FEDERAL COURT OF AUSTRALIA

Minister for Immigration and Citizenship v SZQHH

[2012] FCAFC 45

Citation:	Minister for Immigration and Citizenship v SZQHH [2012] FCAFC 45
Appeal from:	SZQHH v Minister for Immigration & Anor [2011] FMCA 740
Parties:	**MINISTER FOR IMMIGRATION AND CITIZENSHIP v SZQHH and STEVE KARAS IN HIS CAPACITY AS INDEPENDENT MERITS REVIEWER**
File number:	NSD 2325 of 2011
Judges:	**RARES, FLICK AND JAGOT JJ**
Date of judgment:	27 March 2012
Corrigendum	2 April 2012
Catchwords:	**MIGRATION** – appeal from decision of Federal Magistrates Court by the Minister – whether independent merits reviewer failed to disclose material relevant to the respondent's claim such that it constituted a breach of procedural fairness – whether apprehension of bias on part of reviewer – where reasons for decision followed a template used for several generic claims – appeal allowed
Legislation:	*Migration Act 1958* (Cth) s 46A *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 *Protocol relating to the Status of Refugees*, entered into force 4 October 1967, 606 UNTS 267
Cases cited:	*Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88; [2005] HCA 72 affirmed *British American Tobacco Australia Services Limited v Laurie* [2011] HCA 2, 242 CLR 283 cited *Drake and Minister for Immigration and Ethnic Affairs (No 2), Re* (1979) 2 ALD 634 cited *Dunghutti Elders Council (Aboriginal Corporation) RNTBC v Registrar of Aboriginal and Torres Strait Islander Corporations* [2011] FCA 370, 279 ALR 138

cited
Dunghutti Elders Council (Aboriginal Corporation) RNTBC v Registrar of Aboriginal and Torres Strait Islander Corporations [2011] FCAFC 88, 195 FCR 318 cited
Ebner v Official Trustee in Bankruptcy [2000] HCA 63, 205 CLR 337 cited
Huluba v Minister for Immigration and Ethnic Affairs (1995) 59 FCR 518 considered
J.R.L., Re, Ex parte C.J.L. (1986) 161 CLR 342
Johnson v Johnson [2000] HCA 48, 201 CLR 488 cited
Jones v Australian Competition and Consumer Commission [2002] FCA 1054, 76 ALD 424 cited
Karina Fisheries Pty Ltd v Evans (unreported, FCA, Forster J, 1 July 1988) cited
Kioa v West (1985) 159 CLR 550 considered
Lek v Minister for Immigration, Local Government and Ethnic Affairs (1993) 43 FCR 100 considered
McVeigh v Willarra Pty Ltd (1984) 6 FCR 587 cited
Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24 referred to
Minister for Immigration and Citizenship v Kumar (2009) 238 CLR 448; [2009] HCA 10 referred to
Minister for Immigration and Citizenship v Maman [2012] FCAFC 13 cited
Minister for Immigration and Multicultural Affairs v Jia Legeng (2001) 205 CLR 507; [2001] HCA 17 affirmed
NADH of 2001 v Minister for Immigration and Multicultural and Indigenous Affairs (2004) 214 ALR 264; [2004] FCAFC 328 affirmed
Nevistic v Minister for Immigration and Ethnic Affairs (1981) 51 FLR 325 considered
Plaintiff M61/2010E v Commonwealth (2010) 243 CLR 319; [2010] HCA 41 affirmed
R v The Commonwealth Conciliation and Arbitration Commission; Ex parte The Angliss Group (1969) 122 CLR 546 cited
Re JRL; Ex parte CJL (1986) 161 CLR 342 referred to
Re Refugee Review Tribunal; Ex parte H (2001) 179 ALR 425; [2001] HCA 28 affirmed
Reece v Webber [2011] FCAFC 33, 192 FCR 254 cited
Saeed v Minister for Immigration and Citizenship (2010) 241 CLR 252; [2010] HCA 23 referred to
Secretary of the Department of Veterans' Affairs v Studdert [2001] FCA 1642 cited
Stollery v Greyhound Racing Control Board (1972) 128 CLR 509 cited
SZBEL v Minister for Immigration (2006) 228 CLR 152; [2006] HCA 63 affirmed
SZJTQ v Minsiter for Immigration and Citizenship (2008)

	172 FCR 563; [2008] FCA 1938 referred to *SZNRZ v Minister for Immigration and Citizenship* [2010] FCA 107 cited *SZQHH v Minister for Immigration* [2011] FMCA 740 affirmed *The Queen v Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group* (1969) 122 CLR 546 affirmed
Date of hearing:	29 February 2012
Place:	Sydney
Division:	GENERAL DIVISION
Category:	Catchwords
Number of paragraphs:	103
Counsel for the Appellant:	Mr G Johnson SC
Solicitor for the Appellant:	Australian Government Solicitor
Counsel for the First Respondent:	Mr J Gormly
Solicitor for the First Respondent:	Koutzoumis Lawyers

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CORRIGENDUM

1. This judgment was published with the incorrect citation: 'SZQHH v Minister for Immigration and Citizenship [2012] FCAFC 45'. The citation should be 'Minister for Immigration and Citizenship v SZQHH [2012] FCAFC 45'. The cover page has been amended to show the correct citation and MNC.

2. This judgment was published with ‘Mr J Gormly SC’ as the Counsel for the First Respondent. The appearance should be ‘Mr J Gormly’. The cover page has been amended to show the correct appearance.

I certify that the preceding two (2) numbered paragraphs are a true copy of the Corrigendum to the Reasons for Judgment herein of the Honourable Justices Rares, Flick and Jagot.

Associate:

Dated: 2 April 2012

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 2325 of 2011**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	**MINISTER FOR IMMIGRATION AND CITIZENSHIP** **Appellant**
AND:	**SZQHH** **First Respondent**
	STEVE KARAS IN HIS CAPACITY AS INDEPENDENT MERITS REVIEWER **Second Respondent**

JUDGES:	**RARES, FLICK AND JAGOT JJ**
DATE OF ORDER:	**27 MARCH 2012**
WHERE MADE:	**SYDNEY**

THE COURT ORDERS THAT:

1. The appeal be allowed.

2. The orders made by the Federal Magistrates Court on 30 November 2011 be set aside and in lieu thereof it be ordered that:

   (1) the application be dismissed;

   (2) the applicant pay the first respondent's costs.

3. The first respondent pay the appellant's costs.

Note: Entry of orders is dealt with in Rule 39.32 of the Federal Court Rules 2011.

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 2325 of 2011**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	**MINISTER FOR IMMIGRATION AND CITIZENSHIP** **Appellant**
AND:	**SZQHH** **First Respondent**
	STEVE KARAS IN HIS CAPACITY AS INDEPENDENT MERITS REVIEWER **Second Respondent**

JUDGES:	**RARES, FLICK AND JAGOT JJ**
DATE:	**27 MARCH 2012**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

RARES AND JAGOT JJ

1 There are two issues in this appeal from the Federal Magistrates Court. They arise because the trial judge made a declaration that a review undertaken by an independent merits reviewer was procedurally unfair on two grounds. The reviewer considered numerous claims of the applicant for the review, who is the first respondent (**the applicant**), including a claim that Australia owed him protection obligations by reason of his being an Hazara Shia Afghan national. He contended that he had a well founded fear that he would be persecuted if returned to Afghanistan for reasons of his Hazara ethnicity and/or his Shia Muslim religion.

2 The first basis for the trial judge's finding of procedural unfairness was that the reviewer failed to disclose adverse country material in a 2007 article published in the *Christian Science Monitor* (the **CSM article**) that was credible, relevant and significant to consideration of the applicant's claim that, as an Hazara and Shia Muslim, he had a well founded fear of persecution should he be returned to Afghanistan. The second basis for his Honour's finding was that the reviewer dealt with the applicant's claim based on his ethnicity

and religion "in the same terms as in numerous earlier decision[s]" by the same reviewer so as to give rise to an apprehension of bias.

3 The Minister challenges the trial judge's findings for each ground of the declaration his Honour made. First, the Minister contended, the reviewer had put the substance of the CSM article to the applicant during the review process and the applicant had a proper and fair opportunity to deal with that matter. Secondly, the Minister argued that the reviewer was entitled to use generic paragraphs when writing his assessment of the applicant's generic claim based on his ethnicity and religion that had been made on behalf of him and several other persons who had made identical claims. The applicant contended that the trial judge was correct in arriving at his conclusion on both aspects of the declaration he made for the reasons he gave.

BACKGROUND

4 The applicant arrived at Christmas Island by boat in February 2011. He is a citizen of Afghanistan. He was an "off-shore entry person" and "unlawful non-citizen" for the purposes of the *Migration Act 1958* (Cth) (the **Migration Act**) because he arrived without a visa or other legal right to enter Australia at an excised off-shore place, Christmas Island. An unlawful non-citizen cannot make a valid application for a visa by force of s 46A(1). The applicant asserted that Australia had protection obligations to him as a refugee that would entitle him to a protection visa under s 36(2) of the Migration Act, were he permitted to apply for a visa. The Minister has a power to permit a person in the applicant's position to apply for a visa (s 46A(2)). However, that power may only be exercised by the Minister personally and he has no duty to consider any request by a person that he do so (ss 46A(3) and (7)).

5 The Minister decided to consider exercising his power under s 46A(2) to lift the bar preventing the applicant from applying for a visa. The Minister's Department had established an administrative process for the purpose of informing the Minister of matters that were relevant to the decision whether to exercise his statutory power in favour of an off-shore entry person who requested him to do so. The reviewer's assessment and recommendation, considered by the Federal Magistrates Court, were part of a process conducted under those administrative arrangements. That process was described in detail by the High Court in

Plaintiff M61/2010E v Commonwealth (2010) 243 CLR 319; [2010] HCA 41 at 342-345 [38]-[52], 351-352 [73].

6 The applicant was represented during the course of the review by Refugee & Immigration Legal Centre Inc (the **Centre**). Solicitors and migration agents working for the Centre also acted for another 12 Hazara Shia Afghan males seeking protection visas at about the same time as the applicant. The Centre had obtained an expert opinion in support of its clients' claims of the persecution they contended they would face were they returned to Afghanistan. The opinion by Professor William Maley, on the situation of Hazaras in Afghanistan, was written in May 2010. The Centre provided Professor Maley's opinion initially to the Departmental officer conducting the Refugee Status Assessment (**RSA**) in a single email on behalf of all 13 of its clients.

7 Subsequently, following the unsuccessful outcome of his RSA, the applicant sought a review by an independent merits reviewer. This independent merits reviewer was also assigned to conduct reviews of a number of other Hazara Shia Afghans. There was no direct evidence, *first*, if those other persons were clients of the Centre or, *secondly*, whether in all those reviews, including the applicant's, the Centre or those other applicants relied on common material, being Professor Maley's opinion, country information and other generic material relating to the past, present and anticipated future positions of persons of their religion and ethnicity in Afghanistan. However, given the way in which the Centre put its 13 clients' generic claims to the RSA officer, it can be inferred that, in the absence of evidence to the contrary, substantially the same material was relied on for the other nine generic claims considered by the reviewer. The Centre (or those other claimants) also advanced, distinctly and separately, the individual circumstances relating to each of its clients' (or his or her) own cases.

8 Professor Maley's opinion noted that decision-makers assessing claims for refugee status had referred to a report by the Department of Foreign Affairs and Trade of 21 February 2010 entitled "Afghanistan: Situation of the Hazara Minority" (the **DFAT report**). Professor Maley observed that while excellent officials staffed the Australian Embassy in Afghanistan, their ability, and that of a number of other international missions and agencies there, to conduct field research of their own was extremely limited. He suggested that, as a

consequence, there were problems in relying on such sources for an assessment of the general situation confronting Hazaras. He opined that the scale of persecution and abuse of power in Afghanistan tended to be underreported. He also said that it was important to keep in mind that apparent improvements in the present situation in Afghanistan may be neither meaningful nor sustainable.

The DFAT report

9 The DFAT report commenced with the following summary (5/221):

> "**Afghanistan's Hazaras do not live in fear of violence or systemic persecution as they did under Taliban rule. And the current period is perhaps the best in several hundred years for Hazaras in terms of personal and community freedoms, opportunities and human security.** However, they claim to face social, economic and political barriers to upward mobility and community development. The human rights gains Hazaras have experienced in recent years are very real but they wonder if it will continue." (emphasis added)

10 The DFAT report summarised the past persecution of the Hazaras dating from the 17th century when most of the community was driven into an area in the central highlands of Afghanistan described as "Hazarajat". The report noted that during the late 19th century about 60% of the Hazara population had been killed or displaced by a Pashtun ruler. It stated that for brief periods during the succeeding Afghan monarchy and communist regimes the situation of Hazaras improved "… although higher education, foreign service and army service were all closed to them". The report noted that, subsequently, during both the Muhajedin and Taliban regimes, Hazaras experienced persecutory conduct. The DFAT report referred to eligibility guidelines mentioned in a presentation by the senior protection officer of the United Nations High Commissioner for Refugees (**UNHCR**) in December 2009. The presentation stated that belonging to a minority ethnicity was not, then, currently a major cause of flight from Afghanistan. The UNHCR had said that there was no evidence of a campaign by the insurgency to target Hazaras, although it noted that there were some acrimonious incidents. The DFAT report noted that the UNHCR presentation had also said that:

> "The Hazaras were experiencing a relative 'golden age' in the light of their tragic past."

11 Additionally the DFAT report noted that the presentation said that the UNHCR considered that there was a well-organised Hazara people-smuggling operation and that Hazara protection claims abroad were a reflection of migration patterns "out of sync with levels of threat and more in keeping with economic imperatives associated with labour migration". The DFAT report continued:

> "While UNHCR were not convinced that the majority of Hazara protection seekers abroad were genuine, **the political and security situation in Afghanistan was fluid and therefore the current situation where Hazaras enjoyed freedom from fear of persecution might not last indefinitely. Currently, however, Hazaras were not being persecuted on any consistent basis**." (emphasis added)

12 Next, the DFAT report summarised the views of the United Nations Assistance Mission in Afghanistan (**UNAMA**) noting that UNAMA had not received reports of Hazaras being targeted or discriminated against in the current environment. The DFAT report referred to the 2008 *Country Report on Human Rights Practices* for Afghanistan, by the United States' Department of State, that concluded:

> "Since Shi'a representation has increased in government, there has been a decrease in hostility from Sunnis. However, **social discrimination against Shi'a Hazaras continued**." (emphasis added)

13 That report also referred to occasional instances where ethnic Hazaras had been asked to pay additional bribes at border crossings at which Pashtuns were allowed to pass freely. The United States Embassy had advised its Australian counterpart that it expected a similar assessment in the 2009 report that was due shortly. The DFAT report noted that the United States Embassy considered that while discrimination against Hazaras did occur "it was not a major systemic concern".

14 The DFAT report referred to the concerns expressed by "Hazara advocates" that, despite significant advances in recent years, there were "still strong perceptions of discrimination and systemic neglect from within the Hazara Community". It noted that the advocates said that the Hazaras' success in educational achievement reflected their community's attempt, based on its own efforts, to make the most of an opportunity rather than being a result of government assistance or facilitation. The DFAT report referred to an article in the *New York Times* of 3 January 2010 that had noted, first, that two Hazara dominated provinces had achieved the highest pass rates for university admission,

significantly better than the national average and secondly, girls in Hazara communities had made significant strides in education. The DFAT report concluded:

> "The Bonn Agreement and subsequent Afghan Constitution of 2004 protect the rights of the Hazaras, by enshrining "equality among all ethnic groups and tribes". **While unofficial discrimination still persists, there is no doubt that Hazaras are today very active in Afghan civil society**, are well represented in government institutions, vote in proportionally high numbers in political elections (with women more represented than men), **making strong progress in education and live mostly in areas where the insurgency is not active**. They have been described, using an Iraq analogy, as the "Kurds of Afghanistan" in that they are making the most of the new dispensation but with a view to past grim history, remain anxious about the future." (emphasis added)

The RSA report and the process before the reviewer

15 The RSA was conducted by an officer of the Department. The RSA record (or report) referred to the DFAT report in some detail. The officer concluded that if the applicant were to return to Jaghori, where he had lived and some of his family remained, he did not have a well founded fear of persecution and, based on the country information to which the report referred, there was no real chance of persecution occurring.

16 On 7 February 2011, the Centre wrote a 42 page submission on behalf of the applicant for the reviewer and provided a further statement by the applicant in response to the reasons given by the RSA officer for his assessment. The submission referred extensively to Professor Maley's above opinion, as well as his September 2010 update, and country information including the 2009 United States Department of State's report on the human rights situation in Afghanistan and the December 2010 UNHCR guidelines. The Centre's submission criticised, by reference to Professor Maley's opinions and other country information, the information set out in the RSA report concerning what DFAT had reported of the UNHCR's assessment that the current situation for Hazaras was perhaps the best in several hundred years. The submission relied on the 2009 State Department report on the issue of social discrimination, that repeated material in its 2008 report set out in the DFAT report, but added further material concerning instances of abuses. Based on the above material, the submission repeated the generic claims of the applicant that, as an Hazara Shia, he had a well founded fear of persecution for *Convention* reasons (the 1951 *Convention relating to the Status of Refugees* as amended by the 1967 *Protocol relating to the Status of Refugees*).

17 The reviewer interviewed the applicant on 9 February 2011 in the presence of his solicitor/migration agent. On 11 February 2011 the reviewer gave a copy of the DFAT report to the applicant's solicitor/migration agent. Although the Centre sent the reviewer the translation of a document on 27 February 2011, the parties did not refer the Full Court to any submissions made by the Centre on the substance of the DFAT report after the reviewer had provided it. The applicant complained before the trial judge that the RSA record overstated the information from UNAMA by positively asserting that Hazaras were not specifically targeted or discriminated against in the current environment and omitting that agency's qualification that it had not received reporting to this effect. However, that criticism had no substance in relation to the reviewer's assessment and recommendation. This is because the reviewer had given the applicant's adviser a copy of the DFAT report and the applicant had made no submissions on it. No doubt the applicant's adviser did not respond because the 42 page submission had comprehensively addressed already what the applicant could have said about the information in the DFAT report.

18 However, the applicant had not been told of the CSM article at any point in the processes involving the RSA or the review, prior to his being given the reviewer's assessment and adverse recommendation dated 28 March 2011. That raises the question of whether information was in that article that the applicant should have had an opportunity to address in the review.

THE CSM ARTICLE

19 The CSM article was written by a staff writer and published on 6 August 2007. The article commenced under a headline "Afghanistan's success story: The liberated Hazara minority". It referred to the experiences of one Hazara who had seen the persecutory activities of Taliban. The article contrasted that experience with his then perception that the fall of the Taliban amounted to salvation for him and Hazaras generally. The article stated that Western intervention:

> "… **had ended** one of the most brutal chapters in the nation's history of ethnic strife.
>
> In post-Taliban Afghanistan, it is one of the few unequivocal, though often overlooked successes. After centuries of discrimination, abuse, and even ethnic cleansing, the country's third-largest ethnic group has at last managed to find peace and even prosperity in the new Afghanistan.

> 'The interim administration [in 2001] **was the start of a golden period for Hazaras'** says … a human-rights activist in Bamiyan. 'Doors opened for Hazaras.'
>
> … And anecdotal information suggests that **Hazaras are achieving in higher education**: One unconfirmed reports suggests that Kabul University accepted 600 students from one Hazara district alone, and a professor of law and political science at Herat University says half his students are Hazaras." (emphasis added)

THE REVIEWER'S ASSESSMENT

20 The reviewer considered the applicant's claims based on his personal experiences and concluded that he did not accept them. The reviewer rejected the applicant's generic claims, including those based on his ethnicity and religion. Critically, the reviewer said:

> "Nor was there evidence before the Reviewer to support the assertion that the 'social discrimination' referred to in the US State Department Report is so severe as to amount to persecution; **indeed, other material cited discussing the general post-2001 situation of Hazaras indicates a significant lessening of such discrimination (see for example *The Christian Science Monitor,* "Afghanistan's success story: The liberated Hazara minority", 6 August, 2007, …**). The Reviewer therefore does not accept that Hazaras faces [sic] a real chance of general social discrimination amounting to persecution." (emphasis added)

21 The reviewer then said that he attached "particular weight" to the DFAT report stating that it "squarely addressed the issue of persecution of Hazaras". He referred to Professor Maley's opinion and caution on the reliability of the views of diplomatic officials. The reviewer preferred the findings of DFAT "as presenting an unbiased and informed view of the situation of the Hazaras there". He accepted both UNHCR's conclusion that there was no evidence of a campaign by the insurgency, including the Taliban, to target Hazaras and UNAMA's statement that it had not received reports of Hazaras being specifically targeted or discriminated against in the current environment. The reviewer found that, based on "available current and authoritative material", he was not satisfied that Hazaras faced a real chance of persecution by non-State actors, being Pashtuns in general and particularly the Taliban. He concluded that he did 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". Later in his assessment the reviewer said at [82] that the general proposition that no-one was safe in Afghanistan, given the fighting and bloodshed there, did not support a claim for refugee status because it did not point to any discrimination.

22 It is common ground that, as found by the trial judge, the reviewer used a common template to record his assessments on the reviews relating to each of the claimant and the nine other Hazara Shia Afghans. Those assessments were made by the reviewer between 11 January 2011 and 29 March 2011. As noted above, there was no evidence that any material or submissions put on behalf of those other nine persons was different or materially different in respect of the generic claims from what the applicant put to the reviewer. Given that position, we would infer that there was no, or no substantive, difference in any of the material or submissions of those nine persons and the applicant before the reviewer. The generic claims included a claim that because of each claimant's ethnicity and religion, there was a real chance that he would suffer persecution were he returned to Afghanistan. The template was adapted to set out in similar positions in the assessment each individual's particular and generic claims and the reviewer's assessment of those. The assessments also recorded in substantially, but not exactly, the same language the reference material that the reviewer had consulted and his reasoning and findings in respect of the generic claims. However, the reviewer adapted his language and moulded it to take account of the particular and individual circumstances of each claimant.

THE TRIAL JUDGE'S DECISION

23 The trial judge found that the reviewer had expressly relied on the CSM article in [55] of his assessment and applied that article in his rejection of the generic claim at [82]. His Honour noted that the reviewer had used the CSM article to reject the claim that there was social discrimination amounting to persecution of Hazaras. His Honour found that the CSM article was credible, relevant and significant to the decision. He held that the reviewer had not put "the nature and content of the adverse information" in the CSM article to the applicant in his interview or otherwise provided the information or its substance to him for comment. The trial judge found that procedural fairness required the reviewer to put the substance of the CSM article to the applicant. His Honour said that this requirement "was not abrogated by the use of similar information" in the DFAT report set out in the RSA . He said that the CSM article was "controversial" and his Honour understood that many reviewers no longer refer to it. He said that the article's reference to the post-2001 period being the start of "a golden period" for Hazaras was "particularly controversial" and concluded:

> "Given the generality of the material in the article, the controversial assessment of the situation in Afghanistan in it and its reliance upon two spokespersons whose

> authority to comment, and those motivation in commenting, were unstated, **significant reliance on the article by decision makers should be treated with circumspection. Where the article is to be relied upon the general thrust of it needs to be disclosed to claimants. In particular, the force and colour of the article, which puts the view that the past has been erased since 2001 and a new golden age for Hazara Shias in Afghanistan has dawned (with the implication that the change has been fundamental and irreversible) needs to be put to claimants for comment.** That was not done in this case. Although the applicant was on notice that the proposition that the situation for Hazara Shias in Afghanistan had improved since 2001 was in issue, **the particular assertions, namely that a new "golden age" for Hazaras had dawned and that the change had been dramatic, fundamental and irreversible was not put.** Neither was the applicant put on notice that an issue for the Reviewer was not simply whether there was continuing social discrimination against Hazaras in Afghanistan but also whether such discrimination as remained amounted to persecution for the purposes of the Refugees Convention and Protocol." (emphasis added)

24 In arriving at his conclusion of apprehended bias, the trial judge accepted that it was open to a decision-maker to use standard paragraphs or templates in recording the evidence and reasoning process of a decision. His Honour explained why he concluded that the reviewer's use of his template gave rise to an apprehension of bias as follows:

> "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.**
>
> 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 excluded 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*** [sic] **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.**
>
> **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].
>
> The relevant predisposition which is apprehended as possible is the 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* at [20]." (bold, non-italic, emphasis added)

Consideration – (1) The use of the CSM article

25 The principles of procedural fairness require that persons whose interests may be adversely affected receive a fair hearing by the use of an appropriate procedure in the circumstances: *SZBEL v Minister for Immigration* (2006) 228 CLR 152; [2006] HCA 63 at 160 [25] per Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ. There the Court said:

> "'[W]hat is required by procedural fairness is a fair hearing, not a fair outcome'. As Brennan J said, in *Attorney-General (NSW) v Quin* [(1990) 170 CLR 1 at 35-36]:
>
> > "The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone."
>
> It is, therefore, not to the point to ask whether the Tribunal's factual conclusions were right. The relevant question is about the Tribunal's processes, not its actual decision."

26 The Courts have declined to be prescriptive as to the procedures a decision-maker must employ in order to provide procedural fairness in any particular case. This is because what will be both sufficient and necessary to ensure a fair hearing will depend on, and vary with, the context in which the decision-maker acts, including any statutory or regulatory

requirements or considerations: 228 CLR at 160-161 [26], [29]: see too *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252; [2010] HCA 23 at 261 [19]-[20] per French CJ, Gummow, Hayne, Crennan and Kiefel JJ.

27 An administrative decision-maker must determine whether particular information he or she has is credible, relevant and significant before arriving at a final decision: *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88; [2005] HCA 72 at 96 [17] per Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ. If the decision-maker determines that he or she has information that is, *first*, credible, relevant and significant and, *secondly*, apparently adverse to the interests of a person who will be affected by the decision, then, ordinarily, procedural fairness requires that the decision-maker must give that person an opportunity to deal with the information. The person whose interests may be affected should be given the substance of the potentially adverse information, so that he or she may respond to it. However, in general, it is not necessary for the decision-maker to give the person whose interests may be affected a copy of any document containing the information or to identify its source: 225 CLR at 95-96 [15], 100 [29].

28 The identity of the source of potentially adverse information that is credible, relevant and significant to the decision to be made may itself be relevant. For instance, the source's credibility may bear on the reliability of the information. If the identity of the source is potentially relevant, the decision-maker may have to consider whether it can or should be given to the person affected. In 225 CLR at 100 [29], the Court held that the decision-maker did not have to reveal the identity of an informer who wrote a letter. Rather, the Court held the substance of the information in the letter should have been given to the person whose interests were affected. That was because the requirements of procedural fairness could, and there should, have accommodated the public interest in the proper administration of the Act. The public interest included facilitating the ability of persons to provide the authorities with information, confidentially, as to whether the applicants ought to be granted visas: see too *Minister for Immigration and Citizenship v Kumar* (2009) 238 CLR 448; [2009] HCA 10 at 458 [32] per French CJ, Gummow, Hayne, Kiefel and Bell JJ.

29 Country information in many documents can be repetitive or, as with the DFAT report, can summarise information from a variety of sources. Here, the information in the CSM article was country information. The reviewer had to put to the applicant, for his consideration and comment, the aspects of that information that the reviewer considered may bear upon the applicant's claims: 243 CLR at 357 [91], 358 [98]. The Court said in 243 CLR at 357 [91]:

> "… procedural fairness required the reviewer to put before the plaintiff **the substance of matters that the reviewer knew of and considered may bear upon whether to accept the plaintiff's claims**." (emphasis added)

30 However, the reviewer's obligation of procedural fairness did not require the reviewer to put to the applicant every piece of country or other information that the reviewer was considering. Rather, procedural fairness required that the applicant be given the substance of the credible, relevant and significant information available to the reviewer on an issue in the review, of which the applicant was not already on notice. The purpose of giving a person in the position of the applicant the substance of such information is to enable him or her to have an opportunity to deal with its potentially adverse consequences by responding to the decision-maker on those consequences. That enables the decision-maker to take into account the person's answer to the substance of information that has the potential of being used adversely to his or her interests. Affording the person an opportunity of dealing with some matter that he or she has not already had a chance to address in the process ensures that the process itself is fair.

31 But the substance of such information is, generally, distinct from the particular mode or source of its expression, which could be in a book, a news or journal article, or in an audio or audio visual form, such as a radio or television program, or in a number of those. In general, the decision-maker need not disclose more than the substance of the information, however it has been conveyed to him or her. The position may be different if the particular form in which the information was conveyed itself affects the meaning of the information or because some unusual or particular characteristic has a bearing on its credibility, relevance or significance. For example, a decision-maker might put to a person information that had been taken out of context. Depending on the circumstances, such conduct might fall short of what procedural fairness would require unless the decision-maker also identified the context or the way in which the context affected the information being put.

32 The reviewer cited the CSM article as illustrating his finding, in amplification of what a report of the United States Department of State had said concerning the absence of evidence, that social discrimination against Hazaras was so severe as to amount to persecution. Relevantly, this finding was sufficient to reject the applicant's generic claim that Hazara Shias had a well founded fear of persecution by reason of social discrimination against them. However, the reviewer cited the CSM article as indicating that *first*, there was no evidence that such social discrimination as existed amounted to persecutory conduct, and, *secondly*, such discrimination had lessened significantly since 2001. That raises the immediate question as to what information, if any, in the CSM article was information that was credible, relevant and significant which the applicant needed to be informed of in order for him to respond.

33 His Honour found that the reference to the new "golden age" for Hazaras in the CSM article conveyed that there had been a change that was fundamental and irreversible. In fact, the DFAT report had used the expression "golden age" to describe the change in the position of Hazaras since 2001. The CSM article used the expression "golden period" to make the same point. The applicant had a copy of the DFAT report and had had a proper opportunity to deal with the information about a "golden age" or "golden period" for Hazaras. And, with respect to his Honour, the CSM article did not contain an implication that the change for Hazaras in Afghanistan since 2001 was irreversible. Of course, the article recognised that there had been a significant change since 2001, and that the change had benefitted Hazaras. The CSM article used the description "golden period" to convey the same concept and information that was in the DFAT report's use of the expression "golden age". There was nothing in the concept of "golden period", or what the CSM article said about the changed position for the Hazaras since 2001, that was substantively new or different from what the applicant was aware had been said in the RSA, the information in the DFAT report or, for that matter, what the applicant's submissions and country information, including Professor Maley's opinions, had canvassed.

34 We thus disagree with the trial judge's conclusion that the applicant had not been on notice that an issue in the review was whether social discrimination against Hazaras was not just continuing but also amounted to persecution. *First*, the DFAT report set out the State Department's views that while social discrimination against Hazara Shias continued, it was

not systemic. *Secondly*, the applicant's adviser's submission of 7 February 2011 had relied on the social discrimination against Hazaras described in the State Department report and other country information as supporting his claims that Hazaras were persecuted in Afghanistan.

35 The CSM article's references to the history of Hazaras and their interaction with the Taliban and Pashtuns, including past and continuing threatening conduct, were all matters substantively in the country information of which the applicant and his adviser were aware. There was no information of substance in the CSM article of which the applicant had not been on notice at the latest by the time he received the DFAT report.

36 The reviewer's use of the CSM article did not constitute a denial of procedural fairness. The trial judge was in error to find that it had. For these reasons the first basis of his Honour's declaration cannot be sustained. Moreover, insofar as his Honour commented about the use of the article being "controversial" and what other reviewers may or should have done with it, those comments were directed to the merits of review which were matters for the reviewers, not judges, to evaluate.

Consideration – (2) Apprehended bias

37 An administrative decision-maker will be found to have given rise to an apprehension of bias if a fair-minded lay person might think that the decision-maker might not bring a fair and impartial mind to the making of the decision. The hypothetical lay person is an objective observer of the proceedings and will be assumed to be properly informed as to their nature, the matters in issue and the conduct complained of: *Re Refugee Review Tribunal; Ex parte H* (2001) 179 ALR 425; [2001] HCA 28 at 434-435 ([28]-[29]) per Gleeson CJ, Gaudron and Gummow JJ; *NADH of 2001 v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 214 ALR 264; [2004] FCAFC 328 at 268-269 ([14]-[21]) per Allsop J, with whom Moore and Tamberlin JJ agreed.

38 The mere fact that a decision-maker has previously expressed a view on the same or a similar subject does not, of itself, give rise to an apprehension that he or she will not bring a fair and impartial mind to the new decision to be made: see for example in relation to judges *Re JRL; Ex parte CJL* (1986) 161 CLR 342 at 352 per Mason J. After all, decision-makers

can be expected to apply the law and relevant policies in a consistent and predictable way. Likewise, decision-makers in the position of a reviewer or administrative official frequently will have to decide the same issues raised by different persons in separate applications including when a number of persons make generic claims. A decision-maker must have a fair and unprejudiced mind when he or she comes to decide a question including one concerning a generic claim that he or she has addressed on another occasion. However, that does not mean that he or she must have a blank or empty mind on the topic. As Barwick CJ, McTiernan, Kitto, Taylor, Menzies, Windeyer and Owen JJ said in *The Queen v Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group* (1969) 122 CLR 546 at 554:

> "Such a mind is not necessarily a mind which has not given thought to the subject matter or one which, having thought about it, has not formed any views or inclination of mind upon or with respect to it."

39 And, in *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507; [2001] HCA 17 at 533 [72] Gleeson CJ and Gummow J said:

> "The state of mind described as bias in the form of prejudgment is one so committed to a conclusion already formed as to be incapable of alteration, whatever evidence or arguments may be presented. Natural justice does not require the absence of any predisposition or inclination for or against an argument or conclusion."

40 Gleeson CJ and Gummow J recognised, in agreeing with the reasons of Hayne J, that the concept of apprehended bias, as an aspect of procedural fairness, has to accommodate, and may vary in, different decision-making environments (205 CLR at 538 [98]-[100]). Hayne J explained that the genesis of rules about the concept of judicial prejudgment is different from that of prejudgment in administrative contexts and that a range of considerations and differing consequences will arise depending on the source and context of the executive power being exercised (205 CLR at 562-566 [179]-[192]). His Honour recognised that specialised tribunals, such as the Refugee Review Tribunal, would "bring to the task of deciding an individual's application a great deal of information and ideas which have been accumulated or formed in the course of deciding other applications" (at [180]). He said that such a decision-maker was expected to build up "expertise" in matters such as country information, saying (205 CLR at 562-563 [180]):

> "Often information of that kind is critical in deciding the fate of an individual's application, but it is not suggested that to take it into account amounts to a want of procedural fairness by reason of prejudgment."

41 Hayne J elaborated by explaining that at least four distinct elements require consideration in examining an assertion that a decision-maker has prejudged or will prejudge, or that there is a real likelihood that a reasonable observer might reach such a conclusion. He said that the assertion of apprehended bias contains contentions that, first, the decision-maker has an opinion on a relevant aspect of a matter in issue in the particular case, secondly, he or she will apply that opinion to the matter in the case and, thirdly, he or she (205 CLR at 564 [185]-[186]):

> "…will do so without giving the matter fresh consideration in the light of whatever may be the facts and arguments relevant to the particular case. **Most importantly, there is the assumption that the question which is said to have been prejudged is one which should be considered afresh in relation to the particular case.**
>
> Often enough, allegations of actual bias through prejudgment have been held to fail at the third of the steps I have identified. In 1894, it was said that (*R v London County Council; Re Empire Theatre* (1894) 71 LT 638 at 639, per Charles J):
>
> > "preconceived opinions — though it is unfortunate that a judge should have any — do not constitute such a bias, nor even the expression of such opinions, for *it does not follow that the evidence will be disregarded*." (Emphasis added.)
>
> Allegations of apprehended bias through prejudgment are often dealt with similarly (see eg. *Johnson v Johnson* (2000) 201 CLR 488 at 493 [13])." (bold emphasis added)

42 Accordingly, the way in which a decision-maker may properly go about his or her task and what kind or degree of neutrality, if any, is to be expected of him or her will be relevant considerations in evaluating how and in what way the rules relating to apprehension of bias will be applied in a particular situation: 205 CLR at 565 [187] per Hayne J. And, as his Honour concluded (205 CLR at 566 [192]):

> "Once it is recognised that there are elements of the decision-making process about which a decision-maker may legitimately form and hold views before coming to consider the exercise of a power in a particular case, it is evident that the area within which questions of actual or apprehended bias by prejudgment may arise is reduced accordingly."

43 Here, a reviewer had the function of making an assessment that may, but need not, be considered by the Minister for the purpose of exercising the power, under s 46A, of

permitting the applicant to apply for a protection visa. The Minister's Department's guidelines for reviewers requires each reviewer to consider each claim afresh, refer to current and reliable country information available from two nominated sources that are also available to the Migration and Refugee Review Tribunals, and to cite individually in his or her report all such information that the reviewer considered. The reviewer is also required, so far as possible, to conduct an in-person interview with each applicant. As Hayne J recognised, a person in the position of a reviewer will be expected to build up some understanding of country information applicable to situations of various classes of persons in areas of the world from which applications for refugee status emanate.

44 If claims or applications made by a number of persons involve common features, a decision-maker who must determine all of those individuals' claims or applications at about the same time ordinarily will work out his or her findings about the common aspects and apply those consistently in each individual case. For example, claims for refugee status based on conditions prevailing in a claimant's country of nationality relating to persons of a particular race or religion require a decision-maker to analyse country information in order to form a conclusion as to the facts. Assume that 100 persons arrive at the same time in Australia and claim that they are citizens of country A, adherents of religion B and that country A persecutes anyone who adheres to religion B. Each of those 100 claims will raise at least two individual issues and one common issue. *First*, the individual issues will be whether each of 100 is, in fact, a citizen of country A, and an adherent of religion B. *Secondly*, the common issue is whether country A does persecute adherents of religion B. The decision-maker in this situation must decide each of the individual issues based on the particular facts put before him or her by each of the 100 claimants.

45 Next, the decision-maker must ascertain what the position is for adherents of religion B in country A. This aspect of the process involves the decision-maker forming a view about a generic or common issue affecting every one of the 100 claimants on the most recent, up-to-date information available about that issue: *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 44-45 per Mason J (with whom Gibbs CJ at 30 and Dawson J at 71 agreed on this issue); see too *SZJTQ v Minister for Immigration and Citizenship* (2008) 172 FCR 563; [2008] FCA 1938 at 571 [27]-[29] per Rares J. Once he or she reaches that view and decides that issue in the first of the 100 claims, it is difficult to

imagine that he or she would decide any of the other 99 differently or for different, or differently expressed, reasons on the same point. Of course, if any of the 100 persons put to the decision-maker substantive, new country or other information about the generic position concerning country A's treatment of adherents of religion B, then the decision-maker must consider that information and reconsider his or her earlier finding and the reasons for it. For example, the new information may be that a change of government had just occurred in country A and the new government had begun killing all adherents of religion B, reversing a previous policy of peaceful religious toleration. Obviously, if the decision-maker's earlier decisions were made on the basis of information of country A's peaceful religious toleration of adherents of religion B, he or she could be expected to reconsider his or her earlier findings on the generic or common question on the undecided claims by assessing the new information.

46 The trial judge was in error in finding that the reviewer's use of a template to express his reasons for rejecting the generic claims of the applicant and the other nine claimants would give rise to an apprehension of bias. As his Honour found, once the reviewer had excluded the possibility that Hazara Shias could have a well founded fear of persecution for reasons of their ethnicity and or religion, "it is very difficult for an individual applicant to establish such a fear based upon *systematic* [sic] persecution". That may be so but it is a consequence of the fact that the reviewer had found, based on country information and after considering the generic submissions for the applicant and the other claimants, that Hazara Shias did not face a situation in Afghanistan that gave rise to a well founded fear of persecution for reasons of their ethnicity or race. And a fair-minded observer would be aware that the reviewer had arrived at his conclusion based on country information. The fair minded observer would also be aware that the country information had satisfied the reviewer that a generic claim had been made that did not depend on the individual's circumstances beyond the fact that he was an Hazara Shia. The only matter for consideration in that context was the generic claim that Hazara Shias were being, or could have a well founded fear that they would be, persecuted for reasons of their ethnicity or race.

47 The fair minded observer would be mindful that the applicant had had his generic claims assessed in the course of the reviewer's consideration of his and the nine other claimants' generic submissions. The fair-minded observer would expect that the reviewer

would evaluate each of the generic claims and country information for all those persons, including the applicant, and decide those generic claims generically; that is to say, consistently and fairly. The fair-minded observer would not think that the reviewer would fail to continue to bring a fair and unprejudiced mind to deciding each particular application, merely because he dealt with the later generic claims as he had already done in the absence of fresh material bearing on the generic claims being brought to the reviewer's notice between his earlier and later decisions on the other claimants' generic claims.

48 The applicant accepted before the trial judge and in argument in this appeal that no apprehension of bias arose from the manner in which the reviewer had assessed his individual claims. And, his Honour found, although the reviewer had used his template to assess and decide all ten claimants' claims, the reviewer had turned his mind to the applicant's individual circumstances ([71]). The applicant's complaint, reflected in the trial judge's findings, was that an apprehension of bias arose because the reviewer's findings on the generic claims in earlier reviews would be, and were, the same in his review and the reviewer had used the same language in rejecting these.

49 The applicant did not argue that the reviewer's initial decision of the generic claim made in respect of any of the other nine claims was tainted by any apprehension of bias. Rather, he and the trial judge complained that the reviewer decided subsequent generic claims, including the applicant's, based on the same evidence and country information in a consistent way using a template to structure his reasons. Importantly, the applicant did not put to the reviewer anything new or different on the generic claims from what had been put to the reviewer on behalf of the other nine claimants. That situation was not caused by the reviewer.

50 In our opinion, the available material discloses that the reviewer brought to bear upon his task an impartial mind that was open to persuasion, not only with respect to the applicant's specific claims but also the generic claims. Having considered the standard or template paragraphs as they actually appear in the context of the ten individual assessments prepared by the reviewer, it is apparent that those phrases that he used in his template form part of the reviewer's individual consideration of each case on its own merits, including the applicant's case. Apart from the paragraphs dealing with the applicable legal requirements of

the assessment (which appear to be identical in each of the ten assessments), all of the other so-called standard or template paragraphs contain differential consideration of each of the applicant's and other nine claimants' own particular claims and circumstances.

51 The fair-minded observer would not regard the reviewer as having prejudged each of the applicant's and the other nine claimants' generic claims in the sense that the reviewer was not open to persuasion. But that observer would expect that if a particular individual did not put anything new to the reviewer on the generic claims, then consistently with the reviewer's earlier decisions, he would come to the same conclusion for the same reasons on the same material. There was no suggestion that the reviewer was using someone else's template reasons for rejecting the generic claims. The complaint is that the reviewer used his own reasons for doing so. If those were the reviewer's reasons for rejecting the generic claim, he was entitled to use and even repeat them, since he had no more material to consider. The applicant could not suggest why a reworded, but substantively similar, reasoning process would have changed his argument that an apprehension of bias arose from the use of the same reasons, even if differently worded. And for this reason, the argument also fails. It is a syllogism to say that because a decision-maker used the same words to reject two identical claims, he or she was apparently biased.

52 The applicant's complaint elevated form over substance to suggest that the reviewer's exact or near exact repetition of his own reasons for rejecting generic claims made by a number of individuals suggested a mind incapable of persuasion. The problem with this argument is that there was no attempt to persuade the reviewer on any one of the various individuals' generic claims with different submissions or information for any of them. But, having made rote submissions, the applicant complained that he received a rote response.

53 Here, the various other applicants in the reviews complained of arrived on different boats in about January and February 2010 at Christmas Island and made their generic claims based on the same material. The reviewer sought to deal with all those person's claims in an efficient and fair manner. He assessed their claims based on individual experiences and circumstances individually in each of his assessments. But he used the same or similar language to reject the generic claims in all ten cases. It is difficult to see why the reviewer, who was not a judge but an administrative decision-maker, had to deal differently and

individually with those generic claims when there was nothing to distinguish them one from another. They were put and decided on the same material. A fair-minded observer would not apprehend that the reviewer had failed to bring a fair and unprejudiced mind to each of those generic claims in the circumstances.

54 The trial judge also erred when he reasoned that the reviewer placed a heavy onus on the applicant to satisfy him of his generic claim based on the applicant's individual circumstances. If the country information accepted by the reviewer supported a conclusion that Hazara Shias were not, and were not likely to be, persecuted as a class in Afghanistan, it is difficult to see how an individual would succeed in persuading the reviewer, in those circumstances, that he had been persecuted or had a well founded fear of being persecuted for reasons of his ethnicity or religion should he return. Such a conclusion would be in the teeth of the country information that the reviewer had accepted about the treatment of persons of that ethnicity and religion and would negate the claim that the mistreatment alleged or feared was for a *Convention* reason.

CONCLUSION

55 The appeal must be allowed with costs. The decision below must be set aside and orders made that the application to the Federal Magistrates Court be dismissed with costs.

I certify that the preceding fifty-five (55) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Rares and Jagot.

Associate:

Dated: 27 March 2012

IN THE FEDERAL COURT OF AUSTRALIA
NSW DISTRICT REGISTRY
GENERAL DIVISION **NSD 2325 of 2011**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	**MINISTER FOR IMMIGRATION AND CITIZENSHIP** **Appellant**
AND:	**SZQHH** **First Respondent**
	STEVE KARAS IN HIS CAPACITY AS INDEPENDENT MERITS REVIEWER **Second Respondent**
JUDGES:	**RARES, FLICK AND JAGOT JJ**
DATE:	**27 MARCH 2012**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

FLICK J

56 The First Respondent was born in the Ghazni Province of Afghanistan in 1974. He is a person of Hazara ethnicity and is a Shia Muslim.

57 He is one of many people who have arrived in Australia illegally by boat. His claim for refugee status was first rejected on 8 June 2010. A request for Independent Merits Review was then made on 29 July 2010. A statement in support of that request, together with submissions, was thereafter made. On 28 March 2011 a recommendation was made by the person conducting the review, the Second Respondent in this appeal, that the First Respondent was not a person to whom Australia owed protection obligations under the Refugee Convention.

58 Judicial review of the recommendation was sought by the Federal Magistrates Court of Australia. That Court concluded that the First Respondent had been denied procedural fairness by the officer conducting the review. The Court concluded that the officer had failed

to disclose material that was adverse to the claim being made and that there was a reasonable apprehension of bias on the part of the Independent Merits Reviewer.

59 The Appellant Minister now appeals to this Court. He essentially raises two *Grounds of Appeal*. The first *Ground of Appeal* is to be resolved in favour of the Minister; the second *Ground of Appeal,* however, is to be resolved in favour of the First Respondent. The Minister needs to succeed on both *Grounds* for the appeal to be allowed.

60 It is thus considered that the appeal ought to be dismissed.

THE NON-DISCLOSURE OF ADVERSE MATERIAL

61 The Minister's first *Ground of Appeal* focuses upon the failure to disclose to the First Respondent an article published in *The Christian Science Monitor* which was referred to in the Independent Reviewer's reasons.

62 The claim for refugee status advanced before the Independent Reviewer involved (in part) the alleged persecution of Hazara Shias by the Taliban. The Independent Reviewer concluded:

> [88] Overall, based on the information available to the Reviewer, including the available evidence about his and his family's experiences, I am not satisfied in the circumstances of this case that the claimant would suffer persecution in the form of abduction or arbitrary arrest and detention, imprisonment, extortion, physical assault and torture and possible death, at the hands of the Taliban and/or anti-Hazara and/or Muslim extremists and that he will also suffer substantial discrimination amounting to persecution, on account of either cumulatively or separately:
>
> - His Hazara ethnicity and membership of the particular social group "the Hazara community";
> - His Shia religion;
> - His actual and imputed political and religious opinion against the Taliban by reason of
>   - His Hazara ethnicity
>   - His Shia religion
>   - His refusal to continue providing mechanical services to the Taliban in Helmund in 2005
> - His membership of the particular social group(s) "Afghans who have returned to Afghanistan after living abroad", "Afghans who have returned after living in a Western country" and/or "Afghans who have sought asylum in a Western country";
> - His actual and imputed political opinion in favour of the West, the coalition forces and/or the Afghan government and/or in opposition to the Taliban and/or other anti-government elements on account of his presence in Australia, his Hazara ethnicity/membership of the Hazara community, his Shia religion and/or his refusal

> to support the Taliban;
>
> should he return to Afghanistan now or in the reasonably foreseeable future.

63 In reaching that conclusion the Independent Reviewer had previously set forth under the heading "*Findings and Reasons*" the following paragraphs (without alteration):

> [54] The Reviewer is not satisfied that the material consulted provides independent corroboration of claims that the Taliban now specifically targets Hazara Shias on a general and indiscriminate basis, notwithstanding that individual Hazaras may have been targeted either individually for other reasons or as part of the general insurgency and its attacks on communications and facilities.
>
> [55] Nor was there evidence before the Reviewer to support the assertion that the "social discrimination" referred to in the US State Department Report is so severe as to amount to persecution; indeed, other material cited discussing the general post 2001 situation of Hazaras indicates a significant lessening of such discrimination (see for example *The Christian Science Monitor*, "Afghanistan's success story: The liberated Hazara minority", 6 August, 2007, at http;//www.csmonitor.com/2007/0806/p06s02-wosc.html?page=2). The Reviewer therefore does not accept that Hazaras faces a real chance of general social discrimination amounting to persecution.
>
> [56] The Reviewer attaches particular weight to the recent report by the Department of Foreign Affairs and Trade (DFAT) a copy of which was handed to the adviser on 11 February 2011, which squarely addresses the issue of persecution of Hazaras, while not dismissing the historical background and concerns articulated by Professor Maley and his caution regarding future developments. While mindful of the comments of Kirby J. in *Re Minister for Immigration and Multicultural affairs; Ex parte A (2001) HCA 77*, regarding the optimism of diplomatic officials about political conditions in countries where they are accredited and that Professor Maley is a well known academic commentator on Afghanistan and advocate for refugees the Reviewer prefers the findings of DFAT on the Afghanistan situation as presenting an unbiased and informed view of the situation of the Hazaras there.

64 It was common ground that a copy of the article published in *The Christian Science Monitor* was not disclosed to the First Respondent.

65 The basic principles to be applied in the resolution of the first *Ground of Appeal* were not put in issue.

66 These principles include the fundamental proposition that a person should be put on notice of the issues to be resolved and matters adverse to his interests and given an opportunity to respond: *Kioa v West* (1985) 159 CLR 550 at 628 to 629. Brennan J there stated the principle as follows:

> A person whose interests are likely to be affected by an exercise of power must be given an opportunity to deal with relevant matters adverse to his interests which the repository of the power proposes to take into account in deciding upon its exercise … The person whose interests are likely to be affected does not have to be given an opportunity to comment on every adverse piece of information, irrespective of its credibility, relevance or significance.

> Administrative decision-making is not to be clogged by enquiries into allegations to which the repository of the power would not give credence, or which are not relevant to his decision or which are of little significance to the decision which is to be made. Administrative decisions are not necessarily to be held invalid because the procedures of adversary litigation are not fully observed. … Nevertheless in the ordinary case where no problem of confidentiality arises an opportunity should be given to deal with adverse information that is credible, relevant and significant to the decision to be made. It is not sufficient for the repository of the power to endeavour to shut information of that kind out of his mind and to reach a decision without reference to it. Information of that kind creates a real risk of prejudice, albeit subconscious, and it is unfair to deny a person whose interests are likely to be affected by the decision an opportunity to deal with the information. He will be neither consoled nor assured to be told that the prejudicial information was left out of account.

This requirement that a person be given an opportunity to respond to material that is "*credible, relevant and significant*" has been the subject of further refinement in other decisions. It may thus be accepted that the rules of procedural fairness may be satisfied if a decision-maker puts to a claimant "*the substance of matters that the reviewer knew of and considered may bear upon*" the claims being made: cf. *Plaintiff M61/2010E v Commonwealth* [2010] HCA 41 at [91], 243 CLR 319 at 356 per French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ. The "*precise detail of all matters*" upon which a decision-maker intends to rely, accordingly, need not necessarily be disclosed: *McVeigh v Willarra Pty Ltd* (1984) 6 FCR 587 at 600 to 601 per Toohey, Wilcox and Spender JJ. See also: *Karina Fisheries Pty Ltd v Evans* (unreported, FCA, Forster J, 1 July 1988); *Dunghutti Elders Council (Aboriginal Corporation) RNTBC v Registrar of Aboriginal and Torres Strait Islander Corporations* [2011] FCA 370 at [34], 279 ALR 138 at 147 (aff'd on appeal: *Dunghutti Elders Council (Aboriginal Corporation) RNTBC v Registrar of Aboriginal and Torres Strait Islander Corporations* [2011] FCAFC 88, 195 FCR 318); *Minister for Immigration and Citizenship v Maman* [2012] FCAFC 13 at [37].

67 The case for the Appellant Minister was that, and contrary to the conclusion of the Federal Magistrate, the "*substance*" of the information contained within *The Christian Science Monitor* had been disclosed to the First Respondent. If this be correct, the non-disclosure of that article would not constitute a denial of procedural fairness.

68 In the circumstances of the present proceeding, it is not considered that there has been any denial of procedural fairness in the failure to disclose a copy of *The Christian Science Monitor* article because:

- it contains no information which was not also contained within other materials to which the First Respondent did in fact have access;
- there is no reason to conclude that the Independent Reviewer gave the information contained within the article in *The Christian Science Monitor* any greater weight than the same information in other materials. Indeed, the Independent Reviewer merely instanced the article as an "*example*";
- the information set forth in *The Christian Science Monitor* article was, with respect, an article which could accurately be characterised as but "*journalistic*" in style and not evidencing anything other than the expression of the opinion of its author and not disclosing any in-depth examination of the opinions expressed; and
- the material which was given "*particular weight*" was the report prepared by the Department of Foreign Affairs and Trade and a copy of that article was available to the First Respondent.

Concurrence is thus expressed with the conclusion of Rares and Jagot JJ that there has been no denial of procedural fairness occasioned by the failure to provide a copy of this article to the First Respondent.

69 Reservation is nevertheless expressed with any unqualified proposition that no denial of procedural fairness arises where the substance or gist of information has been disclosed – albeit in another document to which a claimant may have had access.

70 Even in circumstances where the substance or gist of information has been previously disclosed, a denial of procedural fairness may potentially arise where a claimant has been denied an opportunity to make submissions regarding a particular document which may contain no further or different information than that contained in other documents to which access has been granted. The requirements of procedural fairness may not be satisfied merely because an opportunity has been extended to make submissions in respect to the very same information which may be gleaned from a number of different sources. Common information may be found in a number of different sources. But the reliability, for example, of each of those different sources may be open to question. A breach of the requirements of procedural fairness may arise where a claimant is denied an opportunity to make submissions regarding

information contained within (for example) a more reliable source even though the very same information has been disclosed elsewhere in a less credible source.

71 An administrative decision-maker who, for example, discloses information contained in a document of questionable reliability may not discharge an obligation to act in a procedurally fair manner if he relies upon – but does not disclose to a claimant – a separate document of unquestionable reliability and credibility containing the very same information. A claimant, in such circumstances, may be afforded an opportunity to make submissions in respect to the information that has been disclosed. A claimant may be prepared to make a submission that such information should be rejected, either because it is (for example) unsubstantiated or from a questionable source. But the denial of procedural fairness may arise – not because a claimant is denied an opportunity to make submissions in respect to the very same information – but because he has been denied an opportunity to make meaningful submissions (for example) as to the reliability or credibility of the undisclosed document. He may be prepared to summarily dismiss or even scoff at information set forth in a highly questionable source; but questions may arise if he is denied an opportunity to make submissions directed to both the information and the reliability of such information that may be contained in an undisclosed but more reliable document.

72 But such is not the present case. The information and the manner in which it is expressed in *The Christian Science Monitor* do not call for its disclosure to the First Respondent such that he can be afforded an opportunity to make a separate submission in relation to that article.

A REASONABLE APPREHENSION OF BIAS

73 The argument as to there being a reasonable apprehension of bias has its origins in the Independent Reviewer's verbatim repetition in the report presently under consideration of materials previously set forth in a number of earlier reports prepared by the same reviewer.

74 The Federal Magistrate helpfully summarised this verbatim repetition of materials in the following manner (without alteration):

> **Ground 2 — apprehension of bias**
>
> [63] The applicant alleges a reasonable apprehension of bias because of the Reviewer's

> application of a template or "sausage machine" approach. The applicant put in evidence reports and recommendations by the same Reviewer in nine other cases decided between 11 January 2011 and 29 March 2011. All of the cases involved Afghan Hazaras making similar claims to those of the applicant.
>
> [64] The decision in the present case comprises 90 paragraphs. An analysis of the decision with other decisions by the same Reviewer in relation to Hazara Shia claimants (which were tendered in evidence) and which pre-dated the present decision shows that the first 32 paragraphs of the decision are common in whole or part (and substantially in whole) to the earlier decisions of the Reviewer. The only real difference is that the Reviewer identifies the particular claims made by the applicant and submissions made by his representative. There follows a discussion of circumstances in Gazni province in Afghanistan and [45] through to [51] of the decision are effectively identical to the earlier decisions.
>
> [65] Under the heading "Findings and Reasons", [52] through to [59] are the same as in the earlier decisions. Those paragraphs deal with what might be described as the "generic claim" of the applicant that he should be recognised as a refugee because of his Hazara ethnicity and Shia religion. From [61] the Reviewer turned to the particular claims of the applicant. Those paragraphs follow a similar form to the earlier decisions and at [66] through to [77] reproduce substantially what the Reviewer had said in earlier decisions. Paragraphs [78]–[80] consider in more detail the particular claims of the applicant and [81] through to [86] reproduce very substantially the reasoning and reference material referred to by the Reviewer in the earlier decisions. Paragraph [87] refers to a particular claim by the applicant. The conclusions made by the Reviewer at [88] to [90] follow a template form but refer to the particular claims of the applicant.
>
> [66] Some standard paragraphs complained of consist of more than statements of law or summaries of the substance of country material allowed in *Lek v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 43 FCR 100 at 122. The standard paragraphs also contain conclusions about the applicants' claims, unlike those standard paragraphs in *Wu Shan Liang v Minister for Immigration* [1994] FCA 926 which "did not concern assessment of the circumstances of the individual applicants: per Wilcox J at [52].
>
> [67] For example the decision at [53]–[60] includes conclusions on generic claims as well conclusions on country information. These and other paragraphs have been taken from previous IMR recommendations and used again in another set of recommendations, including the recommendation pertaining to the applicant.

It was common ground for the purposes of the present appeal that this summary accurately set forth the extent to which the Independent Reviewer utilised the content of his earlier reports.

75 The duplication or repetition of previously expressed reasons or findings is nothing new. The question as to when the repetition of findings or reasons previously expressed results in the decision-maker failing to properly undertake the task entrusted to him or when the repetition creates a reasonable apprehension of bias, is a question which has been the subject of earlier judicial consideration. It is a question which may be expressed under a number of different grounds of judicial review.

76 Thus, for example, in *Lek v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 43 FCR 100, Wilcox J expressed the view that it was "*not enough*" to establish that a decision-maker has "*surrendered their independence*" to simply point to the mere repetition of reasons (in that case) prepared by another person. That case was a representative action brought under Part IVA of the *Federal Court of Australia Act 1976* (Cth). The action was brought by the applicant on his own behalf and on behalf of 51 other group members. His Honour in that context observed:

> 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 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 were 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 had 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 …:(1993) 43 FCR at 122.

An argument founded upon the prior decisions evidencing a "*rule or policy*" was there rejected.

77 A contrary conclusion was reached by Beazley J (as Her Honour then was) in *Huluba v Minister for Immigration and Ethnic Affairs* (1995) 59 FCR 518. Mr Huluba's application for refugee status was considered by a delegate and rejected. A request for internal review was made and a second delegate reached the same conclusion. In doing so, the second delegate repeated almost word for word the reasoning of the first delegate. In finding that there had been a denial of procedural fairness, Her Honour concluded:

> In the present case, 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.
>
> I do not agree that, as was submitted by counsel for the respondent, that it was sufficient for the second decision-maker to consider the new material. Accepting that the new material was considered, there could still be a breach of procedural fairness. If a decision-maker adopted the reasoning of another without applying an independent mind to the matter, the consideration of other material could not cure the breach of procedural fairness that had occurred. In the present case, I consider that the use of the same language, sometimes in florid terms, on critical aspects of the decision-making process, makes it more probable than not that the second decision-maker did not apply an independent mind to the decision-making process. It follows that the applicant was denied procedural fairness by the second decision-maker: (1995) 59 FCR at 530.

In the different context of judicial decision-making, it has been recognised that "*the repetition of the reasoning and submissions of others has many dangers*": *SZNRZ v Minister for Immigration and Citizenship* [2010] FCA 107 at [6]. It was there said that such repetition "… *may create in the mind of a disappointed litigant the belief that independent judicial consideration has not been given to the legal and factual merits presented for resolution*".

78 In *Reece v Webber* [2011] FCAFC 33, 192 FCR 254 it was concluded that apparent similarity between a draft report and a final report did not give rise to a reasonable apprehension of bias.

79 Whatever the ground of review relied upon, a common question in need of resolution is whether a decision-maker has discharged the responsibilities entrusted to him in accordance with law. He may fail to do so if independent consideration has not been given to the particular case before him. The repetition of previously expressed reasons or findings may be an indicator that independent consideration has not been given to a particular case; but the repetition of reasons and findings does not, of itself, dictate such a conclusion.

80 The need for an administrative decision-maker to make a decision with respect to the particular claim being advanced for consideration does not deny to the decision-maker an ability to make reference to and rely upon prior accumulated knowledge or expertise. Nor could it. An administrative decision-maker is frequently expected to acquire such knowledge and expertise. Thus, for example, in *Minister for Immigration and Multicultural Affairs v Jia Legeng* [2001] HCA 17, 205 CLR 507 Hayne J observed:

> [180] … The decision-maker, in a body like the Refugee Review Tribunal, will bring to the task of deciding an individual's application a great deal of information and ideas which have been accumulated or formed in the course of deciding other applications. A body like the Refugee Review Tribunal, unlike a court, is expected to build up "expertise" in matters such as country information. Often information of that kind is critical in deciding the fate of an individual's application, but it is not suggested that to take it into account amounts to a want of procedural fairness by reason of prejudgment.

Nor is there any difficulty, let alone a reasonable apprehension of bias demonstrated, merely because an administrative decision-maker brings this pool of knowledge and expertise to his decision-making processes. See also, in the context of the Administrative Appeals Tribunal: *Secretary of the Department of Veterans' Affairs v Studdert* [2001] FCA 1642 at [26] per Moore J.

81 The rules of procedural fairness or the:

> … requirements of natural justice are not infringed by a mere lack of nicety but only when it is firmly established that a suspicion may reasonably be engendered in the minds of those who come before the tribunal or in the minds of the public that the tribunal or a member or members of it may not bring to the resolution of the questions arising before the tribunal fair and unprejudiced minds. Such a mind is not necessarily a mind which has not given thought to the subject matter or one which, having thought about it, has not formed any views or inclination of mind upon or with respect to it.: cf. *R v The Commonwealth Conciliation and Arbitration Commission; Ex parte The Angliss Group* (1969) 122 CLR 546 at 553 to 554 per Barwick CJ, McTiernan, Kitto, Taylor, Menzies, Windeyer and Owen JJ.

The question is thus not one as to whether a decision-maker has approached his task with a "*blank mind*"; the question is rather whether he has approached his task with a mind that is "*open to persuasion*": *Jia Legeng* [2001] HCA 17 at [71], 205 CLR at 531 per Gleeson CJ and Gummow J.

82 The "*… principle gives effect to the requirement that justice should both be done and be seen to be done*": *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63 at [6], 205 CLR 337 at 344 per Gleeson CJ, McHugh, Gummow and Hayne JJ. See also: *Re J.R.L., Ex parte C.J.L.* (1986) 161 CLR 342 at 351 to 352 per Mason J. When allowing an appeal against a decision to refuse to order the disqualification of a member of a statutory body in *Stollery v Greyhound Racing Control Board* (1972) 128 CLR 509 at 519, Barwick CJ referred to the "*… basic tenet that justice should not only be done but be seen to be done*".

83 Much obviously depends upon the context in which decisions are made. Administrative decision-making may be made pursuant to administrative arrangements or pursuant to regulatory or statutory authority. Administrative decisions may also be made which affect a spectrum of interests ranging from the grant of withdrawal of what may be regarded as privileges to the grant of withdrawal of unquestionable statutory or common law rights. Administrative decision-making may affect the very liberty of the subject.

84 Any allegation that a reasonable apprehension of bias has arisen by reason of the verbatim repetition of earlier findings or reasons must necessarily be directed to the particular context in which a decision is required to be made.

85 In the present proceeding, that context necessarily starts with a recognition of the fact that the Independent Merits Review which is being undertaken is not a statutory process. It is

a review undertaken pursuant to a document published in April 2010 and titled "*Guidelines for the Independent Merits Review of Refugee Status Assessments*". A recommendation made in accordance with those *Guidelines* does not affect or alter any existing statutory rights of a claimant who invokes its procedures.

86 That context may also potentially include the possibility that many of those who invoke its procedures may have arrived on the same boat that has illegally brought them to Australia and may also be invoked by persons who have originally come from the same country overseas. The claims of such persons may also be advanced by the same representative or organisation. The prospect of a number of claims being advanced by the same representative or organisation and being directed to a body of information or knowledge common to a number of the illegal entrants cannot be ignored.

87 To recognise that the same submissions may be based upon the common origin of a number of illegal entrants and based upon the same source materials as to the circumstances prevailing in a common country of origin is also to recognise the very real prospect that a particular decision-maker may make the very same findings in respect to that material. Indeed, to countenance a divergence of findings may be to countenance inconsistency. "*Inconsistency*", it has been said, "*… is not merely inelegant: it brings the process of deciding into disrepute, suggesting an arbitrariness which is incompatible with commonly accepted notions of justice*": *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634 at 639 per Brennan J.

88 It may also be unnecessary formalism to insist upon a particular decision-maker expressing himself in different terms in different decisions solely for the purpose of guarding against an argument that the use of common language manifests a reasonable apprehension of bias. If those making claims may advance a variety of claims in the same terms and using the same source materials, it may be surprising to insist upon a decision-maker not adopting the same style or approach.

89 But the verbatim repetition of findings and reasons previously expressed should serve as a reason for caution when a Court is called upon to review the decision-making process.

90 The verbatim repetition of findings and reasons may be the occasion for more closely scrutinising the decision-making process with a view to determining whether a genuine review of the source materials has been undertaken. Reliance upon new or additional source materials may require a decision-maker to reassess findings which have previously been made. New or additional materials may contain the very same information as may be found in existing materials; but the greater comparative reliability of the new material may require a decision-maker to consider afresh prior findings of fact. Even a new submission which has not previously been advanced for consideration, even if based upon existing information or materials, may require a reassessment of prior findings. A new submission may cast a different light upon existing findings. The passage of time itself may be a reason to question the reliance that can be placed by a decision-maker upon materials which were once up-to-date but, as at the time the decision under review was made, were of questionable currency.

91 If a reasonable apprehension of bias is to be avoided, a decision-making process which genuinely and independently assesses the materials advanced for consideration in each individual case – and a decision-making process which is seen to be a genuine and independent assessment of the case being made – is required. The same conclusion may be reached regarding the findings to be made in the case under consideration that have been made in earlier decisions; but each process of review requires a decision-maker to view the materials placed before him afresh. Difficulties may well arise in proving a failure to do so.

92 Such observations seem to be consistent with the tasks entrusted to those who undertake an independent review in accordance with the April 2010 *Guidelines*. Those *Guidelines* thus state in part as follows:

> **4.1 Role of the Independent Reviewer**
>
> The Independent Reviewer will consider afresh all claims for protection as they relate to the Refugees Convention, taking into account all available information including up to date country information. This is to include Departmental cases where the RSA officer has relied on Articles 1F, 32 and/or 33(2) of the Refugees Convention to conclude that a claimant does not engage Australia's protection obligations under the Refugees Convention.
>
> As the independent review process is non-statutory, the role of Independent Reviewers is advisory and not determinative. The process is to be prompt, investigative and informal.
>
> When Independent Reviewers are reviewing a negative RSA finding they are:
> - not bound by technicalities, legal forms or rules of evidence; and
> - expected to act in accordance with the principles of procedural fairness in order to determine the merits of the case.

The *Guidelines* go on to outline that it is expected that "*the independent review process will be fair and just*" and that the process will demonstrate that the "*Independent Reviewer has an open mind*". When addressing the requirements of the "*final report and recommendation*", the *Guidelines* suggest that a report may "*be in the attached format*".

93 The "*format*" obviously does not descend to the level of detail as to the substance of a report; it is confined to the "*headings*" and to the issues to be addressed, such as the need to address the "*relevant law*" and the "*claims and evidence*".

94 Nothing in the *Guidelines*, however, detracts from the fundamental responsibility of the person undertaking the review to conduct the review process in a manner which is "*fair and just*" and to maintain an "*open mind*" with respect to the particular claim to which a "*report*" is addressed. A "*report*" which repeats verbatim findings previously made may, in a particular case, fail to constitute a "*report*" which is "*fair and just*" or a report that is prepared by a reviewer who has kept an "*open mind*" with respect to the particular claims of an individual claimant.

95 The case advanced for the Appellant Minister is not one without considerable merit. There is much to be said for a conclusion that the mere verbatim repetition by the Independent Reviewer of much of that which he had previously set forth in earlier reports is not sufficient to establish a reasonable apprehension of bias in circumstances where:

- the report addresses the very same information as had been relied upon in the prior reports

and in circumstances where the First Respondent did not seek to make out any case that in the present proceeding:

- there was any new or additional source material which required the materials previously available to be reconsidered; or that
- any different submission had been made that required individual consideration or that any prior submissions made in previous cases ought to be considered afresh.

Moreover, the report in the present proceeding – as was the case in previous reports prepared by the same Independent Reviewer – separately considered:

- the particular and personal circumstances of the First Respondent.

96 Not without considerable reservation, it is nevertheless concluded that a reasonable apprehension of bias is made out by reason of:

- the extent of the repetition of the earlier materials;
- the repetition of the same materials and conclusions over a period of time, albeit a limited period of time;
- the fact that the findings which have been made and which were previously made were made by the same Independent Reviewer; and
- the absence of any indication that the Independent Reviewer gave even a passing thought as to whether or not he should reach a contrary conclusion with respect to the material he had previously considered.

This conclusion is reached notwithstanding the fact that a line by line scrutiny of the findings as presently expressed by the Independent Reviewer may expose one or a number of discrepancies or departures from findings previously expressed.

97 The existence of a reasonable apprehension of bias is to be approached by reference to the informed bystander: *Johnson v Johnson* [2000] HCA 48, 201 CLR 488. And the knowledge to be attributed to this bystander may well significantly influence a conclusion as to whether any apprehension of bias is reasonable: *Reece v Webber* [2011] FCAFC 33 at [55], 192 FCR 254 at 273 per Jacobson, Flick and Reeves JJ. But that knowledge does not extend to the bystander being provided with a detailed analysis of divergences between one set of findings and others previously made. It is enough for him to be attributed with knowledge of those similarities summarised by the Federal Magistrate: [2011] FMCA 740 at [63] to [67]. So informed, the bystander would have more than a "*vague sense of unease or disquiet*" (cf. *Jones v Australian Competition and Consumer Commission* [2002] FCA 1054 at [99], 76 ALD 424 at 441 per Weinberg J); the bystander would be more likely to conclude that the Independent Reviewer has simply "*copied*" his earlier findings – probably without even re-reading them – let alone considering whether the same findings should again be made.

98 Although consistency may be seen as an ingredient of justice, it must also be recognised that decision-makers "*may be consistently wrong and consistently unjust*":

Nevistic v Minister for Immigration and Ethnic Affairs (1981) 51 FLR 325 at 334 to 335. Deane J there observed:

> On the other hand, while consistency may properly be seen as an ingredient of justice, it does not constitute a hallmark of it. As Smithers J. pointed out in *Gungor v. Minister for Immigration and Ethnic Affairs* [(1980) 3 ALD 225] consistency must ultimately be related to policy and is safely sought by reference to policy only when the policy is appropriate and acceptable. Decision makers may be consistently wrong and consistently unjust. The Tribunal is not bound by either its own previous decisions or by the content of government policy. There have been and will be cases in which the Tribunal concludes that it should refuse to follow a previous decision of the Tribunal or reject or disregard the dictates of a relevant policy of the Government. The existence of such cases serves to emphasize the fact that each applicant to the Tribunal is entitled to have his or her application for review decided on its own particular merits. The desire for consistency should not be permitted to submerge the ideal of justice in the individual case.

An argument was there rejected that the Administrative Appeals Tribunal failed to properly consider a case and gave paramountcy to government policy.

99 Such a conclusion, it is considered, does not ignore the factual context in which claims of the present kind are made and resolved. It is not to insist upon an Independent Reviewer "*re-inventing the wheel*" every time he may be called upon to make a finding in respect to the same material. It merely calls upon an Independent Reviewer to genuinely consider whether he adheres to findings previously made. Such an exercise may not occasion too much thought and may not require any detailed revision of findings previously made. But each decision, it is concluded, is a fresh decision and requires a fresh consideration of the materials relied upon. It may be that an Independent Reviewer may conclude that he has previously been "*consistently wrong*".

100 Procedural fairness requires no less – especially in a context where the lives of claimants are so immediately affected by the reports being prepared and where they have so few other procedural safeguards.

101 The ground of review relied upon, namely that the repetition of the facts and circumstances expose the recommendation of the Independent Reviewer to a "*reasonable apprehension of bias*", does not require a party to establish "*actual bias*". It is sufficient if there is a "*reasonable apprehension of bias*".

102 Justice is not "*seen to be done*" if there is no indication that the claims being made by the First Respondent have not been considered afresh. From his perspective, he wants his

claims to be considered; it may matter little to him if others have suffered the same fate. The verbatim repetition by the same decision-maker of findings previously expressed – and the absence of any thought being given to whether the previously expressed findings should be adhered to – invites inquiry as to whether the decision-making task has been approached by a mind "*open to persuasion*". And, once that inquiry starts, justice is not "*seen to be done*" where there is nothing to indicate even a willingness to consider previous findings afresh. Even if there are common questions of fact to be resolved in all claims, an individual claimant is entitled to know that his own claims have been considered afresh and on their own merits. The principles relating to whether a reasonable apprehension of bias exists, it is to be recalled, are "… *concerned with the appearance of bias, and not the actuality*": cf. *British American Tobacco Australia Services Limited v Laurie* [2011] HCA 2 at [139], 242 CLR 283 at 331 per Heydon, Kiefel and Bell JJ.

CONCLUSIONS

103 It is concluded that the appeal should be dismissed.

I certify that the preceding forty-eight (48) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Flick.

Associate:

Dated: 27 March 2012