HCJ 3045/05
HCJ 3046/05
HCJ 10218/05
HCJ 10468/05
HCJ 10597/05

Yossi Ben-Ari
and others
v.
Director of Population Administration, Ministry of Interior

The Supreme Court sitting as the High Court of Justice
[21 November 2006]
Before President Emeritus A. Barak, President D. Beinisch,
Vice-President E. Rivlin
and Justices A. Procaccia, M. Naor, E. Rubinstein, E. Hayut

Petition to the Supreme Court sitting as the High Court of Justice.

Facts: The petitioners are five same-sex couples of Israeli citizens who underwent ceremonies of marriage in Canada in accordance with Canadian law. Upon returning to Israel, they applied to the population registry to be registered as married. Their application was refused. They petitioned the court.

Held: (Majority opinion — President Emeritus Barak, President Beinisch, Vice-President Rivlin, Justices Procaccia, Naor, Hayut) Following the rule in *Funk-Schlesinger v. Minister of Interior*, that the purpose of the registry is merely statistical, the registration official at the population registry is not competent to examine the validity of a marriage. When he is presented with a marriage certificate, he is obliged to register the applicants as married, unless such a registration would be manifestly incorrect. The 'manifestly incorrect' exception does not apply in this case. (Minority opinion — Justice Rubinstein) The rule in *Funk-Schlesinger v. Minister of Interior*, which held that the registration official is not competent to examine the validity of a civil marriage and should register the applicants as married when presented with a marriage certificate, should not be extended to the case of a same-sex marriage conducted in one of the few countries around the world where such marriages are conducted. Registration at the population registry is not merely

statistical; it involves a *de facto* recognition of same-sex marriages. The question of same-sex marriages differs from that of civil marriages in that civil marriages are almost universally recognized around the world, whereas same-sex marriages are only recognized in a small minority of countries. The registration of same-sex marriages should therefore be left for the Knesset to decide.

Petition granted by majority opinion (President Emeritus Barak, President Beinisch, Vice-President Rivlin and Justices Procaccia, Naor and Hayut), Justice Rubinstein dissenting.

Legislation cited:

Enforcement of Foreign Judgements Law, 5718-1958.
Evidence Ordinance [New Version], 5731-1971, ss. 3, 29.
Family Court Law, 5755-1995.
Inheritance Law, 5725-1965.
Law of Return, 5710-1950.
National Insurance Law [Consolidated Version], 5755-1995.
Permanent Service in the Israel Defence Forces (Pensions) Law [Consolidated Version], 5745-1985.
Population Registry Law, 5725-1965, ss. 2, 2(a)(5), 2(a)(6), 2(a)(7), 2(a)(8), 3, 15, 16, 17, 19(1), 19(2), 19C.
Prevention of Family Violence Law, 5751-1991.
Residents' Registry Ordinance, 5709-1949.

Israeli Supreme Court cases cited:

[1] HCJ 143/62 *Funk-Schlesinger v. Minister of Interior* [1963] IsrSC 17 225.
[2] CA 630/70 *Tamarin v. State of Israel* [1972] IsrSC 26(1) 197.
[3] HCJ 147/70 *Steadman v. Minister of Interior* [1970] IsrSC 24(1) 766.
[4] HCJ 1031/93 *Pesaro (Goldstein) v. Minister of Interior* [1995] IsrSC 49(4) 661.
[5] HCJ 145/51 *Abu-Ras v. IDF Galilee Commander* [1951] IsrSC 5 1476.
[6] HCJ 58/68 *Shalit v. Minister of Interior* [1969] IsrSC 23(2) 477; **IsrSJ SV 35**.
[7] HCJ 264/87 *Federation of Sefaradim Torah Guardians — SHAS Movement v. Director of Population Administration, Ministry of Interior* [1989] IsrSC 43(2) 723.
[8] HCJ 2888/92 *Goldstein v. Minister of Interior* [1996] IsrSC 50(5) 89.
[9] HCJ 164/97 *Conterm Ltd v. Minister of Finance* [1998] IsrSC 52(1) 289; **[1998-9] IsrLR 1**.
[10] CA 8036/96 *Yehud v. Yehud* [1998] IsrSC 52(5) 865.
[11] HCJ 1779/99 *Brenner-Kaddish v. Minister of Interior* [2000] IsrSC 54(2) 368.

[12] HCJ 5070/95 *Naamat, Working and Volunteer Women's Movement v. Minister of Interior* [2002] IsrSC 56(2) 721.
[13] HCJ 6539/03 *Goldman v. State of Israel, Ministry of Interior* [2005] IsrSC 59(3) 385.
[14] HCJ 80/63 *Gurfinkel v. Minister of Interior* [1963] IsrSC 17 2048.
[15] HCJ 2597/99 *Rodriguez-Tushbeim v. Minister of Interior* [2005] IsrSC 58(5) 412; **[2005] (1) IsrLR 268**.
[16] CA 10280/01 *Yaros-Hakak v. Attorney-General* [2005] IsrSC 59(5) 64; **[2005] (1) IsrLR 1**.
[17] HCJ 721/94 *El-Al Israel Airlines Ltd v. Danielowitz* [1994] IsrSC 48(5) 749; **[1992-4] IsrLR 478**.
[18] HCJ 5398/96 *Steiner v. Minister of Defence* (unreported).
[19] CA 373/72 *Tapper v. State of Israel* [1974] IsrSC 28(2) 7.
[20] HCJ 693/91 *Efrat v. Director of Population Registry, Ministry of Interior* [1993] IsrSC 47(1) 749.
[21] HCJ 4058/95 *Ben-Menasheh v. Minister of Religious Affairs* [1997] IsrSC 51(3) 876.
[22] CA 191/51 *Skornik v. Skornik* [1954] IsrSC 8 141; **IsrSJ 2 327**.
[23] CA 640/82 *Cohen v. Attorney-General* [1985] IsrSC 39(1) 673.
[24] CrimFH 5567/00 *Deri v. State of Israel* [2000] IsrSC 54(3) 614.
[25] HCJ 4112/99 *Adalah Legal Centre for Arab Minority Rights in Israel v. Tel-Aviv Municipality* [2002] IsrSC 56(5) 393.
[26] HCJ 3267/97 *Rubinstein v. Minister of Defence* [1998] IsrSC 52(5) 481; **[1998-9] IsrLR 139**.

Israeli District Court cases cited:

[27] MA 369/94 *Steiner v. IDF* (unreported).
[28] CA (Naz) 3245/03 *A.M. v. Custodian-General* (unreported).
[29] CrimC (Hf) 477/02 *State of Israel v. Bachrawi* (unreported).

Israeli Magistrates Court cases cited:

[30] CrimC (BS) 2190/01 *State of Israel v. Moyal* (unreported).

Israeli Family Court cases cited:

[31] FC (TA) 48260/01 *A v. B* (unreported).
[32] FC (TA) 3140/03 *Re R.A. and L.M.P.* (unreported).
[33] FC (TA) 6960/03 *K.Z. v. State of Israel, Attorney-General* (unreported).
[34] FC (Hf) 32520/97 *A v. B* (unreported).
[35] FC (TA) 16610/04 *A v. Attorney-General* (unreported).

Israeli National Labour Court cases cited:

[36] NLC 54/3-1712 *Even v. Tel-Aviv University* (unreported).

Israeli Regional Labour Court cases cited:

[37] LabC (TA) 3816/01 *Levy v. Mivtahim* (unreported).

[38] NI (TA) 3536/04 *Raz v. National Insurance Institute* (unreported).

American cases cited:

[39] *Hennefeld v. Township of Montclair*, 22 N.J. Tax 166 (2005).

[40] *In re Kandu*, 315 B.R. 123 (Bankr. W.D. Wash. 2004).

[41] *Lewis v. Harris*, 378 N.J. Super. 168 (App. Div. 2005).

[42] *Lewis v. Harris*, 2006 N.J. Lexis 1521.

[43] *Samuels v. New York State Dept. of Health*, 811 N.Y.S. 2d 136 (2006).

[44] *Seymour v. Holcomb*, 790 N.Y.S. 2d 858 (2005).

For the petitioners in HCJ 3045/05 and HCJ 3046/05 — D. Yakir, Y. Berman.

For the petitioners in HCJ 10218/05, HCJ 10486/05 and HCJ 10597/05 — O.A. Stock.

For the respondent — Y. Gnessin, D. Marx.

JUDGMENT

President Emeritus A. Barak

Two men, who are Israeli citizens and residents, underwent outside Israel a civil marriage ceremony which is recognized in that country. When they returned to Israel they applied to the registration official. They applied to change their registration at the registry from bachelor to married. The registration official refused the application. Was the refusal lawful? That is the question that each of the petitions has presented to us. It should be noted that the question before us is not whether a marriage between persons of the same sex, which took place outside Israel, is valid in Israel. The petitioners are not applying for their marriage outside Israel to be given validity in Israel. The question before us is whether the registration official — whose authority is prescribed in the Population Registry Law, 5725-1965, as interpreted in HCJ 143/62 *Funk-Schlesinger v. Minister of Interior* [1]) — acted within the scope of his authority when he refused to register the marriage of the two men in the register. The petitions before us address the question of the

registration official's authority and not the question of the validity of the marriage.

A. The petitioners

1. There are five petitions of five couples before us. Both members of the couple in each of the petitions are men, and they are Israelis citizens and residents. The petitioners in each of the petitions live together in Israel as a couple, and they conduct a family life and maintain a joint household. They married each other in a civil marriage ceremony in Toronto in Canada, which is recognized in accordance with the law in that country. After they returned to Israel, they applied to be registered as married at the Population Registry. They attached to their application documents that authenticated their marriages. Their applications were refused. They were told that 'marriages of this kind are not legally recognized in the State of Israel, and therefore it is not possible to register them in the register' (the letter of the director of the Population Administration office in Tel-Aviv dated 24 May 2005). This led to the petitions.

B. The arguments of the parties

The petitioners concentrate their main arguments on the authority of the registry official. According to them, the refusal of the registry official to register their marriages in Toronto is contrary to the rule in *Funk-Schlesinger v. Minister of Interior* [1], it discriminates against the petitioners in comparison to couples who are not of the same sex and it violates their right to family life. According to them, according to the rule decided in *Funk-Schlesinger v. Minister of Interior* [1], the registration official acts merely as a statistician. The registration itself is incapable of creating or changing status. The discretion of the registration official, when he is considering an application to register a marriage, is therefore limited. According to the petitioners' approach, when the registration official is presented with an authenticated marriage certificate, unless there is a suspicion as to its authenticity, he should make a change in the registration and register the applicants as married. The registration official is not competent to examine the question whether the marriage is valid under the laws of the State of Israel, and whether the couple are competent to marry in Israel. These questions are often complex and delicate questions. According to the petitioners, the questions in the petitions before us are difficult ones. The registration official was not given the power to decide them. According to *Funk-Schlesinger v. Minister of Interior* [1], as long as no judicial decision has been made to the effect that the marriage is not valid, the registration

official is obliged to register it in the population registry. The petitioners point out that in Israel there has never been a judicial decision with regard to the validity of a marriage of couples of the same sex in Canada, whether in the Supreme Court or in the lower courts. Therefore no weight should be attributed to the position of the respondent that the marriages are not valid, and he should register them. The petitioners emphasize that this court has repeatedly confirmed the rule in *Funk-Schlesinger v. Minister of Interior* [1] since it was adopted. It has been applied in matters of personal status both with regard to marriage and also with regard to adoption and parenthood. The rule has also been extended to the registration of the items of religion and ethnicity in the population register. The petitioners' position is that this case law ruling is desirable, and that it should be applied to their case.

3. The respondent requests that we deny the petitions. His position is that there is no basis for registering marriages of same-sex couples that took place in a foreign country. This position is based on three main reasons. *First*, in Israeli law the legal framework of marriage relates only to a marriage between a man and a woman. There is no recognized legal framework of marriage in our law between two persons of the same sex. *Funk-Schlesinger v. Minister of Interior* [1] is irrelevant to the petitioners' cases. We should distinguish between registration in the population register of a marriage that took place outside Israel, whatever its validity, as long as it satisfies the existing basic legal framework of marriage in Israel, and registration of a marriage that is inconsistent with the existing legal framework of this concept in Israel. Only the registration of the former marriages is governed by *Funk-Schlesinger v. Minister of Interior* [1]. *Second*, the respondent points out that most countries of the world do not recognize marriages of same-sex couples that take place in foreign countries, and they do not register marriages between members of the same sex that took place in foreign countries. Many countries have enacted laws in which it is expressly provided that a marriage can only take place between a man and a woman, and that marriages between members of the same sex that took place in other countries should not be recognized. Therefore, it cannot be said that comparative law requires recognition of these marriages, since it cannot be said that in the few countries that conduct marriage ceremonies between members of the same sex there is an expectation that these marriages will be recognized in other countries. *Third*, the respondent's position is that the question of the registration of marriages of same-sex couples is one of those matters that should be regulated in primary legislation of the Knesset. The administrative tool of registration in the population register should not be used to create a

new legal framework that is contrary to the intention of the legislature. In enacting the Population Registry Law the legislature did not conceive of making the population registry into a tool for creating new legal frameworks. On the contrary, the legislature's intention was that the population register should reflect the existing legal frameworks in Israel in matters of status. Creating a new personal status constitutes a primary arrangement that lies within the jurisdiction of the legislature. The proper place for determining the question of recognizing a new personal status of marriage between members of the same sex is the Knesset. This is especially the case in view of the fact that this question concerns controversial public issues with regard to the fabric and values of society.

c. The proceeding

4. The petitions were heard before a panel of three justices (President A. Barak and Justices E. Rubinstein and E. Hayut). In the panel's decision of 16 November 2005, the parties were given the opportunity of supplementing their arguments. It was also held that the justices were considering expanding the panel and that oral argument would be heard. The panel was expanded on 3 March 2006 and oral argument was heard on 28 May 2006. All of the parties told us that they were prepared to regard the case as if an order *nisi* had been issued in the petitions and the hearing took place accordingly.

d. The legislative framework

5. The Population Registry Law, 5725-1965, regulates the activity of the population registry. It provides that items of information concerning residents are registered at the population registry. These items of information are set out in s. 2 of the Population Registry Law:

'The registry and registration items

2. (a) The following items concerning a resident and any change to them shall be registered at the population registry:

(1) Family name, personal name and previous names;

(2) Parents' names;

(3) Date and place of birth;

(4) Sex;

(5) Ethnicity;

(6) Religion;

(7) Personal status (unmarried, married, divorced or widowed);

(8) Spouse's name;

(9) Children's names, dates of birth and sex;

(10) Present and former citizenship or citizenships;

(11) Address;

(11A) Mailing address, according to the meaning thereof in the Address Update Law, 5765-2005, in so far as notice of this was given;

(12) Date of entry into Israel;

(13) The date on which a person became a resident as stated in section 1(a).

(b) A resident who is registered for the first time shall be given for his registration an identity number.'

The Population Registry Law sets out the significance of the registration in section 3 as follows:

'The registry — *prima facie* evidence

3. The registration at the registry, any copy or extract thereof and also any certificate that was given under this law shall constitute *prima facie* evidence of the correctness of the registration items set out in paragraphs (1) to (4) and (9) to (13) of section 2.'

Paragraphs (5) to (8) were excluded from the rule of '*prima facie* evidence.' These paragraphs concern ethnicity (para. (5)), religion (para. (6)), personal status (unmarried, married, divorced or widowed) (para. (7)) and name of spouse (para. (8)). The matter before us — personal status (unmarried, married, divorced or widowed) (para. (7)) — was excluded from the framework of *prima facie* evidence.

6. Chapter 3 of the Population Registry Law is concerned with the powers of the registration official. It provides that the registration official may require someone who gave notice of registration items to give the

official any information or document in his possession concerning the registration items (s. 19(1)). He is also entitled to record a (written or oral) declaration concerning the truthfulness of the information or document given to him (s. 19(2)). The Population Registry Law distinguishes between initial registration and the registration of changes. Initial registration is made in accordance with a 'public certificate,' and if there is no such certificate, in accordance with the applicant's statement. The registration of changes, which is the context of the petitions before us, shall be made in the following manner (s. 19C):

'Registration of changes

> 19C. A change in a registration item of a resident shall be recorded in accordance with a document that is produced under sections 15 or 16 or in accordance with a statement under section 17 that is accompanied by a public certificate that testifies to the change; …'

In the petitions before us, no documents were produced in accordance with s. 15 (which concerns official actions in Israel, such as a marriage that is recorded under the Marriage and Divorce (Registration) Ordinance), nor were any actions carried out under s. 16 (judicial decisions).The petitions before us therefore fall within the scope of s. 17 of the Population Registry Law, which provides:

'Duty to give notice of changes

> 17. If a change occurred, other than as stated in sections 15 and 16, in the registration details of a resident, he is obliged to give notice of the change to the registration official within thirty days…'.

This notice should be accompanied by a 'public certificate that testifies to the change.' A statement of the applicant alone is insufficient (see CA 630/70 *Tamarin v. State of Israel* [2]; HCJ 147/70 *Steadman v. Minister of Interior* [3]; HCJ 1031/93 *Pesaro (Goldstein) v. Minister of Interior* [4], at p. 676). A 'public certificate,' for this purpose, is 'according to the meaning thereof in the Testimony Ordinance' (which is now the Evidence Ordinance [New Version], 5731-1971). For our purposes, these are the marriage certificates issued by a competent authority under Canadian law in the place where the marriage ceremony was conducted (see the definition of 'public certificate' in s. 29 of the Evidence Ordinance [New Version]).

E. The normative status of the registry and the discretion of the registration official

7. What is the scope of the registration official's discretion? This question has been considered in a whole host of judgments. The main judgment is *Funk-Schlesinger v. Minister of Interior* [1]. This decision was made more than forty-two years ago. In that case Mrs Funk-Schlesinger, a Christian resident of Israel, married Mr Schlesinger, a Jewish resident of Israel. The marriage took place in Cyprus. On the basis of the Cypriot marriage certificate, Mrs Funk-Schlesinger applied to be registered as 'married' at the population registry. The Minister of the Interior refused the application. His refusal was based on the outlook that under the rules of private international law that apply in Israel, the spouses were not married. By a majority (Justices Y. Sussman, Z. Berinson, A. Witkon and E. Manny, with Justice M. Silberg dissenting) it was decided to order the registration. The opinion of Justice Y. Sussman, which was the main opinion, was based on the outlook that the Residents' Registry Ordinance, 5709-1949 —

> '… did not give registration in the residents' registry the force of evidence or proof for any purpose. The purpose of the ordinance is… to collect statistical material. This material may be correct and it may be incorrect, and no one guarantees its correctness' (*ibid.* [1], at p. 249, and also HCJ 145/51 *Abu-Ras v. IDF Galilee Commander* [5]).

Against this background, it was held that 'the function of the registration official… is merely a function of collecting statistical material for the purpose of maintaining a register of residents, and no judicial power has been given to him' (*ibid*. [1], at p. 244). Therefore —

> 'When he registers the family status of a resident, it is not part of the job of the registration official to consider the validity of the marriage. The legislature is presumed not to have imposed on a public authority a duty that it is incapable of discharging. The official should be satisfied, for the purpose of carrying out his office and registering the family status, if he is presented with evidence that the resident underwent a marriage ceremony. The question of what is the validity of the ceremony that took place is a multi-faceted one and examining the validity of the marriage falls outside the scope of the residents' registry' (*ibid*. [1], at p. 252).

In a similar vein, Justice Y. Sussman said that when the Supreme Court hears petitions against a refusal of the registration official to register the marriage of a petitioner, it does not make any legal determination with regard to the validity of that marriage. He wrote:

> 'It is not superfluous to emphasize that we are not dealing with the question whether the marriage is valid or not. The question before us is… whether there was a justification for the refusal of the residents' registry official to register the applicant as a married woman' (*ibid*. [1], at p. 242).

Justice Y. Sussman recognizes that there may be cases in which the incorrectness of the details that a resident wishes to register in the registry is manifest and is not subject to any reasonable doubt. In such cases the official is not obliged to carry out the registration.

> 'The public official is not obliged to exercise his authority in order to be a party to an act of fraud. When a person who clearly appears from his appearance to be an adult comes before him and applies to be registered as a five year old child, what doubt can there be in such a case that the registration is false and that the act of the person is an act of fraud? In such a case the official will be justified when he refuses to register the details, and this court will certainly not exercise its power… in order to compel the official to "forge" the population register' (*ibid*. [1], at p. 243).

8. Since the decision in *Funk-Schlesinger v. Minister of Interior* [1], this court has followed it consistently. Over the years its strength has grown. The repeal of the Residents' Registry Ordinance and its replacement by the Population Registry Law did not change its effect. In HCJ 58/68 *Shalit v. Minister of Interior* [6], in which the law was decided in accordance with the Population Registry Law, Justice Y. Sussman wrote:

> 'The registration official was not given judicial powers, and the purpose of the statute for which he is responsible also does not require him to decide any question. It is therefore unsurprising that neither the ordinance nor the law mentioned above gave the registration official the tools that the court uses in order to discover the truth… A citizen who comes to give a notice as required by the law is presumed to tell the truth. It is not desirable that the official should raise suspicions… The registration is not conditional upon the registration official being

> convinced that the details given to him are correct… The registration is merely a registration of the details as given to the official… Only one exception has been held with regard to this registration… and this is… when one of the details is inherently untrue and this is manifest, such as when an adult appears before the official and asks to be registered as a five year old… in such a case the official shall refuse to register his age, since he is not liable to be a party to the making of a false registration… The Population Registry Law can be seen from its name to be a registry law. Its purpose is the same as the purpose of the ordinance, its predecessor — to collect statistical material' (*Shalit v. Minister of Interior* [6], at pp. 506, 507, 508).

This was also determined to be the law in later cases (see, for example, *Tamarin v. State of Israel* [2], at p. 227; *Steadman v. Minister of Interior* [3], at p. 770).

9. *Funk-Schlesinger v. Minister of Interior* [1] was considered in HCJ 264/87 *Federation of Sefaradim Torah Guardians — SHAS Movement v. Director of Population Administration, Ministry of Interior* [7]). It was held by the majority (President M. Shamgar and Justices A. Barak, M. Bejski and G. Bach, with Vice-President M. Elon dissenting) that the registration official should register the conversion of a person on the basis of a document that testifies to the conversion in a Jewish community outside Israel. President M. Shamgar wrote:

> 'If after receiving details as aforesaid the registration official has a reasonable basis for assuming that the statement is incorrect, he should refuse to register it (s. 19B(b) of the aforesaid law [the Population Registry Law]). A statement that is incorrect means a statement that includes a falsehood (such as when we are dealing with an act of fraud or when there is evidence that the resident is a member of another religion…). It follows from the provisions of the aforesaid law that the registration official does not consider whether a conversion ceremony that took place in a Jewish community abroad and that is confirmed by the document submitted to him is valid or not. From his point of view, a certificate which appears to confirm that a conversion ceremony took place in a Jewish community as aforesaid indicates that such a ceremony requiring registration did indeed take place. This outlook concerning the powers and obligations

> of the registration official with regard to the registration of religion and ethnicity can also be seen from the approach of this court in the past, as reflected for example in the judgment in HCJ 143/62 *Funk-Schlesinger v. Minister of Interior* [1]' (*ibid*. [7], at p. 732).

Even the minority opinion of Vice-President M. Elon was based on the assumption that 'the registration official is obliged to register the details given to him in the statement unless he has a reasonable basis for assuming that the statement is not correct (*Shalit v. Minister of Interior* [6], at p. 507, and following *Funk-Schlesinger v. Minister of Interior* [1]).' In that case Vice-President M. Elon was of the opinion that in view of the definition of 'Jew' in the Population Registry Law, the official had a reasonable basis for assuming that the statement made by the petitioners with regard to their conversion was incorrect.

10. *Federation of Sefaradim Torah Guardians — SHAS Movement v. Director of Population Administration, Ministry of Interior* [7] considered the power of the registration official with regard to the registration of the items of ethnicity (item 5) and religion (item 6). *Pesaro (Goldstein) v. Minister of Interior* [4] also considered, *inter alia*, this question. President Emeritus M. Shamgar, with the agreement of President A. Barak and Justice E. Mazza, M. Cheshin, T. Strasberg-Cohen and D. Dorner, but with the dissent of Justice Tz. Tal, said that:

> 'The Population Registry Law is, as aforesaid, a civil law whose purpose is to collect factual information, including statistics. The minister responsible for implementing the Population Registry Law is the Minister of the Interior. He, and the officials of his office, have the power to make the registration of the registry items in accordance with a statement of the resident, and within the framework of the restrictions on the scope of the discretion that have been laid down in case law… According to *Federation of Sefaradim Torah Guardians — SHAS Movement v. Director of Population Administration, Ministry of Interior* [7], in so far as initial registration is concerned, the registration official is not competent to examine the validity of the conversion' (*ibid*. [4], at p. 688).

11. *Pesaro (Goldstein) v. Minister of Interior* [4] considered the question of the conversion in Israel of Mrs Elian Chava Pesaro (Goldstein). This question was not decided in that case. All that was decided was that the

Religious Community (Conversion) Ordinance did not apply to her conversion in Israel. It was not held that the conversion that she underwent in Israel was valid. Before the petitioner underwent the conversion proceedings and before judgment was given with regard to her conversion, she married Mr Uri Goldstein in a consular marriage at the Brazilian Embassy in Israel. The couple applied to the registration official with an application that he should register them as married. The official refused. His reason was that the consul of a foreign state had no authority to conduct a marriage ceremony in Israel. The court (Vice-President A. Barak and Justices E. Goldberg and E. Mazza) held that according to the rule in *Funk-Schlesinger v. Minister of Interior* [1] the registration official should register the couple as married (HCJ 2888/92 *Goldstein v. Minister of Interior* [8]). I said in my opinion that the question whether it was possible to hold a consular marriage in Israel was a difficult one. In these circumstances, the registration official should act, with regard to a change in registration, on the basis of a public certificate that was submitted to him concerning the marriage. In my opinion I said that:

> 'Since *Funk-Schlesinger v. Minister of Interior* [1] the Supreme Court has repeatedly held that "the function of a registration official under the aforesaid ordinance is merely the function of a collector of statistical material for the purpose of managing the register of residents, and he has not been given any judicial power" (*ibid*. [1], at p. 244, *per* Justice Sussman). Therefore, "the official is obliged to register what the citizen tells him" (*ibid*. [1], at p. 249), unless this amounts to "a manifestly incorrect registration, which is not subject to any reasonable doubt" (*ibid*. [1], at p. 243). It follows that if the couple present to the registry official a certificate that testifies to the conducting of a marriage ceremony before a consul of a foreign country in Israel, the official should register the couple as married, unless it is clear and manifest that the details are incorrect, or there is no doubt that the consul has no power to marry them…
>
> Thus we see that if a non-Jewish woman (a citizen of country A) and a Jewish man (whatever his nationality) apply to the registry official, and present him with a registration certificate of a marriage between the couple that was conducted by the consul of that country A, the registry official should register the couple as married. Admittedly, there is a doubt with regard to the power of the consul to conduct a marriage ceremony in these circumstances, but the registry official is not entitled to decide

this doubt. This doubt is inherent in the Israeli legal system, and as long as a competent court has not decided it, the doubt remains inherent in the legal system… Indeed, as long as this doubt exists, the registry official should register the couple as married, since "the question of the validity of the ceremony that took place is sometimes a multi-faceted one, and considering its validity goes beyond the scope of the residents' registry" (*Funk-Schlesinger v. Minister of Interior* [1], at p. 252)' (*ibid*. [8], at pp. 93, 94).

In this vein Justice M. Cheshin decided in one case that:

'It is the duty of the registry official to register in the population register information that is given to him and that is supported by a document (such as a marriage), without him being able to examine the validity of the legal validity of that information (such as whether the marriage is valid or not: see *Funk-Schlesinger v. Minister of Interior* [1]; *Shalit v. Minister of Interior* [6])' (HCJ 164/97 *Conterm Ltd v. Minister of Finance* [9], at p. 387).

Justice J. Türkel referred to this approach in another case, where he said:

'Registration of the respondents as the children of the legators in their identity card when the family immigrated to Israel has no significance with regard to recognizing the respondents as the adopted children of the legators (on the significance of registration in an identity card and in other official documents under the Population Registry Law, 5725-1965, see the remarks of the honourable Justice Sussman in *Funk-Schlesinger v. Minister of Interior* [1]; the remarks of the honourable Justice H. Cohn in *Shalit v. Minister of Interior* [6] and the remarks of Vice-President A. Barak in *Pesaro (Goldstein) v. Minister of Interior* [4])' (CA 8036/96 *Yehud v. Yehud* [10], at p. 872).

12. *Funk-Schlesinger v. Minister of Interior* [1] was reconsidered in HCJ 1779/99 *Brenner-Kaddish v. Minister of Interior* [11]. In that case an adoption order was made in the State of California, according to which the son of one member of a lesbian couple was adopted by the other member. The couple returned to Israel. They applied to the registration official to record the adoption in the registry. The registration official refused. His position was that from a biological viewpoint the existence of two parents of

the same sex is not possible, and therefore the incorrectness of the registration is manifest. The petition was granted. Justice D. Dorner said that:

> 'In consistent case law over many years beginning with *Funk-Schlesinger v. Minister of Interior* [1], it has been held that a registration official is not competent to determine the validity of the registration that he is required to make, but that he is liable to register what the citizen tells him, unless it is a case of "a manifestly incorrect registration, which is not subject to any reasonable doubt" (*ibid*., at p. 243)… The registration before us does not change the biological position, merely the legal position' (*Brenner-Kaddish v. Minister of Interior* [11], at pp. 374, 375).

Justice D. Beinisch agreed with this approach. She said that the position of the Minister of the Interior relied on the 'exception' recognized in *Funk-Schlesinger v. Minister of Interior* [1] with regard to the power of the registration official not to register something manifestly incorrect, which is not subject to any reasonable doubt. Justice D. Beinisch said that this exception did not apply in the case before her:

> 'In the case before us, the respondent cannot point to any manifest "incorrectness" as aforesaid; the requested registration item is not a biological fact but a matter involving a complex legal question… the respondent's contention… that the incorrectness of the requested registration is "manifest" because there is no possibility of recognizing two mothers for the same child is merely a different form of the argument that we should not recognize an adoption based on a homosexual relationship between the biological parent and the adoptive parent… In the absence of any contention, which is not subject to reasonable doubt, with regard to the validity of the foreign adoption order or with regard to the correctness of the details of the applicants… the registration should register the details of the petitioners on the basis of the adoption order' (*ibid*. [11], at pp. 376, 377).

The minority opinion of Justice A. Zu'bi was also based on the decision in *Funk-Schlesinger v. Minister of Interior* [1]. His conclusion that the adoption should not be registered was based on *two* reasons: *first*, *Funk-Schlesinger v. Minister of Interior* [1] was based on the assumption that a registration of marriage had no probative force, and its whole purpose was to collect

statistical material. With regard to adoption, the registration concerns the item of parents' names (para. (2)). This registration constitutes *prima facie* evidence of its correctness. *Second*, in order to give validity to the adoption order, it should be 'recognized' in accordance with the provisions of the Enforcement of Foreign Judgements Law, 5718-1958. Without this recognition, it should be ignored. In this way it is different from a marriage certificate, where registration does not necessitate 'recognizing' it. It should be noted that a further hearing is taking place with regard to *Brenner-Kaddish v. Minister of Interior* [11], and this has not yet been decided.

13. The next link in the chain of judgments based on *Funk-Schlesinger v. Minister of Interior* [1] was our judgment in HCJ 5070/95 *Naamat, Working and Volunteer Women's Movement v. Minister of Interior* [12]. The petitioners in that case underwent Reform or Conservative conversions (in Israel or in a Jewish community outside Israel). They sought to be registered in the population register as Jews in the ethnicity and religion items. The registration official refused the application. We decided in *Naamat, Working and Volunteer Women's Movement v. Minister of Interior* [12] that the registration official acted unlawfully. Our approach was based on *Funk-Schlesinger v. Minister of Interior* [1]. The following is what I wrote (with the agreement of Vice-President S. Levin and Justices T. Or, E. Mazza, M. Cheshin, T. Strasberg-Cohen, D. Dorner, E. Rivlin, but with Justices I. Englard and J. Türkel dissenting):

> 'The rule in *Funk-Schlesinger v. Minister of Interior* [1], which was made approximately forty years ago, continues to remain valid. In so far as the registration of the items of ethnicity and religion are concerned, it states that the function of the registration official is "… a function of collecting statistical material for the purpose of maintaining a register of residents…" (*ibid.* [1], at p. 244). The registration official has no judicial power and he may not decide an "open" question of law. When he is asked to make an initial registration by virtue of a statement of the applicant, he must grant the request, even if its legal validity is uncertain, and there are different views on the subject, provided that the incorrectness of the statement is not manifest. When the registration official is asked to make a change in a registration by virtue of the applicant's statement, the application should be accompanied by a public certificate testifying to the change' (*ibid*. [1], at p. 744).

This approach was repeated in HCJ 6539/03 *Goldman v. State of Israel, Ministry of Interior* [13]. Justice M. Cheshin wrote:

> 'The Population Registry Law is merely a statistical records law, and its purpose is merely to maintain a database of information concerning the residents of Israel, and since the law is such, it should not be given the task of deciding questions that are beyond its capabilities… The value of the registration in the register — in principle — is the value of a merely statistical-technical registration, and that is indeed its value' (*ibid*. [13], at pp. 393, 395).

14. Criticism has been levelled against *Funk-Schlesinger v. Minister of Interior* [1] (see M. Shava, 'On the Question of the Validity and Registration of Mixed Marriages before a Foreign Consul in Israel,' 42 *HaPraklit* (1995) 188). From its infancy, it was said that the statistical nature of the registration does not 'exhaust the practical importance of the register' (*per* Justice M. Landau in HCJ 80/63 *Gurfinkel v. Minister of Interior* [14], at p. 2071). Justice Tz. Tal emphasized that 'the approach of a merely "statistical" register ignores the reality' (*Pesaro (Goldstein) v. Minister of Interior* [4], at p. 709). Justice J. Türkel added that 'I fear that today it may imply a kind of naivety or turning a blind eye to reality' (*Naamat, Working and Volunteer Women's Movement v. Minister of Interior* [12], at p. 764). Justice I. Englard said that:

> '… if we are merely dealing with insignificant statistics, why do there continue to be so many struggles with regard to the registration? … The truth is, of course, that the symbolic here is the essence, and without a certain outlook on life there is no decision on the question of registration or statistics' (*Naamat, Working and Volunteer Women's Movement v. Minister of Interior* [12], at p. 757).

Indeed, in *Naamat, Working and Volunteer Women's Movement v. Minister of Interior* [12] the state asked us to depart from the rule in *Funk-Schlesinger v. Minister of Interior* [1]. This request was denied, and we said:

> 'The rule in *Funk-Schlesinger v. Minister of Interior* [1] has laid down roots in case-law, and considerations of great weight are required for us to depart from it. No such considerations have been brought before us. The argument concerning the reliance of state authorities is not at all convincing. State authorities are presumed to act according to the law. Within this framework

> they should be aware of the limited nature of the registration in the register… Like public authorities — and against the background of awareness of the limited role of the register — the public at large also understands that the registration of the items of religion, ethnicity and personal status in the register "… was only intended for statistical and similar purposes, and it does not give the person registered any special rights" (Justice S.Z. Cheshin in *Abu-Ras v. IDF Galilee Commander* [5], at p. 1478). Indeed, the registration in the register is "neutral" with regard to the various struggles that have taken place since the founding of the state with regard to matters of ethnicity, religion and marriage, and it ought to remain so. The substantive disagreements on these matters should be conducted by examining the substantive rights, and these lie outside the scope of the register' (*ibid*. [12], at p. 745).

Indeed, the rule in *Funk-Schlesinger v. Minister of Interior* [1] is a proper and good one. It is not proper that without an express provision in the Population Registry Law the registration official — that is to say, the Minister of the Interior — should be given the power to decide fundamental questions of Israeli society. It is not proper that whenever there is a change in the leadership of the Ministry of the Interior there should be a change in policy on key questions of state. These questions ought to be decided by the people through its representatives in the Knesset. As long as the Knesset has not spoken it is proper, in so far as possible, that these ethical decisions should not be made within the framework of the registry. The rule in *Funk-Schlesinger v. Minister of Interior* [1] gives expression to this approach. Indeed, it is precisely someone who wishes to distance himself from any decision concerning symbols that should support the continuation of the rule in *Funk-Schlesinger v. Minister of Interior* [1] and its development. This was discussed by Justice M. Cheshin in *Goldman v. State of Israel, Ministry of Interior* [13]:

> 'The Population Registry Law is, in essence, a technical law, and if we place upon its narrow shoulders a heavy burden of fundamental questions it will be unable to support them. The Population Registry Law was not intended in principle to incorporate questions of nationality and ethnicity, of religion and state, of conversion according to Jewish law or not according to Jewish law, of who is a Jew and who is not a Jew.

> Decisions on these questions and questions similar to them are historic decisions, and as such it is strange — and even absurd — to argue that the registry official should decide them. Decisions of this kind were not delegated to the registry official, nor even to the court when sitting in review of the decisions of the official' (*ibid*. [13], at p. 395).

Naturally, *Funk-Schlesinger v. Minister of Interior* [1] does not prevent a judicial decision on questions of religion, ethnicity and marriage. Notwithstanding, it places the judicial decision in the proper light. Instead of a tangential decision in the technical field of the registry, a decision on the merits of the matter should be made in the proper context. Thus, for example, the question of the validity of non-orthodox conversion should not be made in the artificial context of the powers of the registry official (see *Federation of Sefaradim Torah Guardians — SHAS Movement v. Director of Population Administration, Ministry of Interior* [7] and *Naamat, Working and Volunteer Women's Movement v. Minister of Interior* [12]), but in the substantive context of the Law of Return (see HCJ 2597/99 *Rodriguez-Tushbeim v. Minister of Interior* [15]). A change in the procedural context places the difficult questions in their proper light, by presenting the complete picture of the values, principles and rights that should be balanced.

15. In the petitions before us we have not been asked by the state to reconsider *Funk-Schlesinger v. Minister of Interior* [1]. All the parties have relied on *Funk-Schlesinger v. Minister of Interior* [1]. The petitioners said repeatedly that they are not asking for a decision on the question whether their marriage in Canada is valid in Israel. The state also does not ask us to decide the question of the validity of the marriage. The scope of the dispute between the parties concerns the scope of the rule in *Funk-Schlesinger v. Minister of Interior* [1]. The petitioners argue that the five cases before us fall within the scope of that rule. The registration official should register the change in the register on the basis of the marriage certificate that they presented to him, without examining the validity of the marriage in Israel. Counsel for the state argues before us that a marriage between persons of the same sex constitutes a legal framework of marriage that is not recognized in Israel, and therefore the rule in *Funk-Schlesinger v. Minister of Interior* [1] does not apply. Counsel for the state writes:

> 'A distinction should be made between the registration in the population register of a marriage that took place outside Israel but satisfies the basic legal framework of marriage that exists in

> Israel, whatever its validity — whose registration in the population register is governed by the rule in *Funk-Schlesinger v. Minister of Interior* [1] — and the registration of a marriage that is inconsistent with the existing legal framework in Israel' (para. 35 of the supplementary arguments of the respondent that are dated 23 March 2006).

Who is right? Let us now turn to examine this question.

F. The rule in Funk-Schlesinger v. Minister of Interior and the 'legal framework' argument

16. All the parties agree that the marriage certificates that were submitted to the registration official are lawful under Canadian law; that a marriage ceremony took place in Canada; that the details appearing in the marriage certificate are correct. On this basis we are *prima facie* drawn to the conclusion that the registration official should register the couple as married. This is the clear language of Justice Y. Sussman in *Funk-Schlesinger v. Minister of Interior* [1]:

> 'When he registers the family status of a resident, it is not part of the duties of the registration official to consider the validity of the marriage… it is sufficient for the official in carrying out his duty and registering the family status that evidence is brought before him that the resident underwent a marriage ceremony' (*ibid*. [1], at p. 252).

The state argues that this rule applies to a family status that falls within the scope of a legal framework that is recognized in Israeli law. This framework reflects the outlook of the legislature with regard to the variety of possible family statuses. For our purposes, these frameworks are 'unmarried, married, divorced and widowed' (s. 2(a)(7) of the Population Registry Law). The word 'married' in this context implies a marriage that is consistent with the basic legal framework in Israeli law concerning 'marriage.' This framework only relates to a marriage between a man and a woman. In this regard, the state distinguishes between a 'social framework,' a 'social framework with a certain legal significance' and a 'legal framework.' The social framework reflects family institutions or inter-personal institutions that are recognized by society. Sometimes there are various social ramifications that do not amount to a legal personal status that can be registered. Then it constitutes a 'social framework with a certain legal significance.' This framework is different from a legal framework in that it does not constitute a legal status, as compared with the basic legal framework of a legal status. In

the state's opinion, the petitioners' marriage falls within the scope of a 'social framework with a certain legal status.' It does not fall within the scope of a 'legal framework.' Is the state correct?

17. I do not accept the state's position. It is trying to reintroduce the question of the validity of personal status into decisions concerning registration in the register and the judicial review thereof. With a major effort over more than forty years the decision concerning the validity of the personal status has been excluded from the registration proceedings and the judicial review thereof. Along come the words 'legal framework' and they try to bring the issue of status back onto centre stage of the proceedings concerning registration in the register. We cannot agree with this. All the arguments that were raised over the years that support *Funk-Schlesinger v. Minister of Interior* [1] rule out the idea of the legal framework raised by the respondent. The population registry was not intended to decide the question of the existence or absence of legal frameworks; the registration official is not competent to determine whether there is a recognized 'legal framework' or merely a 'social framework with a certain legal significance'; the register provides statistical data with regard to personal events (such as birth, death, marriage and divorce), not legal constructions that have passed the discerning scrutiny of the registration official. It is not right that the legal struggle concerning personal status should take place in the field of registration.

18. This expression of a 'recognized legal framework' is a new one. It did not appear in the state's arguments in the past. In my opinion, it cannot make any contribution to the matter before us. It raises difficult questions with regard to the level of abstraction of the word 'framework.' Does a 'marriage' in Canada, which is a valid marriage under Canadian law, not fall within the scope of a recognized 'legal framework'? Does an adoption of a child of a biological mother by her lesbian partner constitute a 'recognized legal framework'? Adoption is certainly a recognized legal framework. Does the lesbian character of the joint lifestyle of the couple make this framework of adoption unrecognized? What is the criterion according to which an answer to this question is given? In any case, in *Brenner-Kaddish v. Minister of Interior* [11] it was decided to register this adoption. Was the registration official in that case — which was before we gave our judgment in CA 10280/01 *Yaros-Hakak v. Attorney-General* [16] — ordered to register a 'legal framework that is not recognized' or a 'social framework with a limited legal significance'? What is the difference between the registration of a lesbian adoption and the registration of a homosexual marriage?

19. The state recognizes the fact that the joint lifestyle of homosexual couples constitutes a 'social framework with a certain legal significance.' Counsel for the state writes:

> 'The State of Israel recognizes single-sex couples in many contexts. This recognition is given with regard to socio-economic issues, and also in the context of regulating lawful residence in Israel' (para. 19 of the preliminary response of 13 November 2005).

In this the state is correct. Indeed, in a whole host of judgments it has been held that homosexual couples have rights under specific laws and arrangements. The following is a partial list: (1) rights under collective agreements that are limited to couples (HCJ 721/94 *El-Al Israel Airlines Ltd v. Danielowitz* [17]); (2) pension rights, such as surviving relatives' rights (NLC 54/3-1712 *Even v. Tel-Aviv University* [36]); LabC (TA) 3816/01 *Levy v. Mivtahim* [37]); (3) pension rights under the Permanent Service in the Israel Defence Forces (Pensions) Law [Consolidated Version], 5745-1985 (MA (TA) 369/94 *Steiner v. IDF* [27]); (4) memorial rights (HCJ 5398/96 *Steiner v. Minister of Defence* [18]); (5) recognition as a 'spouse' for the purposes of the Prevention of Family Violence Law, 5751-1991 (FC (TA) 48260/01 *A v. B* [31]); (6) recognition as a 'spouse' for the purposes of the Family Court Law, 5755-1995 (FC (TA) 3140/03 *Re R.A. and L.M.P.* [32]); (7) recognition of a cohabitee for the purposes of rights under the Inheritance Law, 5725-1965 (CA (Naz) 3245/03 *A.M. v. Custodian-General* [28]); (8) surviving relatives' pension under the National Insurance Law [Consolidated Version], 5755-1995 (NI (TA) 3536/04 *Raz v. National Insurance Institute* [38]). Thus we see that the 'social framework' of the homosexual partner has a 'certain legal significance.' Why does this significance not amount to a 'legal framework'? The state's answer is that these social significances are not 'legal frameworks' since they do not amount to a personal status. It follows that the concept of status underlies the state's distinction. It rejects the 'legal framework' of homosexual marriage because it lacks status. So in the state's opinion, the question of registration derives from the question of the 'legal framework,' and the question of the 'legal framework' derives from the question of status. According to the state's approach, the registration official should examine the question of status before he determines the existence or absence of the framework. This approach conflicts directly with the rule in *Funk-Schlesinger v. Minister of Interior* [1], according to which the question of status is not a matter for the registry; a decision on status is

not a matter for the registration official; the judicial review of the decision of the registration official should not consider questions of status. The registration official should not and cannot examine whether a given situation goes beyond a 'social framework with a certain legal significance' and amounts to a 'legal framework.' The court in exercising judicial review of a decision of the registration official should not consider these questions.

20. We asked ourselves whether it cannot be said that what underlies the concept of 'legal framework' is the desire of the state to prevent registration of a marriage that takes place outside Israel and is contrary to public policy in Israel. From the state's written and oral reply it can be seen that it does not raise any arguments of public policy at all. In her written arguments, counsel for the state said:

> 'The position with regard to non-registration does not involve adopting an ethical or public position on the question whether it is proper to recognize a marriage between persons of the same sex, but a professional-legal position with regard to the existing legal position' (para. 94 of the respondent's preliminary response of 13 November 2005).

In reply to our questions during oral argument, counsel for the state said that she is not raising any arguments concerning 'public policy.'

21. In her arguments, counsel for the state said that according to the rule in *Funk-Schlesinger v. Minister of Interior* [1], the registration official should not register something that is manifestly incorrect and is not subject to any reasonable doubt. According to her, the registration of a homosexual couple as married is a registration that is tainted, from a legal viewpoint, with manifest incorrectness, since Israeli law does not recognize this marriage. This argument is fundamentally unsound, for two reasons: *first*, the incorrectness to which the rule in *Funk-Schlesinger v. Minister of Interior* [1] refers is factual incorrectness, whereas the state is arguing with regard to legal incorrectness (see *Brenner-Kaddish v. Minister of Interior* [11], at pp. 375, 377). Justice D. Dorner rightly pointed out in that case (which concerned the registration of an adoption involving a lesbian relationship) that 'the registration before us does not reflect the biological position, only the legal position' (*ibid*. [11], at p. 371). Justice D. Beinisch also said that:

> 'The respondent's contention in this case that the incorrectness of the requested registration is "manifest" because there is no possibility of recognizing two mothers for the same child is merely a different form of the argument that we should not

> recognize an adoption based on a homosexual relationship between the biological parent and the adoptive parent' (*ibid*. [11], at p. 377).

Second, concerning the existence of a 'manifest mistake,' the question is not whether homosexual marriage is recognized in Israel. The question is whether Israeli law will recognize a homosexual marriage that is valid where it was contracted. The answer to this question is not at all simple. It requires us to make precise and detailed examinations. In any case, the decision on this issue — according to *Funk-Schlesinger v. Minister of Interior* [1] — will not be made in registration proceedings and in the judicial review thereof.

22. The state's arguments are based on the contention that there is no social consensus in Israel on the question of the recognition of marriage between persons of the same sex; that the court should not decide these questions; that recognition of a status of same-sex marriages is an ethical question, which ought to be decided by the legislature. I agree with these arguments, to the extent that they concern the possibility that the court should decide the question whether same-sex couples may marry in civil marriages in Israel itself. An expression of that can be found in several judgments (see CA 373/72 *Tapper v. State of Israel* [19]; HCJ 693/91 *Efrat v. Director of Population Registry, Ministry of Interior* [20]; HCJ 4058/95 *Ben-Menasheh v. Minister of Religious Affairs* [21]; *Yaros-Hakak v. Attorney-General* [16]). In *Ben-Menasheh v. Minister of Religious Affairs* [21], the petitioner asked us to order the Minister of Religious Affairs to appoint an official who would conduct civil marriages in special cases. The petition was denied. This is what I wrote in my opinion:

> 'The question of conducting civil marriages between couples who do not have a religious community — just like the conducting of civil marriages for couples who belong to different religious communities — is a difficult and complex question. There is no national consensus on this. It concerns the recognition of status, which operates vis-à-vis everyone. In this situation, it appears *prima facie* that the proper institution for dealing with and regulating the matter is the Knesset and not the court' (*ibid*. [21], at p. 878).

Indeed, I accept that the question of conducting civil marriages in Israel, including marriages between persons of the same sex, should be determined first and foremost by the legislature. This is not the question before us. We are not dealing at all with marriage in Israel. Moreover, there is no

application before us to recognize a marriage between two persons of the same sex that took place outside Israel. When this question arises, it will be examined in accordance with out accepted rules of private international law. All that is before us, and that *Funk-Schlesinger v. Minister of Interior* [1] seeks to resolve, is the question of registration — registration, not recognition — of a marriage between persons of the same sex that took place outside Israel. The state's approach that we should deny the petitions because the marriage that the petitioners contracted is not a 'legal framework' recognized in Israel is an approach that seeks to adopt a position on the question of status; it is an approach that asks the court to rule on a social question that is the subject of dispute. The importance of the rule in *Funk-Schlesinger v. Minister of Interior* [1] is, *inter alia*, that it does not result in the court making a decision on matters of status. It is precisely the approach of the state with regard to a recognized 'legal framework' that makes it necessary to make decisions that the state itself believes ought to be left to the legislature.

23. Before we conclude, let us reemphasize what it is that we are deciding today, and what it is that we are not deciding today. We are deciding that within the context of the status of the population registry as a recorder of statistics, and in view of the role of the registration official as a collector of statistical material for the purpose of managing the registry, the registration official should register in the population register what is implied by the public certificate that is presented to him by the petitioners, according to which the petitioners are married. We are not deciding that marriage between persons of the same sex is recognized in Israel; we are not recognizing a new status of such marriages; we are not adopting any position with regard to recognition in Israel of marriages between persons of the same sex that take place outside Israel (whether between Israeli residents or between persons who are not Israeli residents). The answer to these questions, to which we are giving no answer today, is difficult and complex (see Y. Yonay, 'The Law on Homosexual Orientation in Israel: Between History and Sociology,' 4 *Mishpat uMimshal* 531 (1998); A. Harel, 'The Courts and Homosexuality — Respect or Tolerance?' 4 *Mishpat uMimshal* 785 (1998); M. Tamir (Yitzhaki), 'The Right of Homosexuals and Lesbians to Equality,' 45 *HaPrakit* 94 (2000); A. Harel, 'The Rise and Fall of the Homosexual Legal Revolution,' 7 *HaMishpat* 195 (2002); Y. Marin, 'Marriage between Same-Sex Couples and the Failure of Alternatives to Legal Regulation of Single-Sex Couples,' 7 *HaMishpat* 253 (2002); Y. Biton, 'The Effect of the Basic Law: Human Dignity and Liberty on the Status of Single-Sex Couples,' 2

Kiryat HaMishpat 401 (2002); see also E. Heinze, *Sexual Orientation: A Human Right* (1995); R. Wintemute, *Sexual Orientation and Human Rights* (1995); R. Wintemute and M. Andenas (eds.), *Legal Recognition of Same-Sex Partnerships* (2001); D.R. Pinello, *Gay Rights and American Law* (2003); E. Gerstmann, *Same-Sex Marriage and the Constitution* (2004)). It is to be hoped that the Knesset can direct its attention to these, or some of them.

The result is that we are making the order *nisi* absolute. The respondent shall register the petitioners as married in item 2(a)(7) of the population register.

President D. Beinisch

I agree with the opinion of President Emeritus Barak and with his reasoning. Many years of legal tradition have created and established in our legal system the distinction between the population registry, its function and the limits of its power and the very difficult issues of determining personal status. The fact that, from the viewpoint of the petitioners, the register and the declaration included in it is of importance does not affect the significant distinction that has been created in the case law rulings issuing from this court between the question of the registry and the question of personal status. This approach of our case law created a framework that left undecided those questions that are most complex from a legal viewpoint, and that left the question of social and ethical recognition to the Knesset and the legislature. All of this was discussed and emphasized by my colleague the president in his opinion, and I therefore agree with his position.

Vice-President E. Rivlin

I agree.

Justice A. Procaccia

I agree with the opinion of my colleague President Emeritus A. Barak.

Justice M. Naor

I agree.

Justice E. Hayut

I agree.

Justice E. Rubinstein

Introduction

1. I fear that my opinion differs from that of my colleagues in this case. Forty-three years ago, this court decided by a majority the case of *Funk-Schlesinger v. Minister of Interior* [1], which held that an official of the population registry should register a couple as married if the couple come before him with *prima facie* evidence that proves that a marriage ceremony was conducted in another country, and the official should not examine the *validity* of the marriage. The judgment concerned a Jew and a Christian who were married in a civil marriage in Cyprus. Later this case law ruling became an established principle in the case law of this court in matters subject to dispute, and it was used in *Federation of Sefaradim Torah Guardians — SHAS Movement v. Director of Population Administration, Ministry of Interior* [7], *Pesaro (Goldstein) v. Minister of Interior* [4] and *Naamat, Working and Volunteer Women's Movement v. Minister of Interior* [12] with regard to the registration of ethnicity, religion and conversion, and in *Brenner-Kaddish v. Minister of Interior* [11] with regard to lesbian adoption (it is not superfluous to point out that in the last case there is a further hearing — HCJFH 4252/00 *Minister of Interior v. Kaddish*). Now my colleague the president, and with him most of the panel, also wish to apply this ruling to a marriage between persons of the same sex. My opinion is different. My opinion is that we are really not dealing in this case with a mere statistical registration which was the original nature of the register, a definition that long ago became obsolete, but with a social-public symbol, and that is the true purpose of the petitioners. This is because there are now no economic or 'practical' issues that led them to petition the court. I therefore have doubts as to the distinction between registration and recognition in this context that my colleagues make. In a nutshell, my opinion on the issue raised in the petition is that the question of marriage between persons of the same sex — which is a relatively new matter in public debate, certainly from a historical viewpoint, and is not recognized in the vast majority of countries of the world, and which by its nature raises difficulties in various contexts in view of the attitude of parts of the population to it — lies within the jurisdiction of the legislature and not within the creative interpretation of the court.

2. My colleague the president 'sanctifies' the rule in *Funk-Schlesinger v. Minister of Interior* [1], since he believes that its usefulness increases and

becomes more widespread over the years, since it allows — in his words — 'social quiet' (along the lines of 'industrial quiet') in sensitive areas.

3. The question in my opinion concerns the scope and limits of the rule in *Funk-Schlesinger v. Minister of Interior* [1]. I believe that its limits have already been stretched too far, and there is no room to extend them further. The purpose that this rule initially served, when it sought to resolve the registration of civil marriage that exists in most countries but was not consistent with the marriage system in Israel, is different from its continuing expansion into areas that do not fall within this framework. Specifically, in the present case, we are speaking of a matter that is the subject of dispute both all over the world and in Israel. The ordinary person does not distinguish between registration and the recognition of status; were we to go out onto the street and ask people, I believe that no one would question the fact that they are one and the same. In such circumstances, *this court should ask the legislature to have its say.* This is my approach in a nutshell. I shall now clarify it in greater detail.

On the ruling in Funk-Schlesinger v. Minister of Interior

4. Mr Schlesinger, a Jew, and Miss Funk, a non-Jew, were married in a civil marriage in Cyprus. When they came to Israel, they applied to be registered as married. The registry official refused and they petitioned the court. The following are the remarks of Justice Sussman, who wrote the majority opinion:

> 'It is clear and free of doubt that the function of the registration official, under the aforesaid ordinance [the Residents' Registry Ordinance, 5709-1949, which was replaced by the Population Registry Law, 5715-1965] is merely a function of collecting statistical material for the purpose of managing the register of residents, and he has not been given any judicial power' (at p. 244).

These remarks of Justice Sussman rely *inter alia* on the opinion of the Attorney-General (of 10 March 1958) in which it was stated that 'the civil administration authorities are neither authorized nor capable, and they therefore *are also not entitled*, to make rulings and to decide issues of religious prohibitions' (p. 246; emphasis in the original). Justice Sussman also said that the ordinance '… did not give registration in the residents' registry the force of evidence or proof for any purpose. The purpose of the ordinance is… to collect statistical material. This material may be correct and

it may be incorrect, and no one guarantees its correctness…' (*ibid.* [1], at p. 249), and he gave examples to show that the registry has no probative value.

5. The court, in the majority opinion, did not want to enter the minefield of Jewish religious law. Therefore it held fast to the rule in CA 191/51 *Skornik v. Skornik* [22], by saying that:

> 'The State Attorney did not argue before us that the marriage should be void because it was celebrated in a civil ceremony; there was no basis for this contention because this court has already held that the form of the marriage is governed by the law in the place where the ceremony took place (*Skornik v. Skornik* [22]) and in the absence of any evidence to the contrary, a ceremony that was celebrated in a foreign country is presumed to have been celebrated according to law' (*ibid*. [1], at p. 252).

Justice Sussman went on to say:

> 'The marriage will be declared invalid… if an Israeli judge, *in giving expression to the feelings of the Israeli public*, will be obliged to say that the validity of such a marriage is inconsistent with our lifestyle… Something that disqualifies a marriage under religious law will be a very weighty consideration, but it does not need to be the only consideration. The Israeli public is today divided into two camps. One camp that observes the religious precepts or most of them is confronted by another camp that emphasizes the separation between a state governed by civil law and a state governed by Jewish religious law. The outlooks of the members of the two camps are completely opposed to one another. Public order in Israel does not mean that the judge will force the outlook of one camp on the other camp. Life requires an attitude of tolerance to others and respect for different outlooks, and therefore the criterion that guides the judge can only be *a balance of all the outlooks prevalent among the public*' (*ibid*. [1], at p. 256; emphasis supplied).

Therefore the majority opinion reached the conclusion that the marriage ceremony is decisive for the purpose of registering the status, that examining the validity of the marriage is not the concern of the registration official and that *prima facie* evidence of the ceremony is sufficient in order to oblige him to register the ceremony. It should be noted that Justices Witkon and Berinson left unanswered the question of the recognition of the validity of civil marriage (p. 258), whereas Justice Sussman thought that it should not be

held that civil marriage is definitely invalid. We see, however, that the court based its judgment on the doubt concerning the validity of the marriage under Israeli law (something that has no parallel in the case before us), and emphasized the need for a criterion that is 'a balance of all the outlooks prevalent among the public.' I cannot refrain from saying with regard to the remarks of Justice Sussman that even from the perspective of that time I doubt whether the polarized divergence that he described between two supposedly opposing camps, the supporters of civil law against the supporters of Jewish religious law, reflected the complex Israeli reality, which is multi-faceted. I will merely say that even among religiously observant Jews there were (and are) many whose attachment to Jewish religious law does not detract at all from their attitude to the state as a state governed by civil law, and who see a conceptual harmony in the combination of the two.

6. Justice Silberg, in the minority, was of the opinion that the marriage under discussion, between a Jew and a Christian, had no validity under the laws of the state because Jewish law was the personal law of the man (Schlesinger); consequently, if the registration official —

> '… is persuaded that the man is not married, he is prohibited from registering something that, in his opinion, is absolutely false. This is because the registration questionnaire asks about the *legal* family status of the person being registered, and not about the vague fact of whether he underwent a marriage ceremony or not' (p. 239; emphasis in the original; see also Dr Silberg's article of 1941, 'A Modern Question of the Law of Marriage' (in his book *Coming As One*, at p. 225), where he says, following the case law of Mandatory Palestine, that 'a mixed marriage of a Jew who is a national of Palestine is void…' (at p. 230)).

Justice Silberg, who did not ignore human and practical needs, also made a practical suggestion for cases such as Funk-Schlesinger, which in his opinion could help in 'removing the painful aspect of the vast majority of difficult cases' (at p. 241). This was to add in the law after the word 'married' the words 'in a civil ceremony' or 'in a religious ceremony.' This requires legislation, and the legislature did not accept the recommendation. We have therefore come to where we now stand.

7. There will be some who ask — even though for practical purposes the question is no longer relevant — whether *ab initio* there was a need for the rule in *Funk-Schlesinger v. Minister of Interior* [1], and whether Justice

Silberg was not correct in his approach that implied that if there was a basis for bridging the gap between a marriage that is not recognized in Israel and the registration of Israelis who married abroad in such marriages, this was a task for the legislature. But it can also be argued in support of the approach of Justice Sussman, in the majority opinion, that it is a fact that for forty-three years now marriage under the personal law, which is recognized in Israel, and the registration of civil marriage have coexisted, and the judgment perhaps prevented public battles that would not have contributed to the welfare of the public. Even those who criticize the rule in *Funk-Schlesinger v. Minister of Interior* [1] should not minimize the importance of this factor in that context and similar contexts. Moreover, the legislature is not quick to provide solutions, even though there is considerable distress and there are significant problems with regard to issues of marriage, and we will merely mention those persons who are Israeli citizens by virtue of the right of return but are not Jewish, for whom the law does not provide a proper framework; as the number of non-Jews according to Jewish religious law who came to Israel under the Law of Return (the children and grandchildren of Jews and their spouses) increased — especially in recent years, although these problems began to arise already in the first wave of immigration from the former Soviet Union — the question of their marriage possibilities arose. This question is not at all insignificant, and this is why there have been initiatives such as the draft Civil Union Law (see the article of S. Lifshitz, 'Registration of Relationships,' in the Menasheh Shava Book (A. Barak, D. Friedman eds., 2006) 361, at p. 419). The legislature has not yet addressed these issues, and the question of how to resolve existing problems in the face of the delicate fabric of religious marriage laws. But are there no limits to the rule in *Funk-Schlesinger v. Minister of Interior* [1]? We are dealing with a marriage between persons of the same sex, in a legal framework that no one disputes did not exist in the past, and which was created recently as a part of radical cultural changes in certain sectors of society. Is it not the role of the legislature to address this? In my opinion the answer is that this is its function; and if indeed the legislature decides upon a certain outlook, or even if it does not adopt any position at all, the meaning will be that this is what it wanted.

8. In concluding our analysis of the rule in *Funk-Schlesinger v. Minister of Interior* [1], I thought it would be appropriate to cite some of the remarks of Justice Türkel in *Yaros-Hakak v. Attorney-General* [16]:

> 'There are cases where, after a legal ruling is handed down, it goes beyond its original scope and spreads to areas that the

> persons who made it never imagined it would reach. In my opinion, a blatant example of such a situation is the ruling that was made in HCJ 143/62 *Funk-Schlesinger v. Minister of Interior*…' (*ibid* [16], at p. 142 {95}).

See also the remarks of Prof. Shava following the decision in *Brenner-Kaddish v. Minister of Interior* [11]:

> 'The Supreme Court should reconsider the rule in *Funk-Schlesinger v. Minister of Interior* especially after its extension in the *Goldstein* case and its implementation out of all proportion… in HCJ 1779/99 (*Brenner-Kaddish v. Minister of Interior*)' (M. Shava, 'Registration and Recognition of a Foreign Adoption Order within the Framework of a Lesbian Family,' 1 *Kiryat HaMishpat* 103 (2001), at p. 132).

On the registry

9. Whether true or not, *Funk-Schlesinger v. Minister of Interior* [1] has *prima facie* established in the 'legal' consciousness the idea that the population registry is merely a statistical tool. I say once again that this is not the case; the population registry is the 'entry gate' into the Israeli legal reality. When confronted by a couple who present an Israeli certificate that declares them to be married, an ordinary person is incapable of making fine distinctions as to whether it is merely a case of registration or a recognition of status. But this is not only true of the ordinary man. This was discussed by Justice Landau a short time after the judgment in *Funk-Schlesinger v. Minister of Interior* [1] was given:

> 'The statement… that "the purpose of the ordinance… is to collect statistical material" is certainly true in itself, but it does not exhaust the practical importance of the registry… Therefore the value of the registration should not be denigrated entirely as if it were merely the addition of another digit to the total statistical account of the registry' (*Gurfinkel v. Minister of Interior* [14], at p. 2071; see also *Pesaro (Goldstein) v. Minister of Interior* [4], at pp. 711-712).

Several years later Justice Landau reiterated this approach:

> 'And in truth, how is it possible to denigrate the value of the registration, from a political and social viewpoint, which is no less important than the narrow technical viewpoint… and it is possible to ask: if all of this is a matter of no significance, why is the petitioner fighting in his petition with such stubborn

> persistence… Is it really true that "all the people are in error" in understanding the importance of the registry?' (*Shalit v. Minister of Interior* [6], at p. 526).

This approach was shared by President Agranat:

> 'I ought to emphasize that I am in agreement with my colleague Justice Landau when he says that such a registration, when it has been approved, will not merely have technical value, but also has value from a political-social viewpoint, something which is proved both by the great debate conducted by the members of the Knesset… and by the great interest caused by the trial before us among the public at large' (*ibid*. [6], at p. 598).

President Agranat also warned about the manner in which what is today called merely technical and statistical is likely to be interpreted in the future: 'There are grounds for concern that allowing the registration as aforesaid is likely to be interpreted, in the course of time, as a revolution that has ramifications… also on other walks of life' (*ibid*. [6]). His remarks are most pertinent. The path outlined by these great jurists was followed later by Vice-President Elon:

> 'Indeed, the registration of the ethnicity item as "Jewish" in the population registry does not constitute *prima facie* evidence for any matter of personal status… and since this is so, it is argued before us that it is of no consequence. But when the legislature decided to register the item of ethnicity… we ought not to denigrate its national-public importance, and we should regard it with the proper respect. Moreover, the petitions before us, and the extensive deliberations and arguments required with regard thereto, prove how important and fundamental is the decision in them to all of the litigants before us' (*Federation of Sefaradim Torah Guardians — SHAS Movement v. Director of Population Administration, Ministry of Interior* [7], at pp. 736-737).

This was followed by Justice Tal, who disagreed in *Pesaro (Goldstein) v. Minister of Interior* [4] with the determination of Justice Sussman in *Funk-Schlesinger v. Minister of Interior* [1] and presented a long list of practical ramifications of the registration, but also considered the public significance:

> 'The approach that registration is merely "statistical" ignores reality… Not only do the organs of state and its citizens rely on the registry, but even the legislature itself has given the registry a status far beyond that of a mere statistical registration…

> The question is therefore why these "married persons" should be registered in the population registry… when these marriages, as we have seen, have no local legal validity…
>
> There is also considerable public significance to registration as a Jew in the population registry, far beyond the "statistical" significance. The public does not make the fine distinction between registration for the sake of the registry and registration for the sake of the right of return…' (*Pesaro (Goldstein) v. Minister of Interior* [4], at pp. 705-708).

For this reason, Justice Tal held that 'I cannot agree with the easy solution of registration for registration's sake' (*ibid*.). Justice Englard also continued along this path, when he said bluntly that all the substantial elements inherent in registration constitute a symbol, and it was this — the symbolic nature of the registration — that was under consideration:

> 'Indeed, if we are merely dealing with insignificant statistics, why do there continue to be so many battles with regard to the registration? Why are there so many judgments containing dozens of pages in which the justices are divided in their opinions? *The truth is, of course, that the symbolic here is the essence*, and without a given outlook on life there is no decision on the question of registration or statistics' (*Naamat, Working and Volunteer Women's Movement v. Minister of Interior* [12], at p. 756; emphasis supplied).

Thus we see that the registry is not merely statistical and that it has practical and social ramifications upon the opinions of the public, the authorities and the legislature. It would appear that in recent decades the registry in the legal context has been mainly a battlefield for a struggle over symbols. This was the focus of the petitions mentioned above, and it is also the focus of the petition before us. Should the *de facto* struggle over symbols be the work of the court? And is it proper that it should be done in a roundabout manner, within the framework of the population registry, by continually extending the rule in *Funk-Schlesinger v. Minister of Interior* [1]?

10. It might be asked in what way is the marriage of persons of the same sex different from a civil marriage that is also not recognized in Israel but is registered by virtue of the rule in *Funk-Schlesinger v. Minister of Interior* [1] and is almost unchallenged. The answer in my opinion is not difficult: civil marriage is, as we have said, a recognized institution in many countries, probably in the vast majority of them, and logic dictates that there is no

alternative to registering it, even if we do not regard the registration official merely as a recorder of statistics. But this is not the case with same-sex marriages: when the official looks at these, he will immediately know that he is facing a new legal creation, which the state described in this case as a framework 'that our ancestors did not imagine,' and which has been recognized only in small minority of countries around the world — apparently in approximately six out of more than one hundred and ninety, which is approximately three per cent. Is this therefore the very area in which the court in Israel, with its special character, should march out in front of the legislature? Is this not a situation in which the reasonable official can argue that in his opinion there is a 'manifestly incorrect registration, which is not subject to any reasonable doubt' (Justice Sussman in *Funk-Schlesinger v. Minister of Interior* [1], at p. 243), and therefore it should be addressed and decided by the legislature? Moreover, is the registration sought in this petition 'a balance of all the outlooks prevalent among the public' of which Justice Sussman spoke?

On the petitioners and the court

11. I would like to make a clear distinction between this case and the petitioners' human dignity, to which they are obviously entitled as human beings, like every other human being, and as a constitutional right under the Basic Law: Human Dignity and Liberty, according to which their private lifestyle is their own concern. As the petitioners and the state both said, during the last decade the mutual economic, social and personal rights of same-sex couples have been regulated in case law and the opinions of government authorities, and indeed my colleague the president listed the main points in this field, which speak for themselves. In this way the courts and the authorities have addressed the dignity and fair economic rights of same-sex couples.

12. This petition does not concern a comparison of the social and economic rights of same-sex couples with the rights of married couples. The thrust of the petition, in my opinion, is not the protection of the rights of the petitioners as citizens, as human beings, who are entitled to dignity and equality. As I have said, in recent years, little by little, in field after field, and not without some hesitation, this court has made decisions towards the equality of rights. Indeed, at the beginning of the 1980s, Justice Barak wrote: 'It is obvious that if two men or two women come before the court and apply for approval of an agreement between them as a spouses' property agreement, the court will not approve it, since the applicants are not spouses'

(CA 640/82 *Cohen v. Attorney-General* [23], at p. 689). Much has happened since then, and the proper recognition of the need to continue to realize the protection of social and economic rights has steadily increased within the framework of the values of equality and dignity.

13. I think that the path began with the judgment of this court in *El-Al Israel Airlines Ltd v. Danielowitz* [17] (which was, admittedly, decided by a majority), and it continued with the other cases that the president mentioned in his opinion; but the main work has been done in the trial courts that apply on a daily basis the principles determined by this court. As the president said, in 2004 the Family Courts overturned his determination in *Cohen v. Attorney-General* [23] and recognized two men as 'spouses' for the purposes of the Family Court Law (with regard to approving a property agreement, see *Re R.A. and L.M.P.* [32], *per* Justice Rish-Rothschild; FC (TA) 6960/03 *K.Z. v. State of Israel, Attorney-General* [33], *per* Justice Granit, with regard to protection orders under the Prevention of Family Violence Law, see FC (Hf) 32520/97 *A v. B* [140], *per* Justice Globinsky). Fairness requires that we point out that there is conflicting case law — for a detailed survey see FC (TA) 16610/04 *A v. Attorney-General* [35], *per* Justice Gefman; but it is clear that what in the past was obvious is today, at the very least, a matter of dispute). Meanwhile, government authorities have also recognized the requirements of dignity and equality, and I believe that for years there has been a clear trend of granting the applications of same-sex couples (for a detailed survey, see para. 41 of the petition in HCJ 3046/05).

14. In reply to my question, counsel for the petitioners said that there are additional rights that have not been given to the petitioners, and he referred to s. 3 of the Evidence Ordinance [New Version], 5731-1971, which provides that 'In a criminal trial, one spouse is not competent to testify against the other, nor may one spouse be compelled to testify against a person who is charged together with the other in one indictment.' Without making any firm determinations on this issue, which is not currently before us, I will point out that the trial courts have given the section a purposive interpretation and extended the exemption also to recognized cohabitees who are not married (see CrimC (BS) 2190/01 *State of Israel v. Moyal* [30], *per* Justice Meged; see also CrimC (Hf) 477/02 *State of Israel v. Bachrawi* [29], *per* Vice-President Pizam and Justices Razi and Shiff), from which it may be understood that such a determination is not far off. The principle is that each issue should be examined on its merits to see whether any material right is violated, but the desire for registration has a wider purpose than ensuring

specific rights; it involves the recognition of a symbol. I am therefore of the opinion that a distinction should and can be made between issues that have a direct ramification on the petitioners as citizens and as human beings that are entitled to dignity and equality and questions of a general public nature, with a symbolic significance that has no major practical ramifications. It should also be remembered that granting rights is mainly dependent upon a recognition of *status* — a matter of principle that we have not been asked to decide in this petition — rather than *registration* that does not even constitute *prima facie* evidence of the correctness of its content (s. 3 of the Population Registry Law).

15. Indeed, my colleagues, following their approach, hold fast to the decision in *Funk-Schlesinger v. Minister of Interior* [1]; but even according to the supporters of the decision in *Funk-Schlesinger v. Minister of Interior* [1], do we have before us a case like that in *Funk-Schlesinger v. Minister of Interior* [1], and is it possible to compare the registration of a civil marriage, which is an accepted arrangement in many countries, with a marriage between persons of the same sex that has been recognized in only a few countries? In my opinion, the answer is no. In my opinion, the state is correct in its position that the judicial system should not decide this matter, and its policy should not be seen, albeit unintentionally, as an attempt to predetermine the issue; the legislature should consider the matter and have its say.

On public confidence

16. In my opinion, this court should also consider the question of to what extent it is distancing itself from the social consensus, since both my colleague the president and the petitioners themselves do not dispute that in this case no such consensus exists and since it is very difficult to speak of 'a balance of all the outlooks prevalent among the public.' Public confidence is often mentioned as a fundamental prerequisite for the proper functioning of the court. This means that in matters that are the subject of a major disagreement among the public, the court should consider whether it is essential that it should enter into the dispute; sometimes the answer will be yes, but there are times when it is not. In my opinion, the difference when making the relevant balance lies in the question of the degree to which substantive human rights are *really* violated in this context of the registry. As I have said, there is no violation in this case beyond the symbolic; the socio-economic rights have been regulated in a reasonable manner, and what

remains, if anything, is negligible, and can be regulated in the future, if necessary.

17. Public confidence, according to President Barak in the very important books that he has written, means 'that the judge does not express his own views but the fundamental outlooks of society' (*The Judge in a Democracy*, at p. 50, and see also his remarks in *Yaros-Hakak v. Attorney-General* [16], at p. 117), that 'when the judge is obliged to balance values according to their weight, he should aim to do so in accordance with what seem to him the basic outlooks of society' (*Judicial Discretion* (1987), at p. 188). Elsewhere the question, together with the answer, are clearly presented by Prof. Barak:

> 'Should the judge exercise his discretion in such a way that the legal norm that results from exercising the discretion (whether by way of statutory or case law interpretation or in another way) should also enjoy a social consensus? …
>
> My opinion is that the judge should take into account among his considerations the degree of social consensus for the social values and legal norms that result from them. The judge should aspire to find a solution that is consistent with the social consensus, or at least does not contradict it. In my opinion, it is desirable to avoid choosing an option that directly goes against the basic outlooks of the public… The reason for this approach lies in democratic considerations, considerations of the separation of powers and *the need to ensure public confidence*… An act that conflicts with the social consensus will, in the long term, harm *public confidence* in the court system and the ability of the courts to function property' (*Judicial Discretion*, at pp. 289-290 (emphases supplied); these remarks were also cited in *Ben-Menasheh v. Minister of Religious Affairs* [21], at p. 880).

Admittedly, public confidence does not mean —

> '… popularity and following the trends prevailing among the public. Public confidence does not mean bowing to public opinion polls and surveys. Indeed, public confidence means a recognition that "a judge administers justice in accordance with the law"' (CrimFH 5567/00 *Deri v. State of Israel* [24]).

The court is not a slave to opinion polls and it is not guided by them, but it is proper to examine matters, not merely from the perspective of individual justice for the petitioners, but also from the perspective of 'public justice,' which means, in my opinion, seeking the broadest common denominator

between the different parts of Israel's divided society and avoiding its extremes. Indeed, it is difficult to please everyone; but even if public confidence does not mean pleasing the public, as President Barak said on one occasion, it is not based on extremes. No one denies that social conditions may change, and this has happened to a considerable degree with regard to homosexual relationships (see *The Judge in a Democracy*, at pp. 60-61; *El-Al Israel Airlines Ltd v. Danielowitz* [17], at pp. 781-782). The court has made its contribution to preventing discrimination in socio-economic contexts, as we have said, and these have been regulated to a large degree. Even if this is not completely to the petitioners' satisfaction, it is very close to it; but is there no point at which the need to act within the framework of public confidence, within the framework of the broadest common denominator, will lead the court to say that it has reached the limits of its role, beyond which the legislature should have its say, on matters that are the subject of great controversy?

The role of the court

19. Indeed, the recognition of economic and social rights is a fundamental aspect of human decency that is not opposed by any real conflicting value. By contrast, the line that is crossed by a registration of marriage indicates to everyone a *de facto* recognition of status and a conflict of values that ought to be decided by the legislature. It might be argued that, once the economic and social rights have been recognized, it makes no difference whether they are also accompanied by registration. But to tell the truth, once we saw that the registration is not merely for statistical purposes as stated in *Funk-Schlesinger v. Minister of Interior* [1], even if registration of personal status does not constitute evidence of its correctness (s. 3 of the law), it has great symbolic significance. A people lives by its symbols, and we should reiterate that, were this not the case, both statute and custom in Israel would not attribute much significance to them; moreover, truth be told, I think that the petitioners would not be fighting the battle that they are fighting in this petition. Justice Zu'bi has already said in *Brenner-Kaddish v. Minister of Interior* [11] that 'in practice the petitioners are not merely seeking registration, but they are looking for *de facto* recognition of the adoption.' I think that Justice Cheshin expressed these judicial feelings well, in a minority opinion in a different context:

> 'The real subject of the petition before us is not the introduction of road signs [in Arabic] by the respondent municipalities. The subject is — from start to finish — the cultural and ethnic rights

> of Arabs in Israel. These rights, to the best of my understanding, go beyond the recognized rights that accompany the status of the individual in Israel… It is the nature of things that the court is not the proper forum to consider this issue and decide it, since the political system — and first and foremost the Knesset — has not recognized the rights of the kind that the petitioners desire' (HCJ 4112/99 *Adalah Legal Centre for Arab Minority Rights in Israel v. Tel-Aviv Municipality* [25]), at p. 460; square parentheses supplied).

20. My colleague the president utterly rejects almost the entire legal position of the respondent. With respect, my opinion is different. Like the Attorney-General, I am of the opinion that we are dealing with a matter that should be decided by the legislature. The words of Justice Cheshin in *Yaros-Hakak v. Attorney-General* [16] are appropriate here: '… the court was not intended to march in the vanguard, nor was it charged with testing uncharted waters. The judiciary, in essence, was not given the task of delineating and paving new paths in social matters' (*ibid*. [16], at p. 135 {86}). The remarks of my colleague the president in his book, *The Judge in a Democracy*, are also relevant: 'The judge should generally not be the standard bearer of a new social consensus. As a rule, judges should reflect values and principles that exist in their society rather than create them' (*The Judge in a Democracy*, at p. 47, which is cited in *Yaros-Hakak v. Attorney-General* [16], at p. 117 {64}). I am personally of the opinion that in so far as the rights of the individual are concerned, it is possible that on occasions the court will continue to march in the vanguard, and the same is true with regard to shaping the norms of public administration; but it should not do so in matters of a collective nature that are the subject of a controversy concerning changes in beliefs and outlooks. In these matters, I find the remarks of Vice-President Mazza in *Yaros-Hakak v. Attorney-General* [16] apt:

> '… whether it is desirable that this court should establish, in case law, a *primary* arrangement on this sensitive and controversial issue, which concerns giving a recognized legal *status* to single-sex couples. In my opinion, the answer to this question is no. The principle of the separation of powers, and the special sensitivity of the issue brought before us, require us to act in this case with caution and restraint' (*ibid*. [16], at p. 79 {15-16}; emphases in the original).

21. With regard to the executive authority, President Barak has said:

> '… that there are matters of a unique kind in which the executive authority does not have the power to make fundamental decisions on basic questions that divide Israeli society. There are matters of this kind in which the decisions should be made by the Knesset, whereas the executive authority should restrict itself to the policy for implementing them' (HCJ 3267/97 *Rubinstein v. Minister of Defence* [26], at p. 523 {194}).

The president will say: I am only dealing with the registry, whereas the primary arrangement will be made by the legislature. But in my opinion the registry in this regard is a significant step on the way to a comprehensive arrangement, and therefore its place lies in the legislative domain.

Some remarks on comparative law

22. This court is not the first to contend with the question of the approach to marriages between persons of the same sex that took place in another country. Similar questions are the subject of huge dispute in the various states of the United States, and they are a part of a very vigorous public debate. Admittedly the dispute concerns the question of recognition of the actual marriage, but as we have said the question before us also goes beyond the scope of a mere statistical registration. In the United States the question also arises as to the line separating the work of the court from the work of the legislature. Indeed, in an absolute majority of states in the United States there are legislative arrangements that *reject recognition of marriages between persons of the same sex* that were contracted outside the state (the Defense of Marriage Act (DOMA)). For a survey of the legislative arrangements by state, see appendix to the article of A. Koppelman, 'Recognition and Enforcement of Same Sex Marriage,' 153 *U. Pa. L. R.* 2143 (2005), at p. 2165. The constitutionality of the provisions of the DOMA laws has been scrutinized in several cases, but no judgment has been given by the Supreme Court of the United States in this regard. However there are states, such as New Jersey, in which there is no legislative regulation and where a similar question to the question before us has arisen, and this also concerned a marriage that was contracted in Canada.

23. In *Hennefeld v. Township of Montclair* [39], the court of the State of New Jersey refused to recognize a marriage between persons of the same sex that took place in Canada. It held that —

> '… this court finds that the marriage laws of Canada which recognize same-sex marriage are not consistent with those of

> New Jersey which do not recognize same-sex marriage... Accordingly, the Plaintiffs' Canadian marriage cannot be afforded comity in New Jersey.'

Canadian marriages have not been recognized in states where there are DOMA laws (see *In re Kandu* [40]). This case law relied on previous case law according to which the state constitution did not require recognition of marriage between persons of the same sex (*Lewis v. Harris* [41]). In that case the court addressed its role in recognizing the right of persons of the same sex to marry. With regard to the provisions of the constitution, the court held:

> 'This constitutional provision does not give a *court* the license to create a new constitutional right to same-sex marriage simply because its members may feel that the State should grant same-sex couples the same form of recognition as opposite-sex couples who choose to marry… there is no basis for concluding that our society now accepts the view that there is no essential difference between a traditional marriage of a man and woman and a marriage between members of the same sex' (emphasis supplied).

Even in the State of New Jersey no one disputes that same-sex couples should be given the same rights as heterosexual couples (to this end New Jersey even enacted the Domestic Partnership Act), but the manner, or the 'framework,' in which society chooses to confront the issue — such as whether it constitutes marriage, or a civil union, or another approach — is generally regarded as a public question that the legislature, and not the court, should address.

24. After I wrote the aforesaid, the Supreme Court of the State of New Jersey held, by a majority, that same-sex couples have a constitutional right to the same rights and benefits as heterosexual couples, but it was held that the question of the 'name,' the framework, by which the relationship will be known is a question for the legislature to decide (*Lewis v. Harris* [42]). The court held that it was not possible to strip the term 'marriage' of its loaded meanings, and therefore it was the legislature that should decide whether to use it with regard to same-sex couples:

> 'Raised here is the perplexing question — "what's in a name?" — and is a name itself of constitutional magnitude after the State is required to provide full statutory rights and benefits to same-sex couples? We are mindful that in the cultural clash over same-sex marriage, the word marriage itself —

> independent of the rights and benefits of marriage — has an evocative and important meaning to both parties. Under our equal protection jurisprudence, however, plaintiffs' claimed right to the name of marriage is surely not the same now that equal rights and benefits must be conferred on committed same-sex couples… The Legislature is free to break from the historical traditions that have limited the definition of marriage to heterosexual couples or to frame a civil union style structure, as Vermont and Connecticut have done.'

In so far as the question of framework or symbol is concerned, the court therefore was of the opinion that public debate, as expressed in the work of the legislature, should be allowed to have its say. The court said that traditionally, since ancient times, the word 'marriage' has been used only for the relationship between a man and a woman, and therefore:

> 'To alter that meaning would render a profound change in the public consciousness of a social institution of ancient origin. When such change is not compelled by a constitutional imperative, it must come about through civil dialogue and reasoned discourse, and the considered judgment of the people in whom we place ultimate trust in our republican form of government.'

When the court in New Jersey discussed the reasoning for this determination, which requires the referral of the question of the framework or symbol to the legislature, it addressed the same consideration that I addressed above, namely the need to act within the scope of public confidence:

> 'Some may think that this Court should settle the matter, insulating it from public discussion and the political process. Nevertheless, a court must discern not only the limits of its own authority, but also when to exercise forbearance, recognizing that the legitimacy of its decisions rests on reason, not power.'

All seven justices of the New Jersey court in that case supported the approach that same-sex couples should not be deprived of legal rights and benefits in the law that are given to heterosexual couples. The minority opinion of three justices saw no reason to distinguish between these rights and the right to the 'title of marriage.' This minority opinion also considered the question of symbols — the linguistic use of the term 'marriage' — and it held that there was no basis for depriving the petitioners in that case of the symbol, so that it would not appear that the commitment in a relationship

between persons of the same sex is weaker than that of persons of different sexes, and it also held that labels perpetuate prejudices. Thus we see that a debate took place and the majority referred the question of symbols to the legislature.

25. The Supreme Court of the State of New York, another state where there are no DOMA laws, held that the question of the registration of the marriage of same-sex couples is a matter for the legislature. While relying, *inter alia*, on the judgment in *Hennefeld v. Township of Montclair* [39] from the State of New Jersey, the court in the State of New York held:

> 'The role of the courts is "to recognize rights that are supported by the Constitution and history, but the power to create novel rights is reserved for the people through the democratic and legislative processes"… Deprivation of legislative authority, by judicial fiat, to make important, controversial policy decisions prolongs divisiveness and defers settlement of the issue; it is a miscarriage of the political process involved in considering such a policy change… Judicial intervention is warranted only where the Legislature has placed an unreasonable restriction on access to the legislatively defined right.'

(See also *Samuels v. New York State Dept. of Health* [43]; *Seymour v. Holcomb* [44]).

Conclusion

26. The essence of the matter is this: my colleague the president, like the petitioners, is not satisfied by the respondent's argument that in Israel there is no appropriate legal framework for a marriage of same-sex couples; according to him, the 'legal framework' concept is new, it does not contain a proper criterion and there is no difference between the registration of homosexual marriage and the approval of a lesbian adoption, as decided in *Brenner-Kaddish v. Minister of Interior* [11]. Indeed, my opinion in that case is like the minority opinion of Justice A.R. Zu'bi. Personally, I do not think that giving socio-economic rights to homosexual couples for reasons of human and legal decency is a 'legal framework' similar to the registration of marriage. There is a dividing line between them, and crossing this line is a matter that should be addressed by the legislature. The line is the very symbol, the value decision, which calls for the legislature to consider the matter, since registration is ultimately tantamount to an official stamp of approval given by the state for the creation of a family unit that is recognized only in a small minority of countries around the world. Therefore, were my

opinion heard, we would not grant the petitions.

Petition granted by majority opinion (President Emeritus Barak, President Beinisch, Vice-President Rivlin and Justices Procaccia, Naor and Hayut), Justice Rubinstein dissenting.

30 Heshvan 5767.

21 November 2006.