FEDERAL COURT OF AUSTRALIA

SZTAN v Minister for Immigration and Border Protection [2016] FCA 705

|  |  |
| --- | --- |
| Appeal from: | *SZTAN v Minister for Immigration & Anor (No.2)* [2015] FCCA 3442 |
|  |  |
| File number: |  |
|  |  |
| Judge: | **BROMWICH J** |
|  |  |
| Date of judgment: | 24 June 2016 |
|  |  |
| Catchwords: | **MIGRATION –** scope of obligation under s 425(1) of the *Migration Act 1958* (Cth)  |
|  |  |
| Legislation: | *Migration Act 1958* (Cth), s 425(1)  |
|  |  |
| Cases cited: | *Cabell v Markham* 148 F.2d 737 (1945)*Fox v Percy* [2003] HCA 22; (2003) 214 CLR 118*Kumar v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCA 201*Minister for Immigration and Border Protection v Singh* [2014] FCAFC 1; (2014) 231 FCR 437*Minister for Immigration and Border Protection v Stretton* [2016] FCAFC 11; (2016) 237 FCR 1*Minister for Immigration and Citizenship v Li* [2013] HCA 18; (2013) 249 CLR 332*Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16; (2010) 240 CLR 611*Re Coldham; Ex parte Municipal Officers Association of Australia* [1989] HCA 13; (1989) 84 ALR 208*Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* [2003] HCA 6; (2003) 214 CLR 1*Re Ruddock; Ex parte Applicant S154/2002* [2003] HCA 60; (2003) 201 ALR 437*SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] HCA 63; (2006) 228 CLR 152*SZRMQ v Minister for Immigration and Border Protection* [2013] FCAFC 142; (2013) 219 FCR 212*Warren v Coombes* (1949) 142 CLR 531*Wati v Minister for Immigration & Multicultural Affairs* [1997] FCA 1052; (1997) 78 FCR 543  |
|  |  |
| Date of hearing: | 16 May 2016 |
|  |  |
| Date of last submissions: | 31 May 2016 |
|  |  |
| Registry: | New South Wales |
|  |  |
| Division: | General Division |
|  |  |
| National Practice Area: | Administrative and Constitutional Law and Human Rights |
|  |  |
| Category: | Catchwords |
|  |  |
| Number of paragraphs: | 93 |
|  |  |
| Counsel for the Appellant: | Ms R Francois with Ms A Rao |
|  |  |
| Solicitor for the Appellant: | SBA Lawyers |
|  |  |
| Counsel for the First Respondent: | Mr T Reilly |
|  |  |
| Solicitor for the First Respondent: | DLA Piper Australia |
|  |  |
| Counsel for the Second Respondent: | The Second Respondent filed a submitting notice save as to costs |

ORDERS

|  |  |
| --- | --- |
|  | NSD 167 of 2016 |
|   |
| BETWEEN: | SZTANAppellant |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTIONFirst RespondentADMINISTRATIVE APPEALS TRIBUNALSecond Respondent |

|  |  |
| --- | --- |
| JUDGE: | BROMWICH J |
| DATE OF ORDER: | 24 June 2016 |

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The appellant pay the first respondent’s costs as taxed or agreed.

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

REASONS FOR JUDGMENT

# BROMWICH J

1. This is an appeal from orders made by a judge of the Federal Circuit Court of Australia by which an application to review a decision of the former Refugee Review Tribunal, now the Administrative Appeals Tribunal, was dismissed. The Tribunal affirmed the decision of a delegate of the Minister not to grant the appellant a protection visa.

## Before the delegate

1. The appellant is a 27 year old male citizen of Bangladesh. On 16 November 2011, he arrived in Australia on a business short stay visa, which he obtained when travelling in China.
2. On 9 December 2011, the appellant applied for a protection visa. The basis of the application was a claimed fear of persecution in Bangladesh based on his Buddhist religion. The delegate interviewed the appellant, and accepted his claims both as to a fear of persecution and as to it being well-founded, but refused him a protection visa on the basis that there was effective State protection of Buddhists in Bangladesh.

## Before the Tribunal

1. On 4 November 2012, the appellant lodged an application for review of the delegate’s decision with the Tribunal. The appellant attended a hearing of the Tribunal over two days on 12 and 14 March 2013. On 13 June 2013, the Tribunal affirmed the delegate’s decision. In reaching that decision, the Tribunal:
2. accepted the appellant was a practicing Buddhist and that he had been a Buddhist monk from time to time;
3. accepted that the appellant had participated in consultations as a Buddhist with college authorities and had engaged in social work;
4. was not satisfied that a mere fact of being the kind of Buddhist that the appellant was, whether in Bangladesh generally or in the area where he lived in particular, gave rise to a well-founded fear of persecution for any Convention reason;
5. did not accept the appellant’s claim that he had held leadership positions nor any office in any religious organisation;
6. found that the appellant had significantly exaggerated his activities, the profile of those activities, their political/religious importance and the impact they had on the community as a whole;
7. did not accept that the appellant had engaged in any activities as a Buddhist that could be perceived as anti-Muslim;
8. did not accept that the appellant had led protests in August 2009 or that he returned from a prolonged period in hiding, depressed and unable to lead a normal life, to lead local resistance to the seizure of temple land by Muslim fundamentalists; and
9. found that the appellant had fabricated claims to acquire the profile of a person in need of protection.
10. The context in which the Tribunal made adverse credit findings in relation to the appellant’s fabrication of claims to acquire the requisite profile is the central focus of this appeal.

## Issues on judicial review and on appeal

1. The proceedings in the Federal Circuit Court and on appeal in this Court were concerned with the way in which the Tribunal made adverse credit findings. Taken cumulatively, those adverse credit findings were fatal to the appellant’s claim for a protection visa.
2. The Federal Circuit Court proceedings involved two decisions of the primary judge. The first decision, dealing with an application in a case made by the Minister seeking leave to re-open his case, recounted the background to the appellant’s claims and resulted in a grant of leave to the Minister. The second decision, following a second hearing at which additional evidence was adduced in accordance with the leave granted, incorporated the first decision insofar as it detailed the appellant’s claims for protection and the reasons why the Tribunal did not accept those claims. The first decision therefore provides much of the background and detail for this matter. However it is the second decision that included the presently impugned consideration of the Tribunal’s reasoning on the credibility issue.
3. The appellant’s case in substance was that if the ultimate adverse credit finding was arrived at by a process which included a breach of the Tribunal’s statutory requirements for procedural fairness under s 425(1) of the *Migration Act 1958* (Cth), then the entirety of the Tribunal’s decision was vitiated. Although expressed in a number of different grounds, the substance of the appellant’s case was that the primary judge had erred in not reaching that conclusion.
4. The focus before the primary judge and on appeal to this Court was on one relatively small part of the Tribunal’s reasoning in reaching adverse credit findings. However, it was common ground that this was a material part of the reasoning process by which the Tribunal reached the adverse conclusion as to appellant’s lack of profile.
5. If a material part of the conclusions reached by the Tribunal was shown to have been made in breach of s 425(1), then the primary judge did unavoidably err, and the appeal would need to be upheld, the Tribunal’s decision set aside and the matter remitted to the Tribunal for rehearing according to law.
6. No issue was taken with the summary of the appellant’s claims as set out by the primary judge in his Honour’s first decision under the heading “Background” as follows (footnotes omitted; bold and italics in original):

3. The applicant, a citizen of Bangladesh, applied for a protection visa on the ground that he has a well-founded fear of being persecuted because of his religious beliefs, and his involvement with a social organisation known as “*Mahamandal Kallyan Sangsta*” (**MKS**). The elements of the applicant’s claims for protection are as follows:

a) The applicant is a Buddhist, and MKS is a welfare organisation whose goal is to protect local Buddhists from oppression, discrimination and harassment. The MKS was associated with a Buddhist temple.

b) During the 2008 parliamentary elections in Bangladesh, local BNP/Jamaat leaders approached the applicant and his guru to encourage members of the Buddhist community to vote for the BNP/Jamaat, but the MKS did not involve itself in politics.

c) After the BNP/Jamaat lost the elections to the Awami League (**AL**), BNP/Jamaat thugs targeted the Buddhist community, including the applicant in particular, because they believed that the community had supported the AL members, and supporters of BNP/Jamaat were angered by the applicant’s refusal to work for the BNP/Jamaat.

d) In 2009, in response to threats and assaults on Buddhists, the applicant organised a meeting to protest. That resulted in the applicant and his family receiving more threats.

e) On 1 December 2009 the applicant was attacked by four BNP/Jamaat thugs, and was told he had to leave the area within twenty four hours. The applicant left that night and went to a temple.

f) On 21 September 2010 the applicant heard that BNP/Jamaat thugs had occupied lands belonging to the MKS temple. The applicant organised a protest in response, and this involved him returning to the area of the MKS temple. That led to BNP/Jamaat thugs hunting him down which, in turn, resulted in the applicant fleeing his home on 24 October 2010.

g) The applicant left Bangladesh for China on 22 March 2011.

4. The applicant gave evidence before the Tribunal over two days. The evidence he gave is set out in the Tribunal’s decision, as are concerns the Tribunal raised with the applicant about a number of aspects of the applicant’s evidence. Relevant to the application for judicial review, and also to the Minister’s application to re-open, is the evidence the applicant gave about the person with whom he travelled to China after he left Bangladesh.

5. The applicant said he travelled to China on a student visa to study a course on Buddhist religion; he spent the first four months studying the Chinese language; he received some financial support organised by Upanunda Tero; Upanunda Tero did not help any other person at the place the applicant was studying in China; but when he applied for a visa in the embassy of the Peoples Republic of China (**PRC**) at Dhaka, he met another young man at the gate of the embassy; and at the time the applicant met the young man, both he and the young man were wearing robes.

6. In response to the Tribunal’s asking how it happened that the applicant and another person happened to be at the gate of the embassy on the same day at the same time and ended up studying the same course in China, the applicant said that it had all been arranged by his guru and he knew nothing about how the other young man was at the embassy gate.

7. The applicant told the Tribunal he went to the embassy of the PRC at Dhaka on the recommendation of his teacher. At the embassy gate, the applicant met another young man who was applying for a visa to undertake the same course in China as the applicant. The applicant and this young man travelled to China together, and shared accommodation. At the conclusion of this part of the applicant’s evidence, the Tribunal indicated that it found it difficult to believe that it was only coincidence that accounted for the applicant’s meeting the young man at the embassy. The Tribunal said:

*I’ll explain why this is, this is not your refugee or your protection claim’s all about but it’s very important because I may get the impression that someone in Bangladesh has planned like a long time, a long time for two young Buddhist men to get visas to China and then get… to Australia and also prepare a story so it really is important that you be frank and honest with me now so that I . . . don’t think that there is some scheming or planning and . . . you’re not being honest with me.*

8. This evidence was given during the first hearing. At the second hearing, the Tribunal raised with the applicant concerns it had with a number of aspects of the applicant’s evidence, including the evidence he gave about the meeting with the young man at the PRC embassy. As to that, the Tribunal said:

*Now we also talked about . . . the way . . . you told me that you met another young man at the Chinese Embassy in . . . Dhaka. And . . . I won’t make too much of this but I want to just flag with you I . . . don’t get the sense that you are completely . . . open and frank with me about how the two of you met and why it’s such a big coincidence. Now that’s . . . a little bit in my mind although I may not . . . mention that in the decision.*

9. The Tribunal referred in its reasons to what the Tribunal indicated to the applicant at the hearing about the evidence the applicant gave regarding the meeting with the young man at the PRC embassy. The Tribunal said:

*The Tribunal alerted the applicant to a number of concerns about his claims and evidence. . . . The Tribunal also indicated its disquiet about the applicant’s guarded evidence about his contacts with the other Buddhist monk whom he claims to have met at the PRC Embassy, but advised that it would likely not rely on this to draw any adverse inferences.*

10. The Tribunal did not accept the applicant’s claim for a protection visa. It did not do so, principally because it did not accept the applicant’s evidence. First, the Tribunal was concerned the applicant exaggerated and misconstrued the nature and profile of his religious and social work in his community and had given an unreliable account of his activities as a whole. Second, although the Tribunal accepted the applicant acted as a Buddhist monk from time to time, it found the applicant’s account of his own monastic commitments disjointed and sometimes uncertain. One of the matters to which the Tribunal referred in relation to that conclusion was the applicant’s evidence of his meeting the young man at the Chinese embassy gate in Dhaka. The Tribunal said:

*The applicant told the Tribunal that in early 2011, he went to the Chinese Embassy in Dhaka wearing his Buddhist robes, to apply for a visa to attend a course in China. Another Buddhist monk was at the Embassy gates, applying for a visa to the same course in China. He has since travelled to Australia with this person. The Tribunal found the applicant’s evidence about whether he had discussed this coincidence with his travel companion, for instance to enquire whether he had been assisted or sponsored by the same Buddhist group in Bangladesh, repetitive and evasive.*

11. Third, the Tribunal had significant doubts about the applicant’s claimed social and political activism. One of the matters to which the Tribunal referred in relation to that conclusion was the applicant’s evidence about the funding and travel arrangements to China. The Tribunal said:

*The Tribunal found the applicant’s evidence about the funding and arrangements for his travel to China, then Australia, to be guarded and unforthcoming. He variously indicated that his family, the temple membership as a whole and the whole Buddhist community raised funds for him, adding at one point that the villagers made individual contributions towards his travel costs. He also mentioned in passing that Upananda Thero, the abbot in Hoarapara, raised some funds. The Tribunal formed the impression that the applicant was reluctant to reveal the actual travel arrangements, and in particular the role of the abbot in Hoarapara or other person who organised his travel to China and then Australia. . . .*

12. Fourth, the Tribunal found “*wholly unreliable*” the applicant’s claims that he initiated, led, or played any key role in protesting the kidnapping and rape of some local girls in August 2009; that the prominence this gave to the applicant led to more threats to him and his family; or that BNP/Jamaat thugs assaulted the applicant or his father or threatened to kill him, or forced him to leave his village.

1. The factual matrix for the appellant’s central complaint before the primary judge and on appeal to this Court is conveniently set out in the body and final two bullet points of [103] of the Tribunal’s reasons as follows:

103. The Tribunal accepts that the applicant has acted as a Buddhist monk from time to time. As discussed at the hearing, it is customary for young Buddhist men in such communities to perform duties as a monk for at least a short period, sometimes leading to longer term commitments. The Tribunal found the applicant’s account of his own monastic commitments disjointed and sometimes uncertain. He claims to have been first ordained in February 2007, some three years after he allegedly became Religious Secretary at the MKS [Mahamandal Kallyan Sanstha], and despite his claim to have a prominent profile for some time.

* …
* …
* …
* …
* The applicant told the Tribunal that in early 2011, he went to the Chinese Embassy in Dhaka wearing his Buddhist robes, to apply for a visa to attend a course in China. Another Buddhist monk was at the Embassy gates, applying for a visa to the same course in China. He has since travelled to Australia with this person. The Tribunal found the applicant’s evidence about whether he had discussed this coincidence with this travel companion, for instance to enquire whether he had been assisted or sponsored by the same Buddhist group in Bangladesh, repetitive and evasive.
* The Tribunal considers that the applicant’s periods as a Buddhist monk, and the circumstances of his travel abroad, would be significant to him. It finds his evidence to have been selective and less than frank. This adds to the Tribunal’s doubts about his reliability as a witness.
1. The appellant described the central issue in his appeal as the “*procedural context*” in which the adverse credit finding was made that he had fabricated his claims to acquire the profile of a person in need of protection. This included in particular the Tribunal’s adverse finding on what was described in the Federal Circuit Court as the “**Coincidence Issue**” reflected in the final two bullet points of [103] of the Tribunal’s reasons (extracted above). In short form, the Coincidence Issue arose from evidence that the appellant provided of being at the Chinese Embassy in Dhaka at the same time as another Buddhist monk. The coincidence in question concerned how it was that the appellant and the other monk came to be applying for a visa to attend the same course in China at the same time, subsequently travel to Australia together and both apply for a protection visa. The Coincidence Issue is described in more detail in a lengthy extract of the transcripts of the Tribunal hearing on 12 March 2013, reproduced below at [22].
2. The appellant highlighted two aspects of the Tribunal’s reasons which were said to address the Coincidence Issue, being part of [27] and all of [74]. The part of [27] is as follows (emphasis added by the appellant):

27. … The delegate also asked detailed questions about **the applicant’s travel to Australia via China**, and his living arrangements in Australia. The delegate did not disclose his interest in these matters, and **the Tribunal does not consider them relevant to this decision**.

1. Although not central to his case, the appellant sought to make something of the portion of [27] above to the effect that the Tribunal had made its decision contrary to the way that passage suggests, in that the travel to Australia via China had been relevant to the decision as part of the Coincidence Issue. It is convenient to deal with this side-issue at this point so as to avoid distraction when dealing with main thrust of the appellant’s case.
2. The above sentences at [27] of the Tribunal’s reasons are not altogether clear as to what aspect of the delegate’s reasoning or processes are being referred to. The Tribunal was observing that it would not take into account, in context adversely, an undisclosed aspect of what was before the delegate because it was not relevant. In light of the balance of the Tribunal’s reasons, I do not consider that this can fairly be read as a second reference to the Coincidence Issue. While there is a reference to travel to Australia via China, there is no reference to the other monk, let alone any reference to any issue of coincidence concerning the other monk.
3. The more substantive complaint concerns the Tribunal’s reasons at [74] (emphasis added by the appellant concerning the Coincidence Issue):

74. The Tribunal alerted the applicant to a number of concerns about his claims and evidence. These included that his claims did not appear consistent with country information about the treatment of Barua Buddhists in Bangladesh. The Tribunal was also concerned about his account of his information about his profile and activities, and the extent of his future commitment and interests in Buddhist welfare activities, in light of his evidence at the hearing. The Tribunal also had discussed concerns about the supporting letters, such as the absence of any mention in the letter from the Ven. Bipulasen to the applicant having problems. **The Tribunal also indicated its disquiet about the applicant’s guarded evidence about his contacts with the other Buddhist monk whom he claims to have met at the PRC Embassy, but advised that it would likely not rely on this to draw any adverse inferences**.

1. The appellant’s written submissions in chief described the last sentence in bold above as the statement by the Tribunal that gave rise to the issues in this appeal. The particular phrase in contention was the statement that the Tribunal “*would likely not rely on”* its disquiet about the applicant’s guarded evidence about his contacts with the other Buddhist monk whom he claims to have met at the PRC Embassy *“to draw any adverse inferences*”. The appellant’s case is that while this phrase conveyed to the appellant that it was *not likely* to rely on the Coincidence Issue, in fact the passage from the Tribunal’s reasons at [103], reproduced at [12] above, demonstrated that this was in fact taken into account as part of the adverse credit finding.
2. The appellant’s case is that what was said to him amounted to a misrepresentation which had the effect of denying him an opportunity to be heard on an issue that contributed to the failure of his review by the Tribunal. It was common ground that the appellant did not provide any further evidence, nor seek any further evidence to be called, nor provide any submissions arising from what the Tribunal described as an indication of disquiet about the appellant’s guarded evidence about his contacts with the other Buddhist monks. The factual dispute and challenge to the findings of the primary judge turn on what it was that was in fact represented to the appellant by the Tribunal member, including how that was interpreted to him in Bengali.
3. In particular, the primary judge had before him, and specifically considered, the following materials in relation to the Tribunal’s statements to the appellant on the Coincidence Issue:

(a) the Tribunal’s recollection at [74] of what had been said to the appellant;

(b) the original transcripts for the two Tribunal hearing days;

(c) an additional transcript for part of the first Tribunal hearing day on 12 March 2013, the key portion of which was reproduced in the primary judge’s reasons at [13];

(d) an additional transcript for part of the second Tribunal hearing day on 14 March 2013, the key portion of which was reproduced in the primary judge’s reasons at [6]; and

(e) two transcripts of a part of what had been said to the appellant in Bengali on the second hearing day on 14 March 2013, corresponding to the key portion reproduced at [6], as translated back into English, reproduced in the primary judge’s reasons at [9] and [10], with it being common ground that each was a translation that was reasonably open.

1. Because precisely what was said at the point of the Tribunal hearing referred to in the Tribunal’s reasons at [74] is relied upon by the appellant, relevant parts of each of the above transcripts are reproduced below as a matter of context, or as a matter of precise language at the critical point.
2. ***Tribunal transcript extract from 12 March 2013; primary judge’s reasons at [13];* (*emphasis added):***

MEMBER: Was [X] helping anybody else ah to leave Bangladesh?

INTERPRETER: No he didn’t help anybody but when I went to apply I meet another boy.

MEMBER: Who did you meet?

INTERPRETER: I met him in Dhaka.

MEMBER: Where in, where in Dhaka?

INTERPRETER: In the Chinese Embassy.

MEMBER: Where exactly in the Chinese Embassy?

INTERPRETER: In Dhaka…

MEMBER: No, no, no, no I’m not asking for the address, I’m asking where in the embassy did you meet this person for the first time?

INTERPRETER: In, in front of the gate.

MEMBER: So what time then? Did you have a particular time to appear at the gate?

INTERPRETER: I went in the morning, after ten.

MEMBER: Okay. So how did this happen that you just met another person who was also going to China?

INTERPRETER: Well because the about the robe, the dress. Me and he were in the same um clothes, religious.

MEMBER: Now hundreds and probably thousands of people go to the Chinese embassy every year to get visas. So how did it happen ah that you and another person happened to be at the gate on the same day at the same time and I understand that you also ended up going to the same university in China and that you also travelled to Australia together, how did that happen? Do you know?

INTERPRETER: Because my guru ah apply for me and ah to the university and arrange everything for me and told me to go to the High Commission Embassy to ah that particular time. When I went to the High ah Embassy at that particular time, I saw that another boy was there. And the papers with him I ah saw that exactly the same university, the . . . University.

MEMBER: Okay. So do you know how it is that um another boy in a Buddhist robe happened to be there at the same time? Did your guru arrange for that or did someone else arrange, and why did you both end up, I mean have you wondered why you both ended up at the same, at the gate at the same time?

INTERPRETER: I don’t know anything about it. My guru told me you take these papers, hopefully you will get a visa and you will study in China.

MEMBER: All right, you’ve already mentioned that several times so I don’t, I don’t need to hear that particular point anymore. What I’m asking is you’re asking me to believe a a thing which is very unusual, extremely unusual and extremely coincidental and I am saying to you that if in such a coincidence I think that a person like you would be trying, would be talking to the other boy and finding out why, why are you both ah invited on the same day. But you know nothing which suggests to me that you’re not ah, which, which I’m finding it difficult to believe.

I’ll explain why this is, this is not what your refugee or your protection claim’s all about but it’s very important because I may get the impression that someone in Bangladesh has planned like a long time, a long time for two young Buddhist men to get visas to China and then get get to Australia and also prepare a story so it really is important that you be frank and honest with me now so that I can, so that I don’t think that there is some scheming or planning and and that you’re not being honest with me.

INTERPRETER: I didn’t know anything about this boy. I didn’t know him. Why… I didn’t know him previously. In that gate, in that Embassy gate I met him. Because when I met him ah ah and we get a visa so we plan um to come, to go to China together.

MEMBER: Okay.

INTERPRETER: Well I didn’t know anything about that boy.

MEMBER: Yep. I’ll just put you on notice now Mr [applicant] that ah that ah you have, you have said several times and I’ve understood very clear that you did not know that boy. I I understand that. But I will put you on notice that I find it very difficult to believe that since meeting him you have not tried to figure out how this coincident arisen [sic] so that causes me to doubt you’re being truthful or being completely honest in what you’re now telling me.

INTERPRETER: I didn’t know him previously. I met him first in in front of the Embassy.

MEMBER: Hm mm okay. I I won’t ah dwell on this any further but what I’m saying is I, ah I don’t find it very, I find it very difficult to believe that since meeting him and since travelling to China with him and since coming to Australia with him you have not um tried to discover why you were both there at the gate on the same day.

INTERPRETER: Okay I met him in front of the ah Embassy then we plan we go to China together and and because it is the same university we used to live in the same house, same place. When we ah after few day, after few, after a while we get to know that we can’t stay here for long time. Because then we decide ah we can work hard so that we can go somewhere to for our safety we can go some other country and then ah stay safely. Ah the other guy also ah fleeing ah to China because his brother or father ah maybe ah victimised …

THE APPLICANT: father

INTERPRETER: … his father was been killed.

MEMBER: Thank you I’ll take a note of that. **And I’ll also put you on notice that you have not answered my question about ah how the two of you in all the period that you’ve lived together, travelled together and everything, you’ve never discussed, you you you’re just not answering how that coincidence arose or wondered why you were both at the gate at the same time.**

1. ***Tribunal transcript extract from 14 March 2013 (bold portion*** ***reproduced in primary judge’s reasons at [6]; emphasis added):***

MEMBER: Just by way now to conclude I want to alert you that I’ve got some significant concerns about the claims and evidence you’ve made. I need to advise you of that. These things that you are, are first of all, the things that you are claiming ah to be your experience as a Buddhist monk and ah involved in Buddhist organisations ah is not consistent with the information generally about the treatment of Burua Buddhists in Bangladesh.

Um another concern that I have is that um you have planned to be a Buddhist monk and there are a number of ah, you, you have … as we discussed in detail when we last met, I have great difficulty um accept, or have great difficulty believing that you were able to obtain a a establish a profile while you’re a full time student in Captie first of all.

MEMBER: And ah next um then when you went back to ah ah to Raozan ah I have, I still am concerned that there are gaps in the activities that you did ah that you, I’m concerned that you’ve not given a complete account of all the things that you did ah during your time in Captie, in Raozan. And further, even if I accepted you were a Buddhist monk at some time and you have provided some evidence of that ah it seems to me overwhelmingly from your evidence now it seems that you now have very little interest in Buddhism apart from as a personal practice, um so it’s hard to believe that you will be active in any Buddhist community as a leader or teacher. And just, and just finally when I come to assess the documents, I’ve talked to you about your documents and ah I am ah concerned that some people may have written things that ah have simply been to help you, ah Vippulasen for instance, has helped you to obtain residency in Australia rather than necessarily told the full picture. **So you can, I I just want to now alert you that these are things that I must consider further**.

**Now we also talked about your, the way you, you told me that you met another young man at the Chinese Embassy in in Dhaka. And um I won’t make too much of this but I want to just flag with you I I don’t get the sense that you are completely ah open and frank with me about how the two of you met and why it’s such a big coincidence. Now that’s, that’s a little bit in my mind although I may not, I may not um mention that in the decision**.

Mr [appellant] you’ve asked for more, you’ve requested me for more time to give me the written comments about your Facebook ah on that, comments or responses and I would agree to ah give you another two weeks from today to give me that. If you wish then when you ah reply to me, if you wish to give me any more information I’m happy to, you know like reports I’m happy to look at those too. Ah I will flag ah if you do, if you do find reports of individual Buddhists you know in Chittagong district being harmed you need to understand I will need to assess that very carefully ah because I will be very surprised if the Burua Buddhist community was being persecuted and people and there was such silence about that. Because I would need to ask why, why does everyone report about the attacks on the temple in late last year in Cox’s Bazaar and why did everyone report on the problems with the Chittagong Hill tracts but why do they then not report on the Burua Buddhists.

So that’s just to advise you some, of some things in my mind, but I now will say have you given me all of your claims and evidence or is there anything else that you’d like to tell me?

1. ***Bold part of quote in [23] above as said to the appellant in Bengali, translated back to English; 14 March 2013; primary judge’s reasons at [9]-[10] (footnotes omitted):***

9. There are two translations into English of the Tribunal interpreter’s interpretation into Bengali of the Tribunal’s words in question. The first is that made by Mr Amin:

*These things I have to consider more. You also told that how you met a young man at chinese embassy in Dhaka. Though I don’t say I don’t believe it, but I find it hard to believe it that you have come across with this sort of (indistinct) people, it is a coincidence, how did it match? I may not mention this in my discussion, but this came into my mind. Working in my mind.*

10. The second version is that given [by] Mr Chowdhury:

*You had also said that you had met one young man at Chinese Embassy in Dhaka. . . I do not disbelieve … but I have trouble to believe that how was it possible for you to meet this kind of people, coincidence, how did it coincide? Probably I will not mention this in my decision but is has struck my mind, I am pondering.*

1. At [12], the primary judge also reproduced paragraphs 4 and 5 of the appellant’s affidavit before his Honour, to which I add paragraph 6 as follows:

4. I recall that on the second day of the hearing the Tribunal member informed me that he was concerned about my evidence of that meeting with the other Buddhist monk, but that he was not likely to rely on it.

5. I understood that to be the case as I recall that the interpreter said words to me in Bengali to the effect of:

*You have told me that you met one young person in Chinese Embassy. I am trusting you, but it is getting hard to trust how you met such a person. I am not likely to rely on it in my decision but I am wondering.*

6. I understood that while the Member had reservations about it, it was not important to his decision, so he was prepared to trust me on this issue.

1. The primary judge summarised the submissions before him in a way that remains relevant to this appeal as follows (footnotes omitted):

14. The applicant submits:

a) the Tribunal’s words in question conveyed the representation that, despite its concerns about the Coincidence Issue, the Tribunal was not likely to rely on that issue to draw any adverse credit inferences;

b) the applicant relied on that representation by not addressing the Coincidence Issue in the further written submissions and evidence the applicant provided to the Tribunal after the hearing;

c) contrary to its representation, the Tribunal relied on the Coincidence Issue in its decision as a basis for making findings that were adverse to the applicant; and

d) the Tribunal, therefore:

i) failed to comply with s.425(1) of the *Migration Act 1958* (Cth) (**Act**) because it denied the applicant the opportunity to make submissions on an issue that was relevant to the applicant’s case, and on which the Tribunal relied;

ii) additionally, or alternatively, the Tribunal acted unreasonably.

15. Counsel for the applicant does not only rely on the Tribunal’s words in question as conveying the representation; counsel for the applicant relies on the exchange between the Tribunal and the applicant about the Coincidence Issue during the first of the two hearings. Counsel submits that, on that occasion, the Tribunal tested the applicant with intensity but the Tribunal’s words in question, which were spoken during the second hearing, was a retreat from that position.

16. Additionally, or alternatively, counsel for the applicant submits that both of the interpretations into English of what the Tribunal interpreter said in Bengali to the applicant indicate the Tribunal interpreter misinterpreted the Tribunal’s words in question. Counsel submits that the Bengali words by which the Tribunal Interpreter interpreted the Tribunal’s words in question conveyed the meaning that the Coincidence Issue would not be relied on adversely to the applicant in the Tribunal’s decision.

17. Counsel for the Minister, on the other hand, submits that the Tribunal’s words in question cannot reasonably convey the meaning which the applicant claims they bear, particularly having regard to the exchange that occurred on the first hearing day about the Coincidence Issue. Counsel submits it is clear that the Tribunal indicated that it was still considering the Coincidence Issue.

1. The primary judge then referred to authority concerning what constitutes misleading a visa applicant in general terms, in aid of deciding whether s 425(1) of the *Migration Act* had been breached, including:

(a) the decision of the High Court in ***Re Ruddock****; Ex parte Applicant S154/2002* [2003] HCA 60; (2003) 201 ALR 437 at 444 [28] and 450-1 [58], concerning a visa applicant being misled into thinking that an issue was no longer under consideration;

(b) the well-known passage from Gleeson CJ in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte* ***Lam*** [2003] HCA 6; (2003) 214 CLR 1 at 13-14 [37] concerning practical injustice; and

(c) the judgment of Allsop CJ in *SZRMQ v Minister for Immigration and Border Protection* [2013] FCAFC 142; (2013) 219 FCR 212 at 215-6 [5], [9] and [10], concerning the importance of interpretation to the fairness of a Tribunal hearing.

1. The primary judge said that the first question that fell for determination was whether the Tribunal’s words in question were properly interpreted to the appellant in Bengali. If the words *were* properly interpreted, the question that arose was whether the Tribunal made the representation that the appellant claimed was made in the context of the *English* words in question. If the words *were not* properly interpreted, the question that arose was whether the Tribunal made the representation that the appellant claimed (and any other issues that required determination) in the context of the *Bengali* words.
2. The primary judge noted that there was no expert opinion evidence before him as to whether the Bengali words were an accurate or appropriate interpretation of the Tribunal’s English words. His Honour said that it was not open to him to infer that the Bengali rendering of the English words involved any misinterpretation, given the intricacies of interpretation. His Honour therefore concluded that the appellant’s claims based on misinterpretation from English to Bengali should fail. I did not understand that to be an argument maintained on appeal, but if I am wrong about that, I am unable to see how his Honour erred, given the absence of evidence that what was said in Bengali was in fact a misinterpretation of what the Tribunal said in English.
3. The primary judge said he would consider the appellant’s case on misinterpretation on the assumption that it was reasonably open to infer a misinterpretation by the Tribunal interpreter of the Tribunal’s words spoken in English, based on the subsequent English translation of the Bengali words spoken. Viewed in that way, his Honour said that the submissions that had been made could be seen as posing three questions, namely:
	1. What meaning did the Tribunal’s words in question convey? In particular, did they convey that, despite its concerns about the Coincidence Issue, the Tribunal was not likely to rely on that issue to draw any adverse credit inferences against the applicant?
	2. What meaning did the Tribunal Interpreter’s words (**Bengali Words**) by which he interpreted the Tribunal’s words in question convey? In particular, did they convey that the Coincidence Issue would not be relied on adversely to the applicant in the Tribunal’s decision?
	3. Did the applicant rely on the meaning he attached to the Bengali Words in a way which means he was not given the opportunity s.425(1) required that he be given to appear before the Tribunal “*to give evidence and present arguments relating to the issues arising in relation to the decision under review*”?
4. Each of the above issues remained live on appeal to this Court, although it was common ground that the third issue as to reliance on the alleged misrepresentation only arose if there was a finding that the appellant had in fact been misled.

### First issue before the primary judge: the meaning of the Tribunal’s words in English

1. The primary judge conducted a careful analysis of the words uttered in English by the Tribunal member, being the words in bold at [23] above, repeated here:

So you can, I I just want to now alert you that these are things that I must consider further.

Now we also talked about your, the way you, you told me that you met another young man at the Chinese Embassy in in Dhaka. And um I won’t make too much of this but I want to just flag with you I I don’t get the sense that you are completely ah open and frank with me about how the two of you met and why it’s such a big coincidence. Now that’s, that’s a little bit in my mind although I may not, I may not um mention that in the decision.

1. The effect of that analysis was summarised by the primary judge as follows:

29. When the Tribunal’s words in question are considered together, they conveyed three things: the Tribunal member did not intend to make too much of the Coincidence Issue; the Tribunal nevertheless was considering the Coincidence Issue; the Tribunal, however, may decide not to rely on the Coincidence issue, but it may also decide that it would rely on the Coincidence Issue. There is nothing in the Tribunal’s words in question that could reasonably suggest the Tribunal member represented it was likely the Tribunal would not rely on the Coincidence Issue to draw adverse inferences against the applicant.

1. The primary judge characterised the Coincidence Issue as being one of the “*significant concerns*” the Tribunal had. The appellant takes issue with that characterisation.
2. The primary judge also noted that the words in issue took place in the context of the first Tribunal hearing two days earlier on 12 March 2013, reproduced above at [22]. His Honour said that he disagreed with the appellant’s counsel that, at the second hearing day, the Tribunal had retreated from what had been said about the Coincidence Issue on the first hearing day. Again, that dispute is maintained on appeal.
3. The primary judge concluded that the appellant’s case failed to the extent that it was based on the contention that by uttering the words in question in English, the Tribunal had represented it was not likely that it would rely on the Coincidence Issue.

### Second issue before the primary judge: the meaning of the Bengali words

1. The primary judge then turned to the meaning of what had been conveyed to the appellant as translated back into English from the Bengali words, reproduced at [24] above. In relation to the first of those interpretations by Mr Amin, his Honour concluded that the words used represented that the Tribunal was still considering the question of whether or not to rely on the Coincidence Issue.
2. The primary judge then turned to the second interpretation of the Bengali words by Mr Chowdhury. His Honour said that considered alone, Mr Chowdhury’s interpretation of “*probably … will not*” had a substantially different meaning from Mr Amin’s interpretation that what was said was “*may not*”. The primary judge observed that taken in isolation, the phrase “*probably … will not*” would usually imply a greater than even chance and was equivalent to “*likely will not*”, whereas “*may not*” implies only a possibility. However, his Honour considered that the phrase “*probably … will not*” could not be considered in isolation but had to be considered in context.
3. The complete sentence as interpreted back into English was “*probably I will not mention this in my decision but is* [sic] *has struck my mind, I am pondering*”. The primary judge said that this meant that the Tribunal member was stating, as conveyed in Bengali, that he had not yet made up his mind and therefore could not reasonably imply a meaning that the Tribunal member was not likely to rely on the Coincidence Issue. His Honour said that the only reasonable meaning that could be attached to Mr Chowdhury’s version was that the Tribunal member had not made up his mind whether or not to rely on the Coincidence Issue because he was continuing to ponder – that is, consider – that question.
4. The primary judge therefore concluded that neither interpretation could reasonably give rise to a representation that the Tribunal was not likely to rely on the Coincidence Issue in a manner that was adverse to the applicant. Accordingly, that part of the appellant’s claim also failed.
5. The primary judge said that if, contrary to his Honour’s conclusion, the presence in Mr Chowdhury’s interpretation of the words “*probably … will not*” meant that the Tribunal did represent that it was unlikely that it would rely on the Coincidence Issue in a manner adverse to the appellant, his Honour would be confronted with conflicting translations into English of the Bengali words, even though both parties had jointly submitted both were reasonably open. The primary judge therefore concluded that if both translations from Bengali to English were reasonably open, and if the interpretations were inconsistent, he could not prefer one translation, that of Mr Chowdhury, over the other translation, that of Mr Amin. In those circumstances, the question had to be resolved by reference to the onus of proof borne by the appellant and, again, the appellant’s case had to fail.

### The third issue before the primary judge: whether the applicant relied on the meaning he attached to the Bengali words

1. The third question was whether, as a result of a misrepresentation by the Tribunal, there had been an inducement to the appellant to act to his detriment by failing to “*give evidence and present arguments relating to the issue arising in relation to the decision under review*” per s 425(1) of the *Migration Act*. It was common ground by the parties before me that if I did not overturn the finding that there was no misrepresentation, there was similarly no need to address the inducement question because it could not arise unless the appellant had been misled.
2. I have not addressed the third question because there is no need to do so. However I note that although the primary judge said that he did not consider that question needed to be decided, his Honour took the effort to address it for completeness. I do not perceive any error on the part of his Honour.

## The issues on appeal to this Court

1. By a supplementary notice of appeal dated 29 February 2016, the appellant advanced nine grounds of appeal. In written submissions on behalf of the appellant, those nine grounds were helpfully assembled into four issues as follows:

(a) whether the primary judge erred (in various ways) in relation to an apparent representation made to the appellant by the Tribunal about whether it would rely adversely upon certain evidence (grounds 1, 1A, 4 and 6);

(b) alternatively, whether the primary judge erred (in various ways) in relation to how the representation made by the Tribunal was translated to the appellant (grounds 2, 2A, 2B, 3 and 4);

(c) whether the primary judge erred in rejecting the unchallenged evidence of the appellant about the steps he would have taken had the representation not been made (ground 5); and

(d) whether the primary judge erred in failing to hold that the Tribunal's decision was legally unreasonable (ground 6).

1. I address each of these issues in turn, accepting the appellant’s submissions pointing to the need for the rehearing constituted by this appeal to involve, especially in this case, a thorough examination of the case before the primary judge, albeit constrained by the need to find error. The appellant’s case was overtly one brought in reliance on *Warren v Coombes* (1979) 142 CLR 531 at 539, 551; see also *Fox v Percy* [2003] HCA 22; (2003) 214 CLR 118 at 128-9 [30]-[31], 146 [88]. It should be noted in that regard that the evidence before the primary judge was essentially settled and the issue was largely what findings were properly able to be drawn from it.
2. The appellant’s counsel said that an appeal by way of rehearing did not entail this Court considering whether or not a finding was open to the primary judge in order to determine whether his Honour had erred in making such a finding. I am unable to see that such a bright line can be drawn. If a conclusion was reasonably open to the primary judge on the evidence, it is difficult to see how there can be a finding of error as opposed to a mere difference of opinion in the fact-finding function. I have in any event conducted the necessary independent review by way of rehearing and forming my own view of the evidence that was before the primary judge and the conclusions properly able to be reached from it.

### First appeal issue – alleged error as to the representation made to the appellant (grounds 1, 1A, 4 & 6)

1. The appellant argued that the primary judge relied on two essential points to find that the representation alleged and relied upon by the appellant was not conveyed:

(a) first, that the Coincidence Issue was identified by the primary judge as one of the Tribunal’s “*significant concerns*” regarding the appellant’s claims and evidence, such that the listener would not have any other impression; and

(b) secondly, that the primary judge found that, as the Tribunal member had said he “*may not*” mention the Coincidence Issue in his decision, it necessarily followed that the Tribunal may yet mention it.

The appellant argued that both of these foundational conclusions failed to have regard to contextual matters and through that the primary judge had arrived at an erroneous interpretation of the Tribunal’s representation to him.

1. The three points raised within the first appeal issue were as follows:

(a) the Coincidence Issue was not intended to be understood as one of the Tribunal’s relevant concerns;

(b) the primary judge did not refer to the Tribunal’s own summary of what it understood it conveyed to the appellant at the hearing; and

(c) construing the substance of the representation made to the appellant by the Tribunal required the nature of the recipient to be taken into account.

#### First appeal issue: point one

1. The appellant submitted that the structure of the matters that were raised with him by the Tribunal towards the end of the second hearing day, where the Tribunal put its concerns for his comment, indicated that the Coincidence Issue was not intended to be understood as one of the Tribunal’s relevant concerns. The appellant’s reasoning towards that conclusion was that there were only five matters that were “*significant concerns*” to the Tribunal, being the five items raised prior to turning to the question of the Coincidence Issue. The appellant said that the use of the word “*finally*” denoted the end of the list of significant concerns. The appellant described the Coincidence Issue as only an afterthought, contrary to the inference drawn by the primary judge that this was in fact one of the Tribunal’s “*significant concerns*”.
2. The appellant’s written submissions in chief reproduced part of the excerpt from the second day of the hearing, also reproduced at [23] above, from the beginning down to the sentence concluding “*now that’s, that a little in my mind although I may not, I may not mention that in the decision*”. The component of the transcript after the part reproduced in the appellant’s submissions, reproduced in full above at [23], dealt with written comments about the appellant’s Facebook posts and about reports of individual Buddhists being harmed, and was not reproduced in the appellant’s submissions. The appellant’s submission also did not reproduce the last sentence of the full extract above where the Tribunal member said:

So that’s just to advise you some, of some things in my mind. [B]ut I now will say have you given me all of your claims and evidence or is there anything else that you’d like to tell me?

1. When the omission of the rest of this part of the Tribunal transcript was raised with counsel for the appellant, it was submitted that the final sentence quoted above did not refer to the Coincidence Issue. It is not apparent to me as a matter of context and plain reading why that is so.
2. The proper exercise of the appellate function in this case entails considering the full passage of the transcript of the Tribunal hearing during which concerns were raised in order to ascertain what was being conveyed overall. On a fair and complete reading of the passage reproduced at [23] above, the Tribunal was advising the appellant that the various topics raised were all matters that concerned it, in the sense of being on the Tribunal’s mind, including the Coincidence Issue. This interpretation is some significance. On any view it is important in deciding whether a reasonable reading of what was conveyed to the appellant had left the Coincidence Issue open to be taken into account, irrespective of whether it was classified as a significant concern, or some lesser concern that remained on the Tribunal’s mind.
3. The Minister, in response to this issue, said that whether or not the primary judge was correct or not in characterising the Coincidence Issue as one of the Tribunal’s “*significant concerns*”, that did not mean that the Tribunal’s words were misleading. The Minister submitted that the language used by the Tribunal necessarily implied that the Tribunal may make something of the Coincidence Issue. That is, the Coincidence Issue remained something that the Tribunal could take into account and accordingly the appellant could not have been misled into thinking otherwise.
4. I consider that the Minister’s approach on this issue is correct. Applying the words in s 425(1), what matters is whether the Coincidence Issue remained one of the “*issues arising in relation to the decision under review*”: *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] HCA 63; (2006) 228 CLR 152 at 162 [33], 164 [38], 165 [42]-[43], 165-6 [47]. The Tribunal was not under the obligation suggested by the appellant in post-hearing submissions to indicate the degree of likelihood or otherwise that an issue that had arisen would be taken into account in reaching a decision. That submission entails reading additional words by way of qualification into s 425(1) that are not there, nor an interpretation justified by the text.
5. While, for my part, I would not *necessarily* have interpreted the Coincidence Issue as being one of matters that the Tribunal considered to be a “*significant issue*”, I do not consider that the primary judge erred in reading the Tribunal’s comments in that way. But even if that was not the correct way to read the transcript, I consider the difference to be immaterial. The Tribunal was outlining matters that were on its mind, which could all therefore be regarded as live issues, to a greater or lesser extent. The Coincidence Issue remained “*one of the issues arising in relation to the decision under review*”.
6. In my view, nothing turns on the extent of the concern being labelled as significant, or labelled otherwise. What matters is that it was a matter which remained open to consideration as an issue arising in relation to the decision under review, being the language in s 425(1). The entirety of the passage reproduced at [23] above could not leave any reasonable person to believe that the Coincidence Issue had been put to one side by the Tribunal, would not be taken into account, or was no longer an issue arising in relation to the decision under review. In saying this, I note that this was not how the case was argued before the primary judge, an issue I address later in these reasons.
7. It would have been erroneous for the Tribunal to have represented at the hearing that a particular piece of evidence or argument had been treated in one way and then to treat it in another way in circumstances where but for that representation the visa applicant could have addressed it: see the analogous reasoning in the High Court in *Re Ruddock* at 450 [58]. I can see no reason why that reasoning should not apply with equal force and effect to s 425(1) as to whether or not an issue has been ruled out, so that it is no longer an issue arising in relation to the decision under review.
8. I do not accept the appellant’s implicit submission that *Re Ruddock* reasoning is irrelevant to the consideration of s 425(1) because the High Court was not considering that provision. To the contrary, *Re Ruddock*, although directed to more general issues of procedural fairness, provides a useful way of looking at the practical application of s 425(1), at all times paying careful heed to the language of that provision.
9. The appellant’s first point on the first issue must fail.

#### First appeal issue: point two

1. The second point relied upon by the appellant on the first issue (arising from what was said by the Tribunal in English) was that the primary judge did not refer to the Tribunal’s own summary of what it understood it conveyed to the appellant at the hearing, being the text reproduced at [17] above from [74] of the Tribunal’s reasons.
2. The Minister submitted that the Tribunal’s recollection of what it had said might be relevant if that was all that was available to ascertain what had been conveyed, but that it had to give way to what was actually said when, as in this case, that was available. The Minister pointed out that there is nothing to suggest that the Tribunal member had gone back and listened to what had been said to the appellant. Accordingly, the Minister characterised the last sentence of [74] of the Tribunal’s reasons as a recollection and not the recording of a representation.
3. The appellant submitted that the Tribunal’s understanding of what it had said to the appellant was still of value because it was a reflection of the sense of what had then been represented rather than the bare words used, be they in English or in Bengali, especially in using the phrase “*likely**it would likely not rely on this to draw any adverse inferences*” on the Coincidence Issue. The appellant urged me to go beyond the words in fact spoken and draw an “*inference*” about the totality of the communications to the appellant on this issue.
4. No other evidence of *how* the words corresponding to [74] of the Tribunal’s reasons were conveyed in English was before me. The appellant at [5] of his affidavit, reproduced at [25] above, expressly referred only to his recollection of what was said to him in Bengali, not what was in fact said in English. This is to be contrasted with the evidence before the primary judge and before this Court as to what was in fact said, by way of transcripts of a recording of the hearing of what was said in both English and in Bengali (subsequently translated back into English).
5. The appellant did not provide the primary judge, or on rehearing before this Court, any proper basis for displacing the meaning that was conveyed by the actual words used in English or in Bengali. On any view, evidence to achieve such an outcome would be difficult to adduce at all, let alone to achieve this objective. It would likely be, at best, evidence of evanescent impressions relied upon to contradict or qualify what was actually said. That is hard enough to achieve within a language when a different meaning to what is said is deliberately conveyed, let alone across a language barrier when there was no apparent reason for the Tribunal to say one thing and mean another, albeit that the difference might be subtle.
6. The appellant is really seeking to have the Court engage in an impermissible process of speculation, rather than inference. In any event, there is no suggestion that the appellant in any way relied upon what was said to him in English. To the contrary, as noted above, he expressly relies on no more than his recollection of what was said to him in Bengali. The second point on the first issue on appeal must therefore fail.

#### First appeal issue: point three

1. The third point relied upon by the appellant on the first issue (arising from what was said by the Tribunal in English) asserted that construing the substance of a representation had to include the context of the nature of the audience to what was said, in this case being personal characteristics specific to the appellant. In support of this it was submitted that the Tribunal knew it had difficulty in understanding the flow of the appellant’s evidence and that the appellant was not a sophisticated or highly educated man.
2. As I read the Tribunal’s reasons, the difficulty in understanding the flow of the appellant’s evidence was not due to any interpretation or language difficulty, but rather that the appellant was not presenting a coherent and consistent account. The suggestion that the appellant was not a sophisticated or highly educated man was addressed by the Minister referring to the fact that he was able to write in English and had attended university.
3. I am unable to see how I can have regard to abstract suggestions and possibly inferences of a possible lack of comprehension without there being any evidence before the primary judge or before this Court of any such difficulties. Again, such evidence as there is from the appellant, being his affidavit, makes no reference to any such difficulties.
4. The appellant’s submissions asserted that an unsophisticated listener would understand that, while the Tribunal had concerns, the Coincidence Issue was “*not an issue that the appellant needed to address*”. I am unable to see how that conclusion is reasonably able to be reached in circumstances in which it cannot be said that the Coincidence Issue had been removed from consideration, and more importantly had been expressly raised in the context of isolating and raising specific issues with the appellant. Nor do I consider that the appellant’s affidavit at [4] – [6] goes that far, even taken at face value.
5. The translations back into English from Bengali before the primary judge and therefore this Court do not assist because the last sentence of the extract of what was said at the Tribunal hearing on 14 March 2013 was not apparently placed before either of the interpreters, and therefore was never translated back into English. I am left with no basis to conclude that there was any misunderstanding of the last sentence of that part of the hearing in which the Tribunal had indicated the things that were on the Tribunal’s mind, including the Coincidence Issue. The appellant in his affidavit does not deny an understanding that this was at least something that was on the Tribunal’s mind.
6. The appellant also said that using the words “*may not*” and reading that as implying that he “*may*” refer to the issue was an exercise in “*propositional logic*” rather than the attribution of meaning to conduct in a practical context. It was said that this fell into the error of making “*a fortress out of the dictionary*”, adapting that expression from the judgment of Judge Learned Hand in ***Cabell*** *v Markham* 148 F.2d 737 (1945). However that phrase needs to be read in context, which is not readily adaptable to the spoken word. *Cabell* was concerned withstatutory interpretation, and with the need to have regard to the purpose or object of a statute, and not just abstract words and their dictionary meaning. The fuller quote of what Judge Learned Hand had said in *Cabell* at 739 was:

Of course it is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing: be it statute, a contract, or anything else. But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.

1. While the appellant’s affidavit was directed to the question of influence and what he could or would have done without the representation made to him, it remains the fact that the appellant deposed to understanding the effect of what the Tribunal had said to him as being “*I am not likely to rely on it* [referring to the Coincidence Issue evidence] *in my decision but I am wondering*”.
2. In my view it cannot reasonably be said that the appellant was left in a position where he considered that the Coincidence Issue had been put to one side and was no longer an issue at all. He was therefore not deprived of an opportunity to make any further submissions or produce or have cause to be produced any further evidence on this issue.
3. I am unable to see any error in his Honour’s analysis or characterisation of what was said by the Tribunal in English. I cannot see how any fair reading of what was actually said conveyed anything akin to a likelihood that the Tribunal would not rely at all on any aspect of the Coincidence Issue in reaching its decision.
4. The third point on the first issue on appeal must therefore fail.

### Obligations owed to the appellant at the Tribunal hearing and consequences for the appeal

1. Having regard to the terms of s 425(1), in one sense, the issue raised before the primary judge and before me on appeal of whether the Coincidence Issue was or was not *likely* to be taken into account entailed asking the wrong question. The Minister did not file any notice of contention that the decision of the primary judge should be upheld upon a different basis. There is no need for this Court to take that step in any event because I agree with the primary judge’s interpretation. However, it is to take the inquiry in the wrong direction by alleging that the primary judge arrived at the wrong answer, when that answer was given to the wrong question. What matters is the answer to the correct question along the lines contemplated in *Re Ruddock*, as applied by analogy to s 425(1), adapted as necessary to the words of that provision, to raise the issue of whether the appellant had been misled into thinking that an issue was no longer in contemplation.
2. It follows that, independently of whether the Tribunal did or did not convey the impression that reliance on the Coincidence Issue was not likely (and I am satisfied that was not conveyed), unless the Tribunal can reasonably be taken to have conveyed to the appellant that there would be no reliance on the Coincidence Issue, it remained open for that to be taken into account. Provided the appellant was not left with the reasonably formed impression that it was regarded as no longer an issue, the appellant could not be heard to complain if he decided not to address that issue further because he did not think it was sufficiently important.
3. Procedural fairness at common law, and implied for less prescriptive legislative regimes than the *Migration Act*, requires only that a party be given a reasonable opportunity to present his or her case. This does not extend to ensuring that a party takes best advantage of that opportunity: see *Re Coldham; Ex parte Municipal Officers Association of Australia* [1989] HCA 13; (1989) 84 ALR 208 at 220, applied by the Full Court in *Wati v Minister for Immigration & Multicultural Affairs* [1997] FCA 1052; (1997) 78 FCR 543. It matters not whether the source of the entitlement to the opportunity arises as a result of common law concepts of procedural fairness, or by reason of statutory provisions such as s 425(1), subject only to the prescription of the content of the statutory entitlement.
4. As I have already observed, even under the prescriptive regime created by s 425(1) of the *Migration Act*, the appellant was not entitled to be given a warning or prediction as to whether it was more or less likely that a particular issue would feature in the Tribunal’s reasons.  This is realistic and accords with the concept of practical injustice: *Lam* (2003) 214 CLR at 13-14 [37]-[38]. The Tribunal could not say that something would be, or would not be, taken into account, and then do the opposite.  That is not what happened in this case.
5. Thus, even if I am wrong in my finding about what the Tribunal conveyed to the appellant, the degree of likelihood that the Tribunal would or would not refer to the Coincidence Issue misses the point. What matters is that the appellant had conveyed to him that the Coincidence Issue remained an issue arising in relation to the decision under review. He had an opportunity to address the Coincidence Issue further if he wished to do so.

### The second appeal issue – alleged failure to construe the information properly (grounds 2, 2A, 2B, 3 & 4)

1. The appellant sought to import into the Bengali language representation to him, as translated back into English, the preceding arguments on the first appeal issue. In my opinion those arguments do not fare any better in this context, and the above conclusions apply. In fact, those arguments are somewhat weaker in that context given the much more limited translations from Bengali back to English relied upon.
2. Additionally, the appellant sought to rely on the references to the appellant not being disbelieved (or put another way, the appellant being trusted) in the translations back into English. This was said to be consistent with the appellant’s recollection (in his affidavit at [6]) that the Tribunal had said words to him to the effect that the Tribunal was prepared to trust him on the Coincidence Issue. The Minister’s response to this was that while the Tribunal was indicating that it did not necessarily disbelieve the appellant, the overall context indicated that the Tribunal had not yet made up its mind, rather than being a matter that the appellant did not need to address further. The Minister therefore said that there was no error by the primary judge finding that the interpretation of the Tribunal’s words as rendered back into English from the Bengali translations was not misleading.
3. The Minister relied upon the decision of this Court in *Kumar v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCA 201 at 18-21 [38]-[45] in which the finding was made that while the visa applicant in that case had left a hearing with the impression that only an aspect of what was before the Tribunal was required to be addressed, that impression could not reasonably have been generated by the words or conduct of the Tribunal: see [44]. The Minister said that in like fashion, the appellant’s submissions were not a reasonable understanding of what was said by the Tribunal either in English or in Bengali and accordingly there could be no breach of procedural fairness and no breach of s 425 of the *Migration Act*.
4. I agree with the Minister’s submission; and I reject the appellant’s submission that, like *Re Ruddock*, the reasoning in *Kumar* has no application to s 425(1) because that provision was not referred to in that decision. *Kumar* remains a valid form of analogous reasoning that an unreasonable misapprehension that an issue no longer arises in relation to the decision under review is insufficient to establish a breach of s 425(1).
5. It was not objectively reasonable for the appellant to believe that the Tribunal had removed the Coincidence Issue from consideration. Indeed, the appellant does not go so far. In his affidavit he deposes:

12. If I had understood that the circumstances of my meeting of the other Buddhist monk would be important to the Tribunal’s decision, I would have asked the Tribunal to obtain evidence from him to confirm my explanation.

1. That evidence from the appellant does not suggest that he thought that the Coincidence Issue was no longer an issue arising on the review. On a fair reading of the Tribunal’s reasons, the Coincidence Issue was not of itself decisive, but rather formed a part of a matrix of evidence by which the appellant’s claim of having a relevantly higher profile was not believed. In that sense, the Coincidence Issue was arguably not of itself all that important.

### The third appeal issue – erroneous rejection of the appellant’s unchallenged evidence as to reliance (ground 5)

1. As indicated above, it was common ground between the parties that, if I did not accept that the appellant had been misled, then I did not need to address the primary judge’s rejection of the appellant’s evidence, which was not the subject of cross-examination. In that regard it is important to note that the primary judge himself did not consider he needed to take that step, but did so as a matter of completeness. It was common ground that cross-examination of the appellant before the primary judge was not required in order for his evidence to be rejected in whole or in part.
2. Given the joint view of the parties, I do not need to deal with the third appeal issue. However, there are some aspects of it which would have been troubling if there had in fact been a misrepresentation to the effect that the Coincidence Issue was not an issue arising in relation to the decision under review.
3. In my view it was open to the primary judge to conclude that the evidence of the appellant was improbable, even without cross-examination, such that there was no proper basis to find error in that regard. It was also reasonable, if not essential, to refer to the context of the first Tribunal hearing day, so that it could be seen that the Coincidence Issue had been squarely raised, and then, having been raised again at the end of the second day, had not gone away.
4. However, as the Minister conceded, it was not necessary or appropriate, at least in this case, for the primary judge to attempt to predict whether or not the Tribunal would have acceded to any request to adduce evidence from the other monk (assuming that could have been made relevant). Nor was it necessary, if the misrepresentation was otherwise made out, for the appellant to articulate with precision, if at all, what his actual evidence might have been to the Tribunal: see *SZRMQ* at 215-6 [10]. It would have been sufficient to establish a breach of s 425(1) in this case if the appellant had been misled into thinking that an issue no longer arose in relation to the decision under review, depriving him of the opportunity to address that issue, even if the content of that lost opportunity was not spelt out.

### The fourth appeal issue – legal unreasonableness (ground 6)

1. The appellant’s counsel faintly advanced an argument that the Tribunal’s treatment of the Coincidence Issue, and what was said to be the contradictory indications within its reasons about the relevance of what occurred at the Chinese Embassy in Dhaka and the circumstances of the appellant’s travel to Australia via China, demonstrated an internal contradiction that did not have any logical or rational explanation. This was said to be “*arbitrary*”, “*capricious*” and/or without “*common sense*”, relying upon *Minister for Immigration and Border Protection v Singh* [2014] FCAFC 1; (2014) 231 FCR 437 at 445-6 [44] and *Minister for Immigration and Border Protection v Stretton* [2016] FCAFC 11; (2016) 237 FCR 1, citing *Minister for Immigration and Citizenship v Li* [2013] HCA 18; (2013) 249 CLR 332 at 350-1 [27]-[28], 365-6 [72]; and *Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16; (2010) 240 CLR 611 at 644-648 [121]-[131].
2. As the parties seemed largely to agree, if the misrepresentation point did not succeed, there was little content left for a legal unreasonableness point. In my view that is the correct conclusion to reach in this case and this ground should not succeed. For completeness, I am of the view that the Tribunal’s treatment of the Coincidence Issue was no more than credibility reasoning of a kind that was open to it. I do not consider it comes close to being arbitrary, capricious or without common sense. Accordingly, the primary judge did not err in failing to make such a finding.

## Conclusion

1. As each of the operative grounds of appeal have failed, the appeal must be dismissed with costs.

|  |
| --- |
| I certify that the preceding ninety-three (93) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Bromwich. |

Associate:

Dated: 24 June 2016