



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

Appeal Number: PA/04941/2016

**THE IMMIGRATION ACTS**

**Heard at Liverpool**

**On 23<sup>rd</sup> February 2018**

**Decision & Reasons  
Promulgated**

**On 28<sup>th</sup> March 2018**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS**

**Between**

**KHIN [M]**

**(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Mr G Brown, Counsel, Greater Manchester Immigration Aid Unit

For the Respondent: Mr M Diwnycz, Home Office Presenting Officer

**DECISION AND REASONS**

1. The Appellant is a citizen of Burma (Myanmar) born on [ ] 1959. The Appellant left Burma on 30<sup>th</sup> October 2015 with the assistance of an agent who helped the Appellant get onto a plane by bribing the immigration authorities. She left on her own passport. She flew via Bangkok to London. She claimed asylum on 3<sup>rd</sup> December 2015.
2. The Appellant's claim for asylum was based upon a fear that if returned to Burma (Myanmar) she would face mistreatment due to her

religion/ethnicity as a Rohingya Muslim. That application was refused by Notice of Refusal dated 7<sup>th</sup> May 2016.

3. The Appellant appealed and the appeal came before Judge of the First-tier Tribunal Alis sitting at Manchester on 9<sup>th</sup> May 2017. In a decision and reasons promulgated on 17<sup>th</sup> May 2017 the Appellant's appeal was dismissed on all grounds.
4. Grounds of Appeal were lodged to the Upper Tribunal on 23<sup>rd</sup> May 2017. On 5<sup>th</sup> September 2017 First-tier Tribunal Judge O'Garro refused permission to appeal.
5. Renewed Grounds of Appeal were lodged to the Upper Tribunal on 19<sup>th</sup> September 2017. On 4<sup>th</sup> October 2017 Upper Tribunal Judge McWilliam granted permission to appeal. Granting permission Upper Tribunal Judge McWilliam noted that the Appellant was a Rohingya from Myanmar and that the judge found that simply being a Rohingya had not been viewed by the Tribunal as being a reason to be recognised as a refugee and he considered the case in accordance with *TS [2013] UKUT 281* which was concerned with political opposition. He did not attach weight to the evidence by BROUK which he concluded was not independent. Judge McWilliam considered that whilst it was not clear from the grounds whether the background evidence referred to in the grounds was before the judge, it was arguable that *TS* is not concerned with the issues in this case and the rejection of the evidence from BROUK, which was the most up-to-date evidence relied on by both parties, was irrational.
6. On 31<sup>st</sup> October 2017 the Secretary of State responded to the Grounds of Appeal under Rule 24. Those grounds contended that the Grounds of Appeal failed to refer to evidence not before the First-tier Tribunal and as such the judge could not be criticised for failing to take this into account and no error arises from the decision.
7. It is on that basis that the appeal comes before me to determine whether or not there is a material error of law in the decision of the First-tier Tribunal Judge. The appellant appears by his instructed Counsel Mr Brown. Mr Brown is very familiar with this matter. He appeared before the First-tier Tribunal and he is the author of the Grounds of Appeal. The Respondent appears by her Home Office Presenting Office, Mr Diwnycz.

### **Submissions/Discussions**

8. Mr Brown starts by taking me to the evidence and the Appellant's version of events, namely that her historical account was based on her claim that she had hidden her Rohingya identity; been targeted on account of her and her husband's Rohingya ethnicity and that following her house being raised by the authorities in October 2015 she had fled. He points out that the judge was satisfied on the evidence that the Appellant was a Rohingya from Myanmar and gave his reasons at paragraphs 53 to 55 of his decision. He submits however that the judge had made no clear

findings on the evidence whether the Appellant had obtained a false ID card, which described her as a Burmese Muslim, and thereafter obtained a passport from this false ID.

9. He submits that the judge's treatment of the background evidence was insufficient and that the matter of practicality, bearing in mind the current climate of the Rovingya in Myanmar, that in itself is an error. He submits that anyone who protests as being a Rovingya would be at risk on return. He takes me to the witness statement of Mr Khin who is the president of the Burmese Rovingya Organisation UK (BROUK) and submits that the consideration of Mr Khin's evidence by the judge is inadequate and that the judge has dismissed his evidence on the grounds of "partiality". He submits that this was wrong as the witness had openly accepted in his evidence that the aim of the organisation, of which he was president was to highlight the plight of the Rovingya in the international arena and he confirmed that he had provided evidence and had supported other asylum claims, whose appeals had been allowed. He submits that the judge had failed to provide adequate reasons for rejecting the evidence of Mr Khin. Further, he submits that the judge had failed to engage with the objective evidence set out at tab 2 of the Appellant's bundle and in particular referred me therein to the failure of the judge to adequately give due and proper consideration of the US Department of State Report on Human Rights Practices in Burma dated 12<sup>th</sup> April 2016. He submits that the evidence at the time and certainly since thereafter, is that merely being a Rovingya would mean that an application for asylum would lead to the application being successful pointing out that so far 650,000 have had to flee to avoid crimes against humanity. He takes me to the 2016 report.
10. He submits that it having been accepted by the judge that the Appellant was a Rovingyan and should not be expected to conceal her identity, that he had not properly considered whether by reasons of her activities in the UK there was a real risk of her identity becoming known and a further real risk that her false use of the ID card would become known at the point of return. He notes that the judge has made specific reference to the guidance in *TS* namely that:

"A person who has a profile of voicing opposition to the Burmese government in the United Kingdom can expect to be monitored upon return by the Burmese authorities. The intensity of that monitoring will in general depend upon the extent of opposition activity abroad."
11. He submits that the Appellant has shown a history of voicing opposition against the Burmese regime in the many demonstrations and BROUK meetings in the UK which was corroborated by the evidence of Mr Khin. The judge's dismissal of this evidence being mere support is, Mr Brown submits, wrong in law as you do not have to be a leader merely to become someone who has a profile of voicing opposition. Further, he makes considerable reference to issues of country guidance submitting that the judge has not properly engaged with the material that was before him in assessing whether he should depart from the current country guidance in *TS*.

12. Mr Diwnycz in response is most helpful in his approach. He indicates that on a practical basis matters have moved on considerably since this matter came before the First-tier Tribunal Judge in that the tragic developments for the Royingya in Myanmar is not contested and accepts that even at the date of hearing there was a substantial cloud over the Royingya. He does however point out that there were two matters which may well have influenced the judge's decision, which he does not press strongly against so far as Mr Brown's appeal is concerned. Firstly he notes that there was no Home Office Presenting Officer present before the First-tier Tribunal and secondly that there was no request made by the Appellant for an adjournment. His belief is that there would have been considerable assistance given to the judge in the approach that the Secretary of State takes to such a case had a Home Office representative been present. He does not seek to press me further.

### **The Law**

13. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial considerations, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.
14. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

### **Findings on Error of Law**

15. This is a well-constructed decision from a very experienced and reliable First-tier Tribunal Judge. However, as Mr Diwnycz points out the "steer" that would have come from the Secretary of State having a Home Office Presenting Officer present was not available before the judge. Whilst I have to look at the position as it was when the matter came before the First-tier Tribunal Judge it is conceded by Mr Diwnycz that even at that

time their plight was desperate in Myanmar. He concedes that it is even worse today.

16. The position of the First-tier Tribunal Judge was clearly not helped by the failure of the Secretary of State to provide a Home Office Presenting Officer. However, I am prepared to accept the submissions made by Mr Brown that there are errors of law in the decision and that they are material. I accept that the judge appears to have rejected the core of the Appellant's claims at paragraphs 60 to 64 and thereafter gone on to consider the evidence of Mr Khin in reaching those conclusions rather than considering the evidence in the round. Further, there are inadequacies in the consideration of the objective evidence, in particular the failure to consider three reports on human rights abuse dating between April and October 2016 which were referred to in the objective evidence.
17. Whilst it is understandable how the judge came to his conclusions, I am just about satisfied that there are errors of law that are material and consequently I set aside the decision of the First-tier Tribunal and proceed to remake it.

### **Remaking of the Decision**

18. Mr Diwnycz advises that if I find that there is a material error of law he will not press me further on this matter. It is accepted that the plight of the Rohingya in Myanmar constitutes a major humanitarian crisis. There is no up-to-date country guidance or indeed guidance from the Secretary of State as to the approach to be adopted. This is however a woman who fled the country nearly three years ago, has developed a profile due to her sur place activities and who would I find consequently be at risk on return. In such circumstances I remake the decision allowing the Appellant's appeal.

### **Notice of Decision**

19. The decision of the First-tier Tribunal Judge originally contained material errors of law and the decision is set aside. I proceed to remake the decision allowing the Appellant's appeal.
20. No anonymity direction is made.

Signed

Date 26 March 2018

Deputy Upper Tribunal Judge D N Harris

**TO THE RESPONDENT**

**FEE AWARD**

No application is made for a fee award and none has been made.

Signed

Date 26 March 2018

Deputy Upper Tribunal Judge D N Harris