FEDERAL COURT OF AUSTRALIA

MZYPW v Minister for Immigration and Citizenship [2012] FCAFC 99

Citation:	MZYPW v Minister for Immigration and Citizenship [2012] FCAFC 99
Appeal from:	MZYPW v Minister for Immigration [2012] FMCA 112
Parties:	**MZYPW v MINISTER FOR IMMIGRATION AND CITIZENSHIP and GINA TOWNEY IN HER CAPACITY AS INDEPENDENT MERITS REVIEWER**
File number:	NSD 419 of 2012
Judges:	**FLICK, JAGOT AND YATES JJ**
Date of judgment:	11 July 2012

Catchwords:	**MIGRATION** – independent merits review – whether reviewer failed to take into account relevant considerations – importance of reasons – jurisdictional error committed
Legislation:	*Migration Act 1958* (Cth) ss 36, 46A, 195A *1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol relating to the Status of Refugees*
Cases cited:	*Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379, cited *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 197 ALR 389, applied *Januzi v Secretary of State for Home Department* [2006] 2 AC 426, followed *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259, considered *Minister for Immigration and Multicultural and Indigenous Affairs, Re; Ex parte Palme* [2003] HCA 56, 216 CLR 212, cited *MZYPW v Minister for Immigration* [2012] FMCA 112, reversed *Plaintiff M61/2010E v Commonwealth* [2010] HCA 41, 243 CLR 319, cited *Seiffert v Prisoners Review Board* [2011] WASCA 148, cited

	SZATV v Minister for Immigration and Citizenship [2007] HCA 40, 233 CLR 18, applied *SZBYR v Minister for Immigration and Citizenship* [2007] HCA 26, 235 ALR 609, cited *SZQDZ v Minister for Immigration and Citizenship,* [2012] FCAFC 26, cited
Date of hearing:	15 May 2012
Place:	Sydney
Division:	GENERAL DIVISION
Category:	Catchwords
Number of paragraphs:	40

Counsel for the Appellant:	Mr S E J Prince and Ms L Doust
Solicitor for the Appellant:	Santone Lawyers
Counsel for the First Respondent:	Mr G T Johnson SC and Mr B D Kaplan
Solicitor for the First Respondent:	Sparke Helmore Lawyers
Counsel for the Second Respondent:	The second respondent submitted save as to costs
Solicitor for the Second Respondent:	Sparke Helmore Lawyers

IN THE FEDERAL COURT OF AUSTRALIA	
NEW SOUTH WALES DISTRICT REGISTRY	
GENERAL DIVISION	NSD 419 of 2012

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	MZYPW Appellant
AND:	MINISTER FOR IMMIGRATION AND CITIZENSHIP First Respondent GINA TOWNEY IN HER CAPACITY AS INDEPENDENT MERITS REVIEWER Second Respondent
JUDGES:	FLICK, JAGOT AND YATES JJ
DATE OF ORDER:	11 JULY 2012

WHERE MADE:	SYDNEY

THE COURT ORDERS THAT:

1. The appeal is allowed.

2. The order of the Federal Magistrates Court dated 23 February 2012 is set aside.

3. The First Respondent, his Department, officers and delegates are restrained from relying upon the recommendation of the Independent Merits Reviewer dated 8 July 2011.

4. The First Respondent pay the costs of the Appellant.

THE COURT DECLARES THAT:

1. The recommendation of the Independent Merits Reviewer dated 8 July 2011 was not made in accordance with law.

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 419 of 2012

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	MZYPW Appellant

AND:	MINISTER FOR IMMIGRATION AND CITIZENSHIP First Respondent GINA TOWNEY IN HER CAPACITY AS INDEPENDENT MERITS REVIEWER Second Respondent

JUDGES:	FLICK, JAGOT AND YATES JJ
DATE:	11 JULY 2012
PLACE:	SYDNEY

REASONS FOR JUDGMENT

Flick and Jagot JJ

1 The background to the present proceeding commenced with a delegate of the Respondent Minister deciding that the Appellant was not a person to whom Australia has protection obligations under the *1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol relating to the Status of Refugees* ('*Refugees Convention*'). The Appellant thereafter requested an Independent Merits Review of that decision. Consistent with the description, an Independent Merits Review involves a review by a person who is not an employee of the Department of Immigration and Citizenship but a person who has "*been engaged by a company with which the Department had contracted for the provision of such reviews*" (*Plaintiff M61/2010E v Commonwealth* [2010] HCA 41, 243 CLR 319 at [3]). In conducting that review the reviewer is "*bound to afford procedural fairness to the person whose claim was being reviewed, and … bound to act according to law by applying relevant provisions of the Migration Act and decided cases*" (at [8]).

2 For present purposes it is sufficient to note that the person conducting the Independent Merits Review concluded that the Appellant did not face what was described as "*a real chance of serious harm*" either because of his:

ethnicity; or

religion.

A fear of a real chance of persecution was, however, found to exist by reason of his:

membership of a particular social group, namely his family.

Having come to this conclusion, the Independent Merits Reviewer thereafter went on to consider whether it was reasonable for the Appellant to relocate within Afghanistan. The Independent Merits Reviewer concluded that it would be reasonable for the Appellant to relocate within his country of origin, Afghanistan, and recommended that the Appellant not be recognised as a person to whom Australia has protection obligations under the *Refugees Convention*.

3 The Appellant's application for judicial review to the Federal Magistrates Court was dismissed: *MZYPW v Minister for Immigration* [2012] FMCA 112. In the appeal to this Court the Appellant contends that the Independent Merits Reviewer's conclusion is vitiated by reason of jurisdictional error on two bases relating to the issue of relocation. He has also sought leave to rely on a third ground also related to the issue of relocation.

4 The *Notice of Appeal* filed on 15 March 2012 sets forth two *Grounds of Appeal* being that the Federal Magistrate erred in failing to find that the Independent Merits Reviewer committed jurisdictional error by reason of:

an alleged error in "*… the construction and application of the legal test for relocation …*"; and

"*the IMR's conclusion that it would be reasonable for the Applicant to relocate to Kabul*" being reached through a reasoning process that was illogical, unreasonable or which failed to take into account relevant considerations.

The written submissions relied upon by the Appellant foreshadowed an application to amend those *Grounds* by also relying upon:

an alleged denial of procedural fairness.

Senior Counsel for the Respondent Minister opposed the granting of leave to amend – but only upon the basis that the further *Ground* was without merit. Leave to amend the *Notice of Appeal* should be granted. The amendment involves an issue of law on facts which are not in dispute. Other than the alleged lack of merit in the additional ground sought to be raised the Respondent Minister is not prejudiced in any way by the amendment.

5 The appeal should be allowed.

The Reasonableness of Relocation to Kabul

6 Section 36 of the *Migration Act 1958* (Cth) identifies those criteria to be satisfied if a person seeks a "*protection visa*". A criterion for such a visa is the need for the

Minister to be satisfied that "*Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol* …". Article 1A(2) of that *Convention* provides that the term "*refugee*" shall apply to any person who:

… owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence ... is unable or, owing to such fear, is unwilling to return to it.

7 The requirement that a "*fear*" be "*well-founded*" adds an objective requirement to the examination of the facts and this examination is not confined to those facts which formed the basis of the fear experienced by any particular applicant: *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 at 389 per Mason CJ, 396-397 per Dawson J, 406 per Toohey J, 414-415 per Gaudron J, 429-430 per McHugh J.

8 The requirement that a "*fear*" be "*well-founded*" also incorporates a consideration as to whether a claimant for refugee status can relocate within the country of his nationality so as to avoid persecution: *SZATV v Minister for Immigration and Citizenship* [2007] HCA 40, 233 CLR 18. Gummow, Hayne and Crennan JJ there followed the decision of the House of Lords in *Januzi v Secretary of State for Home Department* [2006] 2 AC 426 saying:

[19] With these propositions in mind, it will be seen that the matter of "relocation" finds its place in the Convention definition by the process of reasoning adopted by Lord Bingham of Cornhill in *Januzi v Secretary of State for Home Department* [[2006] 2 AC 426]. His Lordship said [[2006] 2 AC 426 at 440]:

"The [Convention] does not expressly address the situation at issue in these appeals where, within the country of his nationality, a person has a well-founded fear of persecution at place A, where he lived, but not at place B, where (it is said) he could reasonably be expected to relocate. But the situation may fairly be said to be covered by the causative condition to which reference has been made: for if a person is outside the country of his nationality because he has chosen to leave that country and seek asylum in a foreign country, rather than move to a place of relocation within his own country where he could have no well-founded fear of persecution, where the protection of his country would be available to him and where he could reasonably be expected to relocate, it can properly be said that he is not outside the country of his nationality owing to a well-founded fear of being persecuted for a Convention reason."

[20] The reference in the passage to the unavailability of the protection of the country of nationality of the refugee is best understood as referring not to the phrase "the protection of that country" in the second limb of the definition, but to the broader sense of the term identified in *Respondents S152/2003* [(2004) 222 CLR 1 at 8-9 [20]]. This was the international responsibility of the country of nationality to safeguard the fundamental rights and freedom of its nationals.

[21] Lord Bingham went on in *Januzi* [[2006] 2 AC 426 at 440] to refer to the statement in the UNHCR Handbook [UN High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (1979)] (at [91]):

"The fear of being persecuted need not always extend to the *whole* territory of the refugee's country of nationality. Thus in ethnic clashes or in cases of grave disturbances involving civil war conditions, persecution of a specific ethnic or national group may occur in only one part of the country. In such situations, a person will not be excluded from refugee status merely because he could have sought refuge in another part of the same country, if under all the circumstances it would not have been reasonable to expect him to do so."

[22] His Lordship, significantly both for *Januzi* and the present appeal to this Court, added [[2006] 2 AC 426 at 440]:

"The corollary of this proposition, as is accepted, is that a person will be excluded from refugee status if under all the circumstances it would be reasonable to expect him to seek refuge in another part of the same country."

Their Honours then went on to address the submissions there being advanced as follows:

[23] The Minister framed the issue, for a situation such as that presented by this appeal, as being whether it be reasonable, in the sense of practicable, for the appellant to relocate to a region where, objectively, there is no appreciable risk of the occurrence of the feared persecution. This formulation does not suffer from the defects urged by the appellant. It does not turn upon a "hypothetical assumption", nor does it prevent account being taken of the presence of a subjective fear of persecution, nor does it treat the presence of a "safe area" within the country of nationality as determinative of the existence of a well-founded fear of persecution.

[24] However, that does not mean that, without more, the formulation by the Minister is sufficient and satisfactory. What is "reasonable", in the sense of "practicable", must depend upon the particular circumstances of the applicant for refugee status and the impact upon that person of relocation of the place of residence within the country of nationality.

Kirby J in *SZATV* further addressed the requirement that relocation be "*reasonable*" as follows:

[80] A review of the literature suggests that this conclusion will not invariably follow, either as a matter of fact or law. Thus, internal relocation will not be a reasonable option if there are logistical or safety impediments to gaining access to the separate part of national territory that is suggested as a safe haven [European Council on Refugees and Exiles, Research Paper, pp 8-9]. Nor if the evidence indicates that there are other and different risks in the propounded place of internal relocation [*The Michigan Guidelines on the Internal Protection Alternative*, agreed to at the First Colloquium on Challenges in International Refugee Law, 9-11 April 1999, para [13]]; or where safety could only be procured by going underground or into hiding [Hathaway and Foster, "Internal protection/relocation/flight alternative as an aspect of refugee status determination" in Feller et al (eds) *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (2003) pp 384-385]; or where the place would not be accessible on the basis of the applicant's travel documents or the requirements imposed for internal relocation [Hathaway and Foster, p 391].

[81] An inability or unwillingness on the part of the national authorities to provide protection in one part of the country may make it difficult to demonstrate durable safety in another part of that country [Hathaway and Foster, p 383]. In some circumstances, having regard to the age of the applicant the absence of family networks or other local support, the hypothesis of internal relocation may prove unreasonable [Hathaway and Foster, pp 386-387]. In each case, the personal circumstances of the applicant [UNHCR, Guidelines, p 6 [25]]; the viability of the propounded place of internal relocation [European Council on Refugees and Exiles, Research Paper, pp 12 [8.1], 52]; and the support mechanisms available if an applicant has already been traumatised by actual or feared persecution [UNHCR, Guidelines, p 6 [26]], will need to be weighed in judging the realism of the hypothesis of internal relocation.

9 No issue was taken with the proposition that an assessment of reasonableness was dependent upon "… *the particular circumstances of the applicant for refugee status*". Nor did Senior Counsel for the Respondent Minister put in issue the potential relevance of those factors identified by Kirby J. Relevant to the present proceeding is the Respondent Minister's acknowledgment that when assessing whether relocation is reasonable one may consider factors such as:

"*other and different risks in the propounded place of internal relocation*", including risk of violence for non-Convention reasons; and

"*the absence of family networks*".

What was put in issue, and what must be accepted, was that the factors identified by Kirby J were not to be construed as a statutory list of considerations which must necessarily be taken into account in every case.

The Guidelines

10 The outcome that the Appellant seeks is to have the statutory power conferred by ss 46A and 195A of the *Migration Act 1958* (Cth) exercised in his favour to allow him to apply for a protection visa and/or be granted such a visa. These powers are conferred on, and may only be exercised by, the Minister. The Minister is informed of the facts relevant to the exercise of his discretion by way of a review conducted by an

Independent Merits Reviewer. The administrative arrangements which have been put in place for such purposes were examined in *Plaintiff M61/2010E v Commonwealth* (supra). See also: *SZQDZ v Minister for Immigration and Citizenship* [2012] FCAFC 26 at [8]-[10], 126 ALD 63 at 65-66 per Keane CJ, Rares and Perram JJ.

11 The Department of Immigration and Citizenship has developed non-binding guidelines for Independent Merits Reviewers.

12 The guidelines in force in July 2011 when the Independent Merits Reviewer discharged her functions provided in relevant part as follows (without alteration):

12 The final report and recommendation

Reviewers' reports must:

- clearly set out the recommendations of the Reviewer; and
- set out the reasons for the recommendation.

In order to achieve this, the Reviewer's report must:

- address all the claims made by the claimant, reflect genuine consideration of them, and set out clear findings on all questions of fact that are material;
- include reference to any information or other material (eg. country information) on which findings of fact are based;
- make reference to any responses made by the claimant to material which is adverse to their case;
- where there is relevant conflicting information, explain why one piece of information is preferred over another;
- identify all the information on which a finding is based with reasons as to the finding;
- explain why any submission on a material question of fact was accepted or rejected; and
- set out all the steps in reasoning linking the findings to the ultimate recommendation.
- carefully proofread the report

13 The requirements imposed by these guidelines are laudable. The reasons provided to the Minister, however, must be read in a sensible and balanced manner: cf. *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259. In that case an appeal from a decision of a Full Court of this Court was allowed. When considering the reasons of a delegate of the Minister in the context of a refugee application, Brennan CJ, Toohey, McHugh and Gummow JJ observed:

When the Full Court referred to "beneficial construction", it sought to adopt an approach mandated by a long series of cases, the best exemplar of which is *Collector of Customs v Pozzolanic* [(1993) 43 FCR 280]. In that case, a Full Court of the Federal Court (Neaves, French and Cooper JJ) collected authorities for various propositions as to the practical restraints on judicial review. It was said that a court should not be "concerned with looseness in the language ... nor with unhappy phrasing" of the reasons of an administrative decision- maker [(1993) 43 FCR 280 at 287]. The Court continued [(1993) 43 FCR 280 at 287]: "The reasons for the decision under review are not to be construed minutely and finely with an eye keenly attuned to the perception of error".

These propositions are well settled. They recognise the reality that the reasons of an administrative decision-maker are meant to inform and not to be scrutinised upon over-zealous judicial review by seeking to discern whether some inadequacy may be gleaned from the way in which the reasons are expressed [See *McAuliffe v Secretary, Department of Social Security* (1992) 28 ALD 609 at 616]. In the present context, any court reviewing a decision upon refugee status must beware of turning a review of the reasons of the decision-maker upon proper principles into a reconsideration of the merits of the decision. … [(1996) 185 CLR at 271-272].

See also: Kirby J at 291-292 (applied in *SZBYR v Minister for Immigration and Citizenship* [2007] HCA 26 at [25], 235 ALR 609 at 617 per Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

14 The same approach should be adopted when considering the reasons provided by an Independent Merits Reviewer.

The Reasons of the Independent Merits Reviewer

15 The principles to be applied when considering whether it is reasonable for a claimant seeking refugee status to relocate were not in dispute in the present appeal. What was in dispute was whether the Independent Merits Reviewer had correctly applied those principles.

16 The reasons for the recommendation being made by the Independent Merits Reviewer were within a narrow compass.

17 Paragraphs [83]-[85] of those reasons were as follows (without alteration except for deletion of the name of the applicant):

[83] The reviewer finds Mr 's family could be a particular social group under the Convention. The reviewer finds that Mr 's family has suffered serious harm in the past, due to Pashtuns/Taliban killing his grandfather and coming onto their land in 1980 and threats made to his father. The reviewer also finds that Mr faces a real chance of serious harm, now or in the foreseeable future, if he were to return to his home village in Afghanistan. The reviewer has based this finding on the credible oral evidence given by Mr . However, the reviewer has found that the risk of harm to Mr is localised, as it is the result of direct clashes between his family and people from an adjoining area. Therefore the reviewer then considered whether or not it would be reasonable for Mr to relocate.

[84] As the persecutor here has been found to be a non-state agent, the question becomes whether relocation would be reasonable in all the circumstances. The reviewer considered the possibility of Mr returning to Kabul. Based on the country of origin information, Kabul now has a large Hazara community. Also, as noted above, over 5 million people have returned to Afghanistan since 2002 and in some areas as many as one in three persons is a returnee. The reviewer considered Mr 's submission that his children would be noticeable because they learnt their language in Pakistan, (as opposed to Afghanistan), but the reviewer noted that Hazaragi is the language recorded for Mr in his entry interview on 15 April 2010 (as well as poor level of English), and therefore the reviewer assumes he communicates with his children in Hazaragi, and that his children are fluent speakers. The reviewer also notes the Claimant's submission that his wife 'has very free ideas that would be impossible in Afghanistan', but also noted there is extensive cross boarder migration between Pakistan and Afghanistan, with in excess of 48,000 people recorded as travelling over the boarder at Torkam in one day, (as recorded in the *Study on Cross Border Population Movements Between Afghanistan and Pakistan June 2009 UNHCR)*. With such a high level of migration between Pakistan and Afghanistan, and as many as one in three people being a returnee in some areas of Afghanistan, the reviewer believes that the Claimant and his family would be able to settle in and find work in such a large city. The reviewer also finds that with his work experience, Mr could find employment, possibly as a garment seller or in another type of store, to support himself and his family. Taking into account Mr 's evidence and country of origin information the reviewer finds that it would be reasonable for the Claimant to relocate (even if he did not wish to).

[85] The reviewer finds that although the State in unable to guarantee Mr 's safety if he is returned to Afghanistan, he will be subject to generalised violence, as are most people in Afghanistan. As such, he will not be subject to serious harm, now or in the foreseeable future, for a Convention reason. Following, the reviewer is unable to find that he is a refugee as defined by the Convention and the Protocol.

18 Contained within these paragraphs is an identification by the Independent Merits Reviewer of those factors relied upon as being relevant to the recommendation being made to the Minister. In order to determine whether there was jurisdictional error, it was accepted that it was appropriate to ask whether those factors had been assessed in accordance with law.

Jurisdictional Error

19 Even construing the reasons provided in a "*beneficial*" manner, it is respectfully concluded that they expose jurisdictional error, namely:

(i) a failure to consider the lack of family support that the Appellant will have if he relocates to Kabul; and

(ii) a failure to consider the difficulties associated with the manner in which the children spoke Hazaragi, namely with a noticeable dialect which would identify them as having been living in Pakistan.

The failure to address the lack of family support in either paragraph [84] and [85] is not redressed by a reference to paragraph [76] of the Independent Merits Reviewer's reasons where it is stated that the Appellant "*… would not have the family support networks to enable him to easily reintegrate into Afghanistan*". Whether the absence of family networks were taken into account when considering the reasonableness of the Appellant being relocated to Kabul remains unknown. And, although there is a reference in paragraph [84] to the fact that "*… his children would be noticeable because they learnt their language in Pakistan* ...", that reference is in the context of recording a "*submission*" being made by the Appellant. How that submission was resolved is left unstated. Nor can the ultimate findings and conclusions of the Independent Merits Reviewer be supplemented by reference to paragraph [38], as the Respondent Minister contended. That paragraph is but a summary of an exchange that occurred during the course of an interview.

20 Having identified those two factors as relevant to an assessment as to the reasonableness of the Appellant relocating to Kabul, the Independent Merits Reviewer committed jurisdictional error in not taking them into account.

21 There is also considerable uncertainty as to whether:

the Independent Merits Reviewer erroneously proceeded upon the basis that – when considering the reasonableness of the Appellant being relocated to Kabul – "*generalised violence*" is relevant even though it may not be attributable to "*a Convention reason*". Perhaps the conclusion in paragraph [84] is the final assessment of the reasonableness of relocation and paragraph [85] is but an overall assessment of all claims being made. But the potential relevance of the finding in relation to "*generalised violence*" in paragraph [85] to an assessment of the reasonableness of relocation is uncertain; and

the findings and reasons satisfy the requirements imposed by Clause 12 of the *Guidelines* and whether any such failure would constitute jurisdictional error. A failure to provide reasons may not vitiate a decision for jurisdictional error absent some statutory requirement requiring the provision of reasons: cf. *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* [2003] HCA 56, 216 CLR 212. See also: *Seiffert v Prisoner's Review Board* [2011] WASCA 148 at [162]-[179] per Martin CJ. In the present proceeding, it would be most unlikely that a failure on the part of the Independent Merits Reviewer to comply with Clause 12 could vitiate a decision of the Minister for jurisdictional error. The *Guidelines* are expressed at the outset to be non-binding and the entire scheme is an administrative construction rather than a statutory process. But the remedy for a failure to comply with that requirement need not presently be explored. The consequences of a failure to comply with Clause 12 was not the subject of submissions.

22 The reasons for the recommendation being made are also disturbingly Delphic when they address:

the "*submission*" that the Appellant's wife had "*… very free ideas that would be impossible in Afghanistan*". How that submission was resolved was again left unstated. And the relevance of the reference to "*extensive cross boarder migration*" to those "*ideas*" is elusive.

It is, however, unnecessary to resolve these issues further. Jurisdictional error has been elsewhere exposed. These matters only serve to reinforce a general sense of unease that the Independent Merits Reviewer has failed to truly engage with the Appellant's claims.

23 On any reading of paragraphs [83] to [85], the Minister was certainly not being presented with a coherent presentation of the reasons for the recommendation being made and the basis upon which that recommendation was founded.

24 The reasons for the recommendation are the very means by which the Minister is informed of the facts peculiar to each particular claimant and why, if at all, their circumstances warrant allowing them to make an application for a protection visa. They serve a centrally important and fundamental purpose. The document recording the recommendation to the Minister is important to both the claimant and the Minister. Even though it may be accepted that the reasons for a recommendation may not be drafted by those persons with the skills and expertise of an experienced legal practitioner, the reasons must clearly and accurately set forth the claimant's case and the findings and reasons for either accepting or rejecting those claims. It may safely be assumed that the Minister, when considering a recommendation that has been made, will not always have available to him a member of the Inner Bar to guide him through the text.

Conclusions

25 By failing to consider the Appellant's lack of family support if he were to relocate to Kabul and the difficulties that would arise from his children's Pakistani Hazaragi dialect, the Independent Merits Reviewer fell into jurisdictional error. The Federal Magistrate committed appellable error by not reaching this conclusion.

26 The appeal should be allowed.

27 There is no reason why the Respondent Minister should not pay the costs of the Appellant.

Orders

28 The Court should declare that the recommendation of the Independent Merits Reviewer dated 8 July 2011 was not made in accordance with law.

29 It is otherwise proposed that the Orders of the Court be that:

1. The appeal is allowed.

2. The order of the Federal Magistrates Court dated 23 February 2012 is set aside.

3. The First Respondent, his Department, officers and delegates are restrained from relying upon the recommendation of the Independent Merits Reviewer dated 8 July 2011.

4. The First Respondent pay the costs of the Appellant.

I certify that the preceding twenty nine (29) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Flick and Jagot.

Associate:

Dated: 11 July 2012

IN THE FEDERAL COURT OF AUSTRALIA	
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JUDGES:	FLICK, JAGOT AND YATES JJ
DATE:	11 JULY 2012
PLACE:	SYDNEY

REASONS FOR JUDGMENT

Yates J

30 I have had the advantage of reading in draft form the joint reasons of Flick and Jagot JJ. I agree that the appeal should be allowed.

31 The independent merits reviewer (IMR) found that the appellant faced a real chance of serious harm if he were to return to his home village in Afghanistan. However, having found that the risk of harm to the appellant was localised, the IMR considered whether it would be reasonable for the appellant to relocate to another

place in Afghanistan. The IMR concluded that it would be reasonable for the appellant to relocate to Kabul. Having so concluded, the IMR recommended to the Minister that the appellant not be recognised as a person to whom Australia has protection obligations under the *1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol relating to the Status of Refugees*.

32 The issues raised on appeal to this Court concern the manner in which the IMR considered the question of the reasonableness of the appellant's relocation to Kabul. These matters were dealt with in [84] of the IMR's reasons, as set out in the joint reasons of Flick and Jagot JJ. One of the issues identified by the IMR in that regard was where the appellant, his wife and his children had learnt their language.

33 As the appeal came to be argued, the appellant advanced the submission that, although he had stated in his entry interview on 15 April 2010 that he spoke Hazaragi, the point of importance was that he, his wife and his children spoke a dialect used in Pakistan that was a mixture of Urdu, English and Hazaragi. The IMR (at [38]) recorded the appellant's submission in that regard as follows:

… He asked how it would be possible for his family to live in Afghanistan because their language had changed, their appearance was different, and their lifestyle had changed. The reviewer asked if this had also affected him and he said yes. His children do not dress in the way that they would have to in Afghanistan and his wife has very free ideas about living but this would be impossible in Afghanistan. He said that he, his wife and his children would be killed and one of the biggest issues is language. They learnt their language in Pakistan. It would be a big barrier to come back and try and speak the way people in Afghanistan do. …

34 In [84] of her reasons, the IMR noted this submission. The IMR also noted that the appellant had recorded his language as Hazaragi in his entry interview, as if this was an answer to his submission.

35 On appeal the appellant submitted that the issue was not whether he spoke Hazaragi, but the fact that the dialect that he and his family spoke would mark them out in Afghanistan. He submitted that, as a matter of substance, the IMR simply did not grapple with or confront the essence of what he was putting and, therefore, failed to engage with that matter. He submitted that this was an issue that was central to dealing with the question of whether it would be reasonable in all the circumstances for him to relocate to Kabul.

36 The IMR plainly considered the issue of dialect and the appellant's submission to her to be germane to her analysis as to whether relocation to Kabul would be reasonable. It is a fair reading of her reasons that the IMR accepted that the appellant and his family spoke in a particular dialect. Moreover, there was material before the IMR to the effect that Pakistan-based Hazaras have a distinct accent which would make them easily identifiable should they return to Afghanistan. There was material containing information that the differences in dialect of returnees can lead to a denial of government services, attacks and murders.

37 When the matter came before the Federal Magistrates Court of Australia by way of judicial review, the presiding Federal Magistrate found (at [38]) that the

circumstances of the appellant's wife and children was an issue which had been raised by the appellant with the IMR and that the IMR's findings on this point were based on the appellant's evidence and the independent country information. His Honour found (at [30]) that the appellant did refer to the difficulties which the appellant, his wife and children would have because of the time they had spent in Pakistan, such as speaking Hazaragi differently and having a more liberal way of thinking. His Honour found that these matters were expressly considered by the IMR and found by her not to present a barrier to relocation. The issue in this appeal is whether that finding reveals error, specifically whether his Honour was in error in finding that the question of dialect was considered by the IMR.

38 On balance I have come to the view that the presiding Federal Magistrate erred in this finding. On a fair reading of the IMR's reasons, I am satisfied that she failed, as a matter of substance, to take into account the specific issue of dialect that had been raised by the appellant. Although the IMR's reasons state that the appellant's submission was "considered", I am satisfied that it was simply side-stepped by the IMR doing no more than recording that the appellant had identified Hazaragi as his language and finding that the appellant and his children conversed in the Hazaragi language. This did not engage the substance of the issue brought forward by the appellant for the IMR's consideration. It effectively ignored it. The consequence was that the IMR failed to take that matter into account in her assessment and conclusion concerning the reasonableness of the appellant's relocation to Kabul. In my view this constituted an error of the kind for which relief can be granted: see *Plaintiff M61/2010E v The Commonwealth of Australia* (2010) 243 CLR 319 at [90]; *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 197 ALR 389 at [24] and [95].

39 For these reasons alone, I agree with the orders proposed by Flick and Jagot JJ.

40 However, unlike Flick and Jagot JJ, I am not satisfied that the IMR failed to consider the lack of family support that the appellant would have if he were to relocate to Kabul. In [76] of her reasons the IMR made a specific finding that the appellant would not have the family support networks to enable him to easily reintegrate into Afghanistan. Although this finding is not reiterated in [84] of the reasons, I am not persuaded that, when the reasons are considered as a whole, it was a matter that was overlooked or ignored when the IMR was dealing more specifically with the question of relocation.

I certify that the preceding eleven (11) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Yates.

Associate:

Dated: 11 July 2012