[2015] AATA 61

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| Division | **GENERAL ADMINISTRATIVE DIVISION** |
| File Number(s) | 2014/1660 |
| Re |  |
|  | APPLICANT |
| And |  |
|  | RESPONDENT |

# Decision

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

In accordance with section 43 of the *Administrative Appeals Tribunal Act 1975* (Cth):

1. the decision under review, being the decision of the Delegate of the Minister made 26 March 2014 is set aside.
2. the matter is remitted to the Minister for reconsideration in accordance with the direction that at the time of this decision, Mr El Houmayssi is of good character in accordance with subsection 21(2)(h) of the *Australian Citizenship Act 2007* (Cth).

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

**Deputy President J W Constance**

Catchwords

*CITIZENSHIP - Citizenship by conferral – good character – whether the applicant satisfies the legislative requirement to be shown to be of good character – finding of guilt for domestic violence – consideration of mitigating factors - decision set aside and remitted*

Legislation

*Australian Citizenship Act 2007* (Cth) ss 21(2)(h), 24

Cases

Re Drake and Minister for Immigration and Multicultural and Ethnic Affairs (No.2) (1979) 2 ALD 634

Irving v Minister for Immigration, Local Government and Ethnic Affairs (1996) 68 FCR 422

Zheng and Minister for Immigration and Citizenship [2011] AATA 304

Secondary Materials

*Australian Citizenship Instructions* (Cth) issued 1 January 2015.

# REASONS FOR DECISION

**Deputy President J W Constance**

**4 February 2015**

1. Mr El Houmayssi applied for Australian citizenship by conferral in January 2014.
2. A delegate of the Minister refused Mr El Houmayssi’s application in a decision dated 26 March 2014. This was on the basis that Mr El Houmayssi had not established that at that time he was of good character for the purposes of a grant of citizenship.
3. Mr El Houmayssi 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 set aside and the matter remitted to the Minister with the direction that Mr El Houmayssi is of good character in accordance with section 21(2)(h) of the *Australian Citizenship Act 2007* (Cth).

# background

1. Mr El Houmayssi is a citizen of Lebanon and currently holds a permanent visa, which was first granted in August 2012.
2. He first met Ms Kassem whilst in Australia on a tourist visa in about 2008. Within three months they were engaged, and Mr El Houmayssi returned to Lebanon. After returning to Australia in November 2009, he and Ms Kassem were married in May 2010.
3. Mr El Houmayssi was charged with the offence of common assault following an incident on 25 January 2011. The Police Facts Sheet records that after a prolonged argument in which Mr El Houmayssi refused to speak to his wife:

The Accused and the Victim have continued to argue where [sic] the Victim has asked the Accused to leave the premises. The Accused has gone to grab the house keys but the Victim has acquired them before the Accused could.

As a result the Accused and Victim have struggled for possession of the keys. During the struggle the Accused has bitten the Victim on the top of the left and right wrist and to the side of the left forearm. It is believed this was to release the Victim’s grip of the keys but she managed to hold possession and said to the Accused, “You have to kill me to take the keys”.

The Accused has given up his hold on the Victim and left the premises.[[1]](#footnote-1)

1. Mr El Houmayssi stated in evidence that the argument arose after he placed a can of oil in the hallway, which his wife wanted him to put at the rear of the house. He said they both raised their voices and shouted at one another. He sought to avoid the confrontation by firstly going to bed and secondly moving into the lounge room.
2. As the argument continued, Mr El Houmayssi stated that he “*got very nervous*”. The police report records that Ms Kassem said to Mr El Houmayssi *“divorce me”* and he proceeded to divorce her in accordance with his own culture. According to their religion they were no longer permitted to stay in the same home, and so Mr El Houmayssi attempted to leave. This resulted in the physical confrontation involving the keys.
3. On 10 May 2011, Mr El Houmayssi pleaded guilty to the charge of common assault. On 24 May 2011, the court directed Mr El Houmayssi to enter into a six month good behaviour bond in accordance with section 10 of the *Crimes (Sentencing Procedure) Act 1999*. He was not convicted of the offence.
4. Mr El Houmayssi has not been convicted of any further offences since the 2011 assault.

# THE ISSUE

1. The only issue for determination is whether, at the time of the Tribunal’s decision, Mr El Houmayssi is of *good character* within the meaning of the *Australian Citizenship Act 2007* (Cth).

# LEGISLATION

1. Applications for the conferral of Australian citizenship are governed by the *Australian Citizenship Act 2007* (Cth).
2. Section 24 of the Act provides, in part:

(1) 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.

(1A) The Minister must not approve the person becoming an Australian citizen unless the person is eligible to become an Australian citizen under subsection 21(2), (3), (4), (5), (6), (7) or (8).

1. Section 21(2) of the Act establishes requirements for eligibility for the grant of citizenship. It provides, in part:

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

 ...

(h) is of good character at the time of the Minister's decision on the application.

It is only this subsection which is in issue in the present application.

# AUSTRALIAN CITIZENSHIP INSTRUCTIONS

1. The Australian Citizenship Instructions have been adopted by the Minister to guide those making decisions under the Act. Chapter 10 provides *“guidance on the administration of the ‘good character’ provisions under the Act and to define, for administrative purposes, the meaning of ‘good character’”*.
2. The Instructions reflect government policy and are not binding on the Tribunal. However, the Tribunal should apply the policy unless there are cogent reasons to the contrary*.[[2]](#footnote-2)*
3. Paragraph 10.1.2 of the Instructions provides, in part:

‘Good character’ refers to the enduring moral qualities of a person, and is an indication of whether an applicant is likely to uphold and obey the laws of Australia and the other commitments made through the pledge should they be approved for citizenship.

1. This reflects what the Federal Court said in *Irving v Minister for Immigration, Local Government and Ethnic Affairs*:[[3]](#footnote-3)

Unless the terms of the Act and Regulations require some other meaning be applied, the words ‘good character’ should be taken to be used in their ordinary sense, namely, a reference to the enduring moral qualities of a person, and not to the good standing, fame or repute of that person in the community. The former is an objective assessment apt to be proved as a fact whilst the latter is a review [of] subjective public opinion ... A person who has been convicted of a serious crime and thereafter held in contempt in the community, nonetheless may show that he or she has reformed and is of good character. ... Conversely, a person of good repute may be shown by objective assessment to be a person of bad character. (citations of authorities omitted).

1. After referring to the judgement of the Court in the *Irving,* Paragraph 10.3.1 provides, in part:

In this context, "moral" does not have any religious connotations. The phrase “enduring moral qualities” encompasses the following concepts:

characteristics which have been demonstrated over a very long period of time

distinguishing right from wrong

behaving in an ethical manner, conforming to the rules and values of Australian society.

The good character requirement looks at the essence of the applicant. Their behaviour is a manifestation of their essential characteristics.

1. In considering the *Australian Citizenship Instructions* I have taken into account that they refer to the decision of this Tribunal in *Zheng and Minister for Immigration and Citizenship[[4]](#footnote-4)*:

In the context of the Act, loyalty to Australia, a belief in a democratic form of government, respect for the rights and liberties of all Australians and obedience to and observance of the law are values that are regarded as significant. An assessment of a person’s character will need to have regard to them. They are not values that can be assessed in the abstract. Instead, they are measured in part by what person says, in part what a person does and in part what a person is heard to say and seen to do.

1. The Instructions go on to say that an applicant of good character would, amongst other things, respect and abide by the law of Australia, and be truthful and not practise deception in dealings with the Australian Government.[[5]](#footnote-5)

# consideration

### Characteristics of a person of good character

1. In paragraph 10.3.4 of the Instructions there is a non-exhaustive list of characteristics which a person of good character would have. These are to be considered with other provisions of Chapter 10. They include:
* *respect and abide by the law in Australia and other countries;*

*…*

* *be truthful and not practise deception or fraud in their dealings with the Australian Government, or other governments and organisations, for example: …*
	+ *concealment of convictions that could lead to the cancellation or refusal of a visa or citizenship;*

*…*

* *not be violent … and not cause harm to others through their conduct.*

*...*

1. Paragraph 10.5 provides a *“Framework for making ‘good character’ decisions”.* Its provisions are not exhaustive. The factors listed *“may have different weights, depending on the circumstances of the case”.* The relevant factors to be taken into account in considering why an applicant might not be of good character (as set out in paragraph 10.5.2) include the following:
* *Has the applicant committed any offences and if so, did they admit that in their citizenship application?*
* *If the applicant has committed an offence, was it serious or minor?*
* *Were there victims of the offence? In particular, were the victims vulnerable people like children, the elderly or disabled, or others who trusted the applicant?*
1. The Instructions provide that this framework should be considered first before considering whether there are any mitigating factors which may indicate that a person is now of good character.
2. Under the heading, *Weighing up the decision*, the Instructions provide:

Essentially, the question for decision makers is whether any mitigating circumstances and/or explanation provided by the applicant outweigh the behaviour in question. The assessment about whether an applicant is of “good character” requires the consideration of an aggregate of qualities.

In weighing up the various factors, the decision maker must not apply their own personal standards, but must apply community standards. Having regard to the words of the Preamble, and the pledge to be made if citizenship is approved, decision makers are asking themselves:

• would a person of good character have behaved the way the applicant did

• what is there to demonstrate that the applicant has upheld and obeyed the law

• has the applicant behaved in accordance with Australia's community standards

• does the applicant share Australia’s democratic beliefs and respect its rights and liberties.[[6]](#footnote-6)

**The Offence**

1. The Australian Citizenship Instructions provide that crimes of violence are to be regarded as serious offences. This is even more so in the case of domestic violence. Such conduct is fundamentally inconsistent with the standard of behaviour expected by the Australian community and usually weighs heavily against an individual’s character.
2. Mr El Houmayssi was not convicted of the assault. A six month good behaviour bond under section 10 of the *Crimes (Sentencing Procedure) Act 1999* constitutes one of the more lenient options available to the court in sentencing an offender. I acknowledge that domestic violence offences are undeniably serious. Nonetheless, considering the outcome of the proceedings, the offence for which Mr El Houmayssi was found guilty tends towards the lower end on the scale of serious offences.
3. I note also that Mr El Houmayssi disclosed details of the offence to the Department in making his application for citizenship. This weighs in favour of his character as a person likely to be honest in his dealings with the Australian government.

### Mitigating Factors

1. Paragraph 10.5.2 provides, in part:

Once the behaviour of the applicant has been assessed, the decision maker should turn their minds to whether there are any mitigating factors to be taken into account.

* + *What is the length of time between the date of the offence (if known) and application for Australian citizenship, or between conviction and application? ...*
	+ *Has the applicant accepted responsibility and shown remorse for their conduct?*
	+ *How has the applicant behaved since being released from prison or upon completion of any obligations to a court such as a good behaviour bond?…*
	+ *Has the applicant rehabilitated themselves?…*
	+ *What was the applicant’s age at the time the offence was committed?…*
	+ *Were there any extenuating circumstances relating to the offence?*

*...*

### Evidence of Ms Kassem

1. Ms Kassem acknowledged in evidence that she contributed to the events leading up to the assault. However, importantly, she drew a distinction between the argument leading up to the assault and the assault itself. She stated that Mr El Houmayssi’s strategy for dealing with conflict was to go to sleep or leave the house. This angered her. As a result, when Mr El Houmayssi attempted to go to sleep during the argument on 25 January she became really angry and pursued the argument.
2. Ms Kassem stated that in no way did she blame herself for her husband’s actions. She stated emphatically that there was “*no justification*” for his actions and that he had “*no right to do what he did”*. She reiterated on a number of occasions that her husband was wrong to bite her and that she was justified in calling the police. She does not regret calling the police and maintains that her husband needed to be punished for his actions.
3. With respect to his behaviour since the assault, Ms Kassem emphasised that her husband has changed. He has not assaulted her since. They have had arguments, although nothing on the scale of the argument which preceded the assault.

**Character Evidence**

*Ms Zreika*

1. Ms Zreika is the sister of Ms Kassem. She provided a statement dated 30 June 2014,[[7]](#footnote-7) and a Statutory Declaration dated 13 March 2014.[[8]](#footnote-8)
2. Mr El Houmayssi and Ms Zreika have known one another for almost six years. They see each other almost every weekend. In her statement dated 30 June 2014,[[9]](#footnote-9) Ms Zreika stated that Mr El Houmayssi contacted her after the assault and admitted that what he did was wrong and beyond justification. She believes his contrition is genuine. From her knowledge of him over the two years prior to the assault he was always a trustworthy and kind person. She stated:

He was always a person we could definitely rely on when needed, respectful and most important always treated [Ms Kassem] very kindly. ...

[Ms Kassem] gave him [a] hard time before she forgave him totally. Now after all this [sic] years, when I see my sister and her family I thank God she gave him another chance. He proved for sure that violent [sic] is something out of his character as he never repeated again.

*Ms Buksh*

1. Ms Buksh is a friend of Ms Kassem. She provided a hand-written statement dated 25 June 2014.[[10]](#footnote-10) She has known Mr El Houmayssi since she met him at his and Ms Kassem’s wedding. She did not provide specific details of the offence, although stated that it was a one-off, he is always welcoming and treats his wife and child with the utmost respect.

*Mr Charkawi*

1. In an undated letter filed on 2 July 2014,[[11]](#footnote-11) Mr Cherkawi stated that Mr El Houmayssi works for his company full time and is “*an honest and hardworking employee*”.

*Ms Taban*

1. Ms Taban has been a friend of Ms Kassem since 2006. She noted in her statement[[12]](#footnote-12) that Ms Kassem and her husband had a dispute after which Mr El Houmayssi was required to attend court. Since this time, “*they both have worked through their problems and differences and are a very happy family now”*.

*Mr Ibrahim*

1. Mr Ibrahim made no mention of the assault in his Statutory Declaration dated 13 March 2014.[[13]](#footnote-13) He had worked with Mr El Houmayssi for almost two years and stated that he was always “*very nice, respectful and hard worker”*. On regularly visiting Mr EL Houmayssi’s home on the way to work, he has noticed Mr El Houmayssi’s kindness to his family.

# Consideration

1. The decision whether Mr El Houmayssi is of good character is not made by applying the various factors referred to in the Instructions as a checklist. The evidence has to be looked at as a whole.[[14]](#footnote-14) Paragraph 10.5.4 of the Instructions provides, in part:

Essentially, the question for decision makers is whether any mitigating circumstances and/or explanation provided by the applicant outweigh the behaviour in question. The assessment about whether an applicant is of “good character” requires the consideration of an aggregate of qualities.… A decision maker needs to look holistically at an applicant’s behaviour over a lasting or enduring period of time.

1. Mr El Houmayssi has committed a serious offence. However, as I have noted, the offence is at lower end of the scale of serious offences. He has not committed any further offences in the four years since the assault.
2. Mr El Houmayssi also disclosed the offence to the Department on lodging his application for citizenship. In his application, Mr El Houmayssi answered ‘yes’ to the question of whether he had been convicted or found guilty of any offences. He stated in addition:

I went to court Because [sic] fight happened Between [sic] me & my wife ... I was not convicted & placed on good Behaviour [sic] for one year.

This weighs in favour of Mr El Houmayssi’s character.

1. It was submitted on behalf of the Minister that I should find that Mr El Houmayssi does not think that domestic violence is unacceptable. It concerned me that Mr El Houmayssi admitted in evidence that before the hearing of his criminal charge he was not aware of Australian laws. At that time, Mr El Houmayssi had been in Australia for two years.
2. Nonetheless, I do not agree that Mr El Houmayssi viewed at the time, or currently holds the view, that violence against women is acceptable conduct. Mr El Houmayssi acknowledged in evidence that the assault was entirely his fault. He stated that he felt at fault as soon as he left the house after the assault. He made a mistake which he maintains occurred only once. According to Mr El Houmayssi, since the assault, he and Ms Kassem have an agreement that where either of them becomes angry or they have an argument, they take 15 to 20 minutes alone to cool down and then discuss their differences.
3. Ms Kassem reiterated in her evidence on a number of occasions that her husband had changed. She impressed me as an honest and thoughtful witness. She was assertive in her position that her husband was completely wrong to have assaulted her and maintained that she was justified in calling the police. She made it clear that she would never tolerate violence. The account provided by Ms Zreika in her statement dated 30 June 2014 is consistent with this. On the basis of the evidence of Mr El Houmayssi and Ms Kassem, I accept that Mr El Houmayssi has not been violent since the assault in 2011.
4. I note the warning in the Instructions that the decision maker should take particular care with references from the victims of domestic violence, as there is a risk that the reference could have been directly or indirectly coerced from the victim.[[15]](#footnote-15) However, having observed Ms Kassem in the witness box, I am satisfied that her evidence was not so influenced by Mr El Houmayssi.
5. I am satisfied that over the past four years, having commenced a family, and with the positive influence of Ms Kassem, Mr El Houmayssi has reformed. He is not an individual likely to re-offend. I am satisfied that he understands that domestic violence is unacceptable, and that he genuinely believes this to be so. He impressed me as an honest witness who was genuinely remorseful for the conduct which has put him in the position he now finds himself. I am satisfied that, despite the seriousness of his actions, he does have the enduring moral qualities which the Australian community expects of a citizen of this country. I find that he is of good character within the meaning of the Act.

**CONCLUSION**

1. The decision under review, being the decision of the Delegate of the Minister made 26 March 2014 will be set aside.
2. The matter will be remitted to the Minister for reconsideration in accordance with the direction that Mr El Houmayssi is of good character in accordance with subsection 21(2)(h) of the *Australian Citizenship Act 2007* (Cth).

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| I certify that the preceding 49 (forty-nine) paragraphs are a true copy of the reasons for the decision herein of Deputy President J W Constance |

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

Dated

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| --- | --- |
| Date(s) of hearing | **8 December 2014** |
| Date final submissions received | **8 December 2014** |
| Applicant | **In person** |
| Solicitors for the Respondent | **A Carr; DLA Piper Australia** |

1. Exhibit R2, p. 5-6. [↑](#footnote-ref-1)
2. Re Drake and Minister for Immigration and Multicultural and Ethnic Affairs (No.2) (1979) 2 ALD 634 at 645. [↑](#footnote-ref-2)
3. (1996) 68 FCR 422 at 431-432. [↑](#footnote-ref-3)
4. [2011] AATA 304 at [120]. [↑](#footnote-ref-4)
5. Paragraph 10.3.4. [↑](#footnote-ref-5)
6. Paragraph 10.5.4. [↑](#footnote-ref-6)
7. Exhibit A2 [↑](#footnote-ref-7)
8. Exhibit R1, p.100. [↑](#footnote-ref-8)
9. Exhibit A2. [↑](#footnote-ref-9)
10. Exhibit A3. [↑](#footnote-ref-10)
11. Exhibit A4. [↑](#footnote-ref-11)
12. Exhibit A5. [↑](#footnote-ref-12)
13. Exhibit R1, p.102 [↑](#footnote-ref-13)
14. See paragraph 10.1.1 of the Australian Citizenship Instructions. [↑](#footnote-ref-14)
15. Australian Citizenship Instructions, para 10.6.5 [↑](#footnote-ref-15)