



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-001826

First-tier Tribunal No: PA/51697/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 17 August 2023

Before

UPPER TRIBUNAL JUDGE RIMINGTON
DEPUTY UPPER TRIBUNAL JUDGE SHEPHERD

Between

FSA
(ANONYMITY ORDER MADE)

Appellant

and

The Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: Ms Lecointe, Home Office Presenting Officer

For the Respondent: Ms C Meredith, Counsel, instructed by Birnburg Peirce Solicitors

Heard at Field House on 4 July 2023

DECISION AND REASONS

1. The application for permission to appeal was made by the Secretary of State, nonetheless we will refer hereinafter to the parties as they were described before the First-tier Tribunal (FtT).
2. The Secretary of State seeks to appeal, with permission, against the decision of First-tier Tribunal Kudhail (the judge) dated 20th February 2023, which allowed FSA's appeal against the respondent's refusal, dated 25th March 2021, of her protection and human rights claim.
3. The appellant had claimed asylum in the United Kingdom on 19th November 2019 on the basis that she had a well founded fear of persecution in Somalia as a lesbian woman from Somalia. The respondent asserted the appellant had submitted a Somali passport which was deemed to be a fraudulent document and that the appellant had held and renewed Kenyan passports, said by the Home Office to be legally obtained, and had used these passports to travel to

various countries with a Kenyan identity. It was not accepted that she came from Somalia or that she was gay or that she would face difficulties on return to Kenya.

4. On 4th October 2022, a face to face hearing before the First-tier Tribunal was converted to a virtual hearing owing to rail strikes, and the Tribunal raised an issue with the respondent regarding missing evidence, a document forgery report, from the respondent which supported the allegation of the appellant possessing a false Somali passport. The tribunal identified that the statement of Shahzad Samuel dated 11th March 2021 referred to a document forgery report from the National Document Forgery Unit dated the 19th of February 2020 which had not been disclosed but appeared to have been relied upon to come to the conclusion that the appellant's Somali passport was not genuine. Reference in Shahzad Samuel's witness statement was made to a "NDFU witness statement" as an exhibit but this was missing. The evidence from Tosin Pratt, dated 12th March 2021, according to [9] of the decision under challenge, referred to fingerprint matches of the appellant's Kenyan passport as opposed to issues with the Somali passport itself. The judge said this at [9]

"This Tribunal took the opportunity to raise an issue with the respondent regarding the refusal notice and missing evidence supporting the allegation of the appellant possessing a false Somali passport. Ms Afework, appeared on that occasion and this Tribunal identified that the statement of Shahzad Samuel [p646/CB], refers to a report dated 19 February 2020, which has not been disclosed but appears to have been relied upon to come to the conclusion that the appellant's Somali passport is not genuine." —

5. As a result, a direction was made for the respondent to review the evidence relating to the appellant's claimed Somali nationality, in particular the witness statement of Samuel Shahzad and Tosin Pratt on which she sought to rely. A response was made by the respondent on the 2nd November 2022 stating that "only one meaningful review will be conducted in each case". No further evidence was produced and the judge observed at [13], that the direction was not properly engaged with and this was surprising as the Home Office presenting officer at the case management review agreed it was required yet she filed that response.
6. At the resumed hearing the Home Office presenting officer confirmed she would be relying only on the evidence as presented to the tribunal.
7. The judge set out the position as follows:

"27. The respondent does not accept the appellant is Somali national, this is based on the fact that she does not accept the Somali passport as genuine and asserts that it was found to be a fraudulent upon inspection. Reliance is placed on "NDFU exhibit statement" [para40/449/CB].

28. I have considered the witness statement of Shahzad Samuel dated 11 March 2021 {646/CB}. This refers to the fact that he received a forgery report from the National Documents Fraud Unit and that the examining officer confirmed the documents is fraudulent in her report dated 19 February 2020. He then states the report is exhibited as "NDFU witness statement". As paragraph 9-13 above, sets out this Tribunal raised with the respondent that it appeared this evidence was missing and allowed her the opportunity to review her decision and the evidence. However, the respondents response to the direction was to maintain her position and not to conduct a review. This is

unfortunate as in the absence of this report, I am unable to ascertain the basis for the claim that the Somali passport is fraudulent.

29. I have also considered the statement of Tosin Prat, which forms the evidential basis for the respondent's acceptance that the appellant is Kenyan and in fact, FA Issak [FSI]. This statement refers to US Homeland security confirming that the appellant's fingerprints were matched with applications made for entry into the US from Kenya. Within these applications the appellant used a Kenyan passport, used the name FSI and a different date of birth. The appellant does not dispute this but states she obtained the Kenyan passport via an agent as Somalia was in war, there was no issuing authority and her only means to travel was by obtaining a Kenyan passport. Having a Kenyan passport in and of itself does not mean the appellant is not Somali, as a person can have dual nationality."

8. The judge also set out the range of evidence at [30] (a) to (s) that the appellant had provided to support her claim to Somalian nationality.
9. The judge from [31] onwards carefully analysed the evidence noting that the applicant explained how and why she obtained a Somalian passport [31], that it was issued when Somalia had a functioning government, before Somalia collapsed into anarchy and that she provided a birth certificate [32] and an identity document. Her account was said by the judge to be detailed, plausible and consistent. The judge found the appellant had provided statements from five witnesses, and although the judge exercised caution as these witnesses did not attend, it was noted key witnesses had been accepted as Somali by the respondent and the appellant provided DNA evidence offering 'strong evidence' supporting the claimed relationship of half first cousins. This was 'on the lower standard' evidence of the claimed relationship [33]. One of the witnesses, a cousin, was a Senior Biomedical Scientist at Kings College hospital and his account accorded with the DNA and appellant's evidence. He was born in Mogadishu.
10. The judge took account of the claim of the respondent that the appellant held a genuine Kenyan passport which was supported by her visa application form, a copy of the passport and the statement of Tosin Pratt. The judge noted that the appellant claimed that she had obtained this passport using an agent in Kenya using a false identity. It was identified that the appellant accepted the Kenyan passport was genuine, but said it was obtained using false information; she used the passport knowing it was based on false information. The judge noted it was open to the Secretary of State to seek to have the appellant's nationality confirmed by the Kenyan authorities and indeed the appellant's solicitors sought the respondent's assistance to obtain the same [36]. The judge took account of the respondent's review but rejected the assertion that because she was a teacher this would help her navigate the Kenyan passport application procedures independently. The judge also identified, at [37], the respondent's own policy guidance Nationality: disputed, unknown and other cases, V6 02 October 2017 which noted that the burden rested with the Home Office, if asserting that that the claimant was a specific nationality, but on the balance of probabilities. The judge then stated 'Taking all the evidence in the round, I accept on the lower standard that the appellant has discharged the burden of proof that she is a Somali national' [38].
11. The judge also reasoned at [39]

'With regards to the appellant (sic) claimed Kenyan nationality, I attach weight to [the] statement of Tosin Pratt, Kenyan passport and visa application. I balance that by the explanation offered by the appellant, which I find plausible given her acceptance that the document is genuine but based on fraudulent information provided by an agent. I also take into account the appellant has always stated the document is not accurate and that she is Somali. She has provided credible evidence that she is Somali. On balance, I do not find the respondent has discharged the burden of proof establishing the appellant is Kenyan given the evidence before this tribunal.'

12. Considering all the evidence in the round, the judge found the appellant was gay and that her detailed account was credible. The judge found the appellant was from Somalia and that she had lived discreetly owing to her fear of being killed and had expressed a desire to live with her partner openly [56]. Relying on an expert report, the judge also found the appellant would be at risk from Al Shabab in her home area and from wider society as a gay woman [57].

The Grounds of Appeal

13. Ground 1. There was one ground of appeal; that the judge had used the incorrect standard of proof when considering nationality. At [38], it was submitted, the judge appeared to use the wrong standard. Further the judge had materially erred when considering the burden of proof because reliance in this case was on the appellant, in accordance with **Hussein & Anor (Status of passport: foreign law) Tanzania** [2020] UKUT 250. The burden of proof in this case rested with the appellant. Caselaw trumped policy guidance which predated **Hussein**. Attached to the grounds for appeal was the 'requested NDFU report evidencing that the Somali passport is false', which we shall refer to as 'the missing document'.

The Hearing

14. At the hearing before us Ms Lecointe made an application for the admission of the missing document. She was not clear whether the missing document was before the FtT or not. She submitted that the report indicated there had been alterations in relation to the Somalian passport. The judge, she submitted, was aware that the respondent objected to the Somalian passport but the judge did not know the detail. There was a document which suggested issues around the Somalian passport. There was no explanation as to why the missing document was not in front of the court although she accepted it was in existence at the relevant time.
15. Ms Meredith relied on her Rule 24 response and objected to the late production of that document. The Secretary of State had been given an opportunity to produce the missing document before the FtT and further to take instructions but simply refused to conduct a further review and merely relied on the material before the FtT which was deficient. The application under rules 5 and 15(2) of the Tribunal Procedure (Upper Tribunal) Rules 2008 should be refused and the missing document excluded. In any event, she advanced, even if the document were admitted it went nowhere. The appellant accepted that the Kenyan passport was a genuine document, but said Somalian passports could not be obtained during the civil war which was consistent with the country guidance. That account had not been challenged. Further the respondent was in breach of the specific direction of the court.

16. She said there was no material misdirection in law particularly given the unchallenged findings of the judge. The grounds of appeal were misconceived because the correct standard of proof was that in relation to whether there was a real risk of persecution and of serious harm on return to which the lower standard of proof applied. **Hussein** does not deal with the standard of proof and the Court of Appeal had dealt with that issue in **RM (Sierra Leone)** [2015] EWCA Civ 541 at [35]. The issue here was not the practical issue of obtaining a passport but the issue of determining whether the appellant would face a real risk because of her nationality. **Hussein** sets out three questions, her own case was not challenged that it was falsified because she was unable to obtain a Somali passport at the relevant time and so she obtained a Kenyan one. The Secretary of State's case did not go beyond that. Stage 2 of **Hussein** was that notwithstanding the passport, the surrounding evidence should be considered. **Hussein** could be distinguished because in that case the appellant was found to be incredible on a number of issues and that was not the case here. The appellant here submitted written evidence including medical (DNA) evidence, gave oral evidence, was cross examined and weight was attached by the judge to unchallenged evidence.
17. In **Hussein**, the appellant submitted no further evidence; that was wholly different from this appeal. In this instance the Secretary of State put forward a technical case of a misdirection of law argument, which was misconceived, but challenged none of the facts before the FtT and so her appeal must fail. The judge dealt with the evidence on Kenyan nationality before looking at what the applicant had considered in relation to the Somali passport and did consider the Secretary of State's case on a number of occasions [27], [29] and [39]. The judge accepted that the appellant had a Kenyan passport because there was no Somali granting authority. The judge did not dispute the VAF issue and accepted that the appellant did travel on the Kenyan passport. The judge had considered each angle.
18. Ms Meredith concluded by saying particular attention should be paid to the various findings of the judge, in particular on the expert DNA evidence, the caution applied to the witness' evidence, and the expert report of Dr Hohne, the thrust of which was that the appellant was from Somalia. None of this was challenged. These were legitimate findings of fact which grounded the reasoning that the appellant was not Kenyan but in fact Somali. Lastly the judge merely found that it was open to the Home Office to confirm nationality with the Kenyan authorities and that was as far as that went. This was not in conflict with the finding that the appellant had discharged the burden of proof to the lower standard.

Analysis

19. We have considered the overriding objective and the interests of justice when we come to our conclusions. The judge made plain in her decision at [28] that the missing document was not before her. The missing document, which we considered de bene esse, asserted that there was damage to the photograph on the Somali passport issued in 1986, and the ink seal appeared to go under the photograph. We do not, however, admit the missing document either under Rule 5 or Rule 15(2)A. In fact, what was being asked by Ms Lecointe was the admission of a new document in the face of the specific direction of the Tribunal judge, as set out above, for timely production to the FtT and which had simply been ignored.

20. The **Ladd and Marshall** [1954] EWCA Civ 1 guidelines are as follows:

“In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible”.

21. The conditions for admission in relation to the Ladd and Marshall principles were simply not fulfilled. The exhibit could have been obtained with reasonable diligence, indeed there was a direction for production and an adjournment which assisted the Home Office. We note the statement of Shahzad Samul was dated 11th March 2021 and the underlying document dated 19th February 2020, both well before the hearing of 20th February 2023. The judge did not direct a review but particularly the missing document to be produced and the response confirming only one review is routinely made was made by the very same Home Office presenting officer who had conduct of the matter at the CMR, who must have appreciated what was being requested yet failed to action the direction.
22. We do not find that the judge can be criticised for her approach to document deficiency when the Secretary of State had failed to produce the same despite an opportunity to do the same. We appreciate the overriding objective and the interests of justice but in this particular case, owing to the specific circumstances, we cannot find an error of law on the part of the judge in relation to this aspect.
23. Secondly, as Ms Meredith submitted, the document takes the matter little further forward. It was quite clear from the Secretary of State’s refusal letter that the Somalian passport was deemed to be fraudulent. The position was set out clearly in the refusal letter and the witness statements, particularly that of Mr Samuel dated 11th March 2021 (who referred to the NDFU exhibit) and the statement of T Pratt Home Office FCC Department.
24. The judge at [28] addressed the statement of Shazad Samuel dated 11th March 2021 and was aware that the underlying exhibit document asserted fraud. The judge stated at [28] that Mr Samuel had received a forgery report from the National Document Fraud Unit and “the examining officer confirmed the document[s] is fraudulent in her report dated 19th February 2020”. The judge however stated that the Secretary of State when responding to the direction to produce the same merely maintained her position and the judge was therefore ‘unable to ascertain the basis for the claim that the Somali passport was fraudulent’. The judge at [31] stated that he noted the details in the appellant’s account of when how and why she obtained the passport, and we conclude that it was open to the judge to make those findings in the light of the evidence before her having carefully considered the evidence in the round. The judge also considered the statement of Tosin Pratt dated 12th March 2021 in relation to the Kenyan passport but accepted the appellant’s explanation that she had obtained a genuine Kenyan passport via an agent using false information [28, 31, 38], and [39]. Thus, the judge was fully aware of the allegations of the Home Office despite the absence of the underlying document, and we consider addressed them properly.

25. We bear in mind **RM (Sierra Leone)** [2015] EWCA Civ 541 which addressed the standard of proof where the Tribunal is obliged to determine the appellant's nationality. As stated at [35] what standard of proof applies to the question of an applicant's nationality depends on the legal issue to which it is relevant. As the court stated 'if it is relevant to whether he will suffer persecution... the lesser standard will apply. But if it is relevant to some other issue such as whether it is in fact possible in practice for him to be returned' and any rights that may accrue, the standard is the balance of probabilities. In this case the issue was clearly relevant to whether the appellant would suffer persecution as her nationality determined whether she might face persecution in the country of return.
26. Turning to the application of **Hussein** the headnote reads:
- 1. A person who holds a genuine passport, apparently issued to him, and not falsified or altered, has to be regarded as a national of the State that issued the passport.*
- 2. The burden of proving the contrary lies on the claimant in an asylum case'.*
27. As can be seen from above, the judge carefully considered the position of the Kenyan passport and **Hussein** does not countermand the Court of Appeal's guidance in **RM (Sierra Leone)**. The judge accepted the appellant's case that she had a Kenyan passport because she was not able to obtain a Somali one at the time because of the collapse of the Somali government during that period. This was not challenged. The judge made a series of cogent findings in relation to the appellant's Somalian nationality and as pointed out **Hussein** can be distinguished from this case because in that case at [17], the judge reached adverse 'unchallenged views on the appellant's credibility'. That was not the case here. The judge was clearly aware that the Secretary of State maintained the Somali passport was fraudulent and that the appellant was deemed to have a valid Kenyan passport. The judge reached plausible and cogent findings in relation to the appellant's credibility in relation to both her underlying claim and on nationality.
28. The UNHCR guidelines cited in **Hussein** at [12] state that 'a person holding a passport showing him to be a national of the issuing country, but who claims that he does not possess that country's nationality, must substantiate his claim, for example by showing that the passport is a so-called 'passport of convenience'. The appellant, here, as the judge found, produced a range of evidence and did not merely assert the claim. Further, the judge investigated that claim in a detailed and careful manner on evidence which remained unchallenged. As the UNHCR Handbook continues 'in certain cases, it might be possible to obtain information from the authority that issued the passport. If such information cannot be obtained, or cannot be obtained within reasonable time, the examiner will have to decide on the credibility of the applicant's assertion in weighing all other elements of his story". That is what the judge did here.
29. By contrast, in **Hussein** the appellant was said to have no expert evidence in support of his claim and was not entitled to be regarded as generally credible. Although the judge's decision may be regarded as generous, it is properly reasoned on the appropriate standard of proof, and it is not for this Tribunal to merely substitute its opinion. **Volpi v Volpi** [2022] EWCA Civ 464 confirms at

2(i) that '*An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong*'.

30. The judge considered the submissions of both parties carefully and made detailed factual findings which were dedicated to nationality. In **Hussein** none of the judge's adverse findings on credibility were challenged. Even if the appellant fell within the first question in **Hussein in the headnote**, the judge found she met the second question and discharged the burden of proof. The legal question here was in relation to an asylum claim and thus the judge used the correct standard of proof. The judge considered the background material in relation to Somalia, the Somalian birth certificate and accepted the DNA evidence and the witness statements. None of those findings were challenged. As stated by the judge at [36], it was merely 'open' to the respondent to seek confirmation of nationality and this does not indicate that the judge misdirected herself as to the burden of proof (that is placing the burden of proof on the respondent) and which she properly approached.
31. There was no arguable error of law, and the decision of the First-tier Tribunal shall stand.

Helen Rimington

Judge of the Upper Tribunal
Immigration and Asylum Chamber

31st July 2023