[2015] AATA 60

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| Division | **GENERAL ADMINISTRATIVE DIVISION** |
| File Number(s) | 2014/2909 |
| Re | Khaoula Al Kasiri |
|  | APPLICANT |
| And |  |
|  | RESPONDENT |

# Decision

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| Tribunal | **Deputy President J W Constance** |
| Date | **4 February 2015**  |
| Place | **Sydney** |

The decision of the delegate of the Minister dated 6 May 2014 to refuse Ms Al Kasiri’s application for Australian citizenship is affirmed.

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

**Deputy President J W Constance**

Catchwords

CITIZENSHIP - citizenship by conferral – residence requirement – consideration of discretion in section 22(9) – whether the Applicant had a close and continuing association with Australia during periods of absence – decision affirmed

Legislation

Australian Citizenship Act 2007 (Cth) ss 21(2)(c), 22(1), 22(9)

Cases

*Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634

*Paula v Minister for Immigration and Citizenship* [2012] AATA 543

*Taher and Minister for Immigration and Border Protection* [2013] AATA 917

Secondary Materials

Australian Citizenship Instructions (issued 1 January 2015).

# REASONS FOR DECISION

**Deputy President J W Constance**

**4 February 2015**

1. Ms Al Kasiri applied for Australian citizenship by conferral on 5 March 2014.
2. In a decision dated 6 May 2014, a delegate of the Minister for Immigration and Border Protection refused Ms Al Kasiri’s application. This was on the grounds that she failed to satisfy the residence requirements for the grant of Australian citizenship. Importantly, the delegate found that Ms Al Kasiri did not meet the prerequisites for the exercise of the discretion to treat periods spent overseas as if Ms Al Kasiri was present in Australia.
3. Ms Al Kasiri has applied to the Tribunal for a review of the delegate’s decision.
4. For the reasons which follow, the decision under review will be affirmed.

**THE FACTS**

1. Ms Al Kasiri was born in Syria and is a citizen of that country. She married in Syria in 1998. Her husband was at the time of the marriage, and still is, an Australian citizen. After their marriage, Ms Al Kasiri and her husband moved to Dubai, where they have continued to live ever since. They have three children, all of whom are Australian citizens.
2. In 2001, Ms Al Kasiri purchased a Dubai-based company, Al Shabakah Universal Trading. Although she co-owns the company with a silent partner, she effectively manages and controls it herself.
3. Ms Al Kasiri, with the assistance of her husband, established a commercial relationship between Al Shabakah and the Australian company Hills Limited in 2001. Ms Al Kasiri’s company imports, markets and distributes goods manufactured by Hills Limited to customers in the United Arab Emirates and across the Middle East. According to Ms Al Kasiri, this agreement has established Al Shabakah as the sales distribution agent of Hills Limited in the Middle East. Inquiries regarding the purchase of Hills products in the Middle East are directed to Al Shabakah.
4. Al Shabakah imports goods from four other international companies, all of which are based in countries other than Australia. Ms Al Kasiri estimates that 70 per cent of her working week is spent on doing business with Hills Limited.
5. Ms Al Kasiri has visited Australia on three occasions. She first came to Australia on a two week holiday with her family in 2006. During this holiday she had a meeting with representatives of Hills Limited.
6. A permanent visa was granted to Ms Al Kasiri in about 2009 and she returned to Australia with her family for 16 days in April of that year. The purpose of this trip was to validate her visa as well as to meet with representatives of Hills Limited.
7. The only other time Ms Al Kasiri spent in Australia prior to her application for citizenship was from late January to early March 2014. Again, this trip was partly for the purpose of renewing her permanent visa.
8. During this visit, Ms Al Kasiri states that she had a meeting with the General Manager of International Sales and an Executive Director of Hills Home Living, which resulted in productive discussions surrounding the future relationship between Al Shabakah and Hills Limited. She and her husband also searched for a property which would act “*as a family home”* and met with the principal of a school in Sydney to discuss the possible enrolment of their eldest son.
9. Ms Al Kasiri and her husband plan to move to Australia so that their children can attend university in Sydney. She states that they will firstly send their two oldest children to university in Sydney and then wait until the youngest child finishes his primary education before moving with him to Australia. In this regard, Ms Al Kasiri stated in her statutory declaration dated 24 February 2014 that:[[1]](#footnote-1)

We want [our children] to understand and appreciate the Arabic language, culture and traditions before we move to Australia. For this reason, we want to wait until our youngest son (currently aged 7) is at least five years older before we move to Australia.

1. In August 2014, Ms Al Kasiri and her husband purchased land in Sydney on which they intend to build a family home.

# legislation

1. Section 21(2) of the *Australian Citizenship Act 2007* (Cth) establishes the criteria for general eligibility for the conferral of Australian citizenship. Importantly, subsection 21(2) provides:

(2) A person is eligible to become an Australian citizen if the Minister is satisfied that the person:

...

(c) satisfies the general residence requirement (see section 22) or the special residence requirement (see section 22A or 22B), or satisfies the defence service requirement (see section 23), at the time the person made the application; and

 ...

(g) is likely to reside, or continue to reside, in Australia or to maintain a close and continuing association with Australia if the application were to be approved; and

1. With respect to the general residence requirement, section 22(1) of the Act provides:

(1) Subject to this section, for the purposes of section 21 a person satisfies the **general residence requirement** if:

(a) the person was present in Australia for the period of 4 years immediately before the day the person made the application; and

(b) the person was not present in Australia as an unlawful non-citizen at any time during that 4 year period; and

(c) the person was present in Australia as a permanent resident for the period of 12 months immediately before the day the person made the application.

1. The Act provides the Minister with discretion to treat a period of absence from Australia as a period in which the person was present for the purposes of satisfying the general residence requirement. Section 22(9) provides:

(9) If the person is the spouse, de facto partner or surviving spouse or de facto partner of an Australian citizen at the time the person made the application, the Minister may treat a period as one in which the person was present in Australia as a permanent resident if:

(a) the person was a spouse or de facto partner of that Australian citizen during that period; and

(b) the person was not present in Australia during that period; and

(c) the person was a permanent resident during that period; and

(d) the Minister is satisfied that the person had a close and continuing association with Australia during that period.

**ISSUES FOR DETERMINATION**

1. The Minister accepts that Ms Al Kasiri satisfied (a), (b) and (c) of subsection 22(9) in respect of the periods in which she was absent from Australia in the four years prior to lodging her application. The issue for the Tribunal is whether Ms Al Kasiri had a close and continuing association with Australia during those periods of absence.
2. If the Tribunal finds that Ms Al Kasiri did have such an association and exercises the discretion in section 22(9), the second issue for the Tribunal will be whether Ms Al Kasiri is likely to reside or maintain a close and continuing association with Australia after the prospective grant of citizenship.

## Did Ms Al Kasiri have a *“close and continuing association with Australia”* during the periods of absence from Australia during the four years immediately prior to making her application for citizenship?

1. In applying subparagraph 22(9)(d) it is necessary to consider the ordinary meaning of the words used. The following definitions are taken from the *Australian Oxford Dictionary:*
	1. *“close”* means *“having a strong or immediate relation or connection”;*
	2. *“continuing”* means *“to remain in existence or unchanged”* and
	3. *“association”* means *“the act or an instance of associating; fellowship or companionship”.*

## *Australian Citizenship Instructions*

1. In relation to the exercise of the discretion under subsection 22(9) the Instructions relevantly provide:

In all cases, applicants must provide evidence that they maintained close and continuing association with Australia while overseas. Factors that may demonstrate this close and continuing association with Australia include but are not limited to:

* *evidence that the person migrated to and established a home in Australia prior to the period overseas*
* *Australian citizen children*
* *long term relationship with Australian citizen spouse or de facto partner*
* *extended family in Australia*
* *regular return visits to Australia*
* *regular periods of residence in Australia*
* *intention to reside in Australia*
* *the person has been on leave from employment in Australia while accompanying their spouse or partner overseas*
* *ownership of property in Australia*
* *evidence of income tax paid in Australia over the past four year and*
* *evidence of active participation in Australian community based activities or organisations.*

In assessing whether a person has a close and continuing association with Australia for the purposes of s22(9)(d), it is policy that more weight should be given to the above factors if the person has been lawfully and physically present in Australia for at least 365 days in the 4 years immediately before making an application for Australian citizenship (including at least 90 days as a permanent resident). Less weight should be given to these factors if they have not been present in Australia for at least this period.[[2]](#footnote-2)

1. As noted by the Tribunal in *Taher and Minister for Immigration and Border Protection*:[[3]](#footnote-3)

... the factors referred to above should not be treated in isolation or simply ticked off individually as having been satisfied. It is the combination and association of these factors which may demonstrate a close and continuing association with Australia.

1. The Instructions provide that less weight should be given to the factors listed above where a person has not been present for a period of at least 365 days in the four years prior to applying for citizenship. The Tribunal must apply lawful government policy unless there are cogent reasons to the contrary.[[4]](#footnote-4)
2. It was submitted on behalf of the Applicant that the proposition should not be applied. The Applicant accepts that the fact that she spent 32 days in Australia in the four years leading up to her application is a relevant consideration. However, it is submitted that this should not effectively be regarded as more significant than other factors bearing upon her association with Australia.
3. I am not persuaded by this submission. The Instructions provide a guide to the exercise of the discretion. They are not a tool for the interpretation of the meaning of the words of the statute. As noted by the Tribunal in *Paula and Minister for Immigration and Citizenship[[5]](#footnote-5)*:

The Instructions do not raise a failure to be present for 365 in the relevant 4 years as a bar to a conclusion that a person had a close and continuing association with Australia or to the exercise of the discretion generally. The use of the expressions “more weight” and “less weight” suggest a sliding scale of weight to be attached to a claim for exercise of the discretion, depending on how many days a person has been present in Australia in the relevant period.

1. Regardless of whether or not I attribute less weight to the factors listed in the Australian Citizenship Instructions, I am not satisfied that Ms Al Kasiri had a close and continuing association with Australia during her periods of absence.
2. The Applicant argued that the reasons for her absence from Australia support the notion that she has a close and continuing association with Australia. It was submitted that throughout the relevant period Ms Al Kasiri:

(a) operated a business in Dubai through which she has a continuing connection with Australia that benefits Australia;

(b) cares for her three Australian-citizen children, each of whom will come to Australia to reside when they commence university.

1. I accept that the reasons for an individual’s absence from Australia are relevant to determining whether an individual has a close and continuing association with Australia. In Ms Al Kasiri’s case, however, the above reasons do not tend to establish such an association.
2. It is important to note that section 22(9)(d) speaks of a close and continuing association with Australia. This is different from a close and continuing business association with an Australian company or an association with individual Australian citizens. Although a connection with Australia includes a connection to the Australian economy, any such connection in Ms Al Kasiri’s case was tenuous at best. Ms Al Kasiri’s evidence was that she heard a lot about Hills Limited, and saw a market for its products in the UAE. This led her to forge, and maintain, a relationship between the two companies. All profits made by Al Shabakah from this relationship remained in the UAE and the company has operated solely out of Dubai. Taking this into account, the relationship between the companies was not formed and maintained in any degree by Ms Al Kasiri for the purpose of contributing to the Australian economy, but for advancing her own business interests in Dubai.
3. It is clear that Ms Al Kasiri has a strong relationship with her children and husband who are Australian citizens. However, her husband has not resided here since he lived in Australia for 6 years in the 1990s. Her children also have limited links to Australia, with her youngest child never having visited the country. Her connection to her immediate family is not indicative of any real connection with Australia.
4. Other than her family and business relationships, Ms Al Kasiri has no particular connection with the wider Australian community. She only visited Australia once during the four year period prior to lodging her application for citizenship. This visit was partly for the purpose of renewing her permanent visa and also to attend a meeting with representatives from Hills Limited. In fact, each of her visits to Australia has been partly for visa and business reasons. Apart from keeping in contact with, and meeting, a few friends, there is no indication that Ms Al Kasiri has been involved in any capacity with the wider Australian community.
5. During her visits to Australia, Ms Al Kasiri and her family stayed in hotels. She owned no property in Australia during the four years prior to her application, and has not paid income tax. She has no family in Australia, although has approximately 12 sets of friends. These, however, are mostly friends of her husband.
6. Ms Al Kasiri spoke of an intention to reside in Australia. During the relevant period, Ms Al Kasiri and her husband explored the possibility of sending their eldest child to a Sydney school. They also searched for property in Sydney, which they have since purchased. Although this supports an intention to reside, such steps were only very preliminary in nature and are not of great weight.
7. Taking into account all of the above, I am not satisfied that Ms Al Kasiri had a close and continuing association with Australia during her periods of absence from Australia in the four years prior to her application for citizenship.
8. As a prerequisite to the exercise of the discretion in section 22(9) has not been satisfied, I am unable to treat Ms Al Kasiri’s periods of absence as periods in which she was present in Australia. Having only spent 32 days in Australia in the four years leading up to her application for citizenship, she does not satisfy the general residence requirement for the grant of Australian citizenship.
9. For that reason, it is not necessary for me to consider the second issue of whether Ms Al Kasiri is likely to reside in Australia, or maintain a close and continuing association with Australia after any prospective grant of citizenship.

**CONCLUSION**

1. The decision under review to refuse Ms Al Kasiri’s application for Australian citizenship will be affirmed.

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|  I certify that the preceding 37 (thirty-seven) paragraphs are a true copy of the reasons for the decision herein of Deputy President J W Constance |

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

Associate

Dated 4 February 2015

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| Date(s) of hearing | **4 December 2014** |
| Date final submissions received | **4 December 2014** |
| Counsel for the Applicant | **B Zipser** |
| Solicitors for the Applicant | **Cambridge Law Group** |
| Solicitors for the Respondent | **A Carr; DLA Piper** |

1. Exhibit R1, p.156. [↑](#footnote-ref-1)
2. Paragraph 5.18. [↑](#footnote-ref-2)
3. [2013] AATA 917, at [47]: [↑](#footnote-ref-3)
4. Re Drake and Minister for Immigration and Multicultural and Ethnic Affairs (No.2) (1979) 2 ALD 634 at 645. [↑](#footnote-ref-4)
5. [2012] AATA 543 at [31]. [↑](#footnote-ref-5)