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In 1999, the High Court in Zambia declared that Kenneth Kaunda, president of the country from 1964 to 1991, was not a citizen of the state he had governed for twenty-seven years. This surreal decision was the culmination of a process of manipulation of citizenship law blatantly aimed precisely at excluding the country's elder statesman from holding office once again. The same year, the courts in Côte d'Ivoire annulled the nationality certificate of former prime minister Alassane Ouattara, on the grounds that it had been irregularly issued (for the case of Alassane Ouattara, see above, p. 81). These are just the two most high-profile cases in which governments have used and abused the laws and policies governing the grant of citizenship during the transition to independence of African states to attempt to secure their own hold on power.

Under international law, citizenship cannot be revoked against the person's will except in very restrictive circumstances, and in accordance with due process of law. Well-established principles forbid racial, ethnic or other discrimination in the grant or removal of citizenship, as well as the deprivation of citizenship if a person would then be stateless; and require that a system of challenge to such decisions should be available through the regular courts. A person cannot be expelled from his or her country of citizenship, no matter what the destination. Moreover, though a state may expel non-nationals from its territory or deport them to their alleged state of origin, this is allowed only if the action respects minimum rules of due process, including the right to challenge on an individual basis both the reasons for expulsion or deportation and the allegation that a person is in fact a foreigner. The African Commission on Human and Peoples' Rights – the

guardian of the African Charter on Human and Peoples' Rights – has confirmed many of these rules at African level.

Revocation (or denial) of citizenship by naturalization can in some cases be unproblematic, most obviously if it has been obtained by fraud (though even then, an individual who would become stateless could make a strong case that it should not be allowed); most African citizenship laws include rules to this effect. It is also relatively uncontroversial for a naturalized citizen to be deprived of his or her nationality if the individual has committed a serious crime against the state, or fought for a foreign country against the state that has granted him or her its passport. Again, a wide range of African states make similar provisions. More problematic is the common provision that a person – in some cases whether naturalized or a citizen from birth – loses his or her nationality if he or she acquires the nationality of another state: the prohibition on dual citizenship. And some African states even allow for deprivation of citizenship by birth on virtually unlimited discretionary grounds, including vague allegations of disloyalty to the state. Whatever the legal grounds asserted, such provisions can always allow serious abuse when citizenship can – as is all too common – be taken away without any effective due process, on the discretion of a single official, and without any appeal to a court or other tribunal.

The Egyptian nationality law, for example, gives extensive powers to the executive to revoke citizenship, however obtained, including on the grounds that an individual has acquired another citizenship without the permission of the minister of the interior; enrolled in the military of another country or worked against the interests of the Egyptian state in various ways; and most contentiously if 'he was described as being a Zionist at any time' – allowing for deprivation of citizenship on simple denunciation by a fellow citizen. The law provides additional reasons for the revocation of citizenship from those who obtained it by naturalization. The Libyan nationality law repeats the provision on Zionism, and adds a power to revoke citizenship if a person has converted from Islam to another religion.

Examples of better-drafted law do exist. South Africa specifically provides that no citizen may be deprived of citizenship against his or her will; some other countries, such as Ghana, allow deprivation of citizenship (by naturalization only) on appropriately limited grounds, requiring reasons to be given and providing the right to challenge the decision in court.

Yet, as the cases below show, the right to a legal challenge is not always sufficient: the courts may not always rule in ways respectful of human rights principles, if the law is itself in violation of those principles.

Zambia: Kenneth Kaunda and others become instant foreigners

After twenty-seven years of one-party rule following independence, Zambia held multiparty presidential and parliamentary elections on 31 October 1991. The elections were won by the Movement for Multiparty Democracy (MMD), led by Frederick Chiluba. It was one of the first post-cold-war transitions on the African continent, much heralded as a model for other countries. Unfortunately, the initial promise of the transition was betrayed.

In 1993, the MMD fulfilled a campaign pledge to review the constitution by appointing a twenty-four-member review commission to collect views from the general public and provide proposals for the content of a new constitution. The Mwanakatwe Commission, named for its chairman John Mwanakatwe, released its report in June 1995, including a contentious recommendation for a constitutional amendment to require that both parents of any presidential candidate should be Zambians by birth. This clause would effectively disqualify former president Kenneth Kaunda, whose parents were Malawian missionaries, from standing for the presidency in the 1996 elections on the ticket of the United National Independence Party (UNIP) – the party that he had led during the independence struggle and which had been in power since 1964 until defeated by the MMD. The ruling party pushed the amendment through parliament in 1996, rather than providing for the recommendations to be agreed by a constituent

assembly and subject to a referendum, as the Mwanakatwe Commission had recommended.¹

The opposition Zambia Democratic Congress party unsuccessfully sought to prevent the adoption of the constitutional amendment through the courts.² Kaunda was thus not allowed to contest the 1996 elections, which were held in an atmosphere of severe threat to all opposition candidates;³ in 1997 Kaunda was detained for several months during a general crackdown following an alleged coup attempt.

Chiluba's government had already begun to use citizenship and immigration law to disable its political opponents. William Steven Banda and John Lyson Chinula – both leading members of UNIP – were separately deported to Malawi in 1994 under the Immigration and Deportation Act, on the grounds that they were not citizens and were 'likely to be a danger to peace and good order in Zambia'. Banda fought his deportation order in the courts, arguing that he had a Zambian National Registration Card and a passport and had used these freely for many years without challenge, but the Supreme Court ultimately denied his claim and he was forcibly deported. Chinula was given no opportunity to contest his deportation order before the courts at all and was immediately deported. The Malawian courts, however, declared both deportees not to be Malawian citizens.

Amnesty International complained to the African Commission on Human and Peoples' Rights on behalf of Banda and Chinula. In 1999, the Commission found that the deportations were politically motivated and that Zambia was in contravention of the African Charter by not applying due process in the two cases.⁴ Chinula died in Malawi before the Commission concluded its consideration of the case; despite the ruling, the Zambian government did not allow William Banda to return until fresh elections brought the new government of President Levy Mwanawasa, still heading the MMD, in 2002.

In an ironic twist, following the 1996 elections, the dual-parentage clause was invoked to challenge in court the re-election of President Fredrick Chiluba. The petitioners alleged

that Chiluba's father was not Zambian by birth and therefore Chiluba did not qualify to be elected president of Zambia. This time, the Supreme Court affirmed that citizenship must not be defined in discriminatory terms and questioned the rationale of the provision in the constitution requiring both parents of a presidential candidate to be Zambians by birth. The court held that, while the language of the amendment did not in fact exclude 'non-indigenous' Zambians from the presidency, if it had it might have violated the non-discrimination provisions elsewhere in the constitution. In any event, whichever of several proposed biographies was adopted, Chiluba's ancestors came from Northern Rhodesia (what is today Zambia) and his citizenship and eligibility for the presidency could not be questioned.⁵

In a subsequent case heard in 1999, petitioners from the MMD requested the court once again to review Kaunda's citizenship.⁶ It was argued that the Zambian citizenship of Kaunda should be quashed, that Kaunda had never qualified to be elected president of Zambia, and that he should be declared to have ruled Zambia as president illegally. The High Court observed that Kaunda's own affidavit showed that he had renounced entitlement to Malawian citizenship on 21 June 1970. Thus, the High Court concluded that Kaunda had become a citizen of Malawi by descent when Malawi became independent (on 7 July 1964), but that at the time of the case he was neither a Zambian nor a Malawian citizen and thus a stateless person. Kaunda appealed to the Supreme Court, but the case was settled in 2000 and Kaunda's citizenship restored.

In 2001, the MMD split, after President Chiluba unsuccessfully sought a third term in office. Vice-President Christon Tembo formed a new party, the Forum for Democracy and Development (FDD). The government questioned the citizenship of both Tembo and Dipak Patel, another member of parliament who joined the FDD, who it alleged had not been a citizen when he first stood for election in 1991. Ironically, the MMD had refused citizenship to Majid Ticklay, a resident of Zambia since childhood but of Indian origin, to protect Tembo's own parliamentary seat when Ticklay wished to run for office in 1996.

In April 2003, President Mwanawasa appointed a fourth constitutional review commission, headed by lawyer Wila Mung'omba; and in August of the same year, a twenty-six-member Electoral Reform Technical Committee (ERTC) to analyse and make recommendations regarding the legal framework of the electoral process. The eligibility criteria to run for president were relevant to both processes. The Mung'omba Commission completed its work and mandate in December 2005. Most of the petitioners who addressed the subject of the parentage clause in the qualifications for presidential candidates argued for the provision be repealed. The Commission supported this view, on the basis also that the Supreme Court had doubted the constitutional validity of the parentage clause, and recommended that the requirement should be simply for the president to be a citizen 'by birth or descent' and not a dual citizen.⁷ Responding to the ERTC report, which made the same recommendation, the Zambian government indicated that it also supported the repeal of the provision on parentage.⁸ In 2007, President Mwanawasa established yet another constitution-drafting process under a National Constitutional Conference; following elections after Mwanawasa's untimely death in 2008, new president Rupiah Banda, also of the MMD, was expected to continue with the NCC process.

Botswana: the case of John Modise

John Modise was born in South Africa of Batswana parents, prior to the independence of Botswana, and brought up in Botswana. Until 1978, the year that he became a founder and leader of an opposition political party, Modise held Botswana citizenship without problems. In that year, the government of Botswana decided that Modise could not claim to have citizenship by descent,⁹ and the Office of the President declared Modise a prohibited immigrant. His arrest and deportation to South Africa followed soon thereafter. Even one of Africa's most stable democracies resorted to underhand means to prevent challenge to the status quo.

Modise was not given the chance to challenge the deportation in court and his removal prevented him from following up on an

application for a temporary work permit which, if granted, would have allowed him to remain in Botswana. Four days after the first deportation, Modise re-entered Botswana and was arrested, charged with illegally entering the country as a prohibited immigrant, and deported again without a hearing. After his third attempt to enter Botswana he was again arrested and charged with the same crime, but was this time sentenced to a ten-month prison term. Modise filed an appeal but before it was heard he was again deported to South Africa.

The South African government did not recognize Modise as a citizen either and he was forced to settle in the then 'homeland' of Bophuthatswana, where he lived for seven years before he was again deported, this time to the no-man's-land border zone between Botswana and South Africa, where he lived for several months. Modise was finally allowed to re-enter Botswana on humanitarian grounds, but was forced to remain on the basis of temporary residence permits, which were renewed every three months at the discretion of the Ministry of Home Affairs.¹⁰

The effect on Modise of being rendered stateless, declared a prohibited immigrant, deported numerous times and kept in a prolonged state of insecurity was to bankrupt him, disrupt his personal life and effectively quash his political aspirations. In 1993, a complaint was filed on his behalf with the African Commission on Human and Peoples' Rights, which was finally decided in 2000 after many attempts to reach an amicable resolution. The Botswana government attempted a solution to the problem for many years by offering Modise citizenship by naturalization: but though citizenship by naturalization extends nearly all of the same rights as are conferred on those categorized citizens by birth or descent under the law, the constitution places limits with regard to the holding of political office. As a naturalized citizen Modise would not be eligible to hold the highest political office in Botswana – that of president. Citizenship by naturalization would also not guarantee citizenship of his children, unless it was granted retroactively.

The African Commission ruled in favour of Modise, found

Botswana to be in violation of Articles 5 and 7 of the African Charter on Human and Peoples' Rights and recommended that Botswana recognize Modise's citizenship by descent. The African Commission held that

while [restrictions on holding public office] may not seriously affect most individuals, it is apparent that for Mr Modise such is a legal disability of grave consequence. Considering the fact that his first deportation [and declaration as a prohibited immigrant] came soon after he founded an opposition political party, it suggests a pattern of action designed to hamper his political participation. When taken together with the above action, granting the Complainant citizenship by [naturalization] has, therefore, gravely deprived him of one of his most cherished fundamental rights, to freely participate in the government of his country, either directly or through elected representatives.¹¹

The Botswana government has, however, never backed down from its initial objections to Modise's claim to citizenship and the case finally ended with Modise being forced to accept Botswana citizenship by naturalization.¹²

Swaziland: critics are 'un-Swazi'

Since Swaziland gained independence from the United Kingdom in 1968, its rulers have chosen to emphasize an exclusive ethnic identity for the country. Tradition has been invoked to uphold a monarchical system that has never subjected itself to the rule of law or allowed public debate on the national destiny. And in support of this system of government with no democratic limits on power, a primary weapon used by Swaziland's rulers has been to describe critics as 'foreign', divisive and hostile to Swazi 'tradition'.

During the lead-up to independence, King Sobhuza and his supporters had resisted the operation of political parties, already describing them as antithetical to the 'traditional' systems of Swazi government. Parties were formally allowed by the independence constitution, but in the pre-independence elections no

opposition candidates won a seat. In the 1972 general elections, however, Swaziland's first as an independent country, an opposition political party, the Ngwane National Liberatory Congress (NNLC), gained three seats in parliament. The reaction was immediate. Before the elected candidates could be sworn in, the minister responsible for immigration issued a declaration that one of the members of the NNLC, Bhekindlela Thomas Ngwenya, was a 'prohibited immigrant' under the 1964 Immigration Act and subject to deportation.

Ngwenya challenged the declaration in court, and the deportation order was set aside by the High Court in August 1972 on the grounds that the government had not shown that he was not a citizen.¹³ The government appealed.

While the appeal was pending, an amendment to the Immigration Act was rushed through parliament to establish a tribunal to decide cases of disputed nationality, from whose rulings an appeal could only be made to the Office of the Deputy Prime Minister, whose decision was final.¹⁴ The tribunal, whose jurisdiction was retroactive, ruled that Ngwenya was not a citizen of Swaziland. Ngwenya then challenged the competence of the tribunal in the High Court, which ruled against him in January 1973;¹⁵ on appeal, however, the Court of Appeal ruled in March 1973 that the amendment to the Immigration Act removing the jurisdiction of the High Court was unconstitutional because in effect it amounted to a constitutional amendment and had not followed the correct procedures.¹⁶

On 12 April 1973, the prime minister introduced a motion in parliament abrogating the constitution, the opposition walked out, and the king later that day announced the repeal of the constitution and then the banning of political parties.¹⁷ Among the laws subsequently promulgated was an exceptionally exclusive 1974 citizenship law which essentially required applicants to show that they owed allegiance to a Swazi chief (*ukukhonta*) if they wished to acquire Swazi citizenship; part of a general rise in the political mobilization of Swazi ethnicity.¹⁸

In more recent years, the Swazi government has consistently

harassed Jan Sithole, the vocal general secretary of the Swaziland Federation of Trade Unions (SFTU). Among the many campaigns waged against Sithole for his outspokenness, which have included beatings and assault by security forces, court actions and kidnapping, has been an attack on his integrity and loyalty to Swaziland by virtue of his being a 'foreigner'. The authorities have claimed that Jan Sithole had no right to Swazi citizenship because his father came from Mozambique, despite the fact that he was born in Swaziland, had lived there all his life, and had a Swazi mother. Sithole had applied for citizenship in 1979 in order to comply with the 1974 legal requirements and had received no response. Subsequently, under a 1992 citizenship law, a right to Swazi nationality was conferred on persons whose mother but not father was a Swazi; but all such persons were required to seek a certificate of naturalization from the minister of home affairs.

In early June 1995, during a period of mass trade union mobilization and national stay-aways, Sithole was served with a notice ordering him to appear before a Citizenship Board to justify his claim to Swazi citizenship. Though the hearing never took place, on 19 July the authorities wrote to him asking for 'convincing proof' that he qualified as a citizen of Swaziland. Towards the end of 1995, the authorities also began investigating the citizenship status of Richard Nxumalo, the SFTU president, claiming that he was a South African.¹⁹ Sithole and other trade union leaders faced constant surveillance, repeated arrests and multiple court cases during the same period and for many years thereafter. The citizenship allegations were one part of a more general pattern of harassment; and also part of a pattern in which those who criticized the government have been accused of being 'un-Swazi' for objecting to the style of rule by their traditional leader and absolute monarch, the Swazi king.

This pattern has continued. In late 2002, all six members of the Swaziland Court of Appeal (all South African citizens) resigned en masse, in protest at the royal family's explicit refusal to abide by two high-profile rulings the court had given; members of the legal profession went on strike in support of the judges.

In April 2003, several days after the International Bar Association issued a damning report on these events and the rule of law in Swaziland, Attorney General Phesheya Dlamini announced that the government had opened a file on prominent lawyers and others with dual citizenship, as part of a general crackdown on alleged improper conduct in the legal profession in the interests of ‘the security of the country and its institutions’. Justifying this policy in the Senate, Minister of Home Affairs Prince Sobandla asserted – without legal basis – that dual citizenship in the kingdom was not allowed. Among those threatened with deportation was Paul Shilubane, president of the Swaziland Law Society and a vocal critic of the government, on the grounds that he had dual citizenship in South Africa.²⁰

The current 2005 constitution creates a preference in favour of those ‘generally regarded as Swazi by descent’. Meanwhile, among the provisions of the 1992 Citizenship Act, which is still in force, remains the possibility of acquiring citizenship ‘by ukukhonta’; that is, under customary law. Though other ways of qualifying for citizenship are also now possible in theory, in practice those who are not ethnic Swazis find it very difficult to obtain recognition of citizenship. The 2005 constitution also explicitly confirms that a child born after the constitution came into force is a citizen only if his or her father is a citizen, one of the few recently adopted African constitutions to reaffirm gender inequality.²¹

Tanzania: attempts to silence the media

Tanzania has attempted to strip troublesome individuals of their citizenship several times in recent years. In 2001, the government declared that four individuals were not citizens, though giving them the option of applying for naturalization. The four were the country’s then high commissioner to Nigeria, Timothy Bandora; Jenerali Ulimwengu (a leading publisher, journalist, media proprietor and chief executive of Habari Media Limited, and also a former Tanzanian diplomat and member of parliament, who was born and educated in Tanzania); Anatoli Amani (the leader of the ruling Chama Cha Mapinduzi – CCM – party

in the north-western Kagera region); and Mouldine Castico (a former publicity secretary of CCM in Zanzibar). The declaration was interpreted as reprisal for independent coverage by Ulimwengu's media group of political and economic developments in Tanzania.²²

In August 2006, the government of Tanzania again stripped two journalists of nationality, Ali Mohammed Nabwa, weekly consulting editor of *Fahamu*, and Mr Richard Mgamba, a reporter with the Mwanza-based *Citizen* newspaper. They were accused of being 'unpatriotic and enemies of the state'. The Zanzibar Immigration Department's revocation of Nabwa's citizenship came just days after his citizenship had been restored following a previous withdrawal when the Zanzibar government banned another newspaper he was heading as managing editor.²³

Abuse of immigration law to silence non-citizens

African governments have also abused immigration law to silence critics among the long-term residents of their countries. Non-citizens have far fewer protections under international law than citizens, and immigration law is routinely administered in a fairly arbitrary way across the globe. Nevertheless, due-process protections apply just as much as they do to citizens: any deportee should have the right to challenge his or her deportation. Moreover, when non-citizens are long-term residents – and especially when their lack of citizenship is due to deficiencies in the systems for naturalization – use of immigration law against them has disturbing similarities to the attempts to denationalize those whose citizenship the government states is in doubt. Laws in many African countries, as in the cases from Zambia and Botswana described below, provide ample scope for removing non-citizens as a form of censorship.

Zambian law, like the law of many other African countries, gives the executive a very wide discretion to deport people if 'in the opinion of the minister' a person is 'likely to be a danger to peace or good order'.²⁴ This power has been invoked on many occasions and the courts have until recently mostly been very

deferential in challenging executive discretion in these cases.²⁵ Some of those affected by this arbitrary action are long-term residents who have made the country their home: in 1994, for example, the minister of home affairs issued a deportation order against an Indian man married in Zambia to a Zambian woman and with two daughters in Zambia, and declared his presence in Zambia to be a danger to peace and good order. The courts followed precedent and refused to challenge the minister's decision.²⁶

In a much more recent case, however, the Supreme Court did finally take a decision that placed some limits on ministerial power, ruling against the deportation of Roy Clarke, a British-born writer who has lived in Zambia for three decades, married a Zambian woman, with Zambian children and grandchildren – but had not become a Zambian citizen because Zambian citizenship law does not allow a woman to pass her citizenship to her husband.

On 1 January 2004, Clarke's regular column in Zambia's *Post* newspaper consisted of satirical comment on the president and two cabinet ministers. In Zambia, libelling the president is a criminal offence. The minister for home affairs signed a warrant for Clarke's deportation on 3 January, and announced the decision in an address to ruling party supporters on 5 January, saying that Clarke would be deported within twenty-four hours. Clarke filed an application for judicial review. Courageously, the High Court judge quashed the decision of the minister, saying it violated constitutional freedom of expression as well as procedural rules.²⁷ The state appealed, and in January 2008 the Supreme Court ruled against the government to hold that deportation was a disproportionate response to the offence caused by the article (though the judgment was based on far more limited grounds than the High Court ruling).²⁸

A very similar case was unfolding in Botswana around the same time. In February 2005, Kenneth Good, a seventy-two-year-old Australian lecturer at the University of Botswana, resident in the country for fifteen years, was declared a prohibited immigrant as

an 'undesirable inhabitant' of Botswana and served with deportation papers for his immediate removal.²⁹ No official reason was given, but Good had been critical of the government; shortly after being declared prohibited he presented a paper at the university on 'Presidential succession in Botswana: no model for Africa'. Good challenged the deportation order in court. Papers filed on behalf of the president refused to give reasons as to why Good should be an undesirable inhabitant of Botswana.

After hearing the merits of case, the High Court ruled for the state in May 2005. Immediately the judgment was handed down, Good was arrested and put on a plane to South Africa. He appealed the decision from outside the country. In July 2005, the Court of Appeal, in a 4-1 decision, ruled that President Mogae did not act improperly and that the declaration of Professor Good as a prohibited immigrant was valid. In reaching this decision, the court ruled that Botswana's obligations under international law are secondary to the domestic laws of Botswana, and not binding until brought into national law by parliament. Thus, '[The President's] reasons for such a decision should neither be open to public disclosure nor be the subject of scrutiny by the courts.'³⁰ Good took his case to the African Commission, where a decision was pending as of late 2008.