



Administrative  
Appeals Tribunal

DECISION AND  
REASONS FOR DECISION

**TWWH and Minister for Home Affairs (Citizenship) [2018] AATA 4877 (21  
December 2018)**

Division: GENERAL DIVISION

File Number: **2018/4804**

Re: **TWWH**

APPLICANT

And **Minister for Home Affairs**

RESPONDENT

**DECISION**

Tribunal: **R Cameron, Senior Member**

Date: **21 December 2018**

Place: **Melbourne**

The Tribunal sets aside the decision of the Respondent on 22 August 2018 and remits the matter to the Respondent for reconsideration in accordance with the Tribunal's findings.

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

R Cameron, Senior Member

### **Catchwords**

*CITIZENSHIP – application for Australian citizenship by descent – citizenship applicant born outside Australia – whether the citizenship applicant had an Australian citizen parent at the time of birth – meaning of parent – decision set aside and remitted for reconsideration*

### **Legislation**

*Australian Citizenship Act 2007 (Cth)*

*Australian Citizenship Regulation 2016 (Cth)*

### **Cases**

*H v Minister for Immigration and Citizenship (2010) 188 FCR 393*

### **Secondary Materials**

*Citizenship Policy Document June 2016, Department of Home Affairs*

## **REASONS FOR DECISION**

**R CAMERON, SENIOR MEMBER**

### **INTRODUCTION**

1. The Citizenship Applicant was born in Urumqi City, China in August 2017.
2. On 2 August 2018 TWWH lodged with the Respondent an application for conferral of Australian citizenship by descent on behalf of the Citizenship Applicant who shall be referred to for the purposes of this proceeding as “LW”.
3. TWWH is an Australian citizen. He claims that LW is his son with someone who shall be referred to for the purposes of this proceeding as “Ms W”. Ms W has consented to the application for Australian citizenship by descent on behalf of LW.

4. TWWH claims that at all times relevant to this application, Ms W is his wife.
5. On 22 August 2018 a delegate of the Respondent refused the application for conferral of Australian citizenship by descent on the grounds that she was not satisfied that TWWH was LW's father. Put another way the delegate was not satisfied that the Citizenship Applicant had an Australian citizen parent at the time of his birth.

#### **THE CITIZENSHIP APPLICATION**

6. The Citizenship Application on behalf of LW was lodged by TWWH using "Form 118 – Application for Australian citizenship by descent." The form was submitted to the Respondent under cover of a letter of 2 August 2018 from TWWH's solicitors which contained considerable material by way of submission in support of the application and several sundry attachments.
7. It is useful to summarise some aspects of the material contained in Form 118, the supporting material and the letter from TWWH's solicitors that are in evidence before the Tribunal in this application.
8. TWWH stated that:
  - (a) He and Ms W are Uyghurs;
  - (b) He and Ms W met in October 2015 during a trip to Urumqi, China;
  - (c) In July 2016 he returned to Urumqi and he and Ms W were married in a religious ceremony conducted on or about 14 August 2016 in Urumqi;
  - (d) The wedding ceremony was attended by immediate family and a number of friends<sup>1</sup>;
  - (e) Following the wedding ceremony they travelled to the United States for a honeymoon;

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<sup>1</sup> A number of photos that he identified while giving his evidence from the witness box were tendered.

- (f) In September 2016, following the honeymoon they then travelled to Istanbul, Turkey where TWWH's sister lives;
- (g) At all times following the wedding and honeymoon, they lived together as man and wife;
- (h) In approximately November 2016 Ms W became pregnant to TWWH;
- (i) TWWH attended with Ms W at all medical appointments arising out of the pregnancy whilst they were living as man and wife in Istanbul;
- (j) Due to complications with her pregnancy including illness such as morning sickness Ms W decided to, and did, return to China in April 2017 to be near her mother so that she could have family support. She has remained there ever since;
- (k) Also in approximately April 2017, TWWH returned to Australia so that he could earn money to assist Ms W both before and after the birth of their child;
- (l) Upon Ms W's return to China her passport and all official documents were seized by the Chinese police and have not been returned to her;
- (m) In June 2017 after Ms W's return to China, TWWH applied for a visa to visit her in China however such application was refused; (in cross-examination he stated that he filled out a visa application form at the Chinese Embassy in Sydney. It was a paper application of which he did not keep a copy. He was then called in for an interview by embassy staff. His application was refused. TWWH gave evidence that he was informed of the refusal by a telephone call from the embassy and that there were no letters or emails sent.)
- (n) In August 2017 the Citizenship Applicant, LW was born;
- (o) TWWH and Ms W have kept in touch through various electronic means almost every day since the birth of LW, through these means TWWH has been able to see him grow up;
- (p) TWWH was providing financial support to Ms W. In 2015–2016 he was sending money to Ms W via Western Union. Uyghurs are no longer permitted to remit funds to China this way. When TWWH's mother was in Xinjiang, she gave Ms W her bank card which is now used by her to obtain money;

- (q) On or about 13 April 2018 Ms W was taken by the Chinese police and detained in a re-education camp for Uyghurs, whilst LW was still being breastfed;
- (r) On 19 April 2018 Ms W was released from detention. On her release from detention she was informed that once the child was one-year-old, she would be returned to detention and most likely the son will be put in a holding camp for children, given a Han Chinese name and adopted out to a Han Chinese family;
- (s) Since Ms W's release from detention TWWH had considered it too dangerous to video chat on an Internet platform "WeChat" and that the only way they can communicate is by posting photos on WeChat "moments" which are then promptly deleted after they are viewed;

9. TWWH also stated that:

- (t) He does not have all the documentary evidence required by Form 118;
- (u) He does not have official documents to show he is the biological parent of LW. This is because the Chinese government withheld the birth certificate until 16 April 2018, almost 9 months after the birth of the child. The birth certificate was only issued after Ms W was detained. TWWH submitted that the Chinese authorities refused to place his name on the birth certificate because he had relinquished his Chinese citizenship. This is most likely due to the Chinese government's intentions to remove LW from Ms W's care and place him for adoption as noted earlier;
- (v) TWWH does not have any official documents that include a photograph of LW because all passports and official documents for Uyghur people in China are confiscated;
- (w) It is not possible to have a third party complete an identity declaration and photograph of LW because there is nobody in Australia who could do so. There is nobody in China outside of immediate family who could do so; due to the treatment of Uyghurs in China signing such a declaration is likely to be considered a terrorist offence.



10. Subsequently, on 21 August 2018 in a letter forwarded by his solicitors, TWWH on behalf of LW provided to the Respondent a "Parentage Testing Procedure Report" with attachments prepared by Katherine Pippia (a purported expert DNA tester) dated 20 August 2018, that apparently compared a DNA sample taken from TWWH with a "DBA Genotype Testing Report" of DNA material purportedly collected from LW.
11. The delegate of the Respondent in the decision of 22 August 2018 decided that TWWH had not provided any reliable or verifiable evidence of the nature of his relationship with Ms W or his parentage of LW. Therefore, the delegate was not satisfied of LW's identity nor that he had an Australian citizen parent at the time of his birth.

### **THE ISSUES FOR DETERMINATION BY THE TRIBUNAL**

12. On consideration of the material before the Tribunal there are two issues for determination.
  - (a) Firstly, whether TWWH was LW's father (or for that matter "parent") at the time of his birth in August 2017; and
  - (b) Secondly, whether it can be satisfied of the identity of LW.

### **THE RELEVANT PROVISIONS OF THE AUSTRALIAN CITIZENSHIP ACT 2007**

13. It is appropriate to reproduce the applicable provisions of the *Australian Citizenship Act 2007* (Cth) ("the Act"). The relevant sections provide as follows:

#### **AUSTRALIAN CITIZENSHIP ACT 2007 - SECT 16**

##### ***Application and eligibility for citizenship***

*(1) A person may make an application to the Minister to become an Australian citizen.*

*Note: Section 46 sets out application requirements (which may include the payment of a fee).*

##### ***Persons born outside Australia on or after 26 January 1949***

*(2) A person born outside Australia on or after 26 January 1949 is eligible to become an Australian citizen if:*

*(a) a parent of the person was an Australian citizen at the time of the birth; and*

*(b) if the parent was an Australian citizen under this Subdivision or Subdivision AA, or section 10B, 10C or 11 of the old Act (about citizenship by descent), at the time of the birth:*

*(i) the parent has been present in Australia (except as an unlawful non-citizen) for a total period of at least 2 years at any time before the person made the application; or*

*(ii) the person is not a national or a citizen of any country at the time the person made the application and the person has never been such a national or citizen; and*

*(c) if the person is or has ever been a national or a citizen of any country, or if article 1(2)(iii) of the Stateless Persons Convention applies to the person, and the person is aged 18 or over at the time the person made the application--the Minister is satisfied that the person is of good character at the time of the Minister's decision on the application.*

#### AUSTRALIAN CITIZENSHIP ACT 2007 - SECT 17

##### *Minister's decision*

*(1) If a person makes an application under section 16, the Minister must, by writing, approve or refuse to approve the person becoming an Australian citizen.*

*(1A) The Minister must not approve the person becoming an Australian citizen unless the person is eligible to become an Australian citizen under subsection 16(2) or (3).*

*(2) Subject to this section, the Minister must approve the person becoming an Australian citizen if the person is eligible to become an Australian citizen under subsection 16(2) or (3).*

##### *Identity*

*(3) The Minister must not approve the person becoming an Australian citizen unless the Minister is satisfied of the identity of the person.*

*Note: Division 5 contains the identity provisions.*

14. It should be observed that the term "parent" is not defined in the Act<sup>2</sup>. As will be discussed later in these reasons, applicable authorities have held the term "parent" is not confined to a biological parent and can be applied to a broader parent-child relationship that may evolve in a variety of situations that are not just a matter of biology but of intense commitment to another, expressed by acknowledging that other person as one's own and treating he or she as one's own. The developing trends in IVF, surrogacy and the like

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<sup>2</sup> It is also perhaps instructive that the term parent is also not defined in the *Family Law Act 1975* (Cth). Obviously, had the legislature intended to restrict the concept of parentage to biological parents it would have done so not only in the Act but also in the *Family Law Act 1975* (Cth) where such an issue is most likely to be more frequently ventilated.

mean that a recognised parent-child relationship can be established without a biological connection. Societal trends have changed so that such relationships are recognised as parent and child without hesitation. (Indeed, the Citizenship Policy in the section “Non-biological parent-child relationships” recognises this fact.<sup>3</sup>) It can of course also emerge in the reverse sense where the child develops a parent-child relationship. This frequently occurs in the context of stepchildren and is often seen in the testator’s family maintenance jurisdiction where the definition of an eligible claimant was expanded many years ago to include non-biological children within the ambit of eligible claimants under such legislation. This was a practical acknowledgement by the legislature of the social reality of many families in recent times.

### THE EVIDENCE

15. The documentary evidence before the Tribunal consisted of the following:

- (a) Witness statement of Michael David Bradley, the solicitor for the Applicant, and attachments dated 27 August 2018 which consists of 198 pages;
- (b) Amnesty International Australia document entitled “Summary of country information relating to the treatment of Uyghurs in Xinjiang, People’s Republic of China”, dated 6 September 2018 (“the Amnesty report”);
- (c) Letters passing between the Australian Government Solicitor and the Applicant’s solicitors dated 13 September 2018;
- (d) Witness Statement of “DM” made on 12 September 2018 with exhibits including the Written Statement for the Record of Ambassador Kelley E Currie, the United States Representative to the Economic and Social Council of the United Nations on July 25, 2018, presented to the Congressional-Executive Commission on China Hearing on “Surveillance, Suppression and Mass Detention: Xinjiang’s Human Rights Crisis (“Ambassador Currie’s Written Statement”);
- (e) Witness Statement of “AA” (the father of TWWH) made on 11 August 2018; and

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<sup>3</sup> The Citizenship Policy under the section headed “Surrogacy” also makes the following observation that is relevant to this consideration: “The Act applies universally to children of an Australian parent no matter how the child came to be conceived.”



- (f) Section 37 documents lodged with the Tribunal on 10 September 2018 ("T Documents").
16. It should be noted that TWWH gave oral evidence and was extensively cross-examined by Mr Tran of Counsel on behalf of the Respondent.
17. The makers of the two additional witness statements AA, and DM, that were tendered in evidence were available for cross-examination but Mr Tran informed the Tribunal that it was not necessary for them to be, and they were not, cross-examined.
18. Ms W was unable to give evidence at the hearing before the Tribunal. The preponderance of the evidence demonstrates that were she to attempt to give evidence to the Tribunal which would be considered communicating with or supporting relatives, she would run the distinct and real risk of retaliation by the Chinese authorities including almost certainly incarceration in an internment camp, or as the Chinese government is prone to label them a "re-education centre". (It should be borne in mind there is ample evidence before the Tribunal in this application that the numbers of Uyghurs detained in such re-education centres since April 2017 quite possibly is in the millions. The Amnesty report and Ambassador Currie's Written Statement are referred to in their entirety for verification of these matters.)
19. Accordingly, the Tribunal does not form any adverse inference by reason of Ms W not giving evidence in the course of this application.

## **CONSIDERATION**

### **The credibility of the Applicant**

20. At the outset of the consideration of this matter some comment should be made upon the evidence given by TWWH in the course of this hearing. The Respondent both in its Statement of Facts and Contentions and oral submissions attacked the credibility of TWWH. It was done so in several ways which should be dealt with in the course of these reasons. This consideration of those matters is not undertaken in any particular order of priority or seriousness but to identify legitimate grounds of criticism made by the Respondent of TWWH's credibility.

21. The first ground of attack was that TWWH on his own admission had previously entered into what was described as a “sham marriage in return for a promise to be paid \$70,000”. The full circumstances were contained in a copy of an affidavit that he deposed in 2017 in the Federal Circuit Court of Australia in which he sought dissolution or annulment of that marriage. He also omitted to include this fact in the application that he made on behalf of LW to the Respondent.
22. The second ground of attack that the Respondent submitted was that the bona fides of the purported relationship between TWWH and Ms W was open to question because he says they entered into a religious wedding ceremony on 14 August 2016, yet on 23 February 2017 she filed an application for a visitor short stay visa in which she stated she had never been married. TWWH gave evidence that he told Ms W to do that.
23. TWWH's credibility was also attacked in that the affidavit filed in the Federal Circuit Court of Australia in 2017 gave an inconsistent account of his travel to and from Turkey and the time he spent there, in that he did not mention that he had been to China and the United States and returned to Turkey in the period that he deposed to in that affidavit.
24. He was also challenged because the passport of Ms W did not have a stamp in it that showed a reference to her visit to China. (It should be borne in mind that only extracts of her passport were contained in the T Documents before the Tribunal, not the whole passport.)
25. A further area of challenge to the credibility of TWWH was the fact that he failed to produce any documentation to verify the evidence that he gave both to the Respondent and to the Tribunal from the witness box that he had supported Ms W by remitting funds to her in China. He gave evidence that these transmissions of funds were usually made by transfer via Western Union. One would have expected him to have been able to produce contemporaneous documents such as Western Union receipts, remittance advices and bank statements for the accounts from which such funds were withdrawn. None of this documentation was in evidence. Mr Tran for the Respondent fairly submitted that the Applicant has been extremely well represented by his lawyers and that this was a significant gap in the evidence which should be viewed unfavourably by the Tribunal.

26. The starting point of this consideration should be that it is well-recognised in cases where a witness has made a previous inconsistent statement or engaged in conduct of poor repute, that there is not an inflexible rule of law or practice that all evidence given by such a witness should be regarded as unreliable. Each case must be considered by the Tribunal after observing the witness give their evidence from the witness box and taking into account their demeanour and the overall impression that they create during the course of that evidence. Where there are inconsistent statements or conduct in the past, a Tribunal will almost certainly view the evidence of such witness in the current proceeding with caution but is not precluded from accepting their evidence in that hearing when it is appropriate to do so after having so observed the demeanour of the witness in the box. Also, it is open to a Tribunal to accept the evidence of a witness in such circumstances where there is corroboration of such evidence from other parties or for instance by the tendering of contemporaneous documents.
27. In this case TWWH explained particularly in the course of his searching cross-examination (and also in evidence in chief) why he did some of the things that he did. With respect to the sham marriage both in the affidavit filed in the Federal Circuit Court of Australia and in his evidence in chief, he readily conceded his personal failings and why he did it. He did not seek to deflect any blame. It also should be noted that he gave evidence that he gave the affidavit to the Federal Circuit Court of Australia admitting what he had done with the marriage and he stated that he reported it to the Australian Embassy in Turkey as well. To this extent Counsel for the Applicant also noted that the affidavit itself was affirmed before the Australian Consul General in Istanbul. He faced up to what he described as breaking the law. One also has to observe that it would have been quite easy for TWWH to have not admitted to his own wrongdoing concerning the sham marriage and more likely than not it might never have seen the light of day. Presumably, he could have simply applied for dissolution of the marriage after twelve months of separation in the usual way.
28. His account of the visa application of Ms W and her failing to declare the so-called "marriage" between them was because he said he had a bad reputation. He also told her to do it because although they considered themselves married, there was no marriage certificate. He stated he could not provide one and it was his idea that Ms W not refer to the marriage in the visa application. He once again faced up to his wrongdoing and did not seek to deflect blame. The candour with which he did so reflected well upon him.

29. As for the travel dates being incorrect, he did not seek to quarrel with what was being put to him and once again faced up to the inconsistency.
30. As for the stamp in the passport, of course he could not speak precisely for Ms W but he did observe that it was the copy of some pages of the passport provided with her application for a short stay visa. The passport was copied in China from where she made the visa application. The passport has been retained by the police in China. Therefore, presumably she hadn't returned to Turkey at the time of the visa application. Without reaching a concluded view on the topic, there is also the fact that the pages do not seem to be complete and one is left to speculate as to whether there may have been other pages on the passport containing a stamp (if indeed one was affixed to the document at all). No adverse findings can be made against TWWH concerning the passport.
31. Concerning the absence of financial documentation noted above, TWWH acknowledged that he did have such documentation, primarily receipts that were given when he transmitted money by Western Union, but really did not think to retain them for the purposes of the hearing. Whilst his explanation might have been somewhat shallow, the Tribunal does not consider it to be untruthful or otherwise a reconstruction and is prepared to accept that evidence without forming any adverse view against him. It also needs to be viewed with some degree of reality that frequently people with no experience in courts and tribunals do not expect at the time they undertake such transactions that they will in the future be in a witness box having to give evidence about them. It appeared to the Tribunal that TWWH fell into that category.
32. The Tribunal found TWWH to be a truthful witness. He bore up to comparatively searching cross-examination quite well. He had the characteristics of a witness of truth in that he did make concessions when they were called for even if they did at times not necessarily assist the case that he was seeking to advance, or in several instances as noted earlier, necessarily reflect fairly well upon him. Much of his evidence was corroborated by the two other witnesses whose evidence was not contradicted or not subject to cross-examination. Overall TWWH left the witness box with his credibility intact.
33. Mr Tran for the Respondent in his closing submissions observed that TWWH's evidence had materially altered when compared to the evidence before the delegate of the Respondent. He further stated that the evidence before the Tribunal had been directed to



photos that the delegate had some difficulty with. Mr Tran in the course of his closing conceded that TWWH did during moments of his evidence give spontaneous and genuine answers concerning such matters as the photos of the wedding and his interactions with Ms W. Mr Tran conceded that the delegate did not have the benefit of seeing the evidence of TWWH this way. He only had several grainy black-and-white photos whose authenticity he was entitled to properly question. This concession by Mr Tran properly made in the view of the Tribunal, also assists in making findings concerning TWWH's credibility.

34. It is for these reasons that the Tribunal accepts the evidence of TWWH notwithstanding that his prior statements and conduct, such as entry into the "sham marriage", do not reflect well on him.

**Did LW have an Australian parent at the time of his birth?**

35. When one turns to the provisions of the Act, it is necessary under section 16(2) of the Act for the Citizenship Applicant to establish that he had a parent who was an Australian citizen at the time of their birth.
36. There is some debate between the contentions of the Applicant and the Respondent as to how the Applicant's case is put. The Applicant has approached the question in two ways. Firstly, TWWH relies upon a contention that he is LW's biological father relying upon both his own evidence as to his relationship with Ms W, her subsequent pregnancy and LW's birth. Additionally, TWWH contends that the DNA evidence before the Tribunal is also sufficient to enable a finding that LW is his biological son.
37. Secondly, he contends that upon the evidence before the Tribunal in any event, that in the absence of a definition of 'parent' in the Act, applying the decision of *H v Minister for Immigration and Citizenship*<sup>4</sup> there is no limitation of the concept of parent to biological parents. Accordingly, on the facts it is open to the Tribunal to accept there is a parent-child relationship between him and LW which satisfies the requirement of section 16(2).
38. The Respondent contends that TWWH has expressly claimed that LW is his biological son and therefore, the application should be assessed on that basis. Nonetheless, the

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<sup>4</sup> (2010) 188 FCR 393.

Respondent has conceded that the case law recognises that a biological connection is not necessary to establish parentage in the relevant sense prescribed by the statute. It is then further contended by the Respondent that if the Tribunal is not satisfied of the biological connection between TWWH and LW “the whole application collapses”.

39. The Tribunal cannot accept this contention when one considers all of the material that has been lodged both before the delegate of the Respondent and the Tribunal for this hearing. The statutory declaration made by TWWH on 2 August 2018 whilst certainly asserting that he is the biological parent of LW also deposes to an array of facts which fall within the extended definition of parent as discussed in *H v Minister for Immigration and Citizenship* as noted above. In the Applicant’s Contentions of Fact and Law prepared by Counsel it is put both ways relying upon the fact that TWWH is the biological father of LW and also “the parent in the broader sense” as outlined by the Full Court in *H v Minister for Immigration and Citizenship*.<sup>5</sup>
40. The Tribunal accepts the evidence of TWWH as summarised in paragraphs 8 and 9 of these reasons as establishing those facts. It should be repeated that these facts include the commencement of the relationship between TWWH and Ms W, the “wedding ceremony” in Urumqi, the travel to the United States for the “honeymoon”, the return to Istanbul, living together as husband and wife, the subsequent pregnancy which whilst they were together TWWH supported Ms W through until her return to China, the regular contact between them both before and after the birth of LW, remittance of funds to Ms W by TWWH in the way he alleged and the continuing communication between TWWH and Ms W since the birth of LW via various electronic means including sending photographs. The totality of the evidence given by TWWH to the Tribunal concerning these matters are referred to in their entirety and as noted above are accepted by the Tribunal.
41. There is also the uncontradicted evidence of TWWH’s father, AA which is referred to. Both TWWH’s father and mother were in China at the time of the “wedding” between TWWH and Ms W. He also gave evidence about their honeymoon in the United States and subsequent return to Turkey. He was present with Ms W when she returned to China after the commencement of her pregnancy. He gave evidence of the Chinese government’s campaign against Uyghurs including confiscation of passports and identity documents,

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<sup>5</sup> Paragraphs 17-18, amongst others, of the Applicant’s Contentions of Fact and Law are referred to.

mass detention and highly intrusive surveillance. He gave evidence that Ms W had her passport seized, was required to regularly report the local police about her whereabouts and attend political indoctrination study sessions. Apparently, during his time in China Ms W was classified as an “unsafe individual”, and therefore, the only reason she was not imprisoned or detained was due to the fact of her pregnancy. His evidence also recounted the frequent contact he had with Ms W during the course of her pregnancy. This evidence is accepted by the Tribunal. It is corroborative of the evidence of TWWH and his relationship with Ms W and tends to establish the parent-child relationship between TWWH and LW.

42. The other witness statement which was tendered in evidence was of DM. (He had also made a statement which was submitted in support of the application to the Respondent.<sup>6</sup>) The contents of that witness statement (and the statement that he made which was filed in support of the application with the Respondent and considered by the delegate) are referred to in their entirety. DM has known TWWH since approximately 2009 in Sydney. He also knew him and Ms W in Istanbul from about September 2016. His evidence was that he, his wife, TWWH and Ms W generally saw one another once a week. He was present with them in Istanbul when Ms W became pregnant. In March 2017 he accompanied TWWH and Ms W to a private hospital when she was approximately four months pregnant and had an ultrasound to provide assistance with translation from the Turkish language (presumably, the results of this ultrasound are depicted in a series of medical images that we are in evidence before the Tribunal. Such medical images bear a date of 20 March 2017). He and his wife left Istanbul in approximately June 2017. He has maintained contact with TWWH ever since and was informed of the birth of LW. This evidence is also accepted by the Tribunal. It is corroborative of the evidence of TWWH tending to corroborate his evidence of a parent-child relationship with LW.
43. Following what was said in *H v Minister for Immigration and Citizenship*, the conduct after the birth of LW by both TWWH and Ms W is relevant to confirming the parentage at the time of birth. There is little doubt to the Tribunal that TWWH acknowledged LW as his child before, at the time of and after the birth, and justifies a finding that he was a parent of LW within the ordinary meaning of the word at the time of such birth.

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<sup>6</sup> Page 125 of the T Documents.

### **The DNA test evidence**

44. In evidence before the Tribunal was DNA evidence consisting of the following:
- (a) A document entitled “Parentage Testing Procedure Report” dated 20 August 2018 prepared by Katherine Pippia, together with “Appendix 1: Genotype report for [LW]”; and
  - (b) An original version in Chinese of Appendix 1 to the Parentage Testing Procedure Report. (“Chinese Genotype Report”)
45. The Applicant contends that the Tribunal should rely upon the Parenting Testing Procedure Report to find that LW is the biological child of TWWH.
46. The Respondent on the other hand contends that no weight can be placed on the opinion of Ms Pippia because she did not carry out the testing or supervise the collection of the DNA said to have come from LW. Further, she did not receive a sample of DNA material from LW but a “Genotype report for [LW]” only.
47. It is further contended on the part of the Respondent that an offer had been made on 13 September 2018 for steps to be undertaken to facilitate LW providing a properly supervised sample of DNA material for testing.
48. In evidence before the Tribunal was the Citizenship Policy including the sub-section on “DNA testing” under the section concerning “Biological parent-child relationships”. This section of the Citizenship Policy provides that where there is an application for citizenship by descent and the decision maker is not satisfied that the person has such a biological relationship, the decision maker may suggest a DNA test. The Citizenship Policy prescribes the use of, and how testing procedures will be conducted. There is also in the Citizenship Policy a proviso that if the opportunity to provide DNA evidence has been offered and not accepted, the decision maker should consider the Applicant’s reasons for not accepting such offer and whether any adverse inference may be drawn. It is not mandatory for a decision maker to require an Applicant for Australian citizenship to undergo DNA testing.



49. The contention of the Applicant is that there is a danger to LW and Ms W if they were to attempt to travel outside their present location Urumqi, Xinjiang without assistance from the Australian government. Apparently, movement in and out of Xinjiang has been significantly restricted by the Chinese government. They are unlikely to be permitted to leave that region, Ms W's passport has been confiscated and she has been flagged or earmarked for further detention. This is in addition to the evidence that has been provided to the Tribunal about the scrutiny that she has been under for some time and some of the evidence previously referred to in these reasons.
50. The offer made on 13 September 2018 by the Respondent for steps to be undertaken to facilitate LW providing a properly supervised sample of DNA material for testing was promptly responded to by the Applicant's lawyers which detailed the "Danger and a practical impossibility" of compliance with that request and further made a request for assistance from the Australian government to enable LW and Ms W to safely travel to either Beijing, Shanghai or Guangzhou (where there are Australian diplomatic missions) in order to undertake further DNA testing in a manner that could leave no doubt about the accuracy of collection of DNA material. Given the evidence before the Tribunal and the explanation offered by the Applicant that has been referred to in these reasons which is accepted, the Tribunal does not draw any adverse inference against the Applicant for not accepting the offer contained in the letter from the Respondent to his lawyers of 13 September 2018<sup>7</sup>.
51. Mr Tran conceded that the Respondent did not take issue with the testing of TWWH as revealed in Ms Pippia's report. He further stated that the Tribunal could draw several inferences from the Chinese Genotype Report. Firstly, that it was a kind of report that was comprehensible to her. Therefore, because it meant something to her it counts in the Applicant's favour. Ms Howe contended in response that there is a further inference that can be drawn from it and that is that TWWH is biologically related to the genome subject of the report.

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<sup>7</sup> It should also be noted that Mr Tran in his closing submissions conceded to the Tribunal that there was credible evidence open to the Tribunal to conclude that no adverse inference should be drawn against the Applicant for failing to take up the offer of DNA testing that was made by the Respondent.

52. He conceded that it would be possible for the Tribunal to find that the evidence is not perfect but nonetheless it might be reliable if the Tribunal otherwise accepted the evidence adduced on behalf of the Applicant in the course of the hearing.
53. Mr Tran also contended the key issue is not what conclusion of fact can be drawn from Ms Pippia's report, it is in fact the reliability of the conclusion in paragraph 7 of the report finding that TWWH is biologically related to the genome subject of the Chinese Genotype Report. The critical question in assessing the reliability of the document is that Ms Pippia did not say that she could not understand it. The correct framework of analysis is to consider that if there was something nefarious about the Chinese Genotype Report what would be the motive for it? If there was no motive to fabricate it then when combined with the country information that the Applicant's Counsel took the Tribunal to in the opening (which is in evidence and accepted), one might say even though it is not perfect it is sufficiently reliable. If the Tribunal were to conclude that the evidence heard at the hearing of this application was genuine about the relationship between TWWH and Ms W, having regard to the documentary evidence then that factual analysis in Ms Pippia's report concerning parentage would be open to the Tribunal. Mr Tran repeated that it then dovetails into the findings of credibility of the evidence heard. If Ms Pippia's report is found to be a reliable report, the Respondent would not cavil with the conclusions at paragraph 7 of it, as the Respondent had not put on any expert DNA evidence to the contrary.
54. As a starting point in this consideration, the Tribunal acknowledges that there is no doubt that the most accurate way to answer the question would be to have a properly supervised collection of a sample of DNA material from LW and then in an appropriate and recognised laboratory, have a comparison made of that material with a properly supervised and collected sample of DNA material from TWWH. It is accepted by the Tribunal that the DBA Genotype Testing Report does not provide evidence from whom the sample was collected or how their identity was verified. It is accepted that it does not comply with what is described in the reviewable decision as "Departmental standards and requirements" or the prescription contained in the Citizenship Policy. However, as is contended by the Applicant there is no requirement in the Act and the *Australian Citizenship Regulation 2016* (Cth) made thereunder that the DNA test regarding parentage can only be done by an organisation accredited by the Respondent or Department.

55. However, the Parentage Testing Procedure Report is not without some probative value. As noted earlier the Tribunal accepts the evidence of TWWH and the other witnesses concerning his relationship with Ms W and his contentions concerning her pregnancy. The Chinese Genotype Report contains unique identifiers or what are called "Genetic Marker[s]" which are capable of analysis and comparison with the DNA sample provided by TWWH. Ms Pippia acknowledged that it was capable of proper interpretation. Presumably, such report was prepared by someone who is competent in DNA analysis. It would not be an easy document to create without some very detailed knowledge of DNA technology, such that there would be a 99.9999748825% chance of paternity with TWWH. TWWH was not in China when it was created. He has not been there for some time. Whilst it is not impossible, one has to ask how would the author of the Chinese Genotype Report have obtained access to a sample of DNA material from TWWH enabling the production of such report so that it recorded accurate DNA markers? Having then obtained such sample of DNA material how would one create a report with such a level of accuracy? Therefore, it seems to the Tribunal to be a very long bow to draw to suggest that it is a concoction or contrivance to advance the cause of this application. As to the motive that was touched on by Mr Tran in his closing submissions whilst one could understand such a motive, the Tribunal does not find that one existed. The risks of exposure particularly given the previous history of TWWH which had been brought to the attention of the Respondent (which would naturally mean any documentation produced by him would be subjected to exceptionally close scrutiny) lead the Tribunal to conclude that there was no motive of the type expressed. Also, if as the Tribunal accepts TWWH genuinely believed that the child is his, it seems highly unlikely he would engage in this level of conduct. The consequences which by then he well knew not only for him but the child would be extremely serious.
56. The conclusion of Ms Pippia at paragraph 7 of her report that there is a 99.9999748825% Relative Chance of Paternity should not be dismissed. It is consistent with the finding of a parent-child relationship between TWWH and LW referred to earlier. It is in this context that the Tribunal finds that from the preponderance of the evidence it is a document that is more likely than not to be reliable and therefore, it is of some probative value in that it is corroborative of the Applicant's contention that TWWH and LW are parent and child.

### **The lack of official documentation to demonstrate parentage**

57. The Tribunal notes that this contention was put with considerable force and effect by Mr Tran. However, there is significant country information before the Tribunal which corroborates the evidence of TWWH as to why such official documentation, which might otherwise assist in demonstrating parentage of the Applicant, is not available.
58. For example the Amnesty report concerning treatment of Uyghurs, in Xinjiang had a section specifically devoted to the confiscation of Uyghur passports and official documents. It also confirmed that family members of some Uyghurs living overseas were denied visas to enter the country. This is also consistent with the evidence given by TWWH. Additionally, the report highlighted adverse treatment of Uyghurs trying to communicate with family members overseas. The report also noted the use of cutting-edge digital surveillance systems to track where Uyghurs go, what they read, who they talk to and what they say. It was described as an “opaque system” that treats practically all Uyghurs as potential terrorist suspects. Uyghurs who contact family abroad risk questioning or detention. Uyghurs in Xinjiang are graded according to their “trustworthiness”. Uyghurs are automatically “docked” 10 points when such grading process is undertaken.
59. The concession made by Mr Tran at various stages in the conduct of this proceeding, properly and responsibly made, concerning the steps that have been taken by authorities in China against Uyghurs is also noted and relied on by the Tribunal.
60. The Tribunal accepts the evidence of TWWH as corroborated by much of the documentary country information in evidence as to why no official documentation is available to the Applicant to show that he is the parent, biological or otherwise of the Citizenship Applicant. It is not available because of the concerted efforts of the authorities concerned which have already been described.

### **CONCLUSION**

61. The Tribunal finds that for the purposes of sections 16 and 17 of the Act that TWWH was the Citizenship Applicant’s father or parent at the time of his birth in August 2017 as required by section 16 of the Act. It is satisfied of the identity of the LW and that TWWH who is an Australian citizen is his parent.



## DECISION

62. Therefore, the reviewable decision will be set aside and the matter will be remitted to the Respondent for further processing in accordance with the Tribunal's findings.

## FINAL COMMENTS

63. The Tribunal would also like to acknowledge that this decision was reached after having had the benefit of considerably more evidence than the delegate. It also was made after having had the opportunity to hear the evidence of TWWH which the delegate did not have the benefit of, and the fact that two witness statements were tendered in evidence without such witnesses being required for cross-examination, despite the opportunity being available to the Respondent.
64. Finally, the Tribunal wishes to acknowledge the assistance of Counsel throughout the course of this application. They conducted themselves in an exemplary fashion in the finest traditions of the Victorian Bar for which they should be duly commended.

*I certify that the preceding 64 (sixty-four)  
paragraphs are a true copy of the reasons  
for the decision herein of Robert Cameron,  
Senior Member*

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

Associate

Dated: 21 December 2018

Date of hearing:	<b>14 September 2018</b>
Counsel for the Applicant:	<b>Georgina Costello &amp; Elizabeth Howe</b>
Advocate for the Applicant:	<b>Michael Bradley</b>
Solicitors for the Applicant:	<b>Marque Lawyers Pty Ltd</b>
Counsel for the Respondent:	<b>Chris Tran</b>
Advocate for the Respondent:	<b>Emily Nance</b>
Solicitors for the Respondent:	<b>Australian Government Solicitor</b>