

**Asylum and Immigration Tribunal**

TL and Others (sur place activities - risk) Burma CG [2009] UKAIT 00017

**THE IMMIGRATION ACTS**

**Heard at Field House  
on 29 and 30 October 2008**

**Before**

**Senior Immigration Judge Spencer  
Senior Immigration Judge Kekić  
Miss R I Emblin JP**

**Between**

**TL  
KSK  
NSM**

Appellants

**and**

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

Respondent

**Representation:**

For the appellant: Mr S Cox and Mr P Nathan, counsel, instructed by Scudamores Solicitors

For the respondent: Mr M Blundell, Home Office presenting officer

- (1) *The country guidance given by the Tribunal in HM (Risk factors for Burmese citizens) Burma CG [2006] UKAIT 00012 remains valid. Despite the release of some long term detainees no significant or reliable change has occurred in the approach of the authorities in Burma to be able to say that the human rights situation there is any better than it was at the time the Tribunal in HM promulgated its determination.*
- (2) *The identities and roles of genuine activists in Burmese pro-democracy organisations based in London are likely to be known to the Burmese authorities.*

- (3) *Participation in demonstrations outside the Burmese embassy in London by Burmese nationals is likely to be recorded by the Burmese authorities in London and made known to the Burmese authorities in Burma. Those Burmese nationals participating on a regular basis are likely to have been photographed by the Burmese authorities and identified.*
- (4) *If such a person were returned to Burma and there is an additional factor which would trigger the attention of the Burmese authorities (e.g. lack of a valid Burmese passport; absence of permission to exit Burma; previously having come to the adverse attention of the authorities as an opponent of the regime; or having a connection with known political opponents) there is a real risk of persecution and article 3 ill-treatment on return.*
- (5) *It may be that a pro-democracy demonstrator outside the Burmese embassy known to the authorities to have a real commitment to the cause without an additional risk factor would equally be at risk but each case must be determined on its own facts.*
- (6) *It is unlikely that the Burmese authorities would persecute someone whom they knew to be a hanger-on with no real commitment to the oppositionist cause who was demonstrating merely in order to enhance a false claim for asylum but each case must be decided on its own facts.*
- (7) *In granting permission to leave Burma the authorities are not concerned with the places which the passport holder may visit nor the length of time during which they may be absent from Burma. The Burmese authorities are not interested per se in the places visited by a returning Burmese national who had had permission to leave Burma nor how long they stayed away.*

## **DETERMINATION AND REASONS**

### **1. The background**

This is the reconsideration of the appeals of the appellants who are citizens of Burma. We use this term rather than the more technically correct Myanmar because it is more widely known. The first named appellant was born on 28 December 1965. She is a Muslim from Yangon. She is the mother of the second and third named appellants, born on 16 September 1992 and 28 April 1995 respectively. Although they have separate appeals, it was agreed by the representatives of the parties that for the purposes of these proceedings, they could be treated as dependants of their mother, whom we shall refer to merely as “the appellant”.

2. The appellant left Burma and travelled to Thailand with her husband and two daughters on 30 March 2007. They crossed the border legally using valid passports and having obtained permission to leave Burma. The appellant’s husband returned to Burma but she and her children flew to the United Kingdom on 29 April 2007 via Dubai, arriving here the following day. They all had entry clearance as visitors and were admitted on that basis until 23 May 2007. The purpose of the visit was to see family members. The appellant claimed that at the time of her arrival she intended to return to Burma with her children at the end of the visit.

3. On 21 May 2007 the appellant claimed asylum alleging that she would face ill treatment in Burma because of her political opinion. She maintained that she and two colleagues had formed an organisation to further the cause of democracy and that they were aligned to the All Burma Muslim Association (BMA) which operated overseas. She claimed that she had purchased a satellite phone in Thailand for the use of this organisation, that she had travelled illegally into Burma so as not to be detected with a banned item and had handed it over to her colleague before rejoining her family in Thailand for a holiday. Unfortunately the phone developed a fault and her colleague tried to travel to Thailand to have it repaired but he was intercepted at the border and the phone was found in his luggage. He was arrested. As he had the warranty with him which bore the appellant's details and a copy of her passport, the authorities raided her house and her husband fled to Thailand where he still remained.
4. The Secretary of State refused the application on 13 June 2007 by way of a notice refusing to vary her leave and a letter giving her reasons for the refusal. Similar notices were issued to the appellant's daughters. They were all warned that removal directions would be issued if they did not appeal or leave voluntarily.
5. The appellant appealed under section 82(1) of the Nationality, Immigration and Asylum Act 2002 on asylum and human rights grounds against the respondent's decision and her appeal was heard by Immigration Judge Glossop on 31 July 2007. It was dismissed in a determination promulgated on 5 September 2007. The immigration judge heard oral evidence from the appellant and her brother. Although noting the concession made by the respondent that the appellant's father had been granted asylum in the UK for his anti-government activities, he rejected her account concerning her activities with the BMA and her claim that the authorities had discovered that she had purchased an illegal satellite phone. The immigration judge also found that there was *"no evidence that she would be identified as demonstrating at the Burmese Embassy"*. In her statement of 24 July 2007 the appellant maintained that she had participated in four pro-democracy demonstrations outside the Burmese embassy after her arrival in London. She attached photographs confirming her involvement. She stated that her brother was the Chairman of the BMA. She maintained that these activities in the UK would place her at risk on return to Burma.
6. The appellant sought reconsideration of the decision. She argued in essence that the immigration judge had erred materially in overlooking the evidence that had been adduced to establish the appellant's involvement at demonstrations in the UK and that officials at the embassy photographed demonstrators, identified them and sent their details to Rangoon Special Branch. It was further argued that the appellant would be at risk on return because she had overstayed her visa and this would alert the authorities on return. Any ensuing investigation would reveal that she had sought asylum in the UK and that she had several relations who had been granted asylum. The grounds made it clear that *"no challenge is made to the IJ's findings on credibility"*.
7. The application was considered by Senior Immigration Judge McKee on 26 September 2007 and reconsideration was ordered.

8. The matter then came before Senior Immigration Judge Southern 27 February 2008. He found that the immigration judge had made a material error of law for the following reasons:
  1. *Reconsideration has been ordered of the determination of Immigration Judge Glossop who, by a determination dated 31<sup>st</sup> July 2007, dismissed the appellant's appeal against a decision of the respondent to refuse to vary the appellant's leave after her asylum and human rights claims had been rejected.*
  2. *The appellant, who is a citizen of Burma, claimed asylum about three weeks after arriving in the United Kingdom with entry clearance as a visitor.*
  3. *She claimed to be at risk on return because someone with whom she was associated had been detained in possession of a satellite telephone she had imported unlawfully. That person was in possession of documents linking the appellant to the equipment and that had led to a raid on her home. The immigration judge found the whole of that account to be untrue and there is no challenge to those findings.*
  4. *The appellant now pursues her claim on the basis that she will be at risk on return on account of being identified as a dissident from the photographs taken of her when she attended demonstrations outside the Burmese Embassy in London.*
  5. *It is agreed between the parties (and the Tribunal so finds) that the immigration judge made a material error of law and the determination must be set aside to the extent described below. That being the case it is necessary only briefly to identify the nature of that material error and to make clear the scope of the reconsideration hearing that is to follow.*
  6. *The immigration judge was wrong to say that there was "no evidence" that the appellant would be identified as a person demonstrating outside the Burmese Embassy in London. The appellant relied upon the evidence of a former diplomat who had experience of serving at the London Embassy some years ago and who had made a written statement in which he asserted that such demonstrators would be identified and that, in his view, the Embassy staff had the means to achieve this. The immigration judge was not bound to accept that evidence but if he did not he was required to explain why he rejected it.*
  7. *The immigration judge erred also in his assessment of the risks faced by the appellant upon return. This is because, although he was entitled to find that the appellant made a lawful and officially sanctioned exit from Burma, she would be seen on return as someone who had failed to observe the conditions imposed in that she had overstayed her visa. It was not reasonably open to the immigration judge to find that this difficulty could be cured by the grant of further leave in order to facilitate a safe voluntary return as there was no evidence that such leave would be granted.*
  8. *That being the case, the decision of the immigration judge to dismiss the appeal cannot stand and shall be set aside. But that does not mean that those*

*credibility findings that are not contaminated by the errors identified above should be disturbed. It is specifically confirmed in the grounds for reconsideration that no challenge is made to the findings of the immigration judge as to credibility. Thus, the starting point for the reconsideration hearing will be the findings of fact set out between paragraphs 20 and 23 of the determination. It is not in dispute either that the appellant has overstayed the period of leave granted by the entry clearance obtained on the basis of which she travelled to the United Kingdom.*

### The hearing before us

9. The appeal came before us on 29 and 30 October 2008. At the start of the hearing Mr Cox sought to widen the ambit of the reconsideration. He submitted that although he was not seeking to argue that there were further errors of law, there were deficiencies in the determination in that the immigration judge had failed to make findings on several relevant matters. He submitted that we might find it necessary to make findings on these matters when assessing the risk on return to the appellant. He maintained that we were not restricted to the directions given by Senior Immigration Judge Southern and that in the interests of justice the issue of the satellite phone should be revisited. He submitted that the appellant now had evidence to show that a satellite phone was considered a valuable instrument by the government of Burma and therefore also by the opposition and that whilst it may be that conversations could be intercepted the authorities believed them to be a secret method of communication which is why they were banned. Further, there was evidence that a satellite phone looked like a mobile phone and the immigration judge's description of the phone as an 'instrument' and a 'machine', which suggested that he thought of it as a large contraption easily detected by the authorities, was misconceived. These inaccuracies meant that his findings on the plausibility of the appellant's colleague hiding the phone in his luggage were factually flawed. As it was this incorrect belief which led him to reject the appellant's account, we should make a fresh finding in that respect.
10. Mr Cox also argued that the immigration judge had not made any clear findings as to the current whereabouts of the appellant's husband, said to be in the jungle in Thailand. He sought to adduce a statement from the appellant's husband confirming his whereabouts and a supporting statement from a Major Hussain who was with him. He argued that as the husband's presence in Thailand was due to the discovery of the satellite phone and its link to the appellant, the tribunal could not separate the issues and had to reconsider them as part of these proceedings.
11. Mr Blundell agreed that we had jurisdiction to consider matters which had not been raised as part of the grounds for review but he referred us to the judgements of the Court of Appeal in DK (Serbia) v Secretary of State for the Home Department [2006] EWCA Civ 1747 and NJ (Iran) v State for the Home Department [2008] EWCA Civ 77 and pointed out that whilst there was a discretion to open up areas not identified in the order for reconsideration, there must be exceptional reasons for so doing. He argued that the application to vary the grounds had been made at short notice, just three days prior to the hearing. It should have been raised when the application for review was made last September or at the first stage hearing in February. He stated that there had been no challenge to the credibility findings of the immigration judge

and that Senior Immigration Judge Southern had therefore been able to draw a clear line and rule out of the reconsideration all matters other than the appellant's activities in the UK. Mr Blundell accepted that no explicit finding had been made on a number of matters but he submitted that the rejection of the appellant's account by implication included the activities of her husband.

12. Mr Cox apologised for the late submission of the fresh evidence. He explained that this was because of difficulties in obtaining statements from the appellant's husband and Major Hussain but conceded that attempts to obtain them had not been made prior to September this year in spite of the fact that the first stage reconsideration was held in February and a 'for mention' hearing had taken place before Senior Immigration Judge Gleeson in May at which it was directed that the appeal would be listed for the first available date after 6 July. Mr Cox accepted that in hindsight steps should have been taken earlier but pointed out that he had been instructed in August and he had considered these documents to be relevant to the proceedings.
13. After a short break to consider the submissions made and the authorities referred to as well as the judgment of the Court of Appeal in LS (Uzbekistan) v State for the Home Department [2008] EWCA Civ 909, we decided that this was not one of those most exceptional cases where the issues should be re-opened. We considered that the sole issue before us was the risk to the appellant as a result of her activities in the UK and because of her association with her late father, her brother and her husband. We agreed to admit evidence of the appellant's husband and Major Hussain as to the whereabouts of the husband but not in the context of the findings made by the immigration judge as regards the satellite phone. The parties confirmed they were clear on the issues at hand and the documentary evidence was checked prior to commencement of the oral evidence. In the event Mr Cox made no further reference to this additional evidence on the basis, as he put it in his address to us, that as we were to accept the findings of the immigration judge in disbelieving the appellant's account as to the satellite phone it was unlikely that we would believe the additional evidence.

#### The evidence of the appellant

14. The appellant gave evidence through the court interpreter and they both confirmed they understood one another. She agreed that the contents of her statement of 16 October 2008 were true and accurate as were those of the earlier statement of 24 July 2007. Her case is that her late father was a very prominent opponent of the Burmese regime in the 1970s who was detained, imprisoned and tortured by the regime. When he was released in 1980 he went to the border area with Thailand and became a leader of the Burmese Muslim armed resistance. He left Thailand in 1997 and was granted asylum in the United Kingdom. He died in the United Kingdom on 31 July 2005. Her husband qualified as a lawyer in Burma but his licence was withdrawn by the authorities because of his involvement in the democracy movement of which no further particulars were given. Her older brother lives in Thailand. He took part in the 1988 uprising against the Burmese authorities and was shot. He then went to the border area with Thailand and eventually left Burma. Her younger brother was active in opposition to the Burmese regime from the 1980s and was given refugee status in the United Kingdom. The appellant lives with him in the United Kingdom. Her two sisters both have refugee status in the United Kingdom, as does

her mother. After she came to the United Kingdom she participated in many pro-democracy demonstrations in front of the Burmese embassy in London. Her brother was very active in organising demonstrations and other pro-democracy events against the Burmese regime. He was the chairman of BMA(UK). She attached to her statement dated 16 October 2008 photographs confirming her participation in pro-democracy demonstrations

15. The appellant was referred to the photographs at pages 12-29 of her bundle, described as a "core bundle". Dealing specifically with the photograph on page 26 she said she could not recall the date of the event but believed it to be sometime last year after September. The second photograph on the same page related to a different demonstration which took place in front of the Burmese embassy sometime last year after the monks' protests. She believed it was September or October. With regard to the two photographs on page 27, the appellant stated that the first was taken in February or March 2008 at a seaside town on an occasion held to remember the Burmese Muslim people; the second was taken around November 2007 in front of the Burmese embassy. The photograph on page 28 was taken on 8 August 2008 on the 20th anniversary of the uprising. It had been held in front of the Chinese embassy during the Olympic opening ceremony for the purpose of urging the Chinese not to assist the Burmese government. The second photograph was taken on the birthday of Aung San Suu Kyi but she could not recall the day or the month. She initially maintained that it had taken place in front of a big park in London but then stated it had been outside the Chinese embassy. The demonstration photographed on page 16 had taken place outside the Burmese embassy in November or December 2007. It had been to protest against the oppression and killing of monks in Burma.
16. In response to Mr Blundell's questions in cross-examination, the appellant confirmed that she was illiterate despite having had about five years of education up until the age of 10 or 11. She agreed, however, that she was proficient with numbers and had no problems with dates. She accepted that as shown by her statement, she was able to recall the dates of important events. She stated that if returned to Burma she would continue her political activities despite the risk. She stated that she had sought asylum because she had been afraid her daughters would be harmed. Her claim was prompted by the arrest of her colleague in Rangoon.
17. The appellant agreed that she had been involved with the Burma Democracy Movement Association (BDMA) which was an umbrella organisation. She named some of the other groups contained within it. The appellant agreed that she had attended birthday celebrations for Aung San Suu Kyi and agreed that the latter was the most important reformist figure in Burma. She explained that the opposition celebrated two important dates in connection with her; these were her birthday and the day of her incarceration. She was asked why it was that she had been unable to recall the date of the demonstration held on Aung San Suu Kyi's birthday when shown the photograph at page 28. The appellant stated that she had become forgetful since taking medication. She believed the birthday was on 19 August but then changed her answer to June. She denied that her inability to recall the date meant that she was not a supporter of the pro-democracy movement. She stated that she had named her daughter after Aung San Suu Kyi. Her forgetfulness was because she had been taking tranquillisers. She had not mentioned this in her

statement because she had not realised it was necessary. She also took insulin injections for her diabetes.

18. The appellant confirmed that she had travelled to Thailand on four occasions and she had exit visas on each occasion. Those had been obtained via an agent although the permission received was lawful.
19. The appellant stated that she had known Mr Kyaw Soe Aung (one of her witnesses) since 2007. She agreed that he was right to say she helped organise meetings. Apart from her involvement in these meetings, she had no other contact with him. She did not know anything about his claim to have a secret contact in the embassy or about informers in their midst. She stated that from February 2008 she had not attended meetings as frequently as before because her mother worried about her and did not allow her to go out unaccompanied. She last saw Mr Aung at a demonstration on 24 October 2008. Prior to that she had seen him on 8 August 2008. When asked whether she had seen him in September she was unsure. She had not conversed with him on any of these occasions apart from asking him for directions at a demonstration. She was a little surprised to hear about the informer but could not suggest any reason for why he had not conveyed this news to her other than that he might have thought she would be afraid.
20. The appellant confirmed that she did not know Mr AB (another witness) personally because she did not speak English but she had seen him taking photographs at demonstrations. She had not seen him at the most recent demonstration she attended in October but she was certain she saw him at the August demonstration outside the Burmese embassy. She did not remember whether or not he had his camera with him. Her child was with her. The appellant stated that on one occasion when she demonstrated outside the Embassy, the walls were being painted and the painters on the scaffolding were taking photographs of the protesters. Additionally on many occasions she had noticed people inside the building taking photographs. The protesters normally stood on the opposite side of the road to the embassy when demonstrating although last year her daughter went to lay a wreath in honour of those who had died in the August uprising.
21. In re-examination the appellant clarified that she had become depressed in February after having given birth. She had sought medical help and had been given medication to assist with sleeping and tranquillisers. She had come to the hearing accompanied by her mother, her older daughter and friends.
22. She stated that she did not know whether it was unlawful to use an agent to obtain an exit visa. She explained that those who had never committed any offence would not need to use one but because she had been politically involved she did not visit the government office herself. The agent had filled in all the forms including the D form. Mr Aung had assisted her with her appeal by acting as an interpreter on two occasions.
23. In response to questions from the tribunal the appellant said that she had been present when her daughter had laid a wreath outside the embassy. She stated that she had also used an agent to obtain a passport. She said that she recognised Mr AB because he had attended many demonstrations. The appellant stated that in 2008



following a depression she had only attended a few marches. In 2007, however, she had made semolina cakes and snacks when meetings were held. On one occasion she made a wreath and helped make a mock coffin for a demonstration. She had also helped make banners and stitch headbands. She could not recall any other activities.

24. The appellant stated that she took four different forms of medication; insulin for diabetes, folic acid as a supplement, medication for aches in her arms and sleeping tablets.
25. Mr Blundell had no questions arising from those of the tribunal. In response to Mr Cox's further questions, the appellant identified the mock coffin from a photograph on page 28. She explained that it had symbolised the killing of a lot of people twenty years ago.

### The evidence of Mr AB

26. Mr AB adopted his statement (pp. 87-89 of the core bundle) with a few amendments. He stated that the date of 13 May (on p.88) should be 13 March and that the photograph on page 113 was taken on 12 March 2008. He explained that the picture at p.101 was an enlargement of the photograph on the previous page. His evidence, contained in his statement, was that he worked as a free lance photographer and photographic assistant. He was not acquainted with the appellant but may have seen her on demonstrations outside the Burmese embassy. He was currently working on a photographic documentary about the Burmese community in the United Kingdom. He joined the Burma Campaign UK around 2000 and had attended almost all of the demonstrations outside the Burmese embassy and regularly took photographs of the demonstrations. At every demonstration he had attended he had observed persons inside the embassy taking photographs of the demonstrators. He attached to his statement 9 photographs of such persons taken between 8 August 2005 and 4 September 2007.
27. In cross-examination the witness was asked why he had not provided the dates for the other photographs when he prepared his statement. He said he had prepared it "in a rush" and had forgotten. He had used another statement prepared for a similar case to assist in his preparation for this statement. His photographs had been used in three or four other Burmese cases and he had attended court for the individuals concerned. He allowed his pictures to be used by pro-democracy groups and when it became known that he had photographs of the embassy officials taking photographs he was asked whether those could be used. He attended demonstrations to record the events. He explained that he had an interest in Burmese affairs because his grandmother was Burmese and his grandfather had been posted there during the Second World War. He had not been able to update his statement because he had recently moved house and had been busy.
28. In re-examination he said he continued to attend demonstrations after September 2007. He estimated the number attended this year as between twenty and thirty. He confirmed that the contents of paragraph 8 of his statement, in which he said persons inside the embassy used to take photographs of the demonstrators, still held true today.

## The evidence of Mr Kyaw Soe Aung (Ko Aung)

29. Mr Aung adopted his witness statement (pp. 115-122) as his evidence-in-chief. In that statement he described participating in anti-government politics as a student leader in Burma, as a result of which he was imprisoned from 22 September 1988 until 25 May 1994, after which he began to rebuild underground networks and re-group the All Burma Federation of Student unions (ABSFU). He left Burma in 1996 and came to the United Kingdom where he was eventually granted refugee status in 2001. He became politically active in the United Kingdom. He was a member of the Burma Strategic Group (BSG), a co-founder of the Free Burma Coalition UK (FBC-UK) and an executive committee member of the BDMA. He described how the appellant had been actively involved in the Burmese Muslim Association (United Kingdom) and she had participated in and helped to organise the BDMA's meetings and conferences. She became a member of the BDMA in December 2006. This was an umbrella organisation. He knew that she had been involved with the BMA in the United Kingdom to fight for the rights of her community and knew her to be one of the most active female members of the Burmese community and Burmese Muslims in exile in London. Her brother was an executive committee member of BDMA and chairperson of BMA(UK). He listed 16 demonstrations the appellant had participated in during 2007 and 6 in 2008. He knew that she had done so because he organised them all. In paragraph 16 of his statement he said:

"I understand that the Secretary of State does not believe that T... L... would be in danger if he (sic) were to return to Burma. I would like to point out that it is quite clear that every time there is a demonstration; photos would be taken by the Burmese authorities inside the Burmese Embassy. We know that these photos are sent back to military intelligence in Burma. In 1999, Rachel Goldwyn was shown photographs of the crowds outside the Burmese Embassy when she was interrogated in Burma and it was clear that the officials knew names of people, knew about their activities and in some cases even knew where they were living. I also produce Ms Rachel Goldwyn's report called Scratching the Surface."

30. In cross-examination he was asked by Mr Blundell to point out the passage in Rachel Goldwyn's report which confirmed his claim (made in paragraph 16 of his statement) that Burmese officials were aware of the names and addresses of opposition members. Mr Aung explained that Ms Goldwyn's report did not focus on the people who participated in demonstrations in the UK but she had been his girlfriend and she had told him what had happened. He believed her, although she had not included those details in this report. Mr Blundell suggested that given the detail in her report she would have made it clear that the authorities already knew the identity of these people if that was in fact the case. Mr Aung reiterated that her report did not focus on these details.

31. With respect to his claim about an informer within the BDMA, Mr Aung stated that the executive members met and discussed what to do next. He said he had been alerted to the presence of an informer in 2001 by two people. He described their positions and why it was he believed they had this information. The identity of the informer had not been disclosed and therefore the BDMA undertook their own investigations and once they were satisfied they had discovered the identity, that person was dismissed

from membership of the organisation. That took place in 2005. He was asked to explain why he referred to the presence of an informer in the present tense in his report, if he had been dismissed from the BDMA three years ago. Mr Aung stated that there were more informers who had not yet been identified. He explained that he had not meant there was just one; that was a sincere mistake.

32. Mr Aung was asked whether he had informed the appellant about the existence of informers. He replied that he did not think this was necessary because her brother was an executive member and was aware of what was going on. He was asked whether he was surprised that the appellant knew nothing about this. He stated that there had been no need to inform her. She knew that photos were taken at demonstrations and she knew that it was a risk to oppose the regime. He added that she was not in a good frame of mind and that it may be for that reason her brother had not disclosed this information to her. It was pointed out to him that her depression only began in February 2008 but he could offer no answer to why the appellant's brother had not notified her of these matters earlier.

#### The expert evidence of Mr Martin Morland CMG

33. Mr Morland, a former British ambassador to Burma, prepared a report in May 2008. He had been in Burma as third and then second secretary between 1957 and 1961, returning as ambassador between 1986 and 1990. Despite his retirement in 1993 he has continued to take an interest in Burmese affairs through internet research, friends in Rangoon and contacts with successive ambassadors. He has also had involvement in an educational charity founded after the 1988 uprising to assist students to leave Burma and continue their higher education abroad with the intention of returning after the fall of the military regime. Mr Morland confirmed that he had produced over thirty reports in other asylum cases. He gave evidence before the Tribunal in HM.
34. He had been asked to consider the treatment in Burma of anti-government activists, demonstrations outside the Burmese embassy and the measures taken by the Burmese authorities to deal with them, action likely to be taken against demonstrators if returned to Burma, the likelihood of identification on arrival at the airport and the implications of demonstrators having politically active relations. His report gave a brief history of the military dictatorship which commenced in 1962 with General Ne Win's coup. The general imprisoned all leaders in civilian life for varying terms and handed over political control of the civilian population to military intelligence (MI). They were described as intensely secretive with no known defectors. The system of political control that they set up endured to the present day and was said to be based on the East German Stasi. It relied on random persecution of the civilian population who never knew whom they could trust because of the belief that the MI had thousands of informers. Any sign of dissent, even minor, was savagely punished. Disproportionate penalties were prescribed by executive order in the absence of any kind of independent judiciary. For example the possession of political pamphlets or even a complaint in a private letter about the educational system could lead to arrest. There was no evidence that a distinction between minor and major actions would be made for those Burmese citizens returning home who had engaged in anti-government activity abroad. The report gave information about the case of Stanley Van Tha, arrested in April 2004 upon arrival in Rangoon after his return by the Swiss

government as a failed asylum seeker, and sentenced to 19 years imprisonment. The only political involvement he was accused of was his attempt to seek the support of a Burmese activist in exile for his asylum application.

35. In paragraph 10 of his report, Mr Morland said that in his opinion pro-democracy demonstrations outside the Burmese embassy were anathema to the regime. He said it was the regime's constant fear, as he knew from personal contacts with Burmese friends who kept in touch with political activists in Burma and Thailand, that trouble would break out again. Demonstrations in the United Kingdom were liable to attract publicity which may be beamed back into Burma by the BBC Burmese service, the BBC's vernacular service with the largest audience apart from the Arabic service, thus giving heart to the population and alarming the government. His opinion was because of the generally effective suppression of dissent inside Burma activity outside assumed disproportionate importance. Security cameras were attached to the embassy and were capable of covering demonstrations; additionally, Mr Morland referred to photographic evidence of officials within the embassy taking pictures of demonstrators and to the testimony of U Khin Maung Kyi, a former diplomat who defected from the Burmese embassy in London after the national uprising of 1988, given in a number of asylum cases. His evidence was that during every demonstration, without exception, military intelligence staff would video and take photographs of demonstrators and copies of these pictures were then sent to Rangoon. Efforts were also made to identify each demonstrator by the security personnel of the embassy. This was done by consulting records of Burmese passport holders and also informants. In paragraph 9 of his report he said there was no evidence that a distinction between minor and major actions, which was evidently not observed inside Burma, should come into play when Burmese who had opposed the government to one degree or another while abroad returned home into the Burmese jurisdiction. He gave the example of Mr Stanley Van Tha. Mr Morland did not rely upon the report of the Democratic Voice of Burma (Norway) dated 18 October 2007 which suggested that government officials were checking every Burmese passport holder who came through the airport, arresting those suspected of having participated in anti-government protests while they were away because he said the evidence came from a single source.
36. Mr Morland also discussed the arrest of Rachel Goldwyn in 1999. She was an Englishwoman arrested and detained after demonstrating against the government in Rangoon. A prominent Burmese activist and recognised refugee, U Ko Aung, known to Mr Morland, testified in another case in 2004 that when interrogated in Rangoon, Miss Goldwyn was shown photographs of the crowds outside the Burmese Embassy and it was clear that officials knew the names of people taking part, of their activities and, in some cases, their places of residence. Given the deterioration in Burma over the last few years, there was no reason to believe that such practices had ceased.
37. In his conclusion Mr Morland expressed the view that the evidence indicated that demonstrators outside the embassy were photographed, that security staff had the means to identify demonstrators, and that the information was relayed back to Rangoon. Any manifestation of opposition was punished by the government which exercised a policy of zero tolerance. If the appellant were to be returned she would be at risk of arrest, interrogation and torture and a prison sentence, either on arrival or subsequently.

38. In evidence in chief Mr Morland confirmed that he was aware that embassy officials took photographs of protesters and that he had no doubt that they used informers. He had not been aware of Mr Van Tha's release at the time he prepared his report in May but pointed out that there was a pattern over the years of prisoners being released, particularly if they were well-known, but then of further arrests. There were no developments that had taken place which caused him to revise his opinion since his report had been prepared.
39. In cross-examination Mr Morland stated that he had last been in Burma over the New Year in 1995-1996. Despite his absence, he had kept in touch with the situation through information on the Internet, of which he was a proficient user, and through daily or weekly contact with friends who lived there and others who travelled back and forth. He did not have much contact with the current ambassador and he had no contact with other diplomatic staff. He had however last week met somebody from the UK Department for International development (DFID). He had two or three Burmese friends living there and contact with the charity Prospect Burma and the writer MS, who frequently travelled back and forth. He provided details of his contacts.
40. Mr Morland was then asked about the September 2008 report of the UN Special Rapporteur contained in the respondent's bundle (pp. 23-46). He confirmed that he was aware of it and was also aware that the Special Rapporteur had met with prisoners. He disputed the suggestion that there were signs of improvement. He stated that although Ms Aung San Suu Kyi had been permitted access to a lawyer recently, that was a right she had been entitled to all along. With regard to the release of Mr Win from prison, he pointed out that he should never have been in prison in the first place. With respect to the claim in the Special Rapporteur's report that legislation primarily used to detain political prisoners was being reformed by the authorities, Mr Morland stated that he accepted the UN was trying to do its best but that he did not believe anything would come out of those recommendations; the promises of reform were "*all flannel*". There had never been any change over the years and according to the US State Department report and the Home Office Operational Guidance Note (OGN) the situation was deteriorating. He attached no weight to the announcement that legislation was being reviewed. The Attorney General had not undertaken any review as yet. Even if he did, however, it would make no difference as the application of laws there was not like in the West; the Burmese regime used its power to imprison people whenever they felt like it.
41. Mr Morland said that he had considered different views but where he did not consider them to be valid, he had not included them in his report. He accepted that perhaps he should have done so. With respect to the article from Democratic Voice of Burma (Norway) (at p.311 section C of the appellant's large bundle) which listed four categories of detainees based on their involvement in anti-government demonstrations, Mr Morland said that he had been surprised when he read this as the authorities were secretive and did not make their methods known. He had also not seen any corroboration of this claim during the course of his research. With regard to the Information Request from the Canadian Refugee Board (p. 97 of the respondent's bundle), Mr Morland stated that the opinions set out therein were assertions of one person and the source of his information was unknown. He stated

that he was aware of cases where the families of activists had been visited by the military. He was not aware of any failed asylum seekers who had been returned to Burma except for Mr Van Tha.

42. Mr Morland confirmed that since the promulgation of HM (Risk factors for Burmese citizens) Burma CG [2006] UKAIT 00012 he had learnt that the exit 'visa' did not bear any time limits and that in fact a passenger took along a D form to the airport and an immigration official placed an exit stamp in the passport. A note was made as to the intended destination but it was not unlawful to travel elsewhere. It was also not a breach of Burmese law if a citizen overstayed his visa in a foreign country.
43. Mr Morland stated that he did not consider it relevant to the current case that Mr Van Tha had been released from prison early. What was relevant was that he had a valid passport but had been imprisoned nonetheless. According to the information he had obtained from Ms Lewa and upon which he had relied when giving evidence to the Tribunal in HM, Mr Van Tha had not been active in politics and had simply sought asylum and presented a letter from an activist to support his case. That low level association had been sufficient to place him in detention. He pointed out that the authorities hated any form of opposition.
44. Mr Morland was not aware of any individuals who had demonstrated outside the embassy here and who had returned. He confirmed that he had not met Rachel Goldwyn, but he had attended a lecture she gave some years ago. Mr Morland stated that it was not inevitable that anyone who had demonstrated in London would be punished on return but he was certain that the authorities had the capability to identify people in photographs and that this information was then sent to Rangoon, where people would be treated in the same way as they would have been had the 'offence' been committed in Burma. The mechanics therefore existed for punishment. It had been established practice well before 1988 for photographs to be sent to Rangoon. He had no reason to believe that such practice had stopped. He believed that military attaches were attached to the embassy prior to the 1988 uprising and was surprised at Mr Kyi's suggestion that this happened after the troubles of 1988. He did not know whether they had ever been expelled. He believed Mr Kyi had defected in early 1989.
45. Mr Morland stated that passports were sometimes refused to undesirables but that this was not invariable as bribes could be paid. He pointed out that the US State Department Report observed that corruption was widespread. He emphasised that the government was irregular in its habits; it was arbitrary in its actions either for reasons of incompetence or because "*they wanted to keep people guessing*". Either way, it was difficult to predict the actions of the authorities.
46. Mr Morland explained that once an individual had a passport the controls at the airport were not that vigorous. It was harder to obtain a passport than an exit visa but with an agent and money this was possible. He did not believe there would be records kept of individuals at the airport. If, however, someone committed an offence or was involved in activities which brought about an interest in them, then they were liable to be arrested at some point after their return if their background showed an association with political activists. It was also likely in such a scenario that they would

receive harsher punishment because of that association but a trigger of some sort was required to bring them to the attention of the authorities.

47. In re-examination Mr Morland referred to a news article in the Democratic Voice of Burma which reported on the questioning of all returnees after the monks' protests last year. He said he did not attach much credence to it as this fact was not reported anywhere else. He was not aware of any expert opinion which expressed views contrary to those he had set out.
48. He said he believed that the fact that the appellant had overstayed her visa in the UK would cause her problems on return; it might serve as a trigger which would lead to questioning.
49. The Tribunal questioned Mr Morland as to whether the Burmese authorities would take a stronger line in relation to protests in Burma compared with those in the United Kingdom on account of the fear that protests in Burma would grow if left unchecked. His reply was that the Burmese authorities regarded demonstrating in front of the embassy as an affront which brought the country into dispute and therefore it was likely that they would act against those participating in such activities.

#### The evidence of Mr U Khin Maung Kyi

50. The appellant relied upon a statement from Mr Kyi dated 16 April 2007. Mr Kyi said that he joined the Burmese diplomatic service in 1962 and occupied several posts before being posted to the Burmese embassy in London in 1985, where he was appointed Chief of Chancery and Third Secretary. Together with two colleagues he defected in 1989 because he was appalled at the gross human rights violations committed by the Burmese military government. He claimed and was granted asylum in the United Kingdom and is now a British national. His evidence was that from 1986 onwards there had been regular demonstrations outside the Burmese embassy during which, without exception, intelligence staff would video and photograph demonstrators and make three copies of each video and set of photographs, one copy of which would be kept at the embassy, one copy of which would be sent to military intelligence headquarters and one copy of which would be sent to the Special Branch in Rangoon in Burma. He stated that before the photographs and videos were sent to Rangoon each demonstrator would be identified by the military attachés at the embassy by interviewing consular staff, by accessing consular records, such as a list of all Burmese passport holders in the United Kingdom including their photographs and by speaking with contacts in the wider Burmese community in the United Kingdom. He went on to say that he was aware that some protestors were secretly working as spies for the Burmese authorities. He gave the example of his having been surprised that a respectable academic, a professor and an expert on Burma, was revealed as an informer with the Burmese military regime who passed on some information to the ambassador regarding a secret meeting held in Berlin of former Western ambassadors to Burma and some experts on Burma. He mentioned in his report that in 1987 the Burmese embassy in London informed the Foreign Office that the Burmese passports of pro-democracy activists who demonstrated in front of the embassy had been declared null and void.

## The submissions on behalf of the respondent

51. Mr Blundell asked that the appellant's evidence be viewed in the context of the finding by the immigration judge that she had provided an incredible account in material respects. Although it had to be accepted that she had attended demonstrations in the UK, her commitment to the cause was questionable and therefore Sedley LJ's comment about 'hangers on' in paragraph 18 of YB (Eritrea) v Secretary of State for the Home Department [2008] EWCA Civ 360 was relevant. He questioned whether the appellant had such a commitment that she would be compelled to pursue her activities in Burma. He accepted that she came from a political family but argued that her commitment was limited and had been overstated before the tribunal. He pointed out that she had been unable to identify the birth date of Aung San Suu Kyi, an anniversary celebrated by the pro-democracy movement worldwide. He submitted it was significant that she could not even recall the month. He referred to the medical evidence that had been adduced during the course of the hearing regarding the appellant's mental health, but submitted that there was no reference to any abnormalities and he reminded us that she made no reference in her witness statements to possessing a poor memory.
52. It was accepted, said Mr Blundell, that Mr AB had attended demonstrations and taken photographs. It was also accepted that some of these showed pictures being taken by officials inside the embassy building. Mr Blundell, however, submitted that the statement failed to detail any evidence of photographs being taken after September 2007.
53. With regard to the statements of Mr Kyi, Mr Blundell submitted that he had not attended the hearing to give evidence and in any event his knowledge of practices at the embassy related to a narrow window of time, i.e. between the abuses following the uprising in August 1988 and his defection in early 1989. Moreover that had taken place 20 years ago. There had been no opportunity to put questions to Mr Kyi arising from his statements, such as how he knew the blacklist was computerised. The respondent regarded his statements as being of historical interest only.
54. Mr Blundell submitted that Mr Aung's evidence was unsatisfactory. Although his own background was accepted, the tribunal was asked to note that Mr Aung repeatedly referred to the appellant as "*the client*" and that he clearly had his own agenda, as could be seen from the Voice of America news article which quoted him as saying he wanted the Home Office to change its policy. Mr Blundell also submitted that the witness had misrepresented what Rachel Goldwyn had said in her report regarding the identification of individuals in photographs. He maintained that if Ms Goldwyn's interrogators had known the identities of these people, Ms Goldwyn would have said so in her report.
55. Mr Aung's evidence about an informer was also unsatisfactory. Although his statement inferred that there was currently one informer within the BDMA, he had altered his evidence and maintained that this informer had been identified in 2005 and had been expelled. He had then added that there were additional informers at the current time. This was an example of how he had tailored his evidence in the light of the difficulties arising in cross-examination. It was also not credible that he had failed to warn the appellant about the presence of informers. Her poor mental



health was not an excuse for that failure as her problems began in February 2008 and her political activity had commenced last year.

56. Mr Morland had been a frank and robust witness, however, less weight should be placed on his evidence than it was in the case of HM. His research was deficient and his conclusions negligible in some respects. There had been a lack of any investigation into the legislative reform detailed by the Special Rapporteur and instead Mr Morland had chosen to assume the worst. He had undertaken no research on returnees or the problems they may or may not have encountered. Nor had he undertaken research on the fate of Mr Van Tha. Significant weight had been attached to Mr Van Tha's case by the Tribunal in HM yet he had now been released and reunited with his family in Switzerland. There had also been no research undertaken on the central issue i.e. on the extent to which the security service had identified people who had demonstrated abroad. Other than the evidence of Mr Aung, there were no other examples of such practices occurring. Mr Morland had not discharged his duty to the court as he had failed to follow the AIT Practice Directions on experts, the source of which was the CPR. It was incorrect to read the Practice Directions as requiring only expert evidence to be summarised and the evidence had shown that there was a range of opinion that contradicted the claim made by Mr Morland that the authorities drew no distinction between high-level and low-level activists. His assertion that there was "*no evidence*" to support that was factually incorrect as shown by the Immigration and Refugee Board of Canada report (at p. 97 of the respondent's bundle). That was not an obscure reference and would have been easily available on the Internet to a proficient user such as Mr Morland claimed to be. Even if he did not attach weight to it, he should have acknowledged it in his report. It was notable that Mr Morland repeatedly referred to the OGN in his oral evidence and his report where it supported his opinions, but ignored sections which contradicted him. Mr Blundell relied upon other items of background evidence which we shall deal with in expressing our conclusions.
57. Mr Blundell submitted that it was relevant that Mr Morland had not been to Burma for 12 years. His contact with the current ambassador was sporadic and he did not keep in touch with any other diplomatic staff. The majority of his information was obtained from the Internet. He was therefore not an expert with proper knowledge of the situation on the ground. His assumption that the authorities always did the opposite of what they said was not borne out by the contents of the report of the Special Rapporteur. This appeal was concerned with the extent to which people involved in demonstrations in the UK were identified by the Burmese authorities and Mr Morland's evidence had shed little light on that matter.
58. Mr Blundell submitted that the policy position of the respondent was correct in believing that there was a distinction between someone like the appellant and others such as Mr Aung, who held a more significant role. He submitted that the respondent was not seeking to contradict the findings in HM but was providing an update. Mr Van Tha had been released and the legislation used to imprison him was under reform. The Special Rapporteur's report showed the extent to which the authorities had co-operated with the UN. Although Mr Morland claimed the Burmese regime was very secretive, it had opened its doors to the UN. The Special Rapporteur had been permitted to visit prisoners of conscience and this was an indication of progress. A further sign of progress was the fact that Aung San Suu Kyi

had been permitted to meet with her lawyers on several occasions. All these events showed positive steps towards democracy although it was accepted that there was still a long way to go. The information from the Canadian Refugee Board supported the stance taken in the OGN. The appellant had not been denied permission to leave Burma. Clearly her family background was not of sufficient concern to the authorities to prohibit her departure. She had not claimed to have had to pay an agent significant amounts of money and she did not reach the level where she would be at risk. The lack of documentary evidence to support the claim that protestors in the UK would be targeted on their return to Burma meant that the appellant's case should not succeed.

#### The submissions on behalf of the appellant

59. Mr Cox argued that the case of YB (Eritrea) painted a bleak picture of the suppression of political opponents and that was even more aptly applicable to the Burmese regime. He submitted that the significant point arising from HM was that the appellant in that case was not a political activist but was married to one and it was the perception of her involvement in politics that led to the adverse interest in her.
60. Mr Cox submitted that the Practice Directions required an expert to consider all material facts including those which detracted from his own conclusions. It had not been argued that Mr Morland had failed to consider material facts. An expert was not required to reproduce the opinions of others; his duty was to provide an evaluated opinion. The views expressed by the Democratic Voice of Burma (Norway) and the Canadian Research Board were not expert opinions and there was no breach by Mr Morland's failure to summarise them. He submitted that Mr Morland was well placed to know the mind of the Burmese state given the number of years he spent there and his ongoing interest in the country and its peoples. He had put forward a harsh critique of the regime but there was nothing to show it was an unfair or unbalanced opinion.
61. With regard to the article from the Democratic Voice of Burma (DVB), it was apparent that a category B activist could be someone simply holding a flag. There was no safe level of activity. The documentary evidence indicated the arbitrary nature of the regime's treatment of opposition members and therefore the Tribunal needed to proceed with extreme caution.
62. The letter from the British embassy did not address the situation for those who did not "*simply*" participate in demonstrations and appeared to concentrate on whether protestors would be prosecuted. Mr Cox noted that it failed to address the issue of whether they would be ill treated. The conclusions in the OGN were simply the view of the author; no evidential source was cited and in any event it was a partisan view. The document was silent on the matter of informers. Mr Morland could not be criticised for failing to undertake research on the numbers of those returning or being returned. The Secretary of State should have provided such information but she had failed to do so.
63. Mr Cox argued that the respondent was wrong to rely on a single document to support the submission that the Burmese government policy was changing. There

was no evidence that the regime had made any changes in how opposition members were viewed and treated. The evidence demonstrated that there was extreme animosity towards any kind of opposition. The Special Rapporteur had set out recommendations in his report and had made it clear that he did not intend to criticise the regime (pp. 38-39). The fact that recommendations had been made did not mean that the Attorney General had agreed to review and amend legislation. The release of Mr Van Tha was not an indicator of changing policy as amnesties had been announced in the past and, as pointed out by Mr Morland, were just “*window dressing*”. The regime had to be judged by its actions and not its promises. It was at least as bleak as Eritrea and so the same reasoning as set out in YB had to be applied here. Whilst it was correct that much of the evidence was historic, there was nothing to show that things had changed. Mr Kyi’s statement about photographs could not be limited to a particular period. Military attaches were at the embassy all along; they had only been formally attached following the 1988 uprising. The evidence of Mr AB showed that photographs were still being taken by the embassy officials; what was the purpose of that if not to identify participants. Their methods of identification were set out on p. 73. The regime did not care why people opposed them; they cared only that they did. It may be that such a finding would lead to protection being given to individuals who were undeserving but it was not for the tribunal to concern itself about that. This jurisdiction did not distinguish between those who were deserving and those who had deliberately brought persecution upon themselves; that was a matter for politicians.

64. Mr Cox urged us to find that the evidence of Mr Aung could be relied on. He argued that Mr Aung had not amended his evidence as suggested by the respondent; he had merely clarified it. It was ludicrous to think that the Burmese regime did not make use of informers.
65. Mr Cox submitted that weight should be given to the fact that the appellant attended demonstrations, that she helped to make banners, she was a supporter of democracy and she named her daughter after Suu Kyi. On her return the appellant would be seen as someone who had overstayed her visa in the UK and this would be enough to bring her to the attention of the authorities. Once that happened, checks would reveal her background and would show that she had been active in demonstrations in the UK. She would then be at risk of ill treatment in breach of article 3 and amounting to persecution.
66. Human rights grounds of appeal under article 8 of the ECHR were not advanced on behalf of the appellant. At the conclusion of the hearing we reserved our determination.

### Our conclusions

67. Our starting point must be the determination of the Tribunal in HM (Risk factors for Burmese citizens) Burma CG [2006] UKAIT 00012 which is the only country guidance determination of the tribunal on Burma. In paragraph 93 of their determination the Tribunal said this:

"On the basis of our assessment of the above evidence, we have come to the following generic conclusions:

- (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 above.
- (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."

68. The Tribunal allowed the appellant's appeal because they believed her account that she had attracted the adverse interest of the authorities on her return to Burma from the United Kingdom when she had been detained and interrogated about contacts with political organisations in the United Kingdom. She escaped detention by means of bribery and returned to the United Kingdom, her exit from Burma being unlawful on this occasion. The Tribunal was satisfied that if she were returned to Burma the likelihood was that the Burmese authorities would discover that she was a failed asylum seeker who had failed to comply with the conditions on which she had been allowed to leave Burma and who was returning without a valid passport. In those circumstances the Tribunal were satisfied that she would face a substantial term of imprisonment in conditions that would amount to a breach of her rights under article 3 of the ECHR. The appeal was allowed on both asylum and human rights grounds.
69. Neither representative invited us to depart from the findings of the Tribunal in HM. The determination of the Tribunal is of importance because in paragraph 93(5) of their determination the Tribunal found that a person who is regarded by the Burmese authorities as a political opponent on return would be likely to face a real risk of persecution or article 3 ill-treatment.

70. Mr Morland gave evidence in HM which was accepted by the Tribunal. We have to deal with the criticisms of his evidence before us made by Mr Blundell, that his evidence is unreliable because he was in breach of his duty to the Tribunal by failing to follow the Tribunal's Practice Directions in relation to expert witnesses. It is said Mr Morland failed to have regard to the report of the Special Rapporteur to the UN General Assembly although we observe that the date of that report is 5 September 2008, after the date of Mr Morland's report. It is said that Mr Morland erred by failing to mention that Mr Stanley Van Tha had been released and had returned to Switzerland. It is said that Mr Morland did not have regard to paragraph 3.7.8 of the Burma OGN dated 31 October 2007. It is also said that he failed to draw the attention of the Tribunal to the report by the Democratic Voice of Burma (Norway) dated 9 October 2007, which reported that government officials had categorised detainees into four groups based on their level of involvement in recent anti-government demonstrations in Burma. Finally, it is said Mr Moreland failed to have regard to the letter from the Deputy Head of Mission at the British embassy in Rangoon dated 1 August 2008 stating that he was not aware of any cases of individuals who had faced persecution in Burma simply as a result of participating in a demonstration overseas. We will deal with these matters in the course of our assessment of the background material since of course any material fact which might detract from Mr Morland's opinion is relevant to the weight which we should attach to his opinion.

71. Paragraph 8A of the Tribunal's Practice Directions deals with expert evidence, its relevant provisions are as follows:

"8A.1 A party who instructs an expert must provide clear and precise instructions to the expert, together with all relevant information concerning the nature of the appellant's case, including the appellant's immigration history, the reasons why the appellant's claim or application has been refused by the respondent and copies of any relevant previous reports prepared in respect of the appellant.

8A.2 It is the duty of an expert to help the Tribunal on matters within the expert's own expertise. This duty is paramount and overrides any obligation to the person from whom the expert has received instructions or by whom the expert is paid.

8A.3 Expert evidence should be the independent product of the expert uninfluenced by the pressures of litigation.

8A.4 An expert should assist the Tribunal by providing objective, unbiased opinion on matters within his or her expertise, and should not assume the role of an advocate.

8A.5 An expert should consider all material facts, including those which might detract from his or her opinion.

8A.6 An expert should make it clear:-

- (a) when a question or issue falls outside his or her expertise; and
- (b) when the expert is not able to reach a definite opinion, for example because of insufficient information.

8A.7 If, after producing a report, an expert changes his or her view on any material matter, that change of view should be communicated to the parties without delay, and when appropriate to the Tribunal.

8A.8 An expert's report should be addressed to the Tribunal and not to the party from whom the expert has received instructions.

8A.9 An expert's report must:-

- (a) give details of the expert's qualifications;
- (b) give details of any literature or other material which the expert has relied on in making the report;
- (c) contain a statement setting out the substance of all facts and instructions given to the expert which are material to the opinions expressed in the report or upon which those opinions are based;
- (d) make clear which of the facts stated in the report are within the expert's own knowledge;
- (e) say who carried out any examination, measurement or qualifications of that person, and say whether or not the procedure has been carried out under the expert's supervision;
- (f) where there is a range of opinion on the matters dealt with in the report –
- (i) summarise the range of opinion, so far as reasonably practicable, and
- (ii) give reasons for the expert's own opinion;
- (g) contain a summary of the conclusions reached;
- (h) if the expert is not able to give an opinion without qualification, state the qualification; and
- (j) contain a statement that the expert understands his or her duty to the Tribunal, and has complied and will continue to comply with that duty.”

72. The particular part of the Practice Directions upon which Mr Blundell based his criticism of Mr Morland's evidence was paragraph 8A.9(f) which states that an expert's report must, where there is a range of opinion on the matters dealt with in the report, summarise the range of opinion, so far as reasonably practicable and give reasons for the expert's own opinion. We accept Mr Blundell's submission that the Practice Directions are based on the CPR. In the context of civil proceedings they are clearly intended to deal with, for example, the opinions of medical experts in relation to matters where there might be a range of medical opinion about a particular diagnosis or prognosis. The position is that, with one exception, Mr Blundell has not drawn our attention to any other expert opinion which it is suggested Mr Morland failed to draw to the attention of the Tribunal. The exception is the report of the opinion of an unnamed analyst in the Responses to Information Requests paper of the Immigration and Refugee Board of Canada dated 7 August 2007. In effect Mr Blundell's criticism amounts to a criticism based on paragraph 8A.5 that an expert should consider all material factors including those which might detract from his or her opinion.
73. Paragraph 2.2 of the Burma OGN dated 31 October 2007 states that since 1962 Burma has been ruled by a succession of highly authoritarian military regimes dominated by the majority Burma ethnic group. The current controlling military regime, the State Peace and Development Council (SPDC), led by Senior General Than Shwe, is the country's de facto government, with subordinate Peace and Development Councils ruling by decree at the division, state, city, township, ward and village levels. On 30 August 2003 the government announced a seven-step road map to build a "modern, democratic, prosperous state". The National Convention, the first step of the road map, was reconvened in 2004, after a recess of eight years, to draw up the basic principles for a new constitution for Burma. The National League for Democracy (NLD) decided not to participate because the SPDC refused to meet their conditions. There had been four sessions of the Convention and it completed its

final session on 3 September 2007. The road map has come under criticism for being un-inclusive and lacking in credibility.

74. Paragraph 2.3 of the OGN states:

"The government's human rights record worsened during 2006 and the government continued to commit numerous serious abuses including extra judicial killings, deaths in custody, disappearances, rape, torture, abuse of prisoners and detainees, arbitrary arrest without appeal, politically motivated arrests and detentions, restriction of freedom of speech, press, assembly, association and movement, restriction of freedom of religion and forced labour (including against children). The military government totally controlled the country's armed forces, excluding a few active insurgent groups."

75. Paragraph 2.4 of the OGN states that the Foreign and Commonwealth Office corroborated reports of the deterioration of Burma's human rights record in 2006 and stated that Burma's human rights record remained a cause of grave concern. Paragraph 2.5 states that despite laws prohibiting torture, members of the security forces reportedly tortured, beat, and otherwise abused prisoners, detainees, and other citizens including routinely subjecting detainees to harsh interrogation techniques designed to intimidate and disorientate. Paragraph 2.7 states that the International Committee of the Red Cross (ICRC) had faced increasing difficulties in conducting detention visits. It took the radical step of publicly denouncing the government for violations of international humanitarian law affecting civilians and detainees and of imposing increasingly severe restrictions on ICRC's work. Paragraph 2.9 states that Amnesty International has recently expressed concerns to the SPDC that articles of Burma's legislation excessively restrict the right of freedom of expression, association and assembly. The authorities continue to use these laws to obtain peace for government critics. Since July 2005, the authorities have penalised senior political figures with extraordinarily long prison sentences in secret trials; held individuals incommunicado, and prosecuted persons attempting to report on human rights violations.

76. In relation to the mass protest that took place towards the end of 2007 the Special Rapporteur in his report dated 7 December 2007 stated that during the crackdowns of 26 to 29 September 2007 the security forces, comprising police and army or riot police as well as members of the Union Solidarity and Development Association and the Swan Rah Shin militia, use excessive force against civilians, including unnecessary and disproportionate lethal force. He stated that following the crackdown, several reports of killings, severe beatings and arrests were received as well as allegations of torture, deaths in custody, relatives of people in hiding being taken hostage and lack of access to medical treatment for the wounded. Allegations were also received that the bodies of some of the people purportedly killed during the crackdown had been burned. He was informed that 10,000 prisoners were detained in Insein prison. He noted that most political prisoners from the NLD and the 88 Generation Group, as well as the monks, were labelled as terrorists by the authorities and then prosecuted on the basis of the security law.

77. In relation to the implicit suggestion by Mr Blundell that the situation in Burma had changed for the better as demonstrated by the Special Rapporteur's report dated 5 September 2008 we have the following observations. In our view Mr Moreland cannot be criticised for failing to refer to this report since his report to the Tribunal

was dated 27 May 2008. We also take the view that the report of the Secretary General should be viewed with a degree of caution since it is aspirational rather than a reflection of any real and lasting change to the situation in Burma. We observe that following the Special Rapporteur's visit in November 2007, after his call for the release of all political prisoners in accordance with his proposed plan of action in his last report to the General Assembly, 58 prisoners were released on humanitarian grounds according to a statement by the government. Nine men over the age of 65 and 49 women either pregnant or with children were set free. In paragraph 51 of his report dated 7 December 2007, however, the Special Rapporteur stated that he condemned the new arrest of political activists, despite the commitment by Prime Minister Thein Sein to the special advisor to the Secretary General on Burma, Ibrahim Gambari, in early November that no more arrests would be carried out. That, in our view, is clear evidence that the Burmese government in the past have only partially acted upon assurances given to officials of the United Nations. Although it is the case that the Special Rapporteur in his visit from 3 to 7 August 2008 was permitted to visit prisoners in prison, in paragraph 45 of his report he said that the continuing detention of political leaders such as U Win W Tin and Hkun Hutunoo put in great jeopardy the participatory aims of the democratic process as expressed by the government in its seven-step road map to democracy. In paragraph 25 of his report he said the prospect of the country becoming a democratic state would depend on each of the remaining steps of the road map being conducted in a democratic and inclusive manner. He recommended to the government of Burma four core human rights element that were indispensable for paving the road to democracy, to be implemented before the elections of 2010. In paragraph 24 of his report, however, he said he was informed by the Commission for Holding Referendum that free campaigning either in favour or against the approval of the new State Constitution was not permitted. Asked about the possibility of the government issuing a comprehensive report on how the referendum had been held the response was that all information concerning the referendum had already been released. In paragraph 26 he said that his meeting with the National Convention discussed the provisions of the new Constitution guaranteeing fundamental rights for the people of Burma. In paragraph 27 he noted with concern that a number of existing domestic laws did not comply with those constitutional provisions and recommended that the government initiate the revision of laws to ensure compliance with the constitutional provisions and international human rights standards

78. In the section of his report dealing with his recommendations the Special Rapporteur set out the four core human right elements that he had said were indispensable. It is perfectly plain from paragraph 87 of his report that these were recommendations rather than undertakings by the Burmese government. The first of the core human rights elements was a review of national legislation. He recommended the government to start reviewing and amending domestic laws which limited fundamental rights and were in contravention with the new Constitution and within international human rights standards. In paragraph 93 he set out what those laws were and said that according to information received the Office of the Attorney General was tasked with analysing legislation. As Mr Cox pointed out the statement that the Office of the Attorney General was tasked with analysing legislation was an indication of the functions of the Attorney General but it did not state explicitly that he had undertaken a review of the legislation which the Special Rapporteur thought needed to be amended. In the case of the second core human rights element,



namely the progressive release of prisoners of conscience in paragraph 98 of his report the Special Rapporteur stated that the government of Burma had in the past issued several amnesty laws for the release of prisoners of conscience in order to restore human rights and to seek national reconciliation. He stated that such mechanisms and others such as pardons, reduction of sentence or conditional release could now be implemented. He listed a number of categories of prisoners that should be taken into account and in paragraph 99 of his report he stated that additional criteria included the release of prisoners connected to specific events such as those arrested in August 1988, May 2003, September 2007 and May 2008 in connection with the referendum and the aftermath of cyclone Nargis. We accept Mr Cox's submission that the Special Rapporteur wished to encourage the government of Burma to take steps that would lead to the recognition of human rights and did not wish to say anything too critical of the government. We, ourselves, cannot read anything into the report that indicates that any substantial change was taking place or was about take place in the human rights situation in Burma. In paragraph 77 of his report the Special Rapporteur said that the promotion of protection of human rights in the country continued to be among the main challenges ahead.

79. It is the case, as subsequent reports have shown, particularly those of Refworld dated 24 September 2008 and 29 September 2008, that the Burmese government have released seven political prisoners, including Mr Win Tin, among a larger number of ordinary prisoners released following an amnesty, but as the reports show there are many more political prisoners still detained.
80. In relation to the release of Mr Stanley Van Tha, Mr Morland's explanation as to why he had not mentioned this was that he had not been aware of his release at the time when he prepared his report in May 2008 but even if he had been he would not have regarded it as particularly significant because there was a pattern over the years of prisoners being released, particularly if they were well known, and then of further arrests. In our view this approach is borne out by the report of the Special Rapporteur in 2007 referred to above. It is significant that according to the report from swissinfo.com dated 5 January 2008 upon his release he did not remain in Burma but rejoined his family in Switzerland.
81. Mr Blundell relied upon paragraphs 3.77 and 3.78 of the Burma OGN dated 31 October 2007. Paragraph 3.77 stated that the claimant's level in involvement in the pro-democracy movement in the UK would be relevant to whether or not a grant of asylum was appropriate. Where it had been established that claimants were high profile activists and had close links to the opposition movement either in Burma or the UK they were likely to face difficulties if returned to Burma. Therefore, prominent activists were likely to qualify for a grant of asylum. Paragraph 3.78 went on to say, however, simply protesting outside the Burmese embassy and the mere existence of photographic evidence to this effect did not necessarily indicate a high level of political involvement in anti-government activities or that the claimant would face persecution or ill-treatment if returned to Burma. The paragraph went on to say that furthermore the Burmese authorities could not, from the photographs alone, know that the appellant was Burmese. In our view the OGN fails to acknowledge the real likelihood that the Burmese authorities at the embassy would have copies of photographs of Burmese nationals who had come to the United Kingdom.

Furthermore the OGN is a policy document and only indirectly of evidential value. The OGN gives no sources for its conclusion that there is a distinction to be drawn between high level and low level involvement in anti-government activities. Paragraph 3.7.3 states that the FCO believes that any photographs of individuals they were targeting who protested abroad could be used as part of a case against them because the regime's military intelligence, a special branch in the police force inside Burma, regularly took photographs of individuals ranging from activists and their families to teachers, diplomats and NGO employees. The FCO had not, however, heard of specific cases where this had happened. On the other hand it has to be borne in mind that no information has been provided to the Tribunal by the respondent, who should know, as to whether there have been any returns to Burma and it is plain that from the evidence that we do have that the British embassy in Rangoon does not monitor any returnees that there might be.

82. In relation to the report from the Democratic Voice of Burma (Norway) dated 9 October 2007 that government officials had categorised detainees into four groups based on their level of involvement in recent anti-government demonstrations in Burma it is important in our view to note that the categories ranged from A to D. Category A included protest leaders of organisers and politicians; category B denoted those who held flags or marched in the first row of protestors. There is no further description of category C. Category D comprised people who were bystanders at the protests or clapped their hands in support. In our view this report in no way cast any doubt upon the validity of Mr Morland's conclusions that the Burmese government did not distinguish between high and low level anti-government activity. The fact that persons might have been detained for being merely bystanders at protests or clapping their hands in support in our view confirms that the Burmese authorities take a repressive attitude towards even minor forms of political protest.
83. Insofar as the letter from Deputy Head of Mission at the British embassy in Rangoon dated 1 August 2008 is concerned, Mr Cox drew our attention to an e-mail from the said embassy in Rangoon dated 15 August 2007 which was sent in reply to a request for information. One of the questions asked was whether a Burmese national who left Burma legally and who took part in demonstrations/events held in the UK against the detention of Suu Kyi and then came to the attention of the Burmese military intelligence would face any penalties for participating in such events. The answer was that it was possible that particular individuals who had come to the attention of the Burmese military intelligence could face penalties for participating in such events. They could, for example, have their passports revoked on return to Burma. They could be arrested and prosecuted for instigating unrest or inciting anger against the state (sedition). This could lead to a prison sentence, possibly for life. The e-mail then went on in terms which were identical save for one significant departure and one sentence which is not material, to the third paragraph of the letter dated 1 August 2008. The letter dated 1 August 2008 said it was difficult to judge how the authorities react in individual circumstances, but the belief of the writer was that an individual would only have a high risk of facing penalties if they had been seen to lead/organise the demonstrations or be responsible for a particularly extreme act of incitement. The significant departure was that in the letter dated 1 August 2008 the expression "a high risk of facing penalties" was used. The letter dated 1 August 2008 stated that the writer was not aware of any cases of

individuals who had faced persecution in Burma simply as a result of participating in a demonstration overseas, but as Mr Cox pointed out the FCO acknowledged in a letter dated 28 September 2004 that they did not systematically monitor returnees from the United Kingdom or elsewhere. Moreover, as was noted on behalf of the appellant, the writer of the letter dated 1 August 2008 did not state the basis for his belief.

84. In relation to the suggestion that Mr Morland had not referred to other expert evidence, Mr Blundell relied upon a passage in response to a request for information contained in a Country of Origin Research Paper produced by the Immigration and Refugee Board of Canada dated 7 August 2007. In correspondence dated 27 July 2007 a country analyst for Asia at the Internal Displacement Monitoring Centre stated that the government of Burma was not in a position to monitor the activities of all of its citizens living in other countries as the number of people who had left Burma was huge. In certain cases the government might monitor the activities of citizens living overseas who were already engaged in political activities while living in Burma and came onto the government's radar screen then. The likelihood of such people getting permission to leave the country, however, became pretty small. In relation to persons who were in a category of being more educated, economically better off and had official permission to leave the country for purposes such as studying abroad and who came to the United States as students, the analyst expressed the opinion that if their activities were largely of limited scope, such as marching in a peace rally at a college campus or writing an op-ed in their college newspaper on Ang San Suu Kyi's birthday, then it was highly unlikely that the government of Burma would be able to/would even be interested in monitoring their activities. It may very well be, as Mr Morland said, that the opinion set in that passage was an assertion by one person and the source of his information is unknown. In our view it is clear, however, that the context in which the issue of monitoring arose was wholly different since the analyst was dealing with the situation on college campuses, of which there must be hundreds if not thousands in the United States. In the instant appeal the Tribunal is concerned with the issue of monitoring of protestors outside the Burmese embassy in London.
85. The conclusion we have reached in relation to how we should approach Mr Morland's evidence is that similar evidence from him was accepted by the Tribunal in HM, the respondent has not commissioned a report from an expert herself and, for the reasons which we have given, the matters which have been advanced by Mr Blundell do not detract from the value of Mr Morland's evidence as an expert witness.
86. In the report of the International Crisis Group entitled "Burma/Burma after Nargis: time to normalise aid relations" dated 20 October 2008, relied upon by the respondent, under the heading "The Political Context" it was stated that some international observers speculated that the shock from cyclone Nargis would lead to political reform – as in Aceh following the 2004 Indian Ocean Tsunami. The top generals, however, made clear they had no intention of deviating from their "seven-step road map". The report said that going ahead with the referendum at the height of the post-cyclone emergency, despite international and domestic outrage, clearly demonstrated the importance they attached to their plan. The report said that although the bungled relief operation intensified popular resentment against the

ruling clique, few Burma citizens believed that it would prompt change. Even democracy activists were pessimistic. It is significant in our view to note that in the Human Rights Watch Report entitled "Burma: Crackdown Bloodier Than Government Admits" dated 7 December 2007 it was said that Human Rights Watch found that the crackdown was carried out in part by the Union Solidarity and Development Association (USDA), a "mass-based social welfare" organisation with more than twenty three million members that the Burmese military was grooming to lead a future civilian government. It operated alongside the Swan Arr Shin (Masters of Force) militia, soldiers and riot police in beating and detaining protestors.

87. In these circumstances we take the view that it cannot yet be said that there is a real likelihood of change in the attitude of the Burma government towards respecting human rights and the freedom of political dissent. We accept the view of Mr Morland that recent events upon which the respondent relies to assert that changes for the better are taking place in Burma are no more than "window dressing" and that it remains to be seen whether any enduring changes are made.
88. In relation to the issue of monitoring of protests we bear in mind the statement in paragraph 18 of his judgment in YB (Eritrea) by Sedley LJ that:

"Where, as here, the tribunal has objective evidence which "paints a bleak picture of the suppression of political opponents" by a named government, it requires little or no evidence or speculation to arrive at a strong possibility – and perhaps more – that its foreign legations not only film or photograph their nationals who demonstrate in public against the regime but have informers among expatriate oppositionist organisations who can name the people who are filmed or photographed. Similarly it does not require affirmative evidence to establish a probability that the intelligence services of such states monitor the internet for information about oppositionist groups."

We bear in mind also that it is stated in the Human Rights Watch Report entitled "Crackdown: Repression of the 207 Popular Protests in Burma" dated 7 December 2007 that the security forces, relying on the photos and videotapes collected by intelligence agents during the protests immediately began arresting anyone suspected of being involved in the protests. We have also had the evidence of Mr U Khin Maung Kyi, the former Burmese diplomat, who worked at the Burmese embassy in London from 1985 until he defected in 1989 relating to the photographing and identifying of demonstrators outside the Burmese embassy in London which we accept as credible.

89. The suggestion made to us by Mr Blundell was not that the evidence of Mr Kyi was not credible. The criticism that was levelled against this evidence was that it was outdated. In our view having regard to what Sedley LJ said in YB (Eritrea) it does not demand much stretch of the imagination to suppose that the measures put in place to identify protestors by a regime as repressive as the Burmese regime would have remained in place and not lapsed due to the passage of time. The events of 2007 and 2008 only have served to enhance the regime's fears about dissidents gaining influence. We have also had the benefit of the evidence of Mr AB in relation to the practice of officials in the embassy as a matter of routine photographing demonstrators outside. The same criticism was levelled by Mr Blundell of him as of Mr Kyi regarding his failure to bring his report up to date. Nonetheless his evidence was not seriously in dispute and taking that together with the other evidence to the

same effect we are satisfied that any Burmese demonstrator demonstrating outside the Burmese embassy would be likely to be photographed and identified by officials within.

90. In her report entitled "Scratching the Surface – My Experiences in Interrogation, Court and Insein Jail, Burma" dated 20 January 2000, Ms Rachel Goldwyn described her arrest, detention and interrogation and ultimate sentence to seven years' imprisonment with hard labour for undermining the stability of the state contrary to section 5J of the 1950 Emergency Act on account of her solo protest in which she sang two Burmese pro-democracy songs, showed two banners and chanted several pro-democracy slogans. She was arrested on 7 September 1999 and interrogated that day and the following day. She stated that during her interrogation she was shown a very recent photograph taken through the windows of the Burmese embassy in Charles Street in London of demonstrators outside the embassy. Those questioning her pointed to Ko Aung (the witness at the hearing before us) in the photograph and asked her to identify him. She went on to say that she was also asked to identify other people in the photograph which was not more than a month old as the demonstrators had a flag that she had made shortly before leaving the United Kingdom. She refused to identify anyone. She was repeatedly asked if Ko Aung was her boyfriend. We are satisfied that limited though this evidence is, it indicated the ability of the Burmese authorities in the United Kingdom to identify Mr Aung outside the Burmese embassy and communicate his identification to the authorities in Burma.
91. We have not found the evidence of Mr Kyaw Soe Aung wholly satisfactory. We find the statement that the appellant was one of the most active female members of the Burmese democratic community in exile in London to be misleading given the account that she herself gave of her activities. We also take the view that the juxtaposition in his statement of mention of Ms Rachel Goldwyn's report called "Scratching the Surface" with his statement that in 1999 she was shown photographs of the crowd outside the Burmese embassy when she was interrogated in Burma and it was clear that the officials knew the names of people, knew about their activities and in some cases even knew where they were living was an attempt to suggest that this information came from her report. It is plain from reading her report that the only person whom she described the authorities as knowing was Mr Aung himself. We also take the view that his evidence in relation to whether there was an informer within the BDMA who passed information to the embassy about people in the Burmese community was unsatisfactory. We take the view that what he said in paragraph 17 of his statement, namely

"We also have established a secret contact in the Burmese Embassy in London. This person has told us that there is an informer within the BDMA who passes information to the Embassy about people within the Burmese community in the United Kingdom who are politically active"

was designed to suggest that this informer was currently active. In cross-examination he was put into a position where he had to indicate the date on which he was told about this informer and what was done about him. This resulted in his saying that this particular informer had been dealt with. This provoked a departure from his witness statement in suggesting that there were other more recent informers. We find it difficult to accept Mr Aung's explanation that what he said in his

statement was an honest mistake. Nonetheless having regard to the statement of Sedley LJ in YB (Eritrea), quoted above, it would have needed little evidence to persuade us that the officials at the Burmese embassy have spies in the Burmese community in the United Kingdom who are able to identify members of opposition groups.

92. The country guidance given by the Tribunal in HM remains valid. Despite the efforts of the Special Rapporteur we take the view that no significant or reliable change has occurred in the approach of the authorities in Burma to be able to say that the human rights situation there is any better than it was at the time the Tribunal in HM promulgated its determination. We take the view that participation in demonstrations outside the Burmese embassy by Burmese nationals is likely to be recorded by the Burmese authorities in London and made known to the Burmese authorities in Burma; we express the view that those Burmese nationals participating on a regular basis are likely to have been photographed by the Burmese authorities and identified. We are satisfied that if such a person is returned to Burma and there is an additional factor which would trigger the attention of the Burmese authorities such as the lack of a valid Burmese passport or the absence of permission to exit Burma or previously having come to the adverse attention of the authorities as an opponent of the authorities or having a connection with known political opponents there is a real risk of persecution and article 3 ill-treatment on return to Burma. It may well be that a pro-democracy demonstrator outside the Burmese embassy known to the authorities to have a real commitment to the cause without an additional risk factor would equally be at risk but each case must be determined on its own facts.
93. Nevertheless despite Mr Morland's view that the Burmese authorities were unpredictable in their treatment of individuals and would regard demonstration outside the embassy in London as an affront to the regime, we find it difficult to accept that the Burmese government would persecute someone whom they knew to be a hanger-on with no real commitment to the oppositionist cause who was demonstrating merely in order to enhance a false claim for asylum. As the Tribunal in HM found, if the Burmese authorities had reason to believe that a returnee had made a claim for asylum in the United Kingdom which had failed, that in itself was unlikely to attract the adverse interest of the Burmese authorities. That suggests that the Burmese authorities would be aware that the returnee had advanced some criticism of the regime in order to mount a claim for asylum yet even then would not be inclined to persecute him unless there were other evidence of opposition. We think it reasonable to draw a distinction between demonstrations in Burma, where it is inconceivable that a person would demonstrate unless he opposed the regime and demonstrations in the United Kingdom, in which a hanger on with no real commitment to the oppositionist cause might participate in the hope of creating a false entitlement to refugee status. We are not prepared to accept that the Burmese government with their spies in the Burmese community would not appreciate the difference between a genuine opponent and a hanger on. We therefore take the view that it is unlikely that a hanger on would be at a real risk of persecution on return to Burma on account of merely having participated in demonstrations but each case must be decided on its own facts.

#### Summary of general conclusion

94. Our general conclusions are as follows:

- (1) The country guidance given by the Tribunal in HM (Risk factors for Burmese citizens) Burma CG [2006] UKAIT 00012 remains valid. Despite the release of some long term detainees no significant or reliable change has occurred in the approach of the authorities in Burma to be able to say that the human rights situation there is any better than it was at the time the Tribunal in HM promulgated its determination.
- (2) The identities and roles of activists in Burmese pro-democracy organisations based in London are likely to be known to the Burmese authorities.
- (3) Participation in demonstrations outside the Burmese embassy in London by Burmese nationals is likely to be recorded by the Burmese authorities in London and made known to the Burmese authorities in Burma. Those Burmese nationals participating on a regular basis are likely to have been photographed by the Burmese authorities and identified.
- (4) If such a person were returned to Burma and there is an additional factor which would trigger the attention of the Burmese authorities (e.g. lack of a valid Burmese passport; absence of permission to exit Burma; previously having come to the adverse attention of the authorities as an opponent of the regime; or having a connection with known political opponents there is a real risk of persecution and article 3 ill-treatment on return.
- (5) It may be that a pro-democracy demonstrator outside the Burmese embassy known to the authorities to have a real commitment to the cause without an additional risk factor would equally be at risk but each case must be determined on its own facts.
- (6) It is unlikely that the Burmese authorities would persecute someone whom they knew to be a hanger-on with no real commitment to the oppositionist cause who was demonstrating merely in order to enhance a false claim for asylum but each case must be decided on its own facts.
- (7) In granting permission to leave Burma the authorities are not concerned with the places which the passport holder may visit nor the length of time during which they may be absent from Burma. The Burmese authorities are not interested per se in the places visited by a returning Burmese national who had had permission to leave Burma nor how long they stayed away.

#### The appellant's circumstances

95. So far as the appellant herself is concerned we accept, as did the immigration judge, that her father was a pro-democracy activist in Burma. The immigration judge described him as a thorn in the side of the Burmese government. We accept the account of the appellant's brother that he was a leader of the Kawtoolay Muslim Liberation Front and that he was named as such in a book entitled "Burma's Golden Triangle on the Trail of the Opium Warlords" by Andre and Louis Boucaud. We are prepared to accept the following: that he, the appellant's mother, the appellant's brother and two sisters were granted asylum in the United Kingdom; that the appellant's brother was involved with the KMLF and also the All Burma Muslim Union (ABMU); that the appellant's brother is an executive committee member of

BDMA as stated by Mr Aung and also chairman of BMA (UK) as Mr Aung and the appellant's brother himself say; that the appellant's husband qualified as a lawyer but his licence was withdrawn in 1988 by the Burmese authorities because of his involvement in the democracy movement and that the appellant has an older brother who lives in Thailand who took part in the 1988 uprising against the Burmese regime. None of these matters were explicitly challenged by the respondent. Notwithstanding these connections, however, it is also true that the appellant never herself was the object of any adverse attention by the Burmese government whilst she lived in Burma. In our view this was undoubtedly because she herself never participated in any pro-democracy movement. We accept that she was illiterate. She clearly did not represent any form of threat whatsoever to the Burmese government. This is borne out by the fact that on her own account she was able to leave Burma for Thailand on a number of occasions and also leave Burma legally in order to come to the United Kingdom. We take the view that had the Burmese authorities had any adverse interest in her then she would have had the greatest difficulty in obtaining a passport. Although the appellant said that she obtained a passport through an agent, she did not appear to have paid anything other than the ordinary amount that one would have to pay in order to obtain a passport. It seems that this was a common practice in Burma and no doubt the appellant did have good reason to keep at arms length from the Burmese authorities in case her family relationships did cause her problems when face to face with Burmese officials.

96. Mr Morland was anxious to emphasise that in granting permission to leave Burma the authorities were not concerned with the places which the passport holder might visit nor the length of time during which they might be absent from Burma. We regard his statement in re-examination that he believed the fact that the appellant had overstayed her visa in the United Kingdom might cause her problems on return and trigger questioning as apparently not altogether consistent his earlier evidence in which he was at pains to point out that the Burmese authorities were not interested in the places visited by persons who had had permission to leave Burma, nor how long they stayed away. We interpret his evidence as meaning that the combination of the appellant's family connections together with her expired visa might attract the Burmese authorities' adverse attention. We take the view that the fact that a failed asylum seeker on return would have overstayed his leave would not in itself provoke the adverse attention of the Burmese authorities. Moreover, our attention has not been drawn to any item of background material which suggests that a failed asylum seeker per se, if returned on a valid passport, would attract the adverse attention of the Burmese authorities.
97. We are satisfied that the appellant took part in numerous demonstrations outside the Burmese embassy during the course of 2007 and also a number of demonstrations there during 2008. We accept that her attendance was less frequent in 2008 due to the birth of her child on 22 December 2007, as a result of which it appears that she developed post natal depression. She had travelled to the United Kingdom on a valid Burmese passport carrying a valid exit stamp and a valid British visa so that her arrival in the United Kingdom would be known to the Burmese authorities. We are satisfied it is likely that the appellant has been photographed protesting outside the Burmese embassy and that officials there would have been able to identify her from her photograph.



98. We also take the view that effectively the appellant's activities with the pro-democracy movement have been limited to demonstrating outside the Burmese Embassy and on occasions outside the Chinese embassy. She was given the opportunity by the Tribunal during the course of her evidence to elucidate upon her activities. She said that apart from preparing cakes and snacks for meetings in 2007, making banners and stitching headbands, making a wreath, helping to make a mock coffin and allowing her daughter to lay a wreath outside the embassy her activities were limited to attending demonstrations.
99. So far as this appellant is concerned we are satisfied that the fact that she had been demonstrating outside the Burmese embassy over a relatively prolonged period and is a member of the BMA in the United Kingdom would be known to the Burmese authorities. Mr Blundell did not suggest that, to use the words of Sedley LJ in YB (Eritrea), she would be a "hanger-on with no real commitment to the oppositionist cause". We are satisfied that the appellant would be identified as someone who had family links to pro-democracy and anti-government activists. We are satisfied that although these family links did not attract the adverse interest of the authorities while she was in Burma nonetheless her activities in participating in demonstrations against the Burmese authorities in the United Kingdom would put her into a different category and she would be seen as a political opponent of the authorities. We are also satisfied that her demonstration activities were not attempts to manufacture an asylum claim, but arose from her genuine family-based involvement in anti-regime activities. In these circumstances we are satisfied there is a real risk that if she were returned to Burma she would be detained, interrogated and subjected to ill-treatment which would breach her rights under article 3 of the ECHR and amount to persecution for a Refugee Convention reason.
100. For the reasons given, the immigration judge made a material error of law in his determination of the appeal. Accordingly the following decision is substituted.

The appeal is allowed on asylum grounds and on human rights grounds under article 3 of ECHR.

Signed

Senior Immigration Judge Spencer

**APPENDIX I: LIST OF BACKGROUND MATERIAL BEFORE THE TRIBUNAL**

1.	1998	Human Rights Watch World Report 1998: <i>Burma</i>
2.	1 March 1998	Extracts from Jane's Intelligence Review
3.	20 January 2000	Report by Rachel Goldwyn: <i>Scratching the Surface</i>
4.	2003	Burma Lawyers' Council: <i>Suppressive Law</i>
5.	30 July 2003	Amnesty International: <i>Burma: Justice on Trial</i>
6.	28 September 2004	Letter from Foreign & Commonwealth Office
7.	6 March 2005	Reuters News: <i>Burma releases veteran pro-democracy activist</i>
8.	7 March 2005	BBC Monitoring Asia Pacific: <i>Burma frees two detained over State Day meeting</i>
9.	16 June 2005	Amnesty International: <i>Burma's Political Prisoners: A Growing Legacy of Injustice</i>
10.	2 December 2005	Assistance Association for Political prisoners ( Burma): <i>The Darkness We See: Torture in Burma's Interrogation Centers and Prisons (Excerpt)</i>
11.	27 March 2006	Office of the United Nations High Commissioner for Human Rights (OHCHR): <i>Report of the Special Rapporteur on the right to freedom of opinion and expression: Summary of cases transmitted to Governments and replies received(Burma excerpt)</i>
12.	April 2006	Kyaw Zwar Tun v United States Immigration and Naturalization Service: US Court of Appeals, Second Circuit
13.	6 March 2007	US Department of State: <i>Country Reports on Human Rights Practices 2006: Burma (excerpt)</i>
14.	30 April 2007	US Department of State: <i>Country Reports on Terrorism 2006; Burma (excerpt)</i>
15.	9 May 2007	Freedom House: <i>The Worst of the Worst: The World's Most Repressive Societies 2007 (Freedom in the World) – Burma (Burma)</i>
16.	16 May 2007	Voice of America News: <i>Burma Detains Activists praying for Aung San Suu Kyi's Release</i>
17.	23 May 2007	Amnesty International: <i>Amnesty International Report 2007: Burma</i>
18.	25 May 2007	Amnesty International: <i>Burma: Aung San Suu Kyi's detention extended</i>
19.	7 August 2007	Immigration and Refugee Board of Canada: <i>Response to information request "Whether the government monitors the activities of its citizens who travel to, or live in, Canada or other countries, especially if those citizens are engaging in political activities abroad in which they criticise the government"</i>
20.	7 August 2007	Immigration and Refugee Board of Canada: <i>Response to information request "Burma: treatment of failed refugee claimants who return to Burma, particularly those who engaged in political activities while outside Burma"</i>
21.	7 August 2007	Immigration and Refugee Board of Canada: <i>Treatment of failed refugee claimants who return to Burma, particularly those who engage in political activities while outside Burma (2005-August 2007)</i>
22.	15 August 2007	Asian Human Rights Commission: <i>Burma: Public assaults and deaths in custody</i>
23.	15 August 2007	Email from British Embassy, Rangoon
24.	22 August 2007	Amnesty International: <i>Urgent Action 219/07 – Burma: Fear of torture or ill-treatment (at least 18 people detained after participating in demonstrations against fuel price rises)</i>
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28.	24 September 2007		The Guardian: <i>Record numbers join Burmese protests</i>
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