



**Upper Tribunal  
(Immigration and Asylum Chamber)**

**Appeal Numbers:  
UI-2022-002739 DC/00054/2021  
UI-2022-002740 DC/00055/2021**

**THE IMMIGRATION ACTS**

**Heard at Birmingham CJC  
On the 8 December 2022**

**Decision & Reasons Promulgated  
On the 23 January 2023**

**Before**

**UPPER TRIBUNAL JUDGE KEBEDE**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**YAQOUB SULEIMAN MOHAMMED  
SALMA ABDALLA AWATH  
(NO ANONYMITY ORDER MADE)**

Respondents

**Representation:**

For the Appellant: Mr Gazge, Senior Home Office Presenting Officer  
For the Respondents: In Person (not legally represented but accompanied by  
Mr Abdullah acting as a McKenzie friend)

**DECISION AND REASONS**

1. This is an appeal by the Secretary of State for the Home Department against the decision of the First-tier Tribunal allowing the appeals of Mr Mohammed and Mrs Awath against the decision to deprive them of their British nationality under section 40(3) of the British Nationality Act 1981.

2. For the purposes of this decision, I shall hereinafter refer to the Secretary of State as the respondent and Mr Mohammed and Mrs Awath as the appellants, reflecting their positions as they were in the appeal before the First-tier Tribunal.

3. The appellants are husband and wife and are currently British citizens. The second appellant entered the UK in June 2005 and claimed asylum as a Somali national, in the identity of Salma Abdalla Awadh/ Awath, born on 3 July 1975 in Kismayo, claiming to have been persecuted in Somalia and to have spent time in Kenya but to have left there because it was not safe. She was interviewed about her claim and was recognised as a refugee on 17 October 2005. She was granted indefinite leave to remain on 25 October 2005. The first appellant was granted indefinite leave to enter the UK on 26 May 2006, as a Somali national, under the family reunion provisions, in the identity of Yaqoub Suleiman Mohammed born on 3 March 1971 in Somalia. Both appellants applied for, and were issued with, certificates of naturalisation as British citizens on 30 October 2012.

4. The appellants' cases were referred to the Home Office Status Review Unit when it was discovered that both they and their two children had applied for, and been refused, entry clearance to the UK as family visitors on two occasions in July 2004, as Kenyan nationals. The application for the second appellant had been made in the identity of Salma Awadh Abdalla, born on 2 June 1974 in Kenya, and for the first appellant in the identity of Yakub Mohamed Suleiman born on 6 February 1970 in Kenya. The appellants had submitted their Kenyan passports as part of the application process and had been interviewed by the entry clearance officer. The appellants were contacted by the Home Office on 18 February 2015 for an explanation but did not reply. They were contacted again on 24 November 2020 and denied any knowledge of the Kenyan identities and applications, claiming that all arrangements had been made by an agent.

5. In a decision dated 30 June 2021 in relation to the second appellant, the respondent did not accept that she had no knowledge of the Kenyan identity and considered that her genuine identity was that of a Kenyan national. The respondent considered that the appellant had provided fraudulent details in her dealings with the Home Office and that her applications for ILR and British citizenship would have been refused if the true circumstances were known, because of the deception and owing to questions about her good character. The respondent considered that there was no innocent explanation for the misleading information which led to the decision to grant her citizenship and concluded that the fraud was deliberate and material to the acquisition of British citizenship. The respondent accordingly considered that deprivation of that citizenship was reasonable and proportionate. The respondent's decision in relation to the first appellant was in similar terms and was dated 29 June 2021,

6. The appellants appealed against that decision under section 40A(1) of the British Nationality Act 1981. Their appeals were heard on 20 December 2021 by First-tier Tribunal Judge Joshi. The appellants were not represented at the hearing but were accompanied by a McKenzie friend, Mr Abdullah. The second

appellant gave oral evidence before the judge and told the judge that she had never attended an interview with the British High Commission in Nairobi, that she was not aware of any applications having been made or refusal decisions and that she had not seen the documentation produced by the agent who brought her and her family to the UK. She produced a certified copy of a birth certificate which she said was posted to her from Somalia and she said that her siblings were Somali nationals with refugee status in the UK. She said that she had lived in Kenya with her family for about five to six years and had then returned to Somalia and then back to Kenya.

7. Judge Joshi found that the respondent had not discharged the burden of proof to show that the appellants had made false representations, concealed material information or committed fraud to obtain their citizenship. She found that the respondent had established a *prima facie* reason to investigate the allegation against the appellants but that the appellants had provided a reasonable explanation of why the applications and passports existed and that the respondent had made an unreasonable finding of fact that the appellants were Kenyan citizens. The judge accepted that the respondent had made enquiries with the Kenyan authorities in November 2020 and April 2021 about the authenticity of the Kenyan passports, but had received no response. She concluded that the respondent had not discharged the burden of proof to show that the appellants had committed fraud and she accordingly allowed the appeals.

8. Permission to appeal was sought by the Secretary of State on two grounds. Firstly, that the judge had made a material misdirection in law and jurisdiction by considering herself whether the Secretary of State had discharged the burden of proof in relation to the allegation of fraud, and therefore by re-making the discretion of the Secretary of State, rather than reviewing the Secretary of State's decision in accordance with the principles in administrative law, as per Ciceri (deprivation of citizenship appeals: principles) Albania (Rev1) [2021] UKUT 238 and Begum, R. (on the application of) v Special Immigration Appeals Commission & Anor [2021] UKSC 7. Secondly, that the judge's actual reasons for allowing the appeal disclosed a material error of law. Her reasoning in regard to the Kenyan passports was contrary to the findings in Hussein & Another (Status of passports: foreign law [2020] UKUT 250 as it was not open to her simply to accept the appellants' denunciation of their own passports in the absence of evidence that they were forgeries.

9. Permission was granted in the First-tier Tribunal on all grounds, albeit with the focus on the second ground.

10. The matter then came before me for a hearing and both parties made submissions.

### **Hearing and Submissions**

11. The appellants were accompanied by Mr Abdullah, acting as a McKenzie friend. They produced a skeleton argument prepared by themselves and Mr Abdallah in which they argued, with respect to ground 1, that the First-tier

Tribunal had reviewed the Secretary of State's decision and answered the fundamental questions by applying public law principles in accordance with the guidance in Ciceri and, with respect to ground 2, that the circumstances in the appellants' case were distinguishable from those in the case of Hussein and that in the appellants' case the burden of proving that the Kenyan passports were genuine lay upon the Secretary of State, the Secretary of State had failed to discharge that burden of proof and the judge was correct in concluding that the Secretary of State had made an unreasonable finding of fact that the appellants were Kenyan citizens.

12. Mr Gazge relied upon the Secretary of State's grounds of appeal and submitted that Judge Joshi had erred in law in paragraphs [44] to [54] by re-making the Secretary of State's discretion on a balance of probabilities, rather than asking the relevant question of whether any reasonable Secretary of State could reach the same conclusion. With regard to ground 2, the judge had erred by simply taking the appellants' word for accepting their denunciation of the Kenyan passports without any supporting evidence, contrary to the decision in Hussein.

13. The second appellant made submissions on behalf of herself and her husband, relying on the skeleton argument. With regard to the first ground she submitted that the judge's finding at [48], that the Secretary of State had made an unreasonable finding of fact, showed that the judge had followed the correct principles in Ciceri. With regard to the second ground, she submitted that the Secretary of State had relied upon copies of the Kenyan passports which had never been verified and had not received any response to enquiries made to the Kenyan High Commission. The circumstances were therefore different to Hussein which related to passports genuinely held and, whereas Hussein required questions of foreign law to be accompanied by expert evidence, the Secretary of State had produced no evidence to show that the passports were genuine.

## **Discussion and conclusions**

14. It is the appellants' submission that Judge Joshi adopted the correct approach, as set out in Begum, when answering the condition precedent question specified in section 40(3) of the British Nationality Act 1981, and undertook a review of the Secretary of State's decision rather than exercising the Secretary of State's discretion herself. They submit that that is evident from the judge's finding at [48], that "*the respondent has made an unreasonable finding of fact*" that they were Kenyan citizens. However such a finding is not, in my view, indicative of the correct approach being followed. Although at [40] of her decision Judge Joshi set out the guidance in Ciceri, I am in agreement with Mr Gazge that her findings at [44] to [54] did not demonstrate that she adopted the correct approach set out in that guidance and did not demonstrate that she had asked herself the correct questions for establishing whether the condition precedent existed, as set out at [71] of Begum, but rather that she had proceeded to re-make the Secretary of State's discretion herself, on a balance of probabilities.

15. Furthermore, I agree with the assertion in the Secretary of State's second ground that the reason for allowing the appeal disclosed a material error of law in any event. It is the appellants' submission that the judge was entitled to accept their denunciation of the Kenyan passports and to reject the Secretary of State's case to the contrary on the basis that there had been a failure by the Secretary of State to discharge the burden of proof which lay upon her. The appellants rely on the line of authorities in cases of allegations of fraud which establish that the burden of proof lies upon the respondent and seek to distinguish their circumstances from those set out Hussein. However I agree with Mr Gazge that the circumstances in this case are not in line with the authorities relied upon by the appellants, but rather that the situation is akin to that of Hussein whereby it was found by the Upper Tribunal that the burden of proving that the holder of a genuinely held passport was not a national of the issuing State lay upon the claimant. The appellants rely upon the fact that the Secretary of State had no evidence of the Kenyan passports being genuine given that there were only copies of the passports and that the Kenyan authorities had not responded to enquiries. However, similar to the situation Hussein at [7], the original Kenyan passports had been presented and inspected on two occasions by entry clearance officers and, whilst the entry clearance applications were refused, there had been no concerns about the genuineness of the passports at the time and there was therefore no reason to believe that they were not genuine documents. In the circumstances I agree with the respondent that the judge's reasoning at [48] ran contrary to the findings in Hussein and was materially flawed.

16. For all of these reasons it seems to me that Judge Joshi's decision was based upon material misdirections of law and that the Secretary of State's grounds are made out. The decision is not sustainable and has to be set aside.

17. With regard to the disposal of the appeals both parties submitted that the appropriate course would be for the matter to be remitted to the First-tier Tribunal. I have to agree. The decision has to be re-made *de novo*, on the basis of a correct application of the law.

## **DECISION**

18. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law. The decision is set aside. The appeals are remitted to the First-tier Tribunal to be dealt with afresh, pursuant to section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007 and Practice Statement 7.2(b), before any judge aside from Judge Joshi.

Signed: S Kebede  
Upper Tribunal Judge Kebede

Dated: 27 December 2022