

FEDERAL COURT OF AUSTRALIA

SZGWN v Minister for Immigration & Citizenship [2008] FCA 238

MIGRATION – whether inadequate interpretation - whether appellant was effectively prevented from giving evidence because of inadequate interpretation - whether the provision of a correct transcript and additional submissions to the Tribunal after the hearing cured the problems caused by poor interpretation - whether the Tribunal discharged its obligation pursuant to s 425 *Migration Act* 1958 - appeal allowed.

MIGRATION – apprehension of bias – conduct of Tribunal Member allegedly dismissive, misleading and obstructive – misunderstandings caused by poor interpretation - apprehension of bias not established.

PRACTICE AND PROCEDURE – leave to amend notice of appeal – new ground of appeal not raised below – no reasonable prospect of success.

Migration Act 1958 (Cth) ss 91R(3), 424(1) 425

Applicant NAAF of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs (2004) 221 CLR 1 cited

Ebner v Official Trustee in Bankruptcy (2000) 205 CLR 337 cited

Gaio v The Queen (1960) 104 CLR 419 cited

Liu v Minister for Immigration and Multicultural Affairs (2001) 187 ALR 348 cited

Minister for Immigration & Multicultural & Indigenous Affairs v SCAR [2003] 128 FCR 553 cited

NADH v Minister for Immigration & Multicultural and Indigenous Affairs (2004) 214 ALR 264 cited

NBMB v Minister for Immigration & Citizenship [2008] FCA 149 cited

Perera v Minister for Immigration and Multicultural Affairs (1999) 92 FCR 6 referred to

Re Minister for Immigration and Multicultural Affairs; Ex parte AB (2000) 177 ALR 225 referred to

Re Minister for Immigration and Multicultural Affairs; Ex Parte Epeabaka (2001) 179 ALR 296 cited

Re Refugee Review Tribunal; Ex parte H (2001) 179 ALR 425 cited

VFAB v Minister for Immigration & Multicultural & indigenous Affairs (2003) 131 FCR 102 cited

VAAC v Minister for Immigration and Multicultural and Indigenous Affairs (2003) 129 FCR 168 cited

WACO v Minister for Immigration and Multicultural and Indigenous Affairs (2003) FCR 511
cited

**SZGWN AND SZGWO v MINISTER FOR IMMIGRATION AND CITIZENSHIP and
REFUGEE REVIEW TRIBUNAL
NSD 2206 OF 2007**

**GILMOUR J
24 JULY 2008
SYDNEY (BY VIDEO-LINK FROM PERTH)**

**IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY**

NSD 2206 OF 2007

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

**BETWEEN: SZGWN
First Appellant**

**SZGWO
Second Appellant**

**AND: MINISTER FOR IMMIGRATION AND CITIZENSHIP
First Respondent**

**REFUGEE REVIEW TRIBUNAL
Second Respondent**

JUDGE: GILMOUR J

DATE OF ORDER: 24 JULY 2008

WHERE MADE: SYDNEY (BY VIDEO-LINK FROM PERTH)

THE COURT ORDERS THAT:

1. Leave be granted to amend the Notice of Appeal in terms of paragraph 1 of the Amended Notice of Appeal dated 4 March 2008.
2. The appeal be allowed.
3. The orders of the Federal Magistrates Court made on 18 October 2007 will be set aside.
4. In lieu, there be orders that:
 - (a) the decision of the Refugee Review Tribunal dated 28 November 2006 be quashed;
 - (b) the application for review be remitted to the Tribunal, differently constituted, to be re-determined according to law.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

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ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

**BETWEEN: SZGWN
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**AND: MINISTER FOR IMMIGRATION AND CITIZENSHIP
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**REFUGEE REVIEW TRIBUNAL
Second Respondent**

JUDGE: GILMOUR J

DATE: 24 JULY 2008

PLACE: SYDNEY (BY VIDEO-LINK FROM PERTH)

REASONS FOR JUDGMENT

1 This is an appeal from the orders made by Federal Magistrate Scarlett on 18 October 2007 dismissing an application for review by the appellants in respect of a decision of the Refugee Review Tribunal (“the Tribunal”) made on 28 November 2006 and handed down on 21 December 2006. The Tribunal had affirmed the decision of a delegate of the first respondent made on 31 January 2005 not to grant protection visas.

2 The appellants are husband and wife. Only the appellant husband made claims under the Convention with the appellant wife relying on membership of his family unit. I will refer to him as the appellant.

BACKGROUND

3 The appellant is a citizen of the People’s Republic of China who arrived in Australia on 13 December 2004. The appellant claimed he had a well-founded fear of persecution on the basis of his imputed political opinion and his religion. He claimed to be an adherent to the banned movement known as Falun Gong.

4 The appellant claimed to have become a sympathetic supporter of the Falun Gong after the movement was banned by the Chinese Government in 1999, and then became actively involved in Falun Gong after he was caught helping to protect a Falun Gong practitioner who was a work colleague. He claimed he was dismissed from his employment in March 2000 because he repeatedly challenged communist officers about the banning of the Falun Gong. In July of that year, he says that he became involved in the distribution of Falun Gong promotional material, and lent support to practitioners. He claimed that he was detained for fifteen days in July 2001, and he was tortured during that time.

5 In 2004, after the appellant had become a “firm” Falun Gong practitioner, government officials who came to his home to take his wife away for a forced abortion found Falun Gong material at his home. He claimed that he was detained for a second time but he was allowed to return home after one week because his wife needed someone to look after her.

6 It was after this that the appellant took steps to leave China. He claimed that if he returned to China he would be subjected to persecution.

PROCEEDINGS BEFORE THE TRIBUNAL

7 The decision of the first Tribunal on 3 June 2005 was set aside by the Federal Magistrates Court on 17 August 2006 and remitted to a second Tribunal. Various errors in the interpretation of questions by the second Tribunal and answers given by the appellant had occurred during the hearing. These errors were said to have been rectified by the appellant in written submissions and a correct transcript provided to the Tribunal after the hearing.

8 The appellant’s claims were rejected by the Tribunal for want of credibility and grave unresolved contradictions in his evidence. The Tribunal rejected the appellant’s claims to have been a Falun Gong sympathiser. It did not accept that he later became a Falun Gong practitioner or that he was involved in distributing or making Falun Gong propaganda, or that he suffered any resulting persecution.

9 The Tribunal accepted that the appellant had demonstrated a familiarity with Falun Gong but found that this was the result of coaching in order to strengthen his claims. It rejected his evidence that he became involved in a Falun Gong study group in Australia soon

after his arrival, finding instead that it was not a practice group for practitioners but a study group for applicants for refugee status.

10 The Tribunal accepted that the appellant later became involved in Falun Gong in Australia but found that he did so to strengthen his claim, and it gave his involvement no weight in accordance with s 91R(3) of the *Migration Act* 1958 (Cth) (“the Act”).

11 The Tribunal accordingly was not satisfied that the appellant had a well-founded fear of persecution for a Convention reason.

PROCEEDINGS BEFORE THE FEDERAL MAGISTRATE

12 In his amended application to the Federal Magistrates Court the appellant claimed amongst other things that the standard of interpretation at the hearing was inadequate so that he was effectively prevented from giving evidence and as a result there had not been compliance by the Tribunal with s 425(1) of the Act.

13 While the Federal Magistrate agreed that the standard of interpreting at the second Tribunal hearing left a lot to be desired, his Honour concluded that the Tribunal had taken appropriate action in dealing with those errors. As a result, he held that there had been no breach of s 425 of the Act. The application was accordingly dismissed.

MOTION TO AMEND GROUNDS OF APPEAL

14 On the day of the hearing of the appeal, counsel for the appellant, belatedly briefed in the matter, moved to amend the grounds of appeal. This sought to re-word the first ground, delete the second ground and to add a new second ground as follows:

1. The learned Federal Magistrate erred when his Honour found that the Refugee Review Tribunal (the “Tribunal”) had not committed jurisdictional error. His Honour erred by failing to find that the Tribunal had complied with section 425 of the *Migration Act 1958* when, in fact, the standard of interpretation at the purported hearing before the Tribunal was so incompetent that the Appellants were denied the opportunity to give evidence and present arguments at a hearing. The interpreter failed to accurately interpret the evidence given by the Appellant during the hearing on 11 October 2006. The Tribunal failed to offer a further hearing with a competent interpreter.

2. The Tribunal's decision was vitiated by jurisdictional error on account of the Tribunal conducting its review in such a manner as to attract a reasonable apprehension of bias.

15 I would grant leave to amend the first ground in the way sought. However, the first respondent objected to the proposed new second ground. I determined to hear the merits of the proposed substituted ground along with the substantive appeal on the basis that there was a deal of overlap in the relevant factual matrix and to deal with the question of leave in my judgment. The first ground contains an error it seems to me. I will take it that the appellant intended to complain that the Federal Magistrate erred by finding that the Tribunal had complied with s 425.

FIRST GROUND:

Compliance with Section 425

16 The appellant contends that the standard of interpretation was so incompetent that he was effectively denied the opportunity to present arguments and give evidence and for this reason s 425 of the Act has not been complied with and as such the Tribunal had fallen into jurisdictional error.

17 Section 425 of the Act provides:

425 Tribunal must invite applicant to appear

(1) The Tribunal must invite the applicant to appear before the Tribunal to **give evidence and present arguments** relating to the issues arising in relation to the decision under review.

(2) Subsection (1) does not apply if:

- (a) the Tribunal considers that it should decide the review in the applicant's favour on the basis of the material before it; or
- (b) the applicant consents to the Tribunal deciding the review without the applicant appearing before it; or
- (c) subsection 424C(1) or (2) applies to the applicant.

(3) If any of the paragraphs in subsection (2) of this section apply, the applicant is not entitled to appear before the Tribunal.
(Emphasis added)

18 The right to give evidence at a hearing exists unless the applicant's appearance is

unnecessary from the applicant's point of view because the review will be decided on the papers in favour of the applicant or the applicant consents to the invitation not being extended, or the applicant forfeits the right; *Liu v Minister for Immigration and Multicultural Affairs* (2001) 187 ALR 348 at [44]. None of those situations under s 425(2) which exempt the Tribunal from compliance with s 425(1) is present in this case.

19 The right pursuant to s 425 is not a merely formal right, but is a right that imposes an objective requirement on the Tribunal to provide a 'real and meaningful' invitation: *Minister for Immigration & Multicultural & Indigenous Affairs v SCAR* [2003] 128 FCR 553 at [37]. Compliance with s 425 of the Act by the Tribunal is a precondition to the valid exercise of its jurisdiction. Failure by the Tribunal to comply with the requirements of s 425 of the Act involves a "jurisdictional error": *SCAR* at [38]. The statutory obligation upon the Tribunal to provide a "real and meaningful" invitation exists whether or not the Tribunal is aware of the actual circumstances which would defeat that obligation. The Full Court in *SCAR* at [37] said that:

... it is also clear that s 425 of the Act imposes an objective requirement on the Tribunal. The statutory obligation upon the Tribunal to provide a "real and meaningful" invitation exists whether or not the Tribunal is aware of the actual circumstances which would defeat that obligation. Circumstances where it has been held that the obligations imposed by s 425 of the Act have been breached include circumstances where ...the applicant was invited to attend and did attend before the Tribunal, **but was effectively precluded from taking part because he could not speak English and a translator was not provided or was inadequate**: *Tobasi v Minister for Immigration and Multicultural Affairs* [2002] FCA 1050; *W284 v Minister for Immigration and Multicultural Affairs* [2001] FCA 1788. (Emphasis added)

20 The first question that must be determined is whether there was a departure from the relevant standard of interpretation. The interpretation before the Tribunal must be so incompetent that it prevents the appellant from giving evidence: *Perera v Minister for Immigration and Multicultural Affairs* (1999) 92 FCR 6 at [38]. Further the departure from the requisite standard of interpretation must relate to matters which were significant to the appellant's case in the Tribunal as well as to the Tribunal's decision: *Perera* at [45]. *Perera* was cited with apparent approval by the Full Court in *Liu v Minister for Immigration and Multicultural Affairs* (2001) 113 FCR 541 at [44]. That passage was itself cited by the Full Court in *SCAR* at [34].

21 While it is accepted that a perfect interpretation is never possible, it is essential that the interpreter serve as an accurate means of communication between the parties: *Gaio v The Queen* (1960) 104 CLR 419 at 433. It is sufficient that the translation is sufficiently accurate so as to convey the idea or concept being communicated: *WACO v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) FCR 511 at [66].

The Transcript

22 The transcript employed by the Tribunal in reaching its decision is somewhat unusual. It is a transcript both obtained by the appellant and provided by him to the Tribunal after the hearing on 11 October 2006 using an external Level 3 NAATI Mandarin interpreter. It is not merely a transcript of the questions asked by the Tribunal Member and the answers of the appellant interpreted into English by the Mandarin Interpreter present at the Tribunal hearing. It also contains the English translation by the external translator of the questions put to the appellant in Mandarin by the Interpreter at the hearing as well as the English translation by the external translator of the appellant's answers in Mandarin.

23 By this method any discrepancies in the interpretation of the Tribunal Member's questions and the appellant's answers can be identified. Words contained in parentheses in the transcript were spoken in Mandarin at the hearing and were subsequently translated into English by the external translator. I have adopted the same parenthetical method in these reasons where excerpts from the transcript are set out.

Was there a departure from the standard of interpretation?

24 I have set out below under various headings illustrations of flawed interpretation. I have, in these tables, used "M" for the Tribunal Member and "A" for the appellant.

"Closeness" to the Falun Gong group

25 An expanded excerpt from the transcript on this topic and some analysis of it appears at paragraphs [53]-[54] below. It demonstrates the considerable confusion on a significant issue caused by inadequate interpretation.

| AB Page | Actual Questions and Answers | Translation |
|----------------|--|--|
| 274 | M: How often were you gathering with that group? | (How long did you meet with them? And how many times?) |

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| 274 | A: (Every morning, I went to Burwood exercise site to practice Falun gong.) | In Burwood, I went every morning to the place where we do exercise. |
| 276 | M: Why do you feel you are closer to that place? | (Why do you think so?) |
| 276 | A:(because as far as distance is concerned, I think it is closer.) | As far as distance is concerned, I feel we are closer. |
| 278 | M: You told me that the place was closer and I asked you what do you mean by that, and you didn't talk about the distance, you talked about other issues, and I wonder why you didn't answer the question on the point on this occasion. | (Do you understand what I am asking you? I asked you why you thought it is closer. You didn't tell me why you feel closer, but to talk about some other advantages, are you with me?) |
| 278 | A: (I still can't understand you. After I came to know my colleague practitioner, I always went there with him due to the short distance to my residence. Moreover most people speak mandarin there.) | Where I live, I have a colleague, members of the same site It is more convenient for us to go together and we speak Mandarin. |

Appellant's involvement in various Falun Gong groups in Australia

26 The shortcomings in the following transcript are self-evident and in my opinion are significant. The Tribunal reasons dealt at length with this subject matter. An analysis of this is contained at paras [56]-[69] and [90]-[95] below.

| Page | Actual Questions and Answers | Translation |
|------|---|---|
| 284 | M: In a statement you said to me, you said you changed from Burwood to Auburn when you moved to Homebush but that's different from what you said today. | (In your previous statement, you said that you changed from Burwood to Auburn because you moved to Homebush. This is not right isn't it?) |
| 284 | A: (That's interpretation error.) | That was an incorrect translations by the translators. |
| 285 | M: What is? What is an incorrect translation? | (What is? At where it went wrong?) |
| 285 | A: (Now I couldn't understand what the question is) | I couldn't hear the question properly |
| 291 | A: (One of them is for refugees and it was self organised by refugees) | One of the groups consists of all refugees |
| 291 | A: (That one was not held on a daily basis, but on every Thursday) | That one meet every Thursday not everyday |
| 291 | A: (At that time, I always went from Berala to Burwood group. Most of the time I went to the refugee group. The reason why is that I have to get in touch with some practitioners as I was new to the group. Thus I went to the refugee study group.) | My statement concerning going from Berala was directed to at...at Burwood refugee exercise group. |
| 292 | A: (When I was in Berala I went to the Burwood refugee group for Dafa Learning) | In the group that I went to Burwood when I was staying in Berala was for the refugee exercise group |

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| 292 | M: That's the one you were with when you were in Berala? | (Were you in Berala at the time?) |
| 295 | M: But I can't see how the interpreter, the translator of this document heard you were talking about Thursday night group and wrote all this stuff about a morning group | (He said that " I couldn't understand why the translator mentioned about your Thursday night group" also talked about morning exercise group.) |
| 299 | A: (That was the place for morning practice) | That was early in the morning exercise. |
| 299 | M: When did you start with the refugee group? | (What about the refugee group?) |
| 299 | A: (We only went to the refugee group every week Dafa learning, Dafa learning in the refugee group) | There was a weekly meeting |
| 299 | M: But when did you start with it, when did you commence with it? Which month, which year? | (Which month and what time?) |
| 300 | A: (The time I lived in Berala was probably... I got in touch with the group... in the first month I went to Burwood Interpreter: (can you say it again) A: (It was in the first month that I went to the Burwood group. I came to know a Refugee group in Burwood, because there are two groups, one in the morning the other at night. I came to know the morning group one month later) | not translated - interrupted by Tribunal Member |
| 301 | A: (Maybe around March 2005, or February, March? Anyway until April. I am not sure about the time....) Interpreter: (Before April?) A: (Yes, Before April. At the time I didn't leave from Berala to my new address.) | My memory is not too good, it could be February or March in Any case it is one month before I left Berala. |

The appellants involvement with Falun Gong in China

27 The significant errors below are obvious. They include the Interpreter telling the Tribunal Member that the appellant wanted (in his answer) "... to make an amendment". The appellant said no such thing.

| Page | Actual Questions and Answers | Translation |
|------|--|---|
| 328 | A: (At the beginning I supported Falun gong when I was in china, then I participated and started to practice. After my arrival to Australia, I practice more | I want to make amendment. In china, initially I was a supporter, but I did practice later, in Australia, I practiced further. |

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| | often.) | |
| 331 | A: (some issues for the last time I indeed didn't hear clearly, If he asked me "did you practice Falun gong in China, I would have answered.) | Last time indeed I could not fully understand some issues. If the question was asked "did you practice Falun gong in China?" I would have answered. |
| 332 | M: You had freedom reign in the statement you made through Mr Jeans, and this statement you are presented as a person who supported Falun gong in China and practiced in Australia | (In your statement from Mr James, you can say whatever you like. In your statement it says that you were a supporter to Falun gong not a practitioner.) |
| 332 | A: (I gave my written documents to the immigrant agency at the time. Something may go wrong while the document was drafted.) | I bring all my written documents to the agent, and in the transfer there could be some errors. |
| 350 | M: When did you start to practising Falun gong in China? | (When did Falun gong start in china?) |
| 351 | A: (The Master preached the Dafa on May 15, 1992) | 15th September 1992. |
| 351 | A: (15 May) | My master transferred his practice to me on 15th May 1992. |
| 351 | A: (formally it counts from that day... to teach the public) | Transmit the doctrine. |
| 355 | M: But you told me that the Master transferred his practice to you, transferred his practice onto you 16 years ago. | (You said your Master confer the practice to you. What do you mean by saying preaching the Dafa?) |
| 355 | A: (That is to say he teaches the public. It has been 16 years since he started to teach the Dafa on 15th May 1992) | Transfer means teaching |
| 355 | A: (The formal preaching was started from 1992. Since then, it has been taught across the country and all over the world gradually.) | Perhaps the term I use is, the literal is "transfer the doctrine" it maybe teaching, might be a proper better word. Falun gong officially teaches its doctrine since 1992. |
| 356 | A: (This is what we Chinese people believe the destiny) Interpreter: (Go ahead) A: (This is because my affinity was yet to reach previously I began to get involved in until 2001 after I got to know it in 1999. it leads all the way to let me devote myself with heart and soul. I was enlightened by the Master step by step.) | This is what we Chinese called destiny, my destiny did not, wasn't ripe, its my interpretation. OK? Wasn't ripe prior to 01. My master is converting me stage by stage. |
| 357 | M: and what made it ripe in 2001 | (Why an affinity is reached at the year 2001.) |
| 358 | A: (because I have more chances to get involved in Falun gong) Interpreter: (hold on, to get involved in Dafa. Dafa? Are you referring to Falun | Because I have more occasion to be in touched with the Great Philosophy, the great method, which is Falun gong, because I had a car and I was able to transport the publicity material, so I have |

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| | gong?) A: (get involved in, I have more opportunities to get involved in it. Dafa refers to Falun gong. I get to know more and more after 2001. Apart from propagating the materials, I have faith in it.) | more occasion to be in touch to be in contact with them. |
| 358 | M: I don't know how having a car, transporting client materials has anything to do with you suddenly becoming more enlightened or <inaudible> | (I can't see why having a car enables you to transport the materials for them.) |
| 358 | M: nine years after you were exposed to the Falun gong, two years after it was banned | (Ok, I don't know why having vehicle materials can make you devote yourself into Falun gong. This was after their preaching in 1999, after two years banning by the government.) |
| 359 | A: (The very reason why it was banned is that people always have desires to know an unknown thing. Once I know, I found it is so great that I began to have faith in it.) | Because they have banned it, it created a desire for me to understand it more. Once I understood it more, I wanted to be with it. I realised the (incomplete). |
| 361 | A: (besides, I would also like to know why the CCP suppress the Falun gong. This is the very reason why I wanted to know more, to find out what organisation it is.) | Because the communist is banning Falun gong, I want to know exactly what organisation it is. |
| 362 | M: I thought it is important to ask you a number of questions about it rather than just to dismiss it because you hadn't mentioned it before | (As you haven't mentioned before I cannot rule this out of my consideration immediately. This is why I have raised you so many questions to you.) |
| 362 | M: So I have gathered more information from you about what your claim was your involvement as a Falun gong practitioner in china. | (So many questions have been raised to you on your Falun gong practice in china.) |

Supporting evidence of the appellant's participation of Falun Gong in Australia

28 The interpretation errors in the passages below are both obvious and significant.

| Page | Actual Questions and Answers | Translation |
|------|---|---|
| 307 | M: But still nothing about the Burwood group that you described in the last hearing or in this particular written statement that I am reading back to you. | (I couldn't see any evidence for the member of the Burwood group.) |
| 308 | A: (First, people in the Auburn group are all refugees. Sometimes their cross-validations are not to be accepted. They did write statements for me but I did not submit to the Tribunal) Interpreter: (In Auburn?) A: (Yes, in Auburn refugee group, I have some statements from the people in Auburn | Firstly the reference from Auburn the reference from auburn they all from refugees, I did not submit them because they are not residents. |

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| | Refugee group, but I did not submit them. This is because they are not Australian citizen) | |
| 308 | M: you did submit them, it comes through you | (He said that you did submit them.) |
| 309 | A: (That's for the refugee group. The one I submitted is from the leader of the Refugee group. His name is Wu Jianghua) | The only one who for the responsible person for the Refugee group is Mr Wu Jianghua. |
| 309 | A: (In the Burwood exercise group, the morning group, a lady whose name is Kitty. The very reason why I did not ask her to write me a statement is that I am no longer practice there. I Could find her as she went abroad to listed the lecture few days ago. Time is very tight for me to wait. But I can provide the documents if it helps.) | The Burwood morning group, the responsible person is called Cathy, she was out of the country, for, for to give evidence elsewhere. And if necessary, I can get her evidence. |
| 310 | A: (Actually our time is flexible. He may not provide in all details Interpreter: (Not to what?) A: (Not to provide in all details. We sometimes met on Thursday that depends on his work commitments. Now we always meet on Friday whilst it used to be on Thursday) | He may not have written it in exact detail, our meetings vary from time to time depends on his work commitments. We used to be on Thursday night, now we meet on Friday night. |
| 310 | M: If you say he hasn't written in exact detail, you are asking me whether I should give weight to his statement | (You say he hasn't written in exact details in other words, what were you saying. Whether I should give weight to his statement to make my decision.) |
| 311 | A: (This is because that we all changed to Parramatta on Friday. The Parramatta I referred is the place that I am currently in for Dafa learning.) | We all moved to Parramatta now, and its no Friday. So when I mentioned Parramatta it is what I meant Friday |
| 313 | M: He says you meet Parramatta Council meetings on Friday night | (He said that he saw you in Parramatta Council on Friday.) |
| 313 | M: It would be very hard for me to read Mr Wu's statement as your evidence with your involvement of Falun gong prior to the last hearing of the RRT | (So I can not look at Mr Wu's statement to prove your, in Falun gong at last hearing prior to the Tribunal hearing, your relationship with Falun gong.) Interpreter: Can I repeat that again? (To prove your relationship with Falun gong prior to the last Tribunal hearing, I can't consider Mr Wu's statement.) |

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| 315 | M: If I were to arrive of that view, I don't ever do so lightly, I would be required under the law to disregard this part of your case | (I do not do it so often but suppose if I have a, if I have to draw a conclusion, then I probably will take the other, his statement will not be taken into my considerations.) |
| 316 | M: but were you actually integrated, involved, were you actually involved in Falun gong group practice, you say you were prior to the last RRT hearing, but there is still no evidence really you were, even if I look at the photographs. And even I accept that that's Burwood | (If I see your photos, I still have no evidence to prove your relations with the Falun gong prior to the last hearing.) |
| 319 | A: (This was in St James. There is a festival which is to be held on the very same day each year. I have a document. I also went there this year, but I didn't take photos. This was last year in 2005) | St James. |
| 319 | A: (All these were taken either this year or last year, this one was in 2005) | No translation |
| 320 | A: (This was in the 2005 Australian Falun Dafa Experience Sharing Conference) | This is national conference 05. |
| 320 | A: (Around October, it was in the Park close to the Central railway station to support the Falun gong) | Central railway station. |
| 320 | M: When was that one with the banner was taken in memory of <inaudible>. | (Which month) |
| 320 | A: (Last October, Oh February to March 2006, March to April?) | May February April 2006. |
| 322 | A: (I didn't take too may photos as I did not do it intentionally. We should give up all kinds of human attachments. Thus I can't take too may photos) | I can't take too many photos. |
| 322 | M: Nothing tells me that you are anything but a distance observer of these people | (Only this photo I can take into consideration.) |
| 323 | M: Ok I presume that sculpture quite distinctive and would lead me to a park in Burwood | (I just need to check out the credibility.) |
| 363 | M: I remain sceptical at this point you were ever a Falun gong practitioner in China | (I still have a Attitude. So I have a.... Attitude to this point. ie. you are a Falun gong practitioner.) |
| 364 | M: to make any further submissions to this matter as you like | Use statement to this matter |
| 364 | M: it was suggested to me earlier I might like to gather more details from a particular witness, that witnesses is welcome to provide more details. | (If witness, you can also use witnesses' statement you can write into your statement that you practiced Falun gong in China by 5pm on 20th October.) |
| 364 | M: you may want to review this hearing with Mr Jeans and if you may feel there are more things to say | (Do you have more things to say to the hearing?) |

Obtaining Passports

29 The standard of interpretation on this important topic was very poor. This area is also analysed at paras [97]-[103].

| Page | Actual Questions and Answers | Translation |
|------|---|--|
| 337 | <p>A: (This is because I was under detention before.) Interpreter: (You were what?)</p> <p>A: (I was under administrative detention before) Interpreter: (Administrative detention?)</p> <p>A: (Yes, to obtain a passport, people first need to have their Police Clearance Record from the Public Security Bureau. Although this is not a real crime, it will affect me to obtain a passport. So I have to entrust someone to pay for it)</p> <p>Interpreter: (Administrative means? Does it mean mobile arrest warrant?)</p> <p>A: (Administrative means minor offences, but not offence to the law. In china, criminal detention means offence to the law while administrative ones is the general warning and the like)</p> | <p>Because my residence would have some light criminal record, but did not have a crime record but because to get a passport I therefore need to spend money to get my passport.</p> |
| 341 | <p>M: You said that if the authority had any record of your passport you couldn't get out. But the point I am putting to you if that passport was not connected, if they found that the passport was not connected to any records, they would arrest you at the airport</p> | <p>(You just said if you have had any criminal record in the authority. You would not be allowed to go out. But they let you go, which means you do not have any records there.)</p> |
| 348 | <p>A: (We paid for the passport. As long as we paid, they will give you the passport. Your previous records would not be recorded to my passport as they charged me for this)</p> | <p>The money I paid is for the passport, they can't erase or erase my previous records. They all they do is to give you your passport because you paid.</p> |
| 348 | <p>A: (In china, the department for issuing the passport and the local police station belong to two functional divisions)</p> | <p>The agency that provide passport, the organ, the department providing the passport is different from Public Security</p> |
| 349 | <p>A: (It is in the community and it is under the control of the community. Like me, I had to report to the local police station every week.)</p> <p>Interpreter: (Local police station? Not the public Security Bureau, not the PSB. Are the local police stations the branch offices of the PSB? At local level?)</p> <p>A: (At local level. In the community)</p> | <p>The department that issues passport is a separate department from the regional offices of Public Security Bureau that I have to report to.</p> |

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| 349 | <p>A: (In other words for instance, someone is wanted by the Liaoning province, but not necessarily by the Public Security Ministry)</p> <p>Interpreter: (Province?)</p> <p>A: (Someone is wanted at the provincial level, not necessarily at the state level)</p> <p>Interpreter: (In Liaoning province, the Public Security Ministry.)</p> <p>A: (for instance, someone is wanted by the Public Security Organ at the provincial level, but it is by no means to say this person is wanted at the state level. one is at a provincial level whilst the other is at the state level. They are two different levels)</p> | <p>There are different levels of operation in the PSB if the province of Liaoning is after someone, the provincial level, it may not be the Chinese government is after that particular person.</p> |

30 *Perera* does not, at [37] or at all, contrary to the reasons of the Federal Magistrate at [57] stand for the proposition that errors in interpreting can be rectified. Nonetheless, I would accept that in certain circumstances errors of that kind may be rectified. This could be done by written submissions to the Tribunal after the hearing: *Applicant NAAF of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 221 CLR 1 at [25] per McHugh, Gummow, Callinan and Heydon JJ and per Kirby J at [75]. It could also be done by the provision of a corrected transcript accepted by the Tribunal as accurate. Indeed, that is what occurred in this case in respect to the question of when the appellant commenced the practice of Falun Gong in China. Such errors however cannot always be rectified in this way and a further oral hearing at which an applicant gives evidence may be necessary. It will at least depend on the nature and extent of the errors.

31 It is the first respondent’s submission that the interpretation errors were rectified by the provision of a correct transcript to the Tribunal by the appellant after the hearing. It refers to the following reasons of the Tribunal on point:

As discussed, in considering this claim the Tribunal is greatly assisted by a fresh, NAATI-accredited translation of the Applicant’s evidence given at the 11 October 2006 hearing, on which the Applicant and his adviser have relied in making the point about misunderstandings at this more recent hearing. The

Applicant and his adviser have not asked for a third RRT hearing, and have said that the transcript helps to overcome deficiencies in the oral interpretation of the Applicant's 11 October 2006 evidence.

Guided by the concerns raised in the 27 October 2006 submission, the Tribunal is **confident** that it has sorted through instances where the Applicant misunderstood questions by the Tribunal that were misinterpreted or inadequately interpreted on 11 October 2006. The Tribunal has also relied, as the Applicant and adviser have indicated they would prefer it to rely, on the transcript's written translation of the information provided by the Applicant at the 11 October hearing, rather than the oral interpretation, the occasional shortcomings of which are shown in the transcript for comparison with what the Applicant is shown to have actually said. (Emphasis added)

32 Earlier the Tribunal in its reasons had said

The adviser's covering letter for the 27 October 2006 post-hearing submission refers to a number of perceived errors in translation at the 11 October 2006 hearing. The Tribunal has taken account of all of the errors to which the adviser refers. Some of the variations between what the transcript reports the Applicant as saying and what the interpreter related on the day appear to be insignificant variations; however, the Tribunal accept that there were errors and is grateful for the transcript on which the Applicant and his adviser evidently rely and which they have provided to the Tribunal. In view of their concerns, and paying close attention to their specific examples of errors, the Tribunal has relied on the translations by the NAATI-accredited expert who undertook the transcript, where those translations differ significantly from the versions of the evidence provided through the interpreter at the hearing.

33 I do not share the Tribunal's confidence. It is the case that certain, but not all, matters were to an extent clarified by the post-hearing written submissions contained in the letter to the Tribunal from the appellant's migration agent dated 27 October 2006, as well as by the transcript. For example the Tribunal in its reasons acknowledged that its view that the appellant's claim to have become a Falun Gong practitioner in China some nine years before he had previously claimed to be one, and which had raised credibility concerns in respect of the appellant, had arisen as a result of a misunderstanding. The misunderstanding was created by the woefully inadequate interpretation on this topic. The relevant passages are set out under para [27] above.

34 Nonetheless, I regard the balance of the errors, some in isolation, but certainly in totality, as significant, concerning as they do central issues raised in the application. For example, confusing and at times seemingly incoherent evidence was given by the appellant

concerning his involvement with a Falun Gong study group at Burwood: see paras [25]-[26], [53]-[62] in these reasons. In its findings the Tribunal did not accept “on the evidence” that the appellant had been involved, relevantly, with the Burwood Park Group. This led it to conclude that the appellant’s familiarity with Falun Gong teaching had been acquired by means other than attendance at the Burwood Park Group. It observed that the “appellant’s evince (sic) about belonging to this group and about how long he had belonged to it and where and when it met, is riddled with inconsistency”. This, in turn, may have had repercussions in relation to the Tribunal’s findings in respect to s 91R of the Act. Such inconsistencies significantly were caused by inadequate interpretation. This is not to review the facts found by the Tribunal. However such a finding demonstrates that on this central issue the appellant did not, in my opinion, receive a fair hearing because he was, in effect, prevented from giving relevant evidence in respect of it.

35 Further, on the question of the appellant obtaining a Chinese passport the Tribunal did not accept “on the evidence” that the appellant, who had made “special arrangements” in order to obtain his (and his wife’s) passports, had done so or needed to do so for the claimed Convention-related reasons. The Tribunal does not say what “the evidence” was. I cannot be confident that the poor interpretation on this matter did not play any part: see para [30] above. Again this is not to review the findings of fact but rather to illustrate that the appellant was prevented, because of poor interpretation, from giving relevant evidence.

36 In my opinion, neither the post-hearing written submissions nor the transcript were capable of curing fundamental problems created by the poor interpretation. First the incorrect interpretation of questions asked by the Tribunal Member could not be cured. The correct questions were never asked because they were poorly interpreted and it cannot be assumed what his answers would have been if this had not occurred.

37 Furthermore, a witness whose answers appear to be unresponsive, incoherent, or inconsistent may well appear to lack candour, even though the unresponsiveness, incoherence or inconsistencies are due to incompetent interpretation: *Perera* at [49]. The negative impression in the mind of the Tribunal Member conveyed by the appellant’s answers, incorrectly interpreted, is, in my opinion, difficult if not impossible to eradicate, after the hearing. Such a negative impression, in one area of evidence, such as the question of when

the appellant began to practice Falun Gong in China, will often affect a decision-maker's conclusions in other areas. It is impossible to discern the affect such impressions made at the time may have had on the Tribunal's conclusions as a whole: cf *Applicant NAAF of 2002* at [40]. The subsequent characterisation of this evidence as a "misunderstanding" by the Tribunal does not inevitably overcome the unfavourable impression obtained at the hearing by the Tribunal concerning the appellant's credit.

38 The Federal Magistrate, in his reasons at [46] and [53] correctly, in my view, said that the standard of interpreting "left a lot to be desired" and constituted "significant errors in interpreting". However, his Honour at [57]-[58] stated:

Quite clearly, the Tribunal has given favourable consideration to the applicants' submissions about the inadequacy of the interpreting and has taken appropriate steps to deal with the matters raised. The Tribunal appears to have done exactly what the applicants asked it to do. If errors in interpreting are made, then they can be rectified (see *Perera v Minister for Immigration and Multicultural Affairs* (1999) 92 FCR 6 at [37] per Kenny J).

Whilst it appears that there were errors on the part of the interpreter at the hearing, I am satisfied that the Tribunal took appropriate action in dealing with those errors, as the applicants requested. As a result, the applicants were not deprived of their ability to give evidence due to interpreting errors and there is no breach of s 425 of the Act. There is no jurisdictional error.

39 These reasons, with the greatest of respect, do not grapple with the problems which have been identified. They do no more than accept at face value, from the Tribunal's reasons, that the problems caused by poor interpretation had been cured by provision of the transcript. The provision of the transcript was no more, as the covering letter, in effect, said, than an attempt to overcome the negative impression (of the appellant's claims) created by the deficiencies in the interpreting. The covering letter from the appellant's migration agent to which I have referred did not purport to be a cure-all. The letter concluded by inviting the Tribunal to contact the writer, Mr Simon Jeans, if it required any further information or assistance. It did not take up this invitation. There is no independent analysis by the Court below of the transcript and the reasons. In my opinion, this was necessary to the disposition of the application for judicial review.

40 The Federal Magistrate at [41] appears to have placed some weight on the fact that the appellant did not ask for a further hearing to deal with the interpretation problems and that the

Tribunal “did exactly what the appellant had asked it to do”, namely to consider the transcript. The first respondent, too, submits that in the absence of such a request it was appropriate for the Tribunal to proceed as it did. The covering letter, as I have already indicated, is not to that effect.

41 The first respondent made the following written submission:

The advisor said that the transcript was provided in order to ‘overcome’ the ‘deficiencies’ in interpretation. Importantly, the appellant’s advisor did not ask the Tribunal to conduct a new hearing. Implicit in the submission was the acceptance by the appellants that subject to the Tribunal taking these matters into account, it was appropriate for the Tribunal to proceed to make a decision.

42 The letter of 27 October 2006 from the migration agent to the Tribunal did not say that the transcript was being provided “in order to overcome the deficiencies in interpretation”. Rather it said:

The deficiencies of the interpreting created a negative impression, which **we have sought to overcome** by providing a transcript of the hearing. (Emphasis added)

The letter concluded, as I earlier observed, with an invitation to the Tribunal to contact Mr Jeans if it required further information or assistance.

43 There was no finding nor evidence to warrant a finding that the appellant consented to not having a further hearing such as to trigger the exempting provision in s 425(2)(b) of the Act. No such submission was put in the appeal. I do not regard the above submission concerning the appellant’s “implicit ... acceptance” that it was appropriate for the Tribunal to proceed to make a decision as being to that effect. Even if it was I would not accept the submission. Consent for the purposes of s 425(2)(b) of the Act would be required to be given, in my opinion, in unambiguous terms. It would be an unusual case for such consent to be implied. Accordingly it is not to the point that the appellant did not ask for a third Tribunal hearing. The statutory obligation under s 425 to “invite” the appellant to appear before it to give evidence and present arguments lay with the Tribunal. It is a continuing obligation: *Applicant NAAF of 2002* at [26]-[27]. It extended no such invitation to the appellant to attend a further hearing so that he could give evidence, with adequate

interpretation, on the topics where it had been demonstrated that his “evidence” at the hearing on 11 October 2006 was riddled with confusion and error because of poor interpretation. The failure by the appellant to ask for a further hearing did not affect that obligation. I am satisfied that the interpretation of matters of significance to the appellant’s case and the Tribunal’s reasons fell well short of the requisite standard.

44 It may be that if there had been no interpretation error the result would not have changed. However I am unable to conclude on the balance of probabilities that this would have been the case. The potential consequences for the appellant should he be forced to return to China are dire. Justice requires that he be afforded another opportunity to give evidence and present arguments.

45 The failure to provide adequate interpretation services meant, in this case, that the Tribunal did not comply with s 425 of the Act. The appellant was in significant respects prevented from giving evidence and for that reason did not receive a fair hearing. Jurisdictional error on the part of the Tribunal has been established. The decision of the Tribunal was accordingly invalid. This ground of appeal is made out.

PROPOSED NEW SECOND GROUND:

Apprehension of Bias

46 Because of the view to which I have come in respect of the first ground of appeal it is not strictly necessary to consider the new second ground in respect of which leave is sought. However I propose nonetheless to consider the merits, going to the question of leave, because the particulars of this ground raise serious allegations against the Tribunal Member. They should not be left unresolved.

47 Apprehension of bias is founded on the notion that justice should not only be done, but it should also be seen to be done: *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 345. The test to be satisfied is “whether the relevant circumstances are such that a fair-minded and informed person might reasonably apprehend that the decision-maker might not bring or have brought an impartial mind to bear on the decision”: *NADH v Minister for Immigration & Multicultural and Indigenous Affairs* (2004) 214 ALR 264 at [14].

48 It is to be remembered that the proceedings before a Tribunal are inquisitorial in nature. There is a distinct difference between judicial officers and Tribunal Members. Judicial officers are required to act both impartially and in a “judicial” manner. A Tribunal Member’s role in conducting a review is to “get any information that it considers relevant”; s 424(1) of the Act: *NBMB v Minister for Immigration & Citizenship* [2008] FCA 149 at [7]. In *Re Refugee Review Tribunal; Ex parte H* (2001) 179 ALR 425 at 435 the court said:

Where, as in the present case, credibility is an issue, the person conducting inquisitorial proceedings will necessarily have to test the evidence presented – often vigorously. Moreover, the need to ensure that the person who will be affected by the decision is accorded procedural fairness will often require that he or she be plainly confronted with matters which bear adversely on his or her credit or which bring his or her account into question...

Where however, parties are not legally represented in inquisitorial proceedings, care must be taken to ensure that vigorous testing of the evidence and frank exposure of its weaknesses do not result in the person who’s evidence is in question being overborne or intimidated. If that should happen, a fair minded lay observer or a properly informed lay person might readily infer that there is no evidence that the witness can give which can change the decision maker’s view.

49 The test of whether a fair minded lay observer would apprehend bias on the part of the Tribunal requires something more than a feeling that conventions of discretion and prudence have been breached. Something more is required, and the apprehension must be firmly established: *Re Minister for Immigration and Multicultural Affairs; Ex Parte Epeabaka* (2001) 179 ALR 296 at [15] and per Kirby J at [53]-[65], and [89]-[95].

50 However, the enquiry is not directed to the personal thought processes of the decision maker, but to the conduct “objectified” though the prism of what a fair minded and informed observer would reasonably apprehend: *NADH* at [21]. Cases of apprehended bias have been established where there has been constant interruptions and challenges to an applicant’s evidence: *Re Refugee Review Tribunal; Ex Parte H* per Gleeson CJ, Gaudron and Gummow J at 71; *VFAB v Minister for Immigration & Multicultural & Indigenous Affairs* (2003) 131 FCR 102 at [68] and [82]; *NADH* per Allsop J at [118]; a hostile attitude, inappropriate tone or hectoring: *VFAB* at [50], [52]; a failure to acknowledge mistakes: *VFAB* at [60]; an aggressive and unfair style of questioning: *VFAB* at [68] and [82]; conduct amounting to intimidation: *Re Refugee Review Tribunal; Ex parte H* per Gleeson CJ, Gaudron and

Gummow J at [31]; unreasoned conclusions bereft of expressed supporting thought processes or any rational foundation: *NADH* per Allsop J at [35], [39], [47], [53], and brevity of reasoning when more reasoning is demanded: *NADH* per Allsop J at [35], [39], [47], [53].

51 The appellant submits that the ground of apprehended bias is supportable on two bases. First, the Tribunal Member's conduct at the hearing was such that a fair-minded and informed person might reasonably apprehend that he might not bring an impartial mind to bear on the decision he was required to give. Second, from the Tribunal Member's reasons in the decisional record and also having regard to the transcript of the hearing, a fair minded and informed person might reasonably apprehend that the Tribunal Member did not bring an impartial mind to bear.

52 In respect to the first of these two bases the appellant, in summary, makes the following submissions. First the Tribunal Member's questioning and conduct toward the appellant's evidence on several occasions appeared dismissive, and included an apparent refusal to entertain certain responses given by the appellant and directed toward his emotional connection to the Auburn Falun Gong group. Second the Tribunal Member also appears to have misled the appellant by misrepresenting the evidence of the appellant by saying the appellant had never claimed to be Falun Gong practitioner in China where in fact the appellant had made that claim in his original protection visa application. Third the Tribunal Member appears to have obstructed the effective hearing of the matter by failing to act on the appellant's criticisms of the interpretation at the hearing as well as concerns raised by the Interpreter.

Alleged dismissive questioning and conduct

53 The following exchanges were relied upon:

Mr Hardy: One of the questions you were asked the last time was about evidence of your involvement with the Burwood group, the last hearing.

Interpreter: (AT the last hearing, you were asked about your identity and role in Burwood group.)

Mr Hardy: When did you start with the Burwood group?

Interpreter: (When did you start with Burwood organisation?)

Mr Hardy: Which you were talking about in the last hearing.

Appellant: (April)

Interpreter: April

Mr Hardy: April what?

Interpreter: (in which year?)

Appellant: (in the year of 05)

Interpreter: 05

Mr Hardy: And how often were you gathering with that group?

Interpreter: (How long did you meet with them? And about how many times?)

Appellant: (Every morning, I went to Burwood exercise site to practice Falun Gong)

Interpreter: In Burwood, I went every morning to the place where we do exercise.

Mr Hardy: Do you ever continue to practice with the Burwood group?

Interpreter: (Do you ever continue to practice with the Burwood group?)

Appellant: (In July, I went to Auburn to practice as I was closer to **it**).

Interpreter: In July, I went to Auburn because, the exercise location, because I was closer to that **place**.

Mr Hardy: why were you closer to **it**?

Interpreter: (Why were you closer to **it**?)

Appellant: (Because there are more people, they are well organised)

Interpreter: (With more people?)

Appellant: (Yes, that group has many people. It is good for our colleague practitioners to study Dafa together.)

Interpreter: We have more members there and there are organised better in their exercise.

Mr Hardy: Ok, that is not why you are closer to **it**.

Interpreter: (But this is not as what you said “you are close to **it**”)

Appellant: (Yes, I do think I am closer to **it**.)

Interpreter: Also I think I am closer to that **place**.

Mr Hardy: Why do you feel you are closer to that **place**?

Interpreter: (Why do you think so?)

Appellant: (Because as far as distance is concerned, I **think** it is closer.)

- Interpreter: As far as distance is concerned, I **feel** we are closer.
- Mr Hardy: If I ask you why you were closer to **it**, I don't understand why your answer was, there are more members, it was better organised.
- Interpreter: (I asked you why you **feel** closer to **it**, I don't know why your answer was that there are more members there and they are better organised.)
- Appellant: As far as Da-fa learning is concerned, the more people there, the more supernatural power <chang> it will be. All practitioners can join each other for experience sharing.
- Interpreter: (Does "Chang" mean "place")
- Appellant: (No, it refers to our "Wheel of law" which even exists in the heaven. Practitioners are encouraged to attach importance to calmness.)
- Interpreter: ("Chang"?)
- Appellant: (Yes, "chang"!)
- Interpreter: Because with more people, the Chang which is something above in the heaven, while you exercise, the CHANG will be better, and then you can exchange or communicate better.
- Mr Hardy: Can you understand what am I trying to present to you here? My problem?
- Interpreter: (Are you with my questions?)
- Mr Hardy: You told me that the **place** was closer and I asked you what do you mean by that, and you didn't talk about the distance, you talked about other issues, and I wonder why you didn't answer the question on the point on this occasion.
- Interpreter: (Do you understand what I am asking you? I asked you why you thought **it** is closer. You didn't tell me why you feel closer, but to talk about some other advantages, are you with me?)
- Appellant: (I still can't understand you. After I came to know my colleague practitioners, I always went there with him due to the short distance to my residence. Moreover most people speak mandarin there.)
- Interpreter: Where I live I have a colleague, members of the same site. It is more convenient for us to go together, and we speak Mandarin.
- Mr Hardy: It looks like I am not going to be able to get to the bottom of this.
- Interpreter: (It seems I am not going to be able to get to the bottom of this.)
- Mr Hardy: Your mind jumped a track. It was like a train going from one track to another.
- Interpreter: (Your mind jump the track, like the rail track, you jump one track.)

Mr Hardy: Can you guess where it happened? I will go back over my notes.

Interpreter: Guess?

Mr Hardy: Can you think, can you, identify where you mind jump a track.

Interpreter: (Can you identify where your mind jump a track, jump the track?)

Mr Hardy: You said, in July I went to Auburn because I was closer to it.

Interpreter: (You have just mentioned that you went to Auburn as you thought it is closer.)

Mr Hardy: I asked you, what do you mean by you were closer to it?

Interpreter: (I ask you what do you mean by “closer to it”?)

Mr Hardy: Or why you were close to it?

Interpreter: (Why were you closer to it?)

Mr Hardy: and you said there were more members there, better organised.

Interpreter: (You said there were more peoples there, better organized)

Mr Hardy: Now your answer to my question did not explain why you were closer to Auburn.

Interpreter: (But you didn’t answer my question why you were closer to Auburn?)

Mr Hardy: It took me off on another subject entirely.

Interpreter: (You took me off on another question)

(Emphasis added)

54 The appellant submits that the Tribunal Member’s responses in the passage above would, to an informed person, appear as if there was an apparent bias displayed by the member when he dismissed the appellant’s evidence regarding the movements from the Burwood Falun Gong group to the Auburn group. The use of the words “feel closer” by the interpreter instead of the expression “were closer” used by the Tribunal Member introduced an unnecessary ambiguity. Although the Tribunal Member had earlier used the word “feel” this had not been interpreted by the Interpreter. It would appear from the appellant’s responses that he interpreted “feel” to mean his personal and emotional feelings about the Falun Gong group he attended, whereas the Tribunal Member’s question was intended to refer to the geographic proximity of the Falun Gong group to the appellant’s residence. The appellant was asked whether he ever continued to practice with the Auburn group. The appellant answered by saying he went to Auburn because he was closer to it. However the

Interpreter interpreted “it” as “place”. It is tolerably clear that the appellant by using the word “it” was referring to the Falun Gong group rather than the place where the group met. When asked to expand on why he was “closer”, the appellant referred to the number of people attending, the level of organisation of the group and the benefit of many members studying together including the greater presence of supernatural power. The Tribunal Member’s response to these answers was “Ok, that is not why you are closer to it.” This interchange of “place” to “it” happened repeatedly. This misinterpretation was the cause of considerable confusion. Another example of this is as follows:

Mr Hardy: You told me that the place was closer and I asked you what do you mean by that, and you didn’t talk about distance, you talked about other issues, and I wonder why you didn’t answer the question on the point of this occasion.

Interpreter: (Do you understand what I’m asking you? I asked you why you thought it is closer. You didn’t tell me why you feel closer, but to talk about some other advantages, are you with me?)

Appellant: (I still can’t understand you. After I came to know my colleague practitioner, I always went there with him due to the short distance to my residence. Moreover most people speak mandarin there)

Interpreter: Where I live I have a colleague, members of the same site. It is more convenient for us to go together and we speak Mandarin.

55 It can also be seen from this exchange that the appellant told the Interpreter, in Mandarin, that he could not understand him. However that was not conveyed to the Tribunal Member in English.

56 In its decision record, the Tribunal rejected the appellant’s claims partly because it disbelieved what it took to be the appellant’s evidence that he had changed from the Burwood group to the Auburn group because of the Auburn group’s geographic proximity to the appellant’s residence.

At the 11 October 2006 hearing, the appellant told the presently-constituted Tribunal that he started exercising with the Burwood group...in April 2005... He said he continued to exercise with the Burwood group until July 2005 when he joined a group at Auburn because he lived at a closer “distance” from Auburn and because it had more members and was better organised. He told the presently-constituted Tribunal that he was living in Homebush when he joined the Burwood group in April 2005 and also living at Homebush when he

changed to the Auburn group. His RRT application, lodged on 8 March 2005 states that he was already living at Homebush at the time. By his evidence, he was living at Homebush even before he allegedly started with the Burwood group.

In somewhat different evidence, the appellant said in a 21 September 2006 statutory declaration... that in April 2005 he joined the Burwood group which was near Berla, where he claimed he was living at the time. He went on to say that he went to the park every morning from April 2005 until he moved to Homebush and then he started going to the Auburn group...

57 The Tribunal attempted to show the inconsistency between the appellant's (incorrectly interpreted) evidence to the Tribunal at the hearing on 11 October 2006 and the Homebush West address provided by the appellant as his address in his application to the Tribunal on 8 March 2005.

58 The Tribunal put to the appellant that in his statutory declaration made on 21 September 2006 he said that he, "went to the [Burwood] park [group] every morning *until* he moved to Homebush and then he started going to the Auburn group." (Emphasis added)

59 In fact, in his 21 September 2006 statutory declaration, the appellant said, "*After* moving to Homebush I went to Auburn to practice Falun Gong." (Emphasis added)

60 The appellant does not indicate in his statutory declaration how long it was after he moved to Homebush he began attending the Auburn group. However, he did tell the Tribunal at the 11 October 2006 hearing that he began with the Auburn group in July 2005. The Tribunal accepted that the appellant joined the Auburn group in July 2005.

61 The appellant submits that it appears as if the Tribunal misinterpreted the appellant's 21 September 2006 statutory declaration as stating his relocation from Berala to Homebush West as the cause of why the appellant changed from the Burwood group to the Auburn group rather than as a narrative of events.

62 The appellant appears to have attempted to dispel the "interpretation error" made by the Tribunal Member about the 21 September 2006 statutory declaration during the hearing of 11 October 2006. However his attempts were thwarted by the misinterpretation of his words by the Interpreter:

Mr Hardy: In a statement you said to me, you said you changed from Burwood to Auburn when you moved to Homebush but that's different from what you said today.

Interpreter: Move to?

Mr Hardy: Homebush

Interpreter: (In your previous statement, you said that you changed from Burwood to Auburn because you moved to Homebush. This is not right, isn't it?)

Appellant: (That's interpretation error)

Interpreter: That was an incorrect translation by the translators

Mr Hardy: What is? What is an incorrect translation?

Interpreter: (What is? At where it went wrong?)

Appellant: (Now I couldn't understand what the question is)

Interpreter: I couldn't hear what the question is

63 In its decisional record, the Tribunal relied upon this misinterpreted answer that the appellant was not able to hear the question, as an insufficient explanation for claiming to have already being living in Homebush West by 8 March 2005.

... the applicant claimed that he had not heard the question, resulting in his indicating that he was already living in Homebush by April 2005 when he started daily exercises with the Burwood group. However, this explanation does not cover why he claimed in writing to the RRT as at 8 March 2005 that he was already living in Homebush.

64 The Tribunal then stated that, the appellant's "reason for joining [the Burwood group] and then leaving it, being that he lived near it at the time and later moved to Homebush, did not appear reliable".

65 The appellant submits that the Tribunal then interpreted the statutory declaration which the applicant had provided in a manner which supported the conclusion that the appellant's evidence was unreliable.

66 Later in its decision record, the Tribunal stated that:

The Tribunal gives weight to the fact that the reason why the Applicant could not stay with the Burwood group already existed well before April 2005, the month in which he claimed to join it, attending it every morning before going

home to get ready for work.

The evidence the Applicant provided to the RRT about changing his address from Berala to Homebush before 5 March 2005 completely undermines the claim about joining the Burwood park group in April 2005 due to his proximity to Berala, about attending it around six morning a week before going home and then to work, and about changing to an Auburn group later on due to having moved to Homebush...

The Tribunal accepts that the Applicant joined a Falun Gong exercise group in Auburn in the second half of 2005. The Tribunal does accept that the proximity to the Applicant's home in Homebush did have something to do with the Applicant's choice of the Auburn group over other groups in and around Sydney.

67 From the above extract, it was said by the appellant that the Tribunal attributed its own causative reasoning based on geographic proximity to the appellant, when there was no foundation to do so.

68 The appellant claimed that the reasons for his relocation were always based on an emotional and/or spiritual connection with the Auburn group that was stronger than with the Burwood group. The appellant submits that the Tribunal dismissed the appellant's evidence about his emotional and/or spiritual reasons for changing groups and indicated it would only accept answers concerning geographic proximity.

69 It is evident from these passages from the transcript that the member and the appellant were at cross-purposes from time to time particularly on the reasons why the appellant moved from the Burwood group to the Auburn group. This was caused by inadequate interpretation of both questions and answers as well as the use of a word such as "feel" with its potential for ambiguity. I do not consider the member was dismissive in his approach. He too was the victim of poor interpretation. He thought the questions and answers were being faithfully interpreted and it is understandable that to a degree he apparently became frustrated and tested what, on the face of it, seemed to be inconsistent answers given by the appellant. This was to be expected in the circumstances. It does not evidence an apprehension of bias.

Alleged misleading of appellant by Member – appellant's claimed level of involvement with Falun Gong in China

70 The appellant submits that the Member appeared to have misled the appellant by

misrepresenting the evidence he had earlier given by saying to him that he had never claimed to be a Falun Gong practitioner in China when in fact he had made that claim in his original protection visa application.

71 The relevant transcript is as follows:

Mr Hardy: It is not clear to me that you told other Tribunal that you ever practiced Falun Gong in China. The evidence to the other Tribunal was that you supported some Falun Gong practitioners, you transported some material for them, you even, you post some Falun Gong propaganda on traffic lights.

Interpreter: (To me, you told the previous hearing that you did not say that you practiced Falun Gong in China. I know you supported it. You picked up people to practice Falun Gong and post advertisements, etc)

Mr Hardy: The other Tribunal Mr Shaw gave you the opportunity to talk about what happened in China. It appears to me that no point did you say to Mr Shaw that you were ever a practitioner in China.

Interpreter: (The previous Tribunal member Mr Shot, had gave you opportunity to say that the level of your involvement with Falun Gong in China. But you never told him you practiced Falun Gong in China.)

...

Mr Hardy: Ok, now, at no point did it come up that you were a practitioner in China.

Interpreter: (During the previous Tribunal hearing, you had never mentioned that you were a practitioner, a Falun Gong practitioner in China.)

Mr Hardy: And you are saying today that you want to make an amendment to that

Interpreter: (Do you want to correct this point?)

Mr Hardy: Ok, This means you didn't even raise it, so it hasn't been mistranslated into English by the interpreter. This means you never raised it, last time, with Mr Short

Interpreter: (You just raise it today, and you had never mentioned it with Mr Shaw, the Tribunal member. So it is by no means a translation error)

Appellant: (Some issues for the last time I indeed didn't hear clearly. If he asked me "did you practice Falun Gong in China?" I would have answered)

...

Mr Hardy: The fact I raised this subject at this stage of the hearing, about your having been a practitioner in China when you previously didn't claim it is of itself a sign that I am concerned about the claim and its credibility.

Interpreter: (Now, I raised this question is that, you had never mentioned you practiced Falun Gong in China. Now you raise this point which I find it hard to believe.)

Mr Hardy: I thought it is important to ask you a number of questions about it rather than just to dismiss it because you hadn't mentioned it before.

Interpreter: (As you haven't mentioned before, I cannot rule this out of my consideration immediately. This is why I have raised you so many questions to you.)

Mr Hardy: So I have gathered more information from you about what your claim was your involvement as a Falun Gong practitioner in China.

Interpreter: (So many questions have been raised to you on your Falun Gong practice in China.)

Mr Hardy: I remain sceptical at this point, you were ever a Falun Gong practitioner in China.

Interpreter: (I still have a <...> attitude. So I have a <...> attitude to this point, ie, you are a Falun Gong practitioner.)

72 The appellant submits that the Tribunal misrepresented the appellant's evidence when it said that he had never previously claimed to be a Falun Gong practitioner in China. The appellant had in fact claimed to be a Falun Gong practitioner in China in his statutory declaration made on 22 December 2004 which accompanied his protection visa application.

73 The appellant claimed that the comments made by Tribunal Member were an indication the Tribunal Member was either not sufficiently apprised of the appellant's claims at the time of the hearing or that he deliberately disregarded the appellant's evidence.

74 The appellant submits that while the most beneficial view to the Tribunal is the first, the second interpretation is open given what the Tribunal Member said in its decisional record:

There was a period during the 11 October 2006 hearing when the Applicant appeared to talk about Master Li having bestowed Falun Gong upon him from 1992. For a time, the Tribunal wondered if this meant that the Applicant was

claiming to have become a Falun Gong practitioner some nine years before he previously claimed to become one, and raised concerns with the Applicant about his overall credibility on the basis of this example. The Tribunal now sees that this was a misunderstanding, and that what he was saying was essentially that Master Li began inviting him and the world to join in Falun Gong in 1992 but that he answered the call in 2001.

75 The Tribunal subsequently noted that:

The position put to the Applicant at the 11 October 2006 hearing about the Applicant never having been a Falun Gong practitioner in the PRC is not an accurate reflection of his claims up to that point, but it is ultimately what the Tribunal finds on the facts in this case.

76 The appellant argued that had the Tribunal Member actually known that the appellant had claimed to be a practitioner in 2001, as he should have, then his line of questioning at the hearing was misleading and therefore would appear to a fair minded and informed person that the Tribunal Member did not have an open mind in making its decision.

77 It is impossible to determine what was in the Tribunal Member's mind at the time of the hearing, and indeed it is not necessary to do so, in order to establish a case of apprehended bias. There is no evidence to show that the Tribunal Member had intended to be misleading. It is likely that he had forgotten the relevant content of the appellant's statutory declaration. The submission made by the appellant that it was open to conclude that the Tribunal Member 'deliberately disregarded' some of the appellant's evidence as to when he became a Falun Gong practitioner is completely without foundation. This is a most serious allegation. It should never have been made. It is quite clear from the Member's reasons that he accepted without qualification that he had made an error in this respect. Decision-makers are fallible. The relevant questions about his involvement in Falun Gong in China were directed to what the appellant had told the other Tribunal. The Member did not actually ask the appellant about what he had said in his statutory declaration. It was open to the appellant, in answering the question to refer to the statutory declaration. He did not. Perhaps he too had forgotten its contents. For these reasons I am far from satisfied that the conduct of the Tribunal Member in relation to this matter evidences even an apprehension of bias on the part of the Member.

The Tribunal Member's conduct when put on notice as to possible deficiencies in the

interpretation

78 During the course of hearing, as can be seen from the following transcript, the Tribunal Member was expressly alerted by both the appellant and the Interpreter that the Interpreter's ability to interpret at the hearing may be inadequate.

Mr Hardy: Now, I need you to answer my question on the point today.

Interpreter: (I hope you could answer my question to the point.)

Mr Hardy: You didn't answer that question on point.

Interpreter: (But you didn't answer that point)

Appellant: (It is more likely that something goes wrong with my comprehension)

Interpreter: Maybe my comprehension is still problematic

Mr Hardy: I think it might be an issue of concentration, and I am going to suggest you that you concentration on the point to the question, and if you don't understand it, let me know.

please ask Interpreter: (I think it might be your attention. If you don't understand, me.)

Mr Hardy: Ok

that I can Interpreter: Can I also because translation is a point. If he doesn't think interpreter for him, please let me know so that I can be excused.

know. Mr Hardy: Ok, if there is some issue with the interpreter, please let me know.

immediately let Interpreter: (If you are not satisfied with my interpreting, please me)... <interrupted>

Mr Hardy: And I will make an assessment of the way forward

Interpreter: <Apparent omission in transcription>

Mr Hardy: OK? I understand that you asked for a mandarin interpreter

Interpreter: (You asked for a mandarin interpreter.)

Hardy: And I understand that is the interpreter we have today

Interpreter: (Today I will ask you in mandarin)

Hardy: The interpreter is highly qualified

Interpreter: (I have professional qualification)

Hardy: Ok? So focus on the questions please.

Interpreter: (Focus on my question.)

...

Burwood to
from what

Mr Hardy: In a statement you said to me, you said you changed from Auburn when you moved to Homebush, but that's different you said today.

Interpreter: Move to?

Hardy: Homebush

Burwood to
isn't it?)

Interpreter: (In your previous statement, you said you changed from Auburn because you moved to Homebush. This is not right, isn't it?)

Appellant: (That's interpretation error.)

Interpreter: (That was an incorrect translation by the translators.)

Mr Hardy: What is? What is an incorrect translation?

Interpreter: What is? at where it went wrong?

Appellant: (Now I couldn't understand what the question is)

Interpreter: I couldn't hear the question

...

79 The appellant submits that given the responses from both the appellant and the Interpreter, the Tribunal Member should have been put on notice that there may be deficiencies in the interpretation.

80 The appellant indicated that the reason he may have appeared to be answering the Tribunal Member's questions 'off point' was because there was a problem with his comprehension of the interpretation provided by the Interpreter. In response, the Tribunal Member stated that he believed the appellant's apparent inability to answer on point was "an issue of concentration".

81 The Interpreter then suggested that perhaps he should be excused given the concerns about the quality of the interpretation.

82 The appellant contended that from the conduct of the hearing and the responses being given by the appellant, the Tribunal should have been alerted to the possibility that there were potentially significant defects in the interpretation being provided by the Interpreter. The Tribunal noted, on more than one occasion, that the answers being given by the appellant did

not appear to correspond with the questions being asked. The Tribunal appears to have become frustrated as a result. The appellant submits that to a fair-minded and informed person, the Tribunal would appear to have closed off the possibility that there could be any legitimate interpretation 'issues'.

83 The apparent frustration of the Tribunal showed when the Tribunal stated, "[i]t looks like I am not going to be able to get to the bottom of this", after noting that the appellant had not answered "on the point" and that then that appellant's mind "jumped a track... like a train going from one track to another". This appears to have led the Tribunal Member to say "[i]t looks like I am not going to be able to get to the bottom of this".

84 And again when the Tribunal Member stated, "[n]ow, I need you to answer my question on the point today" before suggesting that the appellant was not concentrating on the questions being put.

85 Following the hearing, the appellant again raised the 'issue' of misinterpretation by way of a letter from his Migration Agent to the Tribunal dated 27 October 2006 and enclosing a transcript of the Tribunal hearing.

86 In its decisional record, the Tribunal referring to apparent errors in the Interpreter's interpretation at the Tribunal hearing stated:

Looking at the transcript of the 11 October 2006 hearing, obtained by the Applicant through his adviser, the Tribunal is not certain that the legal meaning of what it was disclosing to the Applicant was aptly conveyed by the interpreter.

87 It seems to me likely that the Member was not aware of just how poorly many of his questions and the appellant's answers were being translated. I do not doubt that if he had been so aware that he would have taken steps to rectify the position. The Member told the appellant that if there was an issue with the interpreting that he should let him know. Unfortunately this invitation was not fully interpreted because the Member, who had not finished what he was saying, interrupted the interpretation. When he did finish, the transcript then contains the words "apparent omission in transcription". The result was that the appellant never heard the text of the invitation to raise issues about the standard of

interpretation.

88 The position was not helped when, shortly after this, the appellant said that he couldn't **understand** the question from the Member but this was translated into English as "I couldn't **hear** the question". (Emphasis added)

89 I do not accept the appellant's submissions. If the Member did apparently display a degree of frustration with the appellant arising from his answers this was probably as a result of the poor quality of the interpretation. The invitation by the Member to which I have referred was never interpreted.

Alleged obstruction of an effective hearing

90 The appellant submits that the Tribunal Member interrupted the Interpreter during the course of the hearing in relation to when it was that the appellant commenced with a group in Burwood. It was said that the Tribunal Member had in this way restricted or limited the evidence being presented during the hearing and did not allow the appellant to fully present his arguments. This is said to amount to an apprehension of bias on his part. The relevant transcript follows:

Mr Hardy: but when did you start with it, when did you commence with it? Which month? Which year?

Interpreter: (Which month and what time?)

Appellant: (The time I lived in Berala was probably..., I got in touch with the group... in the first month I went to Burwood.)

Interpreter: (Can you say it again?)

Appellant: (It was in the first month that I went to the Burwood group. I came to know a Refugee group in Burwood. Because there are two groups, one in the morning, the other at night. I came to know the morning group one month later.)

Mr Hardy: Ok, stop for a moment. Translate please.

Interpreter: I was trying to understand the time frame, I didn't get.

Hardy: Ok, you spoke too long and too quickly. Maybe we can simplify this, just by having you tell me which month and which year did you commence practising with the refugee group.

Interpreter: (Which year, which month did you commence?)

Hardy: The answer will have two words, the month and the year. Interpreter?

91 The Tribunal Member's questions which month? Which year? were mistranslated as Which month and what time?

92 The appellant answered this misinterpreted question with reference to the time he was living in Berala. His answer although responsive to the interpreted question was not responsive to the member's actual question. However, the Tribunal Member interrupted the answer being given by the appellant and requested the Interpreter to interpret what had been said. The Interpreter then appeared to have explained why there had been some discussion between him and the appellant. The Tribunal Member then said that the appellant had spoken "too long and too quickly" (which was not translated) and proceeded to ask another question without hearing the translation of the appellant's oral evidence.

93 The appellant says that the Tribunal Member appeared to disregard his uninterpreted evidence in the interests of obtaining a 'simplified' answer to his questions rather than the answers the appellant actually gave.

94 The appellant submits that by his conduct, the Tribunal Member inappropriately limited the appellant's evidence and interrupted the evidence he was giving and that to a fair-minded and informed person, it would appear that the Tribunal Member had denied the appellant a full opportunity to give evidence and present arguments at the hearing.

95 I do not agree. The member had asked two simple questions – Which month? Which year? Because of inaccurate interpretation his questions did not elicit the simple answers that the questions reasonably demanded. It was reasonable for the member to attempt to re-direct his questions which seemingly were producing unnecessarily long responses given the simple question put. He was quite entitled to take this approach and no criticism of him arises. Yet again the problems were caused by inadequate interpretation.

Evidence about obtaining passports to leave China

96 The following is the relevant transcript.

Appellant: (We paid for the passport. As long as we paid, they will give you the passport. Your previous records would not be recorded to my passport as they charged me for this.)

Interpreter: The money I paid is for the passport, they can't erase or erase my previous records. They all they do is to give you your passport because they paid.

Mr Hardy: Ok, I've asked many questions as I think I need to ask on that point. I think you are going round the circles.

Interpreter: (He said that you are going around the circles.)

Appellant: (No, I am no. I haven't finished yet.)

Interpreter: I haven't finished yet.

97 The appellant submits that the Tribunal appears to have inappropriately attempted to restrict his evidence when the Tribunal Member said he was "going round the circles". The appellant was in the process of answering the Tribunal Member's question. It was left to the appellant to inform the Tribunal Member that he had not finished his answer to the question.

98 The Tribunal Member asked no further questions relating to the appellant obtaining a passport or why it might be that his passport did not reveal his previous detention by police despite the appellant providing a lengthy explanation to the Tribunal. This was so despite the fact that there was dialogue on this subject consisting of about two pages of transcript between the Interpreter and the appellant and almost none of it was interpreted into English. Instead, at the conclusion of this uninterpreted dialogue, the Tribunal Member began a new line of questioning about when the appellant began practising Falun Gong in China.

99 In its decision record the Tribunal discussed the concerns the previously constituted Tribunal had about the appellant's evidence about obtaining a passport for him and his wife:

The presently-constituted Tribunal observes that the PRC authorities supposedly had the evidence of the Falun Gong propaganda found in the Applicant's house in April 2004 and did have, in their view, sufficient evidence to put him on **weekly** reporting conditions. (Emphasis in original)

100 However, in the Findings and Reasons section the Tribunal said:

The Tribunal accepts that the Applicants obtained their passports and other travel documentation through a travel agent. The Tribunal is prepared to accept that the Applicant may have made special payments for his and his

wife's passports and other travel arrangements, but does not accept on the evidence before it that he did so or needed to do so for the Convention-related reasons claimed.

101 It is uncertain what the Tribunal's findings on the matter were. However, whether or not the issue was eventually determinative, it was relevant to the review. The appellant submits that to a fair minded and informed person, this may appear that the Tribunal Member was careful to be seen that he had put the required questions to the appellant but that he was not equally careful to listen to the responses given and that the Tribunal Member was not acting impartially by failing to give the appellant every possible opportunity to give his evidence on matters relevant to the review.

102 I reject the submission of apprehended bias. Regrettably, once again, the interpretation was quite inadequate. This is so upon a review of what was actually interpreted but in this case also because the Interpreter did not interpret some of the evidence given by the appellant at all. It is not the function of an Interpreter to engage in dialogue with a witness in order to try to understand what has already been said. That is the function, in this case, of the Member.

The Tribunal's apparent characterisation of the appellant's evidence during the hearing

103 The following transcript is relied upon.

Mr Hardy: Mr Hua's statement doesn't say you meet them Friday, Thursday night. Start again. Mr Wu JiaHua his statement says that you used to meet on Friday nights, not Thursday nights as you just said.

Interpreter: (Mr. Wu Jianhua's statement says that you met on Friday night to practice.)

Appellant: (Actually our time is flexible. He may not provide in all details.)

Interpreter: Not to what?

Appellant: (Not to provide in all details. We sometimes meet on Thursday that depends on his work commitments. Now we always meet on Friday whilst it used to be on Thursday.)

Interpreter: He may not have written it in exact detail, our meeting varies from time to time depends on his work commitments. We used to be on Thursday night, now we meet on Friday night.

Mr Hardy: If you say he hasn't written in exact detail, you are asking me whether I should give weight to his statement.

Interpreter: (You say he hasn't written in exact details. In other words, what, were you saying whether I should give weight to his statement to make my decision.)

104 The appellant contends that the Tribunal Member's characterisation of the appellant's oral evidence above as a request for the Tribunal to reduce the weight given to Mr Wu Jian-hau's statement appears to be erroneous. The appellant submits that it did not ask the Tribunal to do this.

105 The appellant submits that the mischaracterisation of the appellant's evidence would give a fair-minded and informed person further reason to apprehend that the Tribunal Member was directing an impartial mind to the appellant's case.

106 The respondent submits that the Tribunal was seeking merely to establish, in response to a suggestion by the appellant that Mr Wu Jian-hua's statement did not contain all of the pertinent details, whether the first appellant wanted the Tribunal to place less weight on the written statement of Mr Wu Jian-hua's – considering that its contents appeared to reveal a direct inconsistency with the first appellant's oral evidence. Here, the Tribunal is effectively pointing out an inconsistency in the appellant's story and inviting him to comment upon how the Tribunal should approach this issue.

107 The Tribunal in its decision stated that the appellant had sought to distance himself from the statutory declarations that were inconsistent with his evidence and that he had given the Tribunal reason to doubt the reliability of Mr Wu's sworn declaration.

108 I do not accept the appellant's submissions. The Member's question about the weight to be given to Mr Wu's statement was entirely appropriate. Once more however, it can be seen that the standard of interpretation was less than adequate. For example the appellant's answer "we sometimes meet on Thursday ..." was interpreted as "we used to be on Thursday night ..."

Tribunal's apparent reliance upon evidence affected by misinterpretation and given before the previously constituted Tribunal

109 In the previous hearing before the Tribunal, the Interpreter at the hearing had misinterpreted the Tribunal's questions to the appellant about which was the most important of Mr Li Hongzhi's, the founder of Falun Dafa, books.

110 The previously constituted Tribunal relied upon the appellant's answers to support a finding that the appellant was not sufficiently cognisant of Falun Gong doctrine and literature to be a bona fide Falun Gong practitioner.

111 The First Tribunal's decision was overturned and remitted for further hearing.

112 The present Tribunal conceded that the appellant knew the most important of Mr Hongzhi's books but added, "[n]o matter how delayed your response to that question." The appellant submits that the use of those words to qualify the Tribunal's concessions appear to retain the First Tribunal's sentiment of suspicion toward the appellant's bona fides.

113 The appellant submits that it would appear that at the Tribunal hearing there remained concerns about the bona fides of the appellant's claim for a protection visa due to the way in which he answered the misinterpreted questions from the First Tribunal.

114 The Tribunal stated in its decision record that:

The Tribunal accepts that the Applicant demonstrated a familiarity with Falun Gong teaching and exercise practice at the 18 May 2005 hearing. The Tribunal does not take the view that the Applicant faltered in relation to Falun Gong knowledge-related questions asked by the previously-constituted Tribunal. The Tribunal accepts that any impression to the effect that he did would be an erroneous impression resulting from oversight as to the way the questions were being interpreted at the time. However, the Tribunal gives no weight to the fact that the Applicant has a working knowledge of Falun Gong teachings and exercises.

115 The Tribunal continued:

...the familiarity he showed with Falun Gong at the 18 May 2005 was acquired by some other means. The evidence before the presently-constituted Tribunal is that the Applicant was studying prior to 18 May 2005 with a study group convened for "refugees," which is the term the Applicant uses to

distinguish asylum seekers from residents and citizens... The Applicants evidence to both Tribunals leads the presently-constituted Tribunal to the view that all of the knowledge the Applicant gained prior to the 18 May 2005 hearing was gained for the purpose of enhancing his case as an asylum seeker, whether through attendance of coaching classes designed for asylum seekers (as some of his information suggests) or with the help and co-operation of a housemate (as the evidence also supports) or by some other means that, significantly, has nothing to do with joining in genuine Falun Gong exercise or study groups at or around that time.

116 The appellant submits that the Tribunal Member's finding could only be explained by the suspicion retained by the Tribunal Member and that to the fair-minded and informed person it would appear the Tribunal had closed its mind to the possibility that the appellant may have a "familiarity with Falun Gong teaching and exercise practice" because he was a bona fide Falun Gong practitioner.

117 The respondent submits that the Tribunal went to some effort to ensure the appellant understood that this 'issue' was no longer an issue and also explained this in its decision. The Tribunal did not rely on this evidence at all and expressly stated that to be the case.

118 I reject the appellant's submissions. Regrettably the qualified concession by the Tribunal Member relied upon has not been set out in full in the appellant's written submissions. The full text from the hearing transcript is as follows:

Member Hardy: It is clear that, from the evidence already provided that you know the most important book. No matter how delayed your response to that question. **Perhaps badly worded the question was** (sic). (Emphasis added)

119 The last statement actually evidences a possible and, from the Tribunal Member's perspective, perhaps the probable reason why the appellant's responses had been delayed if indeed they were delayed. It does not demonstrate an apprehension of bias. Rather it evinces a fair-minded approach by the Member.

120 In my opinion, for these reasons the proposed new second ground raising apprehended bias has no reasonable prospect of succeeding on appeal were leave to be granted. On this basis alone I would refuse leave to the appellant to raise this ground not argued before the Court below: *VAAC v Minister for Immigration and Multicultural and*

Indigenous Affairs (2003) 129 FCR 168 at [26]-[27].

CONCLUSION

121 Leave is granted to amend the first ground of appeal in terms of paragraph 1 of the Amended Notice of Appeal dated 4 March 2008.

122 The appeal ought be allowed. I will hear the parties on the question of costs given the divided success in relation to the issues before the Court. I will also hear the parties on the question of costs in connection with the application before the Federal Magistrate. The orders of the Federal Magistrates Court made on 18 October 2007 will be set aside. In lieu, there will be orders that:

- (a) the decision of the Refugee Review Tribunal dated 28 November 2006 be quashed;
- (b) the application for review be remitted to the Tribunal, differently constituted, to be re-determined according to law.

I certify that the preceding one hundred and twenty-two (122) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Gilmour.

Associate:

Dated: 24 July 2008

Counsel for the Appellants: Mr D Jenkins

Solicitors for the Appellants: Simon Jeans & Associates

Counsel for the Respondent: Ms L. Clegg

Solicitors for the Respondent: Sparke Helmore

Date of Hearing: 5 March 2008, 18 April 2008

Date of Judgment:

24 July 2008

