AL & Others (Malaysia BOCs) Malaysia [2009] UKAIT 00026

ASYLUM AND IMMIGRATION TRIBUNAL

THE IMMIGRATION ACTS

Heard at: Field House Date of Hearing: 29 April 2008

Before:

Mr C M G Ockelton, Deputy President of the Asylum and Immigration Tribunal
Senior Immigration Judge Spencer

Between

AL
LT
ST

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation
For the Appellant: Mr M S Gill QC, instructed by Christine Lee & Co Solicitors
For the Respondent: Mr R Palmer, instructed by the Treasury Solicitor

1. *Malaysian British Overseas Citizens (BOCs) who have (or have had) Malaysian nationality cannot derive from their status as BOCs a right to enter or reside in the UK.*
2. *The refusal to recognise such a right is not a breach of Arts 3, 8 or 14 of the ECHR.*
3. *A Malaysian BOC does not lose Malaysian nationality by a unilateral voluntary act of applying for a BOC passport or of purported renunciation of nationality. Deprival of nationality and acceptance of renunciation require a formal act of the Federal Government and are not automatic or irreversible.*

DETERMINATION AND REASONS

Introduction

1. The Appellants are nationals of Malaysia and are British Overseas Citizens (BOCs). They appealed to the Tribunal against decisions of the Secretary of State to give directions for their removal as overstayers. An Immigration Judge allowed their appeals on human rights grounds. The Secretary of State sought and obtained orders for reconsideration. Thus the matter comes before us.

2. The basis of the Appellants' claim is that their status as BOCs entitles them to remain in the United Kingdom now that they have arrived here and sought BOC passports. That claim is a very complex one, made at a number of different levels. There is considerable scope for confusion, and we have to say that those working on behalf of the Appellants have done little to minimize the possibilities of confusion. As we shall explain below, it appears to us that the Appellants' claim is partially based partly on unmerited assumptions, partly on misstated facts and partly on an apparent interweaving of two entirely different arguments. In the circumstances we have done our best to extract from the documents and the submissions put before us on the Appellants' behalf such material as might have assisted them in the claims which they make. In doing so we have done our best to adhere to the principle that the Tribunal is concerned with legal rights, rather than political arguments, and the Appellants should succeed if the law is on their side, but that we have no jurisdiction to change the law on the grounds of sympathy either for the Appellants or for their ancestors. On the Appellants' behalf it is said that that the Respondent's treatment of BOCs both generally and from Malaysia has not been entirely consistent. That may be right: it is certainly right to say that it has not been easy to discern any complete consistency in the Respondent's practices, despite a claim of transparency made on her behalf before us.

3. These appeals are test cases intended to deal in general with BOCs from Malaysia. The Immigration Judge treated the first Appellant's case separately, as do we. That is because, in addition to the claim based on his nationality and status, he claims that that the homosexual relationship into which he has entered here means that his removal would disrupt his family life and that he would suffer problems in Malaysia. We shall deal in general with the overarching claims made by the Appellants as BOCs before looking separately at the additional features of the first Appellant's claim.

4. These appeals have a considerable history before the Tribunal. Following the orders for reconsideration there were directions hearings. It was said on behalf of the Appellants that the Respondent was thought to be in the course of formulating a comprehensive policy on BOCs. Whether or not that was right, no new policy has emerged, and it took a very long time for it to be clear that there was to be none. Following the oral hearing we delayed writing our determination in case there was

further material, either by way of expert evidence on Malaysian law, or further information about Lee Thean Hock, whose Judicial Review proceedings in Malaysia we shall also mention below. The production of this determination has also been further delayed by illness in the Tribunal and, finally, by the fire at Field House. The Appellants and the Respondent, by letters to the Tribunal dated 9 December 2008 and 2 December 2008 respectively, confirmed that there were no further submissions that they wish to make based on any developments since the date of the hearing.

5. In addition, the construction of this determination has been rendered exceptionally difficult by the way in which the case on behalf of the Appellants was presented. We do our best in what follows to identify the strands in the Appellants' arguments and deal with each in turn. But even then the process is not unproblematic, because of the partial way in which material was put before us. Mr Gill QC based submissions on the effect of Malaysian law on part only of the Malaysian Constitution, to the exclusion of other parts of the Constitution, which he did not cite. He based submissions on the UK Government's present position on part only of a ministerial statement, to the exclusion of the rest of the statement, which he did not cite. He based submissions on the Government's practice on anecdotal material that he knew to be incomplete. He raised much of his case on the use of the word 'citizen' in the British Nationality Act 1981 without any reference to the context in which that word is used. He argued racial discrimination without identifying any relevant disadvantage suffered by those against whom the discrimination is alleged. It might be thought that a case that has to be put in that way is unlikely to have very much merit: but as this is supposed to be a test case we have felt obliged to look at the material as comprehensively as we could even without Mr Gill's assistance. We have had to supply much of the contexts ourselves.

The Appellants

6. The first Appellant was born on 19 August 1970. He came to the United Kingdom on 25 January 1999 and was granted leave to enter as a visitor until 26 July 1999. He left, apparently during the currency of that leave. He returned to the United Kingdom on 2 December 2000 with entry clearance as a student expiring on 31 October 2002. He made an in-time application for an extension of his leave. He was granted leave until 31 January 2004. He made an application for further leave out of time. That was refused, and he then applied on 22 April 2005 for indefinite leave to remain outside the Immigration Rules. That application was refused and the decision against which the first Appellant appeals is a decision to give directions for his removal as an overstayer dated 30 June 2006.

7. The first Appellant also applied for a BOC passport. At the date of hearing before the Immigration Judge (8 September 2006) no such passport had been issued, but we have seen photocopies of a BOC passport issued to him on 30 October 2006.

8. As we have indicated, the first Appellant's claim is based in part on a homosexual relationship. We will set out the evidence relating to that part of the claim when we come to deal with it, later in this determination. No enquires about return to Malaysia have been made specifically on his behalf. So far as we know, he retains his Malaysian passport.

9. The second Appellant was born on 19 December 1977. He came to the United Kingdom on 11 July 2001 and was granted six months leave to enter as a visitor. He overstayed. On 21 November 2003 he applied for indefinite leave to remain in the United Kingdom on the basis that, having applied for and received a BOC passport, he was no longer entitled to Malaysian citizenship, had no right to live in Malaysia and could not return there. The second Appellant also applied for British citizenship on 13 February 2004: that application was refused on 2 March 2005. His application for indefinite leave to remain was refused on 14 July 2006 and on that date the Respondent gave notice of a decision to direct his removal as an overstayer. It is against that decision that the second Appellant appeals.

10. There has been correspondence on the second Appellant's behalf between his solicitors and the High Commission of Malaysia in London, which has produced a response to which we shall refer in due course. It appears that his Malaysian passport was sent to the Malaysian High Commission in connection with these enquiries and has not been returned to him.

11. The third Appellant was born on 23 April 1978. He came to the United Kingdom on 19 June 2000 and was granted leave to enter for six months. He made an in-time application for leave to remain as a student. That application was refused on 2 July 2001. He appealed unsuccessfully against that decision. He then on 19 May 2002 applied for indefinite leave to remain in the United Kingdom as a BOC. He obtained a BOC passport, after that application, on 28 June 2002. On 28 July 2006 his application for indefinite leave to remain in the United Kingdom was refused, and he was served with notice of intention to direct his removal as an overstayer. It is against that decision that he appeals. In his case, like that of the first Appellant, there have been no specific enquiries made in relation to the possibility of his returning to Malaysia. His evidence before the Immigration Judge was that he still had his Malaysian passport.

The basis of the Appellants' claims

12. The Appellants claim that, as BOCs who have since arriving in the United Kingdom applied for and obtained BOC passports, they have ceased to enjoy the benefits of Malaysian citizenship and are therefore not returnable to Malaysia. The arguments supporting that claim, are, as we have indicated, complex and sometimes confused. The Immigration Judge understood the arguments put to him, and contained largely in Mr Gill's skeleton argument (upon which the

Appellants also rely before us in resisting the Respondent) as falling under a number of categories, which he dealt with in turn.

13. The Immigration Judge dealt first with the claim that the Respondent's decisions were not in accordance with the law in general administrative law terms. He concluded that, as BOCs, the Appellants had no right of abode in the United Kingdom and that there was therefore no primary illegality in refusing them indefinite leave to remain. He rejected the argument that the success of some other claimants, in applications or appeals that might be superficially similar, gave the present Appellants a legal entitlement. He rejected arguments based on any policy of the Respondent: he took the view that there was no relevant policy that had been published.

14. The Immigration Judge went on to consider Art 3. His conclusions are entirely contained within paragraph 48 of his determination, which reads as follows:

> "48. It is submitted on behalf of all three appellants that as they are British overseas citizens, they are entitled not to be removed from United Kingdom as their removal will mean that the United Kingdom is in breach of its obligations under Article 3 of the Human Rights Convention. It is also argued that the respondent who has to establish that the appellants can be removed to Malaysia for purposes of settlement and on whom the burden falls of establishing this fact has not done so. Two of the appellants have been granted British overseas citizen's passports which mean that they lose their Malaysian nationality and would not be readmitted. It is argued that the appellant's position is that of "flying Dutchmen." The second and third appellant have acquired BOC passports and there is no issue as to their BOC status. The third appellant however still has his Malaysian passport in his possession and has not been taken away from him by the Malaysian authorities. The first appellant has not been issued with a BOC passport as yet. The evidence produced by the appellants' legal representatives clearly show that the Malaysian High Court came to its decision [*Lee Thean Hock]* by way of consent order and it is not a precedent as such. It does not create a legal principle. On the evidence before me I do not consider that the Malaysian High Court's decision in the case of the Lee is an authority or a precedent. I agree with the submission in the case of the second appellant, whose passport has been retained by the Malaysian High Commission that he would be left in state of limbo. I find on the evidence before me that this will give rise to a violation of his Article 3 rights in that he is in a position that he cannot travel back to Malaysia. In the case of the first appellant, the respondent has set removal directions without actually deciding the appellant's BOC status. He has been refused indefinite leave to remain on a discretionary basis as the other two appellants. I find on the evidence that the first appellant has established family and private life in the United Kingdom with his partner. The fact that he has not been issued with BOC status has little bearing on my decision. The third appellant has his passport in his possession. Again I accept that the Malaysian authorities will take this away from him whilst they discover that he has been issued with a British overseas citizen status. I hold all three appellants to be in a state of limbo in relation to

their return ability to Malaysia. For these reasons I find that there will be a violation of all three appellant's rights under Article 3 as a result of the respondent's decision to remove them."

15. The Immigration Judge went on find that the first Appellant had also established rights under Art 8. He rejected arguments based on Art 14, but gave no reason for doing so other than that Art 14 cannot be considered in isolation from other articles.

Grounds for reconsideration and reply

16. The Respondent's grounds for reconsideration, in so far as they affect all three Appellants, are that the Immigration Judge "has failed to give reasons for finding that the Appellants would find themselves in such a situation that would violate their Art 3 rights. It is submitted that the IJ has employed too low a test in allowing the appeals under Art 3". As Mr Palmer argued before us, the submission has two limbs: the first is that the Immigration Judge failed to identify what risk of ill treatment resulted from the Respondent's decision; the second is that the Immigration Judge failed to explain how the risk so identified reached the high standard required by Art 3.

17. There are replies submitted by the Appellants. They assert that the Respondent's grounds do not demonstrate any material error of law, but that in the alternative the Appellants' appeals fall to be allowed in any event for the reasons set out in the Appellants' skeleton argument. In the further alternative, it is submitted on behalf of the Appellants that the decisions to refuse leave to remain were not in accordance with the law because of failure to apply a known or published policy, and failure to invite the Appellants to submit representations as to whether or not they fell within that policy.

The Appellants' arguments summarised

18. It is clear that that the reply incorporates the original skeleton argument. That is a document to which we shall make a fuller reference below. But it is also clear that the skeleton argument raises two particular issues that appear to have been largely ignored by the Immigration Judge. One is the argument relating to discrimination and Art 14, which he summarily rejected. The other is an argument based on the history of the relationship between successive British governments and those who eventually came to be denominated as BOCs. That argument is partially based on international law, partly on concepts of fairness, partly on anecdotal evidence on the treatment of others, partly on government statements and partly on a general notion of discrimination. We think we have identified the main strands. It is this argument which occupies most of the skeleton and to which Mr Gill returned frequently in his oral submissions at the hearing.

19. In order to see the way in which the submissions were put to the immigration judge and to us, it may be helpful to set out paragraph 3(a)-(e) and (g) of Mr Gill's skeleton argument, which aims to summarise the Appellants' case.

> "a) The Appellants are BOCs from Malaysia, members of a class of British nationals who have been historically deprived of their rights of residence in this country in a racially discriminatory and degrading manner.
>
> Their status as BOCs arises as a matter of law. In other words, there is no discretion to hold that such persons are not BOCs if the facts establish that they are BOCs. Whether or not the Respondent therefore grants a *passport* to any particular person in recognition of that legal status is therefore not the issue. Where no inquiries have been completed as to whether or not that Appellant is a BOC, it would not be in accordance with the law to proceed to a removal decision prior to the resolution of the question of BOC status which is clearly a highly important consideration in deciding whether or not to remove. No such issue arises in LT or ST's cases as their BOC status is undisputed and they have been granted BOC passports. In LM's case, the Secretary of State has been guilty of much delay in deciding the BOC application. As such, it must be submitted in LM's case the removal decision is premature.
>
> c) As British nationals, who are already in the UK, the Appellant are entitled not to be removed from the UK. To remove them would violate the UK obligations in international law to their own nationals [see under heading of Further Submissions below.]
>
> d) Furthermore, the Respondent cannot establish that the Appellants can be removed to Malaysia, at least not for the purposes of settlement (and, of course, everybody is entitled to the right to settle in their country of nationality, see under heading of Further Submissions below). It is true that the Appellants each also held a Malaysian passport but that has now been taken back by the Malaysian High Commission. However, Malaysia does not permit persons who assert or apply for or recognise some other nationality to continue to remain Malaysian nationals. The Appellants therefore either already have or inevitably will lose their Malaysian nationality and will not be re-admitted to Malaysia for the purposes of settlement. This is because they have claimed and/or asserted their rights as BOCs: art 24 of the Malaysian Constitution as currently interpreted and applied by the Malaysian Govt. In each such case the Malaysian High Commission has <u>repeatedly</u> adopted this position and has sought the return of the Malaysian passports. Nothing has therefore changed in the practice of Malaysian authorities.
>
> e) The Secretary of State is required to demonstrate that he is in a position to carry out a removal to Malaysia. It is not lawful for him to seek to do so in circumstances where he has made no effort at all to resolve this question. The Appellants have tried long and hard to obtain information from the Malaysian High Commission to the effect that the Appellants can be re-admitted for settlement purposes to Malaysia. The Malaysian High Commission has refused or failed to indicate that readmission is a possibility. All the indications are that it is not possible.
>
> … [para 3(f) is set out at para 81 below]

g) Removal would breach art 3 in that it would place the Appellants in a position similar to the East African Asians who, like the Appellants, were also British nationals denied the right of abode in the UK and who could not remain or re-enter East Africa and to whom the UK denied rights of residence on racially discriminatory grounds (which led ECmHR to hold the denial of the right of residence amounted to a breach or art 3). The Appellants would be left in the degrading and inhuman "Flying Dutchman" situation with no country in which they could settle.

h) Further or alternatively, the removal would also breach art 8 and also art 8 read with art 14 for obvious reasons which are amplified later below. In brief terms, the argument is as follows. The Appellants each have at least a private life, if not a family life, in the UK. The decision to refuse discretionary leave to remain was not taken in accordance with the law, and the decision to remove would not now be in accordance with the law for the reasons briefly set out above i.e. BOCs are entitled in law not to be removed; this is all the more so where the Respondent cannot establish that the Appellants are to be removed to a place where they would be entitled to be settle; further or alternatively the decision is unlawful because the Respondent has failed to treat like cases in a like manner and acted arbitrarily and irrationally and, in the further alternative, has unlawfully defeated a legitimate expectation that the Secretary of State would apply to the Appellant his policy and/or practice of granting some form of leave to remain to BOCs; in the further alternative the decision has been made prematurely as a lawful removal decision cannot be made until their has been proper consideration given to questions such as: is the applicant a BOC? Has the applicant's position been lawfully considered by taking all relevant factors into account under any relevant policy and has he been given full opportunity to make representations by reference to those policies? Have all relevant inquiries which the UK ought to make been made? etc. And even if the decision is in accordance with the law and does pursue a legitimate aim, is it proportionate? The AIT will have to consider the position as to the date of the hearing when assessing the human rights arguments. "

We summarise the Appellants' arguments as follows. We have added references to the relevant paragraphs of Mr Gill's skeleton argument and to the remainder of this determination.

Argument	**Para No of Skeleton Argument**	**Para No of Determination**
The burden of proving that the Appellants can be returned to Malaysia is on the Respondent.	2(ii), 3(d), 3(e),3(h),17 29(b),29(c)	52-56
By obtaining a BOC passport the Appellants have lost their Malaysian nationality. Refusing to allow them to be in the UK is a	3(d),3(g),14,16,19,21, 25,26,29(b)	59-72

breach of Art 3 because they have nowhere else to go.		
The Appellants have renounced their Malaysian nationality, with similar results.	_	73-75
The Appellants as BOCs are nationals of the UK and, independently of immunity from removal, have a right as such nationals to be in the UK.	2(i),7-12,20,21,26,28(b), 28(c),29(a),29(b),29(h)	44-51
The Appellants have a legitimate expectation of being, or a human right to be, granted indefinite leave to remain in accordance with the Secretary of State's uniform practice in similar cases.	2(iii)(1),2(iii)(2),3(f),3(h),5, 16(b),18-19,22-25,26(c),29(d), 29(i),29(j)	81-87
The Government's declared view is that the Appellants are the victims of a historic wrong that needs to be put right.	15,16(e),26(c)	37-41,80
The Secretary of State's IDIs give the Appellants an entitlement to leave to remain or an expectation of it.	2(iii)(3),4,6,22,24	88-92
If the Appellants are thought not to have a right to be in the UK that is because they have been deprived of it on a racially discriminatory basis; and refusal to allow them to be in the UK perpetuate that discrimination and so is illegal.	3(a),3(c),3(g),7,12,15,26(c) 26(e),29(e),31	94-99
The Appellants have rights under Arts 3 and 8 of the ECHR overriding the provisions of UK law because refusing them what they seek	2(iii)(5),3(h),20,25	102

is unlawful.		
Refusing the Appellants what they seek is a disproportionate interference with their private and/or family life and so is contrary to Art 8.	26,28(a),29	100-101
Refusing the first Appellant what he seeks is a breach of Art 8 if he is returned to Malaysia because of the Malaysian Government's view of homosexuals.	2(iv)	103-106

20. We prefer to look at the issues in an order different from that adopted by the Immigration Judge, because our starting-point is his determination. We shall begin with Art 3. If no error is shown in his conclusion relating to Art 3, that is the end of the matter. But if the Appellant's claims do not succeed under Art 3, we must see whether there is or may be some other basis upon which it can be said that the decisions against which they appeal are "otherwise not in accordance with the law."

The Historical Context

21. Before we can consider the consequences of the immigration decisions against which the appellants appeal, however, we must consider what their position actually is. Each of the Appellants is a BOC. How they come to be BOCs is of some importance to these appeals, as is the difference between Malaysian BOCs and some other BOCs, as well as the difference between Malaysian BOCs and Malaysian non-BOCs. We need to set out some of the history of Malaysia and some of the history of the development of the status of BOC.

British Overseas Citizens

22. The delineation of any status of citizenship relating to the United Kingdom, and the identification of those to whom it applies are relatively recent phenomena. Historically, those who owed allegiance to the British crown following the Act of Union 1707 were simply British subjects. That category extended not only to those owing allegiance because of their origins or residence in the British Islands, but, as time went on, to people all over the world who became subject to the rule of the United Kingdom as a colonial power. Any person who was not a British subject was an alien. (The only modification of that dichotomy was that some aliens had the protection of the British crown without their countries being colonies. These people were called 'British Protected Persons': they were not British subjects.) The

rights and duties of British subjects were governed solely by common law. The acquisition and loss of British subject status came to be governed partly by statute, most recently the British Nationality and Status of Aliens Act 1914 as amended.

23. The British Nationality Act of 1948 (the 1948 Act) was the first move to create a statutory status of citizenship relating to the United Kingdom. The need for it arose from the developing independence of countries which had been part of the British Empire. The purpose was to restructure the relevant law so that newly independent countries could make, then and subsequently, statutory provisions for their own citizenship. As part of the scheme, the UK created by the 1948 Act a new status, Citizen of the United Kingdom and Colonies (CUKC) which would apply to all those British subjects who did not acquire the citizenship of a former Imperial possession that now had citizenship laws of its own.

24. For most practical purposes, when the 1948 Act came into force on 1 January 1949 all British subjects became (or thereafter became) either CUKCs or the citizens of an independent Commonwealth country. The only exceptions were a number of individuals connected with countries that were already independent Commonwealth countries on becoming into force of the 1948 Act, who neither became citizens of that country nor were made CUKCs by the default provisions of the 1948 Act. They were mostly connected with India and have no relevance to the present appeals.

25. The 1948 Act was not concerned with identification or delineation of the rights and duties of citizenship, but merely with the creation of the statutory citizenship categories in order to allow independent Commonwealth countries to develop their own citizenship laws. The liberty to enter the United Kingdom or to reside here continued, not only for CUKCs but also for citizens of independent Commonwealth countries who were not CUKCs. It arose not from citizenship, but from the status of being a British subject, which United Kingdom law recognised as continuing despite the acquisition of citizenship of a Commonwealth country. In the period after 1948, more countries became independent, and, in addition, the development of immigration control had a considerable impact on the ability of individual Commonwealth citizens to enter and remain in the United Kingdom. But it is worth emphasising that the starting point for those developments was not a right derived from any citizenship but a right derived from being a British subject. As well as being an obvious conclusion from the common treatment of all Commonwealth citizens, that view is endorsed by the speech of Lord Diplock in DPP v Bhagwan [1972] AC 60 at 80 (emphasis added):

> "Prior to the passing of the Commonwealth Immigrants Act 1962, the respondent *as a British subject* had the right of common law to enter the United Kingdom without let or hindrance when and where he pleased and to remain here as long as he liked."

26. The two developments to which we have referred took place alongside one another. Countries newly becoming independent developed their initial citizenship laws in consultation with United Kingdom governments, and provisions for citizenship of the new country were associated with the United Kingdom statute granting independence. Typically, those belonging to new countries ceased to be CUKCs on the countries' independence, thus giving a new country a proper independent citizenship base. As British subjects, citizens of Commonwealth countries continued to be entitled to enter and remain in the United Kingdom, and so could, if they chose, live in the United Kingdom instead of living in their own country. The restrictions on that right began, as the short passage cited from DPP v Bhagwan above shows, in 1962. We do not need to treat the provisions in any great detail, save to say that the liberty to enter and remain in the United Kingdom, historically attributable to all British subjects, was gradually restricted to those with a real connection to the territory of the United Kingdom. After a decade of increasing restrictions, the lasting position was that laid down by s.2 of the Immigration Act 1971. That provided that only "patrials" were to be free from immigration control. Broadly speaking, patrials were CUKCs and Commonwealth citizens who were born, adopted, registered or naturalised as such citizens in the United Kingdom, CUKCs who had a parent or grandparent with that characteristic, and Commonwealth citizens with a CUKC parent born in the United Kingdom. Again it is to be seen that these new provisions cut across the statutory citizenship classes. Being a CUKC was neither a necessary nor a sufficient condition for freedom from immigration control. Some CUKCs were patrials and some were not; some non-CUKCs were patrials and some were not.

27. The British Nationality Act 1981 (the 1981 Act), which came into force on 1 January 1983, was the first to treat citizenship and immigration status together. It provided (again in the broadest terms, but in sufficient detail for present purposes) that CUKCs who were patrials were to be "British Citizens" and to have an unrestricted right of entry and abode to the United Kingdom. CUKCs who were not patrials fell into two classes. First, those who were CUKCs by reason of their connection with a country which at the commencement of the 1981 Act was still a British colony, became British Dependent Territories Citizens. (This classification was renamed British Overseas Territories Citizens by the British Overseas Territories Act 2002.) All other CUKCs became BOCs. The 1981 Act did not change the entitlement of any CUKCs to enter or be in the United Kingdom: to this extent, it merely changed the vocabulary. Citizens of Commonwealth countries did not become British Citizens, even if under the 1971 Act they were patrials. But, despite that, they retained any right of abode that they had before 1 January 1983. The 1981 Act also abolished the status of "British subject" and replaced it with that of "Commonwealth citizen".

28. For completeness we need to add that the status of British Protected Person had acquired statutory recognition in the 1948 Act and continues under the 1981 Act, but refers now to very few individuals.

29. For the purposes of this appeal we do not need to treat the provisions by which a person became a CUKC or becomes a British Citizen in any detail. We need only say this. The status of CUKC was acquired by birth within the United Kingdom or any colony (with very few unimportant exceptions). It was also acquired by birth outside the UK and Colonies if the child's father was a CUKC other than by descent: in other words, the status could also descend by one generation regardless of the place of birth. As colonies became independent, births within the territories concerned ceased to be births within the United Kingdom and Colonies, and in any event most independence statutes contained provisions terminating the status of CUKC for those with connections to the new country. Where there was no such provision, however, the status of CUKC continued, and could still descend by one generation. So the children of those who were CUKCs other than by descent (fathers) became CUKCs not because they were born in a colony but because of the status of their father at the time of their birth, and, if not patrials, became BOCs on 1 January 1983. For reasons we are about to explain, certain Malaysians fell within that category, and indeed the vast majority of those who became BOCs on 1 January 1983 were Malaysian citizens. Under the 1981 Act, British citizenship is transmissible by descent, but British Overseas Citizenship is not. BOCs are therefore a class which, over the years, declines in numbers.

The colonial history of the Malayan Peninsula

30. The Straits Settlements consisted originally of three widely-separated areas on and adjacent to the western and southern coasts of the Malayan Peninsula. They were trading posts of the East India Company and with the other territories belonging to that company were surrendered to the Crown on 2 September 1858. The territories in question were Penang, an island off the west coast of the Peninsula, but including for these purposes a small part of the mainland called Province Wellesley; Malacca, a territory on the southwest coast of the Peninsula, and Singapore, an island off the southern coast of the Peninsula. Various other territories in due course became part of the Straits Settlements colony, but they do not concern us.

31. The border of the Kingdom of Siam, at the north of the Malayan Peninsula, was finally established by the Treaty of Bangkok in 1909. South of that border, the whole of the Peninsula apart from the Straits Settlements colony consisted of a number of separate states. During the period of 50 years beginning in 1870, all those states became British Protected States. Four of them, Pahang, Perak, Negrisembilam and Selangor, joined to become the "Federated Malay States" in 1896. The other states remained unfederated.

32. In 1946 the states making up the peninsula, with the exception of Singapore, joined to form the Malayan Union. The Straits Settlements colony ceased to exist. Singapore became a colony by itself, and Penang and Malacca became part of the

Union. So far as the relationship of the Union with the United Kingdom is concerned, however, Penang and Malacca remained part of the dominions of the Crown, whereas the other states remained British Protected States. The Malayan Union was dissolved in 1948 and was replaced in that year by the Federation of Malaya. The Federation of Malaya became an independent state within the British Commonwealth in 1957. Singapore became an independent Commonwealth country in 1959. Singapore and certain other territories away from the Peninsula joined the Federation of Malaya in 1963 to form Malaysia, but Singapore left Malaysia in 1965, becoming a separate sovereign State.

Malaysians and British Nationality

33. As we indicated above, the position by 1920 was that the Malayan Peninsula consisted of territories that were British Protected States, together with three small areas, Penang, Malacca and Singapore, that were part of a British Colony. The formation of the Malayan Union and the Federation of Malaya in 1946 and 1948 respectively did not affect that position. The Federation of Malaya itself, however, had provisions for citizenship of the Federation, granted to the subjects of the rulers of the various Malay States, and to those born in Penang and Malacca (it will be remembered that Singapore was not part of the Federation).

34. On the coming into force of the British Nationality Act 1948 Penang and Malacca (but not the rest of the Federation) counted as part of the "United Kingdom and Colonies". Those in these territories who had been British subjects became CUKCs; and the provisions of the 1948 Act relating to the acquisition of that citizenship applied to Penang and Malacca as to other colonies. The Malay States were Protectorates and the subjects of their rulers became British Protected Persons under an Order in Council, 1949/140, made under s 30(1) of the 1948 Act.

35. In 1959, on the constitution of the new nation of Malaysia as an independent country within the Commonwealth, it might have been expected that, in accordance with the arrangements for the independence of other colonies, the population of the newly independent country would cease to have a citizenship status linking it to the old colonial power. During the negotiations leading up to independence, however, representations were made on behalf of the CUKCs in Penang and Malacca that they should retain their link with the United Kingdom in distinction to the other citizens of the Federation. Those representations were accepted and the result was that the legislation for the independence of Malaysia and the constitution of Malaysia itself allowed dual nationality and allowed those citizens of the Federation who were CUKCs to retain their status as CUKCs in addition to their nationality of Malaysia. We have not been told whether this arrangement was unique in provisions for the independence of former British Colonies, but it was certainly very unusual. Routinely, citizens of a new independent country lose their nationality of and hence their loyalty to the old

colonial power. Without such a provision, it would be impossible for the new country to be truly independent of its old master.

36. Thus, the CUKCs in Penang and Malacca retained an additional status which their fellow citizens of Malaysia had never had, and which the citizens of other new independent countries were required to give up. We were not told the precise reasons for these arrangements, but it must be remembered that the Federation of Malaya before independence was perhaps somewhat unusual in that it contained both territories that formed part of a British colony and states that did not. One could understand that there may have been a feeling that that historical distinction should be preserved in some way. We were shown part of the speech of the Secretary of State for the Colonies, Mr Lennox-Boyd, in the debate on the Independence Bill in the House of Commons on 12 July 1957 (we were not given the Hansard reference). He dealt with a number of issues, including the provisions for Penang and Malacca to enter the Federation as equal partners with the other states in the new independent country and for the British Crown to relinquish its sovereignty over Penang and Malacca for that purpose. By the wish of the Federation, however, judicial appeals were to be in the last instance to the Privy Council. There had been negotiations relating to the protection of interests both of Malayan and Chinese people in the territories of the Federation. That was what Mr Lennox-Boyd described as "solid guarantees of fundamental liberties to meet Chinese fears of discrimination, with reasonable arrangements to safeguard the special position of the Malayans without injustice to other races". So far as citizenship is concerned, the Secretary of State noted that this was a "very difficult problem" but urged that the compromise that had been reached on the acquisition of citizenship of Malaysia on independence was a fair one. He went on to speak about those who were CUKCs. He said this:

> "Many of the present citizens of the Federation have that citizenship of the Federation because they are citizens of the United Kingdom and Colonies by birth. They are mostly people from the Settlements of Penang and Malacca. These people, who are British subjects by birth, and value it very much indeed, as well as having Malayan citizenship which they value also, have been most anxious that they should not be required to give up their status as citizens of the United Kingdom and Colonies in order to continue to be Malayan citizens after independence. On the other hand, Malayans have been opposed to the retention by any of their citizens of a second citizenship on the grounds that dual nationality of this kind might mean a divided loyalty.
>
> The problem has been met in the following way. The Constitution recognises that all citizens of the Federation will, after independence, be Commonwealth citizens. That is, they will have the common status enjoyed by all persons who are citizens of any Commonwealth country. Secondly, no one is required to give up a second citizenship in order to continue to be a citizen of the Federation. Thirdly, they can, however, lose their federal citizenship if of their own will they adopt another citizenship or if they exercise rights in a foreign country which

could only be exercised by citizens of that country, or if they exercise rights in a Commonwealth country which are not available to Commonwealth citizens as a whole.

The effect of this last provision is wholly to preserve the rights of those who are citizens of the United Kingdom and Colonies, as well as federal citizens, since in the United Kingdom no distinction is drawn between citizens of the United Kingdom and the Colonies and citizens of other Commonwealth countries. Such distinctions as are drawn here are between Commonwealth citizens and aliens.

At the same time, these arrangements, we have agreed, make it clear that the retention of their citizenship of the United Kingdom and the Colonies for certain citizens of the Federation does not give them any special privileges vis-á-vis other Malayan citizens, since the latter, as Commonwealth citizens, enjoy the same rights in the United Kingdom as do citizens of the United Kingdom and Colonies. Thus, the interests of the inhabitants of the Settlements have been preserved in a way fully compatible with the desire of the Federation Government that one section of the population should not have any special privileges vis-á-vis the remainder."

BOCs with no nationality

37. On the coming into force of the British Nationality Act 1981, those citizens of Malaysia who were CUKCs and who were not patrials became, like all other CUKCs who were not patrials and who derived their status as CUKCs from a country that was not still a colony, BOCs. The Malaysians who became BOCs on that date formed the great majority of BOCs, and also the great majority of those 1.3 million BOCs who had some other citizenship.

38. Although the vast majority of those who became BOCs were Malaysians, a substantial minority, probably about 200,000, were people who did not have citizenship of any other country. The largest group of these people was again apparently that connected with Malaysia: about 130,000 individuals who, for one reason or another, were CUKCs but not Malaysian citizens. There were also 100,000 or so other individuals connected with various countries around the world. This group of people as a whole, although individually they had been settled and lawfully resident in other countries, had, no right of abode in the United Kingdom or anywhere else. This was not a result of the creation of the status of BOC. It was a result of the development of immigration control in the United Kingdom from 1962 to 1971. The people affected were non-patrial CUKCs who had no other citizenship. On the coming into force of the 1981 Act those people are called BOCs. They are BOCs with no other citizenship. We make that point because, in referring to them as BOCs it can otherwise be thought that it is because they are "only BOCs" that they have the difficulty that they do have. That is to misunderstand the position. The difficulty arises not from the nationality statute but from the immigration provisions.

39. In any event, the fact that the development of immigration law had led to a group of British subjects being left with nowhere where they had a right to live, was the subject of representations to the British government on a number of occasions during and after the development of the lasting provisions on immigration control. Two incidents are particularly notable. The first relates to East African Asians, that is to say CUKCs with origins in India or Pakistan who had made their home in the British dependencies in East Africa. Their migration to the United Kingdom in the 1960s in the exercise of a right to do so as British subjects (and despite the provisions of the Commonwealth Immigrants Act 1962) led to the passing of the Commonwealth Immigrants Act 1968 which had the deliberate effect of preventing such East African Asians from having a right to enter and live in the United Kingdom. Those provisions were successfully challenged under the European Convention on Human Rights: this was the East African Asians case (1981) 3 EHRR 76. The Special Voucher Scheme, to which reference is made in Mr Gill's skeleton argument in the present appeals, was designed to provide some amelioration of the effects of the 1968 Act. For present purposes, however, we need only note the developments of immigration law having the effect of removing the right to be in the United Kingdom even from CUKCs who had no right to be anywhere else.

40. The group of people with that characteristic, although now very much smaller, was the subject of representations to the Government in connection with the passing of the Nationality, Immigration & Asylum Act 2002. On 4 July 2002 (Hansard Volume 188) Home Office Minister Beverley Hughes made the following statement:

> "At present, some citizens of our former colonies in East Africa have a British passport but not the right to live and work in the UK. Now, if they do not have any other nationality and have never given up another nationality, they will be able to acquire these rights.
>
> We are righting a historical wrong which has left a number of overseas citizens without any right of abode either in the UK or elsewhere.
>
> BOC status is a legacy of decolonisation, when some overseas citizens were treated unfairly, which was then compounded by the 1968 Immigration Act and the 1981 British Nationality Act. The Government is acting to put that right.
>
> We have a moral obligation to these people going back a long way. We are now meeting that obligation and doing the right thing by those citizens of former British colonies who would otherwise have no right of abode in any country.
>
> The number who would want to live in the UK is likely to be small, less than 500 BOCs a year have applied to live in the UK in recent times. They are likely to view it as an insurance policy in case those circumstances change in the future. I am pleased to be able to offer them that added security.

BOCs that have come to the UK recently have done so because they want to work. We are developing routes for people to come and work here legally in ways which boost our economy, and welcome those BOCs who want to be productive members of our society and add to the wealth and prosperity of the nation. "

41. The resulting legislation was s.12 of the 2002 Act, which inserted a new s.4B into the 1981 Act, reading as follows:-

> "4B. **Acquisition by registration: certain persons without other citizenship**
> (1) This section applies to a person who has the status of –
> (a) British Overseas Citizen,
> (b) British Subject under this Act, or
> (c) British Protected Person.
> (2) A person to whom this section applies shall be entitled to be registered as a British Citizen if –
> (a) he applies for registration under this section,
> (b) the Secretary of State is satisfied that the person does not have, apart from the status mentioned in subsection 1, any citizenship or nationality, and
> (c) the Secretary of State is satisfied that the person has not after 4 July 2002 renounced, voluntarily relinquished or lost through action or inaction any citizenship or nationality."

General observation on Malaysian BOCs and the Appellants

42. It is important to remember that if the Appellants are BOCs (and nobody doubts that they are) they became BOCs automatically on the coming into force of the 1981 Act, because they were CUKCs with no right of abode in the United Kingdom. Their status as BOCs is not created or indeed affected by their applying for or receiving a BOC passport (although it is said on their behalf that those events may affect their status as Malaysian citizens.) The Immigration Judge appears to have been under the misapprehension that the Appellants, and others similarly circumstanced, *became* BOCs on the grant of a BOC passport. That is evident from the determination, both in the passage we have already cited and in paragraph 44, which begins "The first Appellant has not yet been granted the British Overseas Citizens status." It looks as if Mr Gill sometimes shares some elements of that misapprehension, because, although the position is stated correctly at para 8 of his skeleton argument, in the Appellants' replies to the grounds for reconsideration, signed by him, there is a reference to the letter from the Malaysian High Commission which, it is said, "makes clear that the BOC status leads to a loss of Malaysian Citizenship." That cannot be an assertion that the Appellants lost their Malaysian citizenship on the coming into force of the 1981 Act: they have claimed to be entitled to use their Malaysian passports to travel to the United Kingdom, and to make applications based on their lawful use of them. It must therefore be an

assertion that some subsequent event is properly described as the "BOC Status" leading to the asserted loss of Malaysian citizenship. Whatever that subsequent event was, it cannot have been the *grant* of BOC Status. The Nationality Acts contain no provision for the grant of BOC status, save in relation to a small number of individuals formerly connected with Hong Kong. With that exception, BOCs are a closed group, consisting of those who became BOCs, by operation of law, on the coming into force of the 1981 Act.

Discussion

Malaysian BOCs as "British Nationals"

43. Having set out the background we now turn to the arguments made on the Appellants' behalf.

44. It may be regarded as an established principle of public international law that, although it is for independent states to regulate the acquisition and loss of their own nationality, it is not open to states to formulate nationality or citizenship laws which have the effect of depriving individuals of the right to live anywhere in the world. Article 15 (1) of the Universal Declaration of Human Rights provides that "everyone has the right to a nationality", and Art 3.2 of the fourth protocol to the European Convention on Human Rights (which has not been ratified by the United Kingdom) provides that:

> "No one shall be deprived of the right to enter the territory of the State of which he is a national".

45. Mr Gill made reference to the latter provision in particular as exemplifying international law and sought to erect upon it an argument that because BOCs are so called, they are to be treated as "nationals" of the United Kingdom and as such nationals have in international law the right to enter and live in the United Kingdom. We regard that argument as entirely misconceived in any application to the Appellants.

46. First, as we have explained, the Appellants are members of the large category of BOCs who have nationality of another country. We have not been referred to any principle of international law entitling a person to exercise the minimum rights protected by international law in respect of *more than one* State. Both the provisions we have cited above use the singular. The latter, in particular, says "the State" not "any State". It may be that, in relation to BOCs who have no other right of abode, Mr Gill's argument might have had some force before the coming into force of s.4B of the 1981 Act. But this is not that case, and that time has past.

47. In any event, the argument that BOCs are to be treated as a sort of citizen, which in turn is to cause them to be treated as a sort of national, which in turn is to be regarded as giving them rights despite what is laid down in the very statutes formulating their status, is an argument which we think is doomed to failure. It ignores the context of the statutory provisions, history, authority and reality. So far as the context of the statutory provisions is concerned, we have shown that BOCs were identified in the 1981 Act by reference to their then present status as individuals who had no right to reside in the United Kingdom and by contrast with those who had such a right. To regard BOCs as having in that context acquired, simply by being called a sort of citizen, a right, the very absence of which is the key to the definition of their status is, with respect, absurd. Besides, the very statutory wording of the 1981 Act prevents the classes of citizenship that it establishes from being regarded as nationalities. The principal category is that of "British Citizen", but there is no country called "Britain". The phrase "British Citizenship" cannot, therefore, be interpreted as intended to create nationality and residence rights in such a country. The same applies to the other major category created by the 1981 Act, that of "Commonwealth Citizen". There is no country called "the Commonwealth" of which Commonwealth citizens are to be treated as nationals with rights of residence. This shows, we think, that it is impossible to treat the use of words like "citizen" and "citizenship" in the 1981 Act as referring to international law nationality rights.

48. The reason for that is historical. Whatever may be the modern terminology, the right to enter and be in the United Kingdom derived, as we have explained, not from anything called citizenship or nationality but from being a British subject. The provisions of both the British Nationality Acts and the various immigration statues have the effect that certain people who would previously have been regarded as British subjects with that right, lost the right, generally in exchange for the right to live in some part of what had previously been colonial territory. That was the scheme. Although there were cases in which the right to be in the United Kingdom was lost without the acquisition of a corresponding right to be anywhere else, the history of the provisions, as we have set it out above, is clearly of the breakup and final abolition of the class of British subjects, and its replacement by recognition of specific attachment to different countries all over the world.

49. That view is supported by authority at the highest level: see DPP v Bhagwan above. Before 1962 and, equally, before the coming into force of the 1981 Act, any rights to enter and reside in the United Kingdom derived from the status of being a British subject. They did not derive from any conception of citizenship before the 1981 Act; and that Act, based as it is so clearly on the status and rights existing at the time it was passed, it cannot be thought of in the way that Mr Gill suggests. As we have explained, in the development of immigration control, being a CUKC was neither necessary nor sufficient to entitle one to reside in the United Kingdom. But everyone who had that right was a British subject.

50. Finally, it seems to us that the argument raised by Mr Gill simply lacks any real basis. It has to be founded on a reading of international law not clearly supported by any international law authority, on the basis of which it is suggested that the 1981 Act should be given a meaning entirely different from that obviously intended by the legislature.

51. In support of the arguments he made, Mr Gill cited Beverley Hughes' statement of 4 July 2002, but he did so only in an abbreviated form, and without its context. He asked us to treat it as applying to all BOCs. It is clear beyond the slightest shadow of doubt that the Minister was referring not to all BOCs, but to those BOCs who had no right to live anywhere in the world. As we have explained, their difficulty arose not from their being BOCs, but from the development of immigration control. That her reference was limited to those individuals is clear both from the words of her statement when it is read in full and from the statutory provision that was made in order to carry the policy indicated in the statement into effect. We know of no basis upon which it can properly be said that any government has regarded the grant of BOC status to individuals who have another nationality as in any way disadvantaging them. We deprecate Mr Gill's attempt to cause us to think differently by referring to parts of the statement out of context.

Burden of proof

52. Mr Gill submits at a number of points that it is the Respondent who has the burden of proof in these appeals, either to show that the Appellants are returnable to Malaysia or that removing them from the United Kingdom would not breach Art 3. We reject those submissions. It is for the Appellants to establish their case.

53. Mr Gill's submissions rely on R v SSHD ex parte Yassine and others [1990] Imm AR 354. That was a case in which Lebanese nationals had visitors' visas for Brazil. They had obtained those visas in Beirut, not because they intended to go to Brazil but in order to be allowed to board a plane to the UK as if in transit to Brazil. When they arrived in the UK they claimed asylum. Under the regime then in force for such claims the Secretary of State declined to give substantive consideration to them and issued directions for their removal to Brazil. The claimants sought judicial review of that decision on the ground that the only basis upon which any of them could lawfully be removed to Brazil was that it was "a country or territory to which there is reason to believe that he will be admitted" in the words of para 8 (1)(c)(iv) of Schedule 2 to the Immigration Act 1971. Schiemann J held that, in the circumstances of the case, the Secretary of State had no basis for thinking that the claimants would be admitted to Brazil on the basis of their fraudulently obtained visas. He thus granted the application.

54. This is not a decision that there is a burden of proof on the Respondent in an immigration appeal. Indeed the issue before the Court in Yassine was not whether the claimants were removable to Brazil but whether the Secretary of State was

entitled to conclude that they were – a question unlikely to be relevant in an immigration appeal. Yassine is authority solely on the process to be adopted by the Secretary of State before making a decision to give removal directions under para 8(iv).

55. The present appeals are not, and under the present regime could not be, appeals against removal directions. Even if they were, any directions for removal to Malaysia would not be given under para 8(iv) but under sub paras (i),(ii) or (iii) of para 8. Those provisions allow removal of persons such as the Appellants to

> "any country being
> (i) a country of which he is a national or citizen; or
> (ii) a country or territory in which he has obtained a passport or other document of identity; or
> (iii) a country or territory in which he embarked for the United Kingdom".

56. There can be no doubt that in the Appellants' case Malaysia is a county within (ii) and (iii), whether or not it also falls within (i). So far as concerns the Secretary of State's decision-making process, a decision to issue removal directions to Malaysia would (provided that the Appellants are liable to removal at all) be unimpeachable. And the question whether the appellants would be in fact be admitted to Malaysia is for them to deal with, on the evidence, unaffected by the decision on the entirely different issue in Yassine. There is nothing in this case that causes the burden of proof to be reversed.

Article 3

57. We quote again from Mr Gill's skeleton argument:-

> "28) As to art 3, the Appellants contend as follows:-
> (a) Any decision which forms the basis of refusal of leave and the consequential exposure to an expulsion and which is in itself challenged on the basis that it violates art 3 must be made in accordance with the domestic law. An unlawful decision cannot be relied by the respondent to support an art 3 deportation. For the various reasons set out in this skeleton argument, the challenged decision is not in accordance with the law and therefore violates art 3 (including the procedural protection giving by art 3).
> (b) Further or alternatively, as stated above, the appellant is within the class of British nationals known as British Overseas Citizens. The appellant's father was a CUKC (as was he) and remained as such until that status was converted to BOC status by the BNA in 1991 as from 1.1.83 the progressive development of immigration control in the 1960s leading to the conversion of status in the 1981 act has, taken together, *deprived* such CUKCs of the full rights of residence in the UK.

(c) In particular, the Commonwealth Secretary, George Thompson, is minuted on 15th February 1968, as saying:-
"although he recognised the problems that will be created by continued influx of a large number of Asians from Kenya, to pass such legislation would be wrong in principle, clearly discriminatory on grounds of colour and contrary to every thing we stood for …. We should effectively deprive large numbers of people of any citizenship at all or, at best, turn them into second class citizens".
Despite these concerns, the Home Secretary, James Callaghan, wrote in a memo dated 21st February, ends:
"we must bear in mind that the problem is potentially much wider than East Africa. There are another one and a quarter million people not subject to our immigration control …. At some future time we may be faced with an influx from Aden or Malaysia".
On the following day he said:-
"We shall legislate so as to deprive citizens of the UK and colonies who did not belong to this country, not of their citizenship but of the automatic right to enter this country …."
These were shameful statements, which the Govt now recognises has given rise "to a historical wrong" which needs to be "righted": (see Beverley Hughes' statement when announcing the changes to be made by s.12 Nationality, Immigration and Asylum Act 2002.

(d) At the time of Malaysian independence, it was never intended that persons such as the appellant or his father should lose their rights as CUKCs: see the government statement during the Hansard debate on the issue in 1957. This was a unique pledge given to those CUKCs from Penang and Malacca. The CIA68 represented a going-back on those promises designed to protect the "unique" situation of the Penang and Malacca CUKCs.

(e) Each of the appellants submits that at the very least the continuation of such a deprivation of the rights of citizenship in the present circumstances where he has no right to settle in Malaysia will mean that he will be left in the flying Dutchman situation of not having any country in the world which will take him on a permanent basis. This is degrading treatment which violates art 3 (see the ***East African Asians case*** [1973] where the EComnHR held that refusal of entry to East African Asians who had not been allowed to remain in East Africa and who had no where else to go violated art 3 as the reason for taking away their rights to full residence in the UK were simply racially discriminatory). Indeed, the violation is all the more gross in that it subjects the appellant to the flying Dutchman scenario on a racially discriminatory basis (the deprivation of full resident's rights having been on a racially discriminatory basis). At the same time the Govt has continued to make exception for persons of a "white" background eg Falkland islanders.

58. The principal argument based on Art 3 is that the Respondent's decision to direct the Appellants' removal is in each case contrary to Art 3 because it is an act which subjects them to the risk of inhuman or degrading treatment or punishment. The

risk, it is said, will arise from the refusal of Malaysia to allow them the benefits of Malaysian citizenship following their acquisition of BOC passports. In order to evaluate this claim, it is therefore necessary to consider what their position in Malaysia will be.

Loss of Malaysian citizenship: the law

59. The claim that the Appellants have effectively already lost their Malaysian citizenship and will not be able to return to their homes in Malaysia is based on the Malaysian Constitution and correspondence with Malaysian government officials. Other than a passing comparison with the decision of the European Commission on Human Rights in the East African Asians (application number 4403/70-419/70 and others), no authorities are cited.

60. The material available to the Immigration Judge, and to us, amounts to the Constitution of the Republic of Malaysia, a number of letters, and inadequately-reported proceedings in an inconclusive case in the Malaysian High Court.

61. As the extract from Mr Gill's skeleton suggests, the Appellants base this part of their claim on Art 24 of the Malaysian Constitution. In their dealings with the Home Office, the Appellants' solicitors have cited only that Article and, furthermore, only an out-of-date version of it, taking no account of amendments and repeals in 1963, 1964 and 1976. The document giving Art 24 only and in that out of date form appears in a number of places in the bundles relied upon by Mr Gill before the Immigration Judge and before us. A correct up-to-date version of Arts 24 and 25 is at pages 208-9 of the main appeal bundle. (There are also extracts from the constitution at pages 262ff of the bundle of "general supporting materials".) But, again the extract stops short of Art 27. There are, however, important provisions of crucial relevance to these cases in Art 27. It does not look as though Mr Gill drew those provisions to the attention of the Immigration Judge, for he makes no mention of them. The same appears to be true of other proceedings in which Mr Gill appeared for the Appellants, appeal numbers HR/00665/2005 and others, heard in October 2005. We have read the determination in that case, because it is one of those cases upon which Mr Gill sought to rely to establish the principle that like cases should be treated like. In those appeals the Appellants were successful following arguments by Mr Gill which, judging from the determination, appear to have been word for word the same as those put to the Immigration Judge in these appeals. Whether the result would have been the same if Mr Gill had referred to all the relevant provisions of the Malaysian Constitution it is impossible to say.

62. The relevant provisions are as follows (for ease of reference we include also the Article on renunciation to which we shall also refer in the course of this determination):

"Renunciation of Citizenship

Article 23

1. Any citizen of or over the age of twenty-one years and of sound mind who is also or is about to become a citizen of another country may renounce his citizenship of the Federation by declaration registered by the Federal Government, and shall thereupon cease to be a citizen.

2. A declaration made under this Article during any war in which the Federation is engaged shall not be registered except with the approval of the Federal Government.

3. This Article applies to a woman under the age of twenty-one years who has been married as it applies to a person of or over that age.

Article 24

1. If the Federal Government is satisfied that any citizen has acquired by registration, naturalization or other voluntary and formal act (other than marriage) the citizenship of any country outside the Federation, the Federal Government may by order deprive that person of his citizenship.

2. If the Federal Government is satisfied that any citizen has voluntarily claimed and exercised rights in any country outside the Federation any rights available to him under the law of that country, being rights accorded exclusively to its citizens, the Federal Government may by order deprive that person of his citizenship.

3. (Repealed)

3A. Without prejudice to the generality of Clause (2), the exercise of a vote in any political election in a place outside the Federation shall be deemed to be the voluntary claim and exercise of a right available under the law of that place; and for the purposes of Clause (2), a person who, after such date as the Yang di-Pertuan Agong may by order appoint for the purposes of this Clause-

(a) applies to the authorities of a place outside the Federation for the issue or renewal of a passport; or

(b) uses a passport issued by such authorities as a travel document

shall be deemed voluntarily to claim and exercise a right available under the law of that place, being a right accorded exclusively to the citizens of that place.

4. If the Federal Government is satisfied that any woman who is a citizen by registration under Clause (1) of Art 15 has acquired the citizenship of any country outside the Federation by virtue of her marriage to a person who is not a citizen, the Federal Government may by order deprive her of her citizenship."

[Arts 25 and 26 contain provisions for deprivation of citizenship obtained by registration in certain cases, and other provisions relating to deprivation of citizenship, none of which is relevant to these appeals.]

Procedure for Deprivation

"Article 27

1. Before making an order under Arts 24, 25 or 26, the Federal Government shall give to the person against whom the order is proposed to be made notice in writing informing him of the ground on which the order is proposed to be made and of his right to have the case referred to a committee of inquiry under this Article.

2. If any person to whom such notice is given applies to have the case referred as aforesaid the Federal Government may, refer the case to a committee of inquiry consisting of a chairman (being a person possessing judicial experience) and two other members appointed by that Government for the purpose.

3. In the case of any such reference, the committee shall hold an inquiry in such manner as the Federal Government may direct, and submit its report to that Government: and the Federal Government shall have regard to the report in determining whether to make the order."

63. The skeleton argument refers to frequent correspondence and in the proceedings before us there were a number of written statements made by staff at the Malaysian High Commission in London. We assume from the vague terms in which the reference in the skeleton argument is made that nothing is to be gained by citing them individually. As we have said, specific enquiries were made on behalf of the second Appellant. The response from the immigration attaché in the High Commission, dated 14 September 2006, reads, so far as is relevant, as follows:

> "We would like to inform that the Malaysian Government does not recognise "dual nationality". In Mr Leong's case, if he has already been issued with a British Overseas Citizen passport and has been enjoying the facilities as a British Overseas citizen, Mr Leong has automatically **loses** his Malaysian nationality. He is no longer entitle to get any privilege or facilities as is given to Malaysian citizens. Mr Leong is advised **to renounce his Malaysian citizenship at our Office.**
>
> However, though Mr Leong is a British Overseas Citizen, he is still allowed to enter Malaysia as a tourist for a certain duration of stay in the country. British Overseas Citizen does not require to apply for a visa to Malaysia for stay not longer than (1) month."

64. That letter is dated a few days after the hearing before the Immigration Judge. It cannot have very much bearing on whether he made any error of law, but it is said that it does have bearing on the issues to be decided; and it is said it indicates a view which has been repeatedly expressed by the Malaysian High Commission in London. We see no difficulty in taking account of it. We have also seen a letter dated 24 September 2007 from the Malaysian High Commission to another firm of solicitors who had apparently raised similar issues and sought advice on renunciation.

"Re: Holding Dual Nationality

I wish to refer to your letter of 20th September 2007 with regards to two of your clients who has applied for renunciation and pertaining to the above matter.

For your information under Constitution of Malaysia - Article 24 Termination of Citizenship; (3)(a) "uses a passport issued by such authorities as a travel document, shall be deemed voluntarily to claim and exercise a right available under the law of that place, being a right accorded exclusively to citizens of that place."

Upon your client acquiring the British Overseas Citizen and enjoying the facilities given by us to the British Government, the Government of Malaysia considers that your client is holding dual nationality. As such they are required to renounce their Malaysian Citizenship as per the above law. British Overseas Citizen is only allowed to the enter Malaysia as a visitor and up to a maximum stay of 30 days. They are subjected to immigration control.

Our National Registration Department is the competent authority with regards to nationality. For further advice, kindly contact them directly."

65. The solicitors did write to the National Registration Department, and received a reply dated 11 October 2007 as follows:-

"APPLICATION FOR RESTORATION OF MALAYSIAN CITIZENSHIP

1. I respectfully refer to your letter … regarding the above matter.

2. For your information the procedures for refusal or renunciation and deprivation of citizenship are subject to the Constitution of the Federation of Malaysia. (Here after referred to as the Constitution), as provided under Articles 23, 24, 25, 26, 26A and 27 of the Constitution.

3. In this connection this Ministry is pleased to inform you as follows concerning the questions submitted relating to the citizenship matters of your clients.

[i] Whether British Overseas Citizens (BOC) citizens are considered as British nationals?

BOC is a citizenship category given by the British government to foreign nationals and they are considered to hold dual nationalities. So the Federal Government (referring to the Government of Malaysia) will take action to deprive them of their citizenship if they hold BOC citizenship at the same time.

[ii] Whether requests for restoration of Malaysian citizenship are allowed for BOC citizens?

For your information, the Federal Government can, under the relevant provisions, issue an order for deprivation of the Malaysian citizenship of any citizen of Malaysia who contravenes the conditions for citizenship provided for in the Constitution of Malaysia.

In this case, Article 24 (1) of the Constitution provides that the Federal Government can take away the citizenship of any citizen of Malaysia **who acquires the citizenship of another state.**

Any citizen of Malaysia who is found to claim and exercise any right given only to citizens of any other country, can be deprived of citizenship by order of the Malaysian Government as provided under Art 24 (2) of the Constitution.

Thus also, as provided under para 3 (a) of Art 24 of the Constitution, any citizen of Malaysia **who acquires and uses a passport issued by another country can also be deprived of citizenship by order of the Federal Government.**

Nevertheless, before an order for deprivation is issued by the Federal Government, based on Art 27 of the Constitution, a notice of deprivation shall be given to the person who has contravened the applicable conditions of citizenship as provided in the Federal Constitution. If an appeal is to be lodged against the notice of deprivation, a Committee of Inquiry (CI) will be formed to conduct an investigation based on the appeal made. After the appeal has been referred to the CI and an investigation carried out, a report will be submitted by the CI to the Federal Government to decide whether an order of deprivation should be issued to that person or not. The CI report will not bind the Federal Government in giving a decision concerning the said appeal.

Provided that, based on Art 18 (2) of the Constitution, no one who has renounced or been deprived of his citizenship under the Constitution, will be registered as a citizen of Malaysia except where permitted by the Federal Government.

[iii] If request [ii] above is approved, what procedures and types of documents are needed to reapply for Malaysian citizenship?

Those who have already renounced and been deprived of their Malaysian citizenship will be considered as foreign nationals, and to reapply for Malaysian citizenship they are required to first acquire the status of Permanent Residents of Malaysia and to fulfil the conditions for citizenship applications.

To apply for citizenship in writing those born in the Federation before Independence Day (i.e. 31 August 1957) should have had, under Art 16 of the Constitution, the status of Permanent Resident of Malaysia for a period of seven (7) years before the date of the application, and there should be not less than five years in total in the said period and with intention to permanently reside in the Federation, and of good behaviour and having a basic knowledge of the Malaysian Language.

Where as those who are applying for citizenship by entry under Art 19 (1) of the Constitution should not be less than twenty-one (21) years of age and have had the status of permanent resident for not less than twelve (12) years prior to the date of the application and with the intention to permanently reside in the Federation and of good behaviour and having a satisfactory knowledge of the Malaysian Language.

Applications are, nevertheless, subject to approval by the Federal Government under Art 18 (2) of the Constitution.

[iv] If they [your clients] wish to reapply for Malaysian citizenship, are they required to first relinquish BOC citizenship before an appeal is submitted to this Ministry?

In the case of your clients, if their application for citizenship has been approved by the Federal Government based on the provisions of the Constitution, they are required to renounce their BOC Citizenship again.

4. In this connection, it is advised that anyone wishing to renounce their citizenship should think carefully so that there is no implication for them in the future as regards the special rights relinquished. For your information also, the Federal Government will no longer consider applications for citizenship from those who have renounced their Malaysian citizenship. The award of Malaysian citizenship to foreign nationals is the Government of Malaysia's highest award and it is necessary to remind Malaysian citizens of this so that they will take care before renouncing their citizenship."

66. The press report is a web version of a report in the Daily Express, describing itself as an "independent national newspaper of East Malaysia". It is undated and we do not know the basis upon which in the index to the bundle it is described as "circa July 2007". It reads as follows:

> "The government will not reinstate the citizenship of Malaysians who have given up their citizenship of this country, Prime Minister Datuk Seri Abdullah Ahmad Badawi said Tuesday. He said Malaysians, who have surrendered their citizenship, also cannot reapply for citizen-hood. All those who had opted to surrender their citizenship officially wrote into the authorities informing that they are giving up citizenship of this country. (Acting on their letters), the Home Affairs Ministry has granted permission to the applicants to surrender their citizenships. Surely, there must be specific reasons for the Ministry to approve their requests. But one thing that I want to stress and explain is that Malaysians who have surrendered their citizenships to the Government cannot have their citizenships reinstated later, suddenly they want to become a Malaysian citizen again, he said after attending the Internal Security Monthly Assembly."

67. The case is that of Lee Thean Hock, Judicial Review No 25-64-2004 in the Malaysia High Court. We understand that the claimant in that case is a person who had renounced his Malaysian citizenship on acquiring a BOC passport and who sought Judicial Review of the decision allowing him to do so. It appears that amongst the arguments raised on the claimant's behalf was an assertion that BOC status did not amount to citizenship and that the acquisition or use of a BOC passport could not be regarded as exercising the rights of a citizen of another country. The proceedings were concluded by consent in February 2005, the order of the court being for the annulment of the renunciation, a declaration that the claimant is a citizen of Malaysia, and costs to be paid by the Respondent. We have no other details, and as the Immigration Judge in the present appeals must have meant, the case is clearly not to be regarded as a precedent. Nevertheless, it may be regarded as throwing doubt upon the claims made on the Appellants' behalf.

Discussion and conclusions on loss of Malaysian Citizenship

68. There is no expert evidence on the effect of the relevant provisions in the Malaysian Constitution. It is sometimes said that it is wrong for a Tribunal to rely on its understanding of foreign legal provisions without expert help, but we are being asked to rely on Art 24, which is written in English, as one of the official languages of the Constitution, and is, as it seems to us entirely clear. In the circumstances there can little objection to our treating Art 27 in the same way. Neither of those articles gives reasons for concluding that a BOC loses Malaysian nationality by acquiring or using a BOC passport, as is claimed on the Appellants' behalf. Arts 24 and 27 on the contrary make it clear first, that the loss of citizenship is by order of the government, not an automatic result of an individual's actions; secondly, that it is discretionary; thirdly, that no order can take effect until a notice of intended deprivation of citizenship has been served on the person affected; fourthly, that that person has a right (not strictly of appeal but) of reference to a committee of enquiry, the report of which is be received by the government before it makes the order.

69. It is no doubt extremely surprising that officers of the Malaysian High Commission in London write letters that seem to ignore the provisions of the Constitution but support the Appellants' claim. Those letters refer to automatic loss of citizenship, and to a requirement of renunciation: neither bears any relation to the constitutional provisions upon which is purportedly based. No explanation for the differences has been offered. We prefer to read the Constitution as it stands, and are fortified in that preference by reading the letter from the National Registration Department in Malaysia itself. (We note, however, that at para 3 (i) that letter appears to make the same error about the acquisition of BOC status that we have identified above at para 42 above).

70. None of the Appellants claimed to have received a notice under Art 27. It therefore follows that none of them can show that he has been, or is even in danger of being, deprived of Malaysian citizenship, however much it may be the case that his acquisition or use of a BOC passport might have made that a possibility. The Appellants have accordingly entirely failed to show by evidence that they could not return to Malaysia as Malaysian citizens, entering the country of their nationality in exercise of their continuing rights as citizens of it. There is no evidential ground for supposing that notices under Art 27 of the Constitution will be issued, but, if they are, the subjects can have their cases referred, and it would be quite wrong for this Tribunal to speculate on the outcome of any enquiry and the Federal Government's decision following it, if indeed such enquiry becomes necessary.

71. The evidence before us is essentially that which was before the Immigration Judge. The subsequent letters from the Malaysian High Commission in London do no more than serve to assist the Appellants' claim that letters from that source,

obtained by the Appellant's solicitors, have consistently had approximately such content; the subsequent letter from the National Registration Department simply sets out the terms of the constitutional provisions.

72. The Immigration Judge appears, as we say, to have taken no account of Art 27. We doubt if he can be blamed, given the way in which the matter was presented to him. Nevertheless, the provisions of Art 27 should have caused enquiry and it is our view that the evidence before him was wholly insufficient to enable him to reach a finding that the Appellants had been deprived of Malaysian citizenship. Although we have also have considerable sympathy with the Respondent's submission that the Immigration Judge failed to consider whether, in the Appellants' case, the treatment which they risked as a result of the deprival of citizenship would be such as to sustain an Art 3 claim, it is clear that the Immigration Judge's conclusion was based on a finding of fact which itself was based on wholly insufficient evidence and was made without taking into account all the relevant evidence. That was an error of law. So far as this part of the claim is concerned, the finding on the evidence is inevitably not that the Appellants succeed under Art 3 but that they do not, the basis of their claim under that head having proved illusory.

Renunciation?

73. At the hearing Mr Gill told us that all three Appellants have now executed what they consider to be renunciations of their Malaysian nationality. After some discussion we decided that this is not a matter to take into account in these reconsiderations. In the first place, voluntary acts of the Appellants long after the hearing before the Immigration Judge cannot show that his determination contained a material error of law. Even where we are satisfied that the Immigration Judge erred in law, we cannot proceed to substitute a determination of our own unless we are also satisfied that the error was material. If the claimed renunciation went to reduce further the returnability of the Appellants, it would tend to demonstrate that any error was not material. It is therefore a matter which it could probably be expected that Mr Gill would be able to argue in full on the Appellants' behalf at the hearing before us. He was, however, unable to do so. As a result, he has failed to show on the Appellants' behalf what the effect of any attempted renunciation would be in their circumstances. Two points in particular come to mind.

74. First, there is no material upon which we could reach a view of the effectiveness in Malaysian law of whatever it is the Appellants have now done. The provisions for renunciation are in Art 23 of the constitution which we have set out above. Only the first paragraph of Art 23 is relevant. Renunciation is only possible if it is by a person who "is or is about to become a citizen of another country". Although Malaysia is not a party to the United Nations Convention on the Reduction of Statelessness, it is clear that the intention is that a Malaysian cannot renounce his

citizenship if by doing so he becomes stateless. We do not know the basis upon which Malaysian law would decide whether a person who has only Malaysian citizenship and BOC status would be regarded as a person who "is … a citizen of another country". If BOC status is not that of being "a citizen of another country" the Malaysian citizen cannot renounce his citizenship. It is not for us to make any decision on the effect of that provision, but we may be permitted to remind ourselves that Malaysian BOCs are BOCs either from their birth or from the coming into force of the 1981 Act, not by obtaining a BOC passport; and it follows that if Art 23 allows renunciation by the appellants (who are now in the UK) it must also allow renunciation by Malaysian BOCs whilst they remain on Malaysian territory. In addition, Art 23 requires registration by the Federal Government before any renunciation can take effect. We have not seen any registrations. We have to add that if registration took place by mistake (as it might if letters from the appellants were supported by submissions of the calibre that have been made to us) it might well be regarded as of no effect even in Malaysian law. We do not know.

75. Secondly, there must be a question as to the extent to which any act of renunciation by the Appellants is entitled to any recognition in UK law if its effect (we say nothing of its purpose) is to prevent the Appellants' return to a country to which they would otherwise be returnable. If the Appellants can, by renouncing Malaysian citizenship, prevent their return to Malaysia, the same is likely to be true of nationals of any other country (save perhaps of States Party to the United Nations Convention on the Reduction of Statelessness) who come to the United Kingdom and, while here, renounce their nationality. We think it very unlikely that this is right. It follows that we think that it is unlikely that the Appellants' acts in renouncing or attempting to renounce their Malaysian citizenship have any effect in these appeals and, in any event, it is clear that the Appellants have entirely failed to show us any such effect.

76. For the foregoing reasons it appears to us that the evidence before the Immigration Judge, and before us, does not establish that the appellants have lost their Malaysian citizenship either by seeking BOC passports or by renunciation. In so far as the Appellants' Art 3 claim is based on their non-returnability to Malaysia, the country of which they are nationals, it therefore fails.

<u>The claim arising from history and policy</u>

77. We turn now to the other principal aspect of the Appellants' claim. Despite the running together of the two issues in the skeleton argument, the second aspect of the claim has to be firmly distinguished from the first. The first aspect of the claim is based, as we have seen, on apprehension of ill-treatment in the *future* on return to Malaysia. The other aspect of the claim depends on the *past*. It is a claim that, so far from being subject to decisions directing their removal, the Appellants were entitled to decisions allowing them to live in the United Kingdom either indefinitely or for a considerable period. That claim looks to the past, because it is

based variously on allegations that to do otherwise than grant them leave would perpetuate an injustice (with or without overtones of colonial exploitation); would amount to discrimination against them; would amount to failing to treat identical cases in the same way; would amount to failure to follow policy; would amount to defeating a legitimate expectation; and possibly other factors, singly or in combination. Because this part of the claim looks to the past rather than the future, it is properly independent of the part of the claim that depends purely on the risk of ill-treatment in the future.

Government practice and policy

(a) The position in 1957

78. We have set out above the reasons why Malaysian citizens remained CUKCs after Malaysian independence, and we have noted that they did so despite becoming citizens of Malaysia. We have also noted above that some people connected with Malaysia were and remained CUKCs who acquired no other nationality, but we are not concerned with them in this appeal. In our view the 1957 materials are of historical interest only. They cannot be regarded as creating any existing rights for the Appellants. In 1957, all CUKCs had an unfettered right to enter and reside in the United Kingdom. The Malaysian CUKCs shared that right, as British subjects, with all other British subjects. We have been shown no material which suggests that there was at any stage any undertaking that in the development of immigration restrictions CUKCs from Malaysia should be treated differently from other British subjects. Even if there had been any undertaking, either in 1957 or later, it could have had no lasting legal effect, because no parliament can bind its successors. The fact that in 1959 some individuals who became Malaysian citizens retained rights to enter and reside in the United Kingdom in common with many millions of other individuals, does not give them any lasting right to enter and reside in the United Kingdom in contrast to the many millions of others with whom they shared that right in 1959.

79. In case it should be thought that this reasoning, if right in law, lacks any moral authority, it must be remembered that the Appellants are not, and could not be, individuals to whom any undertaking was given in 1957. They were not then born. When they were born, the immigration restrictions introduced by earlier legislation and consolidated in the Immigration Act 1971 were already in force. The Appellants have not had a right to reside in the United Kingdom taken away from them: they never had it. They were CUKCs only because their fathers were CUKCs: but they were never patrials.

(b) The Statement of 4 July 2002

80. As has been seen, Mr Gill relied in his submissions to us on an assumption that the Appellants were among those to whom reference was made by Beverley Hughes in

the statement of 4 July 2002. On examination of the whole of that statement we have rejected the submissions. There is accordingly no basis for Mr Gill's consequential submission that there is a government policy incorporating a view that the Appellants have been treated badly by being granted status as BOCs.

(c) The Government's practice

81. A considerable proportion of the bulk of the papers before us consists of correspondence between those representing the Appellants and the Respondent relating to other individuals. We think there is no doubt that the intention was to persuade us that the Government had or has a general practice of granting indefinite leave to remain to persons in the same position as the Appellants. It is put in this way in the grounds:

> "3) Further or alternatively, the Secretary of State has in a large number of cases accepted that Malaysian BOCs who recognise or assert their BOC status (which is their *right* under English law) should be granted leave to remain, usually indefinite leave to remain. This appears to be on the basis that he accepts that they are not deportable as they are not going to be admitted to Malaysia. In this way, many have been granted indefinite leave to remain: See ***Fransman's British Nationality Law*** [LT p.69] for a summary of the Secretary of State's practice; numerous examples are cited of the Secretary of State's practice in this regard [see Bundle A in LM's case pp. 139-153 and the whole of Bundle B in LM's case]. The Appellants seeks like treatment on a non-discriminatory basis. Further or alternatively, they assert that they have a legitimate expectation to be treated in accordance with the policy or practice that was apparently applied to those others."

> "**The established policy and practice of the UK to grant leave to remain to such persons; the obligation to treat like case alike; legitimate expectation**

> In any event, the Secretary of State operates a policy or practice where by he has himself granted leave to remain on this basis on many occasions: see ***Fransman***. This is in fact confirmed by the Secretary of State' own IDIs and letters and the limbo policy.

> There is also the voluminous evidence of similar cases in the bundle. The Secretary of State may assert that each case has to be treated on its own merits. That is no answer where the appellant has provided detailed evidence which demands an answer as to *why* the other cases are different in any legally relevant way. No answer has been provided.

> It is clear from the Secretary of State's constant practice [(footnote (in original) Note the evidence that he has granted leave to remain to large numbers of persons who are in a similar position to the appellant [**13-99**])] that he is pursuing a policy [footnote (in original) this is probably the "limbo" policy referred to in Ooi v SSHD at para 23] to the effect that he will not remove such persons and will

> give them some form of leave to remain. The officially articulated policy says that leave to remain should normally be refused unless there is compelling evidence of non-returnability. This also refers to the "limbo policy". The manner in which this is applied is displayed by the practice. The reality is that the practice actually pursued shows that the respondent grants leave to remain in cases such as the present.
>
> The appellants therefore submit that denial of indefinite leave to remain and consequential removal would not be in accordance with the domestic law and practice on this matter. It is unlawful in that it is arbitrary, it fails to treat like case alike, and it goes against established practice as set out in ***Fransman*** and is therefore irrational, and furthermore, it unlawfully fails to honour a legitimate expectation, particularly where all the indications are that the appellant's will not be readmitted to Malaysia (certainly not for settlement purposes) and/or the Secretary of State has failed to establish that he can lawfully remove them there and that he has carried out all relevant inquiries to enable him to do so."

82. The reference to ***Fransman*** is to page 694 of *Fransman's British Nationality Law* (1998 edition):

> "Currently, any BOC who recognises [BOC] citizenship by obtaining a British passport will not be a Malaysian citizen and will be relieved of his Malaysian passport. In this way, such persons situated in the UK have been granted indefinite leave to remain for the reason that they are British nationals and not deportable to any place. In 1981 there were estimated to be 1,300,000 CUKCs in Malaysia with Malaysian citizenship and 130,000 without any other citizenship."

83. No authority is cited for the practice alleged by Fransman to be current in 1998. As stated, it appears to be based on a conclusion as to the "nationality" of BOCs as such, and a conclusion as to Malaysian law, both of which we have rejected. In any event, Fransman's book is not authoritative on the Secretary of State's practice, and is ten years old.

84. So far as present practice is concerned, we are very surprised indeed by the tone of the paragraphs from Mr Gill's skeleton argument which we have quoted. As we have said, it is the same as the skeleton argument that was before the Immigration Judge in the present cases, and there are signs that it has been used elsewhere (there are occasional references to the appellants as though there were only one of them, and in at least one place the skeleton refers to a single female appellant). A person reading the skeleton argument without the benefit of the other information we have might think on the face of it that, indeed, the Secretary of State has a regular and uniform practice of granting indefinite leave to remain to persons like the appellants.

85. As Mr Gill and those instructing him know perfectly well, however, that is not the case. They may have been able to identify individuals to whom leave to remain

has been granted, but they are also aware of a host of individuals to whom leave to remain has not been granted, many of whom they represent in appeals such as these. It is therefore a matter of considerable concern that the submissions were put in this way. The clear position is that the Secretary of State's current practice is not one of regularly or constantly granting leave to remain to people in the Appellants' position.

86. We simply do not know enough about those to whom leave has been granted, and the large number of those to whom leave has not been granted, to be able to deduce any regular practice. We are particularly and obviously unable to do so when in this calculated fashion we have been shown only part of the evidence.

87. What the material before us does show, and this is a point upon which Mr Gill also relies, is that the Secretary of State has, in some cases at least, responded to an application for a BOC passport from a Malaysian citizen with a letter setting out the view that the acquisition of a BOC passport will *ipso facto* deprive a Malaysian national of his Malaysian nationality. We accept Mr Gill's submission that those letters are evidence of the Secretary of State's view at the time the letters were written. But, as we have said, it is a view that does not appear to be correct. In that context, the letters are also evidence that the grant of leave may have been on the basis of a misapprehension. Even if the appellants were able to show a general practice such as they allege, they would not have any entitlement in public law to rely on it and demand a similar decision in their cases, if it depended on a misapprehension or mistake. A misapprehension or mistake creates no *legitimate* expectation.

(d) Present published policy

88. We turn then to the Secretary of State's declared policy, as set out in the IDIs. For present purposes we need only refer to the following passage from chapter 9:

> "**9. DISCRETIONARY LEAVE AND "LIMBO"**
>
> In some cases a BOC will claim that his nationality obliges the UK to allow him to remain. In considering such cases we must be aware that no country routinely accepts non-citizens and that we cannot force a BOC to go somewhere else. There is a balance between those who genuinely find themselves with nowhere to go and those seeking to circumvent the Immigration Rules.
>
> UKPH applicants who make an application for exceptional LTR/ILR and have no claim to remain under the Rules are to be refused unless there are compelling compassionate circumstances present or there is clear evidence of non-returnability. (See paragraph 9.1).
>
> Applications made for a purpose not covered by the Rules should be refused under paragraph 322 (1). This will attract the right of appeal if the application is in time:

Granting discretionary leave

Discretionary leave for a period of 6 years (3 years followed by 3 years) may be granted to British Overseas citizens and other UKPHs only if one of the following factors are present:-

There is clear evidence of compassionate circumstances. This should be assessed according to the individual merits of the case but direction would normally only be granted in wholly exceptional circumstances. Cases should not be agreed below Senior Caseworker level.

or

There is clear evidence of the persons non-returnability. This should take the form of a letter from the appropriate authorities of the country of normal residence confirming the person's non-returnability, e.g. a refusal to issue a re-entry visa. The applicant should also be asked for a copy of his/her application to those authorities if available. Cases should not be agreed below Senior Caseworker level.

Subsequent grants, of exceptional leave, including the grant of ILR, may be approved at EO level if the circumstances remain the same.

In all cases the onus is on the applicant to provide the necessary evidence. Prolonged enquiries are to be avoided. All relevant questions should be asked in a single letter of enquiry. Failure to reply to such a letter within 4 weeks should trigger the usual reminder followed by a refusal if there is still no reply after a further 28 days.

A person who refuses to apply for a re-entry visa to the country in which he is normally resident should not be given discretionary leave. The expectation must be that UKPHs will apply for the equivalent of returning resident or settlement visas and those who manage to obtain these should not be granted discretionary leave.

There will be cases where a visit visa is issued to enable a compassionate or other visit to take place. In these circumstances it would be wrong to withhold discretionary leave, providing they are able to produce evidence as set out above to satisfactorily demonstrate that they are not returnable to their country of origin *for the purpose of settlement*. This applies equally to first time applicants and those who have already had XLTR for a number of years, and have since been issued with a visit visa. Where a person has held XLTR for a number of years the evidence of the refused settlement visa should be recent. All cases where a visit visa has been issued should be referred to at least Senior Caseworker level.

ILR may be granted after 6 years have been spent in this category assuming the circumstances remain the same. The initial grant of discretionary leave should be for 3 years, followed by a further 3 years and, after 6 years, ILR.

No right of appeal and dismissed appeals

> In cases where UKPHs fail to embark after refusal where there is no right of appeal or where there is a right of appeal and the appeal has been dismissed, the usual warning letter should be sent and the file should be passed speedily to EPU for deportation consideration.
>
> **Applying the limbo policy**
>
> The so-called limbo policy is applicable only after the exhaustion of all the usual administrative processes, including deportation. Only after EPU have decided that further deportation action is not appropriate or feasible, or illegal entry action has been abandoned, should consideration be given to applying the limbo policy.
>
> If it is decided that the status of the UKPH should not be regularised, the applicant should be notified in writing of their position under the limbo policy. ***ANNEX C provides a copy of a stock letter which may be used for this purpose***. The applicant has no right of appeal against the decision not to regularise their stay.

89. As in many other immigration cases at present, there was a difficulty relating to the IDIs and their application. In previous litigation, relating to other Malaysia BOCs who had been refused leave to remain, it transpired that as well as the published parts of the IDIs there are unpublished instructions. A discontinuity between the published and the unpublished parts had the effect that applicants who thought they were providing the evidence sought by the Secretary of State (as set out in the published part of the IDIs) were met with a refusal because the evidence was not of a particular character (as set out in the unpublished part). This difficulty only came properly to light when the unpublished part was, apparently accidentally, disclosed to Mr Gill. But whether or not as the result of revision, and certainly for the purposes of the present cases, the Secretary of State's policy is, we were assured by Mr Palmer, that contained in the passage we have set out above.

90. There are two features of the Secretary of State's policy to which we need to draw attention. The first is that it does not indicate that indefinite leave to remain will be granted in the first instance even to a person who has nowhere else to go. The initial grant is to be of limited leave. Secondly, it is clear that in order for the "limbo" policy to apply, a claimant must demonstrate that he is in limbo: that is to say, that he in fact has nowhere else to go. That has to be done, on an individual basis, by evidence demonstrating that that individual has been refused re-entry to his country of nationality or former nationality for residence or settlement.

91. In the present cases, the Appellants' applications were all for indefinite leave to remain. Those are applications which could not succeed under the Secretary of State's published policy. And they are by individuals none of whom has demonstrated an individual inability to return to Malaysia. Each of them relies instead on general material of dubious accuracy.

92. Even the retention of a passport by the Malaysian High Commission in the United Kingdom does not in our view amount to an individual indication that an appellant cannot return to Malaysia. We say that because, given that the taking of a BOC passport does not in Malaysian law lead to the loss of citizenship, we are unaware of the legal basis upon which any passport can have been retained other than the principle that any passport belongs formally to the government that issued it.

93. For the foregoing reasons we consider that the claimants have not established, from expressed or unexpressed policy, a legitimate expectation that they should be granted indefinite leave or any leave to remain in the United Kingdom.

Colonial history and discrimination

94. The aspects of the case relating to colonial history are those which appear to concern Mr Gill most centrally. Indeed, he reverted to them incessantly during the hearing before us, as a result of which we were deprived of submissions that he might have made on other aspects of the Appellants' case and the evidence. Some flavour of the case and the manner in which he puts it may be obtained from the following sample extracts from his skeleton argument:

> "7. There are many classes of British nationals. The Appellants are not "full" British c*itizens*. Accordingly they do not currently have a right of abode, (this has historically been taken away from persons like the Appellants on a racially discriminatory basis.) But they are nonetheless British *nationals* and are of course within the class of British *nationals* known as British Overseas Citizens. The fact that in domestic law the UK chooses to call its nationals by a range of different names and to discriminate against some of them (often on racial lines) does not affect the point that the Appellants are and are accepted by the Respondent to be British nationals to whom (as to any other British national) the UK owes obligations including obligations of protection.
>
> 12. The Appellants are British nationals and as such are entitled in international law to enter the UK. The fact that the UK has passed domestic laws which, on a racially discriminatory basis, have stripped a category of persons (who are now labelled BOCs) of the right to enter or remain in the UK does not make that legislation effective in international law. Domestic laws cannot be used to deny international responsibilities.
>
> 14. Not all states permit dual nationality. They are not obliged to do so. The UK does; Malaysia does not. The effect is that if Malaysian and British dual nationals assert their British nationality they will lose their Malaysian nationality. The UK is then obliged to take them in.
>
> 15. That is the price to be paid for a colonial past and the shameful deprivation of rights of abode to certain classes of British nationals on racial grounds. This historical wrong has been belatedly recognised by the British Govt (only when the cabinet papers relating to the Commonwealth Immigrants Act 1968 were going to be released

under the 30 years rule and because of the ***Manjit Kaur*** case.) Thus, the Govt now recognises that this deprivation was 'wrong' and should never have happened and the limited attempt to 'right this historical wrong' was made in s.12 of the Nationality, Immigration and Asylum Act 2002. But that only provides persons with a right to register as full British citizens if they have not renounced, voluntarily relinquished or lost through action or inaction another nationality after 4.7.02.

…

20. The question therefore arises whether denial to the Appellants of the right to remain in this country (a country of which they remain nationals for international law purposes although without the right of abode) violates human rights and has been made not in accordance with the law.

21. It should be noted that the Appellants are not even seeking the right to enter this country; they have already entered lawfully and are seeking the right not to be expelled. The Appellants submit that as British nationals, they are entitled to freedom from expulsion from the country of which they are nationals. This right arises irrespective of whether or not the Appellant has rights of settlement in any another country. However, it is in this case *reinforced* by the fact that the Appellants are already in this country and there appears to be no other country to which there is reason to believe that they can be admitted for settlements purposes (at most Malaysia may admit them occasionally as short term visitors but it seems inevitable that it will not permit them to settle there.) Thus, the Appellants can not therefore be lawfully required to leave or be removed from the UK and are entitled to the grant of indefinite leave to remain."

95. It is somewhat difficult to grasp Mr Gill's discrimination arguments. They pervade the skeleton argument as they pervaded his oral submissions, but they are curiously unspecific. We think that he was trying to submit that the grant of BOC status to anybody was itself discriminatory. If that was his submission, there is no substance in it. As we have shown, the naming of a particular group of individuals as "British Overseas Citizens" changed nothing except the name. Of those who became BOCs, the Appellants formed part of a group that were and had been treated rather generously in that they were BOCs as well as (and, it might be said, despite) having effective nationality of another country. The criticisms of UK policies in reducing the right of all British subjects to live in the territory of the United Kingdom, whether in the East African Asian cases or in Beverley Hughes' statement or elsewhere has been directed at those BOCs who had no other nationality. The class of which the Appellants form a part has an advantage not possessed by all BOCs, and an additional status not possessed by all Malaysian citizens.

96. It is very difficult to see that in or by having status as BOCs, Malaysian BOCs suffer any disadvantage by comparison with BOCs who are not Malaysian, Malaysians who are not BOCs, or the inhabitants or the descendants of inhabitants of any other former colony. Some BOCs – probably nearly all non-Malaysian BOCs - have, or had from 1 January 1983, the right to reside in no country in the world. Malaysian BOCs do not have that disadvantage. Compared with other Malaysians, it is

difficult to see that being a BOC as well as being a Malaysian is a disadvantage, or that the statutory allocation of BOC status to some Malaysians was discrimination against those to whom the allocation was made. Similarly, in comparison with other former colonies, the former inhabitants of Penang and Malacca were clearly unusual in retaining, on independence, a citizenship link with the former colonial power. The link appears to have been retained at the request of those parts of what became the Federation, and again it is difficult to see that the provisions of the 1981 Act, in assigning to them a status in addition to their citizenship of the independent State, discriminated against them in so doing. By comparison with other Malaysia nationals, Malaysian BOCs have an advantage rather than a disadvantage.

97. In any event, these appellants have undergone no change in their immigration status. At the time that they were born they were CUKCs without a right of abode in the United Kingdom. The legal position was perfectly clear and has not changed. They belonged to Malaysia and they are, legally and naturally if we may so put it, citizens of Malaysia. They do not have a right to reside in a country other than that to which they naturally belong, but that is the position of most of the world's people. Failing to grant them a benefit to which they have never had any right is not discrimination, and giving them a right which others do not have is not actionable discrimination.

98. We can do little more to respond to the repetitions in Mr Gill's arguments than by repetition of our conclusions. The Appellants are not "British nationals" with a right in international law to enter the UK. They are not amongst those individuals who were deprived of a right to live in the UK either by immigration legislation or by the 1981 Act. They are not in the class of individuals to whom Beverley Hughes was referring. They are probably not in the class of individuals to whom either George Thompson or James Callaghan was referring: as we have indicated, as well as the East African Asians, there were other CUKCs, particularly in Malaysia, as well as other countries like Aden, who had no right to live in the countries where they were living, or anywhere else in the world. The Appellants themselves have neither been deprived of a right to live in the UK nor given any right to suppose that they would be allowed to live in the UK. Their fathers became CUKCs on Malaysian independence, but there was no assurance that their fathers would be able indefinitely to exercise a right to live in the UK, when they had a right to live in Malaysia; there was no assurance that any rights the Appellants' fathers had on Malaysian independence would remain unchanged or would be transmissible by descent; and, in any event, the British government of 1957 could not in law bind its successors and, probably, could not be sensibly regarded as not being entitled to make decisions on the basis of world conditions at the present time, fifty years later. Finally, if it were to be said that governmental statements in 1957 had force today, there would have to be full attention paid to the last part of the extract from Mr Lennox-Boyd's speech set out above. Malaysian CUKC's were to have no privileges that other Malaysian citizens did not have.

99. It is difficult to have sympathy with a single sentence of Mr Gill's argument on discrimination. The Appellants are nationals of Malaysia and are being treated as nationals of Malaysia. The government does not have a policy of granting of indefinite leave to remain in the United Kingdom to nationals of Malaysia save in exceptional circumstances, and it is not required to have such a policy. To treat nationals of Malaysia as nationals of Malaysia is not degrading to them.

Article 8

General arguments

100. With the exception of the specific arguments raised in relation to the first Appellant's homosexuality, the arguments based on Art 8 are entirely general in nature. They are not adapted to the individual circumstances of the Appellants. Indeed it is in Mr Gill's skeleton argument summarising his submissions on Art 8 that we found the references to a female Appellant and to the Appellants in this case in the singular. Those are of course small and insignificant errors, save that they indicate that the submissions made in this case are the same as those made in other BOC cases where the same representatives have acted. Save in the case of the first Appellant, it is not said that, therefore, that there is anything in the individual's circumstances of these Appellants that raises a claim under Art 8. The claim arises, it is said, generally from their circumstances as BOCs in the United Kingdom with the history set out above.

101. The question then is whether there is anything in those circumstances that gives the Appellants, and others similarly circumstanced, a right under Art 8 that transcends immigration law. We cannot see that there is. The Appellants' case is put, throughout, on the basis that they cannot return to Malaysia, or, alternatively, that they ought to be granted indefinite leave to remain for the historical reasons we have discussed. We have decided that both those arguments fail. The Appellants can be returned to Malaysia, and are not entitled to remain in the United Kingdom on the basis suggested. In those circumstances there is no proper ground upon which it could be said that their removal from this country, in which they have no immigration law right to be, to the country of which they are nationals, where their roots are, and where there is no reason to suppose that they will suffer any difficulties, breaches Art 8. It might have been that on an individual basis the appellants were able to show that they had made such contacts in the United Kingdom that their removal would now be unlawful as a breach of Art 8. But the evidence before us, and before the immigration judge, is not of relationships of that nature, or of contacts which are of such depth and importance that they generate a right beside which the rules of immigration law have to take second place.

102 In the context of the conclusions we have reached, Mr Gill's argument that the decisions against which the appellants appeal are contrary to Arts 3 and 8 as

lacking any legal authority requires no separate detailed consideration. The decisions are not prohibited by law and, in addition, are not shown to be incorrect.

The first Appellant's Art 8 claim

103. The first Appellant's evidence before the Immigration Judge was that he had been a practising homosexual before he came to the United Kingdom in 1999. He met his present partner in July 1999 however, evidently very shortly before he left the United Kingdom, because his leave ran out on the 25th of that month. He returned to Malaysia. His partner visited him there, staying with him for a period of about two months. They have lived together in this country since the first Appellant's return here in December 2000.

104. The first Appellant's partner also gave evidence before the Immigration Judge. He is a national of the United States of America, whose immigration status in the country is entirely unclear. He first entered the United Kingdom as a visitor and then applied to stay as a partner of anther man. He was granted leave for two years from November 1999 to November 2001. Before his commencement of that leave, granted, as we say, on the basis of an application made by reference to a different relationship, he had met the Appellant. It appears that he made no modification of his application based on the previous relationship but on the expiry of leave then (presumably mistakenly) granted he applied for indefinite leave to remain in 2001. He was granted leave for two years from 2002 to 2004. In August 2003 he returned to the USA to find work, he remained there for eight months, returning within the currency of his leave. There was no evidence that any application has been made for its extension following its expiry in November 2004.

105. The first Appellant's partner said that he had experienced no difficulty from the authorities when he was with the first Appellant in Malaysia in 2000, but that they had kept their relationship private and he "felt suppressed." Both the first Appellant/and his partner said that he had made three applications for visas to visit the USA whilst the partner was there in 2003 to 2004, but had been refused. The partner's evidence is that there is no basis upon which the first Appellant could live with him in the USA. We do not know whether or not that is in fact the position in US law. It is difficult to see that the unsuccessful applications are evidence of that. First, because they were made by the first Appellant towards the end of "indeed perhaps after the end of" a period of temporary leave in this country, and because, secondly, they were not made on the strength of a lasting relationship with a US citizen, but were applications for temporary visits.

106. The Immigration Judge appears to have assumed that the first Appellant and his partner could not have pursued their relationships in the United States. We regard the evidence of that as wholly insufficient to support such an assumption. There was some evidence before him relating to the attitude to homosexuals in Malaysia, but it is difficult to see, taking into consideration the account of the first Appellant's

history as a practising homosexual before he left Malaysia, and his partner's evidence about the visit. In seeking reconsideration of the Immigration Judge's decision to allow the first Appellant's appeal under Art 8 as well as under on other grounds, the Secretary of State submits that there is no reason why the first Appellant should not return to Malaysia and make an application for entry clearance from there. That submission must, we suppose, have been made on the basis that the first Appellant's partner is "settled" in the United Kingdom within the meaning of the Immigration Acts. As we have said, there is no evidence of that. But if the first Appellant's partner is not settled here the Art 8 argument is an argument that Art 8 gives a right to two men to pursue a relationship in the United Kingdom, although neither of them has otherwise the right to be here. That, we think, is a matter which needs careful analysis in the light of more substantial evidence and more detailed argument than was available to the Immigration Judge or to us.

Conclusions

107. For the reasons we have given, we find that the Immigration Judge made a material error of law. In the first Appellant's case we adjourn this reconsideration for a further hearing directed solely to his claim under Art 8. In the case of the second and third Appellant we substitute determinations dismissing their appeals.

C M G OCKELTON
DEPUTY PRESIDENT