[2012] AATA 488

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| Division | **GENERAL ADMINISTRATIVE DIVISION** |
| File Number | 2011/3795 |
| Re | ANNIE WEN |
|  | APPLICANT |
| And | MINISTER FOR IMMIGRATION AND CITIZENSHIP |
|  | RESPONDENT |

# Decision

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| Tribunal | **Deputy President J W Constance****Deputy President F J Alpins**  |
| Date | **27 July 2012** |
| Place | **Melbourne** |

The decision of the Minister for Immigration and Citizenship, made 24 November 2010, to refuse the application for Australian citizenship by Annie Wen is affirmed.

............[sgd]........................................................

**Deputy President J W Constance**

# Catchwords

CITIZENSHIP AND IMMIGRATION – application for Australian citizenship – applicant under 18 years old – born in Australia – lived all of her life in Australia – discretion to refuse application – Australian Citizenship Instructions – best interests of the child – significant hardship and disadvantage – whether circumstances are unusual – decision under review affirmed

# Legislation

Australian Citizenship Act 2007 (Cth) ss 21(5), 24(1), 24(1A) and 24(2)

# Cases

De Andrade and Minister for Immigration and Citizenship [2011] AATA 737

# Secondary Materials

Australian Citizenship Instructions

# REASONS FOR DECISION

Tribunal **Deputy President J W Constance**

 **Deputy President F J Alpins**

Date **27 July 2012**

# introduction

1. Annie Wen is four years old. In October 2009 she applied for Australian citizenship.
2. On 24 November 2010 a delegate of the Minister for Immigration and Citizenship refused the application. Annie has applied to the Tribunal to review this decision.
3. For the reasons which follow the decision under review will be affirmed.

# legislation and policy

1. At the time relevant to this application, subsection 21(5) of the *Australian Citizenship Act 2007* (Cth) provided:

A person is eligible to become an Australian citizen if the Minister is satisfied that the person is aged under 18 at the time the person made the application.

1. Subsection 24(1) of the Act provides:

If a person makes an application under section 21, the Minister must, by writing, approve or refuse to approve the person becoming an Australian citizen.

1. Subsection 24(1A) of the Act provides:

The Minister must not approve the person becoming an Australia citizen unless the person is eligible to become an Australian citizen under subsection 21(2), (3), (4), (5), (6), (7) or (8).

1. Subsection 24(2) of the Act provides:

The Minister may refuse to approve the person becoming an Australian citizen despite the person being eligible to become an Australian citizen under subsection 21(2), (3), (4), (5), (6) or (7).

1. The Minister has issued *Australian Citizenship Instructions* which are relevant to the determination of this application. The current Instructions provide that for applications received before 9 November 2009 (as is the case in this application) it is necessary to refer to the Instructions in effect immediately before that date.
2. The Introduction to the Instructions which applied before 9 November 2009 includes the following:

Australian Citizenship Instructions (ACIs)

The role of the ACI’s is to support the Australian Citizenship Act 2007. The instructions provide guidance on policy in relation to the interpretation of, and the exercise of powers under, the Act and the Regulations. Decision makers should be mindful that policy must not be applied inflexibly. Policy cannot constrain the exercise of delegated powers under the Act.

1. Applications by persons under the age of 16 are referred to in Chapter 5 of the relevant Instructions. In part Chapter 5 provides that “children under the age of 16 applying individually in their own right would usually be approved under section 24” if they meet certain policy requirements, one of which is that the child holds a permanent visa. It is not in dispute that at no time has Annie held a permanent visa. It follows that she does not meet the policy requirements referred to.
2. Chapter 5 also relevantly provides:

In the case of an applicant who does not meet the policy guidelines above, decision makers must consider the full circumstances of the case, including the best interests of the child, to determine whether the application nevertheless warrants approval because of the unusual nature of those circumstances.

# THE ISSUES

1. As we are satisfied that Annie was under 18 years at the time the application for citizenship was made on her behalf, she is eligible to become an Australian citizen in accordance with sub-section 21(5) of the Act.
2. The issues for determination is whether the Tribunal should exercise the discretion given to it by subsection 24(2) of the Act and refuse to approve Annie becoming an Australian citizen. This requires a consideration of the full circumstances of the case, including the best interests of Annie, to determine whether her application warrants approval because of the unusual nature of those circumstances*.*

# evidence and findings of fact

## *Evidence of Mr Wen*

1. Unless otherwise stated the findings of fact set out in the following seven paragraphs are based on the evidence of Mr Wen, Annie’s father.
2. Annie was born in Australia in September 2007. Her parents, Mr Wen and Ms Cao, are citizens of the Peoples Republic of China. They are residing in Australia under bridging visas associated with Annie’s application for citizenship.
3. Annie has lived with her parents in Australia all her life. She has attended a local kindergarten since October 2010 and dance classes for children since June 2011. Annie has friends her age and attends birthday parties and other celebrations. She converses with her friends in English.
4. In the event that Annie was granted citizenship and Mr Wen and Ms Cao were required to leave Australia Mr Wen, proposes that Annie would remain in Australia in the care of a close family friend, Mrs Zhang. He and Ms Cao have known Mrs Zhang and her family for approximately 18 months. Mrs Zhang and her husband have two daughters aged three years and five years. The two girls are friends of Annie. The children see each other weekly. Mr and Mrs Zhang are willing to care for Annie as proposed by Mr Wen and have appropriate accommodation in their home for her.
5. Before coming to Australia in 2004, Mr Wen and Mrs Cao lived in the large city of Shenyang, China. If they return to China they will return to live in Shenyang. As the school which a child can attend depends upon the district in which the family is registered, Mr Wen and Ms Cao will only be able to afford to enrol Annie in a school in Shenyang.
6. Should he return to Shenyang Mr Wen may not be able to gain employment in Shenyang and may need to live away from home to find work. He is a cook by trade and has also worked as a plasterer and has conducted his own restaurant. He believes that it may be difficult for him to find work in Shenyang. Mr Wen believes that the family’s standard of living will be lower in China than it has experienced in Australia.
7. Based on his experience of attending school in China, Mr Wen is of the opinion that the education system in Australia is of greater benefit to Annie than that which would be available to her in China. In his view Annie would be placed under greater pressure to perform well at school at an early age than she would be in Australia and it would be difficult for her to adapt to the manner of teaching in China.
8. Mr Wen and Ms Cao wish to have more children. If they return to China with Annie they will be subject to China’s one child policy and Annie would be deprived of the benefit of having siblings. Both Mr Wen and Ms Cao have family members living in Shenyang.
9. Mr Wen believes that the food products available in China are not of the same quality as in Australia and therefore Annie might suffer health problems as a result of living there.
10. When asked if he would leave Annie in Australia if she was granted citizenship and he had to return to China, he said that he would, for the sake of her education. He said that he would visit her as often as he could, depending on the type of visa he could obtain.

## *Evidence of Ms Cao*

1. In the opinion of Ms Cao, Annie would have difficulty adjusting to the Chinese education system as she would not have had the formal training already received by her peers in China. She also shares her husband’s concern as to his ability to find work in China and the effect this would have on Annie should she return to China with them.
2. Ms Cao stated that *“there is no way”* she will allow Annie to live in China. She too proposes that if necessary her friend, Mrs Zhang would care for Annie if she and Mr Wen were required to leave Australia. In that event she would visit Annie as often as possible, depending on the visa available to her.

## *Evidence of Mrs Zhang*

1. Mrs Zhang and her husband are prepared to care for Annie on a long term basis should the need arise. Mrs Zhang had not considered what would happen if difficulties should arise between Annie and her children, nor has she discussed with Ms Cao the input Ms Cao would have in Annie’s upbringing should she (Mrs Zhang) care for Annie on a long term basis.
2. Mrs Zhang’s children attend the same schools and dance classes as Annie.

## *Evidence of Ms Butler, Psychologist*

1. Ms Butler is a psychologist experienced in the assessment of children. She provided a report dated 27 February 2012[[1]](#footnote-1) and gave oral evidence.
2. In her report Ms Butler expressed the opinion that Annie *“would face significant hardship and disadvantage to her psychological, academic, emotional, social and physical development…”* if she was to leave Australia and live in China.[[2]](#footnote-2) Her reasons for reaching this conclusion were:
	* Annie lacks the cognitive and emotional resources to catch up to the academic level of her peers in China;
	* Annie would be at significant risk of developing psychological problems if she was placed in the teaching environment of her peers in China;
	* in China Annie would be unlikely to receive the same level of healthcare and education as she would receive in Australia.
3. Notwithstanding the opinion set out in the preceding paragraph Ms Butler concluded:

…

However it should be noted that Annie has no extended family or other support networks here in Australia. Annie has formed a developmentally important bond with her mother and father and shows some reluctance to separate from them. She is still reluctant to sleep in her own bed and sleeps in her parent’s room. A period of separation from her parents longer than a few months is not appropriate for Annie at this stage of her social and emotional development and separation longer than 6 months may place her at risk for emotional and or psychological problems in the future.[[3]](#footnote-3)

1. Ms Butler relied on the statements of Annie’s parents, friends and the interpreter present when she assessed Annie in forming her view of the education system in China. When she gave evidence Ms Butler confirmed her view as to the disadvantages Annie would experience should she live in China. However she was firm in her view that it would not be in Annie’s best interests to be separated from her parents for more than six months. Ms Butler was of the opinion that to separate Annie from her parents for more than three months was an *“inappropriate risk”[[4]](#footnote-4)*and that separation for more than six months was an *“unacceptable risk.”[[5]](#footnote-5)*  She said that Annie was at risk of permanent psychological harm if she was separated from her parents for more than six months and also if she was to leave Australia to live in China. She was unable to say which scenario presented the greater risk.
2. In the opinion of Ms Butler the harm which may be caused to Annie should she remain in Australia without her parents for more than six months could be manifested in low self-esteem, a feeling of a lack of family support, depression and an adverse effect on her future personal relationships.

## *Report of Ms Chetcuti, Psychologist*

1. In June 2010 Ms Chetcuti interviewed Annie and her parents. She provided a report dated 1 July 2010.[[6]](#footnote-6) The report focussed on the background of Annie’s parents.
2. In the summary of her report Ms Chetcuti expressed the following opinions:

In Australia Annie will enjoy excellent health, education, family and a secure economic future. She can grow up as an Australian child that her parents desire for her.

She will be placed in significant emotional, educational and economic risk in China. Her parents will also face significant psychological, economic and financial disadvantage and this will further add to the poor outcomes for Annie.

…

For the best interests of Annie, I strongly recommend and support her application for Australian Citizenship so she can continue to live and be educated in Australia. This will provide Annie the best opportunities.[[7]](#footnote-7)

1. Ms Chetcuti did not give oral evidence.

# consideration

### *The argument put on behalf of Annie*

1. At paragraph 17 of the Applicant’s Statement of Facts and Contentions it is stated:

The essence of the applicant’s case is that she is well settled in Australia. She has spent all her life here. This is her home. Although shy and anxious, she is progressing well at her pre-school. If she were required to return to China, she would face considerable hardship and disadvantage. Her schooling would be severely disrupted. She would be under considerable stress in adjusting to a completely different educational environment. Her economic circumstances would deteriorate, in that her parents have been away from China for some seven years, and do not possess direct skills necessary for employment, at least in their home province. In all probability, her parents would be required to live separately, in search of employment. This can only have a detrimental impact on the applicant, where local registration and school entitlement are linked.

### *Consideration of the full circumstances of the case*

1. On the basis of the evidence of Mr Wen, Ms Cao, Ms Butler and Ms Chetcuti we are satisfied that Annie is likely to experience some difficulty if she is required to adjust to the more formal education system in China. However as she is at a very early stage of her formal education, the adjustment required would not be of the same extent had she been further advanced in her schooling. In addition Annie speaks Mandarin and has been attending Chinese school in Australia.
2. We have considered also the evidence of both Mr Wen and Mrs Cao that the family is likely to experience financial hardship in China and it is likely they will not be able to provide for Annie financially in the way they have been able in Australia. While this may be so, at this stage this evidence is based on the experiences of Mr Wen and Ms Cao some years ago. There is no evidence before us of detailed enquiries of the likely financial situation of the family should Annie return to China with her parents. In addition there is evidence before us that Mr Wen and Ms Cao have substantial assets in Australia which could be used to assist them to re-establish themselves in China.
3. We agree with the following passage from the decision of the Tribunal in *De Andrade and Minister for Immigration and Citizenship[[8]](#footnote-8)* given by Senior Member Handley:

The ACI’s do not define or provide guidance as to what constitutes the best interests of the child. A definition is not found in the Convention itself. However, the Preamble to the Convention recognises that children are entitled to special care and assistance, that families are a fundamental group of society and are a natural environment for the growth and wellbeing of children who should be permitted to grow in a family environment in an atmosphere of happiness, love and understanding.

1. Based on the evidence of Ms Butler we are satisfied that it is in Annie’s best interests that she not be granted Australian citizenship. We have reached this conclusion on the basis that her best interests are served by ensuring, so far as is possible, that she continues to live with her parents and is not left with others in Australia should her parents cease to reside in this country.
2. As we have stated, while Ms Butler supports the contention that Annie will suffer some hardship should she live with her parents in China, she rates the risk of psychological harm that could be occasioned to Annie by reason of separation from her parents for more than six months as *“unacceptable.”* Further she said that the risk of such harm as a result of separation for more than three months is *“inappropriate”.* In the opinion of Ms Butler separation of more than six months could cause Annie to suffer low self‑esteem, a feeling of lack of family support, depression and have an adverse effect on her future personal relationships. The risk of these effects on Annie far outweighs the possible effect of her living in China with one or both parents. If Annie was to be granted citizenship, it is entirely possible that she might be separated from her parents for more than six months.
3. We prefer the evidence of Ms Butler to that of Ms Chetcuti. Ms Chetcuti stated that she focussed on the background of Annie’s parents.[[9]](#footnote-9) She gave very little consideration to the possible effects on Annie.
4. The evidence given by Annie’s parents indicates that neither has properly considered the possible effect on Annie should the application for citizenship be successful and they return to China leaving Annie in Australia. Neither parent gave evidence which showed to us that he or she had given proper consideration to the effect on Annie of her care being given to Mrs Zhang and her husband. They had not considered the prospect that Annie may have difficulty relating to those with whom she may be required to live. They did not have a considered proposal for how they would visit their daughter. Ms Cao has not discussed with Mrs Zhang, Annie’s proposed primary carer, the respective roles of Mrs Zhang and Annie’s parents in her upbringing.
5. Further, there is inconsistency in the argument put by Mr Wen and Mrs Cao in favour of their proposal to leave Annie in the care of Mrs Zhang if necessary. In relation to the possibility that Mr Wen may have to live apart from his daughter in China for the purposes of finding work, Mr Wen states:

It is probable that, if we returned to China, I would be forced into a life of separation from Annie and her mother, if I went elsewhere to find work. This would have a terrible effect on Annie, of course, as up until now she has enjoyed our undivided love and affection as an only child. Emotionally and psychologically, there would be a terrible separation between me and my child, which would be a result simply of the necessity to find work.[[10]](#footnote-10)

Notwithstanding this statement Mr Wen proposes that it would be in Annie’s best interests that she be granted citizenship and that if necessary she be separated from both parents on an indefinite basis.

1. We are satisfied Mrs Zhang is well-intentioned in her offer to care for Annie, including caring for her for a lengthy time. However the evidence of Mrs Zhang did not satisfy us that she had given careful consideration to the effects on Annie of separation from her parents and the difficulties that may cause in caring for Annie.
2. We are satisfied that it is in Annie’s best interests that she remain in the direct care of her parents, even if this means that she will live in China at some time.
3. Having considered all of the circumstances we conclude that there is nothing unusual in the nature of those circumstances to warrant approval of her application. There is nothing unusual in the circumstances of a young child being required to leave Australia, albeit her country of birth, with her parents when their right to continue to reside here comes to an end.

# conclusion

1. The decision of the Minister for Immigration and Citizenship, made 24 November 2010, to refuse the application for Australian citizenship by Annie Wen will be affirmed.

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| I certify that the preceding 48 (forty eight) paragraphs are a true copy of the reasons for the decision herein of Deputy President J W Constance. |

.......[sgd].............................................................

Associate

Dated 27 July 2012

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| Dates of hearing | **17 and 18 May 2012** |
| Date final submissions received | **28 May 2012** |
| Counsel for the Applicant | **Mr G Gilbert** |
| Advocate for the Applicant | **Ms S Verma** |
| Solicitors for the Applicant | **Clothier Anderson & Associates** |
| Advocate for the Respondent | **Mr T Eteuati** |
| Solicitors for the Respondent | **Clayton Utz** |

1. Exhibit A4. [↑](#footnote-ref-1)
2. Exhibit A4 p.12. [↑](#footnote-ref-2)
3. Exhibit A4 p.13. [↑](#footnote-ref-3)
4. Transcript 18.5.12 at p.50. [↑](#footnote-ref-4)
5. Transcript 18.5.12 at p.49. [↑](#footnote-ref-5)
6. Exhibit A15. [↑](#footnote-ref-6)
7. Exhibit A15 p.7. [↑](#footnote-ref-7)
8. [2011] AATA 737 at para.72. [↑](#footnote-ref-8)
9. Exhibit A15 p.2. [↑](#footnote-ref-9)
10. Exhibit A1 para 12. [↑](#footnote-ref-10)