

Federal Court



Cour fédérale

Date: 20180530

Docket: IMM-2957-17

Citation: 2018 FC 557

Ottawa, Ontario, May 30, 2018

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

THAN SOE

Applicant

and

**THE MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS**

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Than Soe, seeks judicial review of the decision of a Minister's Delegate, made pursuant to paragraph 113(d) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act], which found that he is not a person in need of protection as described in section 97 of the Act and, as a result, can now be returned to Myanmar.

[2] Than Soe is a citizen of Myanmar who sought refugee protection in Canada in 2003 following a period of time in the United States [US], where he had been studying. In 2004, he was found inadmissible to Canada on security grounds pursuant to paragraph 34(1)(c) of the Act, but was not returned to Myanmar because of a Pre Removal Risk Assessment [PRRA] Officer's preliminary finding, made in 2006, that he would be at risk in Myanmar. The current decision of the Minister's Delegate reflects the view that the situation in Myanmar has changed significantly since the installation of a new democratically elected government in March 2016, and that because Than Soe is not a political activist or leader, he would not face a forward-looking risk.

[3] For the reasons that follow, the Application for Judicial Review is allowed. Than Soe's PRRA must be re-determined by a different Minister's Delegate.

[4] Note that the parties, the Minister's Delegate and the documents cited refer to both Burma and Myanmar interchangeably. The Judgment and Reasons also use both names to refer to the country to which Than Soe could be eventually returned.

I. The Background

[5] In 1988, while a university student in Burma, Than Soe became involved in student politics and protests against the Burmese military's seizure of the civilian government.

[6] In October 1989, Than Soe hijacked a plane in an effort to draw attention to the plight of Burmese citizens and the arrest of Daw Aung San Suu Kyi, a pro-democracy candidate in an upcoming election who had been placed under house arrest. Than Soe and a fellow student

boarded a domestic flight in Burma and used a fake bomb to force the plane to be re-directed to Bangkok, Thailand. Than Soe made a series of demands of the Burmese government related to various human rights abuses by the military. All passengers exited the plane safely in Bangkok. Than Soe also exited peacefully after being advised that his demands had been communicated. He was then arrested.

[7] Than Soe was convicted of “offending freedom and the Firearm Act” by a Thai court and sentenced to six years in prison. He served part of his sentence in a jail for political prisoners. In 1992, he and his accomplice were pardoned by the Thai government and granted amnesty.

[8] Than Soe remained in Thailand after his pardon. In November 1995, the United Nations High Commissioner for Refugees [UNHCR] declared him a “person of concern”, finding that he would face a significant risk of persecution if ever returned to Burma.

[9] In 1996, Than Soe received a scholarship for Burmese refugees to study at Indiana State University. He disclosed his role in the hijacking before arriving in the US. He graduated with a degree in economics in 2000 and later began a second degree program in computer technology.

[10] Than Soe was detained by US immigration authorities on two occasions; once in 1997 and again in 2002 for a period of eight months, both as a result of his role in the hijacking. The US Immigration Court found that he had established a well-founded fear of persecution and torture if he were returned to Burma and that he was not a security threat to the US or any other country. However, the US could not grant him asylum due to the seriousness of his crime. He

was released from detention on a bond. Than Soe fled to Canada and made a claim for refugee protection in December 2003.

[11] In January 2004, Than Soe was found inadmissible to Canada on security grounds, specifically for engaging in terrorism, pursuant to paragraph 34(1)(c) of the Act. His admissibility hearing was adjourned to permit him to apply to the Minister for an exemption to the inadmissibility finding pursuant to subsection 34(2) on the basis that his presence in Canada would not be detrimental to the national interest. On March 27, 2006, the Minister denied the application. Than Soe sought judicial review of the decision.

[12] In *Than Soe v Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 461, [2007] FCJ No 620 (QL), Justice Phelan found that the Minister's decision to deny Than Soe an exemption from the finding of inadmissibility pursuant to subsection 34(2) was not reasonable, and directed that the request be reconsidered. Subsection 34(2) of the Act was repealed in 2013. However, at the time of the hearing of the present Application for Judicial Review, the Court was advised that the reconsideration of the request for Ministerial relief remained outstanding, 10 years after Justice Phelan's Order directing reconsideration. Counsel for Than Soe subsequently advised the Court that the Minister of Public Safety and Emergency Preparedness had rendered a decision on January 27, 2018 (two days before the hearing, and unbeknownst to counsel for the parties at the time of the hearing) refusing the relief. That decision concludes that "I am *not* satisfied that the presence of Than Soe in Canada would *not* be detrimental to the national interest", "I deny relief" (emphasis added).

[13] In *Than Soe v Canada (Minister of Citizenship and Immigration)*, 2007 FC 671, 313 FTR 265, Justice Shore found that the finding of inadmissibility based on paragraph 34(1)(c) of the Act was reasonable.

[14] Subsection 113(d) provides that in the case of an applicant who is inadmissible for serious criminality, such as Than Soe, consideration of an application for protection shall be on the basis of factors set out in section 97 along with consideration of whether the application should be refused because of the nature and severity of acts committed or because of the danger the applicant constitutes to the security of Canada. This type of PRRA is referred to as a “restricted PRRA”. A positive decision (i.e. a finding of risk) does not result in refugee status, but in a stay of removal (paragraph 114(1) (b)).

[15] The first step in the process for a restricted PRRA Application is that a PRRA Officer conducts a “risk assessment”, and makes a preliminary finding as to whether an applicant is a person in need of protection pursuant to section 97. Second, a Canadian Border Services Agency [CBSA] Officer conducts a “restriction assessment”, and makes a preliminary finding as to whether the applicant should be refused under paragraph 113(d) (either because of the “nature and severity of the acts committed” or because of the danger the applicant poses to the “security of Canada”). Third, the risk assessment and restriction assessment are shared with the applicant for comment. Finally, a Minister’s Delegate considers the assessments, the applicant’s submissions, and any independent research to determine whether the restricted PRRA Application should be allowed or rejected.

[16] Than Soe applied for a restricted PRRA in July 2006. In December 2006, a PRRA Officer conducted the preliminary risk assessment, and found that he was a person in need of protection. Seven years later, in 2013, a CBSA Officer conducted the restriction assessment and determined that the application should not be refused under paragraph 113(d).

[17] In February 2014, the 2006 risk assessment and the 2013 restriction assessment were disclosed to Than Soe and he was invited to make submissions to the Minister's Delegate with respect to the PRRA. He made submissions in April 2014 and subsequently made additional submissions.

[18] In June 2016, the Minister's Delegate requested that Than Soe update his PRRA submissions given the changing circumstances in Myanmar. The Minister's Delegate noted that a democratic election had taken place and a new government had been formed in March 2016, led by the National League for Democracy [NLD] party, with Aung Sun Suu Kyi at its head. Further, the Minister's Delegate noted that recent country condition documents suggested that Than Soe was no longer at risk in Myanmar. The Minister's Delegate provided Than Soe with an article indicating that democracy activists had returned from exile, including a "similarly-situated" hijacker, Soe Myint, who was now living safely in Myanmar.

[19] Than Soe's counsel and the Minister's Delegate exchanged information over a period of several months. Several extensions were provided to Than Soe to permit him to submit further documents.

[20] The Minister's Delegate issued the restricted PRRA decision on May 15, 2017 finding that Than Soe was not a person in need of protection as described in section 97. This decision is the subject of this Application for Judicial Review.

II. The Decision Under Review

[21] The decision of the Minister's Delegate is lengthy, but somewhat unstructured as it moves between addressing the evidence submitted by Than Soe, responding to Than Soe's submissions, and analyzing the risks pursuant to section 97, with factual findings interspersed throughout.

[22] The Minister's Delegate first set out the factual and procedural background and noted the evidence submitted by Than Soe.

[23] The evidence submitted by Than Soe included an affidavit from Paul Copeland, a lawyer with expertise on Myanmar, and a detailed opinion and a follow up letter from Dr. Matthew Walton (an Oxford Professor and expert on Myanmar, who is currently the Aung San Suu Kyi Senior Research Fellow in Modern Burmese Studies, as well as the Director of the Asian Studies Centre). He also submitted letters from other lawyers in Myanmar and human rights advocates with experience in Myanmar, a letter from Soe Myint (a former hijacker living in Myanmar, who had been identified by the Minister's Delegate as similarly situated to Than Soe), and his own letter.

[24] Overall, these letters express the view that Than Soe would still face risks of persecution, arrest, inhumane detention, and/or torture, if he were to be returned to Myanmar, *despite* the recent change in government.

[25] After summarizing Than Soe's submissions, the Minister's Delegate began by concluding that the 2006 risk assessment was out of date given the significant changes in Myanmar. In reaching this finding, the Minister's Delegate relied on excerpts from a report by the International Crisis Group, dated July 29, 2016, which describe that Ms. Suu Kyi's election represents a "significant change of regime". This report was published a mere four months after the election of the NLD. The report notes that the new government has identified "national reconciliation, internal peace, rule of law, constitutional amendment, and further democratic development" as its priorities. It further notes that the government has taken some steps to address the country's authoritarian legacy, including the quick release of many political detainees, and the repeal or amendment of some oppressive laws. The report also notes that there is still "much more to do" to fix the problems of the past.

A. *The Risk of Prosecution and the Consequences*

[26] Next, and in the context of assessing the evidence of Paul Copeland, (to which the Minister's Delegate gave little weight), the Minister's Delegate considered the likelihood that Than Soe would be prosecuted for the hijacking if returned to Myanmar, and whether the prosecution would be fair.

[27] The Minister's Delegate noted that Than Soe had been prosecuted and imprisoned in Thailand for the hijacking and that he was treated humanely in prison, kept in a separate jail for political prisoners, and released after two-and-a-half years. The Minister's Delegate characterized this as "unusually gentle" treatment and concluded that if Than Soe were to be retried for the hijacking upon his return to Myanmar, it would not necessarily constitute a breach of international standards.

[28] The Minister's Delegate reviewed the evidence about the judicial system in Myanmar, quoting at length from a 2016 United States Department of State [USDOS] Report. The USDOS Report notes that the judicial system is under the *de facto* control of the military, and that corruption is common. With respect to trial fairness, it notes that the government has repealed or amended some laws that were used to deny individuals a fair public trial, and that the remaining laws which do so are used less frequently. The USDOS Report notes that in ordinary criminal cases, courts generally respect "some basic due process rights", but deny others, including the presumption of innocence, and the ability to adequately prepare a defence or retain counsel. The USDOS Report states that local human rights lawyers have noted that, under the new government, judicial violations of these rights and standard trial procedures have declined.

[29] The Minister's Delegate concluded that, although there are ongoing problems with judicial independence in Myanmar, improvements have been made. The Minister's Delegate noted that Than Soe's crime was committed over 30 years ago and he has no current connection to issues which are sensitive to the military.

[30] The Minister's Delegate concluded that it was unlikely that Than Soe would be retried, but if he were retried, it was unlikely that the trial would be unfair or subject to any political interference. Therefore the "remote" possibility of a second prosecution did not, in and of itself, constitute a risk pursuant to section 97.

[31] The Minister's Delegate also found that there was no more than a mere possibility that Than Soe would be sentenced to death, in the event he were retried and convicted in Myanmar, noting that there had only be one death sentence recently and that other death sentences had been commuted to life in prison.

[32] The Minister's Delegate also considered the risk to Than Soe if he were sentenced to prison in Myanmar. The Minister's Delegate quoted at length from the 2015 and 2016 USDOS Reports and the 2016 Amnesty International Report, which note serious problems with Myanmar's prisons, including overcrowding and inadequate access to medical services, clean water, and proper sanitation. The Minister's Delegate noted that the Reports indicate some improvements in prisons and that the Amnesty International Report states that "reports of torture are less frequent". The Minister's Delegate concluded that the prison system in Myanmar was harsher than the Canadian system, but the conditions did not rise to the threshold of cruel and unusual treatment or punishment.

B. *The Assessment of the Evidence*

[33] The Minister's Delegate then considered the evidence submitted by Than Soe, finding that it was largely unpersuasive. First, the Minister's Delegate considered a number of letters

from democracy activists in Myanmar — each of whom claimed that Than Soe would be at risk if returned. The Minister’s Delegate assigned them little weight, as they were unsupported by any corroborating documents, and the examples provided by the authors were distinguishable. For instance, a letter from Thein Than Oo, the head of the Myanmar Lawyers’ Network, analogized Than Soe to U. Gambira, a former political activist who had been arrested for re-entering Myanmar illegally. The Minister’s Delegate found that Mr. Gambira was not akin to Than Soe, as Mr. Gambira was a “high profile” activist. Further, the Minister’s Delegate noted that there was no evidence that Mr. Gambira was mistreated while in prison.

[34] The Minister’s Delegate also considered the opinion of Soe Myint, another pro-democracy activist and former hijacker who had recently returned to Myanmar, who the Minister’s Delegate had previously identified as similarly situated to Than Soe. Soe Myint attempted to distinguish himself from Than Soe, and wrote that Than Soe would still be at risk upon return to Myanmar, as he has political enemies. The Minister’s Delegate was not convinced, noting that Mr. Myint did not provide specifics with respect to these claims and did not explain how the differences in their situations would be significant. The Minister’s Delegate found that Soe Myint returned to Myanmar without making any arrangements to secure his own safety, and he had lived without persecution since. Although Soe Myint argued that his situation was different because he hijacked a Thai aircraft rather than a Burmese aircraft, that he was acquitted of his crime in India, and that he was specifically invited back by the Burmese government, the Minister’s Delegate found that these differences were insignificant, noting that both had committed very similar crimes for the same political reasons. The Minister’s Delegate

also noted that Soe Myint has spoken publicly about the hijacking in Myanmar on numerous occasions.

[35] The Minister's Delegate also gave little weight to the 2014 and 2016 opinions of Paul Copeland, a Canadian lawyer who has been previously recognized as an expert on human rights in Myanmar. Mr. Copeland stated that Than Soe remains on the "blacklist" and is still at serious risk of arrest, prosecution, inhumane detention, and torture, and possibly a death sentence if he is returned to Myanmar. While acknowledging that Mr. Copeland has expertise on human rights issues in Myanmar, the Minister's Delegate found that no documents were submitted in support of his claims.

[36] The Minister's Delegate also found that Mr. Copeland's suggestion that Soe Myint had made special arrangements in order to return safely to Myanmar in 2011, which were not available to Than Soe, was speculative.

[37] The Minister's Delegate then considered the opinion of Dr. Matthew Walton, a professor at Oxford University specializing in religion and political development in Myanmar, and a recognized expert on Myanmar. Dr. Walton expressed his view that the recent election of Ms. Suu Kyi is not "sufficient to *guarantee* that Than Soe would not be at risk of arrest, detention, or abuse were he to return to Myanmar" (emphasis added). Dr. Walton also noted that the military retains influence with virtually every level of government, and that there are repressive laws used to silence critics. Dr. Walton added that Ms. Suu Kyi's own party has been both unable to protect its own members, and has used repressive laws to silence its own critics.

Dr. Walton highlighted the cases of several activists and politicians who have been assassinated or arrested since the new government has come into effect.

[38] The Minister's Delegate found that the examples noted by Dr. Walton were not similar to Than Soe, who was not a leader or a member of a current political movement.

[39] The Minister's Delegate concluded that Dr. Walton was not an expert on the law of immigration, asylum or refugee protection or "the standards of proof applicable or the basis at international law for restricting access to protection where an applicant has engaged in terrorism". This was presumably in reference to Dr. Walton's statement that the evidence was not sufficient to *guarantee* that Than Soe would not be at risk). The Minister's Delegate does not specifically indicate the weight he attached to the opinion. However, in the "Summary of Findings" the Minister's Delegate comments on the opinions provided, including from Dr. Walton and Mr. Copeland noting that the degree of polemicism used in their reports diminished their reliability. For instance, Dr. Walton commented that it was "shocking to me that the Government of Canada would make such a simplistic assessment of the risk to someone such as Mr. Than Soe" – a comment which the Minister's Delegate found inappropriate.

[40] The Minister's Delegate did not accept the suggestion made by Than Soe that Soe Myint lived freely in Myanmar because he had abandoned his principles, or the suggestion by Mr. Copeland that Soe Myint had made special arrangements or had signed a declaration to refrain from criticizing the government. The Minister's Delegate also rejected Than Soe's submission that he would likely be asked to sign a similar declaration, which he would refuse to

do and that, as a result, he would be detained. Regardless, the Minister's Delegate found that signing such a declaration, which would be similar to a peace bond, was not unreasonable.

C. *Country conditions – Human Rights in Myanmar*

[41] The Minister's Delegate reviewed current country condition evidence including reports that state that Myanmar is making significant progress in several areas, but that many challenges remain, and that in some respects the government has moved slowly in translating promises into actual reforms. The Minister's Delegate noted reports of the release and repatriation of political prisoners, and an increase in freedom of the press and freedom of expression. The Minister's Delegate noted that commentators have expressed disappointment in the regime's progress but added that "few have argued that overall there have not been improvements and/or that future improvements are not being contemplated".

[42] The Minister's Delegate acknowledged that Myanmar has performed poorly with respect to its treatment of minority groups, and specifically Rohingya Muslims, but found that this challenge was not relevant to Than Soe.

D. *Summary of Findings*

[43] At the outset of the Summary, the Minister's Delegate criticized the evidence of Dr. Walton, Mr. Copeland and the submissions of counsel as exhibiting "a degree of polemicism". The Minister's Delegate also criticized the "hyperbolic" nature of the submissions of Than Soe's counsel regarding his difficulties in finding Soe Myint, in order to obtain a

statement from him, which was one of the reasons Than Soe had sought a lengthy extension of time to file his submissions. The Minister's Delegate found that Than Soe's counsel was "hyperbolic" because, despite his apparent difficulties in reaching Soe Myint, the Minister's Delegate was able to find Soe Myint's contact information easily, after a simple internet search. The Minister's Delegate noted "such writing no doubt has its place but in my opinion it is a style which diminishes the reliability of the content and is generally incompatible with an objective assessment of evidence".

[44] The Minister's Delegate noted that the examples referred to in Than Soe's evidence were not similar to him and did not provide evidence that someone in his circumstances would be at risk in Myanmar. The Minister's Delegate pointed to Than Soe's own letter, where he stated that he was not a famous political exile, nor an activist against the military, but rather "a fair minded and humble person". The Minister's Delegate noted that this differed from the mistreated dissidents referred to in the evidence.

[45] The Minister's Delegate highlighted the improving conditions in Myanmar following the installation of the new government in March 2016. The Minister's Delegate noted the documentary evidence which reports that political prisoners were being released en masse, pro-democracy supporters are no longer enemies of the state, and that former political prisoners and exiled activists are "typically" returning safely to Myanmar. The Minister's Delegate stated that "the fact that the Government is for all intents and purposes now a democracy is significant. Pro-democracy supporters are no longer considered enemies of the state".

[46] The Minister's Delegate found that the situation in Myanmar has improved significantly in recent years with respect to legal reforms and the treatment of political dissidents. While acknowledging that a complete transformation has not been accomplished and that the role of the military is still significant, the Minister's Delegate found that there was little to suggest that Than Soe would be targeted by the authorities.

[47] The Minister's Delegate concluded that it was very unlikely that Than Soe would be retried and even more unlikely that he would face any ill treatment or torture if he were tried, convicted and imprisoned.

[48] The Minister's Delegate was satisfied, on a balance of probabilities, that Than Soe was not likely to face death, torture, or cruel and unusual treatment or punishment if returned to Myanmar, and therefore was not a person in need of protection pursuant to section 97.

III. The Applicant's Submissions

[49] Than Soe submits that the Minister's Delegate's view that significant changes have been made in Myanmar and that he would not face a likelihood of risk if returned is not supported by the evidence. He notes that despite a democratic election and a new government in March 2016, the military continues to wield power, including over the justice system, and that the same risks he would have faced in the past, including at the time of the 2006 risk assessment, continue.

[50] Than Soe argues that the Minister's Delegate's finding that it was unlikely that he would be retried for the hijacking was made without reference to any evidence and in the face of

contradictory evidence. He points to a 2002 UNHCR Report, which had been relied upon by the PRRA Officer in 2006. That report describes Than Soe as “well known to the Burmese military”, and indicates that the “Burmese government would have a legitimate interest in prosecuting [him] for the 1989 hijacking”. The report concludes that it was “likely that Mr. Soe would be subject to excessive punishment for his offense including torture during interrogations and life threatening prison conditions”. Than Soe also notes that Paul Copeland opined that he remained on the “blacklist” and would be arrested and prosecuted upon return.

[51] Than Soe further argues that the Minister’s Delegate erred by failing to find that a prosecution in Myanmar would violate the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1867*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [*Charter*] and basic principles of International Law, both of which enshrine the right not to be tried or punished for an offence a second time. He submits that the Minister’s Delegate’s finding that he received “gentle treatment” in Thailand and that, as a result, a second prosecution would not violate international law, is not reasonable.

[52] Than Soe also argues that the Minister’s Delegate erred in finding that imprisonment would not amount to cruel and unusual punishment. He points to excerpts from country condition documents, which describe inhumane prison conditions amounting to torture. Than Soe notes that the Minister’s Delegate referred to the 2016 USDOS Report regarding prison conditions, but did not acknowledge that the same report describes torture in prisons and in interrogation techniques. The 2016 Amnesty International Report also states that torture is common and that some prisoners were held in cage-like cells with no contact with others.

[53] Than Soe argues that the Minister's Delegate erred by selectively relying on parts of the country condition documents, while ignoring other key parts of the objective evidence. For example, the Minister's Delegate relied on the 2016 USDOS Report, noting that improvements were being made to the legal system. However, the same report describes arbitrary and lengthy pretrial detention and various abuses committed by the security forces against prisoners, which the Minister's Delegate did not acknowledge.

[54] Than Soe submits that the Minister's Delegate erred by relying on Soe Myint as a similarly situated person living peacefully in Myanmar as evidence that Than Soe could do the same. Than Soe notes that Soe Myint himself explained that their situations were not the same. Than Soe further submits that, unlike himself, Soe Myint acknowledged that he engaged in discussions with the Burmese government before his return in 2012.

[55] Than Soe further submits that the Minister's Delegate's allegation of "hyperbole" regarding Than Soe's inability to contact Soe Myint is overstated and irrelevant. He adds that, given the emphasis placed on this by the Minister's Delegate, he should have had an opportunity to address these concerns before the ultimate decision was reached.

[56] Than Soe argues that the Minister's Delegate rejected or discounted the experts' reports and opinions on the basis of irrelevant factors. Than Soe points to the Minister's Delegate's findings that: Dr. Walton had no expertise in immigration or refugee law; Dr. Walton engaged in "polemics" when he wrote that it was "shocking . . . that the Government of Canada would make such a simplistic assessment of the risk to someone such as Mr. Than Soe"; and, the examples

Dr. Walton provided were not similar to the situation of Than Soe. Than Soe submits that Dr. Walton's knowledge of refugee law and his use of strong language is irrelevant to the issue of the risks Than Soe may face in Myanmar.

[57] Than Soe submits that the Minister's Delegate's more general criticism of the experts' opinions as "polemic" is not a reason to reject or discount the evidence. Their evidence reflects an objective assessment, based on their expertise and supported by the country condition documents.

[58] Than Soe further submits that although Dr. Walton stated that the democratic election did not "guarantee" that he was not at risk, Dr. Walton was not using the term as a legal standard nor was he usurping the role of the Minister's Delegate. Read in the context of the entire report, Dr. Walton's opinion is that Than Soe is at risk of detention, arrest, and prosecution in Myanmar.

[59] Than Soe submits that the Minister's Delegate ignored the countless references to the objective country condition evidence cited by Dr. Walton in support of his opinion, and instead rejected Dr. Walton's report on the basis of irrelevant factors. He points, for example, to sources cited by Dr. Walton confirming that the former military government continues to exercise "near total" control over the judiciary, and that the government continues to use Peaceful Assembly Law to target protestors and suppress dissidents.

[60] Than Soe notes that the Minister's Delegate placed undue focus on his own statement that he was not an activist, rather than on his other evidence. He submits that the evidence

demonstrates that the military would view him differently. He adds that Soe Myint stated that Than Soe would be at risk and that he has other enemies. Than Soe submits that he remains on the “black list” and is clearly at risk of detention and prosecution upon return.

[61] Than Soe notes that the Minister’s Delegate rejected the experts’ comparison of him to U Gambira, because of the Delegate’s the view that Than Soe does not have the same high profile as Mr. Gambira. He also disputes the conclusion that he is not considered high profile. He notes that the 2002 UNHCR Report described him as “well known to the Burmese military” and there is no evidence to support that he will not be so viewed now despite the passage of time.

[62] Than Soe also argues that the Minister’s Delegate erred by failing to consider the stability and durability of the recent changes in Myanmar and the probability that these changes would continue in the context of assessing his forward-looking risk pursuant to section 97 (citing *Chowdhury v Canada (Minister of Citizenship and Immigration)*, 2008 FC 290, [2008] FCJ No 368 (QL) [*Chowdhury*]).

[63] Than Soe notes that the Minister’s Delegate relied on a document from July 2016 – four months after the new government took power – to find that there had been significant changes in Myanmar sufficient to justify his return. Than Soe submits that this does not provide any evidence of a durable or sustainable change.

[64] Than Soe adds that the Minister’s Delegate noted that problems remained for Rohingya Muslims, but did not acknowledge that the same significant problems remain more generally for

others. He notes that the same military that he has criticised is responsible for the persecution of Rohyngas, as acknowledged by the Minister's Delegate, and as confirmed by country condition documents. He questions how he can be found to not face a risk from that same military.

IV. The Respondent's Submissions

[65] The Respondent submits that the Minister's Delegate considered all the evidence, including the experts' opinions, conducted a thorough assessment and provided intelligible reasons to support all the findings. The Respondent submits that the key finding is that Than Soe will not be of interest to the authorities in Myanmar.

[66] The Respondent submits that the Minister's Delegate reasonably concluded that it was unlikely that Than Soe would be detained or retried. The Minister's Delegate relied on evidence that political activists, including Soe Myint, had returned without issue, which was confirmed by a report from the United Kingdom Home Office. The Respondent notes that positive changes began before the election and there is no reason to think they would not continue. The Respondent adds that the Minister's Delegate was not required to consider the impact of the concerns regarding the justice system, including the fact that the presumption of innocence does not apply.

[67] The Respondent adds that the Minister's Delegate reasonably found that it was unlikely that Than Soe would face prison conditions that were cruel and unusual.

[68] The Respondent submits that Than Soe's circumstances or profile is more similar to that of Soe Myint than others who have returned to Myanmar and been arrested or detained. The two men committed very similar crimes for the same political reasons. The Minister's Delegate reasonably found that Than Soe is not similarly situated to the persons noted by Dr. Walton, or as described in the country condition documents.

[69] The Respondent submits that Dr. Walton's opinion that the changes in the political environment since the new government "are not sufficient to *guarantee* that Mr. Than Soe would not be at risk of arrest, detention or abuse" misstated and elevated the test for protection. The test under section 97 is not whether a person can be guaranteed to be safe, but whether it is likely. The Respondent submits that Dr. Walton overstepped his role and, as a result, the Minister's Delegate was justified in scrutinizing the foundation for this opinion and finding it to be of limited usefulness.

[70] The Respondent suggests that the Minister's Delegate did not disagree with Dr. Walton's assessment of the country conditions, including with respect to the influence of the military and the use of certain laws to punish dissenters. Rather, the Minister's Delegate disagreed with Dr. Walton's assumption that Than Soe would be of interest to the Myanmar government and/or the military. Given that Than Soe is not a political activist, Dr. Walton's examples are not relevant to Than Soe.

[71] The Respondent points to the country condition documents indicating that persons that have committed certain crimes, including former freedom fighters, are excluded from the

country's "blacklist". The Respondent further notes that Soe Myint, a former hijacker and freedom fighter, returned safely in 2012.

[72] The Respondent argues that the Minister's Delegate is not obliged to accept the opinions of the experts and that the Minister's Delegate's scrutiny of the bases for the opinions is reasonable. The Respondent submits that much of Paul Copeland's affidavit is speculation; no facts were provided to support the claims that Than Soe will be arrested, prosecuted, imprisoned and/or sentenced to death upon return to Myanmar; and, no facts were provided to support the assertion that Soe Myint entered into an arrangement with the Burmese government to secure his safe return.

[73] The Respondent submits that there was no requirement for the Minister's Delegate to consider the durability of the changes in Myanmar. The assessment of risk is forward looking, improvements had begun before the election and there was no reason to think this would not continue. The Minister's Delegate noted the safe return of political exiles in this period, including Soe Myint in 2012.

[74] The Respondent further submits that although a PRRA Officer's risk assessment in 2006 found that Than Soe would face a risk, Than Soe is not relieved of his onus to show that he would face a forward-facing risk in 2017, and that he has not met this onus.

V. The Issues

[75] Than Soe submits that the Minister's Delegate breached principles of procedural fairness by failing to give him an opportunity to respond to the Minister's Delegate's concerns that his evidence, and especially the expert reports, were polemical in nature.

[76] Than Soe also raises several arguments, all of which he submits demonstrate that the decision is unreasonable.

[77] I find that the key issue is whether the decision of the Minister's Delegate is reasonable. I would restate the issues to be considered to determine whether the decision is reasonable, as follows:

- Whether the Minister's Delegate erred in finding that Than Soe would not be at risk of detention, arrest or prosecution in Myanmar and, because of this finding, that he would not face any other risks of cruel and unusual treatment or punishment, including imprisonment;
- Whether the Minister's Delegate erred in comparing Than Soe to Soe Myint;
- Whether the Minister's Delegate erred in his or her assessment of the evidence including by selectively relying on some evidence and by discounting or rejecting the experts' evidence for invalid reasons; and,
- Whether the Minister's Delegate erred by failing to consider whether the changes in Myanmar were lasting and durable.

VI. The Standard of Review

[78] The standard of review applicable to the Minister's Delegate's assessment of the evidence is reasonableness (*Muhammad v Canada (Citizenship and Immigration)*, 2012 FC 1483 at para 28, 423 FTR 242). The reasonableness standard focuses on "the existence of justification, transparency and intelligibility within the decision-making process" and considers "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190). It is not the role of a reviewing court to substitute its own view of a preferable outcome or to reweigh the evidence (*Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59, [2009] 1 SCR 339 [*Khosa*]).

[79] Issues of procedural fairness are reviewed on a correctness standard (*Khosa* at para 43). Where a breach of procedural fairness is found, no deference is owed to the decision maker.

VII. The Minister's Delegate Did Not Breach Procedural Fairness

[80] The Minister's Delegate did not breach procedural fairness by failing to alert Than Soe to his or her concerns and criticisms of the experts' opinions and providing an opportunity to respond.

[81] The Minister's Delegate clearly advised Than Soe of the issues that would be addressed and provided several opportunities for him to provide updated submissions. Than Soe was not

entitled to receive the Minister's Delegate's preliminary views regarding the strength of his application, or a chance to respond to them.

VIII. The Minister's Delegate's Decision Is Not Reasonable

[82] As the Respondent cautions, the role of the Court is not to re-weigh the evidence. However, there is often a fine line between re-weighing the evidence considered by the decision maker and identifying errors arising from misconstruing or selectively relying on certain evidence. Although the Minister's Delegate's decision is thorough and addresses a great deal of the evidence, the crucial findings are not justified or defensible.

[83] First, the Minister's Delegate's finding that Than Soe would not likely be retried upon return to Myanmar – which was the primary basis for the Minister's Delegate's conclusion that Than Soe would not face the consequences of the justice system – is speculative and not supported by the evidence. The related findings that Than Soe would not be at risk of the justice system in Myanmar – either due to harsh treatment or a second prosecution – are inconsistent with the objective evidence, which indicates that key elements of a democratic government, including an independent judiciary, are lacking. Second, the Minister's Delegate's insistence that Than Soe was not at risk, merely because Soe Myint was living safely in Myanmar, was unreasonable. Third, the Delegate further erred by rejecting Dr. Walton's report on the basis of irrelevant factors, without giving it proper consideration. Finally, the Delegate erred by failing to consider whether changes proposed by the new government in Myanmar were operational and would be sustained.

A. *The Minister's Delegate erred in finding that Than Soe would not be at risk of detention, arrest or prosecution in Myanmar and, because of this finding, that he would not face any other risks of cruel and unusual treatment or punishment, including imprisonment*

[84] The Minister's Delegate concluded that it was unlikely that Than Soe would be retried without pointing to evidence to support such a conclusion, other than the premise that Than Soe was similarly situated to Soe Myint. As found below, this premise is not reasonable. In addition, there was evidence which contradicted this conclusion – namely, the 2002 UNHCR Report which described Than Soe as “of interest to the Burmese military” and which states that the “Burmese government would have a legitimate interest in prosecuting [him] for the 1989 hijacking”. Although the report was dated, the Officer did not deal with this evidence.

[85] The Minister's Delegate found that, in light of improvements to the justice system in Myanmar, Than Soe would not be subject to a risk of an unfair trial, or inhumane prison conditions.

[86] The Minister's Delegate also found that if retried, “it seems unlikely that his trial would be subject to political interference”. The Minister's Delegate based this on the passage of time and Than Soe's “lack of connection to current issues which are sensitive to the military”.

[87] These findings are completely inconsistent with the objective country condition evidence.

[88] For example, among other reports, the 2016 USDOS Report describes, among other concerns, the military's control over the police force; the prevalence of arbitrary arrests and

lengthy detentions; the lack of any right to be promptly advised of charges upon arrest; widespread institutional corruption; a denial of the presumption of innocence; and the denial of a right to be present at one's own trial. The same Report describes degrading treatment in prisons including inadequate access to health care and basic needs, including food. Other country condition documents elaborate on abysmal prison conditions. The Minister's Delegate noted a Report that stated that the use of torture is "less frequent", but failed to note that, nonetheless, torture continues.

[89] Further, the Minister's Delegate found that "in the unlikely event that Mr. Soe were to be re-tried for the offence of hijacking" in Myanmar, the second prosecution would not, on its own, violate international standards. This finding was based on the Minister's Delegate's conclusion that Than Soe's punishment in Thailand was "unusually gentle" compared to the penalty for hijacking in Canada. This finding is both unreasonable and not correct. The severity of Than Soe's punishment in Thailand is not a relevant consideration in the assessment of whether it would breach international law to try him again. A second trial in Myanmar would clearly be contrary to the text of *UN Convention on Civil and Political Rights* ("No one shall be liable to be tried or punished again for an offence for which he has already been convicted...").

[90] In concluding that Than Soe would not be targeted by the Burmese government, the Minister's Delegate relied heavily on his own self-description, in a letter, as "neither a famous political exile nor an activist against the military entirely . . . just a fair minded and humble person". Further, the Delegate relied on the fact that Than Soe's activism took place over 30 years ago, and that Than Soe is no longer connected to current issues sensitive to the military.

However, the Minister's Delegate did not consider how Than Soe will be *perceived* by the military, regardless of his self-description or the passage of time. Moreover, the Minister's Delegate failed to consider the 2002 UNHCR Report which, despite being prepared 13 years after Than Soe's activism, still suggested that he would be "of interest" to the Burmese Military.

[91] Although the Minister's Delegate addressed the documentary evidence from several sources and acknowledged that some challenges remain in Myanmar, the Minister's Delegate relied on promised improvements and commitments to change to support the finding that Than Soe would be unlikely to face risk.

[92] While improvements are laudable, to suggest that Than Soe is no longer at risk is unreasonably optimistic. None of the reports indicate that the justice system is currently functioning as expected in a democracy. The objective country condition evidence emphasizes that key elements of a democratic government and independent judiciary are lacking – including that the presumption of innocence does not apply, persons wait indefinitely for a trial or, alternatively, have little opportunity to prepare to defend themselves, and prison conditions for detention and punishment are abysmal. Although no executions have occurred recently, the country condition evidence indicates that death sentences have been imposed. In short, the Minister's Delegate's conclusion that Than Soe was not at risk of the justice system in Myanmar is not supported by the objective evidence.

B. *The Minister's Delegate erred by only comparing Than Soe to Soe Myint*

[93] The Minister's Delegate found that Soe Myint – a former hijacker, who was now living safely in Myanmar – was the appropriate comparator, and that the persons identified by Dr. Walton and by Than Soe were not, because the latter were more recent activists with a higher profile.

[94] The characterization of Than Soe as “similarly situated” to Soe Myint is a key finding upon which the Minister's Delegate's other findings follow from. However, this finding is not defensible or justified by the evidence.

[95] While there are some similarities between Than Soe and Soe Myint, there are significant differences. They were both student activists who hijacked planes in the early 1990s to protest the military regime in Burma. Both lived in exile for several years. However, Soe Myint was acquitted in India. More importantly, Soe Myint was specifically invited by the Myanmar government to return to Myanmar, as were others, and did so in 2012. Soe Myint acknowledged that he was engaged in some discussions with the government before his return, although the details were not disclosed. He stated that the government made a special effort to reach out to exiled media groups, including the media company which Soe Myint led.

[96] Than Soe was convicted in Thailand, spent time in prison, was found to be a UNHCR refugee and subsequently spent several years in the US and then in Canada. He sought refugee protection in both the US and Canada. There is no evidence that he was “invited” to return to

Myanmar. Nor is there any evidence that Than Soe has been removed from the “blacklist”.

Although some political dissidents have apparently been removed, the country condition documents indicate that “criminals”, including those convicted of non-violent offences, remain on the list. The Minister’s Delegate does not deal with these important differences.

[97] Importantly, Soe Myint does not regard Than Soe as similarly situated to him. Although Soe Myint stated that he has not faced any risk in Myanmar, he clearly stated that Than Soe may still be at risk. Soe Myint expressed surprise that the Respondent was contemplating returning Than Soe to Myanmar. Soe Myint noted that the military continues to play an important role and that Than Soe has many enemies. Soe Myint noted that he had ultimately obtained a National Identity Card two years after returning to Myanmar and following all the legal processes, but expressed doubt that Than Soe could do so.

[98] As noted by Dr. Walton, it is “dangerous to assume that if one political activist has not faced repression, another in similar circumstances would have the same experience”.

C. *The Minister’s Delegate erred in his or her treatment of Dr. Walton’s evidence.*

[99] As noted, it is within the discretion of administrative decision makers to determine the weight to attach to expert evidence and the Court will not re-weigh the evidence. However, the decision maker must provide a valid reason for rejecting or discounting the opinions (*Smith v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1283 at para 42, 420 FTR 256, citing Donald JM Brown and John M Evans, *Judicial Review of Administrative Action in Canada* (Toronto: Canvasback Publishing, 2012)).

[100] Although the Minister's Delegate refers to both the experts' reports and opinions and cites at length from country condition documents, the Minister's Delegate cannot selectively rely only on the parts of the evidence that support an optimistic view. In the present case, the experts and the country condition evidence raise serious concerns about the situation in Myanmar so soon after the transition, despite promises of reform.

[101] The Minister's Delegate either rejected or discounted the evidence of Dr. Walton, an expert on Myanmar, for invalid reasons. The Respondent argues that the Minister's Delegate largely accepted Dr. Walton's report, and only disagreed with his conclusion regarding Than Soe's profile. However, a reading of the Minister's Delegate's decision does not support this. Instead, it appears that the Minister's Delegate more generally rejected or discounted Dr. Walton's opinion for two reasons: because he was not an expert in refugee law and because his opinion was polemic, which the Minister's Delegate found to impact the reliability of the opinion. In my view, Dr. Walton's evidence was consistent with the country condition evidence.

[102] Dr. Walton's lengthy opinion expressed a strong view, which was supported by many references to other articles and reports. An opinion should not be discounted based on its strong language, where the opinion is buttressed by countless references and consistent with the country condition evidence. The Minister's Delegate's finding that Dr. Walton's tone diminished the "reliability of the content" and was "incompatible with an objective assessment of the evidence" is not a justifiable reason to discount the opinion. The reliability of the content was amply supported by the objective evidence and the sources cited.

[103] Dr. Walton provided a rationale for his opinions based on his expertise and with reference to several sources. Dr. Walton's opinion is consistent with country condition evidence which shows that despite intentions to implement a democratic regime and despite some changes, there remain major concerns, including regarding the justice system and that the military continues to play a significant role, particularly in the justice system.

[104] The Minister's Delegate also erred in discounting Dr. Walton's opinion simply because he was not an expert on refugee law. Dr. Walton was not proffered as an expert on immigration and refugee law – but as an expert on Myanmar, which is well established by his qualifications. The determination of whether Than Soe would face a risk pursuant to section 97 still rested with the Minister's Delegate. Dr. Walton's opinion was that Than Soe would face a risk, which he clearly stated in several ways. Contrary to the Minister's Delegate's suggestion, Dr. Walton's use of the word “guarantee” did not convey a misunderstanding of a legal standard, nor would it have mattered whether or not he understood the legal standard. He was clearly not intending to offer a legal opinion. Instead, he stated his professional opinion based on his expertise, including as a Senior Research Fellow in Modern Burmese Studies, his research, consultation with foreign governments and NGOs and visits to Myanmar, that Than Soe was at risk. As noted in *Shariaty v Canada (Minister of Public Safety and Emergency Preparedness)*, 2017 FC 986 at para 38, [2017] FCJ No 1038 (QL):

[38] This Court has held that where expert evidence is put forward and considered by the decision-maker, it deserves thoughtful and comprehensive analysis if it is to be rejected (*Naeem v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1375 at para 24).

[105] The experts' opinions, in particular that of Dr. Walton, were not submitted to usurp the role of the Minister's Delegate in assessing Than Soe's risk, but to be considered by the Delegate in conducting this assessment. The experts' opinions are supported by the country condition documents which highlight that significant problems remain in Myanmar.

[106] For example, Dr. Walton pointed to reports from the Assistance Association for Political Prisoners-Burma, which are issued monthly to detail arrests and detentions of political activists. These reports reveal that arbitrary arrests are common, even after a year of the NLD government, and that "many of the abuses that were systemic throughout Myanmar's justice system and penal system continue today". With respect to the control by the military, Dr. Walton noted that "most of the judiciary at every level has been appointed during periods of military rule and has worked within the confines of that system". He explained that although changes to the judiciary were enacted through the 2008 Constitution and the Union Judiciary Law, "[n]o efforts have been made to render the Courts significantly independent of either the executive or legislative branches, thus perpetuating a key weakness of previous military eras". These claims were equally supported by objective sources. Based upon this information, Dr. Walton stated that "[d]ue to the perpetuation of this system of bias and impunity for political and military authorities, we cannot say that the political circumstances in Myanmar have changed such that they would allow Mr. Than Soe to return without facing a significant risk".

[107] Dr. Walton then described how the Penal Code and Telecommunications Law are used to attack activists and political critics and stated that these laws could be used to target Than Soe. Dr. Walton gave two examples of individuals who had been targeted by the same law, which the

Minister's Delegate rejected for being unlike Than Soe. However, Dr. Walton's point is that if Than Soe returns and is critical of the military, he will likely face the same outcome.

[108] Dr. Walton added, that there was no "conceivable argument" that Than Soe would be protected from prosecution or repressive action simply because the NLD government is now in charge. In Dr. Walton's view, the military can and does punish those who criticize it, regardless of the NLD government's authority.

[109] Dr. Walton also noted the comments of the UN Special Rapporteur on the situation on human rights in Myanmar, following her visit to Myanmar in January 2017 where she stated her concerns about reprisals noting, "I am deeply concerned about . . . those critical of the Government, those defending and advocating for the rights of others, and those who *expressed* their thoughts and opinions which did not conform to the narrative of those in positions of power".

[110] Dr. Walton stated that this view is consistent with the information upon which he based his opinion, including that the "fundamental risks to prominent activists critical of either the military or the government have not disappeared", that the military wields considerable control, that the judiciary is characterized by arbitrary decision making, and that the "nominally" democratic government has attacked activists and critics.

[111] Dr. Walton acknowledged that some critics of the regime have returned and have not faced reprisals. However, as noted above, he stated:

When dealing with military and political authorities that have been as vindictive and capricious as Myanmar's have in recent decades, it is dangerous to assume that if one political activist has not faced repression or attacks, another in similar circumstances would have the same experience.

[112] Dr. Walton concluded by noting that “there is still a long way to go to achieve a society where individuals are free to share what has happened to them, to speak their mind and to live peacefully without fear”.

[113] In summary, Dr. Walton provided a thorough and compelling report, supported with objective sources, for his opinion that Than Soe would be at risk in Myanmar. The Minister's Delegate was required to give this report thoughtful and comprehensive consideration. The Minister's Delegate erred in rejecting it or discounting it on the basis of largely irrelevant factors – his tone, and the fact that he was not an expert on immigration law. The Minister's Delegate's finding that the few individual examples provided by Dr. Walton were distinguishable was not sufficient to reject his overall report, which was based on far more than examples.

D. *The Minister's Delegate erred by not considering whether the changes in Myanmar were operational*

[114] The determinative finding in this Application is that the Minister's Delegate erred in finding that it was unlikely that Than Soe would face a risk of retrial, or other negative consequences, upon return to Myanmar. The Minister's Delegate erred in assuming that Than Soe would not be at risk because Soe Myint had returned safely to Myanmar. The evidence

does not justify these findings. However, I also agree with the Applicant that the Minister's Delegate should have considered whether the limited improvements in the early days of Myanmar's new government and the promised changes would come to pass and be operational and sustainable.

[115] In *Chowdhury*, in the context of judicial review of a decision of the Refugee Protection Division which found the applicant to not be a convention refugee or person in need of protection, Justice Mosley noted that the issue of whether a change in the country conditions is a durable change impacting the applicant's risk of persecution is a question of fact, noting at para 13, "A change in the political situation in a claimant's country of origin is only relevant if it may help in determining whether or not there is, at the date of the hearing, a reasonable and objectively foreseeable possibility that the claimant will be persecuted in the event of return".

[116] Justice Mosley added at para 14:

[14] When coming to that decision, the RPD member must, however, have a view as to the stability and probability of continuation of the change in country conditions which resulted in the finding of a lack of risk. To do otherwise would put into harm's way those who flee the persecution of one side of an ongoing dispute. While the period in which their group is in the ascendance might be safe, the fragility of that safety is one issue which the RPD must consider in coming to their decisions. It does not appear from the decision that the member in the instant case directed her mind to that question.

[117] In the context of assessing the forward-looking risk – i.e. the likelihood that Than Soe would face a risk as described in section 97 if returned to Myanmar now – the Minister's Delegate should have considered whether the promised improvements and positive, but limited,

changes noted in the reports published very shortly after the new government took office provided sufficient evidence of changes that were operational and would probably continue. I note that the country condition documents relied on by the Minister's Delegate – for example the International Crisis Group Report published in July 2016, four months after the government took office – reported on very recent changes which would be expected to require a much longer period to evaluate.

[118] I regard the need to consider the durability of the democratic reforms to be somewhat analogous to the consideration of whether a democratic country can provide adequate state protection to those that face persecution and flee. The jurisprudence with respect to state protection is well established and includes a presumption that a state is capable of protecting its citizens. However, that presumption can be rebutted by clear and convincing evidence that state protection is inadequate or non-existent (*Flores Carrillo v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94 at para 30, [2008] 4 FCR 636). The jurisprudence has also established that although state protection need not be perfect, it must be effective to a certain degree and the state must be both willing and able to protect (*Bledy v Canada (Minister of Citizenship and Immigration)*, 2011 FC 210 at para 47, [2011] FCJ No 358 (QL)). State protection must also be adequate at the operational level (*Henguva v Canada (Minister of Citizenship and Immigration)*, 2013 FC 483 at para 18, [2013] FCJ No 510 (QL); *Meza Varela v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1364 at para 16, [2011] FCJ No 1663 (QL); *Galamb v Canada (Minister of Citizenship and Immigration)*, 2016 FC 1230 at paras 32-33, [2016] FCJ No 1220 (QL)). Efforts and promises are not enough.

[119] As noted by Justice Rennie in *Sow v Canada (Minister of Citizenship and Immigration)*, 2011 FC 646 at paras 9-11, [2011] FCJ No 824 (QL), the presumption that a state can protect its citizens varies with the nature of the democracy in the country, and democracy alone does not guarantee state protection. Rather, the quality of the institutions relied on to provide protection must also be considered.

[120] The same principles are analogous and adaptable to the consideration of the forward-looking risk in the present case. The Minister's Delegate noted that "the fact that the Government *is for all intents and purposes now a democracy* is significant". This suggests that the Minister's Delegate relied heavily on the fact that a democratic government was elected, without considering the quality of the institutions of the democratic government. The Minister's Delegate acknowledged that commentators had expressed concerns about the regime's progress. These concerns are highlighted in the country condition documents which clearly convey that essential democratic reforms are not in place (for example, the presumption of innocence and an independent judiciary) and more generally, that it is too soon to make the findings relied on by the Minister's Delegate to conclude that Than Soe would be unlikely to face a risk under section 97.

[121] The Minister's Delegate's decision is premised on the view that the limited improvements to date and the promised changes were sufficient to find that Than Soe would not face risks in the event that he were prosecuted. The Minister's Delegate acknowledged the country condition evidence that pointed to remaining challenges, including to the justice system, but focussed on the optimistic comments. Given the serious "red flags" in the country condition

evidence, the Minister's Delegate was required to consider whether there was evidence that the changes were operational when determining Than Soe's forward-looking risk. As mentioned above, most of the country condition evidence relied on by the Minister's Delegate reported on the situation very soon after the election – for example, the International Crisis Group Report in July 2016, a mere four months later. Generally, considerably more time is needed to assess the impact of promised changes brought about by democratic reform after years of another regime. While the situation in Myanmar may hopefully continue to evolve and the promised improvements may be implemented and may be effective, based on the evidence before the Minister's Delegate at the relevant time, which was very shortly after the installation of the new government, there was insufficient evidence to justify the Minister's Delegate's conclusions that the democratic reforms – particularly those that Than Soe would need to rely on if returned – were operational. For example, the Minister's Delegate noted the country condition documents which stated that the military wielded significant control, that judicial independence was lacking and that there was corruption in the justice system. This cannot be overlooked in favour of promises and “some improvements”.

[122] In conclusion, the Application for Judicial Review is allowed. Than Soe's restricted PRRA should be re-determined by a different decision maker.

IX. No Certified Question

[123] Than Soe proposed three certified questions, only one of which is related to the Court's findings: whether as part of a reasonable assessment of a change in circumstances in a section 97 determination, the Minister is required to consider the durability of the change.

[124] As noted above, I agree that in assessing forward-looking risk the Minister's Delegate should consider the operational adequacy of the democratic reforms in an analogous manner as a state protection assessment. However, that is not the dispositive finding in the Application. Therefore, the question will not be certified.

[125] The Respondent proposed a question related to the issue of who bears the burden of proof in a restricted PRRA where the initial risk assessment finds that there would be a risk. This is not a determinative issue in this Application and will not be certified.

X. No Costs

[126] Than Soe submits that costs should be ordered in his favour because the decision maker approached the Application in a cavalier manner without regard to the "fundamentals of risk assessment" and the expert evidence. He submits that this approach led to the expenditure of resources for all parties and additional stress to him.

[127] Rule 22 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22 provides that "No costs shall be awarded to or payable by any party in respect of an

application for leave, an application for judicial review or an appeal under these Rules unless the Court, for special reasons, so orders”.

[128] The threshold for establishing “special reasons” is high (*Adewusi v Canada (Minister of Citizenship and Immigration)*, 2012 FC 75 at para 23, 403 FTR 258 [*Adewusi*]). In *Adewusi*, the Court provided some examples from the jurisprudence where the threshold had been met, including where one party has acted in a manner that may be characterized as unfair, oppressive, improper or actuated by bad faith, and where there is conduct that unnecessarily or unreasonably prolongs the proceedings.

[129] In the present case, no special reasons exist to award costs. The Minister’s Delegate considered all Than Soe’s submissions and evidence. There was no unfairness, bad faith or unnecessary delay to justify an award of costs.

JUDGMENT in IMM-2957-17

THIS COURT'S JUDGMENT is that

1. The Application for Judicial Review is allowed;
2. The Applicant's PRRA pursuant to paragraph 113(d) of the Act shall be determined by a different decision maker;
3. There is no question for certification; and,
4. No costs are ordered.

"Catherine M. Kane"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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