

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**ADMINISTRATIVE COURT**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 09/12/2013

**Before :**

**TIMOTHY BRENNAN QC**  
**Sitting as a Deputy High Court Judge**

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**Between :**

**THE QUEEN**  
**on the application of**  
**FOO ANN KU**

**Claimant**

**- and -**

**THE SECRETARY OF STATE FOR THE HOME**  
**DEPARTMENT**

**Respondent**

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**Adrian Berry** (instructed by **CK Solicitors**) for the **Claimant**  
**Ben Lask** (instructed by **Treasury Solicitor**) for the **Respondent**

Hearing date: 9 October 2013  
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**Judgment**

**Timothy Brennan QC :**

**Introduction**

1. The claimant is a British Overseas Citizen without right of abode in the United Kingdom. He was once a citizen of Malaysia, but has renounced that citizenship. On 21 December 2011 the defendant, the Secretary of State for the Home Department, removed the claimant from the United Kingdom to Kuala Lumpur, Malaysia. On arrival at Kuala Lumpur the claimant was refused entry to Malaysia and was returned to the United Kingdom, where he remains.
2. At an oral hearing before Philip Mott QC the claimant obtained permission to apply for judicial review to challenge the lawfulness of the decision to remove him. He also gained permission to challenge two occasions of interpretation and application of the

defendant's "limbo policy" in respect of persons in his position, in December 2011 and in November 2012.

### **Narrative**

3. The claimant was born in Malaysia on 27 July 1980. His father held the status of Citizen of the United Kingdom and Colonies under s 4 of the British Nationality Act 1948. At birth, the claimant held that status too (under s 5), but it did not give him a right of abode in the United Kingdom. On 1 January 1983, on commencement of the British Nationality Act 1981 (see s 28), his status was reclassified and he became a British Overseas Citizen (BOC). BOCs are subject to immigration control. They do not have rights to enter or reside in the United Kingdom, to work, or to access public services and benefits.
4. At birth the claimant was also a Malaysian citizen under the operation of Malaysian law.
5. The claimant arrived in the UK as a student, aged 23, on 10 September 2003. He initially obtained further leave to remain in that capacity, but has been overstaying since October 2005.
6. On 16 January 2008 the claimant applied for and was issued with a British passport as a BOC. Having received that passport, and apparently on advice (not from his present representatives), the claimant promptly took the formal step of renouncing his Malaysian citizenship pursuant to Article 23 of the Malaysian Constitution, which permits this to be done by someone over the age of 21 years. On 1 February 2008, he filled in a "Borang K" form, which is a Declaration of Renunciation of Malaysian Citizenship, the appropriate fee was paid and that Declaration was duly registered in Malaysia on 29 May 2008 whereupon he ceased to be a Malaysian citizen.
7. One benefit of the status as a BOC is an entitlement under s 4B of the British Nationality Act 1981 to be registered as a British citizen under certain circumstances. However, s 4B(2)(c) has the effect that this is not available to those who have renounced or voluntarily relinquished any citizenship or nationality after 4 July 2002, as the claimant did. The claimant had therefore deprived himself of the citizenship of Malaysia, where he had a right of abode, without advancing his prospects of obtaining a right of abode in the United Kingdom.
8. In addition to the strict statutory position, the Secretary of State operates what has been called the "limbo policy", to be found in the Immigration Directorates' Instructions (Chapter 22, section 2 "United Kingdom Passports", para 9.1). It records that there is "*a balance between those who genuinely find themselves with nowhere to go and those seeking to circumvent the Immigration Rules*". A total period of 6 years discretionary leave to remain in the United Kingdom may be granted to BOCs in wholly exceptional compassionate circumstances, or if:

*"There is clear evidence of a person's 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, eg 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 ... In all cases the onus is on the applicant to provide the necessary evidence. Prolonged enquiries are to be avoided. ...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 [UK passport holders] will apply for the equivalent of returning resident or settlement visas and those who manage to obtain these should not be granted discretionary leave. ...”*

9. The reasons for the policy being expressed in these restrictive terms are not difficult to discern. The policy places the burden on the applicant to establish that he cannot be returned – that he genuinely finds himself with nowhere to go. As the defendant submits, a policy which required the Secretary of State to prove returnability before an application for discretionary leave to remain could be refused would be impracticable and would be liable to encourage speculative claims. It is appropriate to require a letter from the country of normal residence because a letter is likely to represent a reliable statement of the country’s formal position. In contrast, it may be difficult to verify evidence from the applicant himself, or from a witness produced by him, concerning conversations with consular officials which were neither documented at the time nor followed up in writing. Furthermore, a requirement that the applicant should make a formal application for re-entry ensures that the validity of a claim to non-returnability can be properly tested and that an applicant does not benefit from his own inactivity.

#### **Power to remove**

10. The power to remove the claimant from the United Kingdom derived, if at all, from the Immigration and Asylum Act 1999, s 10(1)(a) and s 10(6)(b) and the Immigration (Removal Directions) Regulations 2000, reg 4(2) of which relevantly provides that directions requiring a person to be removed from the United Kingdom may be made only if the directions specify that the person is to be removed to a country or territory being –
- (i) a country of which he is a national or a citizen; or
  - (ii) a country or territory to which there is reason to believe that he will be admitted.
11. Since the claimant had renounced his Malaysian citizenship his case was not within reg 4(2)(i): a direction requiring his removal to Malaysia could lawfully be made only if there was reason to believe that he would be admitted to Malaysia (reg 4(2)(ii)).
12. The Border Agency’s “Enforcement Instructions and Guidance”, in the form in which they stood at the material time, made the following relevant provision, in Chapter 48.8

*“Removing ...BOC passport holders  
A holder of a ... BOC passport may be served with notice of illegal entry but removal is not straightforward. The person concerned must apply for entry clearance to the appropriate Embassy or High Commission of the country to which he is to*

*be removed. If entry clearance is issued, he may then be removed. If the Embassy or High Commission refuse the application and he can prove this by presenting a letter from them, leave to remain in the UK may be granted by the Managed Migration Directorate (MMD) if further efforts to obtain re-admission to his country of origin are unlikely to prove successful.”*

13. The claimant’s case is not unique. He is one of a number of former Malaysian citizens who have renounced their Malaysian citizenship, apparently in order to take advantage of their status as BOCs. Since such renunciation does not advance the prospects of obtaining registration as a British citizen the UK government had already engaged in discussions with the Malaysian government about the position of those such as the claimant who appeared to have relied on erroneous legal advice. In a letter of 22 July 2010 to an official of the Malaysian High Commission in London the UK Minister for Immigration recorded his view that the most sensible course for those in this group (which might number 500 to 1000 persons) was for them to begin the process of reacquiring their Malaysian nationality. The Minister asked for confirmation in writing, in a way which could be shared with the individuals in question, of what steps should be taken to begin this process and to relocate to Malaysia. No detailed response appears to have been provided at that time.
14. After further correspondence in the meantime, on 15 July 2011 the Senior Deputy Secretary General of the Ministry of Home Affairs of Malaysia wrote to the Deputy High Commissioner of the British High Commission in Kuala Lumpur. Referring to “Issues of Malaysian Nationals Holding British Overseas Citizen Status” he said this [emphasis added]:

*“...the Government of Malaysia views the matter with utmost concern and would like to ensure the British Government of the Ministry’s fullest cooperation towards resolving this longstanding issue...”*

*The Government of Malaysia through its High Commission in London has actively conducted awareness campaigns for the past few years to encourage Malaysian nationals whom [sic] had overstayed in the UK to return home, including those holding BOC status. We would ensure that every application received from BOC holders applying for Malaysian citizenship would be given serious consideration.*

*In this relation, I would like to reiterate that BOC holders who have applied for the citizenship status would have to go through the normal processes as stipulated in the Malaysian Federal Constitution.*

*The applications would need to be accompanied by solid documentary evidences [sic] as proof that they were previously Malaysian nationals.*

*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 time frame to the Malaysian authorities.”*

15. In letters of 18 July 2011 and 22 September 2011 the Assistant Director, Head of Operational Policy of the UK Border Agency pressed for an early meeting with a representative of the Malaysian High Commission in London:

*“to ensure that the right processes can be [put] in place in support of the policy position agreed by the Malaysian Government”.*

In context, it is clear that the Assistant Director was here seeking to put into place with the High Commission in London procedures to give relevant BOCs the ability to apply through the High Commission for reinstatement of their Malaysian nationality.

16. On 4 October 2011 the Deputy High Commissioner responded. He had, he reported, not yet received guidance from the Home Ministry of Malaysia. Accordingly:

*“Without a proper guidance, the normal procedure of applying for reinstatement of Malaysian nationality must be made in Malaysia and cannot be dealt with by this High Commission.*

*While we are pleased to have a fruitful discussion with the UKBA on the subject, I assure you that the meeting will take place as soon as the High Commission receives the necessary guidance from the Home Ministry.”*

17. This was the position in December 2011, when the Secretary of State made the relevant removal directions in respect of the claimant.

18. It is not necessary to record the claimant’s previous immigration history in detail save to mention that various applications for leave to remain had been made (relying on Article 3 and Article 8 of the European Convention on Human Rights). There were unsuccessful appeals. In a judgment dismissing an appeal by the claimant on Article 8 grounds on 17 March 2011 Immigration Judge Lingard, sitting in the First-tier Tribunal, commented on the claimant’s behaviour and position, saying:

*“While it is evidently wrong to suggest that the appellant has been involved in any abuse of process, because he has not, I find, nonetheless, that there has been an abuse of sorts going on in terms of the appellant deliberately trying to pressurise the UK authorities into granting him permanent status. ... I also place into the balance the difficult position in which the appellant has placed himself regarding return to Malaysia but that really does turn out ... to be a matter largely of his own and quite deliberate making. The evidence shows that the*

*appellant has made no attempt to try to engage Malaysian legal representatives or take any formal action to try to re-obtain Malaysian citizenship. He prefers to maintain his stand-off position in the hope that this will enable him to remain permanently in the UK and act as an additional lever in pursuit of his long term aims.”*

19. The claimant’s appeal rights were exhausted by 20 June 2011 and the defendant set the removal directions on 14 December 2011, directing his removal to Malaysia on 21 December 2011. In the accompanying letter the defendant set out the reasons for refusing the claimant leave to remain in the United Kingdom. In short, it was said that the defendant’s position, upheld earlier in the First-tier Tribunal, was that the claimant could travel to Malaysia and could apply to have his Malaysian nationality reinstated upon return to Malaysia. There was no “clear evidence of his non-returnability to Malaysia” and he had not “taken all available steps to regain his Malaysian citizenship”.
20. The claimant made more representations which the defendant refused to treat as a fresh claim. The claimant was detained on 14 December 2011 in preparation for removal. On 20 December 2011 Bean J refused an application for a stay of removal and the Claimant was duly detained and removed, escorted by UK immigration officials.
21. The evidence establishes that the Malaysian High Commission was informed in advance that the claimant was to be deported and was provided with copies of the removal details and of the claimant’s BOC passport and of his expired Malaysian passport. No response was received from the High Commission but, according to the Border Agency there was nothing unusual in this.
22. On arrival in Malaysia, according to the claimant, he was candid with the Malaysian immigration officer, said that he had renounced his Malaysian nationality and presented the passport showing him to be a BOC. He was thereupon refused admission to Malaysia. It is not completely clear why the claimant was not admitted (it may have been an absence of documentary proof that he had been a Malaysian citizen), but something clearly went wrong. He was returned to the UK on 23 December 2011, granted immigration bail on 25 December 2011 and released from immigration detention on 27 December 2011.
23. Discussions between the United Kingdom and Malaysian authorities continued in relation to those such as the claimant. In February 2012, following a number of cases in which individuals being involuntarily returned were refused entry to Malaysia, the United Kingdom government suspended enforced removal of Malaysian BOCs.
24. By letter of 30 November 2012 the Secretary of State notified the claimant’s advisers of her further decision in relation to the “limbo policy” as applied to him. Again, it was concluded that there were no exceptional compassionate circumstances. Reference was made to an occasion on 8 November 2012 when the claimant, on this occasion accompanied by a UK immigration official, attended at the High Commission of Malaysia with a view to obtaining information on the process of re-applying for Malaysian nationality. The UK official had recorded that it had been explained to the claimant by a consular official that he had ceased to be a Malaysian

national because he had renounced his nationality and therefore was no longer a citizen of Malaysia. However, he could visit Malaysia for a month without a visa as a BOC. Further, he could write to the Malaysian authorities in Malaysia and re-apply to be a Malaysian citizen again. Furthermore, he could also apply for a visa to visit Malaysia if he wished to stay for more than a month. In the circumstances, the Secretary of State's conclusion was that the claimant had not shown "clear evidence of non-returnability" for the purposes of the "limbo policy", and that it was open to him to travel to Malaysia on his BOC passport, with or without a visa, and apply to have his Malaysian nationality reinstated once more in Malaysia.

25. The claimant contends that he had made various enquiries about the possibility of having his former citizenship of Malaysia reinstated and found that it could not be reinstated. These enquiries seem to have been made orally and the evidence of them is not particularly cogent. He points to occasions on which he made enquiries which did not bear fruit. He says that on one occasion he was told at the High Commission that he was not returnable to Malaysia for settlement because he was a BOC and not a citizen of Malaysia. He says that, oddly, he was refused written confirmation of this; it would not be given to him, he says, because he was no longer a Malaysian citizen. There is no evidence of any written application by him or by anyone on his behalf, following this up, or of any serious attempt to reverse the effect of the renunciation he made in 2008. It is clear that in 2008 the claimant must have obtained technical advice about his Malaysian citizenship, completion of the "Borang K" form of renunciation and registration of that form in Malaysia. The absence of some equally formal attempt to reverse the situation is striking, and all the more so in the light of comments about the claimant's approach which had been made by the judge of the First-tier Tribunal in March 2011 and which I have quoted above.
26. While (because of its later date) it is not directly relevant to the claimant's judicial review application I record that the material before me establishes that in February 2013 Malaysian officials agreed that a BOC such as the claimant who was prepared to return to Malaysia voluntarily could apply for a 5 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 claimant could therefore return to Malaysia and begin the process of re-acquiring his Malaysian citizenship voluntarily if he wished to do so. It has not been suggested that this is his wish.

### **Reason to believe and EIG 48.8**

27. I deal first with the decision in December 2011 to set removal directions in respect of the claimant. This would be lawful only if (rule 4(2)(ii)) the Secretary of State had reason to believe that he would be admitted.
28. On behalf of the claimant it is submitted that the Malaysian government's letter of 15 July 2011 is altogether inadequate to provide the relevant "reason to believe". It is argued that the letter merely evidences policy discussion which had not produced any sort of mechanism by which any given individual could be admitted to Malaysia. The Malaysian officials were looking at how the matter would be progressed. Use of phraseology such as "cooperation towards resolving this longstanding issue" demonstrated that no conclusion had been reached, a conclusion which was further

demonstrated by the later correspondence I have quoted showing that the High Commission in London was seeking guidance from Malaysia and did not feel able to move further before it was received. The claimant argues that the Secretary of State could not, on the basis of this material, hold a rational belief that the claimant would be admitted to Malaysia if deported. Furthermore, it is emphasised, no acknowledgement whatsoever was received when the Malaysian High Commission was informed that the claimant was to be removed from the UK.

29. In my judgment the claimant's submissions based on the correspondence tend to conflate two concepts which should be kept separate. The first, and critical, one is removability of relevant BOCs from the UK to Malaysia and, which goes with it, their ability to be admitted to Malaysia. The second concept is the detail of the precise process which should be advised to BOCs who wished to reinstate their Malaysian citizenship through the High Commission in London rather than by going to Malaysia to do so.
30. The letter of 15 July 2011 goes to the first of these concepts and later correspondence to the second. The 15 July 2011 letter contained an unambiguous representation, devoid of any relevant qualification, that Malaysia "would be in a position to accept the removal of" BOCs who could be determined previously to be Malaysian nationals, if given "ample prior notification as well as sufficient time frame". There was no indication that a specific response from the Malaysian authorities was required before any given individual could be removed from the UK. The subsequent correspondence, dealing with potential procedural details for those who wished to make progress with such applications through the High Commission in London did not dilute this.
31. In my judgment, at the date of the removal directions, and when the claimant was removed to Malaysia, the Secretary of State clearly had "reason to believe" that the claimant would be admitted to Malaysia on arrival. This is the fair reading of the letter of 15 July 2011.
32. The decision to remove the claimant is also criticised by him for lack of compliance with the Enforcement Instructions and Guidance section 48.8, which I have already quoted in the form in which it stood at the relevant time. In my judgment this document contains nothing of relevance to the claimant's case. The claimant was not able to apply for entry clearance to the Malaysian High Commission, even if he had any intention of doing so. Reason to believe that he could enter Malaysia was to be found in the letter of 15 July 2011, which was dealing with the specific problems of those such as the claimant. To put the point another way, EIG 48.8 has nothing to say about someone who cannot apply to a High Commission for entry clearance because that High Commission is not currently authorised to give it, but whose case is addressed by a formal assurance given by an organ of national government in the country to which he is to be removed.
33. Accordingly, in my judgment, neither the defendant's decision to remove the claimant nor removal of the claimant on 21-23 December 2011 was unlawful and the claimant's claim on this ground fails.
34. Philip Mott QC also granted the claimant permission to challenge the lawfulness of his detention during the days immediately before and immediately after the failed

removal, should he be successful in his challenge to his removal. Since I have concluded that there was no such unlawfulness, the lawfulness of that detention does not arise for decision.

### **The limbo policy**

35. The claimant also contends that, at the time of the Secretary of State's decisions in December 2011 and in November 2012 the "limbo policy" was not correctly applied to him. He was not returnable to Malaysia and it was wrong to conclude that there was no "clear evidence of non-returnability". He says that he made "failed efforts to secure resumption of Malaysian citizenship and/or admission for the purposes of settlement". The claimant points to his visits to the High Commission of Malaysia in London, to conversations he says he had with officials there and to what he says is the difficulty of obtaining leave to enter Malaysia in order to settle.
36. In support of this position, those advising the claimant put in evidence a report on matters of Malaysian law by Chooi & Company, dated 19 December 2012 and prepared, clearly on the instructions of an interest group, for the purposes of a hearing before the First-tier Tribunal in some other case, or cases. It runs to 130 pages in which the author explains, at length, the consequences of renunciation of Malaysian citizenship and opines that

*"a BOC re-applying for citizenship is in all probability going to be met with failure. The only other route to citizenship will be through naturalisation which will require a ten year period of residence subject to further discretionary approval by the [Malaysian] Government".*

This material postdated the decision of the Secretary of State which is under challenge and was untested.

37. On the day of the hearing of this application, a witness statement by one Yoong Thye Chee was produced. This was dated 6 October 2013 (the previous day) and gives an account of the consequences to him of his removal from the UK to Malaysia on 15 March 2013. Again, the material postdated the relevant decision and was untested.
38. Although no formal objection was taken on behalf of the Secretary of State to the admission of these items of material it does not seem to me to be right to take them into account. The lawfulness of the decision of the Secretary of State under the "limbo policy" has to be judged as at the time it was made. It is not appropriate for the Administrative Court to conduct a rolling review of the claimant's position by reference to material which was not available to the decision maker at the time the decision was made and which, in part at least, relates to the circumstances and experiences of someone altogether different who is not before the court.
39. In my judgment, the Defendant is correct to stress the significance of the following points in relation to the limbo policy, as applied to the claimant. First, that the claimant has never presented a letter from the Malaysian authorities indicating that he cannot be returned to Malaysia. Second, that he has never applied for a visa to enter Malaysia. Third, that he has never attempted to enter Malaysia voluntarily. Fourth, as already mentioned, that the UK Government has at all material times had written

confirmation from the Malaysian Government that BOCs who have renounced their citizenship can return to Malaysia and begin steps towards re-acquiring their Malaysian nationality.

40. Taken as a whole, the available material justifies the conclusion that, rather than seeking the return of his Malaysian citizenship so as to facilitate his eventual return to that country, the claimant was content, indeed more than content, that his Malaysian citizenship should remain renounced. He wishes, if he can, to take advantage of the limbo policy and to obtain leave to remain in the United Kingdom.
41. The claimant, on whom in practice rests the burden of establishing his entitlement to benefit from the “limbo policy”, has not made out his case. It cannot be said that it was irrational or otherwise unlawful for the Secretary of State, either in December 2011 or in November 2012, to conclude that the claimant should not be granted discretionary leave to remain.

### **Conclusion**

42. I therefore dismiss this claim for judicial review.