Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/11235/2019**

THE IMMIGRATION ACTS

Heard at George House, Edinburgh	**Decision & Reasons Promulgated**
On the 02 February 2022	**On the 28 February 2022**

Before

UT JUDGE MACLEMAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

V M D

Respondent

For the Appellant: Mr M Diwyncz, Senior Home Office Presenting Officer
For the Respondent: Mr A Fyffe, of McGlashan MacKay, Solicitors

DETERMINATION AND REASONS

1. Parties are as above, but the rest of this determination refers to them as they were in the FtT.

2. FtT Judge Green allowed the appellant's appeal by a decision promulgated on 23 August 2021.

3. The SSHD applied for permission to appeal to the UT, on grounds contending that the FtT failed to apply the test in *AM (Zimbabwe) v SSHD* [2020] UKSC 17; the medical evidence did not support a finding in terms of the criteria in that case; and the reasoning on that threshold being met was inadequate.

4. On 6 September 2021 Designated Judge Shaerf granted permission:

> At [60] and [65] … the Judge set out the relevant burdens of proof … While his decision canvassed at great length the psychological evidence it does not canvass any country background evidence which the appellant produced to show … on arrival … a real risk … on account of a dearth of medical facilities or difficulty in obtaining access to them. This obligation on the appellant is prior to the obligation on the respondent to provide evidence to counter the evidence produced by the appellant. This is an arguable error of law …

5. The appellant has filed a response in terms of rule 24:

> [1] The respondent, who was the appellant before the FTT, opposes the appeal. The grant of permission by the FTT to this Tribunal is precise and narrowly focused. It is contained in the final paragraph of the grant of permission dated 6 November 2021 … *[cited as above]* …
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> [2] It is submitted that the grant of permission does not properly identify an arguable error in law. The FTT Judge identifies at paragraph 63 the legal basis for a distinction being drawn between "domestic cases" and "foreign cases". The Judge defines a domestic and foreign cases as being for a domestic case "where the risk is of suicide in this country on being told of the decision or of suicide in transit, and foreign cases, where the risk relates to the situation after arrival in the receiving country."
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> [3] The Judge at paragraph 65 indicates "following *AA (Iraq)* this is a domestic case. The appellant has said that if the respondent removes him, there is a significant and high risk that he will commit suicide". Reference is then made by the FTT Judge to expert evidence supportive of that claimed risk to the appellant. The combination of those matters entitled the Judge to reach the conclusion that the appellant, before the FTT, would commit suicide before arrival in Vietnam. The dearth of medical facilities or the inability to access medical facilities were therefore irrelevant as the conclusion reached by the FTT was that there was a sufficiently high risk of suicide before the appellant arrived in Vietnam. The judge was entitled to conclude that facilities and their availability in Vietnam were relevant. *[?]* The FTT should not have granted permission in this case.
>
> [4] At paragraph 63 the Judge recognises the domestic measures that he was entitled (but not obliged) to assume the Secretary of State could put in place to guard against any suicide attempt prior to arrival in Vietnam.
>
> [5] It is in the last six lines of paragraph 65 that the Judge makes clear his view that in light of the *dicta* in *AM (Zimbabwe)* it was for the appellant to produce evidence that there is a significant and high risk he will commit suicide. The appellant provided evidence in that regard that was accepted by the FTT Judge.
>
> [6] It then fell to the Secretary of State to produce evidence in rebuttal but no such evidence was produced by the Secretary of State and therefore inevitably in the absence of any counter evidence the Judge required to allow the appeal. There was no error in law.
>
> [7] There is a degree of dissonance between the ground submitted by the Secretary of State and the grant of permission by the FTT. If the Secretary of State was dissatisfied with the basis upon which permission had been granted the Secretary of State could have made an application to the Upper Tribunal to expand the grounds upon which Permission had been granted. The Secretary of State made a positive choice not to do so. It is too late to seek to vary the Grounds now.

6. Mr Diwyncz said there was no need to apply to amend the grounds, as the point was a *"Robinson"* obvious one, and the way was opened by the grant of permission.

7. On that first issue, Mr Fyffe had nothing to add to the reply set out above.

8. Neither representative referred to the statutory source of appeal rights, case law or Presidential Guidance.

9. This issue is thoroughly dealt with in *AZ* (error of law: jurisdiction; PTA practice) Iran [2018] UKUT 00245 (IAC) summarising the position under the heading *(e) Granting permission to appeal on a ground not advanced by the applicant* at [61- 74].

10. *AZ* was a case in which permission should not have been granted on a poor point which was not in the grounds. The grant in this case, however, was on an obvious matter, in the sense of carrying a strong prospect of success. Mr Fyffe has found no argument to the contrary. Nor has he found authority for the proposition that to pursue such a point, amendment of the grounds is necessary.

11. The matter is before the UT.

12. Mr Diwyncz did not abandon the original grounds, but he had nothing to add to them.

13. The original grounds dress up disagreement. Judge Green cited *AM* and sought to apply it at [61, 62 and 65]. He fell into no error on the level of the test on medical grounds.

14. On the point on which permission was granted, Mr Diwyncz said that the Judge glossed over the dearth of evidence from the appellant on medical facilities and access to them in Vietnam.

15. Mr Diwyncz referred to the respondent's *Country Policy and Information Note Vietnam: Mental healthcare,* version 1.0, published in May 2021 ("the CPIN"). He said that it appeared that neither side had taken Judge Green to this obvious source and that although the respondent had an equal duty to do so, omission of reference was a key failure.

16. The appellant submitted, as above, that this was a domestic case concerned with facilities in the UK, not in Vietnam.

17. Having heard both submissions, I indicated that the decision of the FtT would be set aside.

18. The argument for the appellant begins by founding on the first sentence of [65], "Following *AA (Iraq)* this is a domestic case".

19. The Judge's decision is a clear and thorough one, in which neither party shows any fault, up to that sentence; but from there it lapses. The findings proceed on there being no risk domestically or in transit and on "absence of assurances" from the Vietnamese authorities on "treatment following return". The appeal is allowed on "the consequence of returning him to Vietnam". That cannot be reconciled with the opening sentence and, as acutely observed in the grant of permission, it lacks an evidential basis.

20. The error may have arisen largely because the Judge did not have the assistance he should have had, from either side, on the evidence to consider. The CIPIN was published after the respondent's decision, and the medical issues had developed since then, but this was a major source in the public domain and within the knowledge of practitioners. It is so clearly in point that it should not have been overlooked. Mr Fyffe accepted that the appellant also had a duty in that respect.

21. As to further procedure, it was agreed that the case should go back to Judge Green for parties to make further submissions on the CIPIN and on such other evidence about medical facilities in Vietnam as they might seek to introduce.

22. The decision of the FtT is set aside, to the extent explained above. The cased is remitted to the FtT. It should be listed before Judge Green, but may be considered by any other FtT Judge, if that turns out for any reason to be impractical within a reasonable time.

23. The FtT made an anonymity direction, which is observed herein.

3 February 2022
UT Judge Macleman

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email.