



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA/14713/2009

THE IMMIGRATION ACTS

Heard at Bradford
On 19 September 2013

Date Sent
On 31 October 2013
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Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

YE MANG

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R O’Ryan, instructed by Scudamores, Solicitors
For the Respondent: Mr Steward, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, Ye Mang, was born on 27 May 1976 and is a male citizen of Burma. On 5 November 2009, a decision was made to refuse to grant the appellant asylum and to remove him from the United Kingdom by way of directions under Section 10 of the Immigration and Asylum Act 1999. The appellant appealed against that latter decision to an Immigration Judge (Judge Sarsfield) who, in a determination

promulgated on 6 January 2010, dismissed the appeal. Following a grant of permission in the High Court, the appeal eventually came before Upper Tribunal Judge D E Taylor who set aside Judge Sarsfield's determination and, in a determination promulgated on 3 October 2012, remade the decision by dismissing the appeal. The appeal now returns to the Upper Tribunal by way of a consent order in the Court of Appeal which is dated 16 July 2013. That order set aside Judge Taylor's determination and provided at [13] that:

"In light of the country guidance case of **TS (Burma)** which has now been promulgated, the parties consider this appeal should be allowed and this case be remitted to the Upper Tribunal to be re-determined in the light of **TS (Burma)**."

2. During a discussion with the representatives at the outset of the Upper Tribunal hearing the appellant's representatives agreed that (i) the findings of fact of Judge Sarsfield should stand, save that in relation to illegal exit from Burma; (ii) the Tribunal should, as provided by the consent order, consider that the facts as found in the light of *TS (Political opponents - risk) Burma* CG 2013 UKUT 00281 (IAC). The Statement of Reasons annexed to the consent order in the Court of Appeal refers to an earlier order of 10 January 2013 (Burnton LJ) which recorded that, "The grounds concerning the credibility of the appellant's account of his experiences in Burma do not justify permission to appeal. The only arguable ground concerns his alleged sur place activities." As regards legal exit, a Statement of Reasons at [3] records:

"For the avoidance of doubt, the respondent accepts the appellant was an illegal entrant into the United Kingdom however the respondent does not accept that the appellant necessarily exited Burma illegally, a matter to be tested by the fact-finding Tribunal."

3. In his determination at [19], Judge Sarsfield made the following findings (and I summarise): (i) the appellant had never been a member of the NLD. He had never been involved with that party in Burma nor had he become politically involved with it since arriving in the United Kingdom (December 2009); (ii) he did not accept that the appellant's colleague, Ko Soe Naing, was an NLD member or had been arrested; (iii) the appellant's account of having been involved in demonstrations in Burma was not true the appellant had never been arrested or detained as claimed or at all; (iv) the appellant had never been served with an arrest warrant; (v) the judge accepted the appellant had suffered a "cheroot burn" and that his arm was injured but found that these injuries were not the consequence of ill-treatment at the hands of the Burmese authorities as claimed. At [21] the judge wrote this:

"I consider this appellant's account is not credible, does not accord with the background material; he has given contradictory and inconsistent evidence and tried to embellish his account; he is a liar. I am not satisfied that any injuries were sustained as claimed. I'm not satisfied that he left Burma illegally, has been politically involved and come to the authorities' attention or comes within the category of returnees at risk in the case law. If returned I am not satisfied he would suffer such ill-treatment that would amount to persecution, torture or inhuman or degrading treatment, sufficient for a Convention reason or amount to a breach of Articles 2 and 3 of the 1950 Convention."

4. The appellant gave brief evidence in Burmese with the assistance of an interpreter. He adopted his three statements of December 2009, July 2011 and September 2013 as his evidence-in-chief. The appellant said that he would continue attending political demonstrations in Burma as he had done in the United Kingdom, "if given the chance."
5. He was cross-examined by Mr Steward regarding the manner in which he had left Burma. In his witness statement of July 2011, the appellant described his departure from the country as follows:

"I can confirm that I got into the back of the lorry at Hlay Ku Town which is in Burma at about 4pm on 9/8/2009 and arrived at Kaw Ka Rait in Burma about 3am on 10/8/2009. I got out the lorry there for a short while and then back into the lorry in the same position as before. We went through the checkpoint at Thingan Nyi Naung in Burma and I would estimate the lorry was stopped for about ten minutes. We arrived in Mya Wa Di in Burma where we left the lorry and travelled by motorbike to a small place where the motorbikes were left and we took a small boat across the river to Mae Sot in Thailand. In this way, we avoided the border controls."
6. Asked whether the border control had been manned by soldiers or civilians, the appellant said that he had never seen the border control area itself. He had left the track and had travelled by motorbike for about ten minutes before he crossed the border. He said that he had taken ten minutes by motorcycle to reach the crossing. He had obtained the motorcycle at a bus station in the city centre. The appellant said that the crossing of the river was about 30 feet wide. Nobody else had crossed with the appellant. Asked whether he knew whether other refugees had used the crossing in the past, the appellant said that he did not know; he added that his uncle had made all the arrangements. The appellant had made the crossing at twilight.
7. The appellant was asked about the demonstrations which he had attended in the United Kingdom (there are photographs showing him at a demonstration in 2011). The appellant said that he had never been able to use the microphone to address the other protesters; on the one occasion when he had been given the microphone, "time was up and I had not actually had the time to use it."
8. The Tribunal reserved its determination.
9. The burden of proof in the appeal is on the appellant and the standard of proof is whether there would be a real risk that the appellant would suffer, respectively, persecution or treatment contrary to the ECHR (Articles 2/3) if he were to return to Burma. I do not find that the appellant is a witness of truth. I do not accept his account of having left Burma. I do not find it reasonably likely that the appellant would have been able to use the illegal border crossing into Thailand with such ease and without encountering soldiers, policemen or other officials of the Burmese state. The appellant told me that the border crossing was "an established crossing" although he could not give the particulars of anyone else who had used it. If the crossing was as narrow as the appellant claimed (30 feet) then its crossing by boat would be a swift and relatively easy matter and I simply do not accept, given the

nature of the Burmese regime and its concern with ethnic conflicts on its borders and incursions from neighbouring states, the Burmese authorities would not have monitored such an obvious border crossing on territory which it (as opposed to rebels or insurgents) controlled.

10. In reaching that finding, I am aware of the observations of the Court of Appeal in *GM Eritrea* [2008] EWCA Civ 833 at [31]:

Third, the observation in *Ariaya and Sammy* and in *MA* that a person who has not given a credible account of his own history cannot easily show that he would be at risk as a draft evader or because of illegal exit is, with respect, a robust assessment of practical likelihood, but it is not expressed as, and cannot be, any sort of rule of law or even rule of thumb. In every case it is still necessary to consider, despite the failure of the applicant to help himself by giving a true or any account of his own experiences, whether there is a reasonable likelihood of persecution on return. In all of the present cases the appellants argued that the totality of material before the respective tribunals, even though it included almost no contribution from the appellants themselves, required a positive answer to that question. To those arguments I now turn.

11. In reaching my finding I have had regard to the appellant's evidence, specifically regarding his exit including his answers under cross-examination. My finding is, therefore, a discrete finding although, in accordance with best practice, I have assessed the evidence of exit in the context of all the evidence. I have not ignored the fact that the appellant was found to be an untruthful witness by Judge Sarsfield; his finding is clearly insufficient on its own to lead me to a finding that the appellant has lied regarding his exit from Burma but the appellant's general lack of truthfulness is the background against which I have considered the evidence.
12. Mr Steward did not seek to challenge the appellant's claim to have attended demonstrations in the United Kingdom. However, referring to the recent country guidance of *TS*, he submitted that the appellant did not even reach "the lowest profile of a person likely to be at risk." In *TS*, the Tribunal held:

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

6. A person who has a profile of voicing opposition to the Burmese government in the United Kingdom can expect to be monitored upon return by the Burmese authorities. The intensity of that monitoring will in general depend upon the extent of opposition activity abroad.

7. Whether there is a real risk that monitoring will lead to detention following return will in each case depend on the Burmese authorities' view of the information it already possesses coupled with what it receives as the result of any post-arrival monitoring. Their view will be shaped by (i) how active the person had been in the United Kingdom, for example by leading demonstrations or becoming a prominent

voice in political meetings, (ii) what he/she did before leaving Burma, (iii) what that person does on return, (iv) the profile of the people he or she mixes with and (v) whether a person is of an ethnicity that is seen by the government to be de-stabilising the union, or if the person's activity is of a kind that has an ethnic, geo-political or economic regional component, which is regarded by the Burmese government as a sensitive issue.

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

13. With regards to [7] above, this appellant has not led demonstrations nor has he become "a prominent voice in political meetings." Before he left Burma, he had no political or opposition profile whatever. I find that when he returns to Burma he will have no intention at all of engaging in political activity of any kind; I explicitly reject his claim under cross-examination that he would continue to attend demonstrations in Burma "if he had the chance." He is unlikely to mix with individuals who have opposition political profiles; he has not done so in the past and I see absolutely no reason why he should start to do so in the future. As Mr O'Ryan acknowledged, problems for a returnee anticipated by *TS* essentially turn on the individual's political activity after return to Burma. I find that this appellant's very limited involvement in demonstrations *sur place* will not *per se* expose him to a risk on return and any risk profile he may have as a result of attending those demonstrations will amount to very little in terms of real risk because he has no interest in engaging political opposition in Burma.
14. That leaves the question of the appellant's possible illegal exit from Burma. As I have recorded above, I do not find the appellant left Burma as he describes. I find it likely that he has invented an account in order to avoid giving any details of how he actually did leave Burma. Had he left Burma illegally, I find that the appellant would have had no hesitation in telling the Respondent's officers and the Tribunal the truth. I consider it likely the appellant has refrained from giving a true account of his exit because he fears that account may damage his claim for asylum. I consider it likely that he left Burma legally. Returning to *GM*, the Court of Appeal held at [39-40]:

So far as *GM* and *YT* are concerned, their lives are an evidential blank between 2000 and their arrival in the United Kingdom, in 2006 in the case of *GM* and 2005 in the case of *YT*. Both Immigration Judges rightly thought that it was not their task to speculate as to what the appellants had been doing during that period. And in any event such enquiry would indeed have been entirely speculative. While they are unlikely to have fallen into any of the categories reported in §9 above, they were of an age to have moved into the student category envisaged by the AIT. Since they put forward no truthful material about what they were doing in the relevant period, it is in my view impossible to say that there is a reasonable degree of likelihood that during that period the appellants did not move into the student category.

At the same time, it is equally impossible to say that it is likely that they did enter that category. That however is not the test. Mr Nicol was wrong in suggesting that it was for the Secretary of State to produce evidence to that effect. That would indeed be to reverse the burden of proof. As this court put it in Ariaya and Sammy, cited in §12 above, it may not be necessary for the appellant in such circumstances to say much, but he must say something, adduce some evidence that puts him in a vulnerable position, before the effective burden of contradicting his case passes to the Secretary of State.

15. Having rejected the appellant's account of his departure, the Tribunal has before it an appellant who has given an untruthful account of past events in Burma and whose *sur place* activities do not expose him to a real risk on return. I find that the appellant has failed to discharge the burden of proving, even to the low standard of reasonable likelihood, that he is likely to be in a "vulnerable position" upon return to Burma.
16. Mr O'Ryan made the point that the appellant has not been shown to be in possession of a valid or expired Burmese passport. There has been little, if any, evidence regarding any attempt which he may have made to obtain a genuine passport. However, I do not consider that this is a case where it is appropriate for the Tribunal to consider the exact logistics of the appellant's return to his home country. I assume that steps will be taken by the respondent to obtain a *laissez passer* or other travel document and there is no evidence to show that, simply because a returnee enters Burma in possession of such a document, he will be assumed by the Burmese authorities to have left the country illegally. If problems do occur once removal directions have been issued, then the appellant may need to seek a remedy by way of judicial review. However, that is not a matter for this Tribunal at the present time.

DECISION

17. This appeal is dismissed on asylum grounds.
18. This appeal is dismissed on human rights grounds.
19. This appellant is not entitled to a grant of humanitarian protection.

Signed

Date 30 October 2013

Upper Tribunal Judge Clive Lane