



**IN THE UPPER TRIBUNAL**  
**IMMIGRATION AND ASYLUM CHAMBER**

**Case No: UI-2022-001970**  
**First-tier Tribunal No:**  
**PA/54917/2021**  
**IA/14928/2021**

**THE IMMIGRATION ACTS**

**Heard at Bradford IAC**  
**On the 12 October 2022**

**Decision & Reasons Promulgated**  
**On the 03 February 2023**

**Before**

**UPPER TRIBUNAL JUDGE REEDS**

**Between**

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

Appellant

**and**

**A M A**

**(ANONYMITY DIRECTION MADE**

Respondent

**Representation:**

For the Appellant: Mr Diwnycz , Senior Home Office Presenting Officer

For the Respondent: Mr Shah, Solicitor advocate instructed on behalf of the appellant

**Anonymity :**

Rule 14: The Tribunal Procedure(Upper Tribunal) Rules 2008:

Anonymity is granted because the facts of the appeal involve a protection claim. and Unless and until a tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly

identify him. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

### **DECISION AND REASONS**

1. The Secretary of State appeals, with permission, against the determination of the First-tier Tribunal (Judge Forster) promulgated on 2 April 2022. By its decision, the Tribunal allowed the appellant's appeal against the Secretary of State's decision dated 27 September 2021 refusing his protection and human rights claim
2. Permission was granted on 17 May 2022 by First-tier Tribunal Judge Roots.
3. For the purposes of this decision, I refer to the Secretary of State for the Home Department as the respondent and to AMA as the appellant, reflecting their positions before the First-tier Tribunal.
4. The background to the appeal is set out in the decision of the FtTJ promulgated on 2 April 2022. The appellant is of Rohingya ethnicity originally from Burma (now known as Myanmar) and having been born there. In 1986 he fled from Myanmar with his parents when he was 6 years old, and using a Bangladeshi passport, they went as a family to Saudi Arabia. The appellant spent his early life in Saudi Arabia as a undocumented refugee. He entered the UK on 16 March 2018 using a Pakistani passport obtained, he said, through an agent.
5. The appellant claimed asylum on 3 April 2018 and a subsequent appeal before a FtTJ was dismissed on 18 April 2019. Before the FtTJ, the appellant's nationality was disputed as he claimed to be a national of Myanmar. The respondent did not accept that he was a Rohingya Muslim from that country but believed him to be a Pakistani citizen. However Judge Anthony accepted the appellant's factual account of being born in Burma and being of Rohingya ethnicity and living in Saudi Arabia with his family for 35 years. However for the reasons given his decision, the judge found that he used a Pakistani passport to apply for a visa to come to the United Kingdom and that it indicated that he held Pakistani nationality and would not be at risk of harm in Pakistan.
6. Following the dismissal of his appeal the appellant made further submissions as a fresh claim on 2 March 2020. The substance of the fresh claim referred to fresh evidence not available to the FtTJ consisting of witness statements and further documentary evidence that out in the respondent's CPIN's.
7. The respondent refused his fresh claim with a right of appeal to the FtTJ in a decision taken on 27 September 2021.

8. The appeal came before FtTJ Forster who in a decision promulgated on 2 March 2022 allowed his appeal on asylum grounds.
9. The respondent sought permission to appeal that decision on 2 grounds and permission to appeal was granted on 17 May 2022.

The appeal before the Upper Tribunal:

10. Thus the appeal came before the Upper Tribunal. Mr Diwnycz appeared on behalf of the respondent and Mr Shah, who represented the appellant previously before the FtTJ, appeared on behalf of the appellant.
11. When clarifying the documents with both advocates, Mr Diwnycz on behalf of the respondent indicated that he did not have the stitched bundle that was before the FtT. Mr Shah indicated the documents that he would be referring to in his submissions were reflected in the Rule 24 response (written submissions) that he had produced prior to the hearing, and which had been served on the tribunal and also the respondent. Therefore time was given to Mr Diwnycz to read the documents. After having done so he indicated that he was able to proceed and confirmed that he had been served with the Rule 24 response provided by Mr Shah.

The respondent's submissions:

12. Mr Diwnycz relied upon the written grounds. They are as follows.
13. The first ground asserts that the judge applied the wrong standard of proof. The previous Judge had held that the appellant was a citizen of Pakistan and could live there without fear of persecution and the issue was whether he could return to Pakistan. This question fell to be decided to the civil standard (see MA (Ethiopia) v Secretary of State for the Home Department [2009] EWCA Civ 289, at paragraph 78, 'inability to return can and should be proved in the ordinary way, on the balance of probabilities'). The grounds submit that the FtTJ applied the lower standard at paragraph [33] which is the incorrect standard of proof. It is further submitted that if the findings of the Judge are upheld then as in the case in Abdullah v Secretary of State for the Home Department [2013] EWCA Civ 42 (06 February 2013) the appellant does not succeed in his appeal as he still has not shown, to the balance of probabilities, that he cannot return to Pakistan.
14. As to ground 2, it is submitted that the FtTJ erred in law by failing to follow the decision of Devaseelan. The respondent submits that the FtTJ failed to afford the respect, as per Devaseelan, to the previous findings that the appellant could have taken the step of approaching the Pakistani authorities in the UK to show the passport issued to him was other than genuine. The FtTJ failed to follow (see MA (Ethiopia) v Secretary of State for the Home Department [2009] EWCA Civ 289, at paragraph 48).
15. The grounds also submit that it was an arguable error in law to give such weight to the self-interested claims of the witnesses and the appellant

when matters can be put to the test ( see decision in Hussein (Status of passports: foreign law) Tanzania [2020] UKUT 250 (IAC) (30 July 2020) at [12].

16. In his oral submissions Mr Diwnycz referred to headnote one in the decision of Hussein and that as he produced a valid Pakistani passport he was therefore entitled to it.
17. He stated that he had no response to the rule 24 (written submissions) provided by Mr Shah and that the appellant had not produced the evidence to disregard the passport.

The submissions made on behalf of the appellant:

18. Mr Shah on behalf of the appellant relied upon his written submissions which had been served on the tribunal and the respondent prior to the hearing.
19. He stated that in relation to the case law cited on behalf of the respondent, his submission was that the decisions could be distinguished from the facts of the present appeal. In relation to the decision of Hussein he referred the tribunal to the headnote and in particular headnote 1, which referred to a person holding a genuine passport, apparently issued to him and not falsified or altered, has to be regarded as a national of the state that issued the passport. He submitted that the evidence before the FtTJ was that the passport stated he was born in Karachi, but this was contradicted before the 2 FtTJ's and the presenting officer had accepted the appellant was born in Myanmar and not born in Karachi as summarised in his previous history. Therefore if the passport contained false information concerning his place of birth and his address it would make the passport invalid. Therefore the decision could be distinguished from the facts of the decision in Hussein.
20. He further submitted that when looking at the facts of that decision, paragraph 5 refers to the issue of the appellant using a Tanzanian passport. At paragraph 7, it shows the history of travel and that the passport had been inspected on at least 10 occasions on his entry and exit through international airports. In that appeal the tribunal was concerned that they only had the assertions of the appellant and was not supported by country information or expert evidence therefore his assertions were insufficient. Mr Shah submitted the facts are very different from the present appeal and that the appellant did use the passport to go to Pakistan, but he passed through the channels through bribery.
21. Mr Shah referred the tribunal to his skeleton argument at paragraphs 4 and 7 and the references made there to the 3 witnesses who had given evidence and were part of the Rohingya community. Two of the witnesses, SA and HA were granted leave on the basis of the same historic background; both entered the United Kingdom using Pakistani passports obtained through agents which they had explained to the FtT, and their

appeals were allowed. The decision was admitted to corroborate the oral evidence. Mr Shah submitted that the judge found them to be truthful and that they had first-hand experience.

22. Mr Shah then turned to the decision in Abdullah. He submitted that the facts of the appeal was set out at paragraph 3 and that he claimed to be born in Saudi Arabia and that he was a stateless Bidoon and was issued with a Saudi passport. He submitted that in the present appeal the appellant was never born in Pakistan. He referred to paragraphs 5 and 6 of the decision and that the appellant in Abdullah had an appalling immigration background and that the judge did not believe his account therefore credibility was an issue. When contrasted with the present appeal, credibility was not an issue.
23. Mr Shah referred to the country information report in the appellant's bundle (p79) dated 11/4/ 2019 (Pakistan: Rohingya Muslims Citizenship). Mr Shah submitted that this was a document which led the FtTJ to depart from the previous decision. At paragraph 1.1.2 reference is made to Rohingya living in Pakistan and a request was made to the Pakistani authorities about them but that they declined to comment. At 1.1.3 it recorded that "many Rohingya and Bengalis had obtained illegal identification documents in Pakistan." At 1.1.4 reference was made to Pakistani passport holding no value and 1.2.1 of the report referred to the reported situation in Saudi Arabia in 2015 of 250,000 and 500,000 Rohingya in the country.
24. A further document they relied upon was page 101 which was a copy of an article "the Nation" showing that 47,000 government officers concealed their government service to obtain passports and there was no mechanism to check if the government officials were concealing their service. Mr Shah submitted that the document corroborated the high level of corruption.
25. Mr Shah also referred to a document on page 104 "Daily Star "dated 14/12/2021. The document states "do not deport Rohingya's from Saudi Arabia until genocide ends." The document refers to a global platform of Rohingya's urging Saudi Arabia not to deport any Rohingya's until the genocide is over and not to deport them to Bangladesh. According to media reports, Saudi Arabia wanted to deport 42,000 Rohingya's possessing Bangladesh passports. Mr Shah also referred to page 118, to show that the Saudi Arabians were deporting Rohingya refugees against their will. He referred to page 119, which referred to fake Pakistani passport is being used, and page 139, an article about 300 Rohingya in Bangladesh who travelled abroad on Bangladeshi passports. He submitted that Bangladesh would not accept them, and human traffickers existed.
26. Mr Shah submitted that the documents in country information addressed concerns as to why the Rohingya had Pakistani and Bangladeshi passports.

27. Mr Shah returned to the two authorities relied upon by the respondent and submitted that there were no country reports or witnesses to corroborate the appellant's account as in the present appeal.
28. Mr Shah took the tribunal to page 45 - 50 of the respondents bundle where there were photographs submitted on behalf of the appellant of the Rohingya community including distinguished figures who had given evidence before the FtTJ. Mr Shah submitted that in the 2 authorities relied upon by the respondent there was a lack of corroborative evidence apart from the appellant's account. In the present appeal they were distinguished figures before the FtTJ, and they gave evidence and were cross-examined. The FtTJ concluded that they had sufficient knowledge, and their evidence could be relied upon. Mr Shah referred to a witness who attended SA and he identified himself in the pictures. At paragraph 28 the FtTJ summarised the evidence before Judge Cockrell in relation to the witness as SA. Mr Shah referred to the witnesses who were named in the photographs and were identified. Therefore in summary he submitted the FtTJ was assisted by 3 people holding senior positions who had first-hand experience and were available and were cross-examined at the hearing which provided significant corroborative evidence. Therefore the cases relied upon could be distinguished.
29. Mr Shah provided to the tribunal a decision of the Upper Tribunal in *R, on the application of Agha v SSHD (false document)* [2017] UKUT 00121, to demonstrate that a document was not a valid document if it contained dishonest or false information. When applied to the present appeal he submitted that the passport had 2 fundamental pieces of information which was incorrect. He submitted if the document contained false information it would be invalid.
30. Mr Shah turned to the grant of permission at paragraph 3. He submitted that the fresh evidence in 2019 led the FtTJ to deviate from the decision in Devaseelan. He submitted the grant of permission did not set out the error.
31. Paragraph 25 of the FtTJ's decision took a structured approach to the evidence and that the cases relied upon by the respondent could be distinguished. The judge was satisfied on the respondents own report on Rohingya Muslims citizenship dated 11/4/2019 (cited at paragraph 25) which was support for the appellant was not holding a validly issued passport. This was because the country reports stated that it was a common occurrence in the middle eastern countries. The FtTJ found the evidence to be credible that in Middle Eastern countries someone would need a document because they would not be provided with any such document. If you had a passport they would allow that person to work and to stay. Mr Shah submitted that the country information reports referred to the bureaucratic relationships and why Pakistan/Bangladesh would be willing to give passports knowing that it was provided because they wanted to keep relations with Saudi Arabia.

32. Mr Shah further submitted that a criticism cannot be made of the appellant. It was argued why he did not go to the High Commission, but Mr Shah submitted that the HC did not comply with the Home Office to clarify the situation in Pakistan. The country reports recorded that since 2017 the United Nations could not get access in Myanmar and that it would be pointless to go to the Pakistani High Commission who were not cooperating with the Home Office and would not give any information.
33. Mr Diwnycz by way of response submitted that any evidence of falsification was the self-serving evidence of the appellant. Furthermore, the appellant had not contacted the High Commission about the validity of the passport.
34. Mr Shah stated he wished to add a further observation that in the appellant's case there was no dispute that he was not born in Karachi and that was not his permanent address. In the decision of Abdullah, the appellant was born in Saudi Arabia and given a passport and therefore they were on totally different facts.

#### Discussion:

35. There are 2 grounds of challenge to the decision of FtTJ Forster. Mr Diwnycz did not seek to add to the written grounds of challenge or substantially answer the matters set out in the written submissions provided by Mr Shah.
36. Dealing with the first of the written grounds advanced by the respondent it is submitted that the FtTJ applied the wrong standard of proof and that the issue was not whether the appellant would suffer persecution in Burma but whether he could return to Pakistan and this question fell to be decided by the civil standard, that is, the balance of probabilities. The written grounds cite the decision of MA (Ethiopia) v SSHD [2009] EWCA Civ 289 at paragraph 78. It is further submitted that the FtTJ applied the lower standard at paragraph 33 of his decision which was the incorrect standard.
37. Neither advocate took the tribunal to the decision of MA (Ethiopia) nor was there any reference in the written submissions to the decision. The factual circumstances in MA (Ethiopia) related to an appellant who was an Ethiopian of Eritrean origin. Both her parents were Eritrean, but she was born in Ethiopia and her language was the Amharic language of Ethiopia. Before the tribunal, the issue was perceived to be whether the appellant would face a risk of being denied status as a national, it being assumed that this would, if established, constitute persecution to the required standard. At paragraph 49 decision, the Court of Appeal described the facts of MA as a "highly unusual case" and that the outcome depended on whether the Ethiopian authorities would allow the appellant to return to Ethiopia. Whilst the factual circumstances in that appeal do not reflect the factual circumstances in the present appeal, the decision is relevant to the issues raised.

38. The respondent also refers in the grounds to the decision in Abdullah[2013]EWCA Civ 42 where the court drew a distinction between the question of whether the appellant would face persecution in Saudi Arabia (which was to be determined on the lower standard of proof) and the question of whether as someone of Palestinian origin, the authorities in Saudi Arabia would allow him to return and that this factual question was unrelated to the question of asylum and thus the ordinary civil standard applied.
39. In the decision of RM (Sierra Leone) [2015] EWCA Civ 54, the Court of Appeal considered a number of authorities, including MA (Ethiopia) and Abdullah and set out at paragraph 35 the following  
“what emerges from those cases – and would in truth be clear enough even in the absence of authority – is that what standard of proof applies to the question of an applicant’s nationality depends on the legal issue to which it is relevant. If it is relevant to whether he will suffer persecution (whether by reference to the refugee Convention or article 3) then the lower standard will apply. But if it is relevant to some other issue – such as whether it is in fact possible or practical for him to be returned and any rights that may accrue if it is not – the standard is the balance of probabilities.”
40. There is no dispute that the earlier decision of the FtTJ found the appellant to be an ethnic Rohingya born in Burma who had left aged 6 to live in Saudi Arabia with the use of false documents for a substantial period of time but found that he was a national Pakistan based on the passport he entered the UK with.
41. As set out above the standard of proof applying to the question of nationality depends on the legal issue to which it is relevant. The respondent in the grounds submits that the issue was one of “returnability” and thus the civil standard balance of probabilities applies and points to paragraph 33 where it is submitted that the FtTJ applied the lower standard.
42. Mr Diwnycz did not expand on this issue nor was the tribunal directed to the other parts of the decision of the FtTJ and the specific factual findings he made.
43. The difficulty with the submission can be seen in the FtTJ’s conclusions drawn from the evidence and are summarised at paragraph [38] of his decision. The FtTJ found for the reasons that he set out in the decision that the appellant did not have status in Pakistan, Saudi Arabia or Bangladesh nor Myanmar (presumably based on his ethnic origin as a Rohingya Muslim) and found “there is a real risk that the appellant will be refouled to Myanmar. The appellant would not have a place to go if removed from the UK. The appellant has discharged the burden on him to the lower standard to establish that he is entitled to protection.”
44. On a reading of that paragraph it suggests that the FtTJ’s conclusion on the evidence as a whole is that the appellant would be at risk of harm or



refoulement to Myanmar. Whilst the FtTJ did not expressly state by whom, it can be inferred from his factual assessment of the evidence that it would be from Pakistan or Saudi Arabia on the basis of the country evidence cited by the FtTJ and the deportation of the Rohingya from Saudi Arabia and the Pakistani authorities failure to recognise the Rohingya as refugees.

45. Thus the question answered by the FtTJ was not solely an issue of returnability but also question of serious harm on return. If that is the position the FtTJ did not err in applying the lower standard of proof in that paragraph.
46. The respondent however only points to paragraph [33] in support of a submission that the FtTJ applied the wrong standard of proof and not by reference to paragraph [38] or any other paragraph. However paragraph [33] needs to be viewed in the context of the evidence as a whole.
47. The FtTJ set out the decision of the previous FtTJ who, contrary to the submissions made by the respondent, did accept a significant part of the appellant's factual claim. Importantly the previous judge accepted the appellant was an ethnic Rohingya born in Myanmar and also accepted the appellant factual account as to his residence in that country up until the age of 6 when fled with his parents using a Bangladeshi passport to enter Saudi Arabia and spending a significant period of years during both his childhood and adult hood in Saudi Arabia as an undocumented refugee. The FtTJ however found that as he had a valid Pakistani passport he was a national of Pakistan and could have earned himself of the protection of that country.
48. The appellant submitted a fresh claim relying on evidence not previously available to FtTJ including evidential support both in the form of country report evidence and evidence from witnesses as to the position of Rohingya in Pakistan and that on evidence available to the respondent from their own resources, ethnic Rohingya had used documents like passports obtained illegally to enter the UK. Further evidence in the respondent's CPIN referred to the prevalence of forged documentation. The appellant also provided evidence from witnesses who would satisfy the respondent that they were ethnic Rohingya from Myanmar who entered the UK using Pakistani passports which were not obtained legally and contained false details and were recognised as refugees.
49. The FtTJ correctly adopted as his starting point the decision of the previous FtTJ (see paragraph 17 - 21 of his decision) applying the well-established principles and the decision of Devaseelan (paragraph 22) and went on to identify the evidence that was in essence "new evidence" or evidence that was not before the previous FtTJ. I observe that the respondent accepted that this was a "fresh claim" under paragraph 353 of the Immigration Rules and provided for an in country right of appeal.
50. The FtTJ identified at paragraphs [23 - 24] evidence in the respondent's CPIN and identified there was no dispute about the position of the

Rohingya in Burma and the issue identified by the FtTJ at both paragraphs related to the status of the document used by the appellant to enter the UK. The question can be taken to be whether it was a genuinely issued document or was it issued in the circumstances stated by the appellant?

51. In this respect the FtTJ undertook an assessment of the evidence at paragraph [25]. The respondent does not challenge the contents of that document. That is not surprising as it is the respondent's own document. The response to an information request Pakistan: Rohingya Muslims, citizenship is dated 11 April 2019. It stated that many Rohingya have carried a Pakistani national ID card but since 2014 the authorities have cracked down on fake versions and many have found it hard to renew their cards. Reference is made to paragraph 1.1.2 and a CNN article from September 2017 which states that despite living in Karachi for several generations, many Rohingya are not eligible for citizenship and that according to Pakistani policy, the Rohingya do not qualify as asylum seekers or refugees. Many Rohingya have obtained illegal identification documents in Pakistan (paragraph 1.1.3) and a source quoted at paragraph 1.1.4 that Pakistani passport hold no value.
52. The relevance of that document which was not before the previous FtTJ is that a provided support the appellant's factual claim as to the circumstances in Pakistan for Rohingya and that the Rohingya Muslims were not eligible for citizenship and that according to policy in Pakistan, they did not qualify as asylum seekers or refugees and that many Rohingya had obtained illegal documents in Pakistan.
53. Alongside that evidence the FtTJ had the advantage of written and oral evidence from witnesses. Between paragraphs [26 - 30] the FtTJ set out the evidence from those witnesses.
54. Insofar as the grounds assert that the FtTJ erred in law by giving weight to "self-interested claims of witnesses," the FtTJ was not in error in taking into account and assessing that evidence "in the round" and alongside the other documentary evidence. As the FtTJ stated at paragraph [26] the decision of Judge Cockrell in relation to the witness SA was not binding on him and the FtTJ was entitled to consider the way in which his claim was considered as it arguably had a bearing on the factual question when considering the issue of documentation, nationality, and risk.
55. There is nothing to suggest that they were self-interested witnesses and as Mr Shah submitted their evidence and witness statements attested to their bona fides in the UK. The witness TK, whose evidence is set out at paragraph 29, is well known to a number of human rights organisations as his evidence attests. In relation to SA, he sets out his background and that he knew the appellant having met him in Saudi Arabia in 2005. His evidence is recorded in the decision of FTT J Cockrell at paragraph 27 - 28 was that he had used a Pakistani passport to enter the United Kingdom which had been obtained by an agent and that Judge Cockrell found as a fact that SA was not entitled to that passport because he was not Pakistani

by birth, descent, or migration and that he was not entitled to that passport. Similar evidence is provided by the witness NM (see paragraph 30). The matter of weight attached to that evidence was entirely a matter for the FtTJ.

56. Against that background the FtTJ assessed the evidence between paragraphs [32 - 34]. As he stated, much of the evidence was not in dispute and turned on the issue of the appellant's passport and then he summarised in one sentence the parties respective positions.
57. Returning to the respondent's grounds, paragraph [33] was not an assessment of nationality applying the lower standard as asserted. In that paragraph the FtTJ set out that he was not persuaded by the Presenting officer's argument that if you lived in Pakistan it would be grounds to establish a basis for obtaining citizenship. Even if he could enter, it did not mean he could reside there .The FtTJ went on to give his reasons by assessing the respondent's own evidence at paragraph 34 which undermined the respondent's case on obtaining such documentation. That was the issue set out in the decision letter. The FtTJ stated he did not accept the argument in "practice" relying upon paragraph 1.5.1 of the respondents document where it was stated that document fraud is common in that it is easy to procure fraudulently obtained genuine documents. Corruption is widespread across all sectors and government institutions; the FtTJ stated that that evidence was consistent with the evidence that he had heard in the case from witnesses and had seen in the documents provided. Mr Shah has pointed to some of the documents in support of that factual finding during his written and oral submissions. The FtTJ's assessment that it was "common for Rohingya to obtain identity documents including passport on false information to be to travel and in the case of Saudi Arabia to get work permits" was a finding based on the documentary evidence including the respondent's own document.
58. Having set out the assessment of the evidence as a whole, the FtTJ concluded that he was able to depart from the assessment of the previous FtTJ and found that the passport was a genuine passport but was based on false information and as such the passport was not evidence of his nationality for the reasoning set out at paragraph [36].
59. There is no dispute that the appellant was born in Myanmar who left that country at the age of 6 via Bangladesh using false documents to enter Saudi Arabia where he lived until 2018. Thus it is not in dispute that his nationality would not be recognised in Myanmar, and he would be at risk of harm there. The FtTJ found on the facts that he was not a citizen of Pakistan by birth or descent. I observe that the previous FtTJ referred to the passport as setting out his place of birth and permanent address as "Karachi" both of which were found to be inconsistent with the factual findings made as to the appellant's history. The appellant's parents are from Burma, and he was thus not a citizen of Pakistan by way of descent.

60. The FtTJ was entitled to find on the documentary evidence before him that citizenship was not open to the Rohingya in Pakistan and that they did not recognise them as refugees as they are not signed to the 1952 Convention and that Pakistani passports and other documentation could be obtained from agents for the payment of bribes and that the issue of the passport should therefore be seen in the light of and against that evidential background.
61. The FtTJ's conclusions are summarised at paragraph [38]. The FtTJ found for the reasons that he set out in the decision that the appellant did not have status in Pakistan, Saudi Arabia or Bangladesh nor Myanmar (presumably based on his ethnic origin as a Rohingya Muslim) and found "there is a real risk that the appellant will be refouled to Myanmar. The appellant would not have a place to go if removed from the UK. The appellant has discharged the burden on him to the lower standard to establish that he is entitled to protection."
62. As set out above that paragraph suggests that the FtTJ's conclusion on the evidence as a whole is that the appellant would be at risk of harm or refoulement to Myanmar. Whilst the FtTJ did not expressly state by whom, it can be inferred from his factual assessment of the evidence that it would be from Pakistan or Saudi Arabia on the basis of the country evidence cited by the FTT J and the deportation of the Rohingya from Saudi Arabia and the Pakistani authorities failure to recognise the Rohingya as refugees.
63. Thus the question answered by the FtTJ was not solely an issue of returnability but also question of serious harm on return. If that is the position the FtTJ did not err in applying the lower standard of proof in that paragraph.
64. It is right that the FtTJ did not expressly set out the standard of proof within his factual findings however I do not consider the reference to "the lower standard" at paragraph [33] supports the respondent's contention that he considered the issue of nationality on that basis. In any event, the respondent in the grounds identified the relevant issue of nationality or his "returnability" however where the respondent considers the claimant to be of a specific nationality other than he claims, the burden of proof rests on the respondent to prove the assertion on the balance of probabilities. The test is therefore met if it is more likely than not that the appellant holds the asserted nationality. On the factual findings made by the FtTJ, and his assessment of the evidence the whole the respondent had not proved that assertion on the balance of probabilities.
65. Furthermore the conclusions at paragraph [38] and the reference to the lower standard is based on the issue of risk of refoulement when seen in the light of the findings of fact made as to nationality therefore the lower standard would be applicable rather than the balance of probabilities. I observe that the previous FtTJ considered the issue of nationality on the basis of a "reasonable likelihood."

66. Where it is stated in the grounds that the appellant cannot succeed in the appeal as he has not shown on the balance of probabilities that he cannot return to Pakistan, fails to take into account the factual findings made by the FtTJ on the evidence as a whole, and as Mr Shah submits, were reasonably open to him to make.
67. The second ground submits that the FtTJ failed to afford respect to the previous finding “ as per Devaseelan” that the appellant could have approached the Pakistani authorities and that failing to do so ignore the guidance in MA (Ethiopia). I prefer the submission made by Mr Shah that the FtTJ did follow the approach in Devaseelan and identified the evidence upon which he was entitled to depart. The FtTJ did not ignore the point made in MA (Ethiopia) at paragraph 37 of his decision, and whilst I would accept that such an approach has evidential value, the decision in MA does not set out that it is essential in every case for a person to approach that countries authorities. The FtTJ did acknowledge that this was a practical way to proceed but on the facts of the present appeal the FtTJ gave sustainable reasons why this did not undermine the other evidence that was before the tribunal on the issues notably the acceptance of the appellant’s history in Myanmar and Saudi Arabia, his ethnic origin as a Rohingya and the details on the document itself including false information as his place of birth and permanent residence which was not consistent with the factual findings previously made and that there was cogent evidence in the respondent’s own evidence that documents such as passports could be obtained fraudulently and expressed in the context of the Rohingya in Pakistan.
68. In so far as the grounds referred the decision of Hussein and another (status of passport: foreign law) [2020] UKUT 00250, I accept the submission made by Mr Shah that the decision is distinguishable on its facts for 3 reasons. Firstly the appellant in that decision was found to be incredible on a number of relevant issues unlike the appellant. Secondly the passport issued to the appellant in that decision was used on a large number of occasions which is relevant in establishing its genuineness and thirdly, there was a recognition in the decision of Hussain at paragraph 14 that the appellant was the only person who stated that something was wrong with his passport. In the present appeal the FtTJ had supporting and cogent evidence from both witnesses and from documentary country materials.
69. During those matters together, even if the FtTJ did not expressly set out the standard of proof when making his factual findings, on the FtTJ’s overall assessment it was reasonably open to him on the evidence to reach the conclusion that it had not been demonstrated that he was a national of Pakistan. Therefore the appeal brought by the respondent is dismissed and the decision of the FtTJ shall stand.

## **Decision**

70. The decision of the First.-tier Tribunal did not make material error of law in his decision; the decision of the FtTJ shall stand.

*Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008*

Unless and until a tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Upper Tribunal Judge Reeds  
Dated : 29/11/ 2022