FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZQHI v MINISTER FOR IMMIGRATION & ANOR [2012] FMCA 72

MIGRATION – Review of decision of Independent Merits Reviewer – procedural fairness – whether Reviewer used a repeated formula or template – where similarities and use of template paragraphs – whether reasonable apprehension of bias.
PRACTICE AND PROCEDURE – Application for extension of time – granted.

Migration Act 1958 (Cth), ss.36(2), 476, 477
Administrative Decisions (Judicial Review) Act 1977, s.5

M61/2010E v Commonwealth of Australia; Plaintiff M69 of 2010 v Commonwealth of Australia (2010) 85 ALJR 133
NADH of 2001 v Minister for Immigration [2004] FCAFC 328; [2005] 214 ALR 264
LEK v Minister for Immigration & Anor [1993] 43 FCR 100
Huluba v Minister for Immigration & Anor [1995] 59 FCR 518
Wu Shan Liang v Minister for Immigration & Anor [1994] FCA 926
Chu v Minister for Immigration & Anor [1997] 78 FCR 314
WAFK v Minister for Immigration & Anor [2003] 133 FCR 209
WAFK in *S1527 of 2003 v Minister for Immigration & Anor* [2005] FMCA 1846
S1527 of 2003 v Minister for Immigration & Anor [2005] FMCA 1846
Wu Shan Liang [1996] 185 CLR 259
SZQHH v Minister for Immigration & Anor [2011] FMCA 740
Webb v The Queen [1994] 181 CLR 41

Applicant:	SZQHI
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	STEVE KARAS IN HIS CAPACITY AS INDEPENDENT MERITS REVIEWER
File Number:	SYG 1121 of 2011

Judgment of:	Raphael FM
Hearing date:	31 October 2011
Date of Last Submission:	31 October 2011
Delivered at:	Sydney
Delivered on:	9 February 2012

REPRESENTATION

Counsel for the Applicant:	Mr J Gormly
Solicitors for the Applicant:	Koutzoumis Lawyers
Counsel for the Respondents:	Ms R Francois
Solicitors for the Respondents:	Australian Government Solicitor

THE COURT DECLARES

The Court declares that the 28 March 2011 recommendation of the second respondent that the applicant not be recognised as a person to whom Australia has protection obligations under the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol relating to the Status of Refugees was not made in accordance with the law.

THE COURT ORDERS

(1) The time for filing an application under s.476 Migration Act be extended until 2 June 2011.

(2) The First Respondent pay the Applicant's costs assessed in the sum of $6,240.00.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG 1121 of 2011

SZQHI
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

STEVE KARAS IN HIS CAPACITY AS INDEPENDENT MERITS REVIEWER
Second Respondent

REASONS FOR JUDGMENT

1. The applicant is an Hazara Shia male aged twenty-five who arrived in Australia by boat at some time prior to 2 February 2010 when he was detained at Christmas Island. This is not the first time the applicant had sought refuge in a third country. In 2008 he travelled to the United Kingdom where his claims were rejected and he was returned to Afghanistan. On 16 April 2010 he received a refugee status assessment which recommended that he not be recognised as a refugee. He sought review of that assessment from an Independent Merits Reviewer[1]. The relevant assessment was carried out by the second respondent in the presence of the applicant and his agent by way of interview on 8 February 2011. On 28 March 2011 the second respondent found that the applicant did not meet the criterion for a protection visa set out in s.36(2) of the *Migration Act 1958,* (Cth)[2] and recommended to the

[1] "Reviewer"
[2] "Act"

Minister that he not be recognised as a person to whom Australia has protection obligations under the *1951 Convention Relating to the Status of Refugees* as amended by the *1967 Protocol Relating to the Status of Refugees*. It is now accepted that an applicant is entitled to seek judicial review of a decision of a Reviewer in this court consequent upon the decision of the High Court in *M61/2010E v Commonwealth of Australia; Plaintiff M69 of 2010 v Commonwealth of Australia* (2010) 85 ALJR 133 and the provisions of s.476 of the Act.

2. At [11] [CB 419] the Reviewer set out his understanding of the essence of the applicant's claims:

> *"[11] The claimant, in short, claimed he was fearful of being returned to Afghanistan where he would face persecution in the form of serious physical harm and possible death at the hands of non-state agents in Afghanistan based on his ethnicity as a "Hazara", membership of the following particular social groups; Hazara, actual/perceived sympathizers or supporters of the coalition forces or foreign workers/NGO's in Afghanistan; and/or returnees from a Western country, failed asylum seekers returning from a Western country, actual and/or imputed political opinion-Anti-Taliban/Pashtun/Sunni and religion, Shia Muslim."*

3. The applicant comes from Jaghori in Ghazni Province. He told that when he returned from England he went to Kabul to get money from the UNHCR and was caught and searched by the Taliban. He was in a taxi with four to five Hazaras going from Jaghori to Kabul. They were stopped by the Taliban and manhandled but during the course of the incident the Taliban received a telephone call and left quickly. The applicant was able to return to the taxi and continue his journey to Kabul. He also told of another incident when he was twenty-three years of age. He was a passenger in a motor vehicle which the Taliban fired on from a distance in the mountains. He had been going to Ghazni for groceries for his shop. No-one was hurt. He said these were the only two incidents involving himself and the Taliban. The applicant believed that he was unable to return to Afghanistan as he was threatened with death because there had been many threats made against him and his family after he came to Australia. He believed that the Taliban would have been told of his travel here because his mother had killed a cow and used it to feed the villagers as an offering for his safe journey. He believed a villager may well have told the Taliban.

The killing of the cow took place in 2009. He said that the Taliban had personally delivered a letter to his mother threatening him.

4. The Reviewer noted that the applicant agreed that he was able to practice his religion in Jaghori where it was safe but that he was required to pray separately when he travelled outside that area. He told the Reviewer that he had taken part in a protest demonstration outside the detention centre on the road to Darwin and a friend with a shop in Jaghori said that he had seen him on the television. Because of this he was unable to relocate in Afghanistan as he was now "famous" and everybody knew about him and if he travelled he would be caught by the Taliban.

> *"[14] He said his village was surrounded by the Taliban and he cannot go out of Jaghori although there are not Taliban in Jaghori. However, he needs to travel out of Jaghori to get goods and other things from Ghazni and Kabul and cannot do so because of the Taliban. He sold the shop he had before going to England one month before leaving Afghanistan to come to Australia."* [CB 424]

5. The Reviewer noted submissions made by the applicant's advisors following the interview.

6. In his decision record the applicant's claims as shortly stated above are set out in one section which is followed by a section entitled "Independent Evidence" which lists a large number of documents, reports and the like on Afghanistan which the Reviewer has consulted. [CB 427 – 430]. The Reviewer then touches on some general country information before moving to the situation of Hazaras, then a section on Ghazni Province and a section on the return of refugees. The Reviewer's findings and reasons for his decision commence at [54] [CB 440]. The Reviewer divides his decision between what can be said to be a generic claim by male Hazaras of a generalised well founded fear which was dismissed on the basis of available and current authoritative material:

> *"The Reviewer does not accept that the Taliban specifically targets Hazaras or Shias differentially from the population at large is not satisfied that Hazaras face a real chance of harm amounting to persecution by non state actors i.e. Pashtuns in general and the Taliban in particular simply by reason of their ethnicity and/or religion. The Reviewer does not accept that a person's identity as a Hazara Shia of itself causes*

him or her to fall within the Refugee Convention definition. Nor do the UNHCR guidelines suggest that it should." [60] [CB 441 – 442]

7. The Reviewer acknowledged that this finding did not mean that an Hazara Shia could not be found to be a refugee on the basis of that person's own individual circumstances and experiences to which his ethnicity or religion might be relevant and turned to this claimant's particular experiences. Between [74] and [77] the Reviewer comments upon what he describes as "*significant inconsistencies and the emergence of substantial new information during the RSA process at the hearing interview with himself which caused him concern."* The Reviewer was not satisfied that these difficulties were reasonably explicable or without significance for the substance of the applicant's account and did not find him to be a satisfactory witness:

> *"[75] A number of these difficulties, and the claimant's generally unsatisfactory explanations, are evident from the omission regarding his alleged incidents with the Taliban prior to his leaving Afghanistan for Australia in 2009. As well there was some plain contradictions in his evidence as reflected in his written statements and evidence at the hearings or interviews like that in Curtin where he categorically denied being robbed by the Taliban although he admitted to being subjected to robberies by criminals as a regular occurrence in Afghanistan and his written statements and earlier submissions by his advisers that he was robbed by the Taliban in the incident on the road when stopped by the armed Taliban. The Reviewer notes that very relevant information was not given consistently through the process as the claimant said he was stressed a lot and forgot.*
>
> *[76] The way in which major new information regarding the claimant's situation and alleged happenings and incidents with the Taliban and others even though he was vague and confused as to the happenings and times emerged was somewhat disturbing. Such major and distinct information and details by the claimant seems hard to overlook for such a time during the RSA process. After the entry interview, the claimant had further opportunities during the RSA process and with his legal advisers to raise these alleged crucial matters – none of which mentioned the significant information regarding his alleged Taliban and media incidents in Kabul not to mention the cow sacrifice by his mother and the alleged results from that event. The reasons advance by the claimant for these omissions and inconsistencies were unsatisfactory.*
>
> *[77] The Reviewer is satisfied from the detailed contemporaneous note by the initial interviewer that the claimant was asked directly at the entry interview what his reasons were for leaving Afghanistan and being unable to return there and if he had any other events or reasons involving the Taliban or others that would cause him to leave and not want to return to Afghanistan. The*

Reviewer is satisfied that the claimant had been deliberately untruthful in this regard.

[78] Although the Reviewer felt the claimant had embellished and fabricated parts of his story, nevertheless, the Reviewer is prepared to accept that the claimant left Afghanistan in 2009 and his family remains in Afghanistan unaccosted or harassed by the Taliban who allegedly have his details and who the claimant believes are after him to kill him as evidence in apart from the copy letter allegedly by the Taliban produced at the Curtin hearing. However, the Reviewer has to assess whether he has a well founded fear of persecution for a Convention reason now and into the reasonably foreseeable future." [CB 447 – 448A]

8. The Reviewer also dealt with the applicant's claim about his photo being seen in Jaghori. He noted that no copy of the photo had been produced and concluded that because of the applicant's lack of credibility that his assertion of others seeing him in the Darwin demonstration in Afghanistan was nothing more than a self serving statement to give effect to a *sur place* claim. He also dealt with an interview with a Hazara representative in Australia in February 2011:

> *"However, the Reviewer does not place much weight on the interview with an advocate and representative for the Hazara cause as not presenting an unbiased or objective view in the circumstances. As well much of what the claimant maintains in this regard especially about the Taliban and supporters in his local area is mere conjecture and supposition."* [94] [CB 454]

9. On 2 June 2011 the applicant filed an application with this court seeking review of a decision of the second respondent. On 7 October 2011 an amended application was filed. There were two grounds to that application but only the second ground was proceeded with. This is:

> "2. The second respondent (the reviewer) did not afford procedural fairness to the applicant for reasonable apprehension of bias.
>
> Particulars
>
> - The reviewer used a repeated formula or template for his recommendation;
> - The formula or template was applied inflexibly by the reviewer in relation to this review of the applicant's claims and the claims of several other IMR applicants;

- The IMR reviewer had used the same formula or template as a precedent for recommendations in relation to other IMR applications prior to the applicant's IMR's advisor's submissions."

The applicant also sought an extension of time in respect of the filing of the application. He was twenty-one days outside the thirty-five day time limit set by s.477 of the Act**.** The applicant claimed that it had been very difficult for him in detention to obtain the necessary assistance to allow him to make this application. This is quite understandable and given the relatively short delay I am minded to order that the applicant's time for filing an application under s.476 of the Act be extended until 2 June 2011.

10. It will be seen that the sole ground of review is constituted by the use of template paragraphs in a manner that would cause a fair minded and informed person to reasonably apprehend that the Reviewer might not have brought an impartial mind to bear on the decision; *NADH of 2001 v Minister for Immigration* [2004] FCAFC 328; [2005] 214 ALR 264 at [14]. The Full Bench described the apprehension at [17] as not of the fact or likelihood of a lack of impartiality but of a possibility (real and not remote) thereof. The applicant brought evidence of a substantial number of other decisions of this Reviewer in which the template paragraphs have been used. These are in the form of both annexures and exhibits. An analysis of these documents done in chambers reveals the following:

A Summary

All of the reasons of the second respondent are divided into five broad sections: 1) Recommendation of the Reviewer; 2) Statement of Reasons; 3) Claims and Evidence; 4) Findings and Reasons; and 5) Recommendation. Of these, the sections respectively entitled Statement of Reasons, Claims and Evidence and Findings and Reasons may be divided further.

B Statement of Reasons

This section is commonly divided into the subheadings: "Details of review request" and "Relevant law". The section is identical in all of the IMRs in evidence.

C Claims and Evidence

The Claims and Evidence section takes the following form in each review of the second respondent (the bracketed numbers correspond to paragraphs in the IMR of *SZQH*I):

An introductory paragraph [10], a summary of the claimant's personal claims [11], a summary of what may be drawn from earlier interviews and assessments [12], the summary of the interview with the Independent Merits Reviewer ([13]-[14]), indications at the interview by the claimant's adviser [15], further submissions made by the Legal Adviser post-interview ([16]-[19]) and Independent Evidence (divided itself into the subheadings: "Country Information", "Hazaras", "Ghazni", "Jaghori District" and "Return of Refugees").

Paragraphs [10-13] have been identified as potential template paragraphs (see table below):

Paragraph [10] commonly states "The reviewer has before him:" and proceeds to list the materials before the reviewer relating to the particular claimant's claims and evidence.

Paragraph [11], commonly begins with the phrase: "*The claimant, in short, claimed he was fearful of being returned to Afghanistan…*". It continues "*…where he would face persecution in the form of serious physical harm and possible death at the hands of non-state agents in Afghanistan based on…*" (see Exhibits ZK-A, ZK-E, ZK-F, Annexures A, B and C). And it commonly concludes with the statement that "*His fear of persecution will be dealt with more fully later in this assessment.*"

Paragraph [12] commonly states, "*From the earlier interviews and assessment in this matter the Reviewer notes*:" and then commonly sets out established evidence in relation to the individual claimant in the following order:

> How and when the claimant entered Australia.
>
> "*The claimant speaks Hazaragi and claims persecution from Afghanistan.*"
>
> Details of entry interview.
>
> Details of interview with an officer of RSA.

Paragraph [13], provides details of the IMR interview including place, date, interpreter's presence, agent's and legal adviser's presence.

Paragraph [14] has been identified in the table as a "unique" paragraph as it contains the claimant's individual evidence, however, it commonly begins with the phrase, "The claimant's evidence may be summarized as follows:"

The section entitled "Independent Evidence" does not contain a single paragraph that does not exist in other IMRs of the second respondent. It should be noted, however, that some of the IMRs in evidence do contain additional paragraphs and some are missing those that are found in the IMR of *SZQH*I.

D Findings and Reasons

The "Findings and Reasons" section does not contain subheadings but a common structure exists in each of the IMRs.

The first nine paragraphs are identical. The first 7 paragraphs relate to the applicants' claims that Hazaras face persecution generally in Afghanistan. The next two paragraphs introduce the particular claims of the applicants.

These nine paragraphs are followed firstly by a paragraph that again summarises the particular claims. It is followed by a paragraph which summarises the claimant's life (marital status, age, origins, why the claimant left Afghanistan and life since leaving). This is followed by a paragraph dealing with the claimant's statutory declaration.

After further summarising, the reviewer contemplates those countries that the applicant has been to after leaving Afghanistan and whether rights of return exist. He then states "*I will assess his claims against Afghanistan as his country of nationality*".

The paragraph following this statement [70] generally deals with the claimants' fear of the Taliban. However, in SZQHI's case, the conclusion is made:

> *"Indeed, the Reviewer does not accept that the Taliban are interested in the claimant as alleged and his statements that he is a marked man by the Taliban as evidenced in the alleged letter from the Taliban and the letter from the village elders dated in January 2011 are self serving fabrications in the circumstances. The Reviewer is not satisfied that the claimant was a witness of truth and I am satisfied that he has fabricated and embellished his position and situation as he has gone along in this process and he is not averse to telling untruths to better his position for asylum. It is clear from the material before the Reviewer that the claimant was* [particular to claimants untruthfulness] … *Although he had ample opportunity and was invited and asked by the interviewees if he had any more to say or add during the process as recorded, he continually said no and [particular circumstances not brought up prior] although given many opportunities to do so "*

The other IMRs do not universally include a conclusive statement at this point (except Exhibit ZK-F, Annexure A and Annexure C). Annexure C includes the similar phrasing:

> *"…Indeed, the Reviewer does not accept that the Taliban are interested in the claimant as alleged and his statements that he was told by his fellow villagers in Pakistan that they were are* [sic] *self serving fabrications in the circumstances. The Reviewer is not satisfied that the claimant was a witness of truth and I am satisfied that he has fabricated and embellished his position and situation as he has gone along in this process and he is not averse to telling untruths to better his position for asylum. It is clear from the material before the Reviewer that the claimant was* [particular to claimants untruthfulness] … *Although he had ample opportunity and was invited and asked by the interviewees if he had any more to say or add during the process*

as recorded, he continually said no and [particular circumstances not brought up prior] *although again he had ample opportunities to do so."*

Without citing it at length, the same phrasing of reasons appears in exhibit ZK-F.

The next three paragraphs deal with the law on credibility. They are identical in each of the IMRs.

Paragraph [74] is nearly identical to that in exhibit ZK-F and also Annexure C. It reads:

"*In this instance there were significant inconsistencies and the emergence of substantial new information during the RSA process and at the hearing of this matter in* [place of interview] *which caused the Reviewer concern. It was not just a question of vagueness or inconsistencies in recounting peripheral details* [other reviews extend here depending on claim]. *Having heard the claimant's evidence at the hearing* [some say interview] *and his explanations the Reviewer was not satisfied that these difficulties are reasonably explicable or without significance for the substance of his account. The Reviewer did not find the claimant to be a satisfactory witness in this regard.*"

It is noted that in other IMRs, the claimants were found to be reliable, or partly reliable in the equivalent paragraphs to [74].

After this section on credibility, which in SZQHI's IMR extends to paragraph [78] (in which some parts of the claimant's story are accepted), come seven identical paragraphs summarising Australian law. In summary they deal with the concept of well-founded fear as interpreted in Australia, including a discussion of its dual subjective and objective nature (*Chan*). They also deal with the concept of persecution in Australian law.

The Reviewer then deals with the particular claims in one paragraph [87]. Although dealing with particular claims, the paragraph has features common to other IMRs (Annexure A and C, Exhibits ZK-F in particular).

It begins:

"*The reviewer notes that the claimant stated* [then claims of prior incidents with Taliban/persecutors]."

This introductory phrase is common to all the IMRs on the record. And continues:

"*The claimant also relies on general reported happenings and incidents in Afghanistan by the Taliban as indicating, in part, that he believes that he as a Shia and Hazara who allegedly* [particular claims related to Taliban: is being sought/ escaped from the Taliban etc.] *would be a target for the Taliban and as such he would suffer severe harm and persecution from the Taliban if he were to return to Afghanistan [note lack of full stop common to SZQHI,*

Annexure A, Annexure C] The adviser also referred to a number of RRT decisions in support of the claimant's claims for asylum, however, the Reviewer finds that those cases were decided on their own facts and circumstances. The Reviewer does not accept in the circumstances of this case that there is a real chance that the claimant whose family remains in Afghanistan [without incident /or contact] *with the Taliban would suffer persecution now or in the foreseeable future for a Convention reason. Indeed I do not accept that the Taliban are personally interested in him as alleged and claimed and for the reasons put forward by the claimant. As well, the harm claimed does not appear to differ in some degree from the generalized type of violence that is reported from time to time in Afghanistan.*"

Note: Annexure B is quite different, where the applicant had not claimed former involvement with the Taliban. Exhibit ZK-F does not include the claims made by an adviser in relation to RRT decisions. Exhibit ZK-E is also quite different but includes some of the common phrases. Exhibit ZK-A is again quite different but the paragraph is identifiable (see para 77). ZK-B has three paragraphs dealing with this issue and few similarities to the SZQHI IMR. ZK-C is also markedly different.

This section is followed by two paragraphs that feature identically in the other IMRs [88 and 89]. They respectively deal with prior persecution of Hazaras by the Taliban generally, continuing fear and with the fact that a general lack of safety in Afghanistan does not support a claim for refugee status. (Note some IMRs expand upon paragraph [89] which in the SZQHI decision is only one sentence)

The next paragraph [90] includes the Reviewer's overall finding. It commonly states:

"*Overall, based on all the information available to me including the available evidence about his* [and his family's] *experiences and the fact that it was* [person's] *decision to leave Afghanistan to seek protection in Australia, I am not satisfied that the claimant has a well-founded fear of persecution* [recounts individual claims] *now or in the reasonably foreseeable future. Indeed, given the circumstances of this case, the claimant may have been affected in part by the incidents of an armed insurgency in terms of general insecurity and hardships, but this does not amount separately or cumulatively to a well-founded fear of persecution for a Convention reason. It is accepted that the Convention definition does not generally encompass those fleeing generalized violence, internal turmoil or civil war (see MIMA v Haji Ibrahim (2000) 204 CLR 1 at 141). Further, as noted by Professor Hathaway, a person affected by generalized phenomena is not ordinarily entitled to protection on that basis alone. In his well known tome, The Law of Refugee Status, 1991, Professor Hathaway records that" ….refugee law is concerned only with protection from serious harm tied to a claimant's civil or political status, persons who fear harm as the result of a non-selective phenomenon are excluded. Those impacted by natural calamities, weak economies, civil unrest, war and even generalized failure to adhere to basic standards of human rights are not ,therefore, entitled to refugee status on that basis alone". (p93)*

This is followed by an identical paragraph dealing with the UNHCR Handbook.

Paragraphs [92] and [93] contain the Reviewer's reasons in relation to the applicant's claim that he will be persecuted as a returnee from a Western country. Paragraph [92] is repeated in near identical from in Annexure "A" at (87) Annexure "C" at (88) and a similar paragraph appears in Exhibit "ZK-A" at (82), in "ZK-B" at (85) and in Annexure "B" at (75). Indeed, apart from the introductory sentence, the paragraphs are nearly identical. The first sentence only varies in accordance with who made the claim, be it the adviser, the applicant or both. The remainder of paragraph [92] dismisses this claim through reference to independent evidence. However, paragraph [92] is also different to other decisions in that reference is made to letters that the applicant had submitted as evidence to support his claim. It states "*The Reviewer does not accept that the claimant would face a real chance of persecution for that* reason **even though he has furnished copies of letters allegedly from the Taliban and his village elders sent to him by email**." Whereas, other reviews on the record do not include this statement or replace it with evidence submitted by the applicant concerned. Likewise, in the following sentence, the Reviewer states "*As well, the Reviewer does not accept that the claimant would be readily identified as a person returning from a Western country or* ***that he had converted to Christianity or developed anti-Islamic ways from people around him in Australia*** *without more than his assertion of this especially given the porous borders and what appears to be a mobile workforce from Afghanistan travelling to and from neighbouring and other countries.*" [Only the sections highlighted in bold above do not appear in other reviews on the record.]

Paragraph [93] features identically in other reviews.

Paragraph [94] deals with the applicant's participation in protests at his detention centre in Darwin. A similar claim is dealt with in "ZK-B", "ZK-C", "ZK-D" and "ZK-F" in the paragraphs that follow on from those corresponding to paragraph [93] (of SZQHI's IMR decision). Although the individual claims are referred to, the conclusion to this paragraph is identical to that in "ZK-F", "ZK-C" and "ZK-D" and also in "ZK-B" (with the exception of an orthographical correction [the addition of a comma after the words '*In the circumstances*']). It reads:

> "…*In the circumstances the Reviewer was not satisfied without evidence to the contrary that material that appeared in the Media in Australia has been produced so pervasively in Afghanistan that local district Taliban* **who interacted with the claimant's family by producing the alleged letter calling for the death of the claimant and that of the village elders has it in their hands.** Indeed, it is highly improbable and implausible that the Taliban (locally or otherwise) would be able to identify the claimant from such footage **without more given his reported incidents with the Taliban involving him before he left and came to Australia.** *The Reviewer is satisfied that given the circumstances of this case that any participation by the claimant in the Darwin demonstration will not give rise to a real chance of serious harm in the reasonably foreseeable future. The issue of persecution on the basis of*

being in Australia and having sought asylum has already been addressed." [Again the emboldened sections are particular to SZQHI's IMR decision]

Paragraph [95], like paragraph [90] above, gives an overall conclusion to the reasons. It has features similar to all other decisions on the record.

Paragraph [96] details the Reviewer's finding.

Paragraph [97] details the Reviewer's recommendation, it is identical in each of the reviews."

	Recommendation of the Reviewer/ Recommendation (total number)	Details of review request/ Relevant law (total number)	Claims and Evidence (interview/submission by legal adviser/Independent evidence etc.) (total number)	Findings and Reasons (total number)
Paragraphs which appear identically in other IMRs (some with changed names, place names and dates) (69 of 97 paras):	1-2, **97** (3)	**3-9** (7)	**20-53** (34)	**54-62**, **71-73**, **79-86**, **88**, **89**, **91**, 92, **93** (24)
Paragraphs that appear to be templates (same structure and introductory or concluding statements). (14 of 97)			10-13 (4)	63, 64, 69, 70, 78, 87, 90, , 94 (due to later review including protest claim), 95 (very similar, western spy), 96. (11)

Unique Paragraphs (14 of 97)			14-19 relating to the claimant's evidence and submissions. (6)	65-68, 74-77 (8)

Note: Emboldened paragraphs represent those that are replicated identically. Numbers in brackets are total numbers of paragraphs.

11. Can it be said that these similarities and use of template paragraphs allows for the apprehension of a predisposition of the Reviewer towards a result other than a result reached by an evaluation of the material before him in a fair way with a mind that was open to persuasion in favour of the person in question? *NADH* supra. This must be looked at in the context of existing decisions on similar circumstances.

12. In *Lek v Minister for Immigration & Anor* [1993] 43 FCR 100 Wilcox J dealt with an application for judicial review of decisions of delegates of the Minister who made a series of decisions relating to applications for refugee status of 52 Cambodian boat arrivals. It is important to remember that this decision was made under the legislation then existing, although it did have some similarities with the current system in use for offshore arrivals. The applications for review were brought under s.5 of the *Administrative Decisions (Judicial Review) Act 1977*[3] and not under the Migration Act. One of the grounds of review was that:

> "The decisions to refuse refugee status were made pursuant to a rule or policy of refusing all applications regardless of merit. The rule or policy was manifested by the creation of standard paragraphs intended to facilitate rejection of particular convention claims." [at 118.2]

13. Evidence had been brought of the way in which the delegates were instructed to prepare their reports including the provision to them of standard template paragraphs and an analysis of their use had been done by the solicitors for the applicants. Some standard paragraphs were used in many of the decisions. Wilcox J discusses these at [121 – 122] before saying:

> "I agree with Counsel that the use by decision makers of reasons devised by others is a matter that should excite concern about the possibility that individual decisions were taken in accordance with an overriding rule or policy or at the direction or

[3] "ADJR Act"

> behest of others but if an inference is to be drawn from standard provisions it is not enough to point to mere use. It is necessary to consider the content of the adopted provisions. The standard provisions widely used in this case are either statements of law or summaries of the substance of documentary material concerning conditions in Cambodia. The full documentary material was before each delegate. He or she have to decide whether or not to accept it. It seems to me that delegates who chose to accept that material could adopt already formulated summaries of its relevant content without exposing themselves to the reproach of having surrendered their independence of judgment. It is significant that Ms Kikirekova's analysis does not suggest that the delegates relied on standard paragraphs in connection with claims relating to applicant's personal experience or circumstances. It was by reference to these factors that the few who were granted refugee status achieved success."

14. *Huluba v Minister for Immigration & Anor* [1995] 59 FCR 518 was another decision under the ADJR Act by Beazley J as she then was. In that case the department had provided the applicant with an internal review of the initial decision but it was alleged that the second decision maker had not applied an independent mind to the review but merely repeated the assessment of the first delegate. At page 525 her Honour set out a series of passages from both reports which continued to page 527. At page 529 her Honour noted that procedural fairness required a decision maker to apply an independent mind to the application but was entitled to have regard to the research and investigations carried out by others as well as to assessments and reports and recommendations prepared by others in the course of the administrative process:

> "A decision-maker may have regard to and adopt, if thought appropriate, the reasoning of some other person involved in the administrative process. Thus a decision-maker could accept the reasoning of an officer whose function it had been to provide a recommendation and could adopt verbatim, such report or recommendation, provided at all times that the decision was the independent decision of the decision-maker. This case is different. The second decision-maker's task was to make a new determination. In doing so there would have been no breach of the rules of procedural fairness for the second decision-maker to read and consider the findings of the first decision-maker. However, procedural fairness required that she reach an independent decision in the matter.
>
> It is obvious from the passages set out above that the second decision-maker used substantial portions of the report of the first decision-maker. The coincidence of the language makes any other conclusion improbable. Those passages contain critical findings. The question arises, therefore, whether this coincidence of language demonstrates a failure by the second decision-maker to bring an independent mind to the determination of the application."

Her Honour distinguished *Lek* on the basis that in the case before her:

> "The second decision-maker used material from the first decision-maker's report which was specific to the applicant. They contained the decision-maker's findings as to whether the applicant's alleged activities were presently grounds for persecution in Romania and as to the applicant's credibility, both critical factors in the decision of both decision-makers."

Her Honour concluded that by adopting the reasoning of another without applying an independent mind to the matter a breach of procedural fairness had occurred.

15. In *Wu Shan Liang v Minister for Immigration & Anor* [1994] FCA 926 Wilcox J again considered the effect of the use of standard paragraphs. He also analysed those claims over several pages looking at the manner in which several of the delegates dealt with a batch of claims all represented by the same agents before concluding at [52]:

> "The summary I have set out demonstrates, I think, that none of the so-called "standard paragraphs" concerns assessment of the circumstances of individual applicants. Indeed, little of the adopted material contains expressions of personal opinion. In the cases where personal opinions are expressed, other delegates have chosen not to adopt the material. It is obvious that delegates felt free to choose whether or not to adopt the previously-prepared material. Where they did adopt it, they seem to have been ready to vary its basic form so as to make it more accurately reflect their own views. Despite the concern which the use of "standard paragraphs" should always evoke, I see no reason to doubt that the delegates who refused the subject applications ultimately expressed their own views in their own way."

16. *Lek*, *Huluba* and *Wu Shan Liang* are all cases where it was being said that use of identical material indicated that the decision maker did not bring an independent mind to the decision making process and in all of them the decision turned upon whether the templates were used in respect of the applicant's particular claims as opposed to their use to describe general country information or legal principles in migration matters. In *Chu v Minister for Immigration & Anor* [1997] 78 FCR 314 the Full Bench Carr, Kiefel and Sundberg JJ considered a case in which an allegation of apprehended bias was raised arising out of the use of similar paragraphs. This is the nature of the claim in the instant case. At [p.338] the court opined:

> "The delegate in the present case was obliged to accord procedural fairness to the appellant. Accordingly, she would be disqualified from deciding his claim if the

> Court thought that, in all the circumstances, a fair-minded observer might have a reasonable apprehension that the delegate would or might not bring an impartial and unprejudiced mind to the question to be decided. One of the circumstances for the Court to take into account is that the decision-making process is not held in public — a factor that may increase the likelihood of apprehension. Another is that the process in which the delegate is engaged is administrative, and that the standard which a fair-minded observer will expect of a delegate discharging an administrative function may not be as high as that expected of, say, a judge or a formally constituted tribunal such as the Broadcasting Tribunal or the Industrial Relations Commission.
>
> The primary judge's conclusion that there was a reasonable apprehension of bias was based on the cumulative effect of the four considerations we have mentioned. As to the first, the mere coincidence of language between the reports adopted by a second and first decision-maker would not in our view of itself lead a fair-minded observer to entertain a reasonable apprehension that the second decision-maker might not have brought an impartial and unprejudiced mind to the matter. Though he did not put it in quite this way, his Honour seems to have been of this opinion. What appears to have caused him to have concluded that the high coincidence of language between the 1992 Departmental report and the 1994 Departmental report was significant was that the reference in the former report to 16 years having elapsed since the appellant's last conviction had not been converted to 18 years in the latter report. This his Honour described as "supportive of an inference being drawn from the identity of language in this case because it demonstrates a lack of proper consideration". The person who prepared the 1994 Departmental report was careless in not adjusting the number of years from 16 to 18. But we do not regard that lapse as suggesting the appearance of bias on the part of the delegate, or as suggesting that a fair-minded observer might reasonably have apprehended that the delegate may not have brought an impartial and unprejudiced mind to the task before her. It is to be noted that his Honour did not conclude that it was. Rather he said that the identity of language coupled with the oversight justified the inference that the delegate did not apply an independent mind to the decision-making process. That is a different issue from the apprehended bias question."

The Full Bench also noted that the appellant could derive no assistance on the apprehended bias issue from *Huluba*.

17. *WAFK v Minister for Immigration & Anor* [2003] 133 FCR 209 was another case in which it was alleged that because the findings of a second Tribunal followed a formula or common formula that could be traced in earlier decisions the Tribunal had failed to apply itself to the appellant's particular circumstances. French J considering that claim stated at [38]:

> "The coincidence in the text, so far as it related to independent country information, does not support the inference that the Tribunal took its text from the particular

earlier Tribunal decisions which were referred to by counsel. It may be that in similar cases, eg, cases involving persons of Arab ethnicity coming from Iran, there will be a good deal of commonality in the independent country information referred to by various tribunals and that similar citations will be made. It may be the case that Tribunal members are using similar surveys of relevant country information in similar cases and adopting a "cut and paste" technique to incorporate those in their judgments. This does not, in my opinion, demonstrate, as a matter of fact, that a tribunal so doing fails to consider the country information for itself. In the case under appeal I do not consider that, even if a cut and paste technique were adopted, as seems likely, that this is indicative of a failure by the Tribunal to carry out its statutory function. No doubt it could be said that at [96] of its reasons the Tribunal goes beyond the mere recitation of independent country information to a conclusionary statement which is word for word the same as a conclusionary statement made in another Tribunal decision involving a person of Arab ethnicity from Iran. While I think it would be preferable for Tribunal members in drafting their reasons to express their conclusions in their own words rather than those of another decision by another member, failure to do so does not indicate that the Tribunal member has not applied his or her mind to the facts or that the Tribunal member does not in fact hold the view expressed in the reasons given."

18. Federal Magistrate Smith followed the views of French J in *WAFK* in *S1527 of 2003 v Minister for Immigration & Anor* [2005] FMCA 1846. Whilst he found that significant copying had happened he:

> "…would not use that word with any disparaging or critical connotations. Comparing the three sets of reasons, it is clear that the first two shared or provided "template" decisions which the present member has used. This included the adoption by the present member of the wording of some significant general findings about relevant country information in both sections of the Tribunal's reasons. [16]
>
> …
>
> "That there was adoption of general findings on country information should not be surprising. The courts for many years have been aware that Tribunal members often adopt and apply a "boiler plate" analysis of the relevant law. This has not, of itself, provided ground for judicial review." [17]

19. His Honour at [18] made reference to the High Court decision in *Wu Shan Liang* [1996] 185 CLR 259 at [266] per Brennan CJ, Toohey, McHugh and Gummow JJ:

> "A statement of reasons for a decision reviewable under the AD(JR) Act is not invalid merely because it employs a verbal formula that is routinely used by persons making similar decisions. If the formula is used to guide the steps in making the decision and reveals no legal error, the use of the formula will not invalidate the decision. On the other hand, if a decision-maker uses the formula to cloak the

decision with the appearance of conformity with the law when the decision is infected by one of the grounds of invalidity prescribed by the Act, the incantation of the formula will not save the decision from invalidity. In such a case, the use of the formula may even be evidence of an actionable abuse of power by the decision-maker."

At [20] his Honour delivered his findings:

"I consider that the adoption by a Tribunal member of phrases taken from previous Tribunal decisions, whether written by a different member or by himself or herself, cannot of itself amount to jurisdictional error. Jurisdictional error might be found where the adoption of findings appears to the court to have led to a failure by the member constituting the Tribunal to address the particular review with an unbiased and open mind, or a failure actually to perform the Tribunal's review duty in relation to the particular application for review which is required by http://www.austlii.edu.au/au/legis/cth/consol_act/ma1958118/s414.htmlss.414 and 415 of the Migration Act. However, even the adoption of text which makes findings specific to the credibility of an individual applicant might not suggest a failure to exercise jurisdiction. As French J said in WAFK v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCA 1293:

> [52] It appears clear that the Tribunal has borrowed from the text of earlier Tribunal decisions or from some common source which is used in cases of this kind. While each case must turn upon its own circumstances, I am not satisfied that the mere fact of the use of common form text in relation to statements of general principle, general conclusions about country information and even findings of credibility in similar cases is necessarily indicative of jurisdictional error. It is, of course, in the latter area, that is to say findings of credibility in the particular case, that the Tribunal should be at pains to make it clear that it has given careful consideration to the detail of the application which it is required by the Act to review. I do not consider that resort by the Tribunal to common form texts for the purpose of findings of credibility in respect of a particular applicant is desirable. However, in this case the use of that text was sufficiently modified by reference to the particular circumstances of the appellant's claims to indicate that the Tribunal was giving consideration to the appellant's case."

20. The claims made against the Reviewer in the instant case were considered by Driver FM in *SZQHH v Minister for Immigration & Anor* [2011] FMCA 740. His Honour's reasoning and finding as to the apprehended bias claim is set out in full below:

> [80] As in *Wu Shan Liang*, *Chu*, *WAFK*, *Lek* and *SZQEL* the applicant's complaint, to the extent that it is based on the use of common language in the reasons concerning country information and in its statements concerning the applicable law, does not indicate that the reviewer has not considered the country

information for himself or failed to consider the applicant's individual circumstances. As Smith FM observed in *Alami v Minister for Immigration & Anor* [2011] FMCA 623 at [31], there is no serious doubt that the Reviewer's "report might not genuinely record his own careful and thorough consideration of [the applicant's] claims in the light of relevant country information, nor that it might not provide his own carefully considered reasons for the recommendation he made to the Minister and his Department."

[81] However, the complaint here extends to the detail of the reasoning process itself. It might be argued that a reviewer is entitled to apply a template decision to a template claim by an applicant. Hazara Shias commonly claim a well-founded fear of persecution as a class claim, namely that by reason simply of their ethnicity and religion, they should be recognised as refugees. This draws upon the history of the Hazara minority in Afghanistan and the continuing threat posed by the Taliban and the broader Pashtun population. Given the history of the Hazara minority, such a claim cannot and should not be lightly dismissed. While a template claim, it was part of this applicant's claims and needed to be considered. It is a concern that the consideration given to that claim by the Reviewer was in identical terms to the consideration of the template claims by earlier Hazara applicants dealt with by the same Reviewer. This is particularly so in circumstances where the applicant's advisor had made detailed submissions bearing on this aspect of the applicant's claims.

[82] Further, the elimination of the template claim that the applicant should be recognised as a refugee because of his ethnicity and religion may have infected the Reviewer's consideration of the applicant's particular circumstances. In concluding at [58] in identical terms to the previous decisions that the Reviewer did not accept that the Taliban specifically targets Hazaras or Shias differentially from the population at large and that he was not satisfied that Hazaras face a real chance of harm amounting to persecution by non state actors (Pashtuns in general and the Taliban in particular) simply by reason of their ethnicity and religion, the Reviewer placed a heavy onus on the applicant to satisfy him that his particular circumstances gave rise to a well-founded fear of persecution (which in order to have a Convention nexus in his case must be linked to his ethnicity or religion) and which, in order to satisfy the requirements of s.91R of the Migration Act, must be systematic. Plainly, if a reviewer excludes the possibility of a well-founded fear of harm of the class of Hazara Shia applicants by reason of their ethnicity and religion, it is very difficult for an individual applicant to establish such a fear based upon systematic persecution. It is difficult to argue why the Taliban and Pashtuns would target individuals systematically by references to their ethnicity or religion if they do not target the ethnic and religious class to whom an applicant belongs systematically. It may reasonably be argued, therefore, that the Reviewer's approach to the determination of the generic claim pre-determined the outcome of the specific claims of the applicant.

> [83] The Reviewer's approach to the generic claim was so apparently inflexible or mechanical that a fair-minded and informed person might reasonably apprehend that the Reviewer might not have brought an impartial mind to bear on the decision: *NADH of 2001 v Minister for Immigration* [2004] FCAFC 328; 214 ALR 264 at [14]. The apprehension itself is not of the fact or likelihood of a lack of impartiality, but of a possibility (real and not remote) thereof: *NADH* at [17]."

21. I think there is much force in the argument put by Driver FM as to the attitude that might be taken by a fair minded observer. But that is not the full test. The observer is not only to be fair minded but to be informed; *Webb v The Queen* [1994] 181 CLR 41 per Dean J at [76]. "Informed" in this context means being aware of the structures under which decisions of this nature are made including the fact that there exists a very large amount of independent country information which is referred to in similar terms by advocates acting on behalf of asylum seekers. The observer will be informed that this information will have been read by the Reviewers together with other information provided to them by the department and from their own researches. The generic claims being made by these applicants are just that; "generic". They are not claims arising out of their particular circumstances. I cannot see any vice in Reviewers both setting out those claims and their refutation of them in standard form and I do not think, contrary to the views expressed by Driver FM, for whom I have the greatest respect, that doing this infects the way in which the informed observer would view the Reviewer's decision making in regard to the particular claims. I believe that the view is one that has the support of the authorities rehearsed above.

22. On the other hand I do not feel similarly sanguine about the way in which the observer would view the treatment of the particular claims. The decision upon them is made in one paragraph [87] [CB 450]:

> "*[87] The Reviewer notes that the claimant stated he had been involved in 2 incidents with the Taliban since being deported back to Afghanistan from the UK for being Hazara/Shia. The claimant expresses a fear of the Taliban who want to kill him for being Hazara/Shia, for being suspected of supporting the Americans and denying him the right and capacity to earn a livelihood. The claimant also relies on general reported happenings and incidents in Afghanistan by the Taliban as indicating, in part, that he believes that he as a Shia and Hazara who allegedly is being sought by the Taliban who have his details as reflected in the alleged letter given to his mother by the Taliban and*

> *that he would be a target for the Taliban and as such he would suffer severe harm and persecution from the Taliban if he were to return to Afghanistan. The adviser also referred to a number of RRT decisions in support of the claimant's claims for asylum, however, the Reviewer finds that those cases were decided on their own facts and circumstances. The Reviewer does not accept in the circumstances of this case that there is a real chance that the claimant whose family remains in Afghanistan without incident with the Taliban would suffer persecution now or in the foreseeable future for a Convention reason. Indeed, I do not accept that the Taliban are personally interested in him as alleged and claimed and for the reasons put forward by the claimant. As well, the harm claimed does not appear to differ in some degree from the generalized type of violence that is reported from time to time in Afghanistan."*

23. That paragraph has been shown in the analysis to be very similar to paragraphs in other decisions where only the different factual circumstances have been inserted. In other words the decision upon those facts is in all cases identical even though the facts are different. That to my mind does raise the apprehension that the Reviewer has not brought an impartial mind to the process to the process (see *Re Refugee Review Tribunal; Ex parte* H (2001) 179 ALR 425 at [27], *NADH of 2001 v Minister for Immigration* (2005) 214 ALR 264) and raises the apprehension that he wishes to fit this applicant into the template he has previously prepared. That this may not be case is not to the point. As the Full Bench said in *Chu*:

> "One of the circumstances for the court to take into account is that the decision making process is not held in public – a factor that may increase the likelihood of apprehension." [At 338C]

24. I acknowledge that at [74 – 77], see [7] of these reasons, the Reviewer makes some important and unique findings in relation to the credibility of the applicant. But in the way in which the reasons are structured those findings do not appear to be tied into the substantive finding at [87]. In [87] he makes reference to the two incidents which it is reasonably clear from [74 – 77] he does not believe occurred but he does not say so and this raises the impression, even in the mind of an informed observer, that the Reviewer was more intent on fitting the case into the pre-existing template than ensuring comprehensible reasoning. That would indicate a predisposition to a particular outcome and exhibit the symptoms of jurisdictional error.

25. Whilst it has been necessary to look at the Reviewer's decision in some detail and to compare it critically with the other decisions tendered, this has not been done with a mind attuned to the establishment of error. I am of the view that the applicant has made out his case, that this decision record, when compared with others handed down by this Reviewer, would lead the fair minded informed lay observer to the view that the Reviewer might not bring an impartial and unprejudiced mind to the question to be decided. I shall therefore make the declarations sought by the applicant and order that the First Respondent pay the Applicant's costs assessed in the sum of $6,240.00.

I certify that the preceding twenty-five (25) paragraphs are a true copy of the reasons for judgment of Raphael FM

Date: 9 February 2012