



Upper Tribunal
(Immigration and Asylum Chamber)

OO (Burma -TS remains appropriate CG) Burma [2018] UKUT 00052 (IAC)

THE IMMIGRATION ACTS

Heard at Manchester Piccadilly
On 9 November 2017

Decision & Reasons Promulgated
On 9 January 2018

Before

UPPER TRIBUNAL JUDGE PLIMMER

Between

OO
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Markus, Counsel instructed by Oaks Solicitors
For the Respondent: Mr A McVeety, Senior Home Office Presenting Officer

TS (Political opponents–risk) Burma CG [2013] UKUT 00281 (IAC) remains appropriate country guidance on the risk to political opponents in Burma.

DECISION

1. This appeal concerns a national of Burma who was born in 1965. The government of Burma changed the name of the country to Myanmar in 1989, following the suppression of a popular democratic uprising. Internationally both names are recognised. In this decision, I refer to the country as Burma.

Procedural history

2. The appellant arrived in the United Kingdom ('UK') on 7 April 2010 using his own passport, containing a valid student visa, and claimed asylum on 10 May 2010. This was refused in June 2010 and he appealed to the First-tier Tribunal ('the first FTT'), which dismissed his appeal in a decision dated 13 August 2010. The first FTT entirely rejected the appellant's account of being politically active in Burma, observing that if he had a long record of political activism and been detained, he would not have been issued with a passport in 2009 and permitted to leave Burma. The appellant became 'appeals rights exhausted' on 15 December 2010. Removal directions were set in 2011 and the appellant issued judicial review proceedings challenging a decision not to treat his submissions as a fresh claim. In a consent order dated 1 September 2014 the respondent ('the SSHD') agreed to reconsider the appellant's submissions in light of TS (Political opponents-risk) Burma CG [2013] UKUT 00281 (IAC).
3. In a decision dated 19 March 2015, the SSHD refused the asylum claim and the appellant appealed to the FTT ('the second FTT'). In a decision dated 25 January 2016 the second FTT allowed his appeal on Refugee Convention grounds. The second FTT acknowledged that the first FTT's factual findings should be used as a starting point, considered TS and found, *inter alia*, that the appellant had taken an active part in numerous demonstrations in the UK before concluding that he would be at risk of persecution in Burma. The SSHD then appealed to the Upper Tribunal ('UT').
4. In a decision dated 26 June 2016 UT Judge O'Connor concluded that the second FTT's assessment of risk upon return was unlawful because two important factors, as identified in TS, were left out of account: (i) whether his political views were genuine or opportunistic and (ii) the nature and extent of any political activities he is reasonably likely to engage in upon return to Burma. At the hearing before Judge O'Connor it was agreed that the second FTT's findings of fact should be maintained. It was also agreed that the decision would be remade by the UT at an adjourned hearing with a Burmese interpreter.
5. The rehearing unfortunately had to be adjourned three times. At a hearing on 21 February 2017, the appellant raised a new issue shortly before the hearing relating to the asserted likely refusal by the Burmese embassy to issue him with a new passport, and the SSHD required additional time to consider: (i) whether it is accepted that the appellant would not be issued with a passport; (ii) whether he would be returned to Burma, absent a passport; (iii) what the consequences of (ii) would be if he were to be returned. Directions were given for both parties to file and serve further evidence relevant to these three issues. The SSHD did not receive the appellant's further evidence in time to seek evidence in response and a hearing before me on 3 May 2017 was adjourned. The SSHD was directed to file and serve a full position statement responding to the appellant's updated skeleton argument and addressing the three issues set out above.

6. A further hearing before me on 19 June 2017 was adjourned as the SSHD had not received evidence requested from the Burmese embassy, in circumstances wherein it was expected the evidence would be available imminently.

Hearing

7. At the beginning of the hearing the representatives clarified the documents they placed reliance upon. The Respondent relied mainly upon the Country Policy and Information Note, Burma: Critics of the Government, Version 2.0, March 2017 ('the 2017 CPIN'). This document does not merely record the SSHD's own assessment but sets out in comprehensive detail, with quotations, the assessments made by wide-ranging sources. Indeed, Mr Markus placed considerable reliance upon the contents of the 2017 CPIN. The appellant's evidence was in disarray and scattered amongst numerous bundles. After a short adjournment, Mr Markus provided me with a helpfully tabbed bundle containing all the evidence relied upon by both parties, including the country background evidence and country guidance decisions on Burma. The country background documents available to me are set out in Appendix A.
8. Mr Markus clarified that reliance was no longer placed on the application prepared by the appellant's solicitors dated 3 August 2017, in which the SSHD was invited to withdraw her appeal. I therefore need say no more about this.

Issues in dispute

9. Both representatives agreed that the appeal raises three issues. First, whether, as submitted by the SSHD, there has been a change of conditions in Burma to justify a departure from the country guidance in TS.
10. Second, whether this appellant is reasonably likely to be at prospective risk in Burma, given his particular political profile and likely political activities in Burma, in light of TS and / or the updated country conditions.
11. Third, and in the alternative, whether the appellant would be unable to renew his passport or obtain a certificate of identity ('CoI') from the Burmese Embassy, with the result that he would be detained on return to Burma. In relation to this issue, Mr McVeety submitted that HM (Risk factors for Burmese citizens) Burma CG [2006] UKAIT 00012 no longer applied, and placed reliance upon updated evidence, which he submitted called into question its conclusions.

Oral evidence

12. Both representatives also agreed that the second FTT's findings of fact are preserved but it was nonetheless important for the appellant to provide updated evidence as to his political activities since January 2016, and his intentions, if returned to Burma. The appellant confirmed all three of his witness statements, two from 2015 and the most up to date one dated 12 April 2017.
13. Mr Markus took the appellant to photographs in the bundle of evidence and he clarified who he was demonstrating with. Mr Markus also played a very short

video, secretly recorded when the appellant attended the Burmese Embassy. McVeety asked the appellant to clarify his political role in the UK and I heard detailed evidence regarding this.

Submissions

14. I then heard submissions from the parties. Mr McVeety invited me to depart from TS given the changes in the country conditions identified in the 2017 CPIN. In the alternative, he asked me to find that when the TS risk factors are carefully considered, the appellant would be of no real interest to the Burmese authorities.
15. Mr Markus submitted that any changes to the country conditions are at an early stage and there is sufficient evidence that the government, and the military (who form part of the executive) remains intent on targeting their critics. He invited me to find that TS remains appropriate country guidance and when the TS risk factors are considered, this appellant is at real risk of persecution if returned to Burma for reasons relating to his political opinion.
16. I only heard brief submissions regarding the HM / third issue. Both representatives agreed that it would only be necessary for me to address the third issue if I determined both the first and second issues against the appellant.
17. At the end of the submissions I reserved my decision, which I now provide with reasons.

Legal framework

18. The legislative framework to these appeals includes international and European Union law comprising the Refugee Convention, through the prism of the Qualification Directive, Council Directive 2004/83/EC. This framework is well-known and does not need to be elaborated. When making findings of fact and assessing risk on return, I do so by applying the lower standard of proof.

TS

19. It is convenient to set out the headnote of TS at this stage.

"1. In order to decide whether a person would be at risk of persecution in Burma because of opposition to the current government, it is necessary to assess whether such activity is reasonably likely to lead to a risk of detention. Detention in Burma, even for a short period, carries with it a real risk of serious ill-treatment, contrary to Article 3 of the ECHR and amounting to persecution/serious harm within the meaning of the Qualification Directive.

2. A person is at real risk of being detained in Burma where the authorities regard him or her to be a threat to the stability of the regime or of the Burmese Union.

3. The spectrum of those potentially at risk ranges from those who are (or are perceived to be) actively seeking to overthrow the government to those who are in outspoken and vexing opposition to it. Whether a person is in need of protection will depend upon past and future political behaviour. This assessment has to be made against the background of a recently reforming government that carries a legacy of repression and continues to closely monitor those in opposition. The evidence points to a continuing anxiety over the break up of the state and the loss of its power.

4. *The question of risk of ill-treatment will in general turn upon whether a returnee is detained by the authorities at any stage after return.*

5. *A person who has a profile of voicing opposition to the government in the United Kingdom through participation in demonstrations or attendance at political meetings will not for this reason alone be of sufficient concern to the Burmese authorities to result in detention immediately upon arrival. This is irrespective of whether the UK activity has been driven by opportunistic or genuinely held views and is regardless of the prominence of the profile in this country.*

6. *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.*

7. *Whether there is a real risk that monitoring will lead to detention following return will in each case depend on the Burmese authorities' view of the information it already possesses coupled with what it receives as the result of any post-arrival monitoring. Their view will be shaped by (i) how active the person had been in the United Kingdom, for example by leading demonstrations or becoming a prominent voice in political meetings, (ii) what he/she did before leaving Burma, (iii) what that person does on return, (iv) the profile of the people he or she mixes with and (v) whether a person is of an ethnicity that is seen by the government to be de-stabilising the union, or if the person's activity is of a kind that has an ethnic, geo-political or economic regional component, which is regarded by the Burmese government as a sensitive issue.*

8. *It is someone's profile in the eyes of the state that is the key to determining risk. The more the person concerned maintains an active political profile in Burma, post-return, the greater the risk of significant monitoring, carrying with it a real risk of detention.*

9. *In general, none of the risks identified above is reasonably likely to arise if an individual's international prominence is very high. The evidence shows that the government is keen to avoid adverse publicity resulting from the detention of internationally well-known activists.*

10. *In the light of these conclusions, TL and Others (Burma CG) [2009] UKAIT 00017 can no longer be relied on for Country Guidance. The issue of illegal exit and its consequences considered in HM (risk factors for Burmese Citizens) Burma CG [2006] UKAIT 00012 were not addressed by the parties and the guidance in that decision remains in force for the time being.*

11. *There is evidence of positive changes in Burma which as they become embedded may result in the need for the present country guidance to be revisited by the Upper Tribunal in the short to medium term."*

20. There have undoubtedly been widely publicised positive changes in Burma since the guidance issued in TS, after a hearing in March 2013. This was foreshadowed at [11] of the TS headnote. Mr McVeety submitted that the change was now so embedded, that the guidance in TS no longer applied. To make good that proposition Mr McVeety relied entirely upon the 2017 CPIN. Mr Markus invited me to find that there was an absence of cogent evidence to justify not applying the guidance in TS.

Country guidance legal framework

21. DSG & Others (Afghan Sikhs: departure from CG) Afghanistan [2013] UKUT 148 (IAC) makes it clear that a judge may depart from existing country guidance in the circumstances described in (i) Practice Direction 12.2 and 12.4 and (ii) the UT (IAC) Guidance Note 2011, no. 2, entitled 'Reporting Decisions of the Upper Tribunal Immigration and Asylum Chamber' paragraphs 11 and 12, which I set out below.

22. Practice Direction 12.2 and 12.4 states as follows:

“12.2 A reported determination of the Tribunal, the AIT or IAT bearing the letters ‘CG’ shall be treated as an authoritative finding on the country guidance issue identified in the determination, based upon the evidence before the members of the Tribunal, the AIT or the IAT that determine the appeal. As a result, unless it has been expressly superseded or replaced by any later ‘CG’ determination, or is inconsistent with other authority that is binding on the Tribunal, such a country guidance case is authority in any subsequent appeal so far as that appeal:-

- a. relates to the country guidance issue in question; and
- b. depends upon the same or similar evidence.

12.4 Because of the principle that like cases should be treated in like manner, any failure to follow a clear, apparently applicable country guidance case or to show why it does not apply to the case in question is likely to be regarded as grounds for appeal on a point of law.”

23. In the UT Guidance Note 2011 No 2, at paragraph 11, it is stated:

“If there is credible fresh evidence relevant to the issue that has not been considered in the country guidance case or, if a subsequent case includes further issues that have not been considered in the CG case, the judge will reach the appropriate conclusion on the evidence, taking into account the conclusion in the CG case so far as it remains relevant.”

24. And at paragraph 12:

“Where country guidance has become outdated by reason of developments in the country in question, it is anticipated that a judge of the First-tier Tribunal will have such credible fresh evidence as envisaged in paragraph 11 above.”

25. The UT made the following observation in DSG at [26]:

“A country guidance case retains its status until either overturned by a higher court or replaced by subsequent country guidance. However, as this case shows, country guidance cases are not set in stone (see also HS (Burma) [2013] EWCA Civ 67), and a judge may depart from existing country guidance in the circumstances described in the Practice Direction and the Chamber Guidance Note. That does not amount to carte blanche for judges to depart from country guidance as it is necessary, in the wording of the Practice Direction to show why it does not apply to the case in question. In SG (Iraq) [2012] EWCA Civ 940, the Court of Appeal made it clear, at paragraph 47, that decision makers and tribunal judges are required to take country guidance determinations into account, and to follow them unless very strong grounds supported by cogent evidence, are adduced, justifying their not doing so. To do otherwise will amount to an error of law.”

26. In KS (Burma) v SSHD [2013] EWCA Civ 67, in the course of considering and approving of the country guidance system employed by the UT, Maurice Kay LJ said this at [20]:

“The important point is that when there is a challenge on legal grounds to country guidance, either directly or, as here, indirectly, the guidance is subjected to rigorous scrutiny. The Court will need to satisfy itself that the particular part of the guidance that is being called into question was the subject of evidence that was properly evaluated, after full argument, by the UT, whether or not it applied strictly to the appellant or appellants before it.”

27. Where, as here, one party seeks to challenge the continued validity of country guidance, it is similarly important that the evidence is properly evaluated and subjected to rigorous scrutiny, and this is what I have sought to do.

Evidence relied upon by the SSHD

28. The 2017 CPIN presents a mixed picture for those involved in or perceived to be involved in political activities critical of the government. The position is summarised at 2.2.1-2.2.3 as follows:

“2.2.1 Since the change from military rule to a civilian government in March 2016, there is a growing tolerance of diversity of political opinion, freedom of association, and improvements in freedom of the press and internet based expression. There are some concerns about the ongoing restrictions on the exercise of the rights to freedoms of expression, association and assembly; and the continuing intimidation, harassment and arrest of real or perceived critics of the government. Broad reforms have resulted in the release of thousands of political prisoners (see Political reform, Political affiliation including Political prisoners, Freedom of association and assembly, and Freedom of speech and media).

2.2.2 Furthermore, authorisation to exit Burma, in the form of a “D-form”, is no longer required. Therefore, a person who left Burma “illegally” is no longer at real risk of imprisonment on return to Burma unless that person is returned without a passport or Certificate of Identity issued by the relevant Burma Embassy (see Entering and exiting Burma).

2.2.3 The Home Office’s view is that these significant and durable changes to Burma’s governance and exit/entry procedures amounts to strong grounds supported by cogent evidence to depart from the findings in TS (Political opponents –risk) Burma/Myanmar CG [2013] UKUT 281 (IAC) (25 June 2013), and HM (Risk factors for Burmese citizens) Burma CG [2006] UKAIT 00012 (23 January 2006), which were based explicitly on conditions under the previous military junta. Therefore, the Country Guidance in TS and HM should no longer be followed by decision makers.”

29. The 2017 CPIN goes on to set out the SSHD’s views as to why a person is unlikely to be at risk for voicing their political views and / or attending demonstrations at 2.2.4-7, before outlining the political developments and changes in Burma at sections 5 and 6. Under the heading ‘political reform’ reference is made at 5.1.3 to what the UN Secretary General described as “*a major transformation*” in Burma, which has seen “*significant progress made in the reform of its political and economic institutions, as well as in its opening up to the outside world*”.

Evidence relied upon by the appellant

30. Mr Markus wholly acknowledged the positive political developments in Burma but submitted that much of the evidence referred to within the 2017 CPIN supports the appellant’s case that that there has not been sufficiently fundamental or durable changes to the way in which the Burmese authorities treat those who are regarded as critics of the government.
31. It is an uncontested fact that the National League for Democracy (‘NLD’), led by Aung San Suu Kyi, won a landslide victory in elections on 8 November 2015. However, the military continues to play a significant role in the government. Under the constitution, the military holds 25% of seats, maintaining control over

security ministries and Suu Kyi is precluded from taking the presidency. The 2017 CPIN acknowledges that the military continues to operate autonomously of Burma's elected establishment (see 5.2.1-2) and quotes from extensive sources to the following effect: significant progress has been made on human rights but there continue to be concerns relating to civil and political rights – see 5.1.1, 5.1.3, 5.2.4, 5.2.5. At 6.1.4-5, the 2017 CPIN quotes from the Australian Department of Foreign Affairs and Trade Country Information Report for Burma dated 10 January 2017 ('the 2017 DFAT report') as follows:

"Nonetheless, some laws restricting political activism remain, and protesters have continued to be arrested, including since the NLD came to power...[I]n the course of normal events, Myanmar citizens face a low risk of official or societal harassment, discrimination, violence or imprisonment on the basis of their actual or imputed political opinion. People who actively participate in public protests against the government or the military face a moderate risk of being arrested and detained. Given the NLD government only assumed power in March 2016, it is unclear at this stage whether those detained in these circumstances will typically be released more quickly than under the previous government.

32. The 2017 CPIN also quotes from the Human Rights Watch Report 'Burma: Don't Prosecute Peaceful Speech – Government Failing to Protect Critics from Arrest, Jail' dated 24 January 2017 at 6.1.7 in which it is said that during the government's first year there has been an escalation in prosecutions of peaceful political speech. Following her visit in January 2017 the UN Special Rapporteur on the situation of human rights in Burma issued a report dated 1 March 2017, wherein she noted the pervasive and extensive fears of reprisals for criticising the government – see 6.1.9 of the 2017 CPIN. Monitoring and surveillance of critics of the government and those perceived to be critics remain – see 6.2.1-6.3.4. Ex-political prisoners have been subject to close monitoring upon release. In her report dated 8 March 2016 the UN Special Rapporteur expressed concern at continued reports of civil society actors being monitored by military intelligence and the Special Branch Police, including being followed and photographed at meetings whilst their families, friends and colleagues were questioned on their whereabouts. Concern was also expressed about the "...continuing application of problematic legal provisions (both historic and recently-enacted) to arrest, prosecute, and convict civil society actors, journalists, and human rights defenders," particularly, regarding freedom of association and assembly and continued monitoring and surveillance of civil society actors – see 6.2.1-2. Political prisoners have been released but many remain imprisoned or detained pending trial – see 6.33-4.

Expert evidence

33. Mr Markus also relied upon a country expert report prepared by Dr Zarni dated 10 August 2017. Dr Zarni's qualifications and experience are set out in IS at [21]. The UT considered him well-qualified to speak about matters in Burma at [63] but questioned the academic rigour with which he has approached the task before him at [66] and [75]. The UT nonetheless accepted his evidence that the sophisticated state intelligence network had not been dismantled in Burma and those who demonstrate against the government and are involved in political opposition in the UK is fed back to senior officers in Burma for assessment - [81-2].

34. In his 2017 report Dr Zarni sets out the political developments in Burma after the elections but also describes the use of broad anti-defamation laws to target those critical of the government together with a continuation of the “old pattern” of curtailing freedom of speech. Dr Zarni acknowledges that there was a period of time up to March 2016 when the government made efforts to reach out to Burmese living abroad but that this “new found tolerance and cooperation” has been “closed off”. Dr Zarni’s 2017 report suffers from a similar absence of academic rigour to that observed in TS. Aspects of his analysis are generalised and unsupported by clear examples or evidence. Dr Zarni’s conclusion that there remain significant concerns together with the continued extensive human rights violations, notwithstanding the changes in the political landscape, is however entirely consistent with the majority of the country background evidence. Importantly, Dr Zarni emphasises that a significant aspect of his evidence accepted in TS, continues to apply to the current regime: the sophisticated state intelligence network operating outside and inside Burma has not been dismantled - see [23 to 26] of the 2017 report.

UN Special Rapporteur

35. The UT in TS attached significant weight to the evidence provided in the 2013 report from the UN Special Rapporteur at [74-76]. The report from the UN Special Rapporteur dated 1 March 2017 summarises the progress that has been made but describes the human rights challenges as “formidable”. The UN Special Rapporteur acknowledges the strides taken in opening up the democratic space but considers the country to still be without a truly civilian government. Whilst much attention is placed on the serious human rights violations against the Rohingya (at [72-76]), the UN Special Rapporteur remains concerned regarding wider human rights abuses including, the application of problematic legal provisions, particularly in politically sensitive cases and noted that 170 prisoners remain imprisoned for peacefully exercising their rights to freedom of opinion and assembly. The conclusions reached paint a stark picture, that is probably gloomier than the previous report:

“82. It has been almost one year since the new Government came to power. The Special Rapporteur has already noted in her previous report the formidable human rights challenges it faces while simultaneously having to navigate and direct a bureaucracy carried over from the previous Government, as well as govern within the constraints of a Constitutional framework which gives precedence to military prominence over civilian authority. She recalls that the consolidation of democracy and the creation of a culture of respect for human rights is a complex undertaking that requires political will and sustained investment in not just enhancing the functioning and integrity of State institutions but also their accountability.

83. While improvements have been seen in some areas and some are making clear efforts, as the Special Rapporteur reflected after her recent visit, many ordinary people in Myanmar have unfortunately begun to lose hope that the new Government will address their needs and concerns. That is undoubtedly at least partially due to the continued impunity enjoyed by the military and other security forces and their dominant position in the Government. Trust that was placed in the new civilian leadership has started to wane with repeated incidents that carry the hallmarks of the previous Government. Where abuses and violations are suspected, the Government appears quick to resort to its standard position of “defend, deny and dismiss”.

84. Addressing the apparent climate of impunity will be vital for the new Government moving forward. Impunity arises from a failure by States to meet related obligations, including to investigate violations; take appropriate measures in respect of the perpetrators by ensuring that those suspected of criminal responsibility are prosecuted, tried and duly punished; provide victims with effective remedies; and take other necessary steps to prevent reprisals by those implicated in alleged abuses and violations.

85. Currently, existing policies, laws and avenues for redress appear to favour those in positions of power rather than ensure that everyone is equal before the law and has an equal opportunity to have legitimate grievances addressed. Laws continue to be misused to stifle freedom of association and assembly, and to subvert freedom of opinion and expression. Individuals who have lived on land for generations continue to face eviction without proper safeguards for projects that bring them little or no benefits. Conflict, which continues to have a devastating effect on civilians, sometimes appears to be focused around resource-rich areas or near lucrative projects.

86. The Special Rapporteur reminds the Government of the distinction between rule of law and rule by law, as far too often issues of concern are explained away as having been dealt with “according to the law”. Too often also cases of abuses and serious, even grave, human rights violations that potentially involve the State as the perpetrators, are closed with no explanation or dealt with in secrecy under the pretext of national security. Alternatively, a plethora of committees or commissions are set up to tackle the same issue with duplicative mandates, insufficient guarantees of independence and impartiality, and confusing, inconclusive and delayed outcomes. Where the State is unable to discharge its primary duty of investigating violations, taking appropriate measures against perpetrators and providing victims with effective remedies, it must seek assistance to do so. When it is unwilling to do so, the international community must step in and step up.”

Assessment of the background evidence post-TS

36. The UT in TS was in no doubt at [77] that significant progress had been made to address human rights abuses. The UT also acknowledged at [78] that the positive changes might become sufficiently embedded to warrant a re-examination of the country guidance on Burma. Positive changes have undoubtedly continued after TS, most notably the 2015 elections themselves, but as the UN Special Rapporteur put it in her August 2016 report:

“92. The Special Rapporteur welcomes the Government’s commitment to furthering democratic transition, national reconciliation, sustainable development and peace, and the important steps already taken in this regard. However, Myanmar’s young democracy can only progress if human rights are fully integrated into its institutional, legal and policy framework. Building a culture of respect for human rights must be a priority now and in the future.

93. After the euphoria following the elections, the reality of the wide-ranging challenges facing the new Government has not significantly dampened the sense of hope for change. It will therefore be the key test for this Government to capitalize on its overwhelming public support and current momentum to make progress in human rights priorities and further reforms.”

37. The UN Special Rapporteur’s 2017 report makes it clear that many challenges remain and respect for human rights has not been integrated into Burma’s institutional, legal and policy framework. The UN Special Rapporteur also explains that the military retains dominant influence within the government and human

rights abuses continue to be perpetrated with impunity. The UN Special Rapporteur is not a lone voice – her assessment is consistent with the conclusions reached by Dr Zarni, Amnesty International and Human Rights Watch.

38. I now turn to the terms of the Practice Direction and Guidance Note on country guidance decisions. TS is authority in this appeal in so far as it (a) relates to the country guidance issue in question and (b) depends on the same or similar evidence. This case raises the issue of how the appellant, a government critic is likely to be treated upon return to Burma. That is the same broad issue of concern in TS. The evidence in this case is obviously not the same as the evidence before TS. Not only is the evidence updated by over four years, but there have been significant and wide-ranging developments in Burma as a consequence of its move toward democracy. However, having carefully scrutinised the evidence before me, in particular the reports of the UN Special Rapporteur and the 2017 CPIN (which as I have said cross-references to extensive and wide-ranging source materials), as to how government critics are treated in Burma, I am satisfied that the evidence is to similar effect to that available to TS.
39. First, a wide variety of sources, as set out above, support the broad proposition that those who engage in activity critical of the Burmese government continue to face a real risk of surveillance, monitoring and detention, such that the guidance in TS has not been shown to have been overtaken by events in Burma. As Dr Zarni noted in his 2017 report, a number of credible publications outside of Burma have documented a soaring in prosecutions for allegedly defaming the government. The 2017 DFAT report quantifies the risk of people who actively participate in public protests against the government or military to face a moderate risk of arrest and detention.
40. Second, there continue to be links between a sophisticated human intelligence network and the military. There is no evidence that the sophisticated state intelligence network has been dismantled, particularly given the military's significant influence and involvement in the executive and parliament. Indeed, the UN Special Rapporteur continued to express concern at continued reports of civil society actors being monitored by military intelligence including being followed and photographed at meetings whilst their families, friends and colleagues were questioned about their whereabouts.
41. Third, the UT in TS was particularly concerned about the practice of torture in detention in Burma. This has not been specifically addressed by the UN Special Rapporteur in relation to government critics outside of armed conflict. Dr Zarni's evidence continues to point to the risk of ill-treatment in detention, in incidents not related to armed conflict and a continued culture of impunity for perpetrators, as does the US Department of State's 2016 Country Report on Human Rights Practice in Burma dated 3 March 2017. The guidance in TS that there remains a risk of torture and / or serious ill-treatment during short detentions remains appropriate.
42. Having considered all the relevant updated evidence, I am not satisfied that the changes to the political landscape in the aftermath of the elections have led to any fundamental change in the approach toward critics of the government by the

Burmese authorities. The situation remains similar to the assessment in TS at [78] that: “the reforms and improvements to the human rights have not yet reached root and branch level such that those who voice opposition to the regime are free to do so confidently without risk of discriminatory interference by the state with potentially severe consequences for some at present”.

43. It follows that I do not accept the SSHD’s submission to the effect that there are sufficiently significant and durable changes to Burma’s governance and approach to government critics, that the guidance in TS should be departed from. In short, there is insufficient cogent evidence available to justify not following the country guidance in TS, and the updated country background evidence continues to support that guidance.

Findings of fact and application of TS

43. The findings of fact made by the second FTT have been expressly preserved. When reaching my own findings of fact on the evidence post-dating that decision, I have taken these findings into account as well as the adverse factual findings made by the first FTT. I have had the benefit of assessing considerably more evidence stretching over many years, than the first FTT. I have taken into account the appellant’s evidence before me together with the photographic and other supporting documentary evidence. Having considered all the evidence in the round, I make the findings set out below.
44. As set out in TS, whether there is a real risk that monitoring will lead to detention following return, will in each case depend on the Burmese authorities’ view of the information it already possesses, coupled with what it receives as the result of any post-arrival monitoring. Their view will be shaped by a number of factors, which I address in turn, before considering on a cumulative basis. I have considered the guidance in TS on the basis that the appellant will be returned to Burma, and for these purposes any failure on the part of the Burmese Embassy to provide him with a passport or CoI does not arise – see the SSHD’s letter dated 3 August 2017 that emergency travel documents have been in use since March 2017 and the appellant’s acceptance of this in Mr Markus’s skeleton argument at paragraph 17(a).

How active the person had been in the UK, for example by leading demonstrations or becoming a prominent voice in political meetings

45. Despite not being politically active in Burma prior to his arrival in the UK, the appellant has taken an active role in numerous demonstrations outside the Burmese Embassy and elsewhere from 2010 to 2017, including making and holding placards/banners/flags and using the megaphone to shout slogans. This claim is supported by numerous photographs. These demonstrations were small and the appellant is easily identifiable.
46. The appellant has shown commitment to demonstrating and political activism in the UK over an extended period of time. I accept that his motivation is genuine. The appellant finds it difficult attending demonstrations in London due to the costs involved in travelling from his home in Manchester but nevertheless manages to

attend as many demonstrations as he is able to. In 2016 and 2017 he attended approximately six demonstrations. I note that when considering matters in 2010, the first FTT did not consider the appellant to have attended demonstrations out of any genuine commitment but in order to bolster a weak asylum claim. My findings are different but are based upon an additional six years of activities on the part of the appellant. Of course, it is not necessary for the appellant to establish that his attendance at demonstrations was motivated by genuine commitment, if he is at real risk upon return by reason of his participation alone. However, the genuineness of his commitment to demonstrating in the UK is relevant to my assessment of how he is likely to behave if returned to Burma.

47. During the course of cross-examination, the appellant claimed that he played a role in organising the demonstrations. I accept that the appellant is genuinely committed to the political causes that he has been and continues to be involved in. I also accept that he played a role in motivating others to attend demonstrations but that his role was limited to this. The appellant was unable to cogently explain what he did to organise the demonstrations beyond encouraging others to attend.
48. I accept that the appellant became a member of the Burmese Democratic Movement Association ('BDMA') in 2011 but this ceased to exist after its main organiser was detained upon arrival in Burma in 2014. I accept that whilst the BDMA's activities were reducing, the appellant became involved in '88 New Generation Students'. This is an organisation committed to full civilian rule. The appellant's membership of these organisations is corroborated by letters of support from the organisations themselves.
49. The appellant has therefore been active in attending demonstrations outside the Burmese Embassy over an extended period of time. He has not played any obvious leading role at the demonstrations and does not have a high profile but has on a few occasions played a prominent role at the demonstrations, and this is reasonably likely to be known to the authorities. The appellant has not been a prominent voice at political meetings but has attended many meetings affiliated with activities in opposition to the Burmese military and continues to be a member of an organisation critical of the current regime. The appellant has demonstrated real commitment to political causes he genuinely believes in, and the stamina to commit to this over an extended period of time.
50. As Dr Zarni is recorded to have noted in TS, whilst protests by overseas communities in front of diplomatic posts do not immediately threaten to destabilise or disrupt the military controlled social order inside Burma, these protest demonstrations are usually headline news, the impact amongst the Burmese public is significant and for that reason the government disproportionately views transmitted news of protests in front of its embassies abroad and other direct and practical instigations as having a contagious impact.

Activities before leaving Burma

51. I have assessed risk on the basis that the appellant was not politically active until after his arrival in the UK, in accordance with the findings of the first FTT.

Activities on return to Burma

52. The appellant's motivation and commitment is unlikely to change if he is returned to Burma. He will have been in the UK for over seven years having grown accustomed to openly expressing his views, over an extended period of time. I accept that he is committed to lasting change in Burma based upon a fully civilian government. The appellant has carefully explained why he believes that deeper constitutional change is necessary so as to ensure less military power and greater rights for minorities. His activities critical of the government are reasonably likely to continue in Burma.

The profile of the people he mixes with

53. The appellant has been seen publicly in the company of a well-known activists, known to and regarded adversely by the Burmese authorities: Ko Aung and Dr Sein Win. I accept that on occasion the appellant has been seen with and as supporting higher profile critics of the Burmese government.

Whether a person is of an ethnicity that is seen by the government to be de-stabilising the union, or if the person's activity is of a kind that has an ethnic, geo-political or economic regional component, which is regarded by the Burmese government as a sensitive issue.

54. The appellant is of mixed Shan and Mon ethnicity. His activities in the UK have had an ethnic component and he is staunchly anti-military. He is committed to resolving the problems caused by the military targeting the Shan and other minorities. These activities are reasonably likely to continue in Burma. This continues to be regarded as a sensitive issue by the Burmese government. According to the 2016 USDOS report, "tension between the military and ethnic minority populations, whilst somewhat diminished in areas with ceasefire agreements, remained high".

Cumulative assessment of prospective risk

55. The appellant has been able to credibly demonstrate a genuine political profile critical of the Burmese government both before and after the elections, whilst in the UK, and an intention to protest and demonstrate on return on matters regarded by the Burmese authorities to be politically sensitive and controversial. The authorities are reasonably likely to know about him; it is not reasonably likely that he will be detained on arrival at the airport, but he will be monitored and, as he progresses politically in Burma, it is reasonably likely that he will be seen as vexing the authorities by espousing the causes he particularly believes in – minority rights and full civilian rule. When all the risk factors are considered cumulatively, it is reasonably likely that after a period of monitoring the appellant will be detained for questioning and will be in need of protection.

HM country guidance

56. The headnote in HM sets out the following:

"The following comprise general guidelines in assessing risk on return to Burma of a Burmese citizen:

1. *A Burmese citizen who has left Burma illegally is in general at real risk on return to Burma of imprisonment in conditions which are reasonably likely to violate his rights under Article 3 of the ECHR. Exit will be illegal where it is done without authorisation from the Burmese authorities, however obtained, and will include travel to a country to which the person concerned was not permitted to go by the terms of an authorised exit. We consider it is proper to infer this conclusion from the effect in the Van Tha case of the employment of Article 5(j) of the Burma Emergency Act 1950, either on the basis of the application of that Article in that case or also as a consequence of a breach of the exit requirements we have set out in paragraph 83.*
2. *A Burmese citizen is in general at real risk of such imprisonment if he is returned to Burma from the United Kingdom without being in possession of a valid Burmese passport.*
3. *It is not reasonably likely that a Burmese citizen in the United Kingdom will be issued with a passport by the Burmese authorities in London, unless he is able to present to the Embassy an expired passport in his name.*
4. *If it comes to the attention of the Burmese authorities that a person falling within (1) or (2) is a failed asylum seeker, that is reasonably likely to have a significant effect upon the length of the prison sentence imposed for his illegal exit and/or entry. To return such a person from the United Kingdom would accordingly be a breach of Article 33 of the Refugee Convention. Whether that fact would come to the attention of the authorities will need to be determined on the facts of the particular case, bearing in mind that the person is highly likely to be interrogated on return.*
5. *It has not been shown that a person who does not fall within (1) or (2) above faces a real risk of persecution or Article 3 ill-treatment on return to Burma by reason of having claimed asylum in the United Kingdom, even if the Burmese authorities have reason to believe that he has made such a claim, unless the authorities have reason to regard him as a political opponent."*

57. Given the findings I have reached in relation to the application of IS, it is not necessary for me to assess whether the appellant is at risk by reason of the Burmese Embassy refusing to grant him a CoI or passport. Both representatives focused their attention on IS. The letter from the Embassy dated 30 June 2017, submitted by the SSHD, and supported by a witness statement from Ms Vigor from the SSHD's Return Logistics unit, does not take the matter much further. This states:

"We issue the passport or certificate of identity to someone who can firmly prove that he/she is a Myanmar national with proper documents but only on the approval of the concerned Ministry of Home Affairs and Ministry of Labour, Immigration and Population of Myanmar".

This offers no indication of the requirements necessary for an application to be successfully "approved" by the Ministry.

58. In her written submissions the SSHD asserted that "all Burma nationals are issued with a Certificate of Identity in lieu of a passport". This proposition is unsupported by cogent evidence and difficult to reconcile with the 30 July 2017 letter, which implies that even if Burmese identity / nationality is confirmed, a CoI will only be issued on the approval of the relevant Ministry. Under Burma's quasi-parliamentary system of government one quarter of parliamentary seats go to active duty military

appointees. As noted at 5.2.1 of the 2017 CPIN, the military continues to head the ministries of defence, home affairs and border affairs.

59. Matters seem to have moved on since HM. First, there is now provision for a CoI to be issued in lieu of a passport, albeit both appear to require the relevant Ministry's approval. Second, and in any event, HM is predicated upon the acceptance that those who left Burma illegally are in general prosecuted and detained but the provision rendering illegal departure a criminal offence has not been enforced in recent years, according to 10.4.5 of the 2017 CPIN, quoting from the 2017 DFAT report.
60. I did not hear full argument on these matters, and as the appeal must be allowed on a separate point it is not appropriate or necessary for me to address the guidance in HM in any further detail, save to state the following:
- a. Whilst I accept that the appellant attended the Burmese Embassy on 5 April 2017 with a view to trying to evidence his belief that the authorities would not provide him with a new passport, I do not accept that reliance can be placed upon the evidence that an employee at the Embassy told him that as a person who claimed asylum, his passport will not be renewed. The evidence as to who said this and the surrounding circumstances is vague. The appellant does not know the name of the individual or his job title. The appellant has not been able to explain how he was able to see someone so quickly, when the Embassy was closed, and when he did not have an appointment. A friend who is recognised as a refugee from Burma, accompanied the appellant to the Embassy but has not explained how he knew the name of the individual at the Embassy they spoke to, but not his rank. I note that there are witness statements from others, who have explained what happened when they attended the Embassy. They did not attend the Tribunal in order to provide oral evidence and do not give any detailed information about the person who refused to renew their respective passports.
 - b. In any event, matters appear to have moved on: the 2017 DFDL report makes it clear that a person may now lawfully enter Burma, with a passport or a CoI - see the 2017 CPIN at 10.4.3-4.
 - c. The evidence before me indicates that the guidance in HM probably requires updating.

Decision

61. I remake the decision by allowing the appeal on Refugee Convention grounds.

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order.

Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original first Appellant in this determination identified as OO.

Upper Tribunal Judge Plimmer

Dated: 4 January 2018 but amended on 26 January 2018 pursuant to rule 42 of the Tribunal Procedure (Upper Tribunal) Rules 2008 to include an anonymity order

Appendix A

1. Human Rights Watch: "They can arrest you at any time", The criminalisation of peaceful expression in Burma, June 2016
2. Human Rights Watch Annual Reports for 2016 and 2017
3. Report of the Special Rapporteur on the situation of human rights in Myanmar, 29 August 2016
4. BBC news - Amnesty accuses Myanmar of crimes against humanity, 19 December 2016
5. The Guardian - Free Speech curtailed in Aung San Suu Kyi's Myanmar as prosecutions soar, 10 January 2017
6. NY Times - Brazen killing of Myanmar lawyer came after he sparred with the military, 2 February 2017
7. US Country Report on human rights practices 2016 - Burma, 3 March 2017
8. Report of the Special Rapporteur on the situation of human rights in Myanmar, 14 March 2017
9. The Guardian - Myanmar's great hope fails to live up to expectations, 31 March 2017
10. Country Policy and Information Note, Burma: Critics of the Government, Version 2.0, March 2017