IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-000534
First-tier Tribunal No:
PA/51857/2023
(LP/02526/2023)

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 03 July 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE HARIA

Between

KM (Myanmar)
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr P Nathan instructed by Oaks Solicitors
For the Respondent: Mr E Terell Senior Home Office Presenting Officer

Heard at Field House on 8 April 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. For the sake of continuity, I shall refer to the parties as they stood before the First-tier Tribunal: thus, the Secretary of State is once again "the Respondent" and Mr KM is "the Appellant".

2. The Appellant was born in 1987 and is a national of the Myanmar Republic also known as and referred to in this decision as Burma. He appeals with permission against the decision of First-tier Tribunal Judge Buckwell ("the Judge") sent to the parties on 24 December 2023 dismissing his asylum and human rights appeal. The Appellant had appealed to the First-tier Tribunal against the decision of the Respondent dated 17 March 2023 to refuse his asylum and human rights claim.

Anonymity

3. The Judge issued an anonymity order and no party before me requested that it be set aside. I have taken into account the starting point for consideration of anonymity orders is open justice and the principle of open justice and find that in this case an anonymity order is appropriate as the Appellant claim he is a risk of persecution.

Relevant facts

4. The Appellant first arrived in the United Kingdom ("UK") on 21 December 2009, with leave to enter as a student. On 18th August 2010, the Appellant sought asylum citing his previous political activities; a search at his parents' home by the Burmese authorities; and his recent political activity in the UK. The Respondent refused his claim for asylum and the decision was upheld on appeal by First-tier Tribunal Judge Sarsfield ("Judge Sarsfield") in a decision sent to the parties on 23 October 2010. Judge Sarsfield determined that the Appellant lacked credibility and had fabricated his account. Judge Sarsfield found the Appellant had not been persecuted as a Muslim and his claims of persecution prior to leaving Burma were not credible. Whilst acknowledging the Appellant may have demonstrated outside the London Embassy Judge Sarsfield found his *sur place* activities to be "… cynical and self serving and undertaken to enhance his application …" and there was no evidence of the Appellant receiving any adverse interest from the Burmese authorities. Judge Sarsfield concluded that the Appellant would not be at risk on return to Burma.

5. The Appellant's appeal to the Upper Tribunal was dismissed and the decision of Judge Sarsfield upheld in a decision sent to the parties on 22 March 2011 of Immigration Judge Kelly sitting as a Deputy Judge of the Upper Tribunal. As a consequence, the Appellant became appeal rights exhausted.

6. The Appellant raised a number of further submissions which were initially refused by the Respondent and following a judicial review the Respondent reconsidered the Appellant's claim and refused it in a decision dated 22 May 2015. The Appellant's appeal against this refusal was dismissed in a decision sent to the parties on 19 May 2016 of First-tier Tribunal Judge Morgan ("Judge Morgan"). Despite the fresh evidence of the Appellant's membership of the Burmese Muslim Association, his attendance at

meetings and demonstrations, Judge Morgan found the Appellant was not at risk of persecution on return to Burma.

7. The Appellant submitted a number of further submissions reliant on the Respondent's inability to remove him to Burma, which were rejected and on the 16 April 2018, the Tribunal refused permission for a judicial review.

8. On 6 July 2021, following a military coup in Burma in February 2021, the Appellant submitted further submissions raising the arrests, detentions and killings by the Burmese authorities as significant changes in Burma affecting his claim. The Respondent initially rejected the further submissions but reconsidered the refusal following a judicial review and issued a fresh refusal decision dated 17 March 2023. The Appellant appealed against the Respondent's refusal decision and his appeal was dismissed in a decision of the Judge dated 24 December 2023. It is this decision which is the subject of this appeal.

Decision of the First-tier Tribunal

9. The appeal came before the Judge sitting at Taylor House on 7 December 2023. The Appellant attended the hearing together with KZ as his witness.

10. The Judge at [54] confirmed that he had carefully considered the previous decisions in accordance with the guidance in Devaseelan (Second Appeals - ECHR - Extra-Territorial Effect) Sri Lanka* [2002] UKIAT 00702, [2003] Imm AR 1.

11. The Judge whilst accepting the Appellant's subjective basis for demonstrating against the Burmese regime, and the credibility of his evidence applied the Upper Tribunal decision in TS (Burma) CG [2013] UKUT 281, held that the Appellant would not be at risk on return. In that regard the Judge referenced the Upper Tribunal's determination in OO (Burma) [2018] UKUT 52 (IAC) which confirmed that the decision in TS remained good country guidance.

Grounds of Appeal

12. The Appellant relies on the grounds of appeal drafted by Mr Nathan who represented him at the First-tier Tribunal hearing before the Judge.

13. In summary the grounds of appeal advanced are:

> Ground 1: The Judge erred in assessment of risk on return to the Appellant as a result of his involvement with the National Unity Government (NUG). It is asserted that the Judge despite evidence that there has been a significant change in Burma which warrants a departure from the country guidance case of TS (Political opponents –risk) Burma CG [2013] UKUT 281 (IAC) refused to depart from the guidance in TS. Furthermore, it is asserted that the

Judge failed to note and engage with various photos and other documentary evidence in the bundle showing the Appellant's involvement with the NUG. It is also asserted that the Judge failed to refer to and apply the Country Policy Information Note Myanmar (Burma): Critics of the military regime Version 5.0 dated June 2023) ("CPIN") (referred to in the grounds as Respondent's COI report dated June 2023).

Ground 2: The Judge erroneously considered the Appellant's lack of a current passport to involve administrative actions by the Respondent so that the Appellant would have the appropriate documentation to satisfy the airlines and immigration officials for his travel back to Burma. The Judge failed to have regard to the changes since the Upper Tribunal decision in OO (Burma) to the passport CV form issued by the Burmese Embassy that the Appellant must complete to obtain a passport and the risks to the Appellant in having to answer a question as to whether he had sought asylum in the UK.

14. First-tier Tribunal Judge Gumsley granted permission by a decision dated 17 February 2024 on all grounds summarised the grounds and stating that it is:

> "…arguable that the FtT Judge failed to appropriately or adequately engage with the changes to the government in Myanmar/Burma and the evidence placed before him (particularly the COI Report and the position now of the NUG) as justification for departing from previous case law and country guidance (TS and OO(Burma) which both predated the changes in the country)".

Rule 24 response

15. Mr Terrell who appeared for the Respondent confirmed there was no Rule 24 response. Mr Terrell on behalf of the Respondent accepted from the outset that the second ground established a clear material error of law, but submitted ground one was not as clear cut.

Upper Tribunal Hearing

16. The hearing was attended by representatives for both parties as above. Both representatives made submissions and my conclusions below reflect those arguments and submissions where necessary.

17. I had a bundle comprising 493 pdf pages and a letter comprising 6 pdf pages from the Appellant's representatives dated 4 April 2024 with copies of the Facebook evidence shown to the Judge. I also had a copy of the decision of the Judge dated 24 December 2023.

18. At the end of the hearing I reserved my decision.

Discussion

19. I appreciate that judicial restraint should be exercised when examining the reasons given by a First-tier Tribunal Judge for his decision and that I should not assume too readily that the Judge misdirected himself just because not every step in his reasoning is fully set out. This is the guidance given by the Court of Appeal at paragraph [77] of KM v SSHD [2021] EWCA Civ 693.

20. What matters is whether the Judge has demonstrably applied the correct approach and it should be assumed that a Judge in a specialist jurisdiction such as this understands the law unless the contrary is shown.

21. Given the Respondent's concession on Ground 2, it is sensible for me to address that ground first.

Ground 2:

22. Mr Terrell on behalf of the Respondent accepted the second ground established a clear material error of law. For the reasons set out below I find he was correct to adopt such a position.

23. The Judge addresses the issue of the Appellant's lack of a passport at [51] and states as follows:

> "Much was made of the fact that the appellant does not have a current passport issued by the Embassy or Consulate. However the practical matter of the return of the appellant to Myanmar would involve administrative actions being ensured by the respondent so that the appellant would have the appropriate documentation to satisfy the airline/s with whom the appellant would travel and also the immigration officials when the appellant seeks to cross the border on return back into his home country. This is a process which the respondent regularly has to ensure in relation to failed asylum seekers from a wide range of countries around the world who may not possess current travel documentation when their appeals are determined. Such are administrative matters and I find that the respondent would not seek to return the appellant to Burma in the absence of appropriate documentation having been obtained."

24. Mr Terrell accepted that it was not sufficient for the Judge to say that ensuring the Appellant has current travel documentation was an administrative matter as the Appellant had put forward a precise argument as to the risk that might arise as a result of the redocumentation process. The evidence shows the CV form has been updated since the decision in OO(Burma) and it now requires the applicant to reveal whether he has claimed asylum in the UK. Mr Terrell rightly accepted that the Judge was required to do more and grapple with the issue.

25. Mr Nathan's submissions in relation to the issue of a new passport to the Appellant are noted by the Judge at [39] and [40] as follows:

> "39. With respect to the issue of a new passport for the appellant, he has complied in this country with the terms of his current admission. There have been no enforced returns to Burma since 2015. Since 2016 the Home Office had had some seven years to request of the Burmese Embassy/Consulate that the appellant should be re-documented, but that has not occurred. The appellant himself had sought the issue of a new passport in 2017 but had been refused.
>
> 40. If the appellant were to be removed to Burma without appropriate documents then he would be placed at risk to the extent that his Article 3 ECHR rights would be breached. Mr Nathan queried whether exceptional circumstances had been fully considered. The respondent had had a period of 13 years to seek to have documents issued to the appellant and to remove him to Myanmar. That had not happened. However up until the procedures were changed during Covid-19, the appellant had reported monthly in accordance with his bail conditions. Following the changes he has reported by telephone. Still no passport had been issued to the appellant and Mr Nathan indicated his view that the appellant would not be issued with a new passport."

26. The Respondent's representative at the First-tier Tribunal did not challenge the submission that the Respondent had not enforced a single removal to Burma since the third quarter of 2015.

27. There was no challenge to the evidence which demonstrated that in 2017, the Appellant had tried unsuccessfully to obtain a passport from the Burmese Embassy in order to travel to Thailand to visit his ailing father and ultimately had to obtain a Certificate of Travel.

28. A copy of the amended passport CV form issued by the Burmese Embassy together with the translation was included in the Appellant's bundle [227C-251C]. Question 37 of the CV form requires the applicant to confirm whether he/she has:

> "…Applied/ Granted Refugee or Aylum Seeker Status…".

29. The Upper Tribunal in SA (Removal destination; Iraq; undertakings) Iraq [2022] UKUT 00037, a case concerning Iraq stated that:

> "An undertaking by the Secretary of State not to remove P until it would be safe to do so (when he has acceptable Civil Status documentation or until he can be forcibly removed to the IKR, for example) cannot be accepted by the tribunal because to do so would impermissibly delegate to the respondent the legal claim which is for that tribunal to determine…"

30. The Upper Tribunal in SA was considering the position with regard to returns to Iraq however the principle stated in SA applies equally in this case. In determining risk on return the Judge was obliged to consider any risk to the Appellant in effecting the return. This consideration inevitable required the Judge to consider the fact that the Appellant does not have a valid passport, his expired passport is with the Respondent and that in

order to obtain a passport to travel to Burma he would be required to complete the amended CV form which would require him to declare whether he has applied for, or been granted asylum. The submission made to the Judge at the First-tier Tribunal hearing were that the consequence of the miliary coup in Burma together with the requirement on the application for a passport to confirm whether the applicant had applied or asylum potentially places the applicant at risk on return from the Burmese authorities. The Judge failed to engage with these submissions.

31. The Upper Tribunal in HM (Risk factors for Burmese citizens) Burma CG [2006] UKAIT 00012, at headnote 2 confirmed that there is in general a risk on return if a Burmese citizen returns to Burma from the UK without a valid Burmese passport. It is therefore not reasonable to expect the Appellant to return to Burma without a valid Burmese passport.

32. I find the Judge's failure to consider the risk on return to the Appellant in having to disclose whether he had claimed asylum in the UK in order to obtain a valid Burmese passport to be a material error of law.

Ground 1:

33. I turn to consider the first ground. Mr Nathan expanded on this ground at the hearing and submitted that although the guidance in the Respondent's CPIN is that the country guidance in TS should continue to be followed, the CPIN itself includes evidence that indicates the Appellant would be at risk on return. He submitted that the Appellant relied on the CPIN in support of his case that matters had significantly changed in Burma since the military coup and that a person who has "liked" and/or forwarded NUG posts as the Appellant has would be at risk on return as his Facebook account would be checked by the authorities. Mr Nathan submitted that the issue of the Appellant's profile not falling within those identified in TS falls away due to the risk of from "liking" or forwarding a NUG post. Mr Nathan submitted that the CPIN confirms that a person by merely clicking "Like" or sharing an NUG post would fall foul of the penal code. Mr Nathan relied in particular on paragraphs 13.3.6 and 13.3.7 of the CPIN in the section of the CPIN which deals with the internet and social media and states:

> "13.3.6 RFA reported on 5 May 2022:
> 'Authorities in Myanmar have arrested more than 200 people for incitement and terrorism since late January [2022] in connection with posts they made to social media in support of opposition groups the junta has labeled terrorist organizations, according to official statements.
> 'On Jan. 25, the junta announced that anyone posting content in support of the shadow National Unity Government (NUG), Committee Representing the People's Parliament (CRPP), or prodemocracy People's Defense Force (PDF) paramilitaries — intentionally or not — would face lengthy prison terms as well as the loss of their homes and other property.

> 'In a statement on Thursday, the junta said that it had arrested 229 users for violating the country's Anti-Terrorism Law [drafted in 2013, amid a series of 'terrorist' bombings in cities in October 2013] .and a section of the Electronic Communications Law that prohibits distribution of anti-junta propaganda online since authorities began to monitor Facebook for such posts on Jan. 27.'
>
> 13.3.7 Yangon based daily newspaper The Global New Light of Myanmar reported on the 21 September 2022:
> 'Leader of the [State Administration Team] SAC Information … [announced] those who support the NUG, CRPH and PDFs on social media Facebook will be imprisoned for three to ten years.'"Clicking 'Like' or 'Share' of the posts, pictures and videos of NUG, CRPH, PDFs or their supporters are infringing Section 124 (b) of the Penal Code. The punishment will be three to ten years of imprisonment or a fine," clarified the SAC Information Team Leader. The public conversations (comments) and shares on Facebook, which is the most used social platform in Myanmar, are monitored by the Tatmadaw. In addition, news about account owners who support NUG, CRPH and PDFs being identified and arrested were also reported in State-owned newspapers.'

34. Mr Terrell pointed out that although the Respondent's accepts there has been a change in the country the Respondent's position is that there is no change in the authorities ability to monitor *sur place* activity requiring a change policy and the guidance in TS still applies. Mr Terrell referred to paragraph 3.2.5 of the CPIN which deals with the change in the country since TS and states:

> "The country information does not suggest a significant change in monitoring ability or interest in sur place activities since TS was heard. Therefore, decision makers should continue to follow those findings, considering recent events as documented in this note, including that the military are less concerned with attracting adverse publicity from the arrest of internationally well-known individuals"

35. In SG (Iraq) v SSHD [2012] EWCA Civ 940 at [43] to [50] the Court of Appeal said that the country guidance procedure was aimed at arriving at a reliable and accurate determination and it was for those reasons, as well as the desirability of consistency, that decision-makers and tribunal judges were required to take country guidance determinations into account, and to follow them unless very strong grounds supported by cogent evidence, were adduced justifying their not doing so. This sets a high threshold for the evidence required in order to depart from country guidance cases.

36. The Judge at [38] demonstrates that he was clearly alive to the issue raised by Mr Nathan as he records Mr Nathan's submissions on the issue as follows:

> "In the view of Mr Nathan there have been huge changes since the country guidance decision in TS Burma CG. At the time of that Mr Nathan considered that there had been some hope for the future of the country. The respondent had produced a report in that respect. There is the

> Burmese Penal Code and the military government monitor Facebook. On return Mr Nathan averred that the authorities would want to see the Facebook and social media accounts and activities of the appellant. He is an individual who has been active with the BMA for 13 years and the letter written by the President has been unchallenged. The appellant remains at risk."

37. It would have been more helpful if the Judge had been more precise in his description in his decision of the report produced by the Respondent. It is nevertheless reasonable to assume that the reference by the Judge to a report produced by the Respondent's is a reference to the CPIN. Contrary to what is asserted in the grounds, in addition to this reference at [38] the Judge also refers to the CPIN at [30] and [34].

38. In his findings at [47] to [50] the Judge deals with the issue raised by Mr Nathan and states:

> "47. Mr Nathan sought to persuade me that country circumstances are different to those when the decision in TS Burma CG was issued and designated as country guidance. However, and whilst I accept that there have been further significant country events subsequently, Upper Tribunal Judge Plimmer, now the President of the First-tier Chamber, in OO Burma endorsed the country guidance in TS Burma CG.
>
> 48. Of course, Mr Nathan was of course entitled to seek to persuade me that country guidance should perhaps not be followed within this appeal. However, absent strong professional views on contrary country circumstances, I do not find it appropriate to depart from the guidance in TS Burma CG.
>
> 49. Therefore, I find it appropriate to consider the activities of the appellant in the round and to assess such findings in that respect against the criteria in TS Burma CG. As I have indicated, my views here are that the appellant is one of a number of individuals who are active in protesting against the authorities in Burma, but he has no leadership or distinctive role which means that he stands out. I do not believe that his profile is such that he would have a recognised political profile in the eyes of the governing authorities in Burma.
>
> 50. Based upon the above findings I have considered the factors set out in TS Burma CG. In particular the guidance is set out at paragraph 83 of that panel decision. Taking the criteria set out into account my view of the profile of the appellant, as I have found it to be in this country and as a matter of fact, would not place the appellant at risk of persecution on return. I fully acknowledge that any period of detention in Burma may place an individual at risk as to a breach of their absolute rights under Article 3 of the European Convention. However, with the profile of the appellant, as I have found it to be, I do not believe that the authorities in Burma would find the appellant to be a threat to the stability of the present government."

39. It is relevant to consider the Judge's findings in the context of the evidence before him of the Appellant's *sur place* activities. The grounds

state the Appellant showed the court copies of his Facebook page showing him attending demonstrations organised by the NUG but acknowledge that the text was not translated from Burmese to English although the relevant headings were in English and clearly indicated NUG.

40. The Judge at [8] notes the Appellant produced further documentation at the hearing submitted in three emails from Mr Nathan. Mr Nathan confirmed that copy of this evidence was filed with the Upper Tribunal with the letter from the Appellant's representatives of dated 4 April 2024. At [16] the Judge records the Appellant confirmed his Facebook posts had not been taken down, the posts were shared, he had not put his own comments online, there was a feature of a demonstration and a photograph showing the Appellant. At [52], the Judge considers the Appellant's Facebook activities and finds the evidence of his engagement with social media to be limited. The Judge notes the evidence of the Appellant's Facebook activities was not accompanied by an English language translation. The Judge has therefore clearly engaged with the evidence and made findings on the evidence that were open to him. This demonstrates that the criticism that the Judge failed to engage with the evidence is not merited.

41. Mr Nathan accepted that this was not a case where the Appellant had produced reams of posts and he acknowledged that he should have taken on board the guidance of the Upper Tribunal given in XX (Iran) CG [2022] 23 (IAC) in relation to Facebook and produced evidence in line with that guidance.

42. The Judge records at [33] the submission made by presenting officer at the hearing as to the guidance given by the Upper Tribunal in XX that mere posting on Facebook will not automatically put a person at risk and it depends on the profile and level of involvement.

43. I agree with the Judge's conclusion at [48] that here very strong reasons for a departure from the country guidance in TS have not been established. The Judge made those findings having applied anxious scrutiny to the evidence and being fully aware of the CPIN and the submissions made on the Appellant's behalf by Mr Nathan.

44. For the reasons given this grounds discloses no material error of law.

45. The Appellant is successful on Ground 2 but not on Ground 1.

Disposal

46. I took into account the submissions of the representatives as to the disposal of the appeal. Mr Terrell and Mr Nathan both agreed that they were not averse to the appeal being remitted in the event that an error of law was found on both grounds and otherwise they would prefer the matter to remain with the Upper Tribunal.

47. I am mindful of the Court of Appeal case of AEB v SSHD [2022] EWCA Civ 1512, albeit that I have not found that there was a procedural error in this appeal. Paragraph 7.2 of the Practice Statement contemplates that an appeal may be remitted to the First-tier Tribunal where the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for the party's case to be put to and considered by the First-tier Tribunal. Mr Terrell agreed with Mr Nathan that further evidence from the Respondent would assist in the remaking. Given the nature and extent of the fact-finding necessary to enable this appeal to be remade, as there has been a failure properly to consider some of the evidence, and having regard to the overriding objective, I find that it is appropriate to remit this case to the First-tier Tribunal.

Notice of Decision

48. The decision of the First-tier Tribunal dated 24 December 2023 is set aside for a material error of law in respect of the Appellant's fear of return to Burma.

49. The appeal is returned to the First-tier Tribunal for a *de novo* rehearing before any Judge other than First-tier Tribunal Judge Buckwell.

Directions:

50. Mr Terrell suggested that although directions for the future conduct of a remitted appeal are usually a matter for the First-tier Tribunal, in this case given the concession on Ground 2 and the fact that it is accepted that the Respondent has not enforced a removal to Burma since 2015 it would be helpful for directions to be issued by the Upper Tribunal for further evidence from the Respondent. Mr Nathan agreed. I considered this to be sensible. The representatives agreed a draft set of directions which I amended and issue below:

1. The Respondent shall within 28 days of the remittal of this appeal to the First-tier Tribunal file and serve:

   a. Full details of the current agreement between the Burmese Embassy (aka Myanmar Embassy) and the UK government with respect to either:
      i. the renewal of a Burmese Passport; or
      ii. the production of a Certificate of Travel.

   b. A written assessment as to the reasons for this additional question and the impact on risk on return to Burma if the individual discloses having previously made an asylum claim. In particular it is noted that the Respondent's Country Return Guide requires the completion of the Burmese Embassy's CV form. That form as currently found on the Burmese Embassy's

website[1] includes a question 37, inserted since the 2021 military coup, which now requires the individual to disclose his or her status in relation to claiming asylum in the UK.

2. The Respondent shall within 28 days of the remittal of this appeal to the First-tier Tribunal undertake a review and file and serve a written response of the risk on return to the Appellant as a consequence of the Facebook accounts specified below as the Appellant asserts that in light of the Burmese Authorities' monitoring of NUG activities that he is likely to be at risk through this association alone (see section 13.3 of the Respondent's CPIN of June 2023 regarding Critics of Military Regime):

   a. The 'National Unity Government Representatives Office – United Kingdom' and note the photographic entries for 05 August 2023 and 01 February 2024 which show the Appellant present at NUG demonstrations and in particular making a speech[2]; and

   b. The Appellant's Facebook Account[3].

N Haria

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

28 June 2024

[1] CV_Form_for_Myanmar_Nationalities_for_Consular_Matters_as_of_24-08-2023.pdf (londonmyanmarembassy.com)
[2] https://www.facebook.com/share/CkVQy1LTmroVq6L9/?mibextid=WC7FNe https://www.facebook.com/share/8seTXGBytAa2GrSC/?mibextid=WC7FNe
[3] https://www.facebook.com/yalhaws.demmahom.14