IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-003400
UI-2024-003401, UI-2024-003402
UI-2024-003403, UI-2024-003404

First-tier Tribunal No: PA/00393/2024
PA/00394/2024, PA 00395/2024
PA/00396/2024, PA/00397/2024

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 7th of November 2024

Before

UPPER TRIBUNAL JUDGE HIRST

Between

OMP
BAP
MAP
EAP
JP
(ANONYMITY ORDER MADE)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Walsh of counsel, instructed by Universe Solicitors
For the Respondent: Ms McKenzie, Senior Home Office Presenting Officer

Heard at Field House on 4 November 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the Appellants are granted anonymity.

No-one shall publish or reveal any information, including the names or address of the Appellants, likely to lead members of the public to identify them. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. The Appellants appeal from the decision of First Tier Tribunal Gould promulgated on 24 May 2024, dismissing the First Appellant's protection and human rights appeal. The Second to Fifth Appellants are the First Appellant's wife and children and are dependents on his asylum claim.

Background to the appeal

2. The First Appellant is a Nigerian national. The basis of his initial claim for asylum was that he feared persecution by Boko Haram because of his previous association with a particular Nigerian army battalion. The First Appellant additionally claimed that his daughters were at risk of female genital mutilation (FGM) by members of his family if returned to Nigeria.

3. The First Appellant's claim was refused on 18 December 2023 and his appeal against that refusal came before the First Tier Tribunal at a hearing on 20 May 2024. The Tribunal did not accept that the First Appellant had previously come to the attention of Boko Haram or that he and his family had subsequently been able to relocate and avoid detection, and concluded that he was therefore not at risk from Boko Haram on return. The Tribunal rejected the FGM claim on the basis that the claim was opportunistic and found that the First Appellant and his wife would be able to protect his daughters on return.

4. Permission to appeal was sought on the grounds that the Tribunal had erred in its approach to the Appellant's account of past adverse interest by Boko Haram and that the judge's findings as to the plausibility of the Appellant's account and risk on return were perverse. In particular:

    a. the judge mischaracterised [26] the nature of the First Appellant's case, which was that he had come to the attention of Boko Haram not because of his personal involvement in military action in the northeast, but because of his association with a Nigerian army battalion (NIBATT41) which had been active against Boko Haram in the region;

    b. the judge's conclusion [28] that the delay between the First Appellant leaving the army and his being targeted by Boko Haram undermined the credibility of his account was perverse and speculative;

    c. the judge's finding [29] that the First Appellant had not taken immediate action upon receiving threats from Boko Haram to protect himself and his family did not reflect the evidence, including that the Appellant had fled with his family to different regions in Nigeria on two previous occasions, and was perverse;

    d. the judge's finding [30] that the lack of targeting of the First Appellant between his relocation to Bodiji in December 2018 and May 2019 was not consistent with Boko Haram having hostile interest in him did not reflect

the evidence that he had in fact been targeted in Bodiji and was perverse;

e. the judge's finding [31, 34] that it was not plausible that Boko Haram would only post a 'wanted' poster on the First Appellant's gate was speculative as to the motives and conduct of Boko Haram.

5. Permission to appeal was granted on 25 August 2024 by Upper Tribunal Judge Rintoul on all grounds. There was no Rule 24 response by the Respondent.

Submissions of the parties

6. On behalf of the Appellant, Mr Walsh's submissions followed closely the grounds of appeal. The judge's reasoning in paragraph 26 necessarily involved an inference that Boko Haram would only be interested in individuals who were actually deployed in the northeast of Nigeria, and would be able to differentiate army personnel on the basis of their service, which was an impermissible and speculative conclusion in the absence of any evidential basis for it. The judge's reasoning and findings at paragraphs 27-31 were similarly speculative and based on impermissible inferences or assumptions as to the likely behaviour of Boko Haram which were not supported by evidence.

7. On behalf of the Respondent, Ms McKenzie submitted that there had been no error of law in the First Tier Tribunal's determination. The judge had been entitled to arrive at his decision on the evidence before him. There was no evidence before the judge as to the likely timeframe in which Boko Haram would be able to trace or contact a person of interest; however, the judge's conclusions were not speculative and were open to him on the Appellant's evidence. In relation to the 'wanted' poster, the judge had been entitled to give limited weight to the evidence given that the original document was not before him and the Second Appellant was not present to provide evidence.

8. The representatives were agreed that if I found there to be a material error of law in the First Tier Tribunal determination the appeal should be remitted to the First Tier Tribunal for a *de novo* hearing with no findings of fact preserved.

Conclusion

9. I remind myself of the principles to be applied by an appeal court to first instance findings of fact (cf *Volpi v Volpi* [2022] EWCA Civ 464 at [2]) and the role of the First Tier Tribunal as an expert tribunal. I also remind myself that perversity is a high threshold; and an appellate court may set aside a first instance decision on the basis that a judge has failed to give the evidence a balanced consideration only where the judge's conclusions are "rationally insupportable".

10. Having considered the judgment as a whole and the submissions of the parties, I conclude that the judge erred by misinterpreting or mischaracterising the evidence before him, and that his conclusions on material aspects of the First Appellant's account were based on impermissible assumptions about how Boko Haram would behave which were speculative and for which there was no evidential basis.

11. In relation to paragraph 26, the First Appellant's army experience, and his connection to NIBATT41, were not in dispute, and there was objective evidence before the judge indicating that members of Nigerian army battalions active in Boko Haram regions, including NIBATT41, had been targeted. I accept the Appellants' submission that the judge's conclusion that Boko Haram would not have been interested in the First Appellant because he had not personally been deployed in the northeast regions was based on a speculative inference that Boko Haram was able to differentiate between military personnel. That inference was not supported by any evidence before the First Tier Tribunal.

12. I accept that the judge's conclusions at paragraphs 28 and 30 of the determination were similarly flawed. The judge concluded at [28] that the delay between the First Appellant leaving the army in October 2017 and being contacted on Facebook by Boko Haram in October 2018 undermined the credibility of his account because it was inconsistent with the threat he claimed to face. At [30] the judge concluded that the lack of contact by Boko Haram between the Appellants' relocation to Ibadan in December 2018 and the 'wanted' poster in May 2019, were also inconsistent with the threat he claimed to face from Boko Haram and undermined the credibility of the First Appellant's account. Both conclusions were clearly based on the judge's subjective views about how Boko Haram might reasonably behave and were not supported by any evidence before him as to the ability of the group to trace and identify persons of interest or the likely timescales for doing so.

13. In relation to the 'wanted' poster, the judge's finding [31] was that it was "implausible" that Boko Haram would have managed to locate the First Appellant's new home in Ibadan but not acted on the threat to kill the First Appellant which was made in December 2018.

14. The judge's finding [29] that the First Appellant had not taken immediate action to protect himself and his family upon receiving threats from Boko Haram was not in my view a fair or balanced reflection of the evidence before him. The First Appellant's case was that he did not initially treat the first Facebook message as serious, because he thought it was not genuine; however, when that was followed up by further contact in December 2018 the First Appellant appreciated the seriousness of the threat and relocated his family to Ibadan state within a few days. The judge's conclusion that what he characterised as a failure to take action undermined the First Appellant's credibility was not in my view one which was adequately or rationally supported by the evidence before him.

15. Both the Upper Tribunal and the Court of Appeal have warned against the dangers of a first instance judge assessing credibility and risk on the basis of his own perception of what is 'reasonable' or 'plausible': see, for example, *HK v Secretary of State for the Home Department*[2006] EWCA Civ 1037 at [29]. I consider that in this case, the judge fell into precisely that error at paragraphs 26-31 of the determination by rejecting the First Appellant's account on the basis of his own perceptions of what was inherently plausible or probable, and that his conclusions went beyond what was rationally supported by the evidence before him.

16. Having rejected the First Appellant's account, the judge found that the Appellants were not at risk from Boko Haram and did not go on to consider issues

of sufficiency of protection or internal relocation. The errors in the judge's reasoning were therefore material to the outcome of the appeal.

17. I find that the First Tier Tribunal's decision disclosed material errors of law and I therefore set it aside. In light of the parties' agreement as to the disposal of the appeal it is appropriate to remit the appeal for a *de novo* hearing with none of the findings of Judge Gould preserved.

Notice of Decisions

The determination of the First Tier Tribunal involved the making of a material error of law and is set aside.

The appeal is remitted to the First Tier Tribunal for a *de novo* hearing with no findings of fact preserved.

L Hirst

Judge of the Upper Tribunal
Immigration and Asylum Chamber

4 November 2024