IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Cases No: UI-2023-001715
UI-2023-001716
UI-2023-001717

First-tier Tribunal No: HU/55409/2022
HU/55411/2022
HU/55413/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

23rd February 2024

Before

UPPER TRIBUNAL JUDGE LANE

Between

NR
AR
MR

(ANONYMITY ORDER MADE)

Appellant

and

Entry Clearance Officer

Respondent

Representation:

For the Appellants: Mr Osmani
For the Respondent: Mr Clarke, Senior Presenting Officer

Heard at Field House on 22 January 2024

DECISION AND REASONS

1. The first appellant is a female national of Afghanistan born on 15 March 1999. She appealed to the First-tier Tribunal against the respondent's decision dated 27 July 2022 to refuse her application for entry clearance. She is the mother of the second and third appellants, AR and MR. The First-tier Tribunal dismissed the appeals and the appellants now appeal to the Upper Tribunal.

2. The grant of permission succinctly sets out the issues in the appeal to the Upper Tribunal:

> The grounds assert that the Judge erred in law by failing to allow the appeals after finding it would be unjustifiably harsh for the Appellants to remain in Afghanistan. It is also argued that the Judge's approach to proportionality is flawed as she weighed the Appellants failure to meet the requirements of the Immigration Rules against them in the balancing exercise. Whilst it is clear that the Appellants cannot meet the refugee family reunion requirements under paragraphs 352A and 352D of the Immigration Rules, the Judge's finding that there are unjustifiably harsh consequences (at paragraph [52]) is arguably incompatible with her conclusion that the decisions are proportionate. This is because the Judge accepts the Appellants fall within the scope of paragraph GEN.3.2(2) of Appendix FM, which reflects part of the Secretary of State's policy as to where the line should be drawn in respect of those seeking entry on family life grounds. Following *TZ(Pakistan) & Another* [2018] EWCA Civ 1109, it seems to me that it is at least arguable that her findings that there are unjustifiably harsh consequences ought to have been positively determinative of the proportionality assessment as the grounds contend.

3. On first reading, the apparent anomaly identified in the grounds of appeal at [16] is of concern. At [52], the judge writes:

> Essentially this [the application of the test in GEN 3 of the Immigration Rules] would require finding of unjustifiably harsh consequences for the appellants to remain in Afghanistan. Given the objective evidence as well as the appellant's witness statement I find it to be unreasonably harsh for the appellants to remain in Afghanistan. [my emphasis].

4. For the judge thereafter to dismiss the appeal would perhaps seem surprising. The above paragraph is not well expressed. However, it is clear as one reads on in the decision that the judge found (correctly) that GEN 3 did not apply to these appellants and that the respondent Family Reunion Policy did not apply because 'the sponsor is not currently recognised as a refugee or has been granted humanitarian protection in the UK. He is here as an immediate family member of his brother who has … the sponsor arrived in 2017 when the appellant was married to another and therefore, they were not a family unit before the sponsor fled. Neither does he have indefinite leave to remain as it is limited to 31 December 2024.' Given the application for entry clearance which had been made and the circumstances of the sponsor and appellants described by the judge, the Tribunal was required to carry out a proportionality assessment rather than to determine whether, on the facts, a threshold (viz. undue harshness) had been crossed. The decision could, perhaps, have made this distinction clearer (the rather confusing submissions made to the judge did not help) but the Tribunal cannot be criticised for carrying out that proportionality assessment which she duly does at [57-64]. The judge's conclusion at [65] shows a an even-handed

and legally sound determination of the balancing factors for and against the appellants:

> Having considered the factors in favour and against allowing this case I have stepped back and looked at whether a decision to refuse would be proportionate given these factors. There are significant and weighty factors against the appellants. The Government has chosen to allow those with specific status to be able to apply. I apply the proportionality balancing looking at all the factors. Given the number of factors weighing against the appellants to which I given varied weight in the balance I find them not to be outweighed by those in favour of the appellant. I find in favour of the respondent.

5. I find that the judge has correctly determined this appeal on the basis of a proportionality assessment under Article 8 ECHR. That assessment is sound in law, being an outcome available to the judge on her analysis of the relevant balancing factors, and notwithstanding her observation (and it is no more than that given the test she was obliged to apply) that for the appellants to remain in Afghanistan would be unduly harsh. In the circumstances and notwithstanding a failure to express herself as clearly as she might have done, I find that the appeal is not vitiated by legal error. The appellants' appeals are dismissed.

Notice of Decision

The appeals are dismissed.

C. N. Lane

Judge of the Upper Tribunal
Immigration and Asylum Chamber

Dated: 21 February 2024