



[2014] AATA 957

Division **GENERAL ADMINISTRATIVE DIVISION**

File Number **2014/4487**

Re **Trang Tran**
 APPLICANT

And **Minister for Immigration and Border Protection**
 RESPONDENT

DECISION

Tribunal **Ms G Ettinger, Senior Member**

Date **22 December 2014**

Place **Sydney**

The Tribunal sets aside the decision under review and decides that Ms Tran, having had a *close and continuing association with Australia* as a permanent resident during the four years prior to her application for citizenship, and continuing, should be considered as having been present in Australia during that period in accordance with the discretion provided for in section 22(9) of the *Australian Citizenship Act 2007*.

The Tribunal remits the matter for reconsideration in accordance with the direction that Ms Tran satisfies sections 21(2)(c) and 21(2)(g), of the *Australian Citizenship Act 2007*.

.....
[sgd]
Ms G Ettinger, Senior Member



CATCHWORDS

CITIZENSHIP – eligibility – citizenship by conferral – general residence requirement – spouse of Australian citizen – long periods of absence from Australia in four years immediately before citizenship application – Applicant with Australian citizen husband overseas for his employment – discretion to treat periods of absence from Australia as ones in which Applicant was present in Australia as a permanent resident – whether Applicant had close and continuing association with Australia during periods of absence from Australia in the four years immediately before citizenship application – decision under review set aside and remitted

LEGISLATION

Australian Citizenship Act 2007 (Cth) ss 21, 22, 22A, 22B, 23, 24

CASES

Minister for Immigration and Citizenship v Makasa (2012) 207 FCR 488
Re Drake and Minister for Immigration and Ethnic Affairs (No 2) (1979) 2 ALD 634
Re Han and Minister for Immigration and Border Protection [2014] AATA 846
Re Herrmann and Minister for Immigration and Border Protection [2014] AATA 105
Re Ho and Minister for Immigration and Ethnic Affairs (1994) 34 ALD 664
Re Jiang and Minister for Immigration and Citizenship [2011] AATA 688
Re Kilpi and Minister for Immigration and Citizenship [2012] AATA 605
Re PMYL and Anor and Minister for Immigration and Border Protection [2014] AATA 148
Re Saba and Minister for Immigration and Border Protection [2014] AATA 579
Re Sie and Minister for Immigration and Border Protection [2014] AATA 60
Re Taher and Minister for Immigration and Border Protection [2013] AATA 917
Re Ul Haque and Minister for Immigration and Citizenship (2013) 139 ALD 376
Re Wang and Minister for Immigration and Border Protection [2014] AATA 555

SECONDARY MATERIALS

Australian Citizenship Instructions – Chapter 5 titled “Citizenship by Conferral”

REASONS FOR DECISION

Ms G Ettinger, Senior Member

22 December 2014

SUMMARY

1. Ms Trang Ngoc Tran, who is forty four years old, is a citizen of Vietnam who, in 1999, married Peter John Dooley, an Australian citizen. She is a permanent resident of Australia and applied for citizenship on 14 June 2014. A delegate of the Minister for Immigration and Border Protection, who is the Respondent in these proceedings, refused her application on 21 August 2014, on the basis that she did not satisfy sections 21(2)(c) and 21(2)(g) of the *Australian Citizenship Act 2007* (Cth) (Citizenship Act).
2. As Ms Tran did not satisfy the *general residence requirement* the delegate gave consideration to the discretion in section 22(9)(d) of the Citizenship Act. That discretion was not exercised in Ms Tran's favour because it was considered she did not have a *close and continuing association with Australia* during her periods of absence from Australia in the four years immediately before her citizenship application.
3. Ms Tran has exercised her rights to apply for review of that decision to this Tribunal. The application concerns whether the discretion in s 22(9) of the Citizenship Act should be exercised so as to treat any of Ms Tran's periods of absence from Australia, in the four years immediately before she applied for Australian citizenship, as periods in which Ms Tran *was present in Australia as a permanent resident* with the consequence that she satisfies the *general residence requirement* in section 22(1) of the Citizenship Act, and is eligible to become an Australian citizen by conferral under section 21(2) of the Citizenship Act.
4. It has been necessary to consider whether Ms Tran had a *close and continuing association with Australia* in the periods in which she was absent from Australia in the four years immediately before her citizenship application for the purposes of section

22(9)(d) of the Citizenship Act. It has also been necessary to consider section 21(2)(g) which deal with Ms Tran's intentions to reside in Australia and maintain a close and continuing association with Australia.

5. I am satisfied that Ms Tran has that *close and continuing association with Australia*, in satisfaction of sections 21(2)(c) and 21(2)(g). My reasons follow.

ISSUES

6. The issues for decision by the Tribunal are:
 - whether Ms Tran satisfies the residence criteria at sections 21(2)(c) of the Citizenship Act;
 - whether for purposes of section 21(2)(g) of the Citizenship Act, the Applicant is likely to reside in, or continue to reside in Australia, or to maintain a close and continuing association with Australia if the application is approved;
 - whether Ms Tran satisfies the criteria in section 22(9)(a) – (d) of the Citizenship Act; in particular whether Ms Tran had a *close and continuing association with Australia* in the periods in which she was absent from Australia in the four years immediately before the Citizenship Application for the purposes of section 22(9)(d) of the Citizenship Act;
 - whether the discretion in section 22(9) of the Citizenship Act should be exercised to treat any or all of Ms Tran's periods of absence from Australia as a period in which Ms Tran was *present in Australia as a permanent resident*.

LEGISLATIVE CONTEXT

7. Section 21 of the Citizenship Act deals with the application and eligibility for citizenship. Ms Tran was over the age of 18 years and a permanent resident of Australia at the time of her application for citizenship in satisfaction of sections 21(2)(a) and (b). Pursuant to section 21(2)(c) of the Citizenship Act, Ms Tran would have to satisfy the *general residence requirement* (see section 22) or the special residence requirement (see section 22A or 22B), or satisfy the defence service requirement (see section 23), at the time of

the application. Ms Tran has been found not to satisfy the *general residence requirement* in section 21(2)(c). She has also been held not to satisfy the requirements of section 21(2)(g) of the Citizenship Act. Section 22(1)(g) deals with the Minister's satisfaction that the applicant for citizenship *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.*

8. Section 22 deals with the general residence requirement, and follows as relevant.

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.*

9. Ms Tran was only physically present in Australia for a total of 38 days and absent from Australia for 1,423 days in the four years immediately before the citizenship application, which exceeds the 12 months allowable absence, she did not meet the *general residence requirement*.
10. The Respondent has indicated from the movement records, that overall, the longest period Ms Tran spent in Australia was 98 days from 22 December 2006 to 28 March 2007, which is outside the relevant period, and that otherwise she has only ever spent short periods in Australia. Accordingly, she cannot satisfy the *general residence requirement* in section 22(1)(c) of the Citizenship Act, unless a discretion in section 22(9) is exercised in her favour.
11. Section 22(9) of the Act provides for a discretion in some circumstances to treat a period as one in which a person was present in Australia as a permanent resident:

(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.*

12. As noted above, Ms Tran married in Mr Dooley in 1999, and became a permanent resident on 30 September 2001. Accordingly she meets the tests in sections 22(9)(a) – (c), and the issue is whether Ms Tran had a close and continuing association with Australia during the four years before her application for citizenship (section 22(9)(d)), and, if so, whether the discretion in section 22(9) should be exercised in her favour.

BACKGROUND

13. Ms Tran is a citizen of the Socialist Republic of Vietnam who first arrived in Australian on 11 June 1998, on a subclass 676 (Tourist) visa. On 3 May 1999 she was granted a subclass 309 (Partner) temporary visa, and she became a permanent resident on 30 September 2001.
14. In her statement (Exhibit A1), Ms Tran stated that she was granted a subclass 155 (resident return) visa on 29 November 2005, which was renewed on 21 May 2010 and is valid to 21 May 2015.
15. Ms Tran married Peter John Dooley in 1999, and they have three children, L, born in 2003 and adopted from Vietnam, F, born in 2009, and M, born in 2011. L is a permanent resident of Australia, and the two younger biological children of the marriage are Australian citizens.
16. Mr Dooley's work in the construction industry has taken him to various places in the world, many in Asia. He is currently posted in Macau where the family lives. In his statement (Exhibit A2), and in his oral evidence which he gave by telephone from Macau, Mr Dooley corroborated Ms Tran's statements regarding her deep love of

Australia, and connection with their family and extended family in Australia, as well as their plans to return to live in Australia by 2016. He also reiterated what Ms Tran had said about their not insubstantial investments and financial affairs, which are entirely Australian-based.

17. I noted that Ms Tran worked with the Australian Embassy in Hanoi from 27 December 1995 to 12 March 1999. She told me that she maintains contact with members of the staff there, and that that is one of the ways in which she maintains a close connection with Australia.
18. Because of her husband's employment situation, Ms Tran has not spent a lot of time in Australia. She detailed the dates in her statement, and a print-out provided by the Respondent gave the precise dates (Exhibit R2).
19. The Respondent noted that Ms Tran was physically present in Australia for only 38 days and absent for 1,423 days in the four years immediately prior to applying for citizenship on 14 June 2014. Further, that Ms Tran was not present in Australia at all as a permanent resident in the period of 12 months immediately before the date of her application for citizenship on 14 June 2014.
20. The Respondent indicated that Ms Tran has only spent short periods of time in Australia. Her one long stay was from 22 December 2006 to 28 March 2007.

Sections 21(2)(c) and 21(2) (g) of the Citizenship Act

21. It is agreed that Ms Tran does not satisfy the general residency requirement in section 21(2)(c).
22. The requirements of section 21(2)(g) which deal with whether Ms Tran is likely to reside in Australia, or to maintain a close and continuing association with Australia if her application were to be approved, also need to be determined.

23. However, although Ms Tran does not meet the *general residency requirement* (section 21(2)(c)), the Minister, and hence this Tribunal, has a discretion pursuant to section 22(9) of the Citizenship Act to treat a period when Ms Tran was not in Australia, as a period when she was present in Australia as a permanent resident.

Consideration of section 22(9) of the Citizenship Act

24. It is common ground that Ms Tran meets the requirement of section 22(9)(a)-(c) of the Act in that she was the spouse of an Australian citizen, Mr Dooley during the period relevant to her application, and that she was a permanent resident, absent from Australia during the relevant period.
25. However, as already stated above, her application was refused on the basis of section 22(9)(d) of the Citizenship Act because the Minister was not satisfied that she had a *close and continuing association with Australia* during that period. That *close and continuing association with Australia* is considered during any or all of the periods in which Ms Tran was absent from Australia in the four years immediately prior to her citizenship application for the purposes of s 22(9)(d) of the Citizenship Act.
26. The phrase *close and continuing association* is not defined in the Citizenship Act. The words in the phrase are ordinary English words, and should be given their ordinary meaning in the context in which they appear. By way of example, I note that the latest version of the *Macquarie Dictionary* (Sixth Edition (2013)), defines *close* (at p. 287) as meaning *near, or near together, in space, time or relation*, *continuing* (at p. 327) as meaning *to remain in a particular state or capacity ... to cause to last or endure; maintain or retain, as in a position and association* (at p. 82) as *the act of associating ... the state of being associated ... connection or combination*.
27. The phrase *close and continuing association with Australia* has been considered in a number of recent Tribunal decisions, including *Re Sie and Minister for Immigration and Border Protection* [2014] AATA 60 at [37], *Re Herrmann and Minister for Immigration and Border Protection* [2014] AATA 105 at [33], *Re Ul Haque and Minister for Immigration and Citizenship* (2013) 139 ALD 376 at [52], *Re Taher and Minister for*

Immigration and Border Protection [2013] AATA 917 at [47] and [48], and *Re Jiang and Minister for Immigration and Citizenship* [2011] AATA 688 at [25]. As Senior Member Walsh noted in *Re Wang and Minister for Immigration and Border Protection* [2014] AATA 555, one of the conclusions drawn in these decisions is that whilst a spouse may have a close and continuing association with Australian family, that is not the same as a spouse having a close and continuing association with Australia. Senior Member Walsh noted, and I agree that the fact that the spouse of an Australian citizen has a close and continuing association with her Australian citizen spouse's family will not, by itself, constitute a close and continuing association with Australia for the purposes of s 22(9)(d) of the Citizenship Act.

28. Ms Tran is convinced she has a *close and continuing association with Australia* in terms of the legislation. Both she and her husband, and a number of friends and relations gave evidence on her behalf. Ms Tran told me that she has had strong bonds with Australia since 1998. She worked with the Australian Embassy in Hanoi and has learnt about Australian culture, and completed real estate studies with a view to employment in Australia. She has ongoing contact with her husband's family, and was instrumental in getting her husband and his estranged father together in order for the grandfather to be able to enjoy the grandchildren.
29. In coming to a decision regarding whether Ms Tran has a *close and continuing association with Australia*, in terms of section 22(9)(d) of the Citizenship Act, a consideration of the Australian Citizenship Instructions (Citizenship Instructions), is necessary, and follows.

Whether the Australian Citizenship Instructions are lawful

30. The Citizenship Instructions contain the following introduction:

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

31. I noted Mr Donnelly's detailed argument on behalf of Ms Tran in regard to the following extract from the Citizenship Instructions (section 5.18), which was in essence that the statement below is unlawful or otherwise inconsistent with section 22(9) of the Citizenship Act, and should therefore not be followed.

In assessing whether a person has a close and continuing association with Australia for the purposes of 22(9)(d), it is policy that more weight to the above factors should be given 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 Australian for at least this period.

32. He argued that if *more weight* were to be given to the factors identified in cases where an applicant had been in Australia for at least 365 days in the four years immediately before making an application for citizenship, as noted above, it would be a gloss on the statutory test in section 22(9)(d) of the Citizenship Act. He argued further that the statement reproduced above serves *a purpose foreign to the purpose and objects of section 22(9)(d)*, and referred to the Explanatory Memorandum to the Bill. He submitted that the nature of the weight to be given should be left to the decision makers rather than being stipulated in the Citizenship Instructions.
33. The Respondent provided a supplementary submission in which he argued that because the discretion in section 22(9) of the Citizenship Act operates as an exception to the *general residence requirement*, it does not prohibit consideration of the length of time a person has been present in Australia in determining whether they have a *close and continuing association with Australia*. The Respondent also submitted that a person's presence in Australia is a relevant consideration for the purpose of deciding whether to exercise the discretion in section 22(9) in a person's favour at the point of making a decision under section 24 of the Act.
34. The Respondent submitted further, that even if the Applicant is found to have a *close and continuing association with Australia* such that she satisfies section 22(9) of the Citizenship Act, then it will remain open for the Tribunal to refuse to approve the Applicant becoming an Australian citizen despite satisfying section 21(2) of the Citizenship Act. In that regard the Respondent relied upon *Minister for Immigration and*

Citizenship v Makasa (2012) 207 FCR 488 at [77], noting also that in *Re Ul Haque and Minister for Immigration and Citizenship* (2013) 139 ALD 376, the Senior Member stated at [50], that: *while physical presence is not determinative, it is none the less highly relevant to the nature of a person's association with Australia.*

35. I am mindful of Deputy President Constance's statements in *Re Han and Minister for Immigration and Border Protection* [2014] AATA 846 at [35] and [36] albeit in relation to section 22(9)(a). The Deputy President stated in relation to extrinsic materials such as Explanatory Memoranda: ... *I repeat what was said by the High Court in Saeed and Minister for Immigration and Citizenship [(2010) 241 CLR 252, 264-265], that "[s]tatements as to legislative intention made in explanatory memoranda or by Ministers, however clear or emphatic, cannot overcome the need to carefully consider the words of the statute to ascertain its meaning"*.
36. At [36] Deputy President Constance stated: *The Australian Citizenship Instructions are also consistent with the interpretation adopted by the Minister. The Tribunal must apply lawful government policy unless there are cogent reasons to the contrary. [Re Drake and Minister for Immigration and Ethnic Affairs (No 2) (1979) 2 ALD 634 at 645.]*
37. I note also that Senior Member Handley stated in *Re Kilpi and Minister for Immigration and Citizenship* [2012] AATA 605 at [53] that:
- Chapter 5 of the ACIs in relation to s 22(9) provides that for the purpose of exercising the discretion in s 22(9), more weight should be given if the person was physically present in Australia for 365 days in the 4 years (including at least 90 days as a permanent resident). Less weight should be given if they have not been present for at least this period. I am satisfied that this instruction guides, but does not control the making of decisions under s 22(9) (Re Drake No.2). The amount of weight and eventually the way in which the scales tip, when all other factors are considered is a matter for the decision-maker. I am not satisfied that the ACIs are unlawful and they do not place a fetter on the discretion in s 22(9) of the Act.*
38. I respectfully agree with both of Deputy President Constance's statements, and those of Senior Member Handley as noted above, and find that the Citizenship Instructions are not unlawful or otherwise inconsistent with section 22(9) of the Citizenship Act, and must therefore be applied (*Re Drake*).

Consideration of the discretion

39. In relation to the discretion contained in section 22(9) of the Citizenship Act, the Citizenship Instructions indicate in relation to spouses of Australian citizens who are permanent residents, that factors which demonstrate a *close and continuing association with Australia* while overseas 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*
- *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 payment 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 22(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 if they have not been present in Australian for at least this period.

40. I am mindful that the above list is not exhaustive, and that it is a not a matter of ticking boxes, but rather taking a holistic view of the Applicant's situation in considering whether she is able to demonstrate that she has a *close and continuing association with Australia*.

41. In that regard I agree with the following comments of Senior Member Fice in *Re Taher and Minister for Immigration and Border Protection* [2013] AATA 917 at [47]:

In my opinion, the factors referred to [in section 5.18 of the Citizenship Instruction] 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...

42. Factors that may demonstrate this close and continuing association with Australia, but not weighted in any particular order (*Re PMYL and Anor and Minister for Immigration and Border Protection* [2014] AATA 148 are addressed below.

Evidence that the person migrated to and established a home in Australia prior to the period overseas

43. Ms Tran did not migrate to, and establish a home in Australia prior to the period overseas. She met her husband in Vietnam while she was working there at the Australian Embassy.

Australian citizen children

44. Ms Tran has three children, an adopted child aged 11, who is a permanent resident of Australia, and two biological children aged five and three whose father is Mr Dooley, and who are Australian citizens.

Long term relationship with Australian citizen spouse or de facto partner

45. Ms Tran and Mr Dooley married in 1999, some 15 years ago.

Extended family in Australia

46. Ms Tran was very enthusiastic when speaking about her family in Australia. She is very close to Mr Dooley's family, and had, at the time of the hearing, travelled back for his aunt's funeral. She states that she is close to her mother-in-law, who attended at the hearing, and looked after her young grandson while Ms Tran gave evidence.
47. Ms Tran told me that she has emotional ties with Australia, most of her friends are Australians, she has learnt about Australian culture and she values our democracy and lifestyle. She remains in touch with friends from the Australian Embassy in Hanoi where she worked before she met her husband.

Regular return visits to Australia

48. Ms Tran only spent 38 days in Australia in the four years immediately before 14 June 2014, the date of her application for citizenship. She was in Australia in November 2014 for the funeral of her husband's aunt.

Regular periods of residence in Australia

49. Notwithstanding Ms Tran and Mr Dooley's ownership of eight properties in Australia, including one on the Central Coast of NSW where they intend to reside from 2016, Ms Tran has to date never resided in Australia.

Intention to reside in Australia

50. Both Ms Tran and Mr Dooley gave evidence that at the conclusion of his current contract, in 2015, they intended to relocate to Australia, and saw that as being by 2016. Ms Tran said that she and Mr Dooley could live a more relaxed lifestyle in their house on the Central Coast, and planned for their children to attend school in Australia.
51. Ms Tran also indicated that she had completed a Certificate IV in Property Services (Real Estate) and completed a real estate sales person course, and wanted to utilise those qualifications to work in Australia. She said that she had a passion for working in the Australian property market, and had experience in Singapore working with the Australian Property Group when they were living there.
52. She also told me that in anticipation of their return, she obtained a Medicare card.
53. The Respondent cited *Re Ho and Minister for Immigration and Ethnic Affairs* (1994) 34 ALD 664 where Deputy President McMahon (as he then was), considered the meaning of likely to reside in Australia. The Respondent noted that at [31], Deputy President McMahon stated:

It cannot mean "likely to take up residence in 18 months or two years time" or "likely to reside some time in the indefinite future if economic conditions permit and if a suitable job can be found". The juxtaposition of the phrase with the opening phrase of the paragraph, indicates that the minister must be satisfied that the applicant is likely to

reside in Australia immediately, or very soon after, being granted a certificate of Australian citizenship.

54. The Respondent submitted relying on *Re Ho*, that Ms Tran does not therefore meet the requirements of section 21(2)(g) of the Citizenship Act, and does not demonstrate a likelihood to reside in Australia. The Respondent submitted that accordingly, she would not, in the immediate future, be able to maintain *a close and continuing association with Australia*, particularly having regard to the significance of actual presence in Australia.
55. I have noted the Respondent's submissions regarding *Re Ho*, and a much more recent comment on the interpretation and weight to be given to evidence regarding a citizenship applicant's *intention to reside (Re Saba and Minister for Immigration and Border Protection [2014] AATA 579)*, which I prefer. I accept the Applicant and her husband regarding their intention to return to Australia by 2016.

The person has been on leave from employment in Australia while accompanying their spouse or partner overseas

56. Ms Tran has never resided in Australia or been employed here. By way of contrast, she does engage the services of Australians, real estate agents who assist with managing the properties she owns jointly with Mr Dooley, and the services of a tax agent, an accountant and other advisors.
57. I am satisfied that Ms Tran has undertaken courses in real estate and is qualified, and intends to work in that field on her return. I note that she has some experience in Australian real property, having worked in the area in Singapore.

Ownership of property in Australia

58. Both Ms Tran and Mr Dooley told me that they own eight properties in Australia, which are managed by real estate agents on their behalf with Ms Tran's regular involvement. One property, on the NSW Central Coast, is where they plan to live on their return to Australia after Mr Dooley's contract ends in 2015. Ms Tran told me they intend their children to have an Australian school education commencing in 2016.

59. The couple corroborated each other's evidence that all their money is invested in Australia, and that they have no investments elsewhere. In consideration of their privacy, I will not publish the names of the institutions where the investments are held, nor the amounts involved, which are moderately substantial.
60. Ms Tran claims to have paid insurance, tax, operated bank accounts jointly with her husband, and made investments, including a joint term deposit here to the exclusion of any other country. In connection with the jointly owned properties, Ms Tran and Mr Dooley pay water and council rates, and land tax.
61. The Respondent does not accept that the above-named activities go to Ms Tran's *close and continuing association with Australia* on the basis that the activities and investments are jointly held with Mr Dooley, rather than just being Ms Tran's. In his Statement of Facts and Contentions at [36] the Respondent contended that the Applicant had *not demonstrated a relationship with Australia independent of her relationship with her husband such that she can be said to have a close and continuing association with Australia in her own right*.
62. I have noted the submissions, and will consider them in the context of an examination of all the Applicant's circumstances.

Evidence of income tax paid in Australia over the past four years

63. Ms Tran's evidence was that she and her husband paid income tax annually in Australia in relation to the real estate and investments which they hold here.

Evidence of active participation in Australian community based activities or organisations

64. There was no evidence of active participation in Australian community based activities or organisations by Ms Tran, although she has cited family holidays and barbecues in that regard.

Friends and Relatives

65. Ms Tran tendered a number of statements from family and friends, some of whom also gave oral evidence at the hearing. A summary of what they said follows.
66. **Ms Mandy Moore's** statement was Exhibit A3. She is an Australian citizen, and stated that she had known Ms Tran for 17 years. She told me that she had known Mr Dooley for 47 years, and that he is her son's godfather. She said that they stayed in touch by electronic means, and holidayed together whenever the Dooleys were in Australia.
67. In her oral evidence she emphasised Ms Tran's connection with Australia and love for Australia, and the fact that the eldest child, L, reads Australian books, and understands Australia.
68. **Ms Kim Tuyen Ta** provided a statement (Exhibit A4), and gave oral evidence. She is an Australian citizen and was at university together with Ms Tran in Vietnam in 1990. She spoke about the connection of the Dooley children with Australia via their sporting activities, and the future Australian education planned for them. She also mentioned that the Applicant and her husband discussed investing in Australia.
69. **Mr Michael Dooley**, brother-in-law of Ms Tran provided a statement (Exhibit A5), and gave oral evidence. He commented on spending holidays with Ms Tran and family in Australia, their plans to return, and the fact they were bringing their children up as young Australians. He praised Ms Tran as a good mother, and good Australian who loves this country and has many friends in Australia.
70. **Ms Fiona Ngo** provided a statement (Exhibit A6). She stated that she has known Ms Tran since 1993 when they worked together in the Australian Embassy in Hanoi, and had become good friends. I noted that Ms Tran told me she worked at the Embassy from 1995. She said that they saw each other when Ms Tran and family visited Australia and their family in the Blue Mountains. She praised Ms Tran as playing a positive role in the community.

71. **Ms Van Vuong** provided a statement (Exhibit A7). She too worked with Ms Tran at the Australian Embassy in Hanoi, attended her wedding, and has maintained contact with her and her family. She stated that Ms Tran is *fitting in smoothly with Australian life style and will be an asset to our community with her energetic and attitudes to Australian ways of life, her commitment to Australia values is invaluable.*
72. **Ms Christine Harris**, aunt of Mr Dooley, provided a statement (Exhibit A8). She said that she had known Ms Tran for nearly 17 years, and, at the time of writing in October 2014, had recently returned from a holiday visiting the family in the company of Mr Dooley's mother.
73. **The Tribunal** has noted that the referees mentioned above were unanimous in supporting Ms Tran's application for citizenship on the basis of her close and continuing connection with Australia, the way she brought up her children to be Australians, and the contribution she would make to life in Australia. They are of value as one of many factors in assessing Ms Tran's *close and continuing association with Australia.*

Conclusions regarding whether Ms Tran has a close and continuing association with Australia

74. In coming to a conclusion regarding whether Ms Tran meets the test for a *close and continuing association with Australia*, I have taken into account the evidence of Ms Tran, her husband and her friends and relatives, and the submissions of both parties. I am satisfied that:
- Ms Tran worked for the Australian Embassy in Hanoi from 27 December 1995 to 12 March 1999, and gained her initial knowledge and the love of Australia, and Australians, there. She told me she has learnt about Australian culture, and she values the democracy and lifestyle in Australia. She remains in touch with friends from the Australian Embassy.
 - She met Mr Dooley there, and married him in 1999 which is some 15 years ago. I respectfully agree with Senior Member Handley that the mere fact of being married to an Australian for a significant time can be considered to *an association or connection to Australia (Re Kilpi and Minister for Immigration and*

Citizenship). I accept that the only reason why Ms Tran has not resided in Australia is that she has followed her husband all over the world to support and assist him with his life and their children. That weighs strongly in her favour.

- I sense from Ms Tran's evidence that she has great love for Mr Dooley, referring to him as *the love of my life*, and raising three children (two biological children of the couple who are Australian citizens) with him. The adopted child has permanent residence in Australia.
- I am satisfied that Ms Tran has undertaken courses in anticipation of the couple's return to Australia so that she can be employed in real estate. She told me she holds a real estate licence for NSW. She also told me that when they lived in Singapore where her husband was working, she was promoting Australian property.
- I am also satisfied from the evidence that Ms Tran and family will return to Australia by 2016, and move into the house they have purchased as their future residence.
- They jointly own eight properties in Australia, which Ms Tran manages with the assistance of real estate agents she has selected. She arranges for the payment of the outgoings, including rates and taxes. I am mindful of the Respondent's submissions that the holdings are not exclusive to Ms Tran, and that that could mitigate against her in the consideration of whether she has a *close and continuing association with Australia*. However, I do not accept that argument, noting that all the couple's investments are in Australia, that she and the children are economically dependent on Mr Dooley, and that they have no investments elsewhere.
- I accept Ms Tran's argument that the majority of her friends are Australian, that she is close to Mr Dooley's relatives, and accept that she has entered into the spirit of the Australian family, in particular in facilitating the reconciliation between her husband and his father, and the closeness to her mother-in-law and family. It seems to me from the evidence that she is closer to the Australian family than her original family, keeping in touch with them through the available

electronic means. In giving weight to this factor, I am mindful of the distinction sought to be made between a *close and continuing association with Australia*, and Australians. I find Ms Tran has both.

- The referees referred to above were unanimous in supporting Ms Tran's application for citizenship on the basis of her close and continuing connection with Australia, the way she brought up her children to be Australians, the contribution she would make to life in Australia.

75. In coming to a decision I have noted the Respondent's view that Ms Tran has not worked or lived in Australia, and that the property and investments she owns are jointly owned with Mr Dooley. As she is currently not in the paid workforce, and is at home bringing up the couple's children, she is financially dependent on Mr Dooley. The evidence which I accept is that she manages their financial affairs with Australia. That does not preclude me from considering the eight properties and considerable investments the couple have, as one of the factors going to Ms Tran's *close and continuing association with Australia*.

76. Having considered all the evidence regarding Ms Tran's connection with Australia, and the application of the factors listed in the Citizenship Instructions, and taking a holistic view of the situation, I am satisfied that Ms Tran had a *close and continuing association with Australia* in the four years immediately before the citizenship application for the purposes of s 22(9)(d) of the Citizenship Act. I am satisfied it is continuing, and that she is looking forward to a return to Australia to live (section 21(2)(g)).

77. Accordingly I am satisfied that the discretion in section 22(9)(d) of the Citizenship Act should be exercised in Ms Tran's favour to treat all of the periods in which Ms Tran was absent from Australia in the four years before the citizenship application as periods in which she was present in Australia as a permanent resident.

DECISION

78. The Tribunal sets aside the decision under review and decides that Ms Tran, having had a *close and continuing association with Australia* as a permanent resident during the four

years prior to her application for citizenship, and continuing, should be considered as having been present in Australia during that period in accordance with the discretion provided for in section 22(9) of the *Australian Citizenship Act 2007*.

79. The Tribunal remits the matter for reconsideration in accordance with the direction that Ms Tran satisfies sections 21(2)(c) and 21(2)(g), of the *Australian Citizenship Act 2007*.

I certify that the preceding 79 (seventy-nine) paragraphs are a true copy of the reasons for the decision herein of Ms G Ettinger, Senior Member

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

Associate

Dated 22 December 2014

Date of hearing	17 November 2014
Counsel for the Applicant	Mr J Donnelly
Solicitors for the Respondent	Mr D McLaren, Sparke Helmore