Upper Tribunal
(Immigration and Asylum Chamber)

Chin and Another (former BOC/Malaysian national – deportation) [2017] UKUT 00015 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Decision Promulgated**
On 22 December 2016	**On 8 May 2017**

Before

THE PRESIDENT, THE HON. MR JUSTICE MCCLOSKEY

Between

MR SOO THOON CHIN
MRS MEI POH TENG
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr G Davison, of counsel, instructed by The Chancery Partnership
For the Respondent: Mr P Deller, Senior Home Office Presenting Officer

The deportation of a former Malaysian national and former BOC is liable to be deemed unlawful where relevant Government Policies relating to inter-state arrangements with Malaysia have not been taken into account or given effect.

DECISION

Introduction

1. In the case management directions of Upper Tribunal Judge Bruce dated 13 September 2016 one finds the following useful synopsis of the framework of this appeal:

> *"The first Appellant Mr Chin resists his deportation to Malaysia inter alia on the grounds that he is not a national of that country. He asserts that he is stateless. The second Appellant is party to these proceedings as she is the wife of the first Appellant who faces deportation as his family member".*

In the various decisions and notices generated by the Secretary of State for the Home Department ("*the Secretary of State*") Mr Chin's date of birth is stated to be 12 April 1962 (now aged 54 years) and he is described as a "British Overseas Citizen" ("BOC"). Mr Chin is married to the second Appellant, Mrs Teng.

2. Both the underlying decision making process of the Secretary of State and the progress of these appeals have been regrettably sluggish. There are notices and decisions dating from November 2010. Quite how a period of six years has been permitted to elapse since then, without finality, is unclear. The gravest period of individual delay began on 25 November 2010, when the Secretary of State wrote to Mr Chin inviting his representations against deportation from the United Kingdom and 16 January 2014 when, by a further letter, Mr Chin was notified of a further decision that Section 32(5) of the UK Borders Act 2007 applies. This generated a right of appeal to the First-tier Tribunal ("FtT") which Mr Chin duly exercised.

Chronology

3. The following are the main milestones in Mr Chin's immigration history:

   (a) He resided lawfully in the United Kingdom between February and June 2001.

   (b) In August 2002 he was admitted to the United Kingdom as a visitor for a sojourn of six months. His wife had entered the United Kingdom two days previously with a visitor's visa valid for six months.

   (c) In November 2004 the couple's two children (both now of adult age) were granted leave to enter as visitors for six months.

   (d) On 18 July 2005 Mr Chin was granted a BOC passport with a period of validity expiring ten years later.

   (e) The two children and Mrs Teng resided unlawfully in the United Kingdom from May 2005 and March 2006 respectively.

(f) In December 2004 Mr Chin's solicitors submitted an application for indefinite leave to remain in his behalf and, in April 2006, they included his spouse and two children, as dependants, in this application.

(g) On 23 November 2006 Mr Chin relinquished his Malaysian nationality.

(h) The aforementioned application was refused in June 2007 and Forms IS/151A were prepared in respect of all four persons – but, evidently, not served. A period of three years inertia followed.

4. At this point in the tale Mr Chin acquired a significant criminal record. On 17 June 2017 he was convicted upon indictment of customs and excise offences and, on 01 September 2010, was sentenced to 30 months' imprisonment. Next, on 25 November 2010, Mr Chin was invited via the usual form of notice to make representations against his possible deportation. This was followed by a reconsideration of the indefinite leave to remain on compassionate grounds application, yielding a further refusal decision based on Mr Chin's offending, under Rule 322(5A).

The Secretary of State's Decision

5. Following yet another hiatus a formal Home Office notice of decision dated 16 January 2014 was served on Mr Chin. This identified him as a "BOC". In the text it is noted that deportation action is being pursued against Mrs Teng. Their case was considered under the Article 8 ECHR regime of the Rules, yielding the conclusion that neither of them satisfied the relevant Rules requirements or succeeded under the rubric of "exceptional circumstances". The overarching conclusion expressed was that the public interest in their deportation should prevail. Deportation was based on the "conducive to the public good" ground.

Appeal to the FtT

6. By its decision dated 10 April 2014 the FtT allowed the Appellants' appeals. This brief decision contains no consideration whatsoever of the legal issues or the merits generally. While the judge professed to find that the Secretary of State's decision was "*not in accordance with the law*", and appeared to remit the case to the Secretary of State for s fresh decision, the sole basis for the tribunal's decision was that the Secretary of State had failed to comply with earlier case management directions. On 04 June 2014 the Upper Tribunal set this decision aside and remitted the appeals for a fresh decision by FtT.

7. This gave rise to a further decision of the FtT, dated 23 January 2015. The FtT decided as follows:

(a) Mr Chin was a "foreign criminal" within the meaning of the 2007 Act notwithstanding his BOC status.

(b) Mr Chin relinquished his Malaysian nationality on 23 November 2006.

(c) Mr Chin is not stateless: this part of the judgment is unreasoned and is followed by a long quotation from the Home Office Policy on BOCs, which is left in limbo without further analysis or consideration or findings.

(d) The deportation decisions were harmonious with the Article 8 regime of the Rules.

(e) Returning to the Home Office Policy in the penultimate section of the judgment, the Tribunal noted the following four matters: Mr Chin had never presented a letter from the Malaysian authorities indicating that he could not be returned to Malaysia; he had not applied for a visa to enter Malaysia; he has never attempted to enter Malaysia voluntarily; and, finally, the Malaysian government has provided written confirmation to the United Kingdom government that BOCs who have renounced their citizenship can return to Malaysia and begin steps to re-acquire their Malaysian nationality – and, specifically, could apply for a five year residence authorisation, designed to lead to citizenship, before leaving the United Kingdom.

The appeal was dismissed accordingly.

Appeal to this Tribunal

8. By order of Upper Tribunal Judge Blum dated 08 September 2015 permission to appeal was granted in the following terms:

> *"It is arguable that the* [FtT] *failed to consider the possibility that a BOC may also be a stateless person and the legal impact that statelessness may have on an automatic deportation".*

Regrettably, the appeal has progressed laboriously through the Upper Tribunal system. Having been listed speedily, at a hearing on 03 November 2015 this Tribunal, in the light of certain submissions made on the Appellants' behalf, adjourned the appeal to enable the Appellants to make an application to the Secretary of State. As noted in our ruling dated 04 November 2015, the Secretary of State has not made any statelessness decision in the history of this case. The ruling stated:

> "*If the first Appellant considers that he is entitled to this status, he should make the appropriate application under the relevant regime of the Immigration Rules (paragraphs 401 – 403).*"

The hearing of the appeal was adjourned accordingly.

9. The Appellants' representatives delayed in making this application until 21 June 2016. This elicited a decision on behalf of the Secretary of State, dated 21 July 2016, refusing the Appellants' application under paragraph 322(1B) of the Rules viz on the ground that he is the subject of a deportation order. Evidentially, the precise nature of the application made to the Secretary of State is unclear. However, what is clear is that the ensuing decision did not address the issue of statelessness at all. Given the

appeal history, this was quite remarkable. This was followed by a case management review held on 13 September 2016 and, ultimately, the hearing of this appeal on 22 December 2016.

Two Significant Pieces of Evidence

10. It is convenient at this juncture to highlight at this juncture two noteworthy pieces of evidence. The first is a letter dated 13 July 2015 from the High Commission of Malaysia. This describes Mr Chin as a BOC and indicates that he was born in Penang, Malaysia on 12 April 1962. The text continues:

> *"… the above-named is no longer a citizen of Malaysia from the date stated on Borang K registered 0000106146 at Malaysian High Commission on 23 November 2006. Therefore, he is not eligible to apply for a Malaysian passport".*

There is also a formal UKBA document (IS.151FCD), dated 23 November 2011, stating:

> *"We have applied to obtain an Emergency Travel Document (ETD) from the Malaysian authorities. Once this is obtained you will be made a subject of a deportation order and will be removable when all your appeal rights are exhausted".*

It is common case that no ETD has been issued in respect of Mr Chin.

The Issues Considered

11. This Tribunal had occasion to review the law on statelessness in R (on the application of Semeda) v Secretary of State for the Home Department (statelessness; Pham [2015] UKSC 19 applied) (IJR) [2015] UKUT 658 (IAC). Its decision drew attention to the test for statelessness enshrined in Article 1(1) of the United Nations Convention relating to the Status of Stateless Persons (the "1954 Convention") namely where the person concerned is not considered to be a national by any state under the operation of its law: see [13]. This Tribunal observed, at [14]:

> *"It is no coincidence that statelessness was made the subject of an international treaty during the same era when elaborate international provision was made for refugees. Statelessness, as a matter of law, denotes the lack of any nationality. While some stateless persons are also refugees, not all asylum claimants are stateless and not all stateless persons are refugees. Statelessness is a global phenomenon which has multiple causes. It invites reflection on the two conventional mechanisms whereby nationality is acquired, namely (a) through birth on the territory of a state (jus soli) and (b) from birth through descent (jus sanguinis). Statelessness is addressed not only in the 1954 Convention but also in the Convention on the Reduction of Statelessness (1961), the American Convention on Human Rights, the African Charter on the Rights and Welfare of the Child and the European Convention on Nationality."*

At [16] this Tribunal stated:

> *"At a practical level, the question of whether the definition of statelessness is satisfied will frequently require an assessment of whether the person concerned possesses or has access to a document, such as a passport or a national identity card or something kindred, which denotes that the individual is recognised by one of the states of the world as one of its nationals. This will form part of the enquiry, assessment and decision in the generality of cases of this kind. Furthermore, it is appropriate to observe that most cases are likely to involve a significant measure of evaluative assessment, to be contrasted with stark fact finding, on the part of the decision making official."*

Account was also taken of the decision of the Supreme Court in Pham v Secretary of State for the Home Department [2015] UKSC 19 that in some cases the practice, as well as the laws, of the government of a foreign state may have to be considered: see per Lord Carnwath at [38].

12. Some reflection on the broader international law context is instructive. Nationality provides the link between a state and its people. It is a status to which a person can lay claim only under the relevant laws of the state concerned. Once acquired, the status of nationality confers benefits and imposes duties. In the Nationality Decrees in Tunis and Morocco case [PCIJ, Series B, Number 4 1923] the International Court of Justice was requested by the Council of the League of Nations to provide an advisory opinion in a dispute between Britain and France over French nationality decrees which had the effect of giving French nationality to the children of certain British subjects. The Court declared (at page 24) that –

> "*…. The question of whether a certain matter is or is not solely within the jurisdiction of a state is an essentially relative question, it depends upon the development of international relations. Thus, in the present state of international law, questions of nationality are, in the opinion of this Court, in principle within this reserved domain.*"

13. This principle was stated even more emphatically by the ICJ in the Nottebohn case (ICJ Reports 1955, at 4 and 23). It was restated in Article 1 of the Hague Convention on the Conflict of Nationality Laws (1930):

> "*It is for each state to determine under its own law who are its nationals.*"

As the next succeeding sentence demonstrates, this rule is not absolute:

> "*This law shall be recognised by other states insofar as it is consistent with international conventions, international custom and the principles of law generally recognised with regard to nationality.*"

14. While nationality provides the vital nexus between the individual and the state concerned, it has an important broader dimension. It is well established that via nationality the individual can have recourse to the benefits of international law (Shaw, International law, 6th ed, pp 659-660). This, however, is not available in limbo. Rather, it is accessible only through the medium of the state, which means state conferral of the status of nationality.

15. The status of BOC is regulated by Part III of the British Nationality Act 1981 (the "1981 Act"). This operates in tandem with the British Nationality (General) Regulations 2003. The general rule devised is that BOC status can be acquired only be registration. On 01 January 1983 a substantial group of persons – around 1.5 million former Commonwealth citizens – attained the status of BOC by automatic reclassification. Since then, the policy underpinning the 1981 Act has been to limit the number of new BOCs and the design of the legislation itself is to gradually phase out this category.

16. Malaysia is an Independent Commonwealth Country. It secured its independence, under the guise of the Federation of Malaya, in 1957. At this time many Malaysians had the status of Commonwealth Citizen which they retained and, in due course, on 01 January 1983 those belonging to this class were reclassified BOCs. In Fransman's British Nationality Law (3rd Edition) one finds the following passage of note at page 1085:

> "*Malaysia does not permit multiple nationality, but the exact state of Malaysian law in this regard has been unclear for years and is still unclear. There have been times …. when any BOCs who relied upon their British overseas citizenship by obtaining a BOC passport were relieved of their Malaysian passports (by the Malaysian authorities) on the ground that they were no longer Malaysian (having automatically lost Malaysian nationality by acting as BOCs).*"

The author continues:

> "*…. Such people in the UK at the time of these events have been granted indefinite leave, as BOCs who could not be removed to Malaysian or elsewhere. But that is not to say that all such BOCs were regularised in this way or that such regularisation was pursuant to any general Home Office policy or practice.*"

At this juncture, it is appropriate to observe that no Home Office policy relating to BOCs who formerly held Malaysian nationality features in either the Secretary of State's decisions or arguments this appeal. I shall comment further on this *infra.*

17. The operation of Malaysian law and practice in this sphere is given some colour by the facts in R (Ku) v Secretary of State for the Home Department [2013] EWHC 3881 (Admin). There the claimant, a BOC without right of abode in the United Kingdom and a former citizen of Malaysia, who had renounced this status, was removed by the Secretary of State to Kuala Lumpur where, on arrival, he was refused entry and was returned to the United Kingdom. The evidence recited in the judgment appears to indicate an indeterminate state of affairs vis-à-vis the Malaysian and United Kingdom Governments. In this context, the learned deputy judge noted, *inter alia*, at [26]:

> "*…. The material before me establishes that in February 2013 Malaysia agreed that a BOC such as the claimant who was prepared to return to Malaysia voluntarily could apply for a five year residence pass (intended to lead to citizenship) before departure*

from the United Kingdom. This would allow him to live and work in Malaysia while his application to reacquire his citizenship was processed."

The judgment also quotes from a Malaysian Government letter dated 15 July 2011 containing the following passage:

"*With regards to the removal of BOC holders who have no right to remain in the UK, the Government of Malaysia would be in a position to accept the removal of such persons provided that they could be determined previously to be Malaysian nationals. In such cases it is of paramount importance for the UK to give ample notification as well as sufficient timeframe to the Malaysia authorities.*"

I interpose: there is no evidence that (a) these arrangements do not apply to Mr Chin or that (b) any of these steps has been taken in his present case.

18. The challenge of Mr Ku was based squarely on issues of policy, including the Secretary of State's Enforcement Instructions Guidance ("EIG"). His contention that the removal decision was not in compliance with the relevant policies was rejected: see [27] – [33]. His further challenge, based on the so-called "limbo" policy (which features nowhere in the present case) was also rejected: see [39].

19. The decision in Lu is of some three years vintage. It is based on a series of policy materials (letters *et al*) predating 2013. None of these materials features in the evidence of argument in this appeal. Equally, none of them plays any expressed part in the decisions of the Secretary of State belonging to the framework of this appeal.

20. I have considered the decision of the Special Immigration Appeals Commission in Hamza v Secretary of State [2010] UKSIAC 23/2005. This concerned section 40(4) of the 1981 Act, which precludes the Secretary of State from making a deprivation of British Citizenship Order if satisfied that this would render the subject stateless. This has no application to the present case. *Ditto* the decision of the CJEU in Kaur (ECR 2001, 1-01237) which decided that in order to determine whether a person is a national of the United Kingdom of Great Britain and Northern Ireland for the purposes of Community Law, it is necessary to refer to the 1982 Declaration on the definition of the term "nationals", which substituted its 1972 predecessor. I derive no assistance from either of these decisions.

21. On behalf of the Appellant Mr Davison submitted that the second decision of the FtT is vitiated by error of law on account of its failure to determine whether Mr Chin is stateless – and, if he is, whether he can be lawfully deported to Malaysia. In this context Mr Davison drew attention to the Secretary of State's formal statement (via letter dated 01 November 2016) that Mr Chin is not stateless as he is recognised as a BOC "*albeit that he does not have a right of abode*". Mr Davison submitted that the Secretary of State's classification of Mr Chin as a BOC who has no right of abode in the United Kingdom impels ineluctably to the conclusion that he is a stateless person as he is not a citizen or national of any other country of the world. Mr Davison's alternative submission is that given the Secretary of State's contention that Mr Chin is not stateless as he is recognised as a British national albeit without right of abode,

it must follow that he is not vulnerable to deportation given the definition of *"foreign criminal"* in Section 117D (2) of the 2002 Act, namely –

> *"… a person who is not a British citizen, who has been convicted in the UK of an offence and who has been sentenced to a period of imprisonment of at least twelve months, or has been convicted of an offence that has caused serious harm, or is a persistent offender".*

22. There were both written and oral submissions on behalf of the Secretary of State. These drew attention to Section 40 of the British Nationality Act 1981, which provides:

> *"(1) In this section a reference to a person's "citizenship status" is a reference to his status as –*
>
> *(a) a British citizen,*
> *(b) a British overseas territories citizen,*
> *(c) a British Overseas citizen,*
> *(d) a British National (Overseas),*
> *(e) a British protected person, or*
> *(f) a British subject.*
>
> *(2) The Secretary of State may by order deprive a person of a citizenship status if the Secretary of State is satisfied that deprivation is conducive to the public good.*
>
> *(3) The Secretary of State may by order deprive a person of a citizenship status which results from his registration or naturalisation if the Secretary of State is satisfied that the registration or naturalisation was obtained by means of –*
>
> *(a) fraud,*
> *(b) false representation, or*
> *(c) concealment of a material fact.*
>
> *(4) The Secretary of State may not make an order under subsection (2) if he is satisfied that the order would make a person stateless.*
>
> *(4A)** But that does not prevent the Secretary of State from making an order under subsection (2) to deprive a person of a citizenship status if –*
>
> *(a) the citizenship status results from the person's naturalisation,*
> *(b) the Secretary of State is satisfied that the deprivation is conducive to the public good because the person, while having that citizenship status, has conducted him or herself in a manner which is seriously prejudicial to the vital interests of the United Kingdom, any of the Islands, or any British overseas territory, and*
> *(c) the Secretary of State has reasonable grounds for believing that the person is able, under the law of a country or territory outside the United Kingdom, to become a national of such a country or territory.*
>
> *(5) Before making an order under this section in respect of a person the Secretary of State must give the person written notice specifying –*
>
> *(a) that the Secretary of State has decided to make an order,*

(b) the reasons for the order, and

(c) the person's right of appeal under section 40A(1) or under section 2B of the Special Immigration Appeals Commission Act 1997 (c. 68).

(6) Where a person acquired a citizenship status by the operation of a law which applied to him because of his registration or naturalisation under an enactment having effect before commencement, the Secretary of State may by order deprive the person of the citizenship status if the Secretary of State is satisfied that the registration or naturalisation was obtained by means of –

(a) fraud,

(b) false representation, or

(c) concealment of a material fact."

[** In force from 20 July 2014]

The Secretary of State's case also draws on Schedule 2 to the 1981 Act. Under the rubric of "Provisions for Reducing Statelessness", this provides:

"Persons born in the United Kingdom after commencement

1. -

(1) Where a person born in the United Kingdom after commencement would, but for this paragraph, be born stateless, then, subject to sub-paragraph (3) –

(a) if at the time of the birth his father or mother is a citizen or subject of a description mentioned in sub-paragraph (2), he shall be a citizen or subject of that description; and accordingly

(b) if at the time of the birth each of his parents is a citizen or subject of a different description so mentioned, he shall be a citizen or subject of the same description so mentioned as each of them is respectively at that time.

(2) The descriptions referred to in sub-paragraph (1) are a British overseas territories citizen, a British Overseas citizen and a British subject under this Act.

(3) A person shall not be a British subject by virtue of this paragraph if by virtue of it he is a citizen of a description mentioned in sub-paragraph (2).

Persons born in a British overseas territory after commencement

2.–

(1) Where a person born in a British overseas territory after commencement would, but for this paragraph, be born stateless, then, subject to sub-paragraph (3) –

(a) if at the time of the birth his father or mother is a citizen or subject of a description mentioned in sub-paragraph (2), he shall be a citizen or subject of that description; and accordingly

(b) if at the time of the birth each of his parents is a citizen or subject of a different description so mentioned, he shall be a citizen or subject of the same description so

mentioned as each of them is respectively at that time.

(2) The descriptions referred to in sub-paragraph (1) are a British citizen, a British Overseas citizen and a British subject under this Act.

(3) A person shall not be a British subject by virtue of this paragraph if by virtue of it he is a citizen of a description mentioned in sub-paragraph (2).

Persons born in the United Kingdom or a dependent

3.—

(1) A person born in the United Kingdom or a British overseas territory after commencement shall be entitled, on an application for his registration under this paragraph, to be so registered if the following requirements are satisfied in his case, namely—

(a) that he is and always has been stateless; and

(b) that on the date of the application he was under the age of twenty-two; and

(c) that he was in the United Kingdom or a British overseas territory (no matter which) at the beginning of the period of five years ending with that date and that (subject to paragraph 6) the number of days on which he was absent from both the United Kingdom and the British overseas territories in that period does not exceed 450.

(2) A person entitled to registration under this paragraph—

(a) shall be registered under it as a British citizen if, in the period of five years mentioned in sub-paragraph (1), the number of days wholly or partly spent by him in the United Kingdom exceeds the number of days wholly or partly spent by him in the British overseas territories;

(b) in any other case, shall be registered under it as a British overseas territories citizen.

Persons born outside the United Kingdom and the overseas territories after commencement

4.—

(1) A person born outside the United Kingdom and the British overseas territories after commencement shall be entitled, on an application for his registration under this paragraph, to be so registered if the following requirements are satisfied, namely—

(a) that that person is and always has been stateless; and

(b) that at the time of that person's birth his father or mother was a citizen or subject of a description mentioned in sub-paragraph (4); and

(c) that that person was in the United Kingdom or a British overseas territory (no matter which) at the beginning of the period of three years ending with the date of the application and that (subject to paragraph 6) the number of days on which he was absent from both the United Kingdom and the British overseas territories in that period does not exceed 270.

(2) A person entitled to registration under this paragraph –

(a) shall be registered under it as a citizen or subject of a description available to him in accordance with sub-paragraph (3); and

(b) if more than one description is so available to him, shall be registered under this paragraph as a citizen of whichever one or more of the descriptions so available to him is or are stated in the application under this paragraph to be wanted.

(3) For the purposes of this paragraph the descriptions of citizen or subject available to a person entitled to registration under this paragraph are –

(a) in the case of a person whose father or mother was at the time of that person's birth a citizen of a description mentioned in sub-paragraph (4), any description of citizen so mentioned which applied to his father or mother at that time;

(b) in any other case, a British subject under this Act.

(4) The descriptions referred to in sub-paragraphs (1) to (3) are a British citizen, a British overseas territories citizen, a British Overseas citizen and a British subject under this Act.

Persons born stateless before commencement

5.—

(1) A person born before commencement shall be entitled, on an application for his registration under this paragraph, to be so registered if the circumstances are such that, if –

(a) this Act had not been passed, and the enactments repealed or amended by this Act had continued in force accordingly; and

(b) an application for the registration of that person under section 1 of the British Nationality (No. 2) Act 1964 (stateless persons) as a citizen of the United Kingdom and Colonies had been made on the date of the application under this paragraph, that person would have been entitled under that section to be registered as such a citizen.

(2) A person entitled to registration under this paragraph shall be registered under it as such a citizen as he would have become at commencement if, immediately before commencement, he had been registered as a citizen of the United Kingdom and Colonies under section 1 of the British Nationality (No. 2) Act 1964 on whichever of the grounds mentioned in subsection (1)(a) to (c) of that section he would have been entitled to be so registered on in the circumstances described in sub-paragraph (1)(a) and (b) of this paragraph.

Supplementary

6.

If in the special circumstances of any particular case the Secretary of State thinks fit, he may for the purposes of paragraph 3 or 4 treat the person who is the subject of the

application as fulfilling the requirement specified in sub-paragraph (1)(c) of that paragraph although the number of days on which he was absent from both the United Kingdom and the British overseas territories in the period there mentioned exceeds the number there mentioned."

The kernel of the Secretary of State's case is that Mr Chin, being a BOC, is not *de iure* stateless.

My Conclusions

23. The Secretary of State's reliance on the statutory provisions reproduced above is misconceived since (a) this is not a case of deprivation of citizenship status (section 40) and (b) place of birth and its ramifications (Schedule 2) feature not in the Secretary of State's decision making and are remote from the issues in this appeal.

24. Two further conclusions are incontestable. First, Mr Chin was formerly a national of Malaysia but has not held this status since 23 November 2006. Second, Mr Chin was formerly a BOC, a status which expired on 17 July 2015. It is correct that at the time of the deportation decision, 16 January 2014, Mr Chin was a BOC. However, there have been developments since then.

25. The first of these developments materialised when the first of the FtT's two decisions was made. This gave the Secretary of State the opportunity to review the deportation decision and, in particular, to examine it in the light of the policies noted in [17] – [18] above. However, the Secretary of State failed to take this simple and obvious course. While the challenge to the first decision of the FtT was duly vindicated, this was a vacuous victory, making no contribution to finality in Mr Chin's case.

26. The second main post-decision development occurred when this Tribunal adjourned the hearing of the appeal to enable Mr Chin to make an application to the Secretary of State for a determination of statelessness under paragraphs 401 – 403 of the Rules. Bizarrely, in the decision which ensued, the Secretary of State did not address the issue of statelessness at all. This lack of co-operation with the Upper Tribunal is disturbing.

27. The third notable post-decision development is found in the Secretary of State's letter dated 01 November 2016 wherein it is asserted that Mr Chin is not stateless as he is recognised as "*a British national albeit that he does not have a right of abode*". This statement is incoherent. Mr Chin has <u>never</u> held British nationality. Furthermore, this letter fails to engage with the elephant in the room, namely at the time when it was written Mr Chin was no longer a BOC. Insofar as this purports to be an assessment of whether Mr Chin's case complies with the definition of statelessness enshrined in the 1954 Convention it is truly hopeless. It is clear that what is asserted in the letter dated 01 November 2016 underlay the Secretary of State's deportation decision over two years previously.

28. Errors of law abound in the Secretary of State's decision making in this case. First, the assertion that Mr Chin is a British national is manifestly unsustainable in law. The second error of law is that when the deportation decision was made it was clearly contemplated that Mr Chin would continue to hold the status of BOC when deported. However his passport expired on 17 July 2015. The third error of law relates to the Secretary of State's policies vis-à-vis former Malaysian nationals. There is no evidence that these policies have been considered, much less given effect, by the decision makers in Mr Chin's case. The primary public law duly in play was to consider whether the policies applied to Mr Chin and, if so, how, simultaneously respecting the Lumba principle (Lumba v SSHD [2011] UKSC 12). This duty was not performed, either at the time of making the deportation decision or when several opportunities to do so presented themselves subsequently at the review stages which materialised. All of these errors are perpetuated in the written and oral submissions advanced on behalf of the Secretary of State.

29. Given the errors of law in the Secretary of State's decision diagnosed above, the decision of the FtT cannot stand and is hereby set aside. No further hearing is required in order to determine the appeal (an issue which I canvassed with the representatives at the conclusion of the hearing). The Secretary of State's decision is unsustainable in law and the appeal succeeds accordingly. The result is that a lawful decision has not yet been made in this case. It is now incumbent on the Secretary of State to reconsider the series of decisions and position statements in the history of this case and to make a lawful decision, duly guided by this judgment.

Notice of Decision

The appeal is allowed to the extent identified above.

Signed

THE HON. MR JUSTICE MCCLOSKEY
PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Date: 28 December 2016

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make a whole fee award of any fee which has been paid or may be payable on account of the errors of law identified above

THE HON. MR JUSTICE MCCLOSKEY
PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Date: 30 December 2016