ASYLUM AND IMMIGRATION TRIBUNAL

LD (Article 14; same-sex relationships) Brazil [2006] UKIAT 00075

THE IMMIGRATION ACTS

Heard at: Field House Date of Hearing: 4 July 2006

Date of promulgation: 10 September 2006

Before:

Senior Immigration Judge Chalkley
Senior Immigration Judge Grubb
Senior Immigration Judge Spencer

Between

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms L Dubinsky, Counsel instructed Wilson & Co, Solicitors
For the Respondent: Ms S Vidyadharan, Home Office Presenting Officer

Prior to the coming into force of the Civil Partnership Act 2004, it was not a breach of art 14 of the ECHR amounting to unlawful discrimination on the ground of sexual orientation to refuse to grant leave to a person in a same-sex relationship who could not satisfy the requirements of the Immigration Rules in circumstances where a party to a marriage would be granted leave under the Rules. The differential treatment was, at that time, objectively justified. (N.B. Because of the provisions of the Civil Partnership Act 2004 this is an example of the rare case where leave to remain is an essential requirement for the development of family life under art 8.)

DETERMINATION AND REASONS

1. This is a reconsideration on the application of the Secretary of State of a decision of Immigration Judge Martineau promulgated on 2 June 2005 who allowed the appellant's appeal against a decision of the Secretary

of State taken on 4 April 2005 refusing the appellant's application to extend his leave to remain in the United Kingdom outside the Immigration Rules.

2. The appeal raises a difficult legal issue concerning the application of the prohibition against discrimination found in art 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 ("the ECHR") where leave to remain is refused to a person in a same-sex relationship prior to the coming into force of the Civil Partnership Act 2004.

Background

3. The facts are not in dispute and can be stated briefly. The appellant is a citizen of Brazil who was born on 24 August 1979 and so is 25 years old. He came to the United Kingdom as a visitor on 21 June 1999. Thereafter, he was granted leave to remain as a student on a number of occasions to study English until 31st December 2002. The appellant is gay and during this time he formed a relationship with a male German citizen working in the UK. They lived together and on 3 March 2003, the appellant was granted further leave to remain for 2 years as his unmarried partner. However, after a year or so the relationship broke down and they separated. The appellant moved into a house in London with friends. Whilst there, he formed a friendship with a male British citizen whom he had briefly met in Brazil in 2002. Over time their relationship developed and they became close. In the summer of 2004, the appellant's partner moved to Brighton and this only served to crystallise for them the strength of their relationship. In January 2005 they began living together as a couple in Brighton.

4. On 2 March 2005 – the day before his leave ran out - the appellant applied for further leave to remain outside the Immigration Rules on the basis of that relationship. It was not contended that the appellant could satisfy the Immigration Rules. Paragraph 295D of HC 395 permits the grant of leave to remain to an unmarried partner, including one in a same-sex relationship, where the couple have been "living together in a relationship akin to marriage" for 2 years. However, the appellant had not been in the relationship for a sufficient period of time to meet that requirement. In effect, the appellant asked the Secretary of State to waive the 2 year cohabitation provision in para 295D. On 4 April 2005, the Secretary of State refused his application for leave to remain. The appellant appealed. The immigration judge held that the appellant's removal would not be disproportionate and so would not be a breach of his right to private and family life protected by art 8 of the ECHR. However, he allowed the appeal because the Secretary of State's decision was unlawful by virtue of art 14 (read with art 8) on the ground that it discriminated against the appellant on the basis of his sexual orientation. The immigration judge noted that had the appellant been heterosexual and married he would not have been required to satisfy

the cohabitation period. That difference in treatment could no longer be justified given the change in social policy and the recognition of civil partnerships between same-sex couples in the Civil Partnership Act 2004. On the application of the Secretary of State, reconsideration was ordered by a Senior Immigration Judge on 17 June 2005.

5. One final matter should be noted. At the time of the application, it was not possible for the appellant and his partner to register their relationship under the Civil Partnership Act 2004 which received the Royal assent on 18 November 2004 but which did not come into force until 5 December 2005. It was (and is) their intention to do so as soon as they are permitted by the Secretary of State whose permission, we understand, has not been forthcoming because of the appellant's immigration status.

Adjournment application

6. At the outset of the hearing, we raised the issue of JM* Liberia [2006] UKIAT 00009 in which the Tribunal held that in a variation appeal under s 82(2)(d) of the Nationality, Immigration and Asylum Act 2002 an appellant could not raise human rights grounds related to his removal from the UK, namely he could not rely on the ground in s 84(1)(g) of the 2002 Act. Ms Dubinsky informed us that the Court of Appeal had given permission to appeal on this issue in JM on 2nd May. She submitted that the appellant's human rights case was seriously disadvantaged by the decision in JM and it would be appropriate to await the Court of Appeal's decision. The appellant's case was, in part, that his removal from the UK would interfere with his right to private and family life under Art 8 and would be disproportionate. She asked us to adjourn the case pending their decision. Ms Vidyadharan, who represented the Secretary of State, submitted that we were bound by the starred decision of JM and invited us to continue with the hearing.

7. We concluded that it was not appropriate to adjourn pending the Court of Appeal's decision in JM. We decided we were bound by JM as a starred determination of the Tribunal and should apply it. That does not necessarily mean, as Ms Vidyadharan submitted, that the reconsideration should succeed and the appeal be dismissed. It is open to the appellant to argue that his human rights were breached by the Secretary of State's decision to refuse to extend his leave without regard being had to the effect of any future removal, in other words he may rely on the ground in s 84(1)(e) of the 2002 Act "that the decision is unlawful under section 6 of the Human Rights Act 1998". Whilst Ms Dubinsky understandably reserved her position on the JM issue (paras 15-17 of appellant's skeleton), the hearing before us proceeded upon that basis.

The applicable law

8. It is convenient at this point to set out the relevant legal provisions.

Immigration rules

9. We begin with the Immigration Rules. Paragraphs 295D-E of HC 395 provide for the grant of leave to remain to unmarried couples for a probationary period of 2 years. Previously, a concession operated outside the Rules for unmarried couples. These paragraphs came into effect on 2 October 2000 and (with minor subsequent amendments) are in the following terms:

> **"Requirements for leave to remain as the unmarried partner of a person present and settled in the United Kingdom**
>
> 295D. The requirements to be met by a person seeking leave to remain as the unmarried partner of a person present and settled in the United Kingdom are that:
>
> (i) the applicant has limited leave to remain in the United Kingdom which was given in accordance with any of the provisions of these Rules; and
> (ii) any previous marriage (or similar relationship) by either partner has permanently broken down; and
> (iii) the applicant is the unmarried partner of a person who is present and settled in the United Kingdom; and
> (iv) the applicant has not remained in breach of the immigration laws; and
> (v) the parties are not involved in a consanguineous relationship with one another; and
> (vi) the parties have been living together in a relationship akin to marriage which has subsisted for two years or more; and
> (vii) the parties' relationship pre-dates any decision to deport the applicant, recommend him for deportation, give him notice under Section 6(2) of the Immigration Act 1971, or give directions for his removal under section 10 of the Immigration and Asylum Act 1999; and
> (viii) there will be adequate accommodation for the parties and any dependants without recourse to public funds in accommodation which they own or occupy exclusively; and
> (ix) the parties will be able to maintain themselves and any dependants adequately without recourse to public funds; and
> (x) the parties intend to live together permanently.
>
> **Leave to remain as the unmarried partner of a person present and settled in the United Kingdom**
>
> 295E. Leave to remain as the unmarried partner of a person present and settled in the United Kingdom may be granted for a period of 2 years in the first instance provided that the Secretary of State is satisfied that each of the requirements of paragraph 295D are met.
>
> **Refusal of leave to remain as the unmarried partner of a person present and settled in the United Kingdom**
>
> 295F. Leave to remain as the unmarried partner of a person present and settled in the United Kingdom is to be refused if the Secretary of State is not satisfied that each of the requirements of paragraph 295D is met."

10. At all relevant times for this appeal, paras 284-286 of HC 395 provided as follows for the extension of stay in the UK as a spouse:

"**Requirements for an extension of stay as the spouse of a person present and settled in the United Kingdom**

284. The requirements for an extension of stay as the spouse of a person present and settled in the United Kingdom are that:

(i) the applicant has limited leave to enter or remain in the United Kingdom which was given in accordance with any of the provisions of these Rules, other than where as a result of that leave he would not have been in the United Kingdom beyond 6 months from the date on which he was admitted to the United Kingdom on this occasion in accordance with these Rules, unless the leave in question is limited leave to enter as a fiancé; and
(ii) is married to a person present and settled in the United Kingdom; and
(iii) the parties to the marriage have met; and
(iv) the applicant has not remained in breach of the immigration laws; and
(v) the marriage has not taken place after a decision has been made to deport the applicant or he has been recommended for deportation or been given notice under Section 6(2) of the Immigration Act 1971; and
(vi) each of the parties intends to live permanently with the other as his or her spouse and the marriage is subsisting; and
(vii) there will be adequate accommodation for the parties and any dependants without recourse to public funds in accommodation which they own or occupy exclusively; and
(viii) the parties will be able to maintain themselves and any dependants adequately without recourse to public funds.

Extension of stay as the spouse of a person present and settled in the United Kingdom

285. An extension of stay as the spouse of a person present and settled in the United Kingdom may be granted for a period of 2 years in the first instance, provided the Secretary of State is satisfied that each of the requirements of paragraph 284 is met.

Refusal of extension of stay as the spouse of a person present and settled in the United Kingdom

286. An extension of stay as the spouse of a person present and settled in the United Kingdom is to be refused if the Secretary of State is not satisfied that each of the requirements of paragraph 284 is met. "

11. On 5 December 2005, the Civil Partnership Act 2004 came into force. It is not necessary for us to set out in detail the content of this legislation here. Suffice to say it enables a same-sex couple to enter into, and register, a civil partnership which, for all intents and purposes, is legally equivalent to a marriage between a heterosexual couple. It resulted in changes to the Immigration Rules brought in by HC 582 from 5 December 2005 in order to treat civil partners in precisely the same way as the Rules treat spouses. As a consequence, paras 295D-E were amended to explicitly include "same-sex partners", although they were already undoubtedly covered by the phrase "unmarried partner". More significantly in effect was the amendments to paras 284-286 to include wording to cover civil partnerships. Thereafter, registered civil partnerships and marriages were indistinguishable for immigration purposes. It is the juxtaposition of the position of heterosexual and same-sex couples prior to the amendment of para 284 which is said by

the appellant to have resulted in unlawful discrimination under art 14 (read with art 8) of the ECHR in this case. We now turn to those Convention provisions.

ECHR

12. Article 8 of the ECHR provides as follows:

> "Article 8
> *Right to respect for private and family life*
>
> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

13. And, art 14 is in the following terms:

> "Article 14
> *Prohibition of discrimination*
>
> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

14. The appellant's case is that the refusal to extend his leave to remain is a breach of art 14 (read with art 8) on the ground that it unlawfully discriminates against him on the basis of his sexual orientation. Although para 295D of the Immigration Rules provides equally for leave to be granted to unmarried heterosexual and homosexual couples after they have been in a "relationship akin to marriage" for 2 years, the Rules at the relevant time discriminated against homosexual couples by only allowing couples who were married (and therefore by definition could not be homosexual) to be granted leave to remain under para 284 of HC 395. As a result, para 284 unlawfully privileged heterosexual couples over same-sex couples. The appellant was entitled to be treated equally with heterosexual couples on a par with the requirements of para 284. Apart from not being "married", it was not suggested before us that the appellant could not satisfy the remaining substantive requirements of para 284.

Article 14

15. Before turning to consider the specific grounds upon which the Secretary of State challenges the immigration judge's decision, it will be helpful to set out the approach to cases in which art 14 is relied upon.

16. First, it is established law that art 14 does not create a free-standing right of non-discrimination. It is more limited than that in two principal respects.

17. Article 14 is limited to discrimination upon one of the "grounds" enumerated in art 14 itself "sex, race, colour" etc and, importantly, "other status". It was not questioned in this case that 'sexual orientation' was a prohibited ground of discrimination under art 14 (see, e.g. Ghaidan v Godin-Mendoza [2004] UKHL 30; [2004] 2 AC 557).

18. Further, art 14 in its own terms only precludes discrimination in the "enjoyment of the rights and freedoms set forth in this Convention". This is not to say, indeed it is trite law, that there must be a breach of one of the substantive articles of the Convention before a breach of art 14 can be established. That would make art 14 self-evidently otiose and is not required by the Strasbourg jurisprudence (see, e.g. Abdulaziz, Cabales and Balkandali v UK (1985) 7 EHHR 471 (breach of art 14 but not art 8)). Instead, the Strasbourg court requires that the facts fall within "the ambit" or "scope" of one of the Convention rights (see, e.g. Abdulaziz, Cabales and Balkandali, above at para [71] and Botta v Italy (1998) 26 EHRR 241). It is also said, alternatively, that art 14 will only be engaged when the claimant can show that the effect upon him of the alleged discrimination "constitutes one of the modalities" of the exercise of the right guaranteed (see, Petrovic v Austria (1998) 33 EHRR 307 at para [28]). It has been observed, almost by way of understatement, that these expressions are "not free from difficulty" (Ghaidan, above, *per* Lord Nicholls at para [10]) as can been seen from the exegesis of the Strasbourg jurisprudence by the House of Lords in the recent case of M v Secretary of State for Work and Pensions [2006] UKHL 11 (hereafter "M's case") – an important case for this appeal and to which we shall return later. That decision does, however, make clear that the "ambit" question in art 8 case may create particular difficulties because of its "wider and much less well-defined ambit" than many other rights protected by the ECHR (see, M, above *per* Lord Walker at para [61]).

19. It was not suggested to us in this appeal that the decision of the Secretary of State did not fall within the "ambit" of the appellant's art 8 right to respect for his private and family life. It does not seem to us that (as yet) the appellant's relationship with his partner and any effect the Secretary of State's decision may have on that falls within the concept of "family life" under art 8. As we understand the Strasbourg jurisprudence, the Court has not so far included same-sex relationships within that aspect of the right protected by art 8. That much we consider is confirmed by the House of Lords' decision in M's case itself which focuses instead upon the "private life" aspect of art 8 when considering a case of a same-sex couple (but contrast Lord Mance at para [152]). The distinction is, in truth, of little importance given that

aspects of the appellant's "private life" may be affected by the decision.

20. We are not here, of course, concerned with the appellant's removal from the UK – that is precluded by JM. Instead, we are concerned with the appellant's lack of immigration status and the implications that may have for him. For ourselves, we have considerable doubt whether an absence of immigration status can *in itself* fall within the ambit of an individual's art 8 right to respect for his private life. Outside of cases involving interference with an individual's "physical and moral integrity" – which is not in play in this case - it is the disruption to personal relationships, to personal development and to an individual's well-being which engages this aspect of art 8 (see, e.g. Pretty v UK (2002) 35 EHRR 1 at para [61]). It is the appellant's removal which would primarily threaten an interference of that sort. The mere absence of an immigration status will rarely, in our view, have sufficient impact upon or connection to the protected aspects of a person's life to fall within the ambit of art 8.

21. Ms Dubinsky, however, referred us to the Strasbourg decision in Mendizabal v France (Application No 00051431/99) decided by the Court on 17 January 2006 which, she submitted, held that status alone could engage art 8. Unfortunately, apart from a short summary, the decision is reported in French and we were unable to read it. The Court seems to have held that a 14 year delay in issuing a Spanish national living in France with a residence permit did violate art 8. Looking at the summary, it does on the face of it provide some support for Ms Dubinsky's submission.

22. We need not reach a concluded view on this matter since we are satisfied that on the facts of this case, the decision to refuse the appellant leave to remain has other consequences which bring the matter within the "ambit" of art 8 in that it affects his private life. Ms Dubinsky relied upon a number of consequences to the appellant in para 24 of her skeleton: (i) as a person without leave he would be ineligible for a Certificate of Approval to enter into a civil partnership; (ii) he would be an overstayer and liable for criminal offences; (iii) he would lose his entitlement to work – he currently works as a customer service agent at Heathrow Airport; (iv) he would have a precarious immigration status; and (v) the 'clock would stop' for the purposes of naturalisation. It seems to us that the consequences spelt out in (i), (iii) and, perhaps, (v) when taken together broadly relate to the appellant's "private life" in respect of his personal development and personal relationships and the decision of the Secretary of State does, therefore, fall within the "ambit" or scope of art 8 sufficient to engage art 14.

23. Secondly, art 14 requires proof of less favourable treatment on one of the enumerated grounds which cannot be objectively and reasonably be justified by the State (see, e.g. R (Carson) v Secretary of State for

Work and Pensions [2005] UKHL 37). The difference in treatment must pursue a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised (see, Belgium Linguistics Case (No 2) (1968) 1 EHRR 252, at paras [9] and [10]). Differential treatment on the basis of certain characteristics, for example race and gender, will rarely be acceptable. As a consequence, the courts will "carefully examine" any reasons proffered – which must be "very weighty" (Schmidt v Germany (1994) 18 EHRR 513) - to justify differential treatment on inherently 'suspect' grounds, perhaps giving less weight to the legislative or executive view of the public interest than would be the case if other discriminatory grounds are in play (Carson, *per* Lord Hoffmann at paras [15]–[16]). It is now uncontentious that discrimination on grounds of sexual orientation falls within this category (see, e.g. Carson, *per* Lord Hoffmann at para [17] and Lord Walker at para [55]; Ghaidan, *per* Lord Nicholls at para [19]). Again, it is not disputed that the appellant has been less favourably treated because of his sexual orientation because until 5 December 2005 the immigration rules, in particular para 284 of HC 395 differentiated between married couples and same-sex couples. Whether this distinction is justified is the crucial issue and we shall return to that shortly in considering Ground (3) upon which reconsideration was ordered.

24. In brief, therefore, to establish a breach of art 14 what has to be shown is that the Secretary of State's decision: (i) falls with the "ambit" of a substantive Convention right; (here that is satisfied in respect of art 8); (ii) involves discrimination against the appellant on a prohibited ground (here again that is satisfied as the differential treatment was on the ground of sexual orientation); and (iii) is not objectively justified (this is the front-line issue in this appeal and is very much disputed).

25. Having set out the proper approach to art 14, we turn now to consider the immigration judge's reasons and the specific grounds upon which reconsideration was ordered.

Immigration judge's decision

26. The immigration judge's reasons for allowing the appeal are given in paras [21] – [23] of his determination:

> "**Reasoning**
> 21. I summarise my relevant findings of fact, most of which are not contentious, as follows:
> (1) The appellant has been living with [his partner] in a relationship akin to marriage, after a significant acquaintance, since January this year.
> (2) They intend to register this relationship as a partnership under the CP Act within about a month of its planned date of commencement. I infer from the hisotry of the relationship that if they had been able to register it as a partnership by the time the appellant made this application, they would have done so.

(3) Apart from the period of cohabitation required by sub-rule (vi), all the requirements of r.295D of HC 395 are satisfied in this case.
(4) Parliament has legislated to align registered homosexual partnerships with marriage in law, and it is the British government's intention to assimilate the Immigration Rules for marriage and registered partnerships and to bring both sets of changes into force this December. The existing Immigration Rules do not require a married couple to have cohabited for two years or any particular period before a foreign spouse obtains leave to enter or remain as such.
(5) The appellant and [his partner] have at all times since February this year at latest wished to register their relationship under the Civil Partnerships Act of 2004 with a long-term mutual commitment. Had it been open to them in law, they would have done so by the time of this refusal.

22. I further hold that:
(1) If the respondent's refusal stands, there is an interference with the appellant's family and private lives. The physical separation and expense attributable respectively to the appellant's removal and their occasional reunion would be substantial; also there would be the appellant's loss of his job and the friendships that he has made here.
(2) Since it is the government's and Parliament's policy that people such as this couple should be able to register their relationship under the CP Act and live together in Britain without having cohabited for two years, the appellant's immediate admission for the purpose of continuing such a relationship is not a thing contrary to the merits of any pressing social need, or repugnant to public policy; only the bare formality of a rule that is accepted by the government to be out of date would be offended.
(3) While there is to be a delay for practical reasons in the commencement of this Act, apparently until December, there is no reason of policy for it.
(4) The differences in current British family law and the present Rules between the provisions for spouses and those for unmarried partners who intend to live in a long-term relationship, taken together, are an instance of discrimination on the grounds of sex (because as partners of the same sex the appellant and [his partner] can not marry or otherwise obtain legal recognition of their relationship) and of status (because if they were married or otherwise in a legally recognised partnership these two would not have to demonstrate any minimum period of qualifying cohabitation). In view of my findings about their relationship and common intention to register it under the new Act, it is these differences that have caused the respondent to refuse this appellant's application in such a way as to interfere with his family life.
(5) Accordingly this appellant's enjoyment of his rights under Art. 8 to respect and freedom from interference with his family life is not secured without discrimination on the forbidden grounds of sex and status. Rather it is those grounds that are responsible for the respondent's interference in the appellant's family life. As to para 4.3 of the Explanatory Statement, it is the Rules that are shown by the new Act and the DTI's publicity to be discriminatory, not the respondent's application of them.
(6) Clearly the Convention attaches importance to the status of marriage, or there would be no Art. 12. However now that Parliament has passed the Civil Partnerships Act, and given the DTI's statement of the government's policy towards people in the position of this couple, there can in Strasbourg terms be no legitimate reason or objective justification for the discrimination that I have found.
(7) I have relied on Art. 14, because if I had to decide this appeal only by reference to the current Rules and law, the appellant's decision to embark on a relationship when he did, as the law in force then was, and with the benefit of the leave that he then had, his case under Art. 8 alone would have failed. He would simply have been another person temporarily in Britain who had taken a chance and formed a relationship when the current law and rules did not permit him to remain for its long-term fulfilment. Separation for what

> would now be little more than six months would not be so severe as to be disproportionate. It is Parliament's change of the law, and the government's intended means of carrying it through in subsidiary legislation, that show the existing Rules to be wrongly discriminatory.
>
> 23. If follows that the respondent's decision under appeal infringes the appellant's right to family life under Art. 8 taken with Art. 14 of the ECHR. It was therefore unlawful under sec.6 of the Human Rights Act, and this appeal succeeds."

27. The immigration judge's decision on the substantive application of art 8 is no longer an aspect of this appeal. We say no more about it as it was not argued before us as a result of JM, other than we observe, in passing, that his conclusion in para 22(7) of his determination seems to us entirely consistent with an application of the "exceptionality" test in Huang v SSHD [2005] EWCA Civ 105.

Grounds for reconsideration

28. Reconsideration was ordered on the grounds raised by the Secretary of State. The grounds are expressed somewhat discursively. We gratefully adopt Ms Dubinsky's summary of the grounds in her skeleton argument which formed the basis of the oral argument before us: (1) the immigration judge was wrong to find that the appellant succeeded under Art 14 even though he could not succeed under Art 8; (2) the immigration judge was wrong to hold that para 295D was discriminatory as it is equally applicable to unmarried heterosexual and same-sex couples; and (3) the immigration judge was wrong to take account of legislation (Civil Partnership Act 2004) which was not yet in force. As will become clear it is Ground (3) which is central to this case and was the focus of the oral argument before us.

Grounds (1) and (2)

29. Ms Vidyadharan did not abandon these grounds at the hearing although we did not understand her to press them with any degree of conviction. She was right not to do so: there is nothing in them.

30. As to Ground (1), it is said that the immigration judge erred in finding that the appellant succeeded under art 14 (read with art 8) even though he could not succeed under art 8 itself. It remains to be decided whether he was correct to conclude that art 14 was breached at all but, as our analysis above shows, he was not in error to find such a breach merely because art 8 itself was not breached. Neither did the immigration judge approach art 14 on the basis that it created an independent right of non-discrimination which would also have been an error. Instead, he linked the discriminatory breach of art 14 with art 8 and concluded at paras 22(5) and 23 of his determination that the appeal should succeed. It is true that he related the right engaged under art 8 to the appellant's "family life" when it would have been

better to look to his "private life" under art 8. Nevertheless, that is quite immaterial to his conclusion. This ground fails.

31. As to Ground (2), this seems to suggest that the appellant claimed that para 295D was discriminatory and was, at least in part, a basis for the immigration judge's decision. Of course, as we have seen that is not the appellant's case. Paragraph 295D is not discriminatory: in its scope and application it is 'blind' to sexual orientation. It is the combined effect of that paragraph with para 284 (as it then stood) which is said to be discriminatory in favouring married (and therefore heterosexual) couples over other partnerships (and therefore same-sex couples). It is clear from his determination that the immigration judge did not misunderstand the appellant's argument and therefore did not reach his decision on a erroneous basis: see paras 3 and 21(4) and (5) of his determination.

32. There is nothing in either of these grounds and we see no material error of law in the immigration judge's decision arising from them.

Ground (3)

33. The tougher legal issue arises out of Ground (3). On behalf of the Secretary of State, Ms Vidyadharan submitted that the immigration judge erred in law when he took account of the legislative changes (including changes to the immigration rules) that were to come into effect on 5 December 2005 as a result of the Civil Partnership Act 2004. He was wrong to conclude that the differentiation between heterosexual (married couples) and same-sex couples exemplified in para 284 was not justified. In effect, the Secretary of State says that the immigration judge 'jumped the gun' and treated the law as if it were in fact in force. It was for Parliament to cater for the equivalent of marriage for same-sex couples and they had done so from 5 December 2005.

34. Ms Dubinsky provided us with a detailed and helpful skeleton argument and a further note on Carson following the hearing. She referred us to a number of Strasbourg and domestic authorities, for which we are grateful. We are also grateful for her clear and focussed oral submissions. We intend no discourtesy if we state the essence of Ms Dubinsky's detailed submissions in the following way.

35. Ms Dubinsky submitted that it was for the Secretary of State to justify the differential treatment and he had not done so, at least until the hearing through the submission made on his behalf. Further, she submitted that there was nothing inappropriate in the immigration judge taking account of a change of social policy in determining whether the differential treatment was justified. She relied on passages in R v SSHD ex parte Arman Ali [2000] INLR 89 and R (Lekstaka) v IAT and SSHD [2005] EWHC 745 (Admin) in support of this submission (see

paras 41 and 42 of the appellant's skeleton). She relied upon the case of Ghaidan where, on the basis of art 14 (read with art 8), the House of Lords held there was no fair or rational basis for treating homosexual partnerships less favourably for the purposes of succession to a tenancy on the death of a tenant. Consequently, the relevant provisions of the Rent Act 1977 had to be read as applying to same-sex partners. She submitted that there had been a change of social policy and it was not perverse of the immigration judge to take that into account and to conclude that the differential treatment was not objectively justified.

Context

36. As Ms Dubinsky identified, the central issue we have to decide in this appeal is whether the immigration judge was correct in law to conclude that the differential treatment of the appellant on the basis of his sexual orientation was not objectively justified, particularly having regard to the shift in social policy evidenced in the Civil Partnership Act 2004 and the changes that would follow for para 284 in HC 582.

37. There is no doubt that social policy on same-sex relationships and their acceptance and status (if any) in society has evolved over time. The point is made by Lord Bingham in his speech in M's case at para [6]:

> "Historically, both the law and public opinion withheld their sanction from a relationship between a man and a woman which was not sanctified by marriage or at least regularised by civil ceremony, and homosexual relationships were criminalised or condemned. When extra-marital heterosexual relationships became more generally accepted by the law and public opinion, recognition of homosexual relationships (even of those no longer criminal) was still withheld. Even now there remain bodies of opinion in this country (and much larger bodies of opinion in some other countries) for whom such recognition is still a step too far."

38. As Lord Bingham then goes on to indicate, that has changed because of the democratic majority enacting the Civil Partnership Act 2004 and the consequent removal of the discriminatory features of the social security and child support regimes with which he was concerned in that case. Likewise in the area of immigration, the Rules have been changed to equate same-sex and heterosexual couples with effect from 5 December 2005. To that extent, therefore, the issue in this appeal will have limited impact in the future. Had the circumstances of the appellant been brought forward 12 months in time, he would be able to seek leave to remain for 2 years under para 284 (as it now is drafted) providing he registered a civil partnership with his same-sex partner under the 2004 Act.

39. Can it be said that because the immigration position would change 9 months after his application that it was then unjustified to refuse his application on the basis of the existing immigration rules? We consider that it was not. The important decision is M's case to which we have already made reference. Somewhat surprisingly, the case was barely

touched upon by Ms Dubinsky in her oral submissions and there is only a passing reference to it in para 45 of her skeleton although it is dealt with in a little more detail in para 5 of her further note submitted after the hearing.

M's case

40. In M's case, the House of Lords was concerned with the assessment of child support to be paid by the 'absent parent' under the Child Support Act 1991 for the upkeep of a child following the breakdown of a relationship. The calculation, it was said, operated to the detriment of an 'absent parent' who, following the breakdown of the marriage, had formed a same-sex relationship. This, it was argued, was a breach of art 14 (read with art 8). By a majority (Baroness Hale dissenting), the House held that the effect upon the applicant did not fall within the "ambit" of their art 8 right. That is not an issue which need concern us here. What is important is that a majority of the House also held that the differential treatment of a person in a same-sex relationship was justified at the relevant time in 2001-2002 even though social policy had now changed by virtue of the Civil Partnership Act 2004.

41. As we have seen, Lord Bingham (at para [6] of his speech) acknowledged that social policy could be the basis for differential treatment and, despite a subsequent change in that social policy, legal provisions would not necessarily be unjustified in retrospect. He identified, what it would be fair to characterise, as the need to recognise the gradual change that is often present in giving effect to agreed social change and the logistical difficulties that may be involved in implementing social change agreed in principle. At para [6] he said:

> "Ms M's complaint of discrimination is in my view anachronistic. By that I mean that she is applying the standards of today to criticise a regime which when it was established represented the accepted values of our society, which has now been brought to an end because it no longer does so but which could not, with the support of the public, have been brought to an end very much earlier … If such a regime were to be established today, Ms M. could with good reason stigmatise the regime as unjustifiably discriminatory. But it is unrealistic to stigmatise as unjustifiably discriminatory a regime which, given the size of the overall task and the need to recruit the support of the public, could scarcely have been reformed sooner."

42. Lord Walker made a similar point referring in the process to the speech of Lord Hoffmann in the earlier decision of R (Hooper) v Secretary of State for Work and Pensions [2005] 1 WLR 1681. At paras [94] – [96] of his speech Lord Walker said this:

> "94. … Lord Hoffmann said, in the course of discussing *Walden v Liechtenstein* App No 33916/96,
>
> > "I can quite understand that if one has a form of discrimination which was historically justified but, with changes in society, has gradually lost its justification, a period of consultation, drafting and debate must be included in the time which the legislature may reasonably consider

> appropriate for making a change. Up to the point at which that time is exceeded, there is no violation of a Convention right. But there is no suggestion in the report of *Walden v Liechtenstein* that the discrimination between married couples was ever justified and I find it hard to see why there was no violation of Convention rights as long as the old law remained in place."
>
> 95. Both sides sought to draw some comfort from that passage. *Hooper* recognised that until a date in 2001 (I need not go into the significance of the precise date) the United Kingdom social security law had favoured widows in a way that could be justified as positive discrimination. No right-minded person would now suggest that discrimination against homosexuals was ever justifiable, and so Lord Hoffmann's observations about the need for consultation, drafting and debate are not (Ms Monaghan submitted) in point. But that is to my mind a deeply unrealistic approach, and one that is at odds with the realistic approach of the ECHR in cases such as *Estevez*. Although discrimination against homosexuals could never have been justified, by today's standards, the fact is that for centuries a homosexual couple living together were (even if they escaped criminal sanctions and social ostracism) regarded as quite different from a married couple, or a heterosexual unmarried couple. Profound cultural changes do take time: as Sir Thomas Bingham MR said in *R v Ministry of Defence Ex p Smith* [1996] QB 517, 554: "A belief which represented unquestioned orthodoxy in year X may have become questionable by year Y and unsustainable by year Z."
>
> 96. In my opinion it was within the United Kingdom's margin of appreciation, down to the preparation, enactment and coming into force of the 2004 Act, whether to treat a same-sex couple (for social security purposes, and the allied purposes of the 1991 Act) as a family unit or as two individuals."

43. Lord Mance made much the same point at para [155]:

> "155. Justification exists where discrimination is prima facie unlawful, but there is a special reason legitimising it - e.g. where (as in probably in *Petrovic* itself) men and women were treated differently for a reason for which there was historically rational justification but which has now disappeared. In such a case *Petrovic* accepts, and Lord Hoffmann in para 62 in *Hooper* agreed, reasonable time may be allowed for legislative change – though it must not be exceeded as it was in relation to transsexuals (cf *Goodwin*)."

44. The legislative history of the 2004 Act is summarised by Lord Mance in M's case at para [123]:

> "The legislative story goes back at least to late 2001. In October 2001, Jane Griffiths' Relationships (Civil Registration) Bill was introduced in the House of Commons, in November 2001 a major cross-departmental review of the policy and cost implications of a civil partnership registration scheme was initiated, supported by the Women and Equality Unit of the Department of Trade and Industry. In January 2002 Lord Lester of Herne Hill introduced a Civil Partnerships Bill in the House of Lords but withdrew it on 11 February 2002 to allow completion of the cross-departmental review. At the conclusion of the review, in December 2002 it was announced that a strong case was seen for a civil partnership scheme and that a consultation paper would be published in the summer of 2003, as it was on 30 June 2003. There followed a three month consultation period, which showed strong public support for such a scheme. In the DTI report "Responses to Civil Partnership" dated November 2003, the government undertook to introduce legislation as

> soon as parliamentary time allowed. The first draft of the Civil Partnership Bill was dated 22 April 2004, and ensuing Parliamentary process led to the Civil Partnership Act 2004 receiving the Royal assent on 18 November 2004. The Act is an extremely comprehensive piece of legislation, covering not merely the creation and regulation of civil partnerships, but many other subjects, some-interrelated, including social security, pensions, tax credits and the present, with the aim of achieving equality of treatment between opposite sex and same-sex couples. The implementation of the legislation required time, and took place just over a year later."

45. In M's case, Lord Walker, in concluding that "Parliament has acted with reasonable promptness … in the complex process of legislative change which has resulted in the 2004 Act", commented (at para [91]):

> "[the United Kingdom Government] has … been engaged in a necessarily time-consuming process of deliberation and consultation (initiated by the consultation document: Civil Partnership, a framework for the legal recognition of same-sex couples published in June 2003) leading to the preparation and enactment of the 2004 Act. It is a massive piece of legislation extending to 264 sections and 30 schedules. It received the Royal Assent on 18 November 2004 and came into force, as already noted, on 5 December 2005. The delay in bringing it into force was necessary in order to make far-reaching administrative changes including the adaptation of computer systems, the training of staff, and so on."

Discussion

46. M's case makes clear that changing social policy on same-sex relationships was a gradual process which culminated in the 2004 Act. Just as social acceptance took time, so did legal recognition. A realist would have anticipated nothing else: it was a struggle within society (and Parliament) eventually won by the forces of reason who favoured respecting the dignity of all persons whatever their sexual orientation. Although the House in M's case was concerned with differential treatment of same-sex couples in the period 2001-2002, what they say cannot be artificially so restricted and applies, with equal force, to the relevant time in this appeal. The House explored the issue in the context of the legislative history culminating in 2004. We are in no doubt that the same conclusion would have reached if the differential treatment had been brought forward to the time-frame (2004-2005) relevant to this appeal.

47. The benchmark set down by M's case is that the legislative and executive branches of government are entitled to a reasonable time to enact social change of the kind required to give legal effect to the recognition of same-sex relationships. But M's case is not simply concerned with enacting new law. It is also about the implementation of that law. What is said in M's case (and in Hooper by Lord Hoffmann) in relation to the tolerance to a reasonable period of time to enact legislative change applies equally to time required to implement changes particularly where they involve significant administrative changes in existing legal and other processes and practices. Lord Walker in M's case specifically highlights the point in the passage from

his speech which we set out above (at para [91]; see also Lord Mance at para [123] cited above). It would, frankly, be unrealistic to think otherwise.

48. The reality of implementation is acknowledged in a DTI internet release dated 21 February 2005 (at pp 41-42 of the appellant's original appeal bundle) where it is stated:

> "Implementation involves significant changes in many areas, for example, in court rules, the registration service as well as training and guidance for employers. These changes will be put in place over the course of the year."

49. The delay in bringing the 2004 Act into force between November 2004 and December 2005 and its implementation in the social security context are precisely reflected in the immigration context. In the instant case, social policy had changed but rational implementation logistically took some time. It might be suggested that the complexity of implementation is that much greater in the context of M's case and social security than it is in immigration cases. Why not simply amend para 284 or treat same-sex couples as if they were married as soon as the 2004 Act was passed by Parliament? This is, of course, the barely hidden argument for the appellant here. The answer is simple: even if it would have been relatively easy to change the immigration rules on what basis could it have been done? How could the Secretary of State assess claims by same-sex couples to stay? What could have been put in place as an alternative to "marriage" and a "spousal relationship"?

50. The plain and undeniable fact is that until the Civil Partnership Act 2004 came into force in December 2005 there was no equivalent legal relationship to marriage for same-sex couples that could have led to them being treated the same as married couples under para 284. It was only when civil partnership came into existence that heterosexual couples and same-sex couples could be treated equivalently on a status basis. Until then, the Rules could only recognise the commitment of unmarried couples (whether heterosexual or same-sex) by requiring a period of cohabitation precisely in the way para 295D required 2 years for both. Recognition of the commitment of a heterosexual couple by solemnising their relationship through marriage was not available to same-sex couples until the Civil Partnership Act 2004 came into force in December 2005. Thus, the argument for the appellant collapses to an argument that the 2004 Act should have been enacted and/or brought into force earlier and certainly no later than March 2005 when he applied for further leave to remain. The argument is, in our view, unsustainable given the need to implement the legislation across a wide range of administrative systems and social situations.

51. It is said by Ms Dubinsky that the Secretary of State has not, at least prior to the hearing before us, offered any justification for the differential treatment of same-sex partnerships. We accept that it is for him to justify as objectively and reasonably necessary the differential

treatment. In truth, however, the justification is self-evident: it is spelt out in M's case and the DTI document dated 21 February 2005 and which was part of the appellant's own appeal bundle. Social policy on the recognition of same-sex relationships has undoubtedly changed but its implementation remained a real issue. The precise timing was, in our view, a matter upon which the Secretary of State (on behalf of the executive branch of government) is entitled to some leeway before the failure to make a change becomes objectively unreasonable and unjustified. So much follows from the speeches in M's case. Although that case was principally concerned with a period in time (2001-2002) when the law had not been brought into line with changed (or changing) social mores, it is equally instructive on how we should approach the issue of implementation of the law once it is placed on the statute book. We see nothing excessive or disproportionate in the period of a year for implementation, and *a fortiori* the 3 months until March 2005 when the appellant made his application for leave, given the logistics of implementing changes across a range of societal situations.

52. It is the implementation aspect of this case which distinguishes it, and indeed M's case, from Ghaidan where the House of Lords applied s 3 of the Human Rights Act to interpret the relevant provision of the Rent Act 1977 compatibly with the ECHR so as to include same-sex relationships. It has never been suggested in this case, nor sensibly could it be for the reasons we have already given, that para 284 should be interpreted to include same-sex relationships. The recognition of legislative and executive time to give effect to a change in social policy simply did not arise in the circumstances faced by the House of Lords in Ghaidan. We consider that the approach of the House of Lords in M's case is more apposite here.

Conclusion

53. No right-thinking member of our society could today accept or tolerate discrimination on the ground of sexual orientation. Discrimination laws and the 2004 Act reflect our repugnance and outright rejection of it: its wrongness is as strikingly clear as discrimination on grounds of race or gender. That does not mean that all must change instantly. We accept that the differential treatment in this case is upon a "suspect" ground and that therefore any justifying reason must be closely scrutinised. For the detailed reasons given, we have concluded that the differential treatment of spouses and same-sex couples was, at the time, objectively justified. The immigration judge was wrong in law to take account of the legislative changes which had not yet been implemented. He was not entitled to reach the decision he did. The appellant cannot establish that the Secretary of State's decision to refuse him leave to remain on the basis of the existing immigration rules was a breach of art 14 (read with art 8) of the ECHR.

Decision

54. The immigration judge's decision cannot stand and we substitute a decision dismissing the appeal on human rights grounds.

55. The appeal is dismissed.

A GRUBB
SENIOR IMMIGRATION JUDGE

Date: