[2015] AATA 76

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| Division | **GENERAL ADMINISTRATIVE DIVISION** |
| File Number(s) | 2014/2445 |
| Re | GJRL |
|  | APPLICANT |
| And | Minister for Immigration and Border Protection |
|  | RESPONDENT |

# Decision

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| Tribunal | **John Handley, Senior Member** |
| Date | **13 February 2015**  |
| Place | **Melbourne** |

The decision under review is set aside and in substitution it is decided that the applicant is eligible to become an Australian citizen.

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

**John Handley, Senior Member**

**CITIZENSHIP** – application for citizenship by conferral – finding that applicant was not of good character – applicant arrived in Australia aged 5 and now 35 years – offended on multiple occasions and annually between 1995 and 2003 and again in 2007 – offending first occurred as a teenager – section 501 notice in 2004 was not contested – applicant lawfully returned to Australia in 2005 – subsequently married, became a father, obtained secure employment with substantial salary – strong supportive family network – forensic psychologist found the applicant at low risk of recidivism – decision set aside

**Legislation**

Australian Citizenship Act 2007 section 21(2)(h)

**Cases**

Fenn and Minister for Immigration and Multicultural Affairs [2000] AATA 931

Godley v Minister for Immigration and Multicultural and Indigenous Affairs (2004) 83 ALD 411

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

Minister for Immigration and Multicultural and Indigenous Affairs v Godley (2005) 141 FCR 552

Re Zheng and Minister for Immigration and Citizenship (2011) 121 ALD 372

Sui and Minister for Immigration Citizenship [2008] AATA 1062

**Secondary Materials**

Australian Citizenship Instructions (1 July 2014)

# REASONS FOR DECISION

**John Handley, Senior Member**

**13 February 2015**

1. The applicant arrived in Australia with his parents from Tonga on 9 February 1985 when he was five years of age. Save for about 12 months when he was eight or nine years of age and 14 months between 2004 and 2005, the applicant has lived in Australia. He was granted permanent residency on 13 November 2009. He applied for citizenship by conferral on 19 November 2012. A delegate of the Minister refused the application on 23 May 2014. This application was initiated to review that decision.
2. The delegate decided, pursuant to the provisions of s 21(2)(h) (reproduced below) of the *Australian Citizenship Act 2007* (the Act) that she was not satisfied the applicant was of *good character.*

(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.*

1. In short, it was contended that the applicant has a significant criminal history which demonstrated that he is not of good character at the date of review.
2. At this stage it is appropriate to draw attention to a number of issues that arose during and at the conclusion of the hearing and which can conveniently be addressed by reference to a decision of the Tribunal in *Re Zheng and Minister for Immigration and Citizenship* (2011) 121 ALD 372 (*Zheng*) (and other authorities discussed later). By regard to the language of s 21(2)(h) and adopting some of the conclusions in *Zheng*:
	1. an assessment of the applicant’s character is to be determined on the evidence at the date of the review [25], not *at the time of the Minister’s decision*;
	2. the burden of proof is no greater than *satisfaction*. The Tribunal does not need to be *positively persuaded* that the applicant is of good character [38];
	3. the concept of *good character* does not refer to a person’s *reputation* or *repute* [44].
3. The hearing occurred over a period of two days. The applicant was represented by David Baker of Counsel and the Minister was represented by Tigiilagi Eteuati, a lawyer from Clayton Utz. Evidence was heard from the applicant, his wife, mother-in-law, sister-in-law and Ms Pamela Matthews, a forensic psychologist.
4. An order was made pursuant to section 35(2)(aa) of the *Administrative Appeals Tribunal Act* *1975* directing a prohibition on publication of the name of the applicant, his wife, mother-in-law and sister-in-law by reason of the perceived prejudice that those persons and especially the infant children of the applicant and his wife would endure if the extent of his criminal convictions became known. I decided that access to personal information being readily available through Internet search engines and the possibility of electronic and print media broadcasting or publishing details of this decision could, if the applicant was identified, cause him and his family members considerable prejudice.

## Criminal Offences

1. The representatives of the parties agreed that the entirety of the applicant’s criminal offending is found within a National Police Certificate (the certificate) issued by the Australian Federal Police dated 25 September 2014 and received as Exhibit A2. A summary of the certificate, which does not record the date of offending but rather the dates the applicant appeared in court reveals:
	1. he first appeared on 12 October 1995 (he was then 16 years of age) and last appeared on 28 March 2008;
	2. he appeared at the Melbourne County Court on 3 occasions, at the Children’s Court on 3 occasions and in suburban Magistrates’ courts on 11 occasions;
	3. he appeared in a court every year between 1995 and 2003 and appeared for the last time in 2008;
	4. in total he was charged on 86 occasions. On 69 occasions he was convicted. On 17 occasions the charges were proved without conviction and the proceedings were adjourned by the applicant entering into a good behaviour bond;
	5. the applicant was sentenced and served a period of imprisonment on 5 occasions between 2000 and 2003.
	6. the applicant last offended in 2007 (Exhibit A11 is a copy of a Charge sheet which records that he received or retained stolen goods on 26 June 2007). It was this offence which gave rise to the appearance before the Melbourne Magistrates’ Court in 2008;
	7. the overwhelming majority of the offending involved offences of violence or dishonesty. There were four drug related offences;
	8. the most serious offending occurred on 15 May 1999 which resulted in an appearance before the County Court in Melbourne on 10 April 2000 upon a single charge of aggravated burglary. The sentencing remarks of his Honour Judge Nixon (T30, pages 231- 239) record that the applicant, in company with another person threatened two persons with knives and then bound and gagged them. Whilst those persons were restrained, in domestic premises those persons occupied, the applicant or his co-offender removed items of personal property. The applicant was sentenced to a period of imprisonment of two years with a non-parole period of nine months.
2. The above summary is recorded at this stage, before recording any of the evidence with respect to the applicant’s history, because much of the offending occurred at various stages during the applicant’s life, commencing with his formative years, occasions when he was in and influenced by poor company, during occasions when he was either dependent or frequently consuming alcohol and illegal substances and during periods where he was depressed, unable to secure regular employment and financially insecure.
3. It is worth also recording at this stage that the applicant’s circumstances have been well known to the Department of Immigration and Border Protection for many years, either by applications initiated by the Minister from time to time or applications initiated by the applicant, namely:
* at or about the time that the sentence following the convictions of December 2003 ended, the applicant was served with a notice pursuant to s 501 of the *Migration Act* *1958* (the Migration Act) and he was taken into immigration detention. Although documents in relation to that event are not within the T-documents, it would appear that a delegate of the Minister decided the applicant *did not pass the character* test because he had *a substantial criminal record* (s 501(6) and (7)). The applicant did not challenge that decision and voluntarily left Australia and returned to Tonga.
* In April 2004 the applicant’s fiancée lodged a Prospective Marriage Visa application, the intention being to permit him to return and lawfully stay in Australia. He was then sponsored by her (she later became his wife). That application was refused. An application to review that decision was lodged and heard in this Tribunal on 14 April 2005. The applicant gave evidence by telephone from Tonga. On 10 June 2005 Deputy President Wright decided that the decision under review should be set aside. The Minister did not challenge that decision and the applicant returned to Australia on 10 September 2005.
* On 16 February 2009, the applicant was advised that the Minister was considering cancellation of his visa and issuing a notice pursuant to s 501 of the Migration Act. His past convictions, including the sentence in March 2008, were noted (T40, page 323). The applicant was invited to respond, which he did on 25 March 2009. On 29 October 2009, a representative of the Minister advised that she would not pursue that application (T40, pages 316-317).
* Two weeks later, on 13 November 2009, the applicant was granted permanent residency.

## Evidence

### The Applicant

1. A number of statements and letters which had been completed by the applicant were received into evidence. Amongst them was a statement he completed on 28 February 2004 whilst he was in immigration detention (Exhibit A3). Most of the information contained within it was analysed during cross-examination however it is relevant at this stage to briefly summarise it as follows:
	1. Shortly after arriving in Melbourne from Tonga, the applicant was enrolled in a local primary school. At the end of year three, he returned to Tonga with his mother where he stayed for about 12 months. He returned to Australia and completed primary school and then enrolled in a local high school. He played Australian rules football in a suburban league and was part of a premiership team in his second year. His secondary education was progressing well until during year eight when he arrived home one day and observed his mother in a very distressed state. He learnt that his father had been apprehended by immigration officers and was placed in detention. The applicant now understands that his father had overstayed his visa.
	2. The applicant’s mother moved him and his brothers into a relative’s home in another suburb and from that time the applicant became rebellious, in the absence of a father figure. He ran away from home, mixed with poor company and commenced offending.
	3. When his father eventually returned to Australia, the applicant resumed secondary education and progressed to complete year 11. At about that time the applicant was playing competitive rugby in a school’s competition, he was selected as a member of an under 16 Victorian team that played interstate and was selected to tour Great Britain in the following year but declined because his family was unable to meet the costs of accommodation and air fare.
	4. At the completion of year 11 the applicant declined an offer of a carpentry apprenticeship and chose to work in premises where his mother was also employed. Unfortunately, work slowed and he was engaged only for two days each week. He resumed his association with others and resumed offending. He obtained work as a concreter which he enjoyed but was retrenched 12 months later. At about that time he met his fiancée. He later commenced living with her in premises also occupied by her mother and sister.
	5. His fiancée was aware of his offending and his consumption of drugs. She counselled him and asked him to *think about turning* (himself) *into the* police in relation to offences he had committed. The applicant recorded he was then depressed and fearful of doing so and decided to shoplift, knowing that he would be caught. He was charged with a number of offences and convicted on 1 December 2003. He served three months imprisonment and entered into immigration detention at the expiration of his sentence.
2. The applicant said in evidence that his *head was in a fog* at or about the time that he decided to shoplift with the intention of being caught. He said he was then immature and was taking drugs. He irregularly consumed alcohol from the age of 13. Later, between the age of 16 and 20, used cannabis and speed. Between 2000 and 2003, he used methamphetamine (ice) and heroin. The applicant has not used drugs after 2003 except for a relapse in 2007 when he last offended. He did not commit offences between 2003 and 2007.
3. Upon completion of his three-month sentence following the convictions in December 2003, the applicant returned to Tonga, rather than contest the s 501 notice (see paragraph 9). He remained in Tonga for about 14 months during which time his fiancée visited him, having been able to obtain extended leave from her employment, and provided him with financial assistance. She was instrumental in him obtaining work as a volunteer with Red Cross as a driver of a bus delivering disabled children to school. During his time in Tonga the applicant said he felt as if he was a foreigner and was unable to speak the local language. He was also estranged from his parents who returned to Tonga during his three-month sentence commencing in December 2003. On 10 September 2005 he returned to Australia following the successful review by his fiancée of the decision to refuse to grant a prospective marriage visa.
4. The applicant married his fiancée in 2006. His obtained work but it was unsatisfying and he regarded it as being a *dead end job*. He became depressed and anxious, resumed taking drugs, and offended, the last occasion being in July 2007. He was convicted in March 2008 of five offences of dishonesty. A sentence of three months’ imprisonment was imposed but suspended for a period of 18 months.
5. The applicant has not offended since 2007. He voluntarily entered into a program of drug rehabilitation and has not used any illegal drugs subsequently. He was treated by Dr John Sherman who reported in September 2008 (T33, page 262) that the applicant was *an ideal patient*, he attended for treatment on a regular basis, eight urine tests were *clean*, he was being treated by a clinical psychologist and his prognosis was regarded as *excellent*. In 2009, the applicant was treated, twice weekly for about 12 months, by Dr Peter O’Brien who reported in March and July 2009 (T34, page 286 and T35, page 291, respectively) that the applicant had voluntarily sought treatment and counselling following a relapse (in 2007) to drugs of dependence. He further reported that regular urine tests had all been clean, he had been a compliant patient, the strength of methadone drugs prescribed to him had been reduced and by regard to support being provided to him by his wife and her family, he was regarded as a low risk to relapse.
6. In addition to the above treatment, the applicant pursued his rehabilitation by participating in meetings of Narcotics Anonymous for about 12 months and volunteered in a kitchen run by the Sisters of Charity which provided meals to homeless persons.
7. The applicant first obtained employment about six months after he returned from Tonga, loading and unloading containers. Later, he obtained work as a shop fitter for about three years and then as a rigger. Since 2009, he has undertaken a number of training programs with accredited training organisations and has been issued with a number of certificates of successful completion permitting him to undertake work involving rigging (including an additional advanced rigging licence), crane use, earthmoving (which permits him to use front-end loaders, backhoes and excavators), testing and tagging of electrical equipment, tower and rescue work at heights and first aid, CPR and basic emergency life support (through the Royal College of Nursing).
8. From early 2013 the applicant has been employed with an engineering company in Melbourne which constructs and installs mobile telephone towers. A letter and a statutory declaration were received as exhibits from the Director and Operations Manager of that company. Both documents record that the applicant is held in high regard. The applicant earns a salary of $100,000 per annum and has the potential of earning $50,000 per annum in bonuses and overtime. He supervises 20 employees and contractors daily and although his routine hours are between 7 am and 3:30 pm he frequently finishes at about 6:30 pm.
9. It emerged during cross-examination that the applicant had never volunteered to any employer, including his current employer that he had convictions. He said the Operations Manager had heard from another employee that he *had a run-in* in the past. The applicant was subsequently approached by the Operations Manager, having heard that information from another employee, and he told the Operations Manager that he had been *in trouble with the police* about 10 years previously*.* The Operations Manager asked him whether *everything was good, now* and the applicant said that it was*.* No further enquiry was made of the applicant nor did he volunteer any other information concerning his prior offending. The applicant said that he and the Operations Manager are now mates.
10. The applicant said he told the Director that he had previously been *in trouble with the police* about a month before he asked him to write the letter in support of his character which was tendered as Exhibit A13. He said he was not asked by the Director to give details and he did not volunteer any further information.
11. The applicant said he decided not to call the Director or the Operations Manager to give evidence for him because he did not want them to take time away from work or to know about the extent of his prior convictions or about other family members (some of his offending occurred in company with his brothers). He said he wanted to be judged on the person that he now is. He said if the Director now knew of the extent of his offending he did not think his job would be insecure.
12. The applicant said that he was applying for citizenship because although he understood as a permanent resident he was entitled to continue to live in Australia, but without an Australian passport, he feared that if immigration laws changed, he may be refused re-entry into Australia when returning from overseas. He said there have been occasions when returning from overseas that he has been separated from his wife and children upon re-entry because he disclosed in an incoming passenger card that he had prior convictions. He said he had been detained and questioned by customs or immigration officials at Melbourne airport. Additionally he said as a non-citizen he feared being denied consular assistance, if needed, whilst overseas should it ever become necessary.
13. He denied that his ultimate objective was only to obtain an Australian passport. He said he wanted all of his family to be secure with their national identity and no longer wanted his wife and children to be exposed to the stress that he (and his parents) have experienced with immigration officials.
14. He said he is now an older and mature person, a father of two children, valued by his employers and enjoys a secure job with a good salary. He wants the opportunity to vote and to be a citizen.
15. The applicant is ashamed and embarrassed about this past offending and has accepted responsibility for it.

### The Applicant’s Wife

1. The applicant’s wife said she first met him at a party when she was 17 years of age in 2002. About 12 months later, they started living together in her mother’s house. She said that she had met his family and knew he was a *bad boy* but he had never been threatening to her or others nor was he *out of control.*
2. She did not know when she first met him, that he had previously committed offences nor did she know that there were charges outstanding which ultimately led to him appear before the Melbourne Magistrates’ Court in December 2003.
3. She said at about that time, after she learnt of pending charges, the applicant was withdrawing from her and she encouraged him to give himself up to the police. She recalled that he had said to her that she could do better than being in a relationship with him and he would not resist her walking away. On reflection she now believes that he was terrified of the pending charges and returning to jail. Rather than hand himself in to the police, he stole goods from a major department store and was arrested, as a means of being detained. He was refused bail for a period of about five months immediately before he served three months of imprisonment following conviction.
4. She visited him regularly whilst in gaol and later when he was held in immigration detention. She travelled with him and the immigration officers to Melbourne airport before he left for Tonga where she also, later, travelled to stay with him on two occasions. She also provided him with economic support and was instrumental in him obtaining work as a volunteer with Red Cross.
5. She said when he returned to Australia following the successful review of the application for a Prospective Marriage Visa in this Tribunal, her husband was excited but he was scared. She put an ultimatum to him to settle, not offend and obtain work. They married in 2006 but in 2007 he offended after he had been unable to obtain secure regular employment and following his resumption of taking heroin.
6. Subsequent to 2007 she said her husband volunteered to enter into a methadone program. She said he responded well to therapy and took all prescribed medications.
7. She agreed that persons reading her husband’s criminal record would perceive him as being a dreadful person. However she said that he is now a stable and mature husband and father, he has secure employment and his substantial salary has given them confidence to enrol their children in private schools knowing that his income would meet those costs. They do not associate with anyone under the age of 30, they socialise only when they are able to obtain babysitters, and they continue to live with her mother who is also a supporting influence on him. She said that she is proud of his achievements, especially having regard to his background and of his wish to be a citizen.

### The Applicant’s Mother-in-law

1. The applicant’s mother-in-law is currently employed in a senior management position with a national retailing company. She has known the applicant from 2002 when he moved in to live in her house with her daughter. She did not know of his criminal offending until 2003 but said she had her *suspicions* because of where he had been living, he had no assets, he was unemployed and had no trade skills or qualifications.
2. She travelled with her daughter on one occasion to visit him in Tonga, which she regarded as a *grim, third world country*. She learnt that deportees were stigmatised, there were no economic opportunities for residents of Tonga that his parents did not *want him* and he had no future remaining there. She supported and gave evidence for him in the review application in this Tribunal in 2005 in the belief that he would not reoffend. She was furious and disappointed when he reoffended in 2007.
3. She said he reoffended in 2007 because he had not lived up to her expectations and her daughter had been *giving him grief* because he was consuming alcohol and taking drugs. On reflection she now understands that he had been stressed because he was engaged in casual, poorly paid work, he was frustrated and he had been *hiding his problems* before he reoffended.
4. Since 2008 she said the applicant has mellowed, he works long hours, has progressed in the company that employs him, he is a good father and *does everything to redeem himself.* She said she has had conversations with him where he has expressed his gratitude to her and others for the opportunities he has been given. She now has no concerns about him reoffending and said the last sentence was *a big wake-up call.*

### The Applicant’s Sister-in-law

1. The applicant’s sister in law, who now lives interstate and who travelled to Melbourne to give evidence in support, said she first met him in 2002 when he moved into the home of her mother, where she also resided. She said she knew of his convictions when she first met him and said the totality of his offences was shocking.
2. She said he had previously *struggled* with depression and membership of his own family. She has not ever seen him abusive or violent. She returns to Melbourne monthly and maintains close contact with him. She regards him as a friend, a great father and a person committed to his family.

### Ms Pamela Matthews

1. Ms Matthews is a forensic psychologist who assessed the applicant on 2 and 9 September 2014 over an aggregate period of four hours. She provided a report dated 18 September 2014 (Exhibit A14) and gave oral evidence at the hearing.
2. Ms Matthews said that she was aware when she was first engaged and from documents given to her that a decision had been made concerning the applicant’s character and as a consequence of that decision he had been denied citizenship. She said her qualifications permitted her to determine how people function and, in the context of those who have previously offended, whether there is a risk of repeated offending. She said she has extensive experience giving character evidence in the County and Supreme Courts in Victoria and in doing so uses diagnostic tools being the Personality Assessment Inventory (PAI) and the Hare Psychopathy Checklist (Hare Checklist).
3. Ms Matthews said, and reported at page seven of her report, that the applicant’s criminal behaviour was associated with substance misuse and dependence. She was impressed that the applicant had volunteered for drug counselling, especially with Dr Sherman who was well respected as a practitioner in substance abuse and dependence. She was also impressed that the applicant had ceased heroin use after a relatively short period of rehabilitation after he first presented to Dr Sherman.
4. Ms Matthews said that the PAI assists in reaching a clinical diagnosis and screening for psycho pathology. She said and reported by way of conclusion on page 6 of her report that on the basis of the PAI, which involves the applicant answering 344 questions with one of four prescribed answers *being true, mostly true, false* and *mostly false*, that the applicant had a normal personality profile for a man of his age. That conclusion was reached – and she emphasised that the PAI had built-in safeguards to ensure the validity of his responses – because the applicant can be a risk taker, a feature she concluded as not being uncommon in young adults but was also consistent with the nature of his employment. His alcohol use was moderate, his drug use was reported as infrequent (being a word used when the report is generated and not necessarily to be understood as drugs being consumed), he had control over anger and hostility, he enjoys a stable lifestyle with close supportive relationships, he had a positive attitude towards personal change, he acknowledged the importance of personal responsibility, was self-confident, warm, sympathetic and supportive towards others.
5. Ms Matthews was satisfied with the data generated by the PAI, that is, the applicant was a *normal person*, because it was consistent with her clinical assessment of the applicant and her mental state examination of him, which had regard to his presentation, dress, gait, speech, hygiene, thought process and posture.
6. She reported that the Hare Checklist is a respected and credible research instrument which contains 20 items which are scaled to assess psychopathy in research, clinical and forensic settings. It measures personality traits and behaviours especially when predicting criminal behaviour. The applicant’s score on that scale was reported as *well below the level of clinical risk concern* and his estimated future risk of criminal and/or violent behaviour was reported as *very low* (refer report at page six). Ms Matthews said that the Hare Checklist validated her clinical assessment.
7. In her clinical experience Ms Matthews said on the history she obtained of the current level of alcohol consumed by the applicant that he was not at risk of reoffending but increased consumption could cause him to relapse. She said use of drugs would cause him to relapse. She was aware that the applicant had been assessed by Mr Bernard Healey in 2005, who reported that he assessed the applicant as not having evidence of emotional or psychiatric disorder and he had a low risk of recidivism. She said Mr Healey is well respected as a clinical psychiatrist but she had not seen his report.
8. Ms Matthews concluded at page 8 of her report:

In the writer’s view the overwhelming aspects of [the applicant’s] presentation is that he impresses as having worked hard to become a stable husband and father, a good employee, to gain an education and qualifications, and that he sought to be a man of good character. Further it is the writer’s view that his capacity to persist with these goals over a seven year period has been a significant personal achievement of which he can be proud of.

## Conclusion and Reasons for Decision

1. The applicant has applied for conferral of citizenship. Many previous decisions of this Tribunal and the Federal Court referred to conferred citizenship being a privilege and a responsibility. I agree.
2. In this application the issue to be determined is whether the applicant is a person of good character at the date of the review. To make that finding requires more than an examination of whether the applicant, if he were to be a citizen, would conduct himself responsibly and honour the privilege of membership of the Australian community.
3. The Act in its preamble expresses the intention of Parliament that persons conferred with citizenship become members of the Australian community who holds a common bond involving reciprocal rights and obligations. That involves an undertaking to accept the obligations of pledging loyalty to Australia and its people, sharing democratic beliefs, respecting rights and liberties and upholding and obeying Australian law.
4. Those obligations are without controversy because they of course meet the expectations of persons who are Australian citizens. But the expectation of whether the applicant will honour the undertaking as the preamble anticipates, will depend on whether he is now a person of *good character*.
5. In the absence of the words *good character* being defined by the legislation, I am influenced by and adopt the findings in *Irving v Minister for Immigration, Local Government and Ethnic Affairs* (1996) 68 FCR 422. Davies J at page 425 said the words *good character* refers to *the mental and moral qualities which an individual has*. Lee J at page 431-432 said those words referred to the *enduring moral qualities of a person and not the good standing, fame or repute of that person in the community.*
6. The Australian Citizenship Instructions (ACIs) at 10.3.1 record that the phrase *enduring moral qualities* encompass
* 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.
1. The ACIs, also at 10.3.1 record:

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

This broad definition means that a decision maker can be satisfied that an applicant is of good character if the applicant has demonstrated good enduring/lasting moral qualities that are evident before … and throughout… their citizenship processes.

1. The ACIs are not the policy of the Minister but are instructions issued to departmental decision-makers. Nonetheless, although they are not binding on me, they are relevant and instructive. The conclusion I ultimately reach will not be confined to the content of the ACIs alone.
2. In deciding whether I am *satisfied* that the applicant is of good character, I am not obliged to be positively persuaded (as decided in *Re Chen and Minister for Immigration and Citizenship* [2007] AATA 1815 at [18] being a finding made under the preceding Australian Citizenship Act 1948). For the purposes of this review and the current legislation, the standard of proof for the purposes of deciding whether I am satisfied the applicant is of good character will be on the civil standard of balance of probabilities.
3. I will now focus on whether the applicant does have *enduring moral qualities* and therefore whether he is a person of good character.
4. When the applicant was in year eight of secondary school (and I would estimate him then to be about 13 or 14 years of age), he arrived home from school to learn that his father had been placed in immigration detention. His father subsequently left Australia but it is not apparent in the T-documents or from the evidence whether he was deported or voluntarily left Australia. Although the applicant had been progressing well at school and had achieved sporting success, he rebelled (he said in the absence of a father figure) by running away from home, mixing in poor company (including some of his brothers) and offending.
5. His father eventually returned to Australia and the applicant completed secondary education to year 11. However his subsequent employment and financial status was insecure. He resumed his association with persons of poor repute and resumed offending. He was also misusing illegal drugs.
6. The applicant acknowledged that he was then immature and depressed. He was living with his fiancée who encouraged him to give himself up to the police who were apparently aware of his offending but instead he chose to offend by shoplifting, deliberately, with the intention that he would be apprehended and detained. Whatever the reason for that decision having been made, it was inevitable that he would be arrested. He was refused bail for about five months before he was convicted and sentenced. He served three months. As a result of a s 501 notice being issued, he entered immigration detention shortly after the expiration of his sentence and voluntarily left Australia where he remained in Tonga for about 14 months.
7. Between 1995 and 2003 the applicant offended annually. If his character was being assessed immediately before he departed for Tonga, without any other enquiry, an examination of the record of the applicant’s convictions (for offences of violence and dishonesty, other offences incurring a prison sentence of 12 months or more and deportation from Australia), the sentencing remarks of his Honour Judge Nixon (T30, pages 231-239) and some information about his behaviour and conduct during that period, as was learnt during this review, would likely cause the conclusion that his moral qualities were poor. It is of no surprise to me that he was served with a s 501 notice, which subject to review, would cause his removal from Australia. I think it might readily and reasonably be concluded that his offending, in so far as offences of dishonesty were concerned, caused loss and disadvantage to others. On some occasions those offences occurred by him unlawfully entering premises occupied by other persons. In so far as his violent offending is concerned, it was of course intolerable and, as in the case of all acts of violence, without excuse.
8. In September 2005, he returned to Australia after it was decided that his entry should not be refused on character grounds (T27, page 203). Deputy President Wright heard extensive evidence concerning the applicant’s circumstances in Tonga and was satisfied that the applicant did have *an exceptionally strong support structure waiting for him in Australia* (paragraph 29) and that the relationship between the applicant and his fiancée would *not survive unless they can reunite in Australia* (paragraph 31). Deputy President Wright was well aware of the applicant’s prior convictions because he recorded at paragraph 32 [w]*hen I first saw the present applicant’s very bad record, my initial reaction was that he would have no hope of persuading me to exercise my discretion in his favour.* He then recorded that he *anxiously* weighed all of the evidence and decided that the application should not be refused because he did *not think that the Australian community would expect otherwise* (paragraph 32).
9. Although the applicant did not reoffend until 10 August 2007 (which gave rise to the convictions in 2008), he did violate the trust that is implicit by the decision of the Tribunal in 2005 and the trust in him expressed in evidence in that review by his fiancée, mother-in-law and sister in law. Again, without any other information, it might be thought that the applicant then returned to his life of criminal offending and therefore he re-emerged as a person of poor moral quality.
10. Against that history, the applicant has not offended since August 2007. A determination of whether the applicant does have enduring moral qualities and therefore is a person of good character must be made now, seven and a half years after he last offended. That process will involve an examination of the applicant’s character, before and after August 2007.
11. Based on what is now known of the applicant’s circumstances between 1995 and 2003, I am satisfied that the applicant offended because of a combination of the instability of the relationship between his parents and his relationship with them, his association with persons who imposed their influence on him (including some of his brothers), his inability to find meaningful, regular and financially rewarding employment, the absence of one or more mature adults having a positive influence on him and the pernicious effect of his misuse of illegal drugs.
12. He reoffended in 2007 at a time when he had not been in regular or satisfying employment. Without continuity of income, he became depressed and he resumed taking heroin.
13. The National Police Certificate dated 25 September 2014 records that five offences of dishonesty were heard by the Melbourne Magistrates Court on 28 March 2008. Nothing else is known but I think that it might reasonably be concluded that the circumstances of those offences and the applicant’s circumstances at that time were not deserving of any term of imprisonment because the Magistrate imposed a sentence of three months, fully suspended for 18 months. That is a remarkable outcome having regard to his history which would have been before the Court.
14. I am satisfied that the applicant turned his life around after he offended in 2007.
15. From 2009 he has been in regular employment and has satisfactorily completed a number of training programs. He has been in regular employment with a major engineering company in Melbourne since 2013, he supervises 20 employees and contractors on a daily basis and he earns a salary of $100,000 per year with the potential of $50,000 per year in bonuses and overtime. He works long hours and is held in high regard by his employer.
16. He volunteered for treatment with Dr Sherman who regarded him as an ideal patient. Ms Matthews was impressed that he had ceased taking heroin shortly after commencing treatment. His regular urine tests did not reveal the presence of illegal drugs. He also participated in meetings of Narcotics Anonymous and worked as a volunteer with Sisters of Charity in their kitchen.
17. He is a father of two young children who have been registered for enrolment in a private school in anticipation of their fees being met by his salary. He is happily married. He and his wife and children live with his mother-in-law who said the sentencing in 2008 was a wake-up call. She holds him in high regard. His sister-in-law was also supportive.
18. Ms Matthews, who was impressed with the applicant’s rehabilitation and his cessation of heroin, was satisfied both on her clinical analysis and by the outcomes of the diagnostic tools she engaged, that the applicant was of good character and he was of low risk of reoffending.
19. I would have preferred to have heard personally from the Director and the Operations Manager of his current employer. If their evidence was consistent with the contents of the documents they completed, especially if, having heard in evidence of the extent of the applicant’s criminal offending, that their attitude towards him was not diminished, the applicant’s case would be much stronger.
20. A workmate of the applicant, who has known him for five years and a person who has known him and his wife for 10 years provided statutory declarations in support of the applicant’s character (Exhibits A15, A16 and A17). Neither was called. One witness was overseas. The workmate was not called because the applicant said he was replacing him during the hearing and he did not want to take him away from work. Both persons declared they knew of the applicant’s offences and had read the Statement of Facts and Contentions lodged by the respondent (which records all of the charges and the penalties imposed). An earlier statutory declaration by the witness overseas, sworn before the respondent’s Statement of Facts and Contentions was lodged, recorded an awareness of his *past transgressions.* They both described the applicant in positive terms and supported his application.
21. The contents of the documents completed by the above persons were of some assistance. It is unfortunate they were not called but I do not draw an adverse inference against the applicant. They would be witnesses that I would regard as independent and would have added weight to his application.
22. I am conscious that the evidence in support of the applicant’s character was given only by his wife, sister-in-law and mother-in-law as they did before the Tribunal in 2005. I am also conscious that a consultant psychiatrist then gave evidence of the applicant being at low risk of recidivism as did Ms Matthews in this review. Deputy President Wright was moved by the *exceptionally strong support structure* available to the applicant in 2005. That structure continues and the members of it appears to be more reassured about their support for the applicant, based on his progress and his achievements from 2007.
23. I think there is merit in the assertions of the applicant and his wife in correspondence prior to the hearing and in their evidence that he should be judged on the person that he is now, compared to the person that he was in 2007 and previously. I am satisfied that he has matured by a combination of factors being his preparedness to disassociate with previous acquaintances (including family members), self-improve by further qualifications, obtain regular employment where he is trusted by his employer, work long hours and earn a substantial salary, become a father (with the inherent responsibility of that status), consume alcohol modestly and infrequently and desist from taking illegal substances. His recreation is regularly attending a gymnasium. When he is now stressed, he meditates. Before 2007, he was likely, when stressed to take drugs and put himself at risk of offending.
24. Paragraph 10.5.2 of the ACIs under the subheading *Mitigating Factors – could the applicant be of good character anyway* contains criteria for assessing an applicant after completion of previous adverse behaviour. I will acknowledge the criteria but not as a substitute for, or in lieu of, exercising my discretion. I had the advantage of observing the applicant give his evidence together with hearing and observing the evidence of the other witnesses, which the decision maker did not. I also had the advantage of submissions from both representatives and a significant quantity of documents which came into existence after the delegate’s decision.
25. There are many factors within paragraph 10.5.2 which if known to the decision-maker might have caused the primary decision to have greater balance or a different decision altogether. The relevant factors include the period of time between the date of the last offence and the date of review; whether the applicant has accepted responsibility and shown remorse; the behaviour of the applicant subsequent to the last conviction; whether there has been rehabilitation (including abstinence from alcohol and drugs); whether the applicant has removed himself from the bad influence of others; his age when offending and his current age; whether the offending occurred by the influence of drugs and whether there is evidence of employment and a stable family.
26. In the Full Federal Court decision of *Minister for Immigration and Multicultural and Indigenous Affairs v Godley* (2005) 141 FCR 552, Madgwick, Lander and Crennan JJ affirmed a decision of Lee J against a finding that a person was *not of good character* ((2004) 83 ALD 411). The Full Court reproduced a significant part of the primary decision in support of the Full Court’s decision. Although the appeal concerned the s 501 provisions of the Migration Act, a determination of whether a person was not of good character, whilst different to the enquiry that now needs to be made, is no less relevant.
27. Relevantly, paragraph 55 of the decision of Lee J is reproduced at paragraph 34 of the Full Court decision, namely

A finding that a person is “not of good character” requires the Minister to make a supervening determination after having regard to the matters set out in s 501(6)(c). The consideration of past and present criminal conduct and/or past and present general conduct provide indicia as to the presence or absence of good character but do not in themselves answer the question. The Minister must look at the totality of the circumstances and determine whether the person before him is distinguishable from others as a person not of good character, a question not to be confused with characterisation by conduct alone. (See: Minister for Immigration and Ethnic Affairs v Baker (1997) 73 FCR 187 at 197).

…

For a finding to be made under s. 501(6)(c) that a person is not of good character it is necessary that the nature of the conduct said to be criminal, be examined and assessed as to its degree of moral culpability or turpitude. Furthermore, there must be examination of past and present criminal conduct sufficient to establish that a person at the time of the decision is not then of good character. The point at which recent criminal conduct, (as the term “present criminal conduct” is to be understood), becomes “past criminal conduct” must be a matter of judgment. If there is no recent criminal conduct that circumstance will point to the need for the Minister to give due weight to that fact before concluding that a visa applicant is a person not of good character.

1. I am satisfied that the applicant has now reached the point of *past criminal conduct.*
2. The ACIs record that where a person has committed a serious offence, *a significant amount of time may have to be passed before the decision maker is satisfied that the person is now of good character.*
3. Mr Eteuati for the Minister contended at the conclusion of the hearing and in his Statement of Facts and Contentions (at paragraph 22) that not enough time has passed for the Tribunal to be so satisfied (of the applicant being of good character). It was also submitted that if the decision under review was affirmed the applicant could continue to lawfully remain in Australia and reapply for citizenship on a future date when a longer period will have passed.
4. I respectfully disagree with the first submission.
5. An examination of the *totality of* [the applicant’s] *circumstances* (*Godley*) satisfies me that seven and a half years since the applicant last offended does amount in the circumstances of this review to sufficient time having elapsed*.* Additionally, the applicant has demonstrated that he is now deserving of membership of the Australian community.
6. There is a significant risk in comparing other decisions of the Tribunal where Members have exercised discretion. Two decisions however of some relevance being *Fenn and Minister for Immigration and Multicultural Affairs* [2000] AATA 931 and *Sui and Minister for Immigration Citizenship* [2008] AATA 1062 involved reviews of decisions of persons who were of mature age when they first offended, their offences respectively were serious, and they were sentenced to periods of imprisonment. Each review was heard five and six years respectively after the last conviction. In each application, the Tribunal Member decided that there had been an insufficient period of time between the last conviction and the date of review in order to permit a finding that the applicant was of good character. Both members who decided the applications immediately above concluded that each applicant had not made a positive contribution to the community.
7. Unlike the above decision, in this review, the applicant commenced offending at a very young age and continued to do so for all the reasons expressed above. It is seven and a half years since he last offended. (But for those offences, to which a suspended sentence was imposed, he has not offended since 2003). By regard also to everything that he has subsequently achieved, I am satisfied on the balance of probabilities that his moral qualities demonstrated over the last seven and a half years are enduring and he is now a person of good character.

**Decision**

1. The decision under review is set aside and in substitution it is decided that the applicant is eligible to become an Australian citizen.

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| I certify that the preceding 87 (eighty-seven) paragraphs are a true copy of the reasons for the decision herein of John Handley, Senior Member. |

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

Associate

Dated 13 February 2015

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| Date(s) of hearing | **20 and 21 January 2015** |
| Counsel for the Applicant | **David Baker** |
| Solicitors for the Respondent | **Tigiilagi Eteuati, Clayton Utz** |