a long-standing relationship with RD, although she did not accept this relationship was akin to a marriage. Despite the latter she accepted that the relationship constituted family life for the purposes of article 8. It was submitted, however, that it would be proportionate to require the appellant to return to India permanently or, in the alternative, to return to India to make an application for entry clearance. In support of the latter submission Ms Everett placed reliance on the decision of Blake J in Kussin v Secretary of State for the Home Department [2009] EWHC 358 (Admin).

83. In her written submissions made in relation to the decision in X,Y and Z Ms Everett observed the CJEU had concluded that (i) the existence of legislation criminalising homosexual acts cannot be regarded as so significant that it reaches the level of seriousness necessary for a finding that it constitutes persecution, but that imprisonment pursuant to such provision might amount to persecution and (ii) it would be wrong to require a person to conceal their sexuality in order to avoid persecution. She maintained, in relation to the appellant that (i) he would conceal his identity not through fear of persecution but for other reasons and, in any event, (ii) that any treatment he might face upon return to India, even if he were to be open about his sexuality, would not amount to persecution.

84. As to the respondent's further written submissions made in relation to the judgment of the Indian Supreme Court in Koushal, received by the tribunal on 10 January 2014, these set out the history of the litigation, note the fact of the Supreme Court's judgment and then state as follows:

> **"Significance of Supreme Court Decision**
>
> 8. As Section 377 has been enforced only very rarely in cases involving consenting adults, and because the Delhi High Court's ruling of July 2009 was only applicable within the union territory of Delhi, we would submit that the Supreme Court's judgment of 11 December is of little practical consequence to the situation of gay men in India. Amnesty International and Human Rights Watch both expressed their disappointment at the SC's decision, but they did not predict any material change to the treatment of LGBT persons arising from it.
>
> **Update**
>
> 9. BBC News reported on 20 December 2013 that the Government of India had filed a petition in the Supreme Court, asking it 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." The President of the ruling Indian National Congress party described Section 377 as "an archaic, unjust law". Various government ministers have echoed this view."

85. Attached to these submissions was a letter dated 4 September 2013 from the Migration Delivery Officer at the British High Commission in New Delhi to the

Home Office Country of Origin Information Service (COIS). The letter sets out questions sent to the Executive Director of the Naz Foundation at the request of the COIS and the replies thereto. Those replies accord with, and appear to be the source for, the information set out by the respondent in paragraph 3 of her skeleton argument (summarised in paragraph 75(a) above). No application has been made by the respondent to produce this evidence, and no explanation has been provided as to why it was only been produced on 10 January 2014 despite being dated in September 2013; a date prior to the final hearing. Having considered all of the circumstances, we decline to admit this evidence.

Appellant's submissions

86. In his skeleton argument, Mr Eaton cites numerous passages from (i) the decision of the Supreme Court in HJ (Iran) (ii) the Advocate General's opinion in the case of X, Y and Z (iii) the Secretary of State for the Home Department's guidance on *"Sexual Orientation Issues in the asylum claim"* and (iv) the *"UNHCR Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation…"* There is no development thereafter of the conclusions he seeks to persuade the Tribunal to draw from these sources.

87. The skeleton argument then turns to the background situation in India. The following general submissions are made, and each is followed in the skeleton argument by an extract from background material before the Tribunal that is said to support such proposition:

    a. The existence of section 377 has allowed public bodies in general, and in particular the police, to harass intimidate and persecute gay men in India;

    b. There is no settled view on the applicability of the decision of the High Court of Delhi to other states within the Republic of India;

    c. There is evidence of continued use of section 377 following the decision of the High Court of Delhi;

    d. There is still intimidation, harassment, ridicule and violence perpetrated against gay men in India;

    e. Gay men suffer discrimination in accessing health care;

    f. There is very little space for a gay man to live safely in India, without fitting into one of the prescribed forms of "third gender" identities. A poor or low caste gay man, who does not fit within one of the accepted third gender groups, is most at risk of violence and intimidation. Gay Indians, who are not wealthy, are reliant on the family support in establishing a sustainable life, which includes contacts enabling them to find employment and education and to assess housing;

    g. The family for many gay Indians is the "first and main force of persecution"; "the Indian police are the main organ of persecution of gay men in India";

h. The capacity to internally relocate is dependent on the ability to access a support network in the area of relocation; however the long-term viability of a safe haven continues to be dependent on the gay man hiding his sexuality. After relocation there is unlikely to be any of the usual mechanisms, through family, of accessing education, housing and work;

i. The capacity of support networks to assist is hampered by the scale of the problem and they also have to work in a climate of harassment and violence;

j. It is accepted that some states "have developed a modicum of protection for third gender groups", whilst the anonymity of India's biggest cities can at times provide protection for those able to hide their sexual identity.

88. Specifically in relation to the appellant, Mr Eaton's written submissions state:

a. The appellant freely expresses his sexual identity through his personal appearance, including wearing make up. It is not his intention to live discreetly as a gay man in India;

b. In the past he has been forced to leave the family home because of his sexuality, lost his employment in the restaurant in Mumbai, had to rely upon prostitution to support himself and was reported to the police by an ultra nationalist political group which led to him being detained and beaten;

c. It is accepted there would be no ongoing interest in the appellant from the police; however, it was submitted that he would continue to be at risk from his family either in the form of personal violence perpetrated against him, or by operation of the machinery of law;

d. Upon return to India the appellant would be without the necessary support mechanisms. He is not a member of a third gender group and is likely to fall back into street prostitution. He could only access LGBT support groups in the short term. The only meaningful strategy to avoid violence is to hide his identity as a gay man.

89. As to article 8 ECHR, it is submitted that the appellant has a family life in the United Kingdom akin to marriage with RD; he has amassed a substantial private life in the United Kingdom; removal would interfere with his private and family life and such interference would be of sufficient severity so as to engage article 8. Turning to the issue of proportionality, Mr Eaton draws attention to (i) the fact that the appellant is able to openly express his sexuality in the United Kingdom, (ii) he can enter into a civil partnership here and (iii) he can adopt a child here. This, it was submitted, must be contrasted with the circumstances that face the appellant in India, where he would be subjected to constant discrimination and possibly harassment and violence. It is not reasonable to expect RD to move to India and neither would it be proportionate to require the appellant to leave the United Kingdom simply in order to make an application for entry clearance. In relation to this latter submission Mr Eaton placed reliance on the decision of the Court of Appeal in MA (Pakistan) [2009] EWCA 953.

He consequently submitted that the appellant's removal would be disproportionate to the legitimate aim being pursued.

90. In his oral submissions, Mr Eaton drew our attention to various passages within the decision of the Supreme Court in HJ Iran [2010] UKSC 31, and further submitted that following the Advocate General's opinion in X, Y and Z it is clear that a consideration of whether the appellant should act discreetly upon return must be based upon objective and not subjective considerations. We were further reminded that an accumulation of discriminatory actions against an individual could, when taken together, amount to persecution.

91. Mr Eaton then took us through passages in Dr Khanna's written evidence, asserting there to be a strong culture of discrimination against LGBT persons in India from both the police and the public which, when looked at as a whole, amounted to persecutory treatment. Attention was particularly drawn to evidence given by Dr Khanna in relation to the lack of employment opportunities for openly gay persons in India. It was submitted that the same discriminatory treatment must apply to those openly gay persons in self-employment: although Mr Eaton accepted that Dr Khanna had not given evidence to this effect before us.

92. Mr Eaton accepted that not all gay men are at risk in India, and that there are groups of gay persons who can find space to express their homosexuality there, such as (i) gay persons who have property and wealth (ii) the third gender identities such as the *Hijra* and (iii) gay persons with supportive family networks. He submitted, however, that all other groups of gay persons are at risk of persecution, with the urban poor (including *Kothi*) being most at risk as a consequence of their limited ability to (i) obtain privacy and (ii) access the LGBT support networks, which in any event do not provide a sufficiency of protection given their limited budgets and the fact that they work within a climate of discrimination and violence.

93. As to the possibility of internal relocation, it was the expert's evidence that it is not the case that Tamil Nadu provides a greater protection for gay men, but that it simply recognises third genders in their legal system. Neither is the risk of violence to gay men ameliorated by living in Bangalore, Dr Khanna having given evidence to the effect that although LGBT groups in Bangalore have a political background and are consequently able to hold the police to account, this has not affected the actions of the police on the ground.

94. Turning to the appellant's particular case, he observed that the appellant is not content to be discreet about the fact he is a gay person and that he is only being discreet about his relationship with RD in Brighton in the short term.

95. He submitted that if the appellant were to return to India he would fall within a group of persons not able to find their own space to live an openly gay lifestyle. He has no family support in India and his identity as a western gay person is not a grouping that has any resonance there. When the appellant previously lived in India without support he lost his employment, was forced into prostitution, was targeted

by a nationalist group and was arrested and beaten by the police. This, it was submitted, are the circumstances that would face the appellant should he return to India. He accepted that the appellant may be able to mitigate his circumstances if he were able to access a supportive LGBT group, however, this would only be a possibility in the short term.

96. As to article 8 ECHR, Mr Eaton observed that it had been accepted that the appellant has a family life with RD in the United Kingdom and that his removal would lead to an interference with his private and family life here. As to the issue of proportionality he submitted that it was not proportionate to require the appellant to return to India to make an application for entry clearance, the decision of Blake J in Kussin was to be distinguished. Further, in order to survive in India the appellant would have to act discreetly in order to avoid being persecuted, such matter being relevant even if the tribunal were to conclude that the risk to the appellant was not at a level so as to lead to a breach of the Refugee Convention or Article 3 ECHR.

97. In his written submissions made in relation to the relevance of the CJEU's judgment in X, Y and Z Mr Eaton first summarised the questions asked of the court, then the court's ruling; observing in particular that the CJEU had concluded that *"a Member State could not require a LGBT person to behave in a more restrained manner than a heterosexual person, in order to avoid persecution, as long as their conduct would not amount to a criminal offence in a Member State."*

98. It was submitted, in reliance on the CJEU's ruling, that (i) LGBT persons form a particular social group in India for the purposes of the Qualification Directive and (ii) although prosecutions pursuant to section 377 are historically uncommon the existence of this provision has allowed public bodies in general to harass and persecute gay men in India.

99. In his further written submissions made in relation to the decision of the Indian Supreme Court in Koushal, Mr Eaton summarised the terms of the judgment, observed once again that the CJEU in X, Y and Z had concluded that the mere existence of legislation criminalising homosexual acts could not be regarded as so significant that it reaches the level of seriousness necessary to constitute persecution, and accepted that recorded prosecutions under section 377 were relatively uncommon.

100. He continued his written submissions by asserting that the tone of the Indian Supreme Court's judgment reflected the deep lying prejudice against LGBT persons that pervades much of Indian Society and that section 377 had been used as an "umbrella for the harassment, blackmail and torture of LGBT by the Indian police and non-state actors." Mr Eaton observed that the Naz Foundation had pursued its case in the Supreme Court in reliance on the fact of such harassment, blackmail and torture of LGBT persons; submitting that the Supreme Court had not rejected the evidence that such acts took place, but rather concluded that (i) it was not the intention of section 377 that it be used in such a manner and (ii) that's its misuse by the police and others did not make it unconstitutional.

101. Mr Eaton contended that any advances in the space carved out by LGBT persons since the 2009 judgment of the Delhi High Court would likely be lost as a consequence of the judgment in Koushal. He further identified as matters relevant to the tribunal's considerations the fact that (i) the Indian government had not legislated to repeal section 377 in the intervening period between the Delhi High Court's judgement and the judgment of the Supreme Court and (ii) 2014 is an election year in India and that Dr Khanna had given evidence that there is a possibility that the BJP, which has been consistent in its opposition to LGBT rights, might take the lead in the next government. He finally submitted that it is reasonable to speculate that the judgment in Koushal would embolden those in India who carry out attacks on LGBT persons.

Legal Framework

102. The legal framework considered in these appeals includes the Refugee Convention, Council Directive 2004/83/EC, the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights. Although on 21 December 2013 the Recast Qualification Directive (2011/95/EU) came into force throughout the European Union, the United Kingdom has not opted in to this Directive (recital 50 thereof) and consequently for the purposes of our considerations Directive 2004/83/EC remains of application.

103. Article 9 of the Directive defines acts of persecution as follows:

> "1. Acts of persecution within the meaning of Article 1A of the Geneva Convention must
>
> (a) be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; or
>
> (b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in (a).
>
> 2. Acts of persecution as qualified in paragraph 1, can, inter alia, take the form of:
>
> (a) acts of physical or mental violence, including acts of sexual violence;
>
> (b) legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory measure;
>
> (c) prosecution or punishment which is disproportionate or discriminatory;
>
> (d) denial of judicial redress resulting in a disproportionate or discriminatory punishment;

(e) prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling under the exclusion clauses as set out in Article 12(2);

(f) acts of gender-specific or child-specific nature.

3. In accordance with Article 2(c) there must be a connection between the reasons mentioned in Article 10 and the acts of persecution as qualified in paragraph 1."

104. Article 10 of the Directive identifies the reasons for persecutory treatment capable of engaging the Directive (and indeed the Refugee Convention). These include the following:

> "1(d) a group shall be considered to form an innate social group where in particular;
>
> 1. members of that group share an innate characteristic or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and
>
> 2. that group has a distinct identity in the relevant country because it is perceived as being different by the surrounding society;
>
> depending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation…"

105. Paragraph 65 of HJ and HT [2010] UKSC 31 summarises the basis of protection provided:

> "…so far as the social group of gay people is concerned the underlying rationale of the Convention is that they should be able to live freely and openly as gay men and lesbian women, without fearing that they may suffer harm of the requisite intensity or duration because they are gay or lesbian. Their home state should protect them and so enable them to live in that way. If it does not and they will be threatened with serious harm if they live openly, then most people threatened with persecution will be forced to take what steps they can to avoid it."

106. Lord Rodger at [82] sets out the assessment to be carried out by a decision-maker:

i. When an applicant applies for asylum on the ground of a well-founded fear of persecution because he is gay, the tribunal must first ask itself whether it is satisfied on the evidence that he is gay, or that he would be treated as gay by potential persecutors in his country of nationality.

ii. If so, the tribunal must then ask itself whether it is satisfied on the available evidence that gay people who lived openly would be liable to persecution in the applicant's country of nationality.

iii. If so, the tribunal must go on to consider what the individual applicant would do if he were returned to that country.

iv. If the applicant would in fact live openly and thereby be exposed to a real risk of persecution, then he has a well-founded fear of persecution - even if he could avoid the risk by living "discreetly".

v. If, on the other hand, the tribunal concludes that the applicant would in fact live discreetly and so avoid persecution, it must go on to ask itself *why* he would do so.

vi. If the tribunal concludes that the applicant would choose to live discreetly simply because that was how he himself would wish to live, or because of social pressures, e g, not wanting to distress his parents or embarrass his friends, then his application should be rejected. Social pressures of that kind do not amount to persecution and the Convention does not offer protection against them. Such a person has no well-founded fear of persecution because, for reasons that have nothing to do with any fear of persecution, he himself chooses to adopt a way of life which means that he is not in fact liable to be persecuted because he is gay.

vii. If, on the other hand, the tribunal concludes that a material reason for the applicant living discreetly on his return would be a fear of the persecution which would follow if he were to live openly as a gay man, then, other things being equal, his application should be accepted. Such a person has a well-founded fear of persecution. To reject his application on the ground that he could avoid the persecution by living discreetly would be to defeat the very right which the Convention exists to protect – his right to live freely and openly as a gay man without fear of persecution. By admitting him to asylum and allowing him to live freely and openly as a gay man without fear of persecution, the receiving state gives effect to that right by affording the applicant a surrogate for the protection from persecution which his country of nationality should have afforded him.

107. The Supreme Court in RT (Zimbabwe) [2012] UKSC 38 at [24] considered whether there could be a distinction between core and marginally held rights or beliefs and in discussion [40-52] concluded [51] that:

> "...nothing...supports the idea that it is relevant to determine how important the right is to the individual. There is no scope for the application of the core/marginal distinction (as explained above) in any of the appeals which are before this court. The situation in Zimbabwe as disclosed by RN is not that the right to hold political beliefs is generally accepted subject only to some arguably peripheral or minor restrictions. It is that anyone who is not thought to be a supporter of the regime is treated harshly. That is persecution."

108. In X, Y and Z the CJEU considered the case of three asylum applicants in the Netherlands from Sierra Leone, Uganda and Senegal. In each country homosexuality is a criminal offence punishable by a term of imprisonment. The Raad van State requested a preliminary ruling from the CJEU on the following matters:

> "(1) Do foreign nationals with a homosexual orientation form a particular social group as referred to in Article 10(1)(d) [of the Directive]?
>
> (2) If the first question is to be answered in the affirmative: which homosexual activities fall within the scope of the Directive and, in the case of acts of persecution in respect

of those activities and if the other requirements are met, can that lead to the granting of refugee status? That question encompasses the following subquestions:

(a) Can foreign nationals with a homosexual orientation be expected to conceal their orientation from everyone in their [respective] country of origin in order to avoid persecution?

(b) If the previous question is to be answered in the negative, can foreign nationals with a homosexual orientation be expected to exercise restraint, and if so, to what extent, when giving expression to that orientation in their country of origin, in order to avoid persecution? Moreover, can greater restraint be expected of homosexuals than of heterosexuals?

(c) If, in that regard, a distinction can be made between forms of expression which relate to the core area of the orientation and forms of expression which do not, what should be understood to constitute the core area of the orientation and in what way can it be determined?

(3) Do the criminalisation of homosexual activities and the threat of imprisonment in relation thereto, as set out in the Offences against the Person Act 1861 of Sierra Leone (Case C-199/12), the Penal Code Act 1950 of Uganda (Case C-200/12) or the Senegalese Penal Code (Case C-201/12) constitute an act of persecution within the meaning of Article 9(1)(a), read in conjunction with Article 9(2)(c) of the Directive? If not, under what circumstances would that be the case?"

109. The CJEU ruled as follows:

"1. Article 10(1)(d) of Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third-country nationals or Stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted 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."

Discussion

110. We now turn to our assessment of the expert and other background evidence.

111. In summary, Dr Khanna's evidence is to the effect that "same-sex desiring" males, except those in the upper classes, are generally at risk of suffering from violence and extortion from the police in India, as well as violence and other discrimination from the general populace including discrimination in the accessing housing, employment, health care and education. He further opines that LGBT persons do not receive protection from the police and that although there are NGOs and LGBT support groups, the assistance they can provide is short-term and is difficult to access.

112. Dr Khanna's curriculum vitae is formidable. There can be no doubt that he has relevant academic credentials and substantial experience in India, in particular within the field of the consideration of the human rights of sexual and gender minorities. He also has long held allegiances and associations with the "Queer movement" in India, is a founder member of a Delhi based sexual rights group, has provided legal, social and other support to people facing violence in India on the basis of their sexual orientation, and has been engaged in various capacities in the ongoing litigation challenging the validity of section 377.

113. Dr Khanna clearly has a close sympathy with the difficulties faced by same-sex oriented persons in India and we consider that his views as an expert have been shaped in part by this sympathy and also his avowed support for the rights of such persons. This is reflected in the tenor of his evidence and we have borne it in mind in our evaluation of his evidence.

Male same-sex sexual activity – identity defining

114. Our assessment of the current circumstances prevailing in India for same-sex oriented males, or those perceived as such, has been much assisted by Dr Khanna's evidence as to the history of same sex desire, gender plurality and homosexuality in India.

115. It is not in dispute that same sex sexual activity was present, recognised and indeed celebrated in pre-colonial India, across the different religions. Unlike in the Euro-North American context, same sex desire did not, at that time, define self identity; although it has to an extent come to do so in the post colonial era. The emergence of the idea of sexuality as defining identity fuelled the recognition of non-heterosexual sexual desires as being different, which in turn led to such desires becoming stigmatised.

116. Self-identification as "gay" is most common in the middle and upper classes of Indian society. Same-sex oriented males of lower or working class tend not to self identify as gay but instead have their own social spaces or descriptors (such as *Hijra* and *Kothi*), as explained in Dr Khanna's evidence and referred to in paragraph 8 above.

Evidence of change – an overall picture

117. In our conclusion the general circumstances for same sex oriented males in India are improving and have been doing so for some time, albeit progress is still slow. Examples of such improvement can be seen in the fact that in 2001 India had one of its first gay weddings; gay pride marches first took place in Kolkata and Mumbai in 2003 and now take place annually in a significant number of major cities in India; Mumbai now has a dedicated LGBT store, dedicated LGBT websites, an LGBT film festival and dedicated LGBT nights at bars and clubs. Chennai also has a number of "gay clubs". Although these clubs and bars are on occasion subjected to police raids there open existence is a matter which, on the evidence before us, is not something which would have been a possibility until relatively recently. The conclusions we draw from these examples are re-enforced by other evidence before us to the effect that some Indian state authorities, with the assistance of NGO's, have offered the police education and sensitivity training in relation to their dealings with LBGT persons and that incidents of police harassment of LGBT persons are, although still occurring, in decline.

118. We agree with the observations made in an article in Al Jazeera in July 2012 [cited in the report from the Research Directorate of the Immigration and Refugee Board of Canada] that *"Homosexuals have slowly gained a degree of acceptance in a few parts of India, especially in big cities"*. The reality is that although homosexuality remains taboo and is still seen as socially unacceptable in India it is emerging into the public sphere. We do not accept that the decision of the Supreme Court in Koushal will lead to a national or general reversal of the positive changes that have occurred in India for LGBTI persons and in particular for same-sex oriented males.

Prosecution

119. It was made clear in X, Y and Z that article 9(1) of Qualification Directive, read together with Article 9(2)(c) thereof, must be interpreted as meaning that the mere existence of legislation criminalising homosexual acts is not to be regarded as constituting persecution, although a term of imprisonment which accompanies a legislative provision punishing a homosexual act is capable of amounting to persecution provided that there is a real risk of it being applied in any given case. We endorse and apply this conclusion. It has not been argued before us that the existence of legislation criminalising homosexual acts can of itself amount to persecutory treatment as defined in any other of the subparagraphs of Article 9 of the Directive, or within Article 1A(2) of the Refugee Convention. In such circumstances, and given the judgment in X, Y and Z, we proceed on the basis that does not.

120. Turning to the history of the criminalisation of homosexual acts in India, this begins with the introduction of such laws in England. The Buggery Act of 1533 was an Act of the Parliament of England passed during the reign of Henry VIII. It defined "buggery" as an unnatural sexual act against the will of God and man and prescribed capital punishment for commission of the offence. This provision was re-enacted by Queen Elizabeth I, after which it became the charter for subsequent criminalisation of

sodomy in the British Colonies. The Act was repealed in England by the Offences against the Person Act 1828, and in India by Section 125 of the Criminal Law (India) Act 1928, when it was replaced by Section 63 of the same Act, which provided that buggery would continue to be a capital offence.

121. Following Lord Macaulay's Draft Penal Code of 1837, the Indian Penal Code was eventually introduced into Indian law in 1860, consolidating penal law in India. Section 377 of that Code remains in force today and reads:

> "*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".

122. Three things are immediately apparent from the terms of section 377: (i) that whilst homosexual acts have been held to fall within its ambit, they do not do so exclusively, (ii) it applies to acts of carnal intercourse, even where the parties to such act consent to its undertaking and (iii) it is not relevant whether such an act takes place in a public or a private place.

123. The constitutional challenges to section 377 began as long ago as 1994, when the AIDS Bhedbhav Virohi Andolan (ABVA – the campaign against AIDS-related discrimination) filed a challenge in the Delhi High Court in response to the Inspector General of Prisons refusal to issue condoms to prisoners on the basis that to do so would encourage male homosexual behaviour in prisons. This petition was dismissed without consideration having been given to its substantive merit.

124. Thereafter, the arrest of four workers from the Naz Foundation India Trust in Lucknow (referred to in detail in paragraph 18(d) above) attracted international attention and instigated the formation of new activist collectives in India. In September 2001 an NGO called the Lawyers Collective filed a public interest suit in the Delhi High Court on behalf of the Naz Foundation India Trust, challenging the constitutional *vires* of section 377. The government of India at that time (the Bharatiya Janta Party (BJP)) opposed the petition. The petition was dismissed by the Delhi High Court in 2004 for reason that (i) it was academic, and (ii) the petitioner had no *locus standi*. However, this decision was set aside by the Indian Supreme Court in 2006 and the application was 'remanded' back to the Delhi High Court to be heard substantively.

125. The Delhi High Court heard evidence and submissions over a twelve day period and gave its judgment some 8 months later, on the 2 July 2009; it concluded as follows:

> "We declare that Section 377 IPC, insofar it criminalises consensual sexual acts of adults in private, is violative of Articles 21, 14 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 of age and above. A person below 18 would be presumed not to be able to consent to a sexual act. 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."

126. Sixteen petitioners filed challenges to the Delhi High Court's judgment with the Supreme Court. The petitioners include amongst them individuals, numerous religious organisations and the Delhi Commission for the Protection of Child Rights. Significantly the government of India did not appeal the judgment.

127. There were also a significant number of interventions before the Supreme Court in support of the High Court's judgment, including from groups representing the parents of LGBT children, mental health professionals, academics and a collective formed as a "Voice against 377". The proceedings were completed on 27 March 2012 and the judgment reserved.

128. As we have indicated above the judgment of the Indian Supreme Court in Koushal was handed down on the 11 December 2013: the court concluding that section 377 of the Indian Penal Code "does not suffer from the vice of unconstitutionality", and ruling the declaration of the Delhi High Court to be legally unsustainable.

129. Despite the breadth of its terms, prosecutions under section 377 have been rare. Dr Khanna refers to studies from 2000 and 2001 identifying 131 prosecutions under section 377 reaching the higher courts in India (State High Courts, the Supreme Court and previously the Privy Council) in the 140 years since its introduction. The report from the Research Directorate of the Immigration and Refugee Board of Canada of May 2004 refers to studies by the Peoples Union of Civil Liberties identifying the fact that only 30 prosecutions under section 377 had reached the higher courts between 1860 and 1992. In its judgment in Koushal the Indian Supreme Court referred to their having been "less than 200 persons prosecuted for committing offence under Section 377 IPC" in the last 150 years. Putting these figures in context, India currently has a population of approximately 1.2 billion people and the Indian Supreme Court cited evidence that the total population of "MSM" [men who have sex with men] was estimated to be 25,000,000 as of 2006.

130. The Supreme Court did not stay the effect of the judgment of the Delhi High Court pending the hearing of the appeal. Dr Khanna observes that there were conflicting positions on the applicability of the judgment outside the jurisdiction of Delhi High Court, a view that is mirrored in other evidence before us. The evidence does disclose that in January 2012 a Magistrates Court in Mumbai rejected an application to dismiss a charge brought under section 377, declaring that "*section 377 was still alive in statute*", but does not further identify the ultimate outcome of the matter or the reasons therefore.

131. Drawing all of this together, whilst we note Dr Khanna's assertion that the fact that prosecutions under section 377 only rarely reach the higher courts does not of itself mean that prosecutions under section 377 are rare, we nevertheless find, given the complete absence of evidence before us capable of leading us to a contrary conclusion, that such prosecutions are extremely rare, and have always been so. In coming to this conclusion we have taken fully into account Dr Khanna's evidence

that it would be impossible to provide evidence of the overall incidence of such prosecutions given the lack of national records against which to make the relevant checks; however, be that as it may, this does not satisfactorily explain the extent of the dearth of examples of such prosecutions before us. Not only is there a lack of evidence relating to the frequency of prosecutions in the lower courts, but such evidence as there is about prosecutions suggests that a large proportion of whatever number there are relate to child rape cases or cases of non-consensual sex.

132. We conclude, therefore, that on the evidence before us we are not satisfied that there is a real risk of consensual sexual activities between males being prosecuted in India. This was the case before the 2009 judgment of the Delhi High Court, and remains so now.

Police violence and extortion

133. Although the central government provides guidance and support to state authorities, the 28 states and seven union territories of India maintain primary responsibility for maintaining law and order. The police are under state jurisdiction.

134. The fact that police officials extort money and ill treat same-sex oriented males is a common thread running throughout the evidence before us, as indeed are examples of police officials in India arbitrarily arresting and ill-treating non-LGBT persons.

135. The US State Department report for 2012 confirms that LGBT persons faced *"physical attacks, rape and blackmail"* and that *"some police committed crimes against LGBT persons and used the threat of arrest to coerce victims not to report incidents"*. The same report also observes that several states, with the assistance of NGOs, now offer police education and sensitivity training. This evidence is entirely consistent with information from other sources before us, including that contained within the Australian government's Country Advice on India of January 2012 which makes reference to the fact that whilst violence against homosexuals continues, *"the level of police harassment has dropped."*

136. In his written evidence Dr Khanna states that there is *"ample evidence"* of a culture of violence by the police towards LGBT persons. In doing so he draws on information disclosed in a number of reports pre-dating the Delhi High Court's judgment[1]. In addition reliance was placed on the suspension from employment, and subsequent eviction from his university accommodation, of Professor Siras in 2010 and the detention of 100 people after a raid on an all male party in a bar in Hyderabad in September 2013, the bar workers eventually being arrested for enabling obscene acts.

137. Dr Khanna's view is clear: that the question of class is crucial to determining the risk to a same-sex oriented male in India; the poor and working class persons, especially

[1] Two reports authored by the Peoples Union for Civil Liberties, from 2001 and 2004 respectively, a 2002 report from Human Rights Watch, a report of an incidence of torture by the police in 2004, a further two reports of incidents of arrest and ill treatment by the police in 2006, the murder of a gay person in the same year by persons unknown, one incident of extreme torture of an *Aravani* (a third gender identity) in Tamil Nadu in 2007, the forceful eviction of 100 members of a *Hijra* community in 2008.

effeminate males, being most likely to face extreme violence, exclusion and discrimination, whereas the upper class gay person is not at risk of ill treatment.

138. As to instances of blackmail and extortion by the police of LGBT persons, Dr Khanna concludes that this is a common experience. When doing so he refers to, but does not provide details of, reports from social media networks relating to such blackmail and extortion. He observes that reports of blackmail and extortion are made on a monthly, and sometimes more frequent, basis. He further provides by way of example the fact that he was stopped at one of the many checkpoints in Delhi 'because of his looks'.

139. In the Indian Supreme Court the Naz Foundation attacked section 377 on the ground that it has been used to perpetrate harassment, blackmail and torture on certain persons, especially those belonging to the LGBT community. At paragraph 51 of its judgment the Indian Supreme Court stated in relation to this argument that:

> "… [t]his treatment is neither mandated by the section nor condoned by it and the mere fact that the section is misused by police authorities and others is not a reflection of the vires of the section."

140. Mr Eaton submits that the fact that the Court did not conclude that section 377 had not been used in this way is supportive of the fact that it has been so used. A number of points can be made in relation to this aspect of the Indian Supreme Court's decision and Mr Eaton's submission. First, we do not accept that the Indian Supreme Court was implicitly accepting that such acts against LGBT persons had taken, or continue to take, place. It did not need to address this issue given its conclusion that any misuse of section 377 by the police authorities and others does not reflect on the *vires* of the section. Second, insofar as it did refer to the evidence relevant to such issue, it found it to be of poor quality. For example, in paragraph 40 of its judgment the Supreme Court refers to the fact that in its opinion the Naz Foundation had *"miserably failed to furnish particulars of the incidents of discriminatory attitude exhibited by the State agencies towards sexual minorities and consequential denial of basic human rights to them."* Later in the same paragraph the Court conclude that *"[T]hese details are wholly insufficient for recording a finding that homosexuals, gays, etc., are being subjected to discriminatory treatment either by the State or its agencies or the society."* Third, even if the Supreme Court did accept the fact that section 377 had been misused by the police authorities and others, it made no observation as to the prevalence of such misuse, either historically or at the present time.

141. It is additionally relevant that there is a significant LGBT rights network of NGOs in India, and the case before the Delhi High Court and the Supreme Court has brought together and focused the work of such organisations. There is also a lively social media with interest in LGBT rights. Whilst we accept Dr Khanna's evidence that it is likely that a significant number of cases of police violence and extortion of LGBT persons go unreported, had the practice of violence and blackmail of LGBT persons by the police been at the level Dr Khanna suggested it is, or at such a level that it could be said that there is a real risk to any particular same-sex oriented male, we

would have expected this to have been better reflected by the examples of such treatment given in the evidence before us.

142. Whilst reference is made in Dr Khanna's evidence to a police raid of an all male party at a bar in Hyderabad in September 2013, it is significant that although it is said that 100 persons were detained, there is no mention of these persons being ill-treated or subject to extortion attempts by the police whilst in detention.

143. In addition, in the section of his report headed '*Blackmail of LGBT people*', Dr Khanna states, in relation to blackmail by the police, that "*[T]he most recent example of this is a case in Bombay/Mumbai, where a 28 year old gay man was assaulted in a lavatory at Vasai railway station, by two plainclothes policemen, who then proceeded to force him to withdraw cash at an auto-teller machine...*". The article to which this incident is referenced is dated 2 March 2013. It is to be recalled that Dr Khanna's written report is dated 18 September 2013. We find it surprising that if such incidents were as common as Dr Khanna suggests that the 'most recent' example of blackmail that Dr Khanna was aware of, as of 18 September 2013, was an incident that occurred over 6 months earlier.

144. There can be no dispute that violence and extortion of same-sex oriented males still occurs in India and that those of lower caste, or working class (such as the *Hijra* or *Kothi*), are more vulnerable to such actions. However, the evidence before us comes nowhere near establishing that the scale and frequency of police violence against, or extortion and blackmail of, same-sex oriented males is so prevalent as to constitute a real risk to any given same-sex oriented male, whatever their class or status in Indian society. The generally historic nature of the examples that have been provided and the dearth of up-to-date examples of such practices serve only to highlight this point. We find nothing in the recent judgment of the Indian Supreme Court in Koushal that leads us to a different conclusion.

145. Further, the evidence before us does not support a conclusion that the fact of the Supreme Court's judgment will trigger any, or any significant, increase in the levels of violence or extortion attempts levelled at same-sex oriented males by the police, or indeed by non-state actors, such that there will be a real risk to any particular same-sex oriented male of being subjected to such treatment. There was no real risk of a same-sex oriented male being subjected to such treatment in the years immediately preceding the 2009 judgment of the Delhi High Court, and since the section 377 litigation began, homosexuality has emerged into the public sphere and the number and reach of the LBGTQ support organisations has steadily grown.

Violence other than from the police or state authorities [i.e. from non-state actors]

146. We here consider the current position relating to risks of violence against openly same-sex oriented males, where such violence is said to emanate from persons other than the police or state authorities; including family members of the same-sex oriented males.

147. Dr Khanna considers that (i) upper-class gay persons are in the best position to reap the benefits of the Delhi Judgement, such persons being likely to own property and to have their own social space. The upper-class gay person is not, according to Dr Khanna, at risk of suffering from violent treatment at the hands of non-state actors in India; (ii) although working class same-sex oriented males, such as the *Kothi* and *Hijra*, have a social space and are culturally intelligible, they are nevertheless subjected to high levels of violence, particularly those who work in the sex trade. He observes that most people he interviewed for the purposes of his research had, at some time, faced physical violence and other forms of abuse and (iii) middle class gay persons have no social space and are not culturally intelligible in India. As a consequence they have no ability to access privacy, and face ridicule, taunting and casual violence on an everyday basis.

148. Dr Khanna's evidence on this aspect has some degree of resonance with other background evidence before us, but there are features of his evidence that present an altogether more extreme picture for same-sex oriented males than that generally presented elsewhere. There is, we consider, an element of overstatement in his position.

149. We accept that homophobic violence does occur in India and that (i) it is more prevalent in urban areas and (ii) those of 'working class' are the most likely to be subjected to violent acts. However, we do not consider that the evidence establishes that there is generally a real risk of an openly same-sex oriented male, whether upper, middle or working class, being the subject of such violence.

150. Dr Khanna supports his conclusions as to the high level of risks occasioned by those working in the sex industry (which in reality are those of the working or lower castes) by reference to information he received directly from such persons during the course of his research in India. However, he does not provide any details of the research methods he used, how many persons he interviewed for the purposes of his research, when such interviews took place, or what criteria he used to choose the persons whom he interviewed. Dr Khanna's conclusions as to the levels of risk generally and the particularly high levels of risk to those working in the sex industry are not further sourced or referenced in his report, nor did he identify any examples or sources during the course of his oral testimony in support of his conclusions.

151. In so far as the other evidence before us assists in ascertaining the extent of violence occasioned by non-state actors, it does no more than support the conclusion that such violence exists; however it comes no where near demonstrating that there is a real risk to any particular individual of suffering ill treatment at the hands of non-state actors. The Australian government's Country Advice on India (January 2012) cites evidence from 2011 which makes reference to homosexuals being subject to mistreatment in Calcutta and Hyderabad, as well as evidence that members of the Mitr Trust (a Delhi based LGBT organisation whose members now number close to 20,000) report that they have been the subject of harassment from members of the public (as well as the police), but provides no detail or scale to such occurrences. The same is the case for the other evidence before us.

152. Absent further detail, we find that neither Dr Khanna's evidence, nor the generalised and unsourced evidence found elsewhere before us, assists to any great degree in establishing the level of risk of ill treatment from non state actors faced by an openly same-sex oriented male in India. Such evidence as is before does not demonstrate that there is a real risk that any particular same-sex oriented male, or a person perceived as such, will be subjected violence from a non-state actor.

153. As to the risks arising to same-sex oriented males from family members, such cases have to be considered on their individual facts. It is plainly the case that it cannot be said that there is a general risk to all same-sex oriented males from their own family members. Each family will treat the disclosure of homosexuality differently, although we accept that there is a strong cultural family expectation that a son/daughter will engage in a heterosexual marriage. Insofar as it can be established that a family of a particular same-sex oriented male have the willingness and ability to persecute such person, there is no reason why internal relocation to a major city away from the family members should not ameliorate any risk to a level where it can no longer be considered to be 'real'.

154. There is very limited evidence before us of families successfully using the police in an attempt to track down those family members who have fled, with a view to those persons being 'repatriated' back to the family. In any event, India is a country of 1.2 billion people and we have not been drawn to any evidence that there is a central registration system in place which would enable the police to check the whereabouts of inhabitants in their own state, let alone in any of the other states or unions within the country. We consider the possibility of the police, or any other person or body, being able to locate, at the behest of an individual's family, a person who has fled to another state or union in India, to be remote.

Employment

155. We accept that there is some discrimination in employment of those who are known to be, or who are openly or perceived to be, same-sex oriented males.

156. The Australian Government's report of 2012 indicates that there is evidence to suggest that [emphasis added] "*<u>some</u> employers have reportedly fired gay men who do not hide their sexual orientation*"; although no examples were provided and the report itself observes that the source evidence it relies upon does not describe where and in what industries such actions are most prevalent. The Australian report also references reports that <u>some</u> Mitr Trust members have stated that they were denied employment because employers felt uncomfortable with their social identities. This evidence is consistent with that set out in the 2012 US State Department Report, which indicates that "*Activists also reported that some employers fired LGBT persons who were open about their sexual orientation or gender identity*".

157. We do not, however, accept that the difficulty in obtaining, or keeping, employment in India for openly homosexual males is of the scale suggested by Dr Khanna in his oral evidence i.e. that it is 'difficult to imagine' a person known to be a homosexual obtaining employment in India, unless it is in a business where a homosexual person

had risen to a managerial level and homosexuality is not discussed at work. We think that there is a gap in the evidence which shows the conclusions reached by Dr Khanna to be too sweeping.

158. In support of his conclusion Dr Khanna makes reference to the circumstances of Professor Siras. We have set out the facts of Professor Siras' case in paragraph 18(g) above, at least insofar as they are recited in Dr Khanna's report. Those details are limited and do not include either the actual reasons given by the University for dismissing the Professor and withdrawing his use of University accommodation, or of Professor Siras' response. This is a case, of course, in which a video of the Professor engaging in same-sex sexual activities became publicly available. Whether his dismissal was motivated purely by the fact that Professor Siras had been disclosed to be gay, or whether other factors were involved in the decision, such as the possible damage to the University's reputation caused by the publicly available video, is impossible to tell. What is known is that the Professor had the opportunity to seek legal redress, an opportunity he took and which led to him obtaining a stay of the order suspending him from employment. He unfortunately died before these proceedings could be pursued further. At its highest, this incident provides one example of discrimination of a gay person in employment; however, the facts of this example are somewhat unusual and, as identified above, it also provides an example of the availability of legal redress.

159. Other than Professor Siras' case, Dr Khanna indicates that he has personally come across *several* other cases where people have either been dismissed, or conditions made so difficult for them, that they had been forced to resign from their employment once it was known that they were homosexual. Dr Khanna declined to provide any details of these cases, it is said, as a consequence of his concern that the divulgence of such information would lead to further discrimination. As is the case with many of Dr Khanna's conclusions, the supporting evidential foundation, insofar as it was put before us, was sparse and of limited value. Such evidence is insufficient to warrant extrapolation into the sweeping conclusions drawn by Dr Khanna.

160. Given Dr Khanna's evidence as to the limited possibility of an openly same-sex oriented male obtaining employment in India, we invited his opinion as to the prospects of such a person obtaining an income by way of self-employment. We observed that a significant proportion of the working population of India are self-employed. In response, Dr Khanna accepted that there were opportunities for same-sex oriented males to make a living as self-employed persons in a large Indian city. In his submissions, Mr Eaton asked us to find that openly same-sex oriented males would not be able to make a living from self employment, outside of the sex trade, given the level of discrimination that they were likely to encounter. He accepted, however, that the evidence of Dr Khanna did not support this submission.

161. We find that there is an ability for a same-sex oriented male to 'make a living' in India outside of the sex trade. Whilst there is discrimination against persons, or persons perceived to be, same-sex oriented males in obtaining and keeping employment, this is not on the scale postulated by Dr Khanna. In the event that

employment cannot be found, it is open to an openly same-sex oriented male to enter the large self-employed economy in India.

Other discrimination

162. Dr Khanna makes reference to discrimination of "stigmatised communities", in the provision of health care, such discrimination particularly acting against persons such as men who have sex with men, sex workers and injecting drug users, whom, it is said, are either refused healthcare treatment or given differential treatment. In support of his conclusions Dr Khanna refers to (i) the existence of research publications relating to *Kothi* and *"men who have sex with men and transgender people"* and (ii) preliminary findings of current research taking place on discrimination in health care in different parts of India, which, it is said, suggests that levels of discrimination remain high.

163. Dr Khanna does not provide extracts or any detail from the aforementioned sources and neither does he indicate that he has any independent and direct experience of occurrences of such discrimination. We observe, however, that the World Bank, in its report of 2012, also identifies the fact of *"poor access"* to health care in India for LGBT persons. The other evidence before us is largely silent on this issue.

164. On the basis of the limited evidence available to us we are prepared to accept that there is some discrimination against LGBT persons in the provision of health care in India, but we do not conclude that there is a reasonable degree of likelihood or a real risk of an openly same sex oriented male being denied healthcare altogether, or indeed of an openly same sex oriented male being given differential treatment to the general populace.

165. As to the prevalence of aversion therapy as a 'cure' for homosexuality amongst mental health professionals in India, it was clarified by Dr Khanna during in his oral evidence that such therapy was not forcibly given to anyone.

166. Turning to the issue of the availability of accommodation for same-sex oriented males; *Hijra* have their own communities within which they live, and *Kothi* tend also to live within those communities. According Dr Khanna, upper class gay males who own their own property are able to cohabit as male couples without any real difficulty. It is said, though, that the same is not the case for middle class gay males who, if they wish to cohabit with each other, need to present themselves to a landlord as 'friends'. Dr Khanna further observes that it is common in India for landlords to share the same accommodation as the tenant, which increases the difficulties of a gay person being able to hide his sexual orientation.

167. Dr Khanna provides evidence that he is personally aware of several persons who have been evicted from their accommodation when suspicions were raised that they might be gay. Given the prejudice against gay persons in India, we have no difficulty in accepting that there are landlords who also hold such prejudices and that those landlords would be reluctant to rent their properties to openly gay persons, let alone to a gay couple. However, the evidence does not disclose that this problem is

endemic or anywhere approaching it. Dr Khanna's evidence, that the only possibilities for a gay person or couple wishing to rent are to (i) live discreetly so that the landlord does not become aware of a person's sexuality, (ii) find a LGBT landlord, or (iii) live in an area close to a *Hijra* community, suggests that in his view the problem is virtually universal. This conclusion must, though, be based on the underlying presumption that all non-LGBT landlords hold homophobic prejudices to the extent that they would not rent to a known gay person or couple. The evidence before us does not bear this out.

168. If a same-sex oriented male, or couple, do have difficulties in obtaining accommodation because of the prejudice of the landlords they have approached, assistance in finding accommodation can be obtained, certainly in the major cities, from LGBT support organisations. We deal with the role of these groups further below.

LGBT support organisations

169. LGBT support organisations had formed in most of the major cities in India by the late 1990s, and it was the formation of these groups which brought to the fore the experiences of violence and discrimination against LGBT persons at that time. The challenges to section 377 also provided a rallying point for such organisations and over time a nascent movement emerged focussed on decriminalising homosexuality and same-sex orientation in males.

170. In his oral evidence Dr Khanna observed that LGBT support groups are in general informal collectives of people in urban areas who come together with the purpose of building support networks for the LGBT community. Group meetings often take place in the offices of HIV or human rights NGOs. These groups provide a range of assistance to LGBT persons including (i) "keeping them underground" if the police are looking for them, (ii) emotional and financial support, and (iii) the providing of community connections and assistance to enable the supported person to obtain employment and accommodation. Dr Khanna gives an example of an LGBT support group in Gujarat also setting up a home for elderly LGBT persons who are not able to access the normal familial support networks. The LBGT support communities continue to grow as a consequence of persons previously supported by such communities becoming a part of the support structure of the community themselves.

171. Dr Khanna's evidence on this issue generally chimes with that found elsewhere before us. A report from the South Asia LGBT Network confirms that "*India has a robust and effective LGBT activist movement, and largely supportive civil society and mass media that support LGBT rights*". The May 2012 report from the Immigration and Refugee Board of Canada records an Associate Professor at the research unit of the University of York explaining that the "*main purpose of LGBT NGOs in India is to provide a social space where sexual minorities can meet and organise, as well as education on health… but that NGOs are not able to provide protection for LGBT members on an ongoing basis.*"

172. Dr Khanna observes that because of a general lack of resources, support from an LGBT network would be unlikely to be available for more than 6 months. When asked what would happen to the supported person at the end of the 6 month period, Dr Khanna replied by indicating that "typically" the supported person would by that time have found employment or, alternatively, would have moved to another city to access further support there.

173. Whilst there is evidence before us, which we accept, that on occasion the LGBT support networks themselves, or at least those operating them, are the subject of violence and discriminatory acts as a direct consequence of the work they are doing, the support networks, nevertheless, continue to function, and indeed to grow; the latter as a consequence of previously supported people becoming a part of the support structure. The attacks and discrimination appear to have little impact on the willingness of these support communities to continue to assist those in the LGBT community who require support and the section 377 litigation appears to have strengthened ranks of the support networks.

Country Guidance

174. On the basis of the evidence before us we give the following guidance:

    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 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 to be in general 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.

Determination of the appellant's appeal

175. We have set out the preserved and agreed facts in paragraphs 10 and 11 above. It is not disputed that the appellant is a gay person who likes to wear makeup. He came to the United Kingdom in October 2004 as a student but abandoned those studies in October 2005. He thereafter remained in the United Kingdom until January 2007 "enjoying life with partners". The appellant admits breaching the conditions of his student visa during this time [paragraph 27 First-tier Tribunal's determination].

176. The appellant returned to his family home in India on 23 January 2007 but shortly thereafter he was required to leave the house, having had a serious family argument about the waste of his educational funding and about his sexual orientation. He travelled to Mumbai and obtained employment in a restaurant. He then lost his employment, and was evicted from his accommodation, because his employer found out that the appellant had lied about his sexual orientation. He subsequently entered the sex trade, providing sexual services to men. Shiv Sena reported his activities to the police who arrested him under the auspices of section 377. He was detained for a few days and beaten, although not to the extent claimed. He was then released and travelled back to the United Kingdom in his own identity and on his own passport, arriving here on 21 February 2007.

177. The appellant asserts that if he returns to India he will suffer the same fate as he suffered in 2007; we do not, however, accept that this is reasonably likely to be so. Even if he were open about his sexual orientation on return, applying the guidance we have set out above, he is not now reasonably likely to be at risk of suffering persecutory treatment from the police, other state bodies or non-state actors; particularly in one of the major cities.

178. Since he was last in India the circumstances for same-sex oriented males have improved in part, although not wholly, because of the Delhi Judgment in 2009. There is no reason why he would need to return to the sex trade. He has skills from his time in the United Kingdom, including his fluency in English and indeed Farsi, which will no doubt be of benefit to him in the employment market. Alternatively, he could join the 70% of the working population of India in the self-employed economy. He also clearly has the wherewithal to locate and obtain assistance from an LGBT support group should he require short-term assistance in finding employment and accommodation. We do not accept that such organisations would not assist the appellant because 'he does not make sense' in Indian culture as a consequence of the fact that his sexual identity was derived from his time in the west. Dr Khanna provided no supporting evidence for his assertion that LGBT support groups would limit those to whom they provide assistance in this way.

179. Nor is it reasonably likely, given the facts accepted by the First-tier Tribunal, that the police in Mumbai, or in any other city or state, have any current interest in the appellant; as Dr Khanna accepts. There is also no evidence that the appellant's family have an intention, or the ability, to seek him out upon his return to India in order to persecute him. Indeed, no evidence has been provided as to how they would even know he has returned to India should they have such an intention.

180. In summary, we find, in relation to the Refugee Convention, that although, if he were not to act discreetly upon return, the appellant may be the subject of some discrimination in his daily life, for example in finding employment or obtaining accommodation, we do not accept that even if such discrimination is taken cumulatively, it is capable of amounting to a real risk of being persecuted in India. For the same reasons we find that requiring him to return to India would not lead to a breach of the Qualification Directive or Article 3 ECHR.

181. Turning to article 8 ECHR and following the familiar Razgar [2004] UKHL 27] steps, it is not in dispute that (i) the appellant is in a long-term relationship with RD and (ii) that this relationship amounts to family life for article 8 purposes. The extent of the relationship we find is as described by the appellant and RD in their evidence. It is not yet a relationship akin to marriage, but the appellant and RD have an intention to begin living together in September 2014, when RD will be moving out of his family home in order to study the Legal Practice Course in London. They also intend, at around the same time, to enter into a civil partnership. There has also been discussion about the possibility of adoption of children by the couple at some future time.

182. There is little evidence of a wider private life in the United Kingdom for this appellant save for those aspects of his life which he shares with RD. He has lived here for approximately 9 years, save for a short period in 2007.

183. We find that if the appellant were to be returned to India this would cause an interference with his private and family life of sufficient severity so as to engage Article 8. It is not suggested that the appellant's removal to India would be anything other than in accordance with the law (in the wider sense given to this phrase when the ECHR is under consideration), nor it is said that it is not being done in pursuance of a legitimate aim.

184. The core issue before us in relation to article 8 is that of proportionality. Ms Everett submits that (i) it would be proportionate to require the appellant to leave the country to make an entry clearance in order to return, and, in any event, (ii) it is proportionate to require him to permanently leave the United Kingdom.

185. In support of her former submission she relied upon the decision of Collins J in Kussin [2009] EWHC 358 (Admin), whereas Mr Eaton relied, for a contrary position, on the more recent decision of the Court of Appeal in MA (Pakistan) v Secretary of State for the Home Department [2009] EWCA Civ 953.

186. We have had regard to both decisions, and also to the more recent, and well-known, decision from the Court of Appeal in Treebhowan and Hayat v Secretary of State for

the Home Department [2012] EWCA Civ 1054; which provides a detailed analysis of the case law relevant to a consideration of whether a person should be required to leave the UK in order to make an entry clearance application from abroad; including a consideration of the decision in MA (Pakistan).

187. The following passages are taken from the judgment of Elias LJ in Treebhowan and Hayat:-

> "11. Lord Brown accepted that the maintenance and enforcement of immigration control was a legitimate aim. However, he was unpersuaded by the argument, accepted by Laws LJ in *Mahmood*, that others required to apply from abroad would feel it unfair if persons like the appellant who also fell within the policy were permitted to have their cases determined without first returning home. Consistency of treatment was not such a virtue that it dictated an unthinking enforcement of the policy. Lord Brown identified a different justification for the policy (paras 41-42):
>
> > "Is not the real rationale for the policy perhaps the rather different one of deterring people from coming to this country in the first place without having obtained entry clearance and to do so by subjecting those who do come to the very substantial disruption of their lives involved in returning them abroad?
> >
> > Now I would certainly not say that such an objective is in itself necessarily objectionable. Sometimes, I accept, it will be reasonable and proportionate to take that course….."
>
> 12. He then identified situations where the enforcement of the policy would be appropriate, such as where a claimant's immigration history was poor, as in *Ekinci*. He also identified factors which might have a bearing on whether the policy should be implemented. For example, it would be relevant that an applicant who had arrived illegally had good reason to do so, such as where he has a genuine asylum claim; in an Article 8 family claim the prospective length and degree of disruption involved in requiring the applicant to return would be material; and it would be legitimate to enforce the policy where the entry clearance officer abroad was better placed to investigate the claim.
>
> 13. Moreover, Lord Brown emphasised that the routine dismissal of Article 8 cases on this basis was not consistent with a proper respect for Article 8 rights, and nor did it make sense in administrative terms (para 44):
>
> > "I am far from suggesting that the Secretary of State *should* routinely apply this policy in all but exceptional cases. Rather it seems to me that only comparatively rarely, certainly in family cases involving children, should an article 8 appeal be dismissed on the basis that it would be proportionate and more appropriate for the appellant to apply for leave from abroad. Besides the considerations already mentioned, it should be borne in mind that the 1999 Act introduced one-stop appeals. The article 8 policy instruction is not easily reconcilable with the new streamlined approach. Where a single appeal combines (as often it does) claims both for asylum

and for leave to remain under article 3 or article 8, the appellate authorities would necessarily have to dispose substantively of the asylum and article 3 claims. Suppose that these fail. Should the article 8 claim then be dismissed so that it can be advanced abroad, with the prospect of a later, second section 65 appeal if the claim fails before the ECO (with the disadvantage of the appellant then being out of the country)? Better surely that in most cases the article 8 claim be decided once and for all at the initial stage. If it is well-founded, leave should be granted. If not, it should be refused."

…

18. It may at first blush seem odd that Article 8 rights may be infringed by an unjustified insistence that the applicant should return home to make the application, even though a subsequent decision to refuse the application on the merits will not. The reason is that once there is an interference with family or private life, the decision maker must justify that interference. Where what is relied upon is an insistence on complying with formal procedures that may be insufficient to justify even a temporary disruption to family life. By contrast, a full consideration of the merits may readily identify features which justify a refusal to grant leave to remain.

…

26. … *Chikwamba* provides that at least where Article 8 is engaged, the decision maker should not, absent some good reason, fail to engage with the merits and dismiss the claim on the ground that the application should be made from abroad."

188. Having considered a number of Court of Appeal authorities concerned with the application of Chikwamba [2008] UKHL 40, Elias LJ summarised the principles to be derived from them as follows:-

"a) Where an applicant who does not have lawful entry clearance pursues an Article 8 claim, a dismissal of the claim on the procedural ground that the policy requires that the applicant should have made the application from his home state may (but not necessarily will) constitute a disruption of family or private life sufficient to engage Article 8, particularly where children are adversely affected.

b) Where Article 8 is engaged, it will be a disproportionate interference with family or private life to enforce such a policy unless, to use the language of Sullivan LJ, there is a sensible reason for doing so.

c) Whether it is sensible to enforce that policy will necessarily be fact sensitive; Lord Brown identified certain potentially relevant factors in *Chikwamba*. They will include the prospective length and degree of disruption of family life and whether other members of the family are settled in the UK.

d) Where Article 8 is engaged and there is no sensible reason for enforcing the policy, the decision maker should determine the Article 8 claim on its substantive merits, having regard to all material factors, notwithstanding that the applicant has no lawful entry clearance.

e) It will be a very rare case where it is appropriate for the Court of Appeal, having concluded that a lower tribunal has disproportionately interfered with Article 8 rights in enforcing the policy, to make the substantive Article 8 decision for itself. *Chikwamba*

was such an exceptional case. Logically the court would have to be satisfied that there is only one proper answer to the Article 8 question before substituting its own finding on this factual question.

f) Nothing in *Chikwamba* was intended to alter the way the courts should approach substantive Article 8 issues as laid down in such well known cases as *Razgar* and *Huang*.

g) Although the cases do not say this in terms, in my judgment if the Secretary of State has no sensible reason for requiring the application to be made from the home state, the fact that he has failed to do so should not thereafter carry any weight in the substantive Article 8 balancing exercise."

189. Although in the first of his principles Elias LJ makes reference to applications from those who do not have lawful entry clearance, we observe that on the facts of Hayat itself, the claimant had made an application for an extension of his leave (the refusal of which was the decision appealed to the First-tier Tribunal) during the currency of his extant leave to enter as a student, as is the case in the instant appeal. Despite this fact the Court of Appeal concluded that the Upper Tribunal had been wrong to set aside the First-tier Tribunal's determination; the First-tier Tribunal having concluded that it was proportionate to require Mr Hayat to return to Pakistan to make an entry clearance application.

190. Neither the opinions of their Lordship's House in Chikwamba, nor the decision of the Court of Appeal in Treebhowan and Hayat, seek to set out a legal threshold as to when it would be appropriate, in any given case, to require an applicant to make an application from outside the United Kingdom; rather, each alludes to an expectation that in cases where the only matter weighing in the respondent's side of the balance is the public policy of requiring a person to apply under the Rules from abroad, that legitimate objective will usually be outweighed by factors resting on the appellant's side of the balance.

191. In the instant appeal the public policy of requiring a person to apply under the Immigration Rules from abroad is not the only matter weighing in the respondent's side of the balance. There are other cogent reasons for requiring the appellant to return to India to make an application for entry clearance and, in our conclusion, it would be proportionate to require him to do so:

    (1) It has not been suggested that the appellant meets the requirements of any of the Immigration Rules; whether that be in relation to the Rules currently in force or those that were in force at the time of the decision under appeal in 2007. The question of the likelihood of an entry clearance application meeting with success is not a relevant consideration in the assessment of whether such application should be made. In SB (Bangladesh) v SSHD [2007] EWCA Civ 28 the Court of Appeal that an article 8 claim of a person resisting removal is not made weaker by strong prospects of success in a subsequent application for entry clearance; nor is it made stronger by weak prospects in such an application. It found that it would be proper for the Tribunal to

exclude the prospects of success altogether when assessing the proportionality of removal. Such rationale was confirmed by the Court of Appeal shortly thereafter in HC (Jamaica) v SSHD [2008] EWCA Civ 371, and once again in SZ (Zimbabwe) [2009] EWCA 590.

(2) The appellant accepts that he remained in the United Kingdom for over a year, until January 2007, in breach of the conditions of his leave to enter as a student. He then left the United Kingdom, only to return during the currency of his student leave in February 2007, knowing full well that he was not a student at that time. The appellant's leave to enter expired on 31 October 2007 and he claimed asylum shortly thereafter, on the 7 November 2007. When doing so he exaggerated his account of the events which occurred in India, both to the Secretary of State and to the Tribunal (see paragraph 112 of the First-tier Tribunal's determination).

(3) The appellant's relationship with RD began, and has been maintained, whilst the appellant's immigration status has been precarious; indeed for the most part whilst he has been the subject of a decision to remove him from the United Kingdom; this we find to be significant. We have taken into account that since 2007 the appellant has been within the immigration appeal process and that he is not be expected to have put his life on hold for this lengthy period; nevertheless he and RD made choices about their relationship knowing full well the nature of the appellant's immigration position. Although it is the intention of RD and the appellant to adopt a child in the future they, as yet, have no children. Neither do they, at present, live together on a full time and permanent basis.

(4) Mr Eaton submits that the circumstances for gay persons in India must be a relevant factor in the determination of the appellant's article 8 rights, even if the article 3 threshold is not met; we accept that this is so. As we have identified above, homophobic discrimination and violence does occur in India and we have borne this in mind in coming to our conclusion. We have also borne in mind that India has in place legislation criminalising same-sex sexual activity undertaken in private and that the existence of such legislation would, upon the appellant's return to India, constitute an arbitrary interference with his privacy, this being irrespective of the rarity of prosecutions brought under it (see for example the decision in Toonen v Australia UNHRC Communication No. 488/1992).

(5) The appellant will, we find, receive financial support from RD whilst he is making his application and, if necessary, he can also approach one of the LGBT support organisations for assistance. RD will support the appellant's application for entry clearance and there is no reason to think that regular communication cannot be maintained between the appellant and RD for the duration of the application process, however long that maybe (we observe at this juncture that we have been provided with no evidence as to the length of such application process in India). It is not reasonable to expect RD to move

to India to be with the appellant during the period of entry clearance process, or indeed permanently. He can, albeit without the appellant's physical company, continue his life in the United Kingdom, running his pizza business and furthering his studies if he so chooses.

192. Looking at the relevant circumstances in this appeal as a whole, we conclude, for the reasons identified above, that there is good reason why this appellant should be required to leave the United Kingdom to make an entry clearance application and that it is proportionate to require him to do so.

Decision

For the reasons given by Upper Tribunal Judge Gleeson, the First-tier Tribunal's determination contains an error of law requiring it to be set aside. Upon re-making the decision on appeal, we dismiss it on all grounds.

We have made an anonymity direction. Such direction is to remain in place unless or until this Tribunal, or any other appropriate Court, directs otherwise. No report of these proceedings shall directly, or indirectly, identify the appellant. Failure to comply with this direction could amount to a contempt of court.

Signed:

Upper Tribunal Judge O'Connor

Date: 26 January 2014

Appendix – Country Background Documents considered

Source	Date
Report of Dr Akshay Khanna	18 September 2013
Gay Star News article, "Campaigners protest against gay witch-hunt in India"	24 August 2013
US Department of State, 2012 Human Rights Report: India http://www.state.gov/j/drl/rls/hrrpt/2012/sca/204399.htm	19 April 2013
Pink News article, "India, police raid gay party and arrest 22 men"	13 February 2013
The Hindu, 'Delhi High Court legalises gay sex.' http://www.hinduonnet.com/thehindu/holnus/000200907021111.htm	16 January 2013
World Bank report, "Charting a Programmatic Roadmap for Sexual Minority Groups in India"	17 July 2012
Reuters News article, "Indian society struggling with gay rights activist"	10 May 2012
Research Directorate of the Immigration & Refugee Board of Canada: India: Treatment of sexual minorities, including legislation, state protection, and support services (April 2009-March 2012) http://www.refworld.org/docid/50b4a62c2.html	2 May 2012
Extracts from COIR for India	30 March 2012
RRT Government of Australia Country Advice	20 January 2012
Country Advice on India of the Australian Refugee Review Tribunal: headed *"India: IND39685 –Homosexuals – Sikhs – Relocation"* http://www.refworld.org/docid/50597bdf2.html	12 January 2012
Pink News article, "Mumbai police fine 150 gay men after breaking up party"	20 September 2011
Times of India, "Pink India tiptoes out of the closet" http://timesofindia.indiatimes.com/india/Pink-India-tiptoes-out-of-the-closet/articleshow/6123358.cms	3 July 2010

Hindustan Times, 'Gays celebrate one year of Delhi High Court judgment.' http://www.hindustantimes.com/India-news/NewDelhi/Gays-celebrate-one-year-of-Delhi-High-Court-judgment/Article1-566604.aspx	2 July 2010
Bhagwad Jal Park blog, 'Section 377 – Mess in the SC. Hearing for 29th Oct. 2009' http://www.bhagwad.com/blog/2009/rights-and-freedoms/section-377-mess-in-the-sc-hearing-for-29th-oct-2009.html/	1 October 2009
International Gay and Lesbian Human Rights Commission (IGLHRC), 'India: Government Defers Decision on 377 to Supreme Court, 18 September 2009' http://www.iglhrc.org/content/india-government-defers-decision-377-supreme-court	18 September 2009
Human Rights Watch, ''India: Court Strikes Down Sodomy Law' http://www.unhcr.org/refworld/country,COI,HRW,,IND,,4a51a8af1e,0.html	2 July 2009
Australia: Refugee Review Tribunal: RRT Case No. 071494945, [2007] RRTA 276, Australia: Refugee Review Tribunal http://www.refworld.org/docid/47ea2e4e2.html	19 September 2007
Immigration & Refugee Board of Canada: 'Update to IND32120.E of 25 June 1999 on the situation of homosexuals' http://www.refworld.org/docid/41501c1e2a.html	13 May 2004
Supreme Court of India: Notes of Proceedings in Suresh Kumar Koushal v. Naz Foundation, February 23 to March 27, 2012 http://orinam.net/content/wp-content/uploads/2012/04/Naz_SC_Transcript_2012_final.pdf	Undated
International Lesbian, Gay, Bisexual, Trans and Intersex Association: News (India) http://ilga.org/ilga/en/countries/INDIA/Articles	Undated
Naz Foundation India: MSM Programme http://www.nazindia.org/msm.htm	Undated