Neutral Citation Number: [2023] EWCA Civ 1222

Case No: CA-2022-000214

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)
UPPER TRIBUNAL JUDGE LANE
RP/00006/2019

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20 October 2023

Before :

LORD JUSTICE PETER JACKSON
LADY JUSTICE NICOLA DAVIES
and
LORD JUSTICE WILLIAM DAVIS

- -

Between :

THTN	**Appellant**
- and -	
Secretary of State for the Home Department	**Respondent**

- -
- -

Zainul Jafferji and Sheraaz Hingora (instructed by **Burton and Burton**) for the **Appellant**
William Hansen and Matthew Wyard (instructed by **Government Legal Department**) for the **Respondent**

Hearing date : 11 October 2023

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Approved Judgment

Lord Justice William Davis :

Introduction

1. The appellant is a Vietnamese national born in October 1967. She was arrested in the UK in July 2008 on suspicion of cultivating cannabis. On arrest she said that she had arrived in the UK in 2005 in the back of a lorry. She was not convicted of any offence following that arrest. She was granted temporary admission. On 10 March 2010 the appellant claimed asylum. Her claim raised the issue of whether she had been trafficked. She was referred as a potential victim of trafficking. The Single Competent Authority made a conclusive positive grounds decision in her favour. On 18 October 2010 the Secretary of the State for the Home Department ("SSHD") concluded that there was a reasonable degree of likelihood that the appellant may face persecution in Vietnam as a victim of trafficking. Therefore, she was entitled to refugee status. The SSHD granted the appellant asylum and leave to remain for a period of 5 years. In November 2011 the appellant's two daughters joined the appellant in the UK. They were granted leave to remain in line with the appellant.

2. On 15 April 2015 the appellant pleaded guilty in the Crown Court at Stafford to an offence of kidnapping. Her plea was tendered very late in the proceedings. The sentencing judge found that she played a significant role in a very serious offence committed with five other people. He described the conduct as "evil" and "wicked". The appellant was sentenced on 17 April 2015 to a period of 11 years 6 months' imprisonment.

3. As a result of that conviction, the SSHD considered whether to make a decision to deport the appellant. In November 2015 the appellant made an application for indefinite leave to remain by reference to her refugee status. This application was considered within the deportation decision process. On 6 July 2016 the appellant was served with a decision to deport. The SSHD informed her that the appellant was considered to be a danger to the community due to the serious crime she had committed. As a result section 72 of the Nationality, Immigration and Asylum Act 2002 was engaged so as to exclude the appellant from the protection in Article 33(1) of the Refugee Convention 1951.

4. On 22 July 2016 the appellant via her solicitors made written submissions to the SSHD in respect of the deportation decision. It was said that deportation to Vietnam would lead to a violation of her rights under Article 3 of the European Convention on Human Rights. This was because the appellant would be at risk from those who had trafficked her, from her ex-husband and because her health would suffer due to inadequacy of medical treatment in Vietnam for those suffering from HIV.

5. On 5 May 2017 the SSHD notified the appellant that she was considering revoking or ceasing the appellant's refugee status. It was said that the appellant no longer would face treatment amounting to persecution were she to be returned to Vietnam. The UNHCR were informed of the position. In response to that notification various documents were provided by the appellant to the SSHD including a lengthy report from a Dr Tran in relation to trafficking in Vietnam and the health care system in that country. The UNHCR responded on 2 January 2018.

6. On 31 January 2019 in a lengthy and detailed written decision the SSHD made a deportation order, revoked the appellant's protected status and refused her human rights claim. The appellant appealed against the decision to revoke her refugee status and the refusal of her human rights claim. Her appeal to the First-Tier Tribunal ("F-TT") was heard on 10 February and 5 March 2021. Her appeal was dismissed on 16 March 2021. She was granted permission to appeal to the Upper Tribunal ("UT") on 14 May 2021. After a hearing on 25 August 2021 the UT, on 28 October 2021, dismissed the appeal. The appellant applied to the UT for permission to appeal to this court. On 15 November 2021 permission was refused.

7. For some reason it was not until January 2022 that the appellant was notified of that refusal. She applied promptly for permission to appeal to this court. Unfortunately, an administrative error meant that her application did not enter the system until June 2022. There were further delays which largely were not of the appellant's making. Permission to appeal was given by Lord Justice Nugee on 13 March 2023.

The Case Before the First-tier Tribunal

8. The F-TT considered three issues. First, was it appropriate for the SSHD to certify pursuant to section 72 of the 2002 Act that the appellant was excluded from protection under the Refugee Convention? Second, was the SSHD's decision to revoke or cease the appellant's status as a refugee correct? Third, would a return of the appellant to Vietnam violate her rights under Article 3 of the Convention? The F-TT found against the appellant on all three issues.

9. The first issue was not the subject of any appeal to the UT. It is not a matter with which this court has been concerned. It is unnecessary for me to consider the certification issue any further. The consequence of the section 72 certificate remaining in force was that, even if the cessation argument were to succeed, any appeal on that ground would be dismissed but the appellant would be entitled to a determination that the decision to revoke was contrary to the Refugee Convention so that she would remain a Convention refugee. For that reason, the cessation argument remained one of significance.

10. In relation to cessation of refugee status, the SSHD relied on paragraph 339A(v) of the Immigration Rules which provides as follows:

> "*This paragraph applies when the Secretary of State is satisfied that one or more of the following applies:*
>
> *…….(v) they can no longer, because the circumstances in connection with which they have been recognised as a refugee have ceased to exist, continue to refuse to avail themselves of the protection of the country of nationality…*
>
> *In considering (v)….., the Secretary of State shall have regard to whether the change of circumstances is of such a significant and non-temporary nature that the refugee's fear of persecution can no longer be regarded as well-founded.*"

The essential features of the SSHD's case were: there had been fundamental and durable changes in Vietnam in relation to the support of trafficking victims; there was HIV treatment generally available in Vietnam; there was no general risk of female victims of trafficking facing reprisals or re-trafficking on return to Vietnam; the appellant could re-establish herself on return to Vietnam and, if necessary, relocate within Vietnam.

11. The written representations on 2 January 2018 from UNHCR on which the appellant relied were summarised by the F-TT. The opinion of the UNHCR was that current conditions in Vietnam did not warrant the application of Article 1C(5) of the Refugee Convention by which the appellant could "no longer, because the circumstances in connexion with which (she) has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality". The UNHCR considered that there was insufficient evidence that such changes as had occurred in Vietnam had affected the personal circumstances of the appellant. It was said that the alternative of internal relocation was in principle not a relevant consideration when making a cessation decision.

12. The F-TT stated that the relevant principles in relation to any consideration of a cessation decision were set out in *SSHD v MA (Somalia)* [2018] EWCA Civ 994. It found that a cessation decision is a mirror image of an initial decision determining refugee status. The F-TT said (at paragraph 46 of its decision) that "the grounds for cessation do not go beyond verifying whether the grounds for recognition of refugee status continue to exist. Thus, the relevant question is whether there has been a significant and non-temporary change in circumstances so that the circumstances which caused the person to be a refugee have ceased to apply and there is no other basis on which he would be held to be a refugee." These words were taken verbatim from *MA (Somalia)* at [2].

13. Under the heading "consideration of the evidence" the F-TT referred to the most recent Home Office CPIN (country policy and information note) Vietnam: Victims of trafficking. It acknowledged that the views of the UNHCR were "to be carefully considered but carry no special weight or status simply by virtue of their authorship". However, it noted that the CPIN was more recent than the letter from the UNHCR. The CPIN was completed in May 2019 with the Home Office fact finding mission having visited Vietnam in February 2019. The report was published in April 2020.

14. The F-TT referred to a decision of the Upper Tribunal (*Nguyen* [2015] UKUT 170 IAC) which concerned another victim of previous trafficking in Vietnam and the risks such a victim would face before going on to cite at some length paragraphs in the CPIN. In summary the matters to which the F-TT referred were:

- There was no case of which any in country source was aware of re-trafficking of a returning trafficking victim though there was some risk of re-trafficking where there was an outstanding debt.

- An increasing focus within Vietnam on prosecuting traffickers with legislation being put in place, public awareness campaigns being organised and training of the police in dealing with trafficking cases.

- A memorandum of understanding between the UK and Vietnam signed in November 2018 allowing for greater collaboration around intelligence sharing, victim support and prevention work, the memorandum being underpinned by financial resources committed by the UK.

- Information provided by an NGO in Vietnam known as Hagar which had direct dealings with victims of trafficking. Hagar was able to provide reintegration support to returning victims. Hagar in February 2019 stated that they had not seen cases of re-trafficking of victims nor were they aware of instances of retribution against returning victims or their families.

15. In relation to the appellant's personal position the F-TT found that there was no credible evidence that she now owed any debt. Her daughters had remained in Vietnam until 2011 and had not experienced visits from anyone chasing a debt. Subsequently one of the daughters had visited Vietnam without incident. The F-TT found that it was not credible that the appellant would be at risk now 15 years or more after the event.

16. On the basis of the material available to it, the F-TT found that the situation in Vietnam had "greatly improved" since the initial decision to grant refugee status. It concluded (at paragraph 63 of its decision) that the SSHD had been "successful in demonstrating that there has been a significant and non-temporary change in the circumstances in which the appellant was recognised to be a refugee". As a result the appellant was excluded from a grant of humanitarian protection because she had committed a serious crime.

17. The Article 3 case as put to the F-TT was two-fold. First, the appellant would be at risk from death or serious harm from her husband and/or her traffickers were she to return to Vietnam. Protection from the authorities or re-location within Vietnam would be futile because she would be tracked down wherever she went. Second, she was someone with significant health problems. She suffered from HIV and mental illness for which she would not be able to obtain effective treatment in Vietnam.

18. The F-TT dealt with the first limb of the appellant's argument relatively shortly. It repeated its findings in respect of the lack of any continuing interest in the appellant on the part of her traffickers. In relation to her husband, it noted that, even in 2010, her claims of domestic abuse were "inconsistent and incoherent".

19. The evidence in relation to the appellant's medical condition was set out in some detail. Dr Jebakumar, a consultant physician with particular expertise in the treatment of HIV, reported that the appellant suffered from HIV which was well controlled with medication. Were that medication to be withdrawn, she would progressively deteriorate and eventually develop AIDS. She would be subject to intense suffering and die within 3 to 4 years. Dr Jebakumar stated that the quality of medication in Vietnam could not be guaranteed with rural areas not having access to specialised medicine and with the general availability of second line medication being in doubt. The F-TT placed significant weight on the findings of Dr Jebakumar. It found as a fact that the appellant would deteriorate as he described were medication to be withdrawn.

20. The F-TT had a report from Dr Bagalkote, a consultant psychiatrist, in relation to the appellant's mental health. He had diagnosed the appellant as suffering from a psychotic disorder possibly linked to PTSD with significant depressive features secondary to the PTSD. Her mental state currently was well supported by community mental health services and the appellant's daughters. Were that support to be removed, there would be a significant deterioration in her fragile mental state. Dr Bagalkote concluded that removal to Vietnam would lead to a significant deterioration in the appellant's mental state irrespective of the treatment available there. He concluded that she was at risk of suicide. The F-TT placed significant weight on the expertise of Dr Bagalkote and made findings in relation to the appellant's mental health in line with his opinions.

21. With those factual findings in mind the F-TT considered what had been stated in *AM (Zimbabwe) v SSHD* [2020] UKSC 17. It set out the passage from *Paposhvili v Belgium* [2017] Imm AR 267 as set out at [22] of AM *(Zimbabwe)*:

> "183. The Court considers that the 'other very exceptional cases' within the meaning of the judgment in N v The United Kingdom (para 43) which may raise an issue under article 3 should be understood to refer to situations involving the removal of a seriously ill person in which substantial grounds have been shown for believing that he or she, although not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy. The Court points out that these situations correspond to a high threshold for the application of article 3 of the Convention in cases concerning the removal of aliens suffering from serious illness."

The F-TT stated that its task was to consider whether the appellant could access medical treatment in Vietnam since, without medical treatment, there would be a substantial risk of relapse within a short time.

22. There was evidence that the appellant's mother and brother still lived in Vietnam. The F-TT found that they would be able to assist the appellant in registering for medical care, registration being an essential precursor to obtaining medical treatment in Vietnam. The F-TT considered two reports from Dr Tran. He had provided a report in October 2016 after the SSHD had made her initial decision to deport. He provided an updated report in May 2019 for the purposes of the appeal to the F-TT. Dr Tran had apparent expertise in conditions in Vietnam. It was not suggested that he lacked the necessary expertise. The F-TT did not rehearse the content of Dr Tran's reports in any detail. It placed little weight on the conclusions of Dr Tran that there would be significant obstacles in the way of the appellant in obtaining HIV medication and that mental health treatment in Vietnam was inadequate.

23. Having expressed its view of Dr Tran's opinion, the F-TT concluded that "there is no other objective evidence put forward by the appellant showing that there is lack of treatment available to her in relation to her mental health…therefore not satisfied that

there is a lack of treatment for her in Vietnam". The outcome was that removal to Vietnam would not violate the appellant's Article 3 rights.

The Case Before the Upper Tribunal

24. The appellant appealed against the decision of the F-TT. The grounds of appeal in substantial measure were not coherent. There appeared to be a submission that the SSHD ought not to have certified that the appellant was excluded from protection due to section 72 of the 2002 Act. There were arguments that the F-TT was wrong to reject "the expert's report" which appeared to be a reference to the evidence of Dr Tran. However, at the conclusion of the grounds it was argued that, once the F-TT had made its findings about the deterioration in the appellant's mental health were treatment to be stopped, the burden moved to the SSHD to show that adequate treatment would be available. The grounds cited *AM (Zimbabwe)* in support of this proposition.

25. It is apparent from the brief decision of the UT that no submission was advanced at the hearing of the appeal in relation to certification. The issues considered by the UT were cessation of refugee status and Article 3. In relation to the cessation issue, the UT set out the argument of the appellant as follows: the F-TT failed to notify the appellant in advance that less weight was to be attached to the appellant's expert report than the CPIN report because the latter had been prepared more recently; the CPIN report included discussion of policy which previously had been contained in Operational Guidance Notes and such Notes should not be regarded as country information; the F-TT failed to explain why it found that the appellant no longer owed money to traffickers. I understand "the appellant's expert report" to be a reference to the UNHCR response of January 2018.

26. It does not appear that any authority in relation to the status of a UNHCR report was cited to the UT. Part of the argument related to the status of the CPIN. The UT rejected the argument that a CPIN should be treated in the same way as an Operational Guidance Note saying a CPIN was the same as what previously had been called a COIS (Country of Origin Information Service) report. The UT also concluded that the F-TT did not fall into error in placing greater weight on the CPIN than the UNHCR response given that the former report was based on more recent material. The UT found that the explanation given by the F-TT for rejecting the suggestion that the appellant would be chased for a debt on any return to Vietnam was justified by the evidence.

27. The UT's consideration of the ground of appeal relating to the medical condition of the appellant and a potential violation of Article 3 was very brief. The ground was said to be without merit because "the judge made cogent and clear findings that, whilst the appellant's condition may deteriorate if she does not receive treatment, she would be able to access such treatment as she requires in Vietnam". Nothing was said about the proposition that the burden to show adequate treatment would be available lay on the SSHD. No reference was made to *AM (Zimbabwe).*

The Appeal

28. There were six grounds of appeal considered by Lord Justice Nugee. He gave permission on all grounds though he considered two of the grounds to be of greater

substance than the others. At the hearing of the appeal Mr Jafferji for the appellant distilled the grounds into two broad propositions. First, the F-TT was wrong in law in its conclusion in respect of the SSHD's cessation decision. Second, the F-TT fell into legal error in respect of the appellant's Article 3 claim. The first proposition contained a number of strands which had to be considered cumulatively. For my part I was very grateful to Mr Jafferji for his structured and well-reasoned oral arguments. His submissions meant that the court was able to focus on the real issues in the case which may not have been the case at earlier stages of these proceedings.

29. At the core of the submission in relation to the cessation decision was the proposition that the F-TT took no proper account of the original decision to grant the appellant refugee status. That decision in October 2010 noted the following: the appellant's mother had told a friend that the two people responsible for trafficking the appellant were looking for her in Vietnam; the SSHD accepted that this had happened; there was a real risk that the appellant would be pursued by her traffickers were she to return; the Vietnamese government had yet to focus on internal trafficking within Vietnam; internal relocation would not be appropriate because the appellant's traffickers would find her. The F-TT did not refer to the specific terms of the decision in 2010. It is argued that it did not explain why the factors then applicable had ceased to apply, the burden being on the SSHD to make good that proposition. The F-TT concentrated on generic evidence relating to conditions in Vietnam when it was required to consider the personal circumstances of the appellant as much as current country background evidence. Mr Jafferji argued that the Refugee Convention as mirrored in the Immigration Rules requires that the circumstances which gave rise to the original decision have "ceased to exist". The approach taken by the F-TT meant that this analysis was not conducted. Had it been, the F-TT would have concluded that the circumstances had not ceased to exist.

30. As an adjunct to this core submission, Mr Jafferji relied on the failure of the F-TT to give due weight to the UNHCR response coupled with a selective reading of the CPIN. He submitted that the UNHCR response was "of considerable importance": *HK (Iraq) v SSHD* [2017] EWCA Civ 1871 as cited in *PS (Cessation Principles) Zimbabwe* [2022] Imm LR 1. What was said by the F-TT failed to reflect this approach. In any event, the rationale adopted by the F-TT was flawed. The mere fact that the CPIN was based on material gathered 12 months after the response of the UNHCR was of little significance. Mr Jafferji argued that, on a full and proper reading of the CPIN, it did not support the conclusions reached by the F-TT on the relevant issues.

31. It was further argued that the F-TT fell into error when it purported to rely on findings in *Nguyen* when that case was not a country guidance case. The findings were fact specific and not transferable to the appellant's case.

32. Finally, it was said that the F-TT on the face of its decision applied the wrong test. Although the test in *MA (Somalia)* had been cited correctly at paragraph 46 of the decision, the conclusion at paragraph 63 failed to do so. Thus, it should be assumed that the F-TT did not direct itself properly.

33. In relation to Article 3, Mr Jafferji argued that the F-TT had misdirected itself in relation to the burden of proof in a case where the violation of the appellant's Article 3 rights was said to depend on access to and availability of medical treatment in the

receiving state. Although the F-TT referred to *Paposhvili* and *AM (Zimbabwe)*, it did not consider the true impact of those cases. This was not cured in the UT since there was no consideration at all of *AM (Zimbabwe)* by the UT despite the grounds of appeal before it. Mr Jafferji's argument was that, although the burden of establishing a violation of Article 3 remains on the person claiming such a violation, the current jurisprudence both in this jurisdiction and in Strasbourg is that there is a shift of that burden where the violation alleged relates to lack of medical care. It is for someone in the appellant's position to show that she is suffering from a serious medical condition and to provide evidence of the treatment currently being provided and of the consequences were it not to be available. Once that has been done, it is for the returning state to provide evidence about the availability and accessibility of suitable treatment. In this case no such evidence had been provided. Thus, the F-TT should have allowed the appeal in respect of Article 3.

Discussion

34. I am satisfied that there was no error of law made by the F-TT in relation to the cessation decision. The UT was correct in its rejection of the appeal in respect of that decision although, in the light of the focused argument now put, I reach my conclusion for reasons different to those rehearsed by the UT. It is necessary to focus on the reasoning of the F-TT. The decision of the UT was brief and little more than confirmation of that reasoning.

35. As the F-TT stated, the test to be applied to a cessation decision is as set out at [2] of *MA (Somalia).* The full test as expounded in *MA* was as follows:

> "A cessation decision is the mirror image of a decision determining refugee status. By that I mean that the grounds for cessation do not go beyond verifying whether the grounds for recognition of refugee status continue to exist. Thus, the relevant question is whether there has been a significant and non-temporary change in circumstances so that the circumstances which caused the person to be a refugee have ceased to apply and there is no other basis on which he would be held to be a refugee. "

The F-TT did not refer in terms to the details of the decision in 2010 which determined refugee status for the appellant. However, it was aware of the decision which was part of the bundle for the hearing. There was reference to what the appellant had said in 2010 in respect of her husband when the F-TT turned to the Article 3 issue which demonstrates that it had the decision in 2010 well in mind. In addition, the F-TT was fully seized of the cessation decision in January 2019 of the SSHD since that was the decision from which the appeal lay. That decision set out in detail the basis on which the original decision had been made and the reasons relied on by the SSHD to show that the relevant circumstances no longer existed. In its decision the F-TT addressed those circumstances, namely whether the appellant was at risk from her traffickers or at risk of re-trafficking generally. The absence of specific reference to the decision in 2010 cannot vitiate the outcome when it is apparent that the F-TT did have clearly in mind the circumstances which caused the appellant to be granted refugee status.

36. Thereafter the appellant's argument predominantly comes down to a disagreement with the findings of fact of the F-TT. Unless it can be shown that the findings of fact were made without taking into account what ought to have been taken into account and/or by taking into account irrelevant or impermissible factors, the appellant's argument cannot succeed.

37. I do not consider that the F-TT fell into error in its treatment of the UNHCR response of January 2018. Whilst the language adopted did not mirror that used in *HK (Iraq)*, I find that the F-TT's approach was in accordance with principle. The UNHCR response was "carefully considered" which imports a recognition that it was deserving of respect. The reason for departing from the views of the UNHCR was explained. The appellant may disagree with the conclusion reached by the F-TT but it was one that was open to it on the available material. As was said in *PS* the views of the UNCHR "carry no special weight or status simply by virtue of their authorship". In this case the F-TT had a detailed CPIN on which it was entitled to rely.

38. For the argument that a full reading of the CPIN ought to have led the F-TT to a different conclusion to succeed, it would be necessary to show that the F-TT's consideration of the CPIN was so inadequate that no reasonable reading of the report could allow the conclusion reached by the F-TT. In my view, the appellant falls far short of that hurdle. The F-TT did not refer to every part of the CPIN. It was not required to do so. As was stated at paragraph 20 of the decision, the failure to mention certain evidence did not mean that the evidence had not been considered. It was not for the F-TT to engage in a paragraph by paragraph analysis of the CPIN. In any event, I note that a number of the passages now relied on by the appellant consist of extracts from the USSD TiP Report for 2019 setting out the general position as it was perceived to be by the US State Department. This is to be compared with the material obtained by a Home Office fact finding team who visited Vietnam. In my judgment the F-TT was entitled to find that the CPIN taken as a whole supported the conclusion that the circumstances which caused the appellant to be a refugee had ceased to apply.

39. Particular objection is taken to the finding that the appellant no longer owed a debt. It is said that there was no evidence that the debt had been discharged. The argument was that traffickers would not simply forget a debt owed. When the F-TT concluded that there was no credible evidence of a debt, this was contrary to the decision in 2010. There was no reasoning to support the proposition that it no longer would be pursued. The underlying proposition was that, in the absence of evidence to the contrary, it should be assumed that traffickers never give up on a debt. In my view that underlying proposition probably is not sustainable. In any event, there was evidence on which the F-TT could and did rely to show that there had been no chasing of any debt. The passage of 15 years was significant.

40. I accept that *Nguyen* was a case on its own facts. It could not support any general finding as to circumstances in Vietnam still less any conclusion in relation to the appellants' personal circumstances. Insofar as the F-TT relied on *Nyugen* as evidence of what might happen to a returning female victim of trafficking, such reliance was impermissible. If that had been the sole or even the main basis upon which the F-TT made its decision, the decision would have been wrong in law. That is not the position. *Nyugen* was a marginal consideration. It is clear that, had it not been mentioned at all, the outcome would have been the same.

41. I accept also that what was said at paragraph 63 of the decision of the F-TT did not reflect the test as set out in *MA (Somalia)*. Mr Jafferji argued that this shows that the correct test was not applied. This ignores the fact that at paragraph 46 of the decision the F-TT posed the correct question. Further, the factual analysis conducted by the F-TT was directed to the issue of whether the circumstances which had caused the appellant to be granted refugee status had ceased to apply. Where the F-TT correctly expresses the test to be applied and then considers and reaches conclusions about the evidence relevant to that test, nothing turns on a failure fully to express the test when announcing the conclusions. It does not begin to show that the F-TT failed to do what it expressly set out to do.

42. I mention only for the purposes of relegating it to history one of the grounds of appeal on which permission was granted but which was barely referred to by Mr Jafferji. The UT found that a CPIN was the same as a COIS. It was not an Operational Guidance Note. Insofar as it matters, the UT was wrong in so finding. Previously there were two types of report in cases such as this, namely a COIS and an Operational Guidance Note. The CPIN in effect combined the two. This issue is irrelevant to the facts of this case. Mr Jafferji was entirely sensible in giving it no prominence.

43. I turn to the decision in respect of Article 3. The UT did not address the point of principle which had been raised in the grounds of appeal, namely where the burden lies in an Article 3 case concerning the adequacy and availability of medical treatment in the receiving state. The F-TT purported to consider the test set out in *AM (Zimbabwe)* but did not engage in any analysis of the burden of showing the potential violation of Article 3. It follows that I must consider the relevant authorities to see how they apply to the facts of this case.

44. The starting point is *Paposhvili*. The applicant in that case was seriously ill. Indeed, by the time his case came to be considered by the court in Strasbourg he had died. His application was judged to raise an important principle which required determination notwithstanding his death. The critical paragraphs of the judgment are at [186] and [187]:

> "186. In the context of these procedures, it is for the applicants to adduce evidence capable of demonstrating that there are substantial grounds for believing that, if the measure complained of were to be implemented, they would be exposed to a real risk of being subjected to treatment contrary to Article 3 (see Saadi, cited above, § 129, and F.G. v. Sweden, cited above, § 120). In this connection it should be observed that a certain degree of speculation is inherent in the preventive purpose of Article 3 and that it is not a matter of requiring the persons concerned to provide clear proof of their claim that they would be exposed to proscribed treatment (see, in particular, Trabelsi v. Belgium, no. 140/10, § 130, ECHR 2014 (extracts)).
>
> 187. Where such evidence is adduced, it is for the authorities of the returning State, in the context of domestic procedures, to dispel any doubts raised by it (see Saadi, cited above, § 129,

> and F.G. v. Sweden, cited above, § 120). The risk alleged must be subjected to close scrutiny (see Saadi, cited above, § 128; Sufi and Elmi v. the United Kingdom, nos. 8319/07 and 11449/07, § 214, 28 June 2011; Hirsi Jamaa and Others, cited above, § 116; and Tarakhel, cited above, § 104) in the course of which the authorities in the returning State must consider the foreseeable consequences of removal for the individual concerned in the receiving State, in the light of the general situation there and the individual's personal circumstances (see Vilvarajah and Others, cited above, § 108; El-Masri, cited above, § 213; and Tarakhel, cited above, § 105). The assessment of the risk as defined above (see paragraphs 183-84) must therefore take into consideration general sources such as reports of the World Health Organisation or of reputable non-governmental organisations and the medical certificates concerning the person in question."

Mr Jafferji argued that this is a change of approach from the usual claim for humanitarian protection under Article 3. Generally, it is for the applicant to demonstrate the real risk of inhuman or degrading treatment. It is for the applicant to show that she is at risk of persecution on return and that such persecution will be of such severity as to violate her Article 3 rights. *Paposhvili* demonstrates that once an applicant shows that she has a very serious medical condition requiring significant continuing treatment, the burden shifts to the returning state i.e. to dispel any doubts raised by the applicant's evidence.

45. Mr Jafferji argued that the position has been clarified further by the Supreme Court in *AM (Zimbabwe)* at [32] and 33]:

> "32. The Grand Chamber's pronouncements in the Paposhvili case about the procedural requirements of article 3, summarised in para 23 above, can on no view be regarded as mere clarification of what the court had previously said; and we may expect that, when it gives judgment in the Savran case, the Grand Chamber will shed light on the extent of the requirements. Yet observations on them may even now be made with reasonable confidence. The basic principle is that, if you allege a breach of your rights, it is for you to establish it. But "Convention proceedings do not in all cases lend themselves to a rigorous application of [that] principle …": DH v Czech Republic (2008) 47 EHRR 3, para 179. It is clear that, in application to claims under article 3 to resist return by reference to ill-health, the Grand Chamber has indeed modified that principle. The threshold, set out in para 23(a) above, is for the applicant to adduce evidence "capable of demonstrating that there are substantial grounds for believing" that article 3 would be violated. It may make formidable intellectual demands on decision-makers who conclude that the evidence does not establish "substantial grounds" to have to proceed to consider whether nevertheless it is "capable of demonstrating" them.

> But, irrespective of the perhaps unnecessary complexity of the test, let no one imagine that it represents an undemanding threshold for an applicant to cross. For the requisite capacity of the evidence adduced by the applicant is to demonstrate "substantial" grounds for believing that it is a "very exceptional" case because of a "real" risk of subjection to "inhuman" treatment. All three parties accept that Sales LJ was correct, in para 16, to describe the threshold as an obligation on an applicant to raise a "prima facie case" of potential infringement of article 3. This means a case which, if not challenged or countered, would establish the infringement: see para 112 of a useful analysis in the Determination of the President of the Upper Tribunal and two of its senior judges in AXB v Secretary of State for the Home Department [2019] UKUT 397 (IAC). Indeed, as the tribunal proceeded to explain in para 123, the arrangements in the UK are such that the decisions whether the applicant has adduced evidence to the requisite standard and, if so, whether it has been successfully countered fall to be taken initially by the Secretary of State and, in the event of an appeal, again by the First-tier Tribunal.
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> 33. In the event that the applicant presents evidence to the standard addressed above, the returning state can seek to challenge or counter it in the manner helpfully outlined in the judgment in the Paposhvili case at paras 187 to 191 and summarised at para 23(b) to (e) above. **The premise behind the guidance, surely reasonable, is that, while it is for the applicant to adduce evidence about his or her medical condition, current treatment (including the likely suitability of any other treatment) and the effect on him or her of inability to access it, the returning state is better able to collect evidence about the availability and accessibility of suitable treatment in the receiving state.** What will most surprise the first-time reader of the Grand Chamber's judgment is the reference in para 187 to the suggested obligation on the returning state to dispel "any" doubts raised by the applicant's evidence. But, when the reader reaches para 191 and notes the reference, in precisely the same context, to "serious doubts", he will realise that "any" doubts in para 187 means any serious doubts. For proof, or in this case disproof, beyond all doubt is a concept rightly unknown to the Convention."

Mr Jafferji relied on the passage I have highlighted. He said that this was clear and unequivocal. So soon as an appellant adduces proper evidence of her condition which demonstrates that, unless treated properly, she will suffer consequences such as to violate her Article 3 rights, the burden shifts to the returning state to provide evidence that she will receive appropriate treatment. In most instances that burden will be discharged very easily with readily available country information. To draw the line in this way as indicated at [33] of *AM (Zimbabwe)* provides certainty.

46. Mr Jafferji further relied on the judgment of the ECtHR in *Savran v Denmark* [2022] Imm LR 3. This was referred to at [32] of *AM (Zimbabwe)* as being expected to shed light on the procedural requirements in an Article 3 case involving serious illness. Under the heading "General considerations on the criteria laid down in the Paposhvili judgment" the court said at [133] to[136]:

> "133. Having regard to the reasoning of the Chamber and the submissions of the parties and third parties before the Grand Chamber, the latter considers it useful with a view to its examination of the present case to confirm that the Paposhvili judgment (cited above) offered a comprehensive standard taking due account of all the considerations that are relevant for the purposes of Article 3 of the Convention. It maintained the Contracting States' general right to control the entry, residence and expulsion of aliens, whilst recognising the absolute nature of Article 3. The Grand Chamber thus reaffirms the standard and principles as established in Paposhvili (cited above).
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> 134. Firstly, the Court reiterates that the evidence adduced must be "capable of demonstrating that there are substantial grounds" for believing that as a "seriously ill person", the applicant "would face a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy" (ibid., § 183).
>
> 135. Secondly, it is only after this threshold test has been met, and thus Article 3 is applicable, that the returning State's obligations listed in paragraphs 187-91 of the Paposhvili judgment (see paragraph 130 above) become of relevance.
>
> 136. Thirdly, the Court emphasises the procedural nature of the Contracting States' obligations under Article 3 of the Convention in cases involving the expulsion of seriously ill aliens. It reiterates that it does not itself examine the applications for international protection or verify how States control the entry, residence and expulsion of aliens. By virtue of Article 1 of the Convention, the primary responsibility for implementing and enforcing the guaranteed rights and freedoms is laid on the national authorities, who are thus required to examine the applicants' fears and to assess the risks they would face if removed to the receiving country, from the standpoint of Article 3. The machinery of complaint to the Court is subsidiary to national systems safeguarding human rights (ibid., § 184)."

At [140] the court turned to the application of those principles to the facts of the case before it, those facts being of no relevance to the appellant's case:

> "The Grand Chamber observes that in its judgment the Chamber did not assess the circumstances of the present case from the standpoint of the threshold test established in paragraph 183 of the Paposhvili judgment (cited above). As noted in paragraph 135 above, it is only after that test is met that any other questions, such as the availability and accessibility of appropriate treatment, become of relevance."

Mr Jafferji argued that these procedural requirements support his submission as to how the burden should shift in an Article 3 case involving serious illness. He acknowledged that one reading of [134] suggested that an applicant needed to adduce evidence capable of demonstrating that there would be a risk of being unable to access appropriate treatment before any obligation fell on the returning state to "dispel any doubts raised by the evidence". However, he submitted that an alternative reading was that the absence of appropriate treatment was simply something the applicant had to show would violate his Article 3 rights i.e. by reference to the seriousness of her illness. The applicant had no burden to demonstrate that the receiving country's medical facilities would be inadequate to cope with her illness.

47. On behalf of the SSHD Mr Hansen argued the polar opposite position. He submitted that *Paposhvili* did not involve any change from the usual approach to cases where an applicant asserts a violation of Article 3. He relied on [183] of *Paposhvili*, the material part of which was repeated verbatim at [134] of *Savran*. The SSHD's position was that an applicant must provide evidence in relation to medical facilities in the receiving state which is sufficiently cogent to establish a violation of Article 3. Only in that event would it fall on the returning state to meet that evidence should it choose to do so.

48. In my judgment the true position falls between these two extremes. As was explained at [186] of *Paposhvili* "it is not a matter of requiring the persons concerned to provide clear proof of their claim that they would be exposed to proscribed treatment". Rather, the applicant must "adduce evidence capable of demonstrating that there are substantial grounds for believing that, if the measure complained of were to be implemented, they would be exposed to a real risk of being subjected to treatment contrary to Article 3". This is not a position which will lead to uncertainty as submitted explicitly by Mr Jafferji and implicitly by the SSHD. Stage one of the process requires the applicant to provide strong evidence of the seriousness of the illness including the treatment involved and the consequences of removal of treatment. Those are matters which will only be within the knowledge of the applicant. She also must provide sufficient evidence to cast doubt on the availability or accessibility of treatment in the receiving state. The SSHD (or on appeal the F-TT) will be well capable of determining whether sufficient evidence has been adduced to cast doubt on the receiving state's medical facilities. This is reflected in the discussion at [32] in *AM (Zimbabwe).* The passage at [33] on which Mr Jafferji relied must be read in that context.

49. In *AM (Zimbabwe)* the Supreme Court anticipated that *Savran* would shed light on the procedural requirements. I am satisfied that *Savran* confirmed the position. The threshold test set out at [134] clearly requires evidence from the applicant about the position in the receiving state before there is any obligation on the returning state. The Strasbourg court does not use the term prima facie case since that is not a concept

commonly in use at that court. However, it is the term used by Sales LJ (as he then was) in the Court of Appeal in *AM(Zimbabwe)*. It is a concept familiar in this jurisdiction and more than capable of being applied in relation to applications of this kind.

50. In this case the appellant adduced evidence from Dr Tran about the availability of medical treatment in Vietnam. The F-TT considered this evidence and concluded that it was insufficient to establish a serious risk of a violation of Article 3 by reference to the lack of appropriate medical treatment. However, it is apparent that the F-TT did not ask the appropriate question. Rather than asking whether the appellant had proved the serious risk of a violation of Article 3 were she to be removed to Vietnam, the F-TT should have asked whether there were substantial grounds for believing that removal to Vietnam would lead to a serious risk of a violation of the appellant's Article 3 rights. I cannot say that the only answer to that question would have been negative. Had the F-TT concluded that the evidence of Dr Tran was sufficient to cast doubt on the availability of relevant medical treatment, it would have been for the SSHD to decide whether to adduce evidence on the topic.

51. In the real world, the SSHD in a case such as this would be almost certain to adduce country information evidence in anticipation of the F-TT's consideration of the issue. In the unlikely event that for some excusable reason such evidence had not been adduced, the F-TT would be likely to give the SSHD an opportunity to remedy the position. Where the SSHD is making the primary decision, the position will be the same. It will be for her to assess the strength of the evidence in respect of the medical condition relied on by the applicant. If she concludes that it is strong and the applicant provides evidence which provides substantial grounds for doubting the availability of treatment in the receiving state, she will obtain relevant country information before making her decision.

Conclusion

52. For the reasons I have given, the appeal against the decision of the UT in respect of the cessation decision must be dismissed. The reasoning of the F-TT as affirmed by the UT was not subject to any error of law. The factual conclusions were well within the bounds of the decision open to a reasonable tribunal considering the evidence in the case.

53. The appeal in respect of the appellant's Article 3 claim must be allowed. The UT did not consider the impact of *AM (Zimbabwe)* and the Strasbourg caselaw at all. The F-TT failed to apply the correct test to the evidence adduced by the appellant. Had it applied the correct test, it may well have concluded that the appellant had met the threshold in *Paposhvili* as explained in *AM (Zimbabwe)* and *Savran*. In that event, it would have been for the SSHD to consider what if any evidence to adduce in response.

54. Given my conclusions as to the nature of the threshold test, I am satisfied that it would not be appropriate simply to quash the decisions of the F-TT and the UT leaving the SSHD to re-make her decision. This is a case where the issue of the appellant's health and its impact on her Article 3 rights in the event of removal to Vietnam must be remitted to the F-TT for a re-hearing on that issue alone. It is now 2 ½ years since the first hearing before the F-TT. It would not be appropriate to

preserve any factual findings in respect of that issue. The re-hearing will reconsider the mental and physical health of the appellant as it now is and will receive such evidence as the parties think fit in relation to the availability of and access to relevant medical facilities in Vietnam.

LADY JUSTICE NICOLA DAVIES

55. I agree.

LORD JUSTICE PETER JACKSON

56. I also agree.