



First-tier Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/

THE IMMIGRATION ACTS

Heard at Taylor House  
On 20 September 2012

Determination Promulgated

28 SEP 2012

Before

DESIGNATED JUDGE OF THE FIRST TIER TRIBUNAL J G MACDONALD

Between

MR  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Berry, Advocate  
For the Respondent: Ms I Tufur, Home Office Presenting Officer  
Interpreter: Miss Pat Clark (Language -Cantonese)

DETERMINATION AND REASONS

1. The appellant is a British Overseas Citizen (BOC) born on 17 July 1965. He entered the United Kingdom on 1 March 2005 with leave as a visitor until 1 September 2005. An application for ILR was made on 25 November 2005 which was refused as was a further application on 15 March 2010. Notice of immigration decision dated 26 July 2012 was served on the appellant with his removal to an unnamed country but amended by the Home Office Presenting Officer, on the day of the hearing, without objection, to Malaysia.
2. The appellant appeals under section 82(1) of the Nationality, Immigration & Asylum Act 2002.

### Witness Statements of the Appellant

3. He is a BOC originally from Malaysia born to CUKC (Citizen of the United Kingdom and Colonies) parents. He came here on 1 March 2005 with his BOC passport and he has since remained here.
4. Before his arrival he had been advised by his previous UK solicitor that a BOC could work and live in the UK. When he arrived he successfully obtained a National Insurance Number. He truly believed he was allowed to work. He began work as a sous chef.
5. He was in Scotland from 2005 to 2008. He was head chef in a restaurant in Galashiels, Scotland.
6. In December 2008 he moved to London and became a freelance food consultant.
7. He was introduced to the Soho Christian Chinese congregation in 2009. In 2010 he decided to be baptised to become a Christian.
8. He is involved in a Chinese charity in London.
9. He was told that BOCs have to give up Malaysian citizenship before he could apply for any leave to remain. As he understands it Malaysia prohibits dual citizenship.
10. He duly renounced his citizenship and in March 2007 received a letter from the Malaysian authorities that his renunciation of his Malaysian citizenship was formally accepted on 8 December 2006.
11. In October 2011 his solicitor submitted a further immigration application for being a BOC with no other nationality. That application was refused but a judicial review application was successful on the basis that the UKBA would reconsider his application in the light of recent circumstances.
12. He has been explicitly told at the Malaysian High Commission that he is a foreigner and not a citizen of Malaysia.
13. He has attempted to make several enquiries including on 22 August 2012 about the re-acquisition of Malaysian citizenship in his situation. He believes the Secretary of State has granted people in similar position to him leave to remain in the United Kingdom. He has established a private and family life here. He attended a meeting with the Malaysian High Commission in London on 10 January 2011. The group were told explicitly that if they were holding a BOC passport to enter into Malaysia (without a valid Malaysian passport) they would be treated as a BOC ie a foreigner. He has checked the Malaysian Government official website on the possibility of obtaining permanent residency status in Malaysia and does not fall into an eligible category.

14. On 2012 he was accompanied by at the Malaysian High Commission. He was told, plainly, that it was not possible that he could get back the renounced Malaysian citizenship.

**Witness Statement of**

15. She accompanied the appellant to the Malaysian High Commission on 2012 and confirms that the details set out in his statement are accurate.

**Witness Statement of**

16. She has known the appellant for over a year through the English classes run by the Chinese church in London. The appellant is very friendly. He has been very kind to her having assisted her with her gardening and DIY chores.

**The Oral Evidence**

17. The appellant gave oral evidence through the Chinese interpreter as noted in my record of proceedings. He adopted his statements as true. He had no spouse or partner in Malaysia. His parents were dead.
18. In cross examination, he agreed he had entered the United Kingdom on a visit visa and this had expired in September 2005. He had consulted a solicitor with a view to staying here. He had been advised that in order for his application to be considered by the Home Office he would have to give up his citizenship in Malaysia. He gave details of what happened when he attended at the Malaysian High Commission. They would not provide him with any written documents. He had written a letter to the Commission on 13 September 2012 but had not had a reply. Pressed on why he had written a letter only a week ago he said that Malaysia would not let him return there. There was no re-examination of the witness.
19. Both parties agreed that with and in attendance they could be taken to have adopted their witness statements; both parties indicated that they had no questions to ask of the witness.

**Submissions for the Home Office**

20. I was referred to AL & Others (Malaysia BOCs) Malaysia [2009] UKAIT 00026. With regard to paragraph 74 it might be the case that the renunciation would have no effect in Malaysian law. In paragraph 75 it was said that there must be a question as to the extent to which any act of renunciation by the appellants was entitled to any recognition in UK law if its effect was to prevent an appellant returning to a country to which he would otherwise be returnable. While it was accepted that there was a policy of some kind in relation to Malaysian BOCs it did not apply to this appellant.
21. With reference to page 58 of the appellant's bundle it was said that the so called limbo policy was applicable only after the exhaustion of all the usual administrative processes, including deportation. That stage had not yet been reached.

22. There was no clear evidence of his non-returnability. The Malaysian authorities had a discretion to revoke their decision.
23. In terms of Article 8 the appellant had been here for a number of years but he knew he did not have the right to stay here permanently. Elements of his private life could be recreated in Malaysia. I was asked to dismiss the appeal.

#### Submissions for the Appellant

24. Reference was made to the skeleton argument.
25. The Secretary of State had failed to consider the application of her own policy. The appellant was a BOC and held no other nationality. There was no evidence that he would be admitted to Malaysia for the purposes of settlement under Malaysian law. The Secretary of State had not considered the policy to be found in the appellant's bundle at pages 57-58.
26. Reference was made to page 48 of the bundle being a letter from Damian Green MP dated 23 February 2012. In that letter the Minister confirmed that the UKBA were suspending enforced removal action in cases where the subject was a former Malaysian national who had erroneously announced their Malaysian nationality. Given that, it was incumbent upon the Secretary of State to give consideration to whether or not the appellant fell within the scope of the policy.
27. It was clear from all the documentation produced that he could not return to Malaysia. Furthermore there was enforcement guidance (not in the bundle) reinforcing the point that he would not be returned to Malaysia.
28. It was speculation to say that the Malaysian authorities might act differently. It was clear that the final stage had been reached in that the Secretary of State was now proposing to remove him to Malaysia.
29. Separately, as outlined in the skeleton argument, he had a strong Article 8 case. He had been here for some 7½ years. He had a high quality in his private life which could not be replicated in Malaysia. He was very much integrated into the United Kingdom. Everything he had was here. It would be disproportionate to remove him.

#### Conclusions

30. Page 44 of the appellant's bundle contains a letter from the High Commission of Malaysia to the appellant dated 6 March 2007.
31. The terms of paragraph 2 of that letter could not be clearer in that it is said, in bold letters and underlined, that the appellant is "**no longer a Citizen of Malaysia**".

32. That remains the position as at the date of the hearing before me. To suggest that the Malaysian government might reverse their decision or that the position might change in a material way seems to me to be engaging in speculation. The reason that this situation has come about is that the appellant, like many other BOCs, decided that he wanted to remain in the UK. He was told that, in order to do so, he had to renounce his Malaysian nationality and he duly did so. I accept the appellant's evidence that, thereafter, he attended meetings at the Malaysian High Commission in an attempt to establish whether he would ever be able to return to Malaysia. His unchallenged evidence on this point is that he received a firm rebuttal from the authorities when he made enquiries about whether he might be able to return to Malaysia on a permanent settlement basis.
33. The question before me is whether or not there is a policy that might apply to the appellant as has been put forward on the appellant's behalf. It is accepted that the Home Office have not considered the appellant's position under their policy. The position of the Home Office is that there is such a policy but the appellant cannot engage with it for the reasons given in their submissions.
34. What does the policy say? The actual policy is lodged and looking at page 57 of the bundle at paragraph 9 it is headed **Discretionary leave and "Limbo"**. The policy refers to BOC's.
35. A part of the Home Office argument was that the policy should not be applied (paragraph 9.3) because the policy was only applicable after the exhaustion of the all the usual administrative processes, including deportation. This is not a deportation case. Have the usual administrative processes been exhausted? In my view the only sensible answer to that question is yes.
36. I say that because the Home Office have rejected the appellant's application for leave to remain as a BOC. Beyond that they have issued removal directions and before me the removal directions were amended for the appellant to be removed to Malaysia. Accordingly, had the appellant not exercised his right of appeal, he would have been removable to Malaysia without further administrative action being taken against him except for the actual act of removal. In these circumstances it is clear, beyond any argument, that the Home Office had decided that he was suitable to be removed to Malaysia. Accordingly it seems to me that the administrative process was essentially ended as the Home Office had taken their decision to remove the appellant; if the Appellant had not appealed he would have been too late to prevent his removal and in that context it seems reasonable to conclude that the procedure had reached the point where it can be said that, in terms of the policy, the administrative process had been exhausted.
37. While details of the enforcement guidance were not before me, I am reinforced in my view that the appellant should have his position considered under the policy by the terms of the letter from the Minister, Damian Green, at page 48 of the bundle. The terms of the paragraph mentioned above are unambiguous. The UKBA "will

suspend enforced removal action" in cases in which the subject is a former Malaysian national who has erroneously renounced their Malaysian nationality.

38. The appellant falls squarely into that category. On the face of it the UKBA should not be trying to remove him. There is clearly a policy for the Home Office to consider the position of this appellant and they have not previously done so. Put shortly the appellant has an entitlement to be considered under the terms of the limbo policy and this has not yet occurred.
39. It therefore follows that this appeal has to be allowed as the decision to remove the appellant, without considering his position under the policy, is unlawful.
40. I am therefore allowing the appeal to that limited extent. If he is allowed to remain in terms of the policy then no doubt that will be the end of the matter. If he is not allowed to remain then no doubt the appellant will have a further right of appeal and he can re-argue the matter under Article 8.
41. There is no need for anonymity and I was not asked to make a fee order and therefore do not do so.

**DECISION**

42. The appeal is allowed.

Signed

Judge of the First-tier Tribunal



Date