



IAC-PE-SW-V1

**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: AA/02684/2015

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 5 January 2016**

**Decision & Reasons Promulgated  
On 5 February 2016**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE SHAERF**

**Between**

**THAN WIN  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Mr S Singh of Counsel instructed by Duncan Lewis, solicitors

For the Respondent: Mr P Nath of the Specialist Appeals Team

**DECISION AND REASONS**

**The Appellant**

1. The Appellant is a national of Myanmar born on 30 January 1944. On 6 February 2014 he together with his wife Shwe Molly entered the United Kingdom with leave as visitors. On 3 March 2014 they both claimed asylum as dependents of their daughter Ni Ni Win also a national of Myanmar and born on 5 March 1969. Her claim for subsidiary protection is based on her involvement in the development of student guides for

teaching Muslim children in community centres in respect of which she had been targeted by Buddhist extremists. On arrival neither the Appellant nor his wife had been in good health for some considerable time. Indeed on 26 May 2015 the Appellant's wife died.

### **The Respondent's Decision**

2. On 10 February 2015 the Respondent refused the asylum applications of the Appellant and his wife and proposed to make directions for their removal to Myanmar. The Respondent also considered the Appellant's claim based on his private and family life in the United Kingdom and found he did not satisfy the requirements of paragraph 276ADE(i) of the Immigration Rules. She went on to consider his claim under Article 8 outside the Immigration Rules taking into account his medical condition and his family in the United Kingdom and found it would not be disproportionate to remove him.
3. On 16 February 2015 the Appellant lodged notice of appeal under Section 82 of the Nationality, Immigration and Asylum Act 2002 as amended (the 2002 Act). The grounds are entirely generic save for the references to Myanmar as the destination for removal.

### **The First-tier Tribunal Proceedings**

4. On 2 March 2015 the Appellant's solicitors wrote to the First-tier Tribunal requesting that the appeal of the Appellant and his wife be transferred to the same hearing centre as that where his daughter's appeal against refusal of asylum was due to be heard and that all three appeals be in the same list. The First-tier Tribunal obliged and all three were listed for full hearing on 19 June 2015. On 9 April 2015 the Appellant's solicitors wrote to the Tribunal to advise that due to their failing health in respect of which medical evidence would be submitted neither the Appellant nor his wife would be attending the appeals and requested the Tribunal to consider the appeals without a hearing. It would appear that at that point the appeals of the Appellant and his wife became separated from the appeal of their daughter upon whose claim the Appellant and his wife were dependent.
5. On 28 May 2015 the Appellant's solicitors advised the Tribunal by fax that the Appellant's wife had died. The appeal file was handed for a decision on the papers without a hearing to Judge of the First-tier Tribunal Devittie three days after the hearing of their daughter's appeal.
6. By a decision promulgated on 16 September 2015 Judge of the First-tier Tribunal Devittie dismissed the appeals of the Appellant and his late wife on human rights grounds. He also made an anonymity direction. He noted the daughter's claim for subsidiary protection was not before him and that the Respondent had found her account of past persecution not to be credible. He mentioned the statements in the Tribunal file which referred mainly to the poor state of health of the Appellant and his wife. There was no issue but that their claims for subsidiary protection were

entirely dependent upon that of the claim of their daughter who was stated to have been their sole carer in Myanmar. The Judge proceeded on the basis that the Appellant had two children in Myanmar, one of them being their daughter who at the time was in the United Kingdom and who was an asylum seeker. He did not accept that the Appellant's daughter was caring for him on a full-time basis in Myanmar because she had claimed that in Myanmar she was also engaged at least on a part-time basis as a teacher: see paragraph 21 of his decision.

7. On 6 October 2015 Judge of the First-tier Tribunal Ford granted the Appellant permission to appeal because it was arguable the Judge had erred in basing his decision on the facts as at the date of the hearing and so may have give insufficient weight to the deterioration in the Appellant's health since arrival in the United Kingdom and that in the meantime his wife had died. She noted the Tribunal had been notified of her death but that the Judge had not made any mention of it.

## **The Upper Tribunal Hearing**

### **Submissions for the Appellant**

8. Before the hearing I ascertained that the appeal of the Appellant's daughter against the Respondent's refusal of subsidiary protection had been dismissed following the hearing on 19 June 2015. The First-tier Tribunal had refused her permission to appeal and she had renewed her application for permission to the Upper Tribunal which had been granted. The matter had been heard on 8 December 2015 and the Upper Tribunal's decision whether the First-tier Tribunal's decision contained an error of law was still outstanding.
9. There followed a discussion concerning those documents for the Appellant which had been filed late with the Upper Tribunal in readiness for the hearing. Some related to the medical condition of the Appellant's late wife. After discussion, the parties agreed that for the purposes of deciding whether the Judge's decision contained a material error of law it would be adequate to rely on the bundle which the Appellant had filed in the First-tier Tribunal on 15 May 2015.
10. Mr Singh for the Appellant referred to the records from the Appellant's general practitioner which had been before the Judge. In particular he referred to the the various medications the Appellant was currently taking and the diagnosis of severe ischaemic heart disease and that he had previously had a major coronary artery by-pass operation carried out in Myanmar on 23 August 2012: see paragraph 4 of the Appellant's statement of 8 May 2015. The Appellant required a substantial amount of personal care. In Myanmar his daughter, Ni Ni, had been responsible for caring for him and his wife. She was now in the United Kingdom and on return there would be nobody to care for him since his only child remaining in Myanmar was his son who would not be able to care for him for the reasons set out at paragraph 6 of the Appellant's statement. In

addition he had two children who were settled and who were naturalised British citizens settled in the United Kingdom. The Appellant had never claimed there were insufficient medical facilities in Myanmar. His claim was based on the lack of the extensive personal care which he now required and which the Judge had failed adequately to address, focusing on the standard of medical care: see paragraphs 14, 15, 21-23 and 30 of his decision.

11. He continued that the Judge had not taken into account the evidence of the circumstances of the Appellant at the date of the hearing. This was evident from what he had said at paragraph 22 of his decision that the medical evidence showed the Appellant was not fit to travel but he had managed to travel to the United Kingdom. The fact was that the health of the Appellant's wife had deteriorated so much that she had died before the hearing. Although there was evidence in the Tribunal file to that effect, the Judge had failed to make any reference to it in his decision.
12. The Judge had erred in his consideration of the evidence and this had infected his assessment of the proportionality of the decision to remove the Appellant which amounted to a material error of law. In answer to my enquiry, Mr Singh confirmed the Appellant was not raising or pursuing any claim for asylum.

### **Submissions for the Respondent**

13. Mr Nath made the point that the Appellant's own evidence was that he had received extensive medical care in Myanmar. The Appellant had produced little if any evidence about the personal care arrangements and his need for personal care in Myanmar.
14. The position in the United Kingdom of his daughter was at the very least uncertain and he referred to paragraphs 24 and 25 of the Judge's decision. Further, the Judge had not made a finding that the Appellant's son in Myanmar would be unable to care for him.

### **The Appellant's Response**

15. Mr Singh emphasised that the Appellant's carer, his daughter, was no longer in Myanmar. The Judge had considered the situation on the basis of the Appellant's situation before he and his late wife came to the United Kingdom.
16. The Judge at paragraph 30 had considered the learning in *GS (India) and Others v SSHD [2015] EWCA Civ. 40* although the Appellant's claim was not based on standards of medical care but on the availability of personal care. The Judge had made no finding that the Appellant's son in Myanmar would be able to supply appropriate care and the Appellant had in his witness statement explained why his son would not be able to provide such care but the Judge had not addressed it.

### **Findings and Consideration**

17. Following submissions I adjourned the hearing to chambers to discuss freely the issues raised at the hearing in the light of the evidence that the Appellant's health had considerably deteriorated since his arrival in the United Kingdom and the problems which had arisen as a result of the appeals of the Appellant and his late wife becoming separated from the appeal of their daughter. We also discussed the options for my decision.

### **Findings and Consideration**

18. I am satisfied the Appellant's health had deteriorated between the time of his arrival in the United Kingdom and the Judge's consideration of the appeal and that there was evidence of such in the Tribunal file. His general condition will have been further adversely affected by the death of his wife of which there was evidence on the correspondence tag in the Tribunal file and to which the Judge made no reference. Additionally, the Judge did not adequately distinguish between the standard of medical care which the Appellant had received in Myanmar and the availability of the extensive personal care which the Appellant now required by reason of his deteriorating health and which could be given by his daughter who at the date of the Judge's decision was in the United Kingdom and not Myanmar. I find the omission of references to these matters and the evidence for them in the Tribunal file must have infected the Judge's assessment of the proportionality of the proposed removal of the Appellant to Myanmar to an extent sufficient to amount to a material error of law. I take into account that the Judge was not helped by the fact that his decision was based on the papers in the file and there were no written submissions for the Appellant. The consequence is that his decision must be set aside in its entirety.
19. The parties accepted it would be appropriate for me to proceed to re-decide the substantive appeal. The Appellant is evidently extremely ill. His daughter cared for him in Myanmar. I make no finding as to whether the care was full or part-time but I do find that the level of care which the Appellant now receives from his daughter is to all intents and purposes full-time.
20. It is unfortunate that the decision whether the First-tier Tribunal's appropriate and pragmatic course to take is for the appeal of the Appellant to be allowed on the grounds that the medical evidence shows his medical condition is such that if he were to be returned to Myanmar at the date of this hearing he would face the prospect of a lonely and undignified death: see *D v United Kingdom*; because the only person who would care for him is presently in the United Kingdom and she clearly has a long-standing and deep relationship with him as daughter and indeed as carer for him and his late wife.
21. When considering the length of leave, if any, to be granted to the Appellant, the Respondent may well wish to grant leave in line with any leave which might be granted to his daughter on the basis that if his

daughter's appeal is unsuccessful and she is returned to Myanmar the Appellant on the present evidence could return with her.

**Anonymity**

22. There was no request for an anonymity direction and having considered the appeal I find none is warranted.

**Afterword**

23. Subsequent to the hearing and preparation of this decision the Upper Tribunal promulgated its decision to dismiss the Appellant's daughter's appeal (AA/02598/2015).

**NOTICE OF DECISION**

**The decision of the First-tier Tribunal contained errors of law such that it should be set aside. The following decision is substituted:**

**The appeal of the Appellant is allowed on human rights grounds as indicated at paragraph 21 above.**

**Anonymity direction not made.**

Signed/Official Crest

Date 02. ii. 2016

Designated Judge Shaerf  
A Deputy Judge of the Upper Tribunal

**TO THE RESPONDENT: FEE AWARD**

The appeal has been allowed and I have therefore considered whether a fee award should be made. Having regard to what information was available to the Respondent at the date of the Respondent's decision, I do not find it appropriate to make any fee award.

Signed/Official Crest

Date 02. ii. 2016

Designated Judge Shaerf  
A Deputy Judge of the Upper Tribunal