



**Upper Tribunal  
(Immigration and Asylum Chamber)**

AR and NH (lesbians) India [2016] UKUT 00066 (IAC)

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 23 June 2015**

**Sent to parties on:**

**Before**

**UPPER TRIBUNAL JUDGE GLEESON  
UPPER TRIBUNAL JUDGE SOUTHERN**

**Between**

**AR and NH  
[ANONYMITY ORDER MADE]**

Appellants

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellants: Ms N Hashmi, Counsel, appearing by Direct Access  
For the Respondent: Mr P Nath, a Senior Home Office Presenting Officer

- (1) *The guidance in MD (same-sex oriented males) India CG [2014] UKUT 65 (IAC) stands. The guidance at (a) – (f) in MD (India) applies equally to lesbians.*
- (2) *A risk of persecution or serious harm for a lesbian woman in India, where it exists, arises from her family members, and the extent of such risk, and whether it extends beyond the home area, is a question of fact in each case.*

- (3) *The risk of persecution or serious harm is higher for uneducated lower class lesbian women in rural areas, who remain under the control of their family members and may not be permitted to leave the home to continue meeting their lesbian partners.*
- (4) *Where family members are hostile to a lesbian woman's sexuality, they may reject her completely and sometimes formally renounce her as a member of that family. In such a case, whether relocation to a city is unduly harsh will be a question of fact, depending on the ability of such a lesbian woman to survive economically away from her family and social networks.*
- (5) *If a lesbian woman's family wishes to pursue and harm her in the place of internal relocation, their ability to do so will depend on the reach of the family network, how persistent they are, and how influential. The evidence indicates that there is normally sufficient state protection for women whose families seek to harm them in their place of internal relocation.*
- (6) *In general, where there is a risk of persecution or serious harm in a lesbian woman's home area, for educated, and therefore 'middle class' women, an internal relocation option is available. They are likely to be able to relocate to one of the major cities in India and are likely to be able to find employment and support themselves, albeit with difficulty, and to live together openly, should they choose to do so. In general, such relocation will not be unduly harsh.*

## **DECISION AND REASONS**

1. This appeal concerns two lesbian women of Indian citizenship, who have entered into a civil partnership in the United Kingdom. They appeal with permission against the decision of the First-tier Tribunal on each of their appeals, dismissing their appeals against the respondent's decision to remove them to India after refusing them refugee status, humanitarian protection or leave to remain in the United Kingdom on human rights grounds.
2. These appeals have been identified as potentially suitable for country guidance on the position of lesbian women in India. The respondent accepts that as lesbians in India these appellants are members of a particular social group.

### **Terminology and acronyms**

3. In this decision, we have in general referred to LGBTI for the entire same-sex oriented community, and to lesbians or same-sex oriented males, save where the passage cited, or the oral or written evidence used a different description (such as LGBT, LGBTQ, or gay), in which case we have followed the description used by the witness, or in the evidence. The Indian Penal Code is abbreviated to IPC.

### **Existing country guidance**

4. On 12 February 2014 the Upper Tribunal gave guidance dealing with the position of non-heterosexual males in India, in *MD (same-sex oriented males: risk) India* CG [2014] UKUT 65 (IAC), in the following terms:

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

### **The country guidance issue**

5. The Upper Tribunal in *MD* did not receive evidence or give guidance about the position of women homosexuals (lesbians). We note that in (f) the Upper Tribunal did make a generic finding as to the LGBTI community which may be applicable to these appellants, but as regards the position of lesbians in general, there is a lacuna in the *MD* analysis which merits further consideration.
6. We also consider the effect on risk to lesbians arising from the decision of the Indian Supreme Court in *Koushal and another v Naz Foundation and Others* (Civil Appeal No. 10972 of 2013), which held that section 377 of the Indian Penal Code (IPC) which criminalised homosexual sex was not unconstitutional and said that it was a matter for the Indian legislature to determine how, if at all, that controversial provision should be amended.

### **Indian legal and constitutional framework**

7. Article 21 of the Indian Constitution guarantees that:

**“21. Protection of life and personal liberty**

No person shall be deprived of his life or personal liberty except according to procedure established by law.”

8. Sections 368 and 377 of the IPC are as follows:

“368. **Wrongfully concealing or keeping in confinement, kidnapped or abducted person.** – Whoever, knowing that any person has been kidnapped or has been abducted, wrongfully conceals or confines such person, shall be punished in the same manner as if he had kidnapped or abducted such person with the same intention or knowledge, or for the same purpose as that with or for which he conceals or detains such person in confinement. ...

**377. Of Unnatural Offences: Unnatural offences.-**

Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

**Explanation.**--Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.”

The *Naz Foundation* judgment is currently the subject of a curative petition, which was heard in April 2014 but for which no decision has yet been published by the Indian Supreme Court. If the curative petition is successful, the *Naz Foundation* judgment will be set aside and reheard in the Supreme Court.

9. In April 2014, in *National Legal Services Authority v Union of India and others* Writ Petition (Civil) No.604 of 2013<sup>1</sup>, another constitution of the Indian Supreme Court required the government to legislate for legal, constitutional and human rights for transgender (TG) persons and to include on all official forms the options male, female and third sex. We discuss that judgment below.
10. In April 2015, a private members’ bill for the welfare of TG persons passed the Indian Parliament and government legislation is expected in the next session of Parliament, which may or may not affect section 377 overall.

### **Evidence before the Upper Tribunal**

11. In reaching our decision, we have had the benefit of oral and written evidence from Professor Nishant Shahani, a country expert jointly instructed by both parties, and of hearing the appellants themselves give evidence. We had a bundle of country and individual evidence 205 pages in length, to which we have had regard, paying particular attention to those documents and passages to which the parties drew our attention. We received oral and written submissions from both parties.
12. We have set out, at Appendix A, a list of all the country evidence before us, and at Appendices B and C, a summary of the relevant evidence therein contained, including the evidence of Professor Shahani and the appellants.

### **Procedural history**

#### **First appellant’s appeal**

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<sup>1</sup> <http://www.refworld.org/pdfid/5356279d4.pdf>

13. On 5 September 2012, the respondent 5 September 2012 refused to grant the first appellant refugee status, humanitarian protection or leave to remain on human rights grounds, having regard to the first appellant's sexual orientation and her relationship with the second appellant.
14. The first appellant appealed to the First-tier Tribunal. The First-tier Tribunal Judge accepted the appellant's lesbian sexual orientation and her relationship with the second appellant. The parties had conducted their relationship in India with great discretion and had not been suspected of being lesbians. He found as a fact that they would do so again on return.
15. The first appellant's parents were aware of the relationship and disapproved of it, but there was no suggestion that they had any propensity for violent or abusive acts. The Judge accepted at [27] that in the light of the background evidence, the local community might well react in a hostile, aggressive and even violent way if they perceived the appellants as being in a same-sex relationship, but then found that 'on a fair reading of all the sources of evidence' it was pure speculation for her to suggest that she was at risk of acts of persecution or serious harm from members of the local community in her home area. He also rejected the first appellant's Article 3 claim which was based on an asserted risk of suicide if she were returned to India.
16. The First-tier Tribunal Judge accepted that the appellants had family life together as a couple, but considered that the first appellant had shown only a 'quite slender' level of private life in the United Kingdom outside that relationship, based on a short period of residence here, her liking for the United Kingdom, and her desire not to return to India. The private life asserted was not sufficient to outweigh the legitimate aim of main of effective immigration control. Part 5A of the Nationality, Immigration and Asylum Act 2002 had not then been inserted and so the First-tier Tribunal did not deal with section 117B thereof.
17. The first appellant appealed to the Upper Tribunal with permission. On 12 October 2012, Upper Tribunal Judge Dawson found that there was a material error of law in the First-tier Tribunal decision, in relation to the Judge's reasoning. He set aside the decision and directed that it be remade in the Upper Tribunal, and that the First-tier Tribunal's findings should be preserved with regard to the first appellant's sexual orientation, the history of her relationship with the second appellant, and the evidence that her parents knew of the relationship and her sexual orientation.
18. Judge Dawson considered that on the remaking of the decision, the Upper Tribunal should deal with two issues: first, whether it was open to the appellant and her partner to resume their relationship discreetly in their home area, as before, and second, if that was not possible, whether it would be unduly harsh to expect the appellant to exercise an internal relocation option to one of the larger cities in India, having regard to her sex, her sexual orientation, and the nature of the relationship between the appellants.

### **Second appellant's appeal**

19. The parties then entered into a civil partnership, and the second appellant also made an asylum claim. In a letter dated 23 July 2013, the respondent refused to grant the second

appellant refugee status, humanitarian protection, or leave to remain in the United Kingdom on human rights grounds. The second appellant appealed to the First-tier Tribunal.

20. The First-tier Tribunal in the second appellant's appeal considered that there was no evidence, pending the deliberations of the Indian Supreme Court in *Naz Foundation*, that LGBTI persons in India had been forced to conceal their sexuality. The First-tier Tribunal Judge found that there was a slowly emerging LGBTI movement in India's larger cities. The press reports with which she had been provided indicated that lesbians could be the victims of violent assaults or attacks, particularly in rural areas, but the Judge found that these appeared to be isolated incidents.
21. The second appellant's relatives were able to exercise power only in a particular area of the Punjab, where she was born and raised. The appellant was an educated, intelligent young woman with considerable ambition. The Judge 'did not believe' that the second appellant would be prevented from living openly as a lesbian, or forced to moderate her lifestyle or compromise her sexual orientation in order to ensure her safety on return.
22. The First-tier Tribunal found that there was sufficiency of protection against non-state actors in India. If a risk did exist in the second appellant's home area, the Judge considered that it would not be unduly harsh to expect the second appellant to exercise an internal relocation option to one of the large cities, where she would not need to conceal her sexuality and could continue to pursue her ambitions. She had been in the United Kingdom for less than 3 years at this time and she could resume her family and private life in India on return. The two appellants could continue their relationship in their country of origin and their return was proportionate, having regard to the legitimate aim of protecting the economic wellbeing of the United Kingdom. If permission to appeal against her decision were to be granted, she considered that the appeals should be linked for hearing before the Upper Tribunal, which has been done.
23. On 12 January 2014, Upper Tribunal Judge Clive Lane found that the decision of the First-tier Tribunal contained a material error of law and set aside the decision, without preserving any of the facts; it appears that he did so because he considered that the First-tier Tribunal should have adjourned the appeal to be heard jointly in the First-tier Tribunal with that of the first appellant. He directed that the appeals be heard together.
24. That was the basis on which these individual appeals came before the Upper Tribunal for remaking.

### **Upper Tribunal hearing**

#### **Appellants' evidence**

25. We received a short witness statement from each appellant, asserting that they had ceased contact with their family members, including changing their mobile telephone numbers, after they were 'outed' by the first appellant in 2012; that a family friend ('Uncle Raj') accommodates them and has attempted to intercede with their parents; but that their parents remain angry and will kill them on return (in the case of the second appellant, unless she returns to heterosexual orientation).

26. They both stated that Indian society does not treat women well, and lesbians worse, and that they had no home and no income if returned. In their evidence to the First-tier Tribunal, the appellants had not suggested, and they did not now suggest, that they had suffered any persecution in India before coming to the United Kingdom.
27. The appellants' accounts developed significantly during their oral evidence, and in a manner which was surprising to us. It appears that no member of the appellants' families lives in India outside the Punjab. The first appellant's father works in Dubai, returning only once a year. Her mother and slightly older brother still live in the Punjab, as do 16 uncles and aunts, 8 for each parent. Her brother has a mechanical engineering qualification; her mother is uneducated. The second appellant's father has died, and the head of household in her family is her paternal uncle, who has a taxi business. She has a mother and younger brother and sister still in India. They may be at university: she has no contact with her family.
28. The appellants are highly educated women. They both studied in India at university for 5 years, living together in student hostels and accommodation, as many young women do. They were not 'out' to their families or the community. The appellants each achieved a Bachelor of Law and an LLB degree, and the second appellant stayed on for an extra year to study for a diploma in Forensic Science, because the first appellant had not finished her LLB.
29. In the United Kingdom, they have both studied for a 1-year Strategic Management Diploma from SciTech, at the Park Royal campus. They completed their qualifications in the summer of 2012 but there is still money due to the university, because their parents refused to pay any more after the revelation of the appellants' sexuality, so they cannot collect their Diploma certificates. Both appellants accepted in evidence that, contrary to what they asserted in their witness statements, they would be able to get good jobs in India with these qualifications, although one expressed reservations as to whether they could do so if their employers discovered their sexuality.
30. 'Uncle Raj', the person with whom the appellants live in the United Kingdom, is not an uncle to either of them, but he is a family friend, related to them neither by blood nor marriage. He is the uncle of a friend of the first appellant's brother. He has four daughters, and he keeps an off licence. The appellants' families arranged for them to live with Uncle Raj, when the appellants came to the United Kingdom. Each family spent about £5000 on flights, fees and so on to send the appellants to study in the United Kingdom.
31. The appellants' families have Uncle Raj's name and his address and his telephone number, but no family member has come to see either appellant to try to persuade them to return home. Neither, after being unable to reach the appellants because in January 2012 they had changed their mobile telephone numbers, did any family member write to Uncle Raj or telephone his home number to try to resolve matters.
32. Uncle Raj has been prepared to accommodate the appellants for the last 4 years, without any financial recompense or support from their families. The appellants are not working.

He gives them food, and money when they need it. His daughters share their clothes and so on with the appellants.

## Country evidence

33. The respondent's country of origin information on the position of lesbians and LGBTI persons in India consists of three country of origin information and guidance reports, the first dated 18 July 2014 on the topic of 'India, sexual orientation and gender identity'; the second, dated February 2015, on actors of protection and internal relocation; and the third, on women fearing gender based harm/violence, of April 2015. In addition, the respondent produced an Operational Guidance Note in May 2013, which predates the *Naz Foundation* judgment and is therefore of limited, if any, assistance to us in assessing the risk now.
34. The respondent's conclusions in the country reports, so far as it concerns lesbians, may be summarised as follows:

### India, sexual orientation and gender identity (18 July 2014)

- (a) Section 377 is never enforced, save when child abuse or rape is alleged. In the 150 years since it was introduced in 1860, fewer than 200 people have been prosecuted, with only a minority being consenting adults (this is taken from the evidence in the *Naz Foundation* case, and the reference is given). The Naz Foundation itself stated in a letter to the Delhi British High Commission in September 2013 that they were not aware of any instance 'in the last couple of years' where an individual was convicted under section 377 in a case involving consenting adults, anywhere in India. The threat of section 377 was sometimes used to harass people.
- (b) There is no provision in Indian law for civil partnerships or same-sex marriage.
- (c) Joint adoption of children by a same-sex couple is not permitted but surrogacy is legal and single male or female parenthood is recognised.
- (d) There are no laws in India pertaining specifically to lesbian sexual activity.
- (e) India is a vast diverse multicultural country, with more tolerance of homosexuality in cities than in the rural areas. An Australian Refugee Review Tribunal case on 19 September 2007 (*Case 071494945* [2007] RRTA 276) held that in Mumbai, Delhi, and also Bangalore and Kolkata, it was possible to live in a publicly acknowledged sexual relationship, although not easy. Most LGBTI people kept their sexuality private for that reason.
- (f) The major pressure on lesbians in India was the societal and family pressure to marry.
- (g) There was no law against landlords discriminating on sexual orientation grounds but as the Upper Tribunal found in *MD (India)* the evidence did not disclose this to be endemic 'or anywhere approaching it'.
- (h) There were difficulties in the workplace sometimes, but 70% of all working people were self-employed and only 17% were in formal salaried employment.



- (i) Many prominent non-governmental organisations were available to help LGBTI groups, including the Naz Foundation, the Sangini Trust, the Aanchal Trust, the Humsafar Trust, Challenge, Gay and Lesbian Vaishnava Association, the Lakshya Trust (for TG persons) and the Dai Welfare Society (for Hijras). Other smaller locally based non-governmental organisations were also available.

**India: Background information, including actors of protection, and internal relocation (February 2015)**

- (j) In general, a person is likely to be able to access effective state protection against persecution by non-state actors or rogue state actors. That may not always be the case in conflict areas where armed insurgent or terrorist groups are active, or by reason of an individual's particular circumstances.
- (k) Similarly, internal relocation is generally viable but will depend on the nature and origin of the threat as well as the individual's personal circumstances.

**India: women fearing gender-based harm/violence (April 2015)**

- (l) Women in India are a particular social group. They are subject to widespread and deep-rooted discrimination in the exercise of their rights. However, in all cases a real risk of gender-based persecution must be established on the facts as the general level of discrimination does not meet the high threshold for international protection.
- (m) The legislative framework has been strengthened by the Protection of Women from Domestic Violence Act 2005 and the Criminal Law (Amendment) Act 2013, with a high percentage of police investigations into criminal offences against women resulting in charges and prosecutions. Nevertheless, gender-based violence against women remains a serious problem and although internal relocation will in many cases be a viable solution, in some circumstances, the inability to access accommodation, lack of support networks and inability to secure access to a livelihood may make internal relocation ineffective. In some circumstances, effective state protection may not be available.

**Amnesty International 2014/2015**

- 35. The 2014/2015 Amnesty International report for India notes the change of government in India in May 2014, after the elections, when Narendra Modi became Prime Minister of a majority BJP government.

“The Supreme Court agreed to hear a petition seeking a review of its ruling in December 2013 which effectively recriminalized consensual same-sex sexual activity by upholding Section 377 of the Indian Penal Code. In the run-up to the 2014 parliamentary elections, prominent political parties committed to decriminalizing homosexuality.

In April, the Supreme Court granted legal recognition to transgender people in a landmark judgment. It directed authorities to recognize transgender persons' self-identification as male, female or a “third gender” and put in place social welfare policies and quotas in education and employment. However, cases of harassment and violence against transgender people continued to be reported.”

## Human Rights Watch 2015

36. The 2015 Human Rights Watch report is to the same effect:

“The rights of Lesbian, Gay, Bisexual, and Transgender (LGBT) people suffered a setback in December 2013 when the Supreme Court reversed a landmark 2009 Delhi High Court decision striking down a colonial-era law criminalizing adult consensual same-sex relations. At time of writing, a petition to review the decision was pending before the Supreme Court. In April 2014, the Supreme Court recognized transgender individuals as a third gender and asked the government to treat them as a minority eligible for quotas in jobs and education.”

## US State Department Report 2014

37. The US State Department Report on Human Rights Practices in India in 2014 was published on June 24 2015 and is thus the most up to date international assessment of the issues with which we are concerned in this appeal:

### **“Acts of Violence, Discrimination, and Other Abuses Based on Sexual Orientation and Gender Identity**

On January 28, a high court dismissed petitions challenging the December 2013 Supreme Court judgment that overturned a 2009 ruling by the Delhi High Court, which had ruled unconstitutional a colonial-era portion of the penal code that criminalized homosexual sex. The Supreme Court ruled that only parliament may make changes to the law that bans consensual same-sex sexual activity. The media, activists, prominent individuals, and some government officials reacted strongly against the ruling. On April 22, the Supreme Court agreed to hear a curative petition challenging the December ruling. At year’s end the curative petition hearing was pending.

Lesbian, gay, bisexual, and transgender (LGBT) persons 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 education and sensitivity training to police.

LGBT groups reported that they faced widespread discrimination and violence throughout society, particularly in rural areas. Activists reported that transgender persons who were HIV positive continued to have difficulty obtaining medical treatment. Advocacy organizations, such as the Mission for Indian Gay and Lesbian Empowerment (MINGLE), documented workplace discrimination against LGBT persons, including slurs and unjustified dismissals.

Transgender persons in Rajkot, Gujarat, and surrounding neighbourhoods complained of discrimination in finding accommodation. An NGO advocating for LGBT rights reported that at least 32 transgender persons could not find accommodation in Rajkot and that three had attempted suicide following the discrimination.

LGBTI activists in Hyderabad expressed satisfaction with public awareness efforts, including protests against the Supreme Court judgment to uphold the criminalization of same-sex conduct. The activists stated, however, that they were aware of homophobia among students at certain university campuses. According to

LGBTI students, there was also a systematic disregard for LGBTI rights on university campuses.

On April 15, the Supreme Court codified the right to self-identify as male, female, or third gender. The ruling gives a person the right to identify as “third gender” when registering to vote, own property, marry, or apply for a passport, ration card, and driver’s license. The judgment also instructed state and central governments to extend affirmative action or reservations to transgender individuals for admission to higher-education facilities, public appointments, and health-care services. The Supreme Court assigned a committee to study problems faced by the transgender community and provide suggestions on how to address discrimination. On September 11, the central government filed a formal request asking the Supreme Court for clarifications on the policy implications of the ruling as well as an implementation extension.

Following the April Supreme Court verdict, Bharathy Kannamma, a transgender individual from Madurai, Tamil Nadu, ran for a parliamentary seat in the Lok Sabha (the upper house of parliament) as an independent candidate during the April national elections.

In July, following the April Supreme Court ruling recognizing “transgenders” or “third genders,” the Maharashtra election commission authorities rejected a petition to include “third gender” on electoral rolls.

On August 19, the government of Telangana commissioned the Intensive Household Survey to collect social and economic data to ensure those who qualified for welfare programs were registered and receiving benefits. According to a transgender rights activist, the survey collected data for at least 800 transgender individuals, consequently entitling them to multiple welfare programs due to the April Supreme Court judgment.

On September 24, the Delhi Development Authority, under its vice chairman’s direction, provided a third gender option on its 2014 housing eligibility forms, which for the first time included “male, female, or third gender.”

### **Professor Shahani’s evidence**

38. Professor Nishant Shahani was born and raised in Mumbai (also known as Bombay) in India, but left for the United States in 1999, when he was 23, to pursue higher education there. He retains his Indian citizenship but has permanent residence in the United States, and a green card entitling him to work there.
39. Professor Shahani returns regularly to Mumbai every summer and his evidence is based on the knowledge he then gains, and his personal experience as a member of the LGBTI community,, together with critical scholarship on LGBTI identities in India, recent historical developments, and his personal interactions with LGBTI communities and activists on the ground, in Mumbai in particular.
40. Professor Shahani is an Associate Professor at the Department of Critical Culture, Gender and Race Studies Graduate Program (formerly the Women’s Studies Department) at Washington State University. He has been associated with that Department since 2006. His academic career began with a BA, later an MA, in English from the University of Bombay,

in 1997-1999, followed by a Master's degree from the University of Florida in 2001 on the subject 'Queering India: Towards a Post-Colonial Queer Methodology', and finally, a PhD from the same university in Spring 2006 on the subject 'Queer Pedagogy and American Studies: a Reparative Re-thinking'. He has published and lectured extensively on what he describes as 'queer politics and sexuality in India' and in particular, on reparative return and reparative performance.

41. Professor Shahani recognised that section 377 and other Indian Penal Code (IPC) provisions do not expressly reference lesbianism; the risk to lesbians in his opinion is from non-state actors, using the legislation as a threat to enforce certain conduct, rather than using it through the Courts in the normal way. His evidence was that the threatened use of section 368, which deals with kidnapping, is used to force younger women to return home after leaving to join lesbian groups and enter into lesbian relationships. Mere cohabitation with another woman could be seen as evidence of sexual activity.
42. Professor Shahani noted that there had been no prosecutions of lesbians whatsoever under either section 368 or 377 and that the right to privacy is guaranteed by Article 21 of the Indian Constitution. Professor Shahani's opinion is that lesbianism has not been criminalised 'in the strict sense of the term' but the BJP's insistence on the maintenance of traditional family structures has devastating impacts on the lives of lesbian women. He observes that:

"India, of course, is a highly diverse country that is mediated by class, linguistic and religious lines. While homophobia might manifest itself in different formulations and look different depending on these multiple vectors of identity, prejudice against same-sex cuts across these different modalities."

43. The core of Professor Shahani's thesis is that the majority of women in India with same-sex desires are forced into heterosexual marriages, and into secrecy. For those who resist, physical threats result in a form of domestic imprisonment, particularly in smaller towns, where moral character is vital and most families know one another. Cosmopolitan centres such as Mumbai, Delhi and Bangalore allow more economic independence and an opportunity to break away from family constraints, but those opportunities are more easily available to men than women, due to the lower status of women in India. Women who live without a husband, family, or identifiable origin, even in cities, attract suspicion of being 'loose women' or prostitutes and, apart from students living in student hostels, women living together is quite uncommon, in Professor Shahani's experience.
44. The references in Professor Shahani's report are helpfully supported by internet hyperlinks, as well as in some cases the hard copy documents, and are summarised in Appendix B below. We had regard, in particular to an article by Morgan Welch on the website FourTwoNine dated Friday April 18 2014, which was not included in the bundle of documents but is incorporated by reference and is still available on the web:

"...Two of the political parties in India, the anti-corruption Aam Aadmi Party (AAP), and the ruling Indian National Congress, have included Section 377's removal in their political agendas.

However, the party currently leading the polls, the Bharatiya Janata Party (BJP) has made no such declarations, and its president Rajnath Singh has said his party supports the upholding of Section 377. According to the Times of India, he said, "Gay sex is not

natural and we cannot support something which is unnatural.” A member of AAP, Harish Iyer, told the Global Post, “In order for this invisible community to become invincible, we have to show numbers and politicize ourselves...We need to fight not only for LGBT people but for all those who want to live their lives without the Indian government peeping in their bedrooms.”

Already, the Indian LGBT community has seen what speaking out can do; the AAP did not initially include striking Section 377 back down in its political manifesto, but did after activists made their voices heard. ...

On April 15, the Indian Supreme Court directed state and federal governments to include transgender people in all welfare programs for the poor, including health care, education, and jobs to help them overcome social and economic challenges. They also ordered the introduction and legal recognition of a third gender category, and the apex court stated that they will run a public awareness campaign to erase social stigma. According to the Times of India, the court also admitted that Section 377 of the penal code, which includes language calling certain types of sexual activity “against the order of nature,” was being mistreated and misused by both the police and various other authorities.

A national executive member of the BJP, Shaina NC, stated that “Gays and lesbians are not criminals, but we are a conservative party that strongly believes in the traditional family structure, and the need to keep our social and moral fabric intact.” It’s an argument many societies no longer consider persuasive, and may not last much longer in India either. ...”

## Press reports

45. The press reports in the Upper Tribunal bundle record a number of instances where lesbian couples sought to marry and live together as spouses (see Appendix B, at [39], [46], and [50]), and others who lived together. In some cases, one partner is described as taking the male role, wearing short hair and masculine clothes. There appear to be a number of religious ceremonial options which have been successfully used by lesbian couples wishing to marry. The reports relied upon are not all post-*Naz Foundation* and it is the later reports, from 2014 onwards, which are most significant in assessing the current position. The reports are set out in Appendix B and are discussed below.

## Submissions

46. For the respondent, Mr Nath relied on his skeleton argument and the agreed questions. He contended that the *Naz Foundation* judgment of the Indian Supreme Court, whatever its current status, should not be treated as determinative of any larger issue than overturning a specific decision of the Delhi High Court. He contended that any negative effect which the judgment might have would in law be limited to Delhi State and thus would not entail any legal or social changes elsewhere in India. There was no real risk in general of enforcement of the IPC provisions, and no evidence of increased risk to LGBTI persons, including lesbians in India. Although there was evidence in 2014 of nearly 600 arrests of homosexuals in India, there had apparently been no prosecutions and there was no evidence as to whether any of those arrested were lesbians.
47. Mr Nath relied upon the judicial headnote to the Upper Tribunal’s country guidance decision in *MD* (same-sex oriented males: risk) India CG [2014] UKUT 65 (Immigration

and Asylum Chamber). In relation to the risk from State actors, Mr Nath also relied on paragraph 145 of the *MD (India)* decision:

“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 LGBTQ support organisations has steadily grown.”

48. The real question, Mr Nath argued, was whether there would be a risk from non-state actors if the appellants were returned to India. Even assuming that they were at risk in their home area in the Punjab, which the respondent did not accept, Mr Nath contended that the expert evidence of Professor Shahani as to risk was insufficiently sourced and could not carry much weight. The appellants were living independently before coming to the United Kingdom and, unusually perhaps, all of their extended family members lived in a single Indian state. Professor Shahani’s assertion that these appellants could not relocate safely elsewhere in India was unsourced, unsupported by evidence, and speculative. As to the possibility of their supporting themselves by working, while Professor Shahani had accepted that educated women in India worked, she had been unable to provide much assistance beyond that. His evidence as to whether they would be able to sustain themselves in Mumbai, Bangalore or Delhi, as they had done in the past, was also pure speculation.
49. In reality, the evidence indicated that such risk as existed for lesbians in India came from family members and local police in their home areas. In this case, the appellants’ family members had washed their hands of them. There had been no letters, no telephone calls, and no written threats. No member of the extended family had visited the United Kingdom to seek to persuade the appellants to return home.
50. Mr Nath did not ask the Tribunal to go behind the findings of the First-tier Tribunal that these appellants were credible witnesses in relation to the evidence which had been given in the First-tier Tribunal hearing, but he submitted that their oral evidence at the Upper Tribunal hearing entitled the Upper Tribunal to find that their responses on continuing risk were self-serving. There were a number of support organisations available to assist them if required and the appellants were highly-educated and able to work and support themselves on return, a circumstance which they had not disclosed to the First-tier Tribunal.
51. In summary, Mr Nath asked the Upper Tribunal to place no, or very little, weight on the expert evidence. There were no reported cases of prosecution under the IPC and no overall evidence of police misconduct at a level which engaged international protection. The appellants would have access to numerous support networks in India and with their skill sets, it was inconceivable that they would not find work in a larger city. There was no obligation upon them to inform any employer of their sexuality, even having regard to the guidance given by the United Kingdom Supreme Court in *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31. There was a new government in India and a new policy; the appellants had produced no evidence that the *Naz Foundation*

judgment had fuelled an increase in difficulties for LGBTI persons in India. Nor was there reliable evidence of police complicity in relation to LGBTI groups.

52. In Mr Nath's submission, no risk of persecution or serious harm had been made out and he asked the Upper Tribunal to dismiss the appeals.
53. For the appellants, Ms Hashmi also relied on her skeleton argument, and on the country evidence in the appellants' bundle, on the treatment of women generally in India. Ms Hashmi relied on the expert's report as to the risk to lesbians in India. In *MD*, the Tribunal had not been concerned with the position of women. Ms Hashmi accepted that section 377 of the IPC in its original form was clearly understood in India to apply only to non-heterosexual men, not to lesbians.
54. It was very important to consider such evidence as there was in the cultural context of India. India had an enforced moral policy, leading LGBTI people to keep themselves closeted. Women in India were more vulnerable than men, and the bundle included evidence of domestic and other violence against women in the Punjab, albeit without any context as to the sexuality of the victims. Both women and non-heterosexual men were disadvantaged in India: the appellants as lesbians bore a double yoke of disadvantage. She contended that the current ruling party, the BJP, was openly hostile to LGBTI issues, greatly increasing the pressure on lesbian women in Indian society.
55. Ms Hashmi argued that absence of evidence should not be regarded as evidence of absence. Data as to the treatment of lesbians was less available and probably inaccurate: the only study the appellants had been able to discover was a paper entitled "*The nature of violence faced by lesbian women in India: A study conducted by Bina Fernandez and Gomathy N.B*" prepared in 2003 for the Research Centre on Violence Against Women, Tata Institute of Social Sciences, Mumbai 2003) ("*Fernandez-Gomathy case study*"). There was some evidence that the police used section 377 as a pretext to harass women, especially where families were involved. There were no official statistics regarding the position of lesbians: their sexual orientation was not even recognised by the Indian government.
56. Ms Hashmi accepted that the appellants would be able to secure employment when they returned to India, albeit they might have some difficulty, and would have access to NGO support in the cities. However, she questioned whether the employment would last once the appellants' sexual orientation became known. India did not recognise same-sex marriages or civil partnerships and news of their orientation might travel. There would be a problem in retaining a job when the fact emerged that they were in a lesbian couple. Ms Hashmi asserted that there was widespread discrimination and violence against LGBTI persons in India, particularly in rural areas. She reminded the Upper Tribunal of the male LGBTI workers who had been arrested 11 years ago, in 2004, for handing out safe sex leaflets, and of the evidence of 'cure' centres in Goa.
57. Ms Hashmi submitted that what occurred between lesbians was regarded as a deviant sexual act and there was no need for it to be specifically criminalised. The Supreme Court judgment in *Naz Foundation* had led to more public discussion of LGBTI issues but it had nevertheless fuelled homophobia, although the average person in India would be unaware of the decision. The evidence was that after the judgment was published in 2014 there had

been almost 600 arrests of homosexuals, but to the appellants' knowledge, still no prosecutions.

58. Ms Hashmi accepted that the appellants' family members had not sought to use section 368 against them, but considered that it was not necessary for the family to turn up in the United Kingdom to pursue the appellants: the threats which they had made were effective without their presence. The primary question for the Upper Tribunal was what would happen if the appellants returned to India, and the Tribunal should be prepared to find that, on the balance of probabilities, they would be at risk in the Punjab because of the attitude of their families and the families' knowledge of the appellants' sexuality.
59. Even if the risk from the appellants' families were limited to the Punjab, they could not be expected to relocate elsewhere in India because there existed a risk from non-state actors throughout India by reason of the moral policing which had been fuelled by section 377 and the *Naz Foundation* judgment. Section 377 provided further ammunition and tools for men to discriminate against and harass women, and the police were complicit.
60. Returning to the questions originally posed, Ms Hashmi did not seek to assert section 377 of the IPC criminalised lesbianism or made any provision in relation to lesbian acts; that there had been no prosecutions under section 377; but she asked us to find that the threat of prosecution was used as a pretext for harassment. Ms Hashmi asked us to allow the individual appeals.
61. We reserved our decision, which we now give.

## Discussion

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

**“368. Wrongfully concealing or keeping in confinement, kidnapped or abducted person.** – Whoever, knowing that any person has been kidnapped or has been abducted, wrongfully conceals or confines such person, shall be punished in the same manner as if he had kidnapped or abducted such person with the same intention or knowledge, or for the same purpose as that with or for which he conceals or detains such person in confinement. ...

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

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

“1. Article 10(1)(d) of Council Directive 2004/83/EC of 29 April 2004 ... must be interpreted as meaning that the existence of criminal laws, such as those at issue in each of the cases in the main proceedings, which specifically target homosexuals, supports the finding that those persons must be regarded as forming a particular social group.



2. Article 9(1) of Directive 2004/83, read together with Article 9(2)(c) thereof, must be interpreted as meaning that the criminalisation of homosexual acts *per se* does not constitute an act of persecution. However, a term of imprisonment which sanctions homosexual acts and which is actually applied in the country of origin which adopted such legislation must be regarded as being a punishment which is disproportionate or discriminatory and thus constitutes an act of persecution.

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

64. We begin by noting that both parties accept that there have been no prosecutions of lesbians under section 377 at all, and that in practice, section 377 is perceived in Indian law as inapplicable to lesbians. In February 2014, when *MD* was decided, the effect of the *Naz Foundation* judgment handed down by the Indian Supreme Court on 11 December 2013 was too recent for any long-term effects to be reliably established. We recall that the legal position set out in the *Naz Foundation* judgment went no further than finding that section 377 was not unconstitutional.
65. The Supreme Court's reasoning in the *Naz Foundation* judgment is based upon section 377 as it stood when the case was heard, some 2 years before the judgment was handed down. Amendments to the law of rape in sections 375-376 made by the Criminal Law (Amendment) Act 2013 did not include promised amendments to section 377, which was considered to be *sub judice* pending the outcome of the *Naz Foundation* appeal in the Supreme Court.
66. The *Naz Foundation* decision remains under challenge: although a number of review petitions filed against the decision were dismissed by the Supreme Court on 28 January 2014, in March 2014, the *Naz Foundation* filed a curative petition against the judgment, which, if successful, would result in the December 2013 Supreme Court judgment being set aside and remade by a different constitution of the Court. On 23 April 2014, a four-judge bench of the Court gave permission for the curative petition to proceed to oral argument. No indication of the outcome is before us.
67. The curative petition relies on the failure to take account of the changes wrought by the Criminal Law (Amendment) Act 2013 to the definition of rape in section 375, which was amended to include penile penetration, by any means, of women as well as men, and on the perceived incompatibility of the *Naz Foundation* judgment with the more human rights-based approach in the judgment of the Indian Supreme Court on 15 April 2014 in *National Legal Services Authority v Union of India and others*, Writ Petition (Civil) no.400 of 2012 (the *NLSA* judgment) which is referred to in the 2014 US State Department Report published on June 24 2015.
68. We are entitled to have regard to the *NLSA* judgment as indicative of the legal approach which the Indian Supreme Court may adopt in future, if the curative petition succeeds. The *NLSA* judgment is supportive of the position taken by the Upper Tribunal in its existing country guidance and adopts a rights-based international approach to the position of transgender persons (TGs) in India, directing that they be given legal and human rights

as a 'third sex' in Indian law. In contrast to the lukewarm support for section 377 in the *Naz Foundation* judgment, Justice K.S. Radhakrishnan in his judgment in *NLSA* said this:

"119. The role of the Court is to understand the central purpose and theme of the Constitution for the welfare of the society. Our Constitution, like the law of the society, is a living organism. It is based on a factual and social reality that is constantly changing. Sometimes a change in the law precedes societal change and is even intended to stimulate it. Sometimes, a change in the law is the result in the social reality. ...It is the denial of social justice which in turn has the effect of denying political and economic justice. ...

122. It is now very well recognized that the Constitution is a living character; its interpretation must be dynamic. It must be understood in a way that intricate and advances modern reality. The judiciary is the guardian of the Constitution and by ensuring to grant legitimate right that is due to TGs, we are simply protecting the Constitution and the democracy inasmuch as judicial protection and democracy in general and of human rights in particular is a characteristic of our vibrant democracy."

69. We have regard to the evidence of Professor Shahani. In his own evidence, both written and oral, he accepted that there were places in India where lesbians could live in open relationships, particularly where they are what she described as 'middle class' and have financial independence. We note the evidence he gave about the problems experienced by a number of lesbian couples over the years, which strikingly (given the lack of any recognition of same-sex marriage in India) often arose after the couple had eloped and tried to marry, in a variety of ceremonies both civil and religious. In most, but not all the cases cited, the problems had come from the women's families.
70. We also note Professor Shahani's evidence about the range of social networks within India, but that will of course be a question of fact in each case. He was unaware of many recent examples and the instances in his report were many years old, in most cases. Professor Shahani's personal knowledge of life for LGBTI persons in India appeared to be limited to the position, particularly for male non-heterosexuals, in his home city, Mumbai. Professor Shahani conceded that the evidence before the Tribunal did not amount to reliable evidence of a pattern of police misconduct to lesbians. We note that same-sex couples have difficulty in legally adopting children, but given that single women may adopt or undergo IVF, such couples do not need to be childless and we do not consider that legal restriction to be capable of reaching the persecution threshold.
71. We have considered the Fernandez-Gomathy case study. The width of their definition of 'violence' includes many circumstances normally considered to be harassment or discrimination, rather than violence, which makes the study less helpful, but it is the only systematic study available concerning the circumstances of lesbians in India. The Fernandez-Gomathy case study is not new: it was finalised in 2003, long before the liberalisation which the Delhi High Court judgment in *Naz Foundation* began. The principal risk identified by the women studied came from their family members, and from silent shame, social stigma, and ostracism in their home areas.
72. The press reports before us are striking: they speak of difficulties for lesbian couples who eloped or married each other without their family members' approval. We note, in particular, that a lesbian couple who fled Mumbai for Delhi in 2011 received protection from the Delhi Police from overzealous officers of the Mumbai police, after theft charges

were laid by family members in Mumbai. In May 2012, a police post in Ambala arranged protection and the family dispute went before the Civil Court for a decision as to whether the families should be made to accept their daughters' sexuality. Another report, which may concern the same lesbian marriage, reflects police protection ordered by the Punjab and Haryana High Court and formal disinheriting of one of the women by her family.

73. Reports after the *Naz Foundation* judgment reflect public pressure on both sides of the argument and political manoeuvring as the new Indian BJP government decides how to approach the question. We do not accept the submission of Ms Hashmi that the evidence is that the BJP is implacably opposed to LGBTI rights. We note that immediately after the Indian Supreme Court's decision in December 2013 in the *Naz Foundation* case, a BJP spokesman said in a live interview that homosexuality was unnatural and that the party supported section 377. In March 2014, members of the BJP's ideological fount, Rashtriya Swayamsevak Sangh (RSS) expressed a firm anti-LGBTI stance ahead of the election in which the BJP won power. Since that election, other BJP leaders such as Arun Jaitley and Harsh Vardhan have spoken in favour of decriminalising homosexuality. We do not consider that the evidence demonstrates that there is a fixed overall BJP position on the issue.
74. The Indian government has begun collecting statistical data on arrests of homosexuals in many, but not all, Indian states. The population of India was last recorded in 2014 at over 1.2 billion people. The records in the bundle before us indicate that in 2014 there were 778 arrests of homosexuals nationally, but not whether the arrests were followed by a prosecution, nor whether those arrested were non-heterosexual men or lesbians. We do not consider that this amounts to reliable evidence of arrests of lesbian women or prosecution of lesbian women, at a level capable of amounting to a real risk of persecution or serious harm.
75. We remind ourselves of the guidance on transgender or 'third sex' persons given by the Supreme Court in the *NLSA* case, just a few months after the *Naz Foundation* judgment, and the ongoing challenges to the *Naz Foundation* decision. We also recall that the Indian government is to bring in legislation in the next Parliament, following the success of the private members' bill. We cannot on that basis regard the effect of the *Naz Foundation* judgment as a re-criminalisation of homosexual activity, still less of lesbian sexual activity.
76. Since there have been no prosecutions of lesbians in India, we agree with Ms Hashmi that the real issue is the risk to lesbians arising out of the activities of non-state actors. Ms Hashmi conceded, as did Professor Shahani, that the evidence does not support a finding of endemic police complicity in harassment or other ill-treatment of lesbian couples or individuals.
77. Even if there were an individual risk of persecution or serious harm in a lesbian woman's home area, given the size and enormous population of India, in many cases there will be an internal relocation option. We remind ourselves of the guidance given by the House of Lords in *Secretary of State for the Home Department (Appellant) v. AH (Sudan) and others (FC)* [2007] UKHL 49, at [5] in the opinion of Lord Bingham of Cornhill and [20] in the opinion of Baroness Hale), approving the approach of Lord Bingham in *Januzi and others v Secretary of State for the Home Department* [2006] UKHL 5, [2006] 2 AC 426, at [21]. The House of Lords' position is summarised in the opinion of Baroness Hale in *AH (Sudan)*:

“20. We are all agreed that the correct approach to the question of internal relocation under the Refugee Convention is that set out so clearly by my noble and learned friend, Lord Bingham of Cornhill, in *Januzi and others v Secretary of State for the Home Department* [2006] UKHL 5, [2006] 2 AC 426, at para 21:

“The decision-maker, taking account of all relevant circumstances pertaining to the claimant and his country of origin, must decide whether it is reasonable to expect the claimant to relocate or whether it would be unduly harsh to expect him to do so.”

As the UNHCR put it in their very helpful intervention in this case,

“ . . . the correct approach when considering the reasonableness of IRA [internal relocation alternative] is to assess all the circumstances of the individual’s case holistically and with specific reference to the individual’s personal circumstances (including past persecution or fear thereof, psychological and health condition, family and social situation, and survival capacities). This assessment is to be made in the context of the conditions in the place of relocation (including basic human rights, security conditions, socio-economic conditions, accommodation, access to health care facilities), in order to determine the impact on that individual of settling in the proposed place of relocation and whether the individual could live a relatively normal life without undue hardship.”

I do not understand there to be any difference between this approach and that commended by Lord Bingham in paragraph 5 of his opinion. Very little, apart from the conditions in the country to which the claimant has fled, is ruled out.”

The question of internal relocation will be one of fact for the decision maker in each individual case where in the home area a real risk of persecution or serious harm is found to exist.

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

- (7) *The guidance in MD (same-sex oriented males) India CG [2014] UKUT 65 (IAC) stands. The guidance at (a) – (f) in MD (India) applies equally to lesbians.*
- (8) *A risk of persecution or serious harm for a lesbian woman in India, where it exists, arises from her family members, and the extent of such risk, and whether it extends beyond the home area, is a question of fact in each case.*
- (9) *The risk of persecution or serious harm is higher for uneducated lower class lesbian women in rural areas, who remain under the control of their family members and may not be permitted to leave the home to continue meeting their lesbian partners.*
- (10) *Where family members are hostile to a lesbian woman’s sexuality, they may reject her completely and sometimes formally renounce her as a member of that family. In such a case, whether relocation to a city is unduly harsh will be a question of fact, depending on the ability of such a lesbian woman to survive economically away from her family and social networks.*
- (11) *If a lesbian woman’s family wishes to pursue and harm her in the place of internal relocation, their ability to do so will depend on the reach of the family network, how persistent they are, and how influential. The evidence indicates that there is normally sufficient state protection for women whose families seek to harm them in their place of internal relocation.*

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

### **The individual appellants**

79. Applying the principles set out above, we now turn to the circumstances of these appellants. It is not disputed that lesbians in India are a particular social group. The respondent accepts that the appellants are lesbians and that they entered into a civil partnership on 28 March 2013. They are in a committed relationship and have been so for some years. They are at least 'middle class', and highly educated.
80. We remind ourselves of the preserved findings in the First-tier Tribunal decision for the first appellant. The appellants' sexual orientation, and their relationship, now a civil partnership, is not doubted.
81. From the evidence before us, we find that both appellants are both graduates in law and in the case of the first appellant, also in forensic science, who came to the United Kingdom as students for post-graduate business studies. In the United Kingdom, they have lived with the first appellants' 'courtesy Uncle', who has daughters of his own. With no inducement from the appellants' families, indeed with their active disapproval, he has housed, clothed, fed and given spending money to both appellants and there is no evidence that he will not continue to do so if they remain here. He has also sought to intercede with their parents, without success. No harm has come to Uncle Raj from doing so.
82. They have no family members in the cities, nor indeed outside the Punjab and the hostility, and thus risk (if any), to them on the facts of both appeals is confined to the Punjab, where their family members live. The appellants' parents are aware of their orientation and relationship. Since the appellants changed their mobile telephones in January 2012 to block contact from their families, their parents and extended family members have not written to the appellants or to Uncle Raj, telephoned Uncle Raj's house, or come to the United Kingdom to try to persuade these appellants to come home. They have simply detached themselves from the appellants. We do not find that their families have any interest in pursuing these appellants. Our primary finding therefore is that there is no risk to the appellants in their home area of the Punjab, where all of their family live.
83. It is not in dispute that the appellants wish to continue living together as a couple, if they are returned to India. We accept that both of them have rejected, and been rejected by their families. We find that these appellants have an internal relocation option to cities in other states such as Mumbai, Delhi or Bangalore and that it would not be unduly harsh to expect them to exercise that option. The appellants are highly educated and both accepted in their evidence was that their qualifications would get them good jobs in an Indian city, such that they would be able to live together and would be able to pay for accommodation, food and so on.
84. As regards Article 8 ECHR, the appellants have family life together, which would be unaffected by their return to India. Their private life in the United Kingdom can be given

little weight since it has all developed while their presence here was either precarious or unlawful (see sections 117B(3) and 117B(4) of the Nationality, Immigration and Asylum Act 2002 (as amended)). It has not been suggested that the appellants could meet the requirements of paragraph 276ADE and Appendix FM of the Immigration Rules.

85. Nor are there any *Nagre* exceptional circumstances in either appeal. The absence of recognition for their civil partnership is not of itself sufficient to amount to a breach of Article 8 ECHR, still less to persecutory treatment or serious harm (see *LH and IP* (gay men: risk) Sri Lanka (CG) [2015] UKUT 73 (IAC) at [120]-[122]). The evidence of their private life, if any, in the United Kingdom remains slender and is insufficient to outweigh the United Kingdom's right to control immigration, as both First-tier Tribunal Judges found in their decisions. We do not consider that removing these appellants to India would be disproportionate on Article 8 grounds.

86. In answer to the questions posed by Upper Tribunal Judge Dawson on 12 October 2012, and having regard to the decision of the Supreme Court in *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31 we find as follows:

- (1) The appellants are living openly as lesbians and civil partners in the United Kingdom and are likely to continue to do so in India. Their families have disowned them and have shown no inclination to pursue them in the United Kingdom. We do not consider that there is a real risk that they would seek to do so in India; and
- (2) If there is any risk of persecution or serious harm to the appellants from the local community in their home area, they have an internal relocation option to one of India's larger cities. We do not consider that it is unduly harsh to expect them to exercise such an option, having regard to their sex, their orientation, and the committed nature of their relationship as civil partners under United Kingdom law.

### **Remaking the decisions**

87. The making of the previous decisions involved the making of an error on a point of law. The previous decisions have been set aside. Our decision is that these appeals are dismissed on all grounds.

Date:

Signed:

*Judith AJC Gleeson*  
Upper Tribunal Judge Gleeson

## APPENDIX A

### SUMMARY OF ORAL EVIDENCE

#### **First appellant's evidence (AR)**

1. The first appellant adopted her witness statement, which she stated was true to the best of her knowledge, information and belief. She confirmed that she wished it to stand as her evidence-in-chief.
2. The first appellant stated that she informed her parents of her sexuality in early 2012 and they called repeatedly, threatening to kill her if she ever returned to India, because she had caused shame to them by being a lesbian. She had changed her mobile telephone number and had no contact with her family since then. Her Uncle Raj had visited India twice since 2012: on the first occasion he tried to resolve matters between the first appellant and her parents, but they were simply not interested. They told Uncle Raj that they would kill the first appellant if she returned. During the second visit, Uncle Raj made no attempt to mediate further but her parents still spoke to him of their anger and repeated their threat to kill their daughter.
3. The first appellant said that she was afraid to return to India because her parents were not accepting the relationship and the couple could not live with them. Apart from her parents, Indian society would also not accept them: the couple's life would be in danger since women in general were not well treated in India, and lesbians even less so. They would have nowhere to live and no source of income.
4. In cross-examination, the first appellant confirmed that the relationship continued and that she had heard nothing from her family since the angry telephone calls in 2012. She explained that in India she still has her mother and father, and one brother. There is no other family. The first appellant has no blood or marital link to the man she calls Uncle Raj: it is a courtesy title because his nephew is a close friend of the first appellant's brother.
5. The first appellant explained how the couple came to be living in Uncle Raj's house. She said it had originally been a family arrangement, since the first appellant's brother knew Uncle Raj's nephew. However, relations between the families had cooled after Uncle Raj took the appellants' side and refused to stop giving them practical and financial support. Each time Uncle Raj went to India, every year, he would try to persuade the parents, normally by telephone, but they were immovable and now they were not friendly to him either. Uncle Raj had last visited India in 2014, she could not remember exactly when.
6. The family were not happy with the appellants after their relationship was disclosed, but they had not come to the United Kingdom to try to persuade them to come home. They had not written, or telephoned Uncle Raj, whose home telephone number they have. They know the address of his place. All the contact was from Uncle Raj's side, when he went to India. It would have been possible for the families to contact the appellants in the United Kingdom if they wanted to. There had been no written threat, but the threats in telephone calls with the uncle continued.
7. In answer to questions from the Tribunal, the first appellant explained that both their families had arranged for the appellants to stay with Uncle Raj during the 9-month Strategic Management Diploma course, which both women had pursued. They had been given 1-year student visas. Her own father worked in a store in Dubai and travelled back once a year to see her mother. The first appellant's mother was not an educated person. The first appellant's only brother, who was a year older than she, still lived with her mother in the Punjab. He had a Mechanical Engineering diploma.

8. The appellants had shared a room in Uncle Raj's house from the first day, on the basis that they were friends who would like to share a room. They had explained that they were a couple 'after some time': when pressed, the first appellant thought it had been when they told the parents, in 2012, and they telephoned to tell him to stop supporting the appellants. Uncle Raj was more westernised in his views, since he had been living a long time in the United Kingdom, and he was supportive of the appellants' relationship. He was a kind hearted man and gave them moral support, looking after the appellants without any further contribution from their parents.
9. The families had paid about £5000 for the visa, fees, air fare and so forth. However, they had not spent the money to come and find the appellants and bring them home.
10. In re-examination by Mr Nath, the first appellant confirmed that Uncle Raj provided the appellants with food, accommodation, and £40 each when they needed money. He had four daughters so they simply shared clothes and so on with his daughters.
11. The first appellant has sixteen uncles and aunts, eight from each parent, all of whom live in the Punjab. There are no family members outside the Punjab.

### **Second appellant's evidence (NH)**

12. The second appellant confirmed her name and address and adopted her witness statement, which she stated was true to the best of her knowledge, information and belief and that she wished to stand as her evidence-in-chief.
13. In her witness statement, the second appellant said that she had had no contact with her parents since early to mid-2012, when the first appellant's parents told her own parents about their relationship. She had been obliged to change her mobile telephone number because her parents called her repeatedly, saying that if she ever returned to India they would kill her, as she had caused them shame, and had not considered the effect her sexuality would have on her younger brother's marriage prospects, and amongst the community generally.
14. She gave an account of the visit of the first appellant's Uncle Raj to India, in which he had visited her family and sought to resolve matters. The second appellant's parents were angry and told Uncle Raj to stop supporting the appellant financially, so that she would have no choice but to return home and resume a 'normal' heterosexual orientation. They told Uncle Raj that if she did not return to 'normality' they would kill her.
15. The second appellant said that she was afraid to return to India as her parents were not accepting her relationship with the first appellant and thus the couple could not live with them. Indian society would not accept the relationship and women generally in India were not treated well. Lesbians were treated worse: their lives would be in danger. The appellants would have nowhere to live and no source of income.
16. In cross-examination by Ms Hashmi, the second appellant said that when the first appellants told her parents of the second appellant's orientation, they said bad things, and both women changed their mobile telephone numbers. Her parents would become aware of their return if they went to the Punjab, and would find out that they had returned anywhere, 'by here or there'.
17. She had heard nothing from her parents or her family since 2012, save what her Uncle Raj had told her. The second appellant said that her family in India consisted of a sister, a brother, her parents and her paternal uncle, all of whom lived in the Punjab. They had no other family members, and none outside the Punjab. There was no re-examination.



18. In answer to questions from the Tribunal, the second appellant explained further about her family. Her father had died in 2005 and her paternal uncle, who has a taxi business, is head of the family. Her brother and sister are both significantly younger than the second appellant, and were still at school when she was in India. They might have gone on to university but she could not say for certain, because of the family rift. She had heard no family news since 2012. Uncle Raj, with whom they live in the United Kingdom, is in business here: he has an off-licence.
19. The second appellant explained her educational achievements. In India, she had studied at Punjab University Patiala, and in 5 years of study had obtained a Bachelor of Law and then an LLB. That was where she met the first appellant, who was a year behind her, on the same course. The second appellant finished her law studies in 2010 and then took a diploma in Forensic Science while the first appellant caught up with her and also completed her 5-year Bachelor of Law/LLB qualification.
20. In June or July 2011 they had both completed their degrees and were ready to move on with their adult lives together. While at university, the two women had lived together in student hostel and rented accommodation: it was not unusual for young women to do so and they were not 'out' to their parents or the community. They now decided to come to the United Kingdom and live together here, where they could do so openly. They had not returned to India since then.
21. In the United Kingdom, she had studied for a Strategic Management Diploma from SciTech, Park Royal. She had completed it in January 2012, but had been unable to obtain the certificate she had earned because her parents would not pay the remaining fees. Her leave to remain expired on 24 June 2012. The appellants were not working, as they had no permission to do so. The first appellant's uncle, Uncle Raj, provided for them.
22. The second appellant accepted that, contrary to the assertion in her witness statement, she was highly qualified and would be able to get a decent job in India with her qualifications. She said that if employers were aware that she was lesbian, she would not be employed by them.
23. There were no further questions from either of the representatives.

## APPENDIX B

### SUMMARY OF COUNTRY BACKGROUND EVIDENCE

#### A: Professor Shahani's evidence

1. Professor Shahani is an Associate Professor at the Department of Critical Culture, Gender and Race Studies Graduate Program (formerly the Women's Studies Department) at Washington State University. He has been associated with that Department, first as an Assistant Professor, and later as an Associate Professor, since 2006. His academic career began with a BA, later an MA, in English from the University of Bombay, in 1997-1999, followed by an MA in English at the University of Florida in 2001 on the subject 'Queering India: Towards a Post-Colonial Queer Methodology', and finally, a PhD from the same university in Spring 2006 on the subject 'Queer Pedagogy and American Studies: a Reparative Re-thinking'. He has published and lectured extensively on what he described as 'queer politics and sexuality in India' and in particular, on reparative return and reparative performance.
2. Professor Shahani returns regularly to Mumbai every summer and his evidence is based on the He relied in his report on critical scholarship on LGBTI identities in India and recent historical developments, and on his personal interactions with LGBTI communities and activists on the ground.
3. The core of Professor Shahani's argument is that the majority of women in India with same-sex desires are forced into heterosexual marriages, and into secrecy. For those who resist, physical threats result in a form of domestic imprisonment, particularly in smaller towns, where moral character is vital and most families know one another. Cosmopolitan centres such as Mumbai, Delhi and Bangalore allow more economic independence and an opportunity to break away from family constraints, but those opportunities are more easily available to men than women, due to the lower status of women in India. In Professor Shahani's experience, women who live without a husband, family, or identifiable origin, even in cities, attract suspicion of being 'loose women' or prostitutes and, apart from students living in student hostels, women living together is quite uncommon.
4. Professor Shahani recognises that section 377 and other Indian Penal Code (IPC) provisions do not expressly reference lesbianism; the risk to lesbians in her opinion is from non-state actors, using the legislation as a threat to enforce certain conduct, rather than using it through the Courts in the normal way. Section 368, which deals with kidnapping, is also used to force younger women to return home after leaving to join lesbian groups and enter into lesbian relationships. Mere cohabitation with another woman could be seen as evidence of sexual activity. Professor Shahani noted that there had been no prosecutions whatsoever under either section 368 or 377 of the IPC and that the right to privacy is guaranteed by Article 21 of the Indian Constitution.
5. Examples were given of the persecutory acts upon which Professor Shahani relied:
  - (a) In or before 1993, two police women named Urmilla and Leela went through a form of marriage at their local Hindu temple in Madhya Pradesh. They were interrogated, when they went back to work, arrested and secluded, and forced to sign documents they did not comprehend. They were then dismissed from the police force, on 'policy' grounds for 'violating the force's discipline' and bringing it into disrepute.
  - (b) In April 1990, *India Today* reported the case of Lila and Tarunlata, who eloped and married. Lila's father had found out what was occurring between them and begun beating Lila. Tarunlata had undergone gender reassignment surgery and was identifying as a male, Tarunkumar. Lila's father went to the Gujarat High Court to annul the marriage, and

prevent any dowry being payable. The events the subject of that report had occurred between 1985-1987 and although the couple lost the case, they thereafter successfully lived as a couple in the home of Tarunkumar, albeit without benefit of any dowry from Lila to Tarunkumar's family.

- (c) In April 1993, in a small town in the Nagpur area, two women who had grown up in neighbouring villages eloped and tried to marry in a civil ceremony. The registrar told their parents, who broke up the couple and prevented the relationship continuing.
  - (d) In 1994, in a comment reported by Pioneer on 1 November 1994, Vimla Faroqui of the National Federation of Indian Women, described as the 'women's wing of the leftist party' is said to have described a move towards LGBTI and, in particular, lesbian rights as likely to start a move of sexual permissiveness among urban youth who have become vulnerable to the vulgarity of Western culture and as symptomatic of 'the moral decadence of the West'.
  - (e) In 2004, four AIDS activists working for the Naz Foundation and Bharosa Trust were arrested at their offices following police raids, charged with intention to commit sodomy and possession of obscene materials. They were detained for 6 weeks before being released on bail.
  - (f) On or before 2011, two women in Jalgaon, Mumbai, were forced into heterosexual marriages although they were each other's lovers. Their attempts to approach the police resulted in their being detained and examined by tests for fingerprints inside the vagina, to prove lesbian sexual activity. That was a test sometimes used to establish rape, and this was the only documented example of its being used on lesbians. The appellants were also subjected to verbal abuse by the police. (Sourced to 'Queer Women and the Law in India' by Thangarajah and Arasu, published in *Law Like Love: Queer perspectives on love*, Yoda Press, India [2011])
  - (g) In 2013, a 22 year old girl from Shoranur left home with her lesbian girlfriend, to join a lesbian organisation, Sangama, in Bangalore. The father petitioned the Kerala High Court and it issued a notice to the State government and police authorities, 'seeking their stance' (sourced to a report in the Times of India on July 23 2013 entitled 'Girl 'abducted' by lesbian group: Dad in High Court'. In response to questions from the Tribunal, Professor Shahani said that she had sourced this information from a documentation centre and had no further detail to offer as to the circumstances of this case. She no longer had the internet link available.
6. The report describes actions of this kind as 'privatised persecution', controlled by the invocation of section 377. However, as the author recognises, since the Naz Foundation case in December 2013, the visibility of LGBTI issues had increased significantly, and several LGBTI organisations emerged, including Caleri, Lawyers Collective, Organised Lesbian Alliance for Visibility and Action (OLAVA), Sakhi, and Voices Against 377. The organisations were all precariously funded and led, but assisted lesbian couples and provided refuge to women whose families 'had not tolerated their decision to build a life with other women'.
7. A separate issue was that lesbian couples in India were not yet allowed to adopt children, although single women could and did do so, and Indian law recognised single parenthood. There were age restrictions: children could not be adopted by women under 30 or over 50, and children aged between 0-3 years could not be adopted by women over 45. Proof of financial and mental stability were required, and if the adopting woman was one of a couple, no parental rights accrued to the other partner. Amendments to the Juvenile Justice (Care and Protection of Children) Act, 2000 proposed in 2014 included the potential to bar adoption by same-sex couples but there was no

confirmation whether the Indian Parliament had in fact approved such an amendment, or in what terms.

8. The position taken by Indian politicians was contradictory: some refused to contemplate lesbians as Indians and asserted that the whole issue was one of Westernisation, on which India could not compromise. In a live interview on India's IBN Live, on 14 December 2013, just days after the *Naz Foundation* decision in the Supreme Court, a BJP spokesman said that homosexuality was unnatural and that the party supported section 377. Members of the BJP's ideological fount, Rashtriya Swayamsevak Sangh (RSS), expressed a firm anti-LGBTI stance in a report entitled 'No compromise with live-ins or gay rights, moral values supreme' published by the Indian Express on March 8 2014, before the election of BJP Prime Minister Narendra Modi later in the year. However, some BJP leaders such as Arun Jaitley and Harsh Vardhan spoke publicly in favour of decriminalising homosexuality.
9. Professor Shahani's opinion is that lesbianism has not been criminalised 'in the strict sense of the term' but that the BJP's insistence on the maintenance of traditional family structures has devastating impacts on the lives of lesbian women.
10. On the internet news source, FourTwoNine, on April 18 2014, the increasing debate about homosexuality and LGBTI rights was shown to have become politically significant. Professor Shahani considered that debate and national conversation was a step in the right direction but any narrative of triumphant progress in LGBTI rights should be tempered, especially for middle-class and lower-class women who 'lacked the material or cultural capital to join activist groups or seek out the burgeoning underground community space for LGBT people'. Those possessing 'a certain kind of upward class mobility and cultural capital' were better able to detach themselves from the sacrosanct familial ties, but separation from family structures could have 'devastatingly oppressive implications'. He considered Vimla Farouqui's 1994 reported comments at 5(d) above to be symptomatic of the economic disempowerment at the root of the difficulty for lesbian women in India to separate themselves from their family unit.
11. She considered that economic dependence and the imperative to procreate made it extremely difficult for 'most middle-class and poor women...to create the material and social conditions that allow them to organise and sustain a life around erotic and personal attractions'. Many thwarted lesbian couples committed suicide, due to 'a profound sense of isolation and alienation'.
12. Professor Shahani considered that the social improvements and the new cultural spaces for LGBTI individuals created in the previous decade (2005-2015) had benefited principally 'middle class' non-heterosexual men.

"India, of course, is a highly diverse country that is mediated by class, linguistic and religious lines. While homophobia might manifest itself in different formulations and look different depending on these multiple vectors of identity, prejudice against same-sex cuts across these different modalities"

13. Prof Shahani concluded his report with the following summary of his concerns about the position of lesbians in India:

"There are cosmopolitan urban centres such as Mumbai and Delhi where lesbian couples can live in open relationships but, as pointed out in my report, this depends on class status and the ability to live financially independent lives. It would be quite naïve to suggest that [the appellants] would have little or no problems even in big cities if they live openly as lesbians. They will certainly face much pressure from their respective families and the question of safety will depend on their ability to forge a life as separate from their families as possible - both in familial and economic terms. In considering the case of [these appellants], it is important not simply to think about their ability to survive in India. We also need to ask whether returning to

India can offer them more affirmative possibilities of citizenship in which they can have access to independent, to adopt children if desired, to have custody, to marry. At this moment in time, in my opinion, these possibilities unfortunately do not seem realistic.”

### Oral evidence

14. We had the advantage of hearing oral evidence, taken by Skype on a voice-only basis, at the hearing. Professor Shahani confirmed that he was jointly instructed by both parties.
15. In cross-examination, Mr Nath asked Professor Shahani to explain the difference for lesbians between urban and rural environments. Professor Shahani said that that in a small town, for example in North Punjab, where he understood the appellants to originate, it was very hard to live as a lesbian woman. Women were in general more dependent on the family unit, while non-heterosexual men had more economic autonomy. The institution of marriage was so ingrained and so generally enforced in India, that if lesbian women remained involved with their families, they would have to grapple with social enforcement mechanisms.
16. The situation might be different for lesbians whose families had formally or informally renounced them, leaving them free to relocate and try to survive economically in a metropolis such as Mumbai, Bangalore, or Delhi. In the metropolis cities, there were many LGBTI non-governmental organisations to provide support for those living there and Professor Shahani considered that it was possible for lesbians to live openly as such, if they were sufficiently economically mobile. Women did work in the cities, but they experienced gender-based discrimination at work. In the case of these appellants, their success in living in a metropolis without family support would depend what jobs they could get. He considered that it would be important to know whether they would be able to adopt children, either as single women or as a couple, or to become parents by in-vitro fertilisation (IVF).
17. Professor Shahani noted that since the *Naz Foundation* Supreme Court judgment in December 2013, there had been increased media coverage and public dialogue in India as to LGBTI rights. Problems nevertheless remained. Lesbians were more visible publicly now, but they still experienced discrimination. He was aware of a number of cases of historic police harassment of lesbians but the Indian Supreme Court Act of 2013 prohibited police misconduct, and Professor Shahani was unaware of any police misconduct thereafter.
18. On the evidence before the Upper Tribunal, Professor Shahani conceded that there was no overall evidence of a pattern of police misconduct against lesbian women. He considered, however, that the law, and section 377 of the IPC in particular, was used and mobilised symbolically by non-state actors to threaten and oppress sexual minorities.
19. In answer to re-examination questions from Ms Hashmi, Professor Shahani repeated that there was great emphasis in India on the role of the family. He noted an example of male university professors who self-identified as LGBTI, or dropped LGBTI (particularly male homosexual) literature, and who had been harassed and/or blackmailed by the police.
20. Asked whether social status, class or economic independence had a bearing on workplace and/or police harassment, Professor Shahani said that it was a difficult question to answer. Certainly, a lower class person with an accent might be more at risk, but that did not mean there was no risk to a middle-class person: a middle-class person might be able to mediate the situation but would not be exempt. Even in urban centres, there remained some risk of harassment of women identified as living in a lesbian relationship.
21. In answer to questions from Upper Tribunal Judge Southern as to the risk, if any, if the appellants returned but did not tell their families they had done so, Professor Shahani said that anonymity was very difficult in India because of the breadth of social networks. It was normal in India to have

a large network of extended family members right across the country: for women who had an extensive pan-Indian family network of that type, there was a risk that their return to a metropolis could be discovered by chance and relayed to family members who wished to harm or confine them.

22. Professor Shahani said that his instructions had not included any information as to the size of the appellants' family networks or whether they extended across India, nor their social class or educational achievements. He accepted that his evidence that these appellants' families would be spread across India and could find and pursue them in a metropolis outside the Punjab was no more than a 'hypothetical conjecture'. He had approached his report on the basis that these appellants were working class women from a rural village or small town: he accepted that his evidence as to the risk to them was hypothetical.
23. Professor Shahani's evidence was that generally, educated 'middle class' women had greater access to the public sphere. Asked whether his assessment of the risk to these appellants would be different if they were educated middle-class women, Professor Shahani insisted that it would not make much difference. He had heard of several instances where access to upward mobility was severely hampered, and separation from their families would remain a serious impediment.
24. Judge Southern asked Professor Shahani about the examples he had provided of harassment, none of which were recent, or post-*Naz Foundation*. Judge Southern asked whether Professor Shahani was aware of any more up to date examples. Professor Shahani said no: the majority of the information to which he had access was in the report and he knew of no examples than those cited.
25. As regards the LGBTI NGOs listed in his report, Professor Shahani said that the biggest challenge to their continued existence was not the Indian state, or local prejudice, but lack of funding. If they had funding, they were able to continue their work. The list of NGOs which the witness had provided was incomplete: when asked to comment, he stated that his instructions had not included providing an exhaustive list, and that these were simply the groups with which he was personally familiar.
26. Judge Southern then asked Professor Shahani to clarify a reference in his report to gains for LGBTI individuals in India, during the period 2005-2015, in respect of which Professor Shahani in his report advised caution. Professor Shahani responded that in the past, sexual citizenship had been 'extremely taboo' and there had been no public discussion about it. Now, it was a question of increased visibility; there were conversations on the news about LGBTI rights and the BJP Modi government had been speaking after the election about decriminalising homosexuality.
27. There had been a Pride March in Mumbai in December 2013 in response to the *Naz Foundation* decision, but Professor Shahani's understanding was that such a March was not an annual event as occurred in the United States. Mumbai also had a gay club, but it was unofficial and not advertised on that basis. Non-heterosexual men met there, and there was a circuit for non-heterosexual men in Delhi also. There was always a possibility that the police could turn up: Professor Shahani was not in the "gay club" scene so he could not say how often such raids occurred.
28. One effect of the *Naz Foundation* case was that it had become more difficult for the Foundation to continue its HIV activism and to distribute safe sex materials. There was now a certain hesitancy in creating spaces for open dialogue on safe sex education. The effects of the decision were symbolic rather than tangible: LGBTI sexuality remained taboo, and a sexual stigma now attached to expressions of sexuality that certain activists thought were changing. The witness was unable to elaborate on any of the examples he had provided in his report: the only available information was that given to the media by the police. Other than that, there was little or no documentation of instances where LGBTI people experienced harassment, or worse.

29. There was no re-examination.

### OTHER COUNTRY EVIDENCE

**B: “The nature of violence faced by lesbian women in India: A study conducted by Bina Fernandez and Gomathy N.B”** (Research Centre on Violence Against Women, Tata Institute of Social Sciences, Mumbai 2003) (“the Fernandez-Gomathy case study”)

30. In 2003, the Research Centre on Violence against Women, Tata Institute of Social Sciences, in Mumbai, published a paper, entitled “The nature of violence faced by lesbian women in India” (the Fernandez-Gomathy report). The researchers, who described themselves as lesbians and bisexual activists, were members of Street Sangam, a collective for women who love women, and had been in contact with a network of lesbian organisations in Pune, Delhi and Calcutta in order to obtain the information for their research.
31. The Fernandez-Gomathy report’s research material comprised several types of information: semi structured interviews of 22 mental health practitioners as to their knowledge and intervention with 70 of their lesbian clients; quantitative data from a structured questionnaire completed by 50 women identified through city-based lesbian networks; and in-depth personal narratives for 8 women, all of whom were economically independent. The structured questionnaire group and the in-depth personal narratives group comprised economically independent, city-based lesbian women. The lesbian women who responded to these parts of the study were not rural or small town lesbians, illiterate or impoverished lesbians, nor did they have the reduced mobility of other marginalised groups of women. They were all urban, literate and English-speaking.
32. At section 1.4, the Fernandez-Gomathy report stated that homosexual behaviour has ‘generally received tacit acceptance in a predominantly gender-segregated society’. LGBTI organisations, and human rights organisations, are said to be actively campaigning for the decriminalisation of homosexuality by the repeal or modification of section 377 so that it provides legal protection against *coercive* sexual behaviour regardless of gender, but ‘takes the state out of the bedrooms’ of adults involved in *consensual* sexual acts.
33. The authors of the Fernandez-Gomathy report adopted a very extensive definition of ‘violence’ (section 7.4.8), comprising physical violence, emotional reactions, lost relationships with family and friends, public stigma and ridicule, social censure, job loss, home loss and so on. The scope of that definition is too wide to equate to the natural meaning of the word ‘violence’, nor is it necessarily probative of persecution or serious harm.
34. The Fernandez-Gomathy data must therefore be treated with caution where statistics for ‘violence’ are advanced. The authors noted that all of the women in the sample were ‘persistent in their resistance’ to ‘violence’ as the report defined it, and in their attempts to seek support and validation. None of them were seeking to change their desire for women.
35. In the mental health professional sample, mental health professionals interviewed typically had 1-5 lesbian clients. 21% of the total sample of clients were depressed; 7% were seeking gender reassignment surgery, mainly to enable them to live as men and have a female partner without difficulty. All the mental health professionals were aware that homosexuality was no longer considered a mental or sexual disorder and almost all of them accepted that it was ‘normal’. Those who had reservations had the longest service (over 20 years) and the researchers considered that they might simply be old fashioned. Four of them considered that there needed to be greater awareness and acceptance of homosexuality in Indian society. There was comparatively less physical abuse reported, but high levels of what the authors describe as ‘emotional violence’: silent shame, social stigma, and ostracism. A couple of the mental health professionals had facilitated acceptance through family counselling to help parents accept their daughter’s lesbian identity.

36. The responders to the quantitative questionnaire were 50 urban, highly educated and employed women who were in contact with the city-based lesbian social networks. In many cases, their friends had been told of their orientation, and often also their mothers, both of which groups were supportive. Fathers were told less often and only one father was described as supportive. 11 women had told very few people (3 on average) and experienced little 'violence'; of those who had experienced it, they averaged disclosure to 6 people. Physical and sexual abuse was accompanied by emotional abuse: acts of denial, silent hostility and neglect, control over resources. Open confrontation such as deprivation, eviction and imprisonment was avoided and physical battering relatively rare. 11 women were told by family members that they were mentally ill, but only 5 were forced to seek treatment. Sexual violence and battering was mostly in the context of male. The evidence showed that violence and/or abuse would continue until the woman either denied their sexual identity or broke their family links and left home, but in 3 cases, abuse ceased because the woman's family accepted her orientation.
37. The 8 individual narratives included as a major factor silent hostility and ignoring the expression of a woman's lesbian identity, particularly where the person in question did not wish to sever ties with her due to economic or emotional dependence on the lesbian woman, or where the person was unable to influence the lesbian relative or friend. Silence in the family and denial of the person's sexuality was the main reaction, causing internal conflicts, loss of self-esteem, and loss of relationships. The research was not designed to probe suicidal ideation and the case study is not authoritative on that, one way or the other. In four of the 8 narratives, the police became involved at the family's behest, attempting to separate the woman from her partner by public ridicule, threats, taunts, and even fabricating a section 377 case, although the proscription therein is clearly seen as inapplicable to lesbians.
38. 50% of the women who were in employment were self-employed and this, the authors considered, might support a correlation between economic autonomy and sexual autonomy.
39. The case study gives two examples of lesbian couple suicides, one of two young college girls in 1998, and the second a young couple who died together in November 2000. It notes that section 377 of the IPC criminalises anal penetration not lesbian sexual orientation. It notes that there is ostracism and discrimination in society, and states that 'there have been instances of lesbians being thrown out of their rental accommodation, or out of their jobs, when landlords or employers have found out about their sexual orientation'. No indication of the scale of that issue is provided.
40. The 7 women who wanted gender reassignment surgery were denied it: they did not meet the Gender Identity Disorder criteria.

### **Press reports**

41. The oldest report in the bundle is from the Times of India on January 11 2006, entitled "Girl Attempts Suicide over Lesbian Marriage". Two girls age 18 and 20 had been 'living as husband and wife' for the last 5 years. They married at a Shiva temple in Kankerkhera and the 'groom' brought the 'bride' to live in her home in Jawarphuri. Her family did not accept the 'bride' and sent her back to her own family. The 'groom' took insecticide and said from her nursing home that the couple had made a choice and would continue to live together. The local magistrate ordered a police probe into the incident, but no charges had yet been filed: legal opinion was being sought. VHP and Shiv Sena activists demonstrated against lesbian marriage in front of the office of the Deputy Commissioner of Police.
42. On March 8 2009, the Times of India reported on 13 cases of lesbian suicide in the city of Hyderabad, information on which had been sent to the city's Women Development and Child Welfare Department in February 2009, without sparking any investigation. The article is based on



a report by The Lesbian Society, and speaks of 'continuous ostracism and torture' of the women concerned. The founding Director of Shaheen, Jameela Nishat, said that most of Hyderabad's women's organisations would 'stand for the lesbian cause this International Women's Day'.

43. On 2 July 2009, a BBC News report reflected the decision of the Delhi High Court, striking down as unconstitutional section 377 of the IPC.
44. On 24 January 2011, two teenage girls in a village in Boral took poison and died together: one had cut her hair short and dressed as a man. They were very close, even outside the home, eating their lunch together from the same plate, and displaying their affections very publicly. They had the support of their families, who got on cordially together despite criticism from the neighbours for the girls' 'unusual behaviour': the families did reprimand them for public displays of affection. The girls became uncertain of their future together after watching a 2010 film, "Aar Ekti Premer Golpo" (Just Another Love Story), dealing with the uncertainty of a LGBTI relationship. The film was the first on homosexuality to be shot after the decision of the Delhi High Court on section 377 and dealt with the lifestyle and problems of a Delhi-based transgender filmmaker and his bisexual lover.
45. On 19 February 2011, the Indo-Asian News Service reported that a lesbian couple, ostracised in Mumbai, fled to Delhi 'to live a life of their own free will'. An NGO member alleged that the Mumbai police turned up in Delhi, following an allegation of theft (stealing valuables and ornaments) made against one of the women by a family member. The Mumbai police attended their home with gas-cutters and hammers, to break down the door, and threatened to arrest an NGO member for insulting the police, although on her account, they were only trying to stop the Mumbai police breaking down the door. The Delhi Police intervened, after being alerted by an NGO, and the woman in question agreed to attend a local Delhi police station the next day. The Delhi Police said that they were present to see that no untoward incident occurred.
46. Another report of the same incident appeared in the Times of India the following day. The NGO is identified as Sangini, and the report adds that the couple appeared in New Delhi before the National Commission for Women (NCW), the apex national level organization of India with the mandate of protecting and promoting the interests of women<sup>2</sup>. They made statements saying they did not wish to return and desired to live their life as adults.
47. One of them, before leaving Mumbai, claimed to have registered an affidavit to the effect that she was leaving the house of her own free will and that nobody could stop her from leading her life on her own terms. That was the young woman whose family had registered a complaint of robbery. The director of the Naz Foundation, Anjali Gopalan, was also present.
48. On 16 May 2012, a police post in Ambala received a request for protection by a lesbian couple who had married against their families' wishes. The couple were educated up to year 10 and intended to adopt a child and live 'like a normal couple', according to an anonymous police officer. The police sent them to the only domestic violence shelter and care centre in Haryana. The matter was before the civil Court for a decision as to whether the families should be made to accept their daughters' sexuality.
49. On 23 May 2012, Btanna Leach of Gay Star News reported that a lesbian couple from a village in the Punjab, in northern India, who had been living together for the previous month in a police residence, were ejected from their home village and disinherited by their parents. One of the parents said, "My daughter is out of control. We don't have anything to do with her and have

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<sup>2</sup> The National Commission for Women was set up as a statutory body in January 1992 under the National Commission for Women Act, 1990 to review the constitutional and legal safeguards for women; recommend remedial legislative measures; facilitate redress of grievances and advise the national Indian government on all policy matters affecting women.

decided to disinherit her.” The Punjab and Haryana High Court ordered the police to protect the couple, one of whom was a police officer. Another report from Punjab Newslines reflects the same account.

50. On June 4 2012, a report entitled *Violence against Women: the State of Punjab – Part V* by Gunisha Kaur, a human rights activist and a physician at Cornell University, New York City, noted severe underreporting of violence against women in that state, fuelled by rising levels of drug and alcohol abuse and a sharp decline in the role of women in Punjabi society and in their earning potential. Sikh principles called for gender equality and no dowry, but Indian cultural norms had overridden them: extortion of money by torturing the bride continued often beyond the wedding ceremony.
51. Female foeticide and torture were serious problems, and domestic violence shelters were rare and overcrowded. The report recommended that over the longer term, the province should begin to recognise the failure of women and ‘work towards honouring and protecting our mothers, sisters, and daughters’.
52. An article dated 22 August 2012 records the murder of a young woman who married against her family wishes, and the subsequent release of her assailant after payment of a bribe. Another report (which is not dated) entitled ‘Honour Killing Cases Surge in Number’ records details of honour killings of a number of women who entered into relationships with men against their families’ wishes. There is no lesbian element in either account.
53. On 15 December 2013, immediately after the decision by the Indian Supreme Court in the *Naz Foundation* case, the opposition Bharatiya Janata Party (BJP) supported the decision, as reported in IBN Live. The report notes that protests were planned in Delhi against the judgment, and that the government was ‘mulling at all the options’ including filing a review petition against the judgments or taking up the matter in the Indian Parliament. The BJP declared its intention to oppose any Bill to legalise homosexuality. In another article in the Times of India on the same day, its leader, Rajnath Singh, said this:

““Gay sex is not natural and we cannot support something which is unnatural,” said BJP chief Rajnath Singh, putting an end to his party’s equivocation over the issue which had held out the hope that the principal opposition may not hinder government’s plan to organise relief for the LGBT community in the aftermath of [the Supreme Court’s] controversial order last Wednesday. Elaborating on his opposition to the government’s plan to render the SC verdict ineffective, Singh said, “Usually we would not take a stand against SC verdicts and so we don’t want to oppose the SC verdict in this instance either. It is for the government to come up with a proposal in case they want to challenge the order.””

54. On 8 March 2014, writing in the Indian Express, T A Johnson recorded that during its annual report of activities in 2013-2014, the Rashtriya Swayamsevak Sangh (RSS), the ideological fount of the BJP, had emphasised that it would not ‘compromise moral values, social system and tradition in the name of individual freedoms’, when it came to live-in relationships and homosexuality. The General Secretary of the RSS, Suresh Bhaiyyaji Joshi said this:

““...in the past year, two issues have come up for discussion before society – live-in relationships and homosexuality – which led to arguments, both in favour and against, on according legal sanction to such relationships. Before extending legality to such things, we have to keep in mind the deleterious effect it will have upon our social life. Law accords security to the individual. However, a society that goes by its traditions, conventions, culture and life-values, cannot be secured through law. Only guidance based on dharmic and social thought can ensure security to social life,” the General Secretary said.”

55. On 23 April 2014, Andrew Potts, writing for Gay Star News, recorded that an Indian non-heterosexual man had succeeded in an asylum claim before the Refugee Review Tribunal in Australia. The man had last been in India in 2011, when his father locked him in his room, an Islamic cleric threatened reprisals if he did not change his sexuality, and the man’s own cousins

held a knife to his throat and demanded he stop being 'gay'. The Australian Judge in his decision stated that he accepted "that [the applicant] would not be able to live openly as a homosexual in India at any location, as if he did this would result in ostracism and probably further significant harm". We have not seen the original decision of the RRT which underlies the report.

56. On 1 January 2015, a report in the Deccan Herald by Shemin Joy, writing from New Delhi, said that the government had begun collecting data on arrests under section 377, on a state by state basis. Not all states had made returns: 778 cases had been registered nationally, with 587 arrests in the 10 months to October 2014. The highest figure was for Delhi, with 140 cases and 110 arrests up to September 2014; Uttar Pradesh was in second place, with 127 cases and 36 arrests up to June 2014. Haryana state had 99 cases and 89 arrests; Maharashtra had 98 cases and 100 arrests. Kerala (69 cases and 64 arrests) and Madhya Pradesh (64 cases and 48 arrests) also had relatively high numbers. The LGBTI community was seeking repeal of section 377 but the signals from the Minister of State for Home, Haribhai Parathibhai Chaudhary, were discouraging: there was 'no separate proposal to repeal or amend section 377'.
57. On 13 January 2015, BBC News reported outrage in India after a the Goan Sports and Youth Minister, Ramesh Tawadkhar, suggested that the Goan State Government proposed to offer treatment centres to 'cure' LGBTI people, in line with that available for alcoholics and drug users. Many Indians took to social networking sites to express shock. Ban Ki-moon, Secretary-General of the United Nations, was visiting Delhi on that day and spoke out against criminalisation of homosexuality, even where such provisions were unenforced, because 'these laws breed intolerance'.
58. On June 10 2013, the Council on Foreign Relations in a document entitled *Governance in India: women's rights*, reflected the gender discrimination and violence in India, which ranks 84<sup>th</sup> out of 113 countries on the Economist's ranking of economic opportunity for women. The article does not deal specifically with the position of lesbians.
59. On July 23 2013, the Times of India reported an action in the Kerala High Court by a father, seeking to restrain the removal by Shambala, a LGBTI organisation, of a 23 year old girl to be with a lesbian partner. The father argued that the police had failed to rescue the girl from illegal detention and that although the girl was not married, she could not marry a woman, as marriage between women was illegal in India. The girl's lesbian partner was not legally entitled to the control and custody of his day. The Court ordered that notices be sent to the state government and the police, seeking their stance.