[2015] AATA 438

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| Division | **GENERAL ADMINISTRATIVE DIVISION** |
| File Number(s) | 2014/5509 |
| Re | Hanaa Abdulmajeed Saleem AL-KHALIDI |
|  | APPLICANT |
| And |  |
|  | RESPONDENT |

# Decision

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| Tribunal | **Deputy President S E Frost** |
| Date | **24 June 2015**  |
| Place | **Sydney** |

The decision under review is affirmed.

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**Deputy President S E Frost**

# CATCHWORDS

CITIZENSHIP - eligibility - citizenship by conferral - general residence requirement - non citizen applicant spouse of Australian citizen - spousal discretion under s 22(9) of Australian Citizenship Act 2007 - whether the applicant was a permanent resident during period of absence - whether the applicant held a permanent visa immediately before last leaving Australia - decision under review affirmed

# Legislation

Australian Citizenship Act 2007 ss 3, 5, 21(4), 22(1), 22(1A), 22(1B), 22(9)

Migration Act 1958 ss 5, 30 (1)

# REASONS FOR DECISION

**Deputy President S E Frost**

**24 June 2015**

# Introduction

1. The applicant applied for Australian citizenship on 4 November 2013 but her application was unsuccessful. She has applied to the Tribunal for review of the decision.

# The decision under review

1. The decision under review is the decision to refuse the application for Australian citizenship by conferral.
2. The Minister’s delegate found that the applicant did not meet the *general residence requirement* of the *Australian Citizenship Act 2007* (the Citizenship Act). The delegate also found that the applicant was outside Australia at the time the application was being assessed. Absence from Australia is a disqualifying circumstance unless one of the special provisions of the Act applies, which in the delegate’s view was not the case. As will become apparent, this aspect of the reasons for refusal is now irrelevant.

# Eligibility for Australian citizenship

1. The applicant was over 60 years of age at the time she made her application. Her eligibility for Australian citizenship was considered under s 21(4) of the Citizenship Act, which provides as follows:

Person aged 60 or over or has hearing, speech or sight impairment

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

(a) is:

(i) aged 60 or over at the time the person made the application; or

(ii) aged 18 or over at the time the person made the application and is suffering from a permanent loss or substantial impairment of hearing, speech or sight at that time; and

(b) is a permanent resident:

(i) at the time the person made the application; and

(ii) at the time of the Minister’s decision on the application; and

(c) understands the nature of the application at the time the person made the application; and

(d) 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

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

(f) is of good character at the time of the Minister’s decision on the application.

1. The *general residence requirement*, referred to in paragraph (d), is in s 22, which provides relevantly as follows:

**22 General residence requirement**

(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.

Overseas absences

(1A) If:

(a) the person was absent from Australia for a part of the period of 4 years immediately before the day the person made the application; and

(b) the total period of the absence or absences was not more than 12 months;

then, for the purposes of paragraph (1)(a), the person is taken to have been present in Australia during each period of absence.

(1B) If:

(a) the person was absent from Australia for a part of the period of 12 months immediately before the day the person made the application; and

(b) the total period of the absence or absences was not more than 90 days; and

(c) the person was a permanent resident during each period of absence;

then, for the purposes of paragraph (1)(c), the person is taken to have been present in Australia as a permanent resident during each period of absence.

1. Neither subsection (1A) nor (1B) assisted the applicant. During the relevant four-year period, she was absent from Australia for a total of 1227 days (present for only 112 days), and during the relevant 12-month period, she was absent for 336 days (present for only 29 days).
2. The only provision the applicant could rely on was s 22(9) of the Citizenship Act, which gives the Minister a discretion in the following terms:

Ministerial discretion—spouse, de facto partner or surviving spouse or de facto partner of Australian citizen

(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.

# The areas of dispute

1. The dispute between the parties initially centred on paragraph (d) of s 22(9). This was on the basis that all other paragraphs of the subsection had been satisfied.
2. Paragraphs (a) and (b) present no obstacle since the applicant has been married to an Australian citizen for 13 years. It follows that all of her periods of absence during the four years prior to her application for citizenship are potentially capable of being treated by the Minister as periods in which the applicant was in Australia.
3. During the hearing the Minister’s representative indicated that paragraph (c) may present an obstacle since the applicant may not have been a *permanent resident* during all of her periods of absence from Australia. This was despite the fact that she had been granted a permanent visa on 19 August 2009, which is more than four years prior to the lodgment of her application for citizenship on 4 November 2013. Although holding that permanent visa for more than four years prior to the lodgment of the application, she did not first enter Australia under that visa until 6 March 2010. The Minister contended that the applicant did not become a *permanent resident* until that date of arrival, 6 March 2010, and as a result paragraph (c) would not assist the applicant in relation to part of the four-year period prior to lodgment of the application – namely, the period 4 November 2009 to 6 March 2010. The Minister’s discretion in s 22(9) was not enlivened, on the Minister’s contention, and so the decision under review should be affirmed.
4. I allowed time for the parties to provide written submissions on that point.
5. Having considered those submissions, I agree with the Minister’s contention in relation to paragraph (c). It is not necessary for me to consider whether paragraph (d) applies to the applicant’s circumstances since the discretion in s 22(9) is not enlivened even if paragraph (d) is satisfied.

# “Permanent resident” and “permanent visa”

1. Section 3 of the Citizenship Act provides the following two signposts:
* ***permanent resident*** has the meaning given by section 5; and
* ***permanent visa*** has the same meaning as in the *Migration Act 1958* (the Migration Act).
1. Section 5 of the Citizenship Act provides relevantly as follows:

**5 Permanent resident**

(1) For the purposes of this Act, a person is a **permanent resident** at a particular time if and only if:

(a) the person is present in Australia at that time and holds a permanent visa at that time; or

(b) both:

(i) the person is not present in Australia at that time and holds a permanent visa at that time; and

(ii) the person has previously been present in Australia and held a permanent visa immediately before last leaving Australia; or

(c) …

1. Section 5(1) of the Migration Act provides that “***permanent visa*** has the meaning given by subsection 30(1)”. That subsection provides as follows:
2. A visa to remain in Australia (whether also a visa to travel to and enter Australia) may be a visa, to be known as a permanent visa, to remain indefinitely.
3. The critical issue for the applicant, in relation to s 22(9)(c) of the Citizenship Act, is her status during the period 19 August 2009 (when she obtained a permanent visa) and 6 March 2010 (when she first arrived in Australia using that visa).
4. Clearly, in terms of s 5(1)(a) of the Migration Act, although she held a permanent visa, she was not present in Australia during that period. Section 5(1)(a) does not make her a *permanent resident* during that period.
5. As for paragraph (b), she was not present in Australia during that period but she did hold a permanent visa, and so subparagraph (i) is satisfied. But subparagraph (ii) is not, because, although she had previously been present in Australia, she had not held a permanent visa immediately before last leaving Australia.
6. It follows that she did not become a *permanent resident* until 6 March 2010. That means that when the applicant applied for Australian citizenship on 4 November 2013, she had only been a permanent resident for three years and eight months.

# How does that impact on section 22(9)?

1. As the applicant was not a permanent resident until 6 March 2010, neither the Minister nor the Tribunal has the power to treat any period prior to 6 March 2010 as a period “in which the person was present in Australia as a permanent resident”. That is because, during any such period, the applicant was not a permanent resident, and so failed to satisfy s 22(9)(c) of the Citizenship Act.
2. The discretion available to the Minister (and the Tribunal on review) is to treat, in specified circumstances, a period of absence from Australia as if it were a period of presence in Australia. It is not a discretion to treat a person as a permanent resident during a period when he or she was not one.

# Conclusion

1. Because the discretion in s 22(9) is not enlivened, the applicant does not satisfy the general residence requirement in s 22. As a consequence, she is not eligible to become an Australian citizen under s 21(4) of the Citizenship Act.
2. The decision to refuse the application for Australian citizenship by conferral must therefore be affirmed.

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| I certify that the preceding 23 (twenty -three) paragraphs are a true copy of the reasons for the decision herein of Deputy President S E Frost |

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Associate
Dated 24 June 2015

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| Date(s) of hearing | **28 April 2015** |
| Date final submissions received | **22 May 2015** |
| Solicitors for the Applicant | **Manning Lawyers** |
| Solicitors for the Respondent | **Sparke Helmore** |