HIGH COURT OF AUSTRALIA

GLEESON CJ
GUMMOW, KIRBY, CALLINAN AND HEYDON JJ

VBAO APPELLANT

AND

MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS & ANOR RESPONDENTS

VBAO v Minister for Immigration and Multicultural and Indigenous Affairs
[2006] HCA 60
14 December 2006
M81/2006

ORDER

Appeal dismissed with costs.

On appeal from the Federal Court of Australia

Representation

R M Niall with C G Fairfield for the appellant (instructed by Arnold Bloch Leibler)

P J Hanks QC with C J Horan for the first respondent (instructed by Clayton Utz)

Submitting appearance for the second respondent

CATCHWORDS

VBAO v Minister for Immigration and Multicultural and Indigenous Affairs

Immigration – Refugees – Well-founded fear of persecution – Section 91R(1) of the *Migration Act* 1958 (Cth) required that persecution involve "serious harm to the person" – Serious harm defined to include "threat to the person's life or liberty" – Whether "threat to the person's life or liberty" referred to likelihood of death or deprivation of liberty, or communication of intention to kill or deprive of liberty – Whether expression of intention to harm sufficient to constitute "serious harm".

Immigration – Refugees – Application for protection visa – Whether Refugee Review Tribunal made findings of fact favourable to the appellant so as to call into operation s 91R of the *Migration Act* 1958 (Cth).

Words and phrases – "threat", "threat to the person's life or liberty", "serious harm".

Migration Act 1958 (Cth) s 91R(1)(b), (2).

1 GLEESON CJ AND KIRBY J. Depending upon context, the word "threat" can mean a communication of an intention to harm, or it can mean a likelihood of harm. The word has other meanings as well, but those are the two possibilities of present relevance. Where the word has the second of the two meanings mentioned, a communication of an intention to harm might be some evidence of a likelihood of harm, but, if there is an issue about the matter of threat, the question to be decided concerns the existence of the likelihood of harm.

2 The immediate context of present relevance is s 91R of the *Migration Act* 1958 (Cth) ("the Act"). The wider context is the whole Act and the provisions of the Refugees Convention referred to in s 91R. In deciding whether a person has a well-founded fear of persecution if sent or returned to a particular place, and whether, on that account, the person is entitled to a protection visa, the decision-maker is directed by s 91R that Art 1A(2) of the Convention does not apply in relation to persecution unless the persecution involves serious harm to the person. Section 91R(2)(a) gives, as an instance of serious harm, a threat to the person's life or liberty. The serious harm in question, by hypothesis, is future harm. Elsewhere in sub-s (2) of s 91R, the word "threatens" appears three times in a context where, clearly, it bears the second of the two meanings mentioned earlier.

3 Both the immediate and the wider context make it plain that, in s 91R(2)(a), "threat" is used in the second sense. A past communication of an intention to harm a person may, or may not, be some evidence that there is a likelihood of future harm to the person's life or liberty, but the question for the decision-maker is whether there is such a likelihood. The decision-maker is required to consider future persecution that involves serious harm, and one instance of such serious harm is a threat to life or liberty. The decision-maker is to decide the risk of future harm, not the risk of future communications. This accords with the view of s 91R(2)(a) that was taken by Marshall J in the present case, and by Crennan J in *VBAS v Minister for Immigration and Multicultural and Indigenous Affairs*[1].

4 For that reason, and for the reasons given by Callinan and Heydon JJ concerning the findings of fact made in the present case, the appeal should be dismissed with costs.

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1 (2005) 141 FCR 435.

5 GUMMOW J. The appellant seeks in this Court orders effecting the reinstatement of his success before the Federal Magistrates Court (Walters FM). That Court, by order made 14 May 2004, declared invalid and of no effect the decision of the second respondent ("the RRT") which had affirmed the decision of a delegate of the first respondent ("the Minister"). The Minister had refused the grant of a protection visa, deciding that the appellant was not a person to whom Australia owed protection obligations under the Refugees Convention and so failed to meet a criterion stipulated by s 36(2) of the *Migration Act* 1958 (Cth) ("the Act"). The construction of another provision of the Act, s 91R, was at the centre of the litigation.

6 The Federal Court of Australia (constituted by Marshall J) allowed the appeal by the Minister against the decision of the Federal Magistrate and dismissed the application made to the Federal Magistrates Court for review of the decision of the RRT.

7 Marshall J construed s 91R in a fashion which the appellant seeks to controvert in this Court. The Minister supports the construction given the provision by the Federal Court and further, by a notice of contention, submits that, if the construction proffered by the appellant (adopting that of the Federal Magistrates Court), be correct, the Federal Magistrates Court erred in the construction it placed upon the factual findings made by the RRT.

8 The appellant had relied upon particular assaults and threatening telephone calls and letters. In their joint reasons for judgment, Callinan and Heydon JJ explain that the Federal Magistrates Court did proceed upon a misunderstanding that the RRT had made findings of fact favourable to the appellant calling for the application of s 91R of the Act. I agree with what their Honours say on that subject.

9 That conclusion is sufficient to support the dismissal of the appeal to this Court. However, in view of the arguments that were pressed upon the question of construction, it is appropriate to go on to deal with that aspect of the appeal.

10 Section 91R was introduced into the Act by the *Migration Legislation Amendment Act (No 6)* 2001 (Cth) ("the Amending Act"). Paragraphs 17, 18 and 19 of the Explanatory Memorandum on the Bill for the Amending Act, circulated by the authority of the then Minister, stated:

> "17. This item inserts new section 91R into the Act which deals with 'persecution'.
>
> 18. Broadly speaking, Australia owes protection obligations to a person who is a refugee as defined in Article 1 of the Refugees Convention and who is not excluded from protection by the provisions of Articles 1 or 33 of the Convention. Under Article 1A(2) a refugee is a person who, among

other things, has a well founded fear of being persecuted for reason of race, religion, nationality, membership of a particular social group or political opinion.

19. Claims of persecution have been determined by Australian courts to fall within the scope of the Refugees Convention even though the harm feared fell short of the level of harm accepted by the parties to the Convention to constitute persecution. Persecution has also been interpreted to be for reason of the above Convention grounds where there have been a number of motivations for the harm feared and the Convention-based elements have not been the dominant reasons for that harm. Taken together these trends in Australian domestic law have widened the application of the Refugee Convention beyond the bounds intended."

11 Paragraph 18 of the Explanatory Memorandum is to be read in the light of the treatment of the elements of the Convention definition of "refugee" in the joint judgment of six members of this Court in *Minister for Immigration and Ethnic Affairs v Guo*[2]. Their Honours said[3]:

"The definition of 'refugee' in Art 1A(2) of the Convention contains four key elements: (1) the applicant must be outside his or her country of nationality; (2) the applicant must fear 'persecution'; (3) the applicant must fear such persecution 'for reasons of race, religion, nationality, membership of a particular social group or political opinion'; and (4) the applicant must have a 'well-founded' fear of persecution for one of the Convention reasons."

12 Section 91R contains three sub-sections. Section 91R(3) is addressed to what was identified in *Guo* as element (4) of the Convention definition and the significance to be attached to conduct in Australia when assessing the presence of a well-founded fear of persecution. Nothing in this appeal turns upon s 91R(3).

13 Sub-sections (1) and (2) of s 91R are addressed to elements (2) and (3). In particular, pars (b) and (c) of s 91R(1) concern the second element, namely the adverse consequences that constitute "persecution", whilst par (a) of s 91R(1) is concerned with the third element, the reasons for persecution.

14 Section 91R(1) should now be set out. It provides:

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2 (1997) 191 CLR 559 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ).

3 (1997) 191 CLR 559 at 570.

"For the purposes of the application of this Act and the regulations to a particular person, Article 1A(2) of the Refugees Convention as amended by the Refugees Protocol does not apply in relation to persecution for one or more of the reasons mentioned in that Article unless:

(a) that reason is the essential and significant reason, or those reasons are the essential and significant reasons, for the persecution; and

(b) the persecution involves serious harm to the person; and

(c) the persecution involves systematic and discriminatory conduct."

15 This appeal requires attention to that aspect of persecution dealt with in par (b) of s 91R(1), namely, the necessity that the persecution "involves serious harm to the person". In the joint judgment in *Guo* and under the heading "*Persecution*", the following was said of that notion[4]:

"In *Chan* [*v Minister for Immigration and Ethnic Affairs*][5], Mason CJ referred to persecution as requiring 'some serious punishment or penalty or some significant detriment or disadvantage'. One other statement of his Honour in that case is also relevant to this appeal. His Honour said[6]:

'Discrimination which involves interrogation, detention or exile to a place remote from one's place of residence under penalty of imprisonment for escape or for return to one's place of residence amounts prima facie to persecution unless the actions are so explained that they bear another character.'

In the same case, Dawson J said[7] that:

'there is general acceptance that a threat to life or freedom for a Convention reason amounts to persecution ... Some would confine persecution to a threat to life or freedom, whereas others would extend it to other measures in disregard of human dignity.'"

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4 (1997) 191 CLR 559 at 570.

5 (1989) 169 CLR 379 at 388.

6 (1989) 169 CLR 379 at 390.

7 (1989) 169 CLR 379 at 399.

16 Paragraph 19 of the Explanatory Memorandum challenges not these statements which include terms now found in s 91R, so much as perceived inconsistencies in their subsequent application from case to case. The paragraph manifests a concern that the degree of the apprehended "harm" not rise above the level regarded by the Parliament as that accepted by the parties to the Convention as constituting "persecution". Hence pars (b) and (c) of s 91R(1). The notion of "serious harm" for the purposes of par (b) of s 91R(1) is given further treatment in s 91R(2). This states:

> "Without limiting what is serious harm for the purposes of paragraph (1)(b), the following are instances of ***serious harm*** for the purposes of that paragraph:
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> (a) a threat to the person's life or liberty;
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> (b) significant physical harassment of the person;
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> (c) significant physical ill-treatment of the person;
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> (d) significant economic hardship that threatens the person's capacity to subsist;
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> (e) denial of access to basic services, where the denial threatens the person's capacity to subsist;
>
> (f) denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist."

The arguments on this appeal gave particular attention to the phrase "a threat to the person's life or liberty" in par (a) of s 91R(2).

17 It is to be noted that the verb "threatens" is used in pars (d), (e) and (f) of the sub-section in the present tense. Additional observations of Mason CJ in *Chan* are in point here. After noting[8] that the application of the Convention definition is for determination by regard to the facts existing when the person concerned seeks recognition as a refugee, Mason CJ continued in *Chan*[9]:

> "In making such a determination under the Convention, a logical starting point in the examination of an application for refugee status would generally be the reasons which the applicant gave for leaving his country of nationality. Those reasons will necessarily relate to an earlier time,

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8 (1989) 169 CLR 379 at 386-387.

9 (1989) 169 CLR 379 at 387.

since when circumstances may have changed. But that does not deny the relevance of the facts as they existed at the time of departure to the determination of the question whether an applicant has a 'fear of persecution' and whether that fear is 'well-founded'."

18 Counsel for the appellant urged a reading of par (a) of s 91R(2) which would include a past or current communication of an intention to kill or deprive a person of liberty which, looked at objectively, is capable of instilling fear in the person and does so. The Minister supports the construction adopted by Marshall J, in particular that (i) threats to life or liberty in the form of declarations of intent do not, without more, constitute the serious harm which persecution must involve, (ii) the term "threat" connotes "risk" in the sense of danger or hazard, and (iii) the threat to life or liberty must manifest itself as an instance of serious harm as distinct from a possibility of danger. The submissions for the Minister should be accepted.

19 It is trite to observe that the six pars (a)-(f) of s 91R(2) should be considered together; they all take their colour from the specification of "serious harm" in the opening words of the sub-section. That phrase in turn may be traced to judicial statements such as that of Mason CJ in *Chan* to which reference has been made. His Honour also used the adjective "significant" to describe a detriment or disadvantage which answers the description of persecution[10]. The phrase "a threat" to life or freedom was used in *Chan* by Dawson J[11]. The term "significant" qualifies the physical harassment, physical ill-treatment and economic hardship spoken of in pars (b), (c) and (d) of s 91R(2). The consequence of an action or state of affairs spoken of in pars (d), (e) and (f) must be one which "threatens the person's capacity to subsist".

20 This reading of the whole of the text of s 91R(2) suggests that no less an element of comparable gravity is involved in the stipulation of a threat to the life or liberty of the person in question. More is required than a possibility which is capable of instilling a fear of danger to life or liberty.

21 The present tense is employed throughout sub-ss (1) and (2) of s 91R. However, as Mason CJ remarked in the passage from *Chan*[12] set out above, past facts may bear upon the present well-founded fear of persecution on a Convention ground. In that setting, the threat or threats upon which reliance now is placed may be specific instances of past conduct by particular individuals. That was so in the present case. But it need not always be so.

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10 (1989) 169 CLR 379 at 388.

11 (1989) 169 CLR 379 at 399.

12 (1989) 169 CLR 379 at 387.

22 The "threat" may have been an indication of evil to come if the person in question were to be returned to the country of nationality but may not have been based upon any direct statement to that person by any official source. Thus, in the years immediately preceding the adoption of the Convention, many persons outside the Soviet Union as émigrés would have believed themselves to be under a very significant threat of liquidation upon repatriation (as "victims of Yalta") to their country of nationality. That apprehension may not have been provoked by a particular communication, but yet it may have been well founded. Such a state of affairs would have answered par (a) of s 91R(2) as construed in the submissions of the Minister in this appeal.

23 The appeal should be dismissed with costs.

24 CALLINAN AND HEYDON JJ. The matter that was extensively argued in this appeal was the meaning of the phrase "threat to ... life or liberty" in s 91R(2)(a) of the *Migration Act* 1958 (Cth) ("the Act"). The appellant says that it means a communication, past or current, of an intention to kill or deprive a person of liberty which is objectively capable of instilling fear in the person and does so. The first respondent argues that "threat to ... life or liberty" means a real threat of persecution, that is, relevantly here, of serious harm now or in the future sufficient to engender a well-founded fear of it in the person.

The legislation

25 An applicant will be eligible for a "protection visa"[13] if he or she is a non-citizen, in Australia, to whom the Minister is satisfied Australia owes protection obligations under the Convention relating to the Status of Refugees[14], taken with the Protocol relating to the Status of Refugees[15] (together, "the Convention"), as adapted and received into Australian law by and in the Act[16].

26 Article 1A of the Convention relevantly defines "refugee" as a person who:

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

27 Section 91R of the Act however defines "persecution" for the purposes of Australian law:

> "**Persecution**
>
> (1) For the purposes of the application of this Act and the regulations to a particular person, Article 1A(2) of the Refugees Convention as

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13 The Act, s 36.

14 Done at Geneva on 28 July 1951.

15 Done at New York on 31 January 1967.

16 See *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* [2006] HCA 53.

amended by the Refugees Protocol does not apply in relation to persecution for one or more of the reasons mentioned in that Article unless:

(a) that reason is the essential and significant reason, or those reasons are the essential and significant reasons, for the persecution; and

(b) the persecution involves serious harm to the person; and

(c) the persecution involves systematic and discriminatory conduct.

(2) Without limiting what is serious harm for the purposes of paragraph (1)(b), the following are instances of ***serious harm*** for the purposes of that paragraph:

(a) a threat to the person's life or liberty;

(b) significant physical harassment of the person;

(c) significant physical ill-treatment of the person;

(d) significant economic hardship that threatens the person's capacity to subsist;

(e) denial of access to basic services, where the denial threatens the person's capacity to subsist;

(f) denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.

(3) For the purposes of the application of this Act and the regulations to a particular person:

(a) in determining whether the person has a well-founded fear of being persecuted for one or more of the reasons mentioned in Article 1A(2) of the Refugees Convention as amended by the Refugees Protocol;

disregard any conduct engaged in by the person in Australia unless:

(b) the person satisfies the Minister that the person engaged in the conduct otherwise than for the purpose of strengthening the person's claim to be a refugee within the meaning of the Refugees Convention as amended by the Refugees Protocol."

The facts

28 The appellant is a national of Sri Lanka. As the holder of an entertainment visa which was issued on the basis that he was a member of a troupe of dancers sponsored by the Sinhala Cultural and Community Services Foundation, he was permitted to enter Australia on 5 November 2001. The Foundation withdrew its sponsorship when it became clear to it that the troupe was not a troupe of genuine dancers. The appellant applied for a protection visa on 9 November 2001.

29 The appellant told an Australian official who interviewed him after he applied for that visa that for four years he had wanted to work in Australia to pay off a personal loan and to provide for his family. He said that he was a member of the Sri Lankan Freedom Party ("SLFP"), which was a part of the People's Alliance ("PA"). He claimed that he had attended and performed at political rallies, and had organized political meetings. In his written application for the visa, the appellant said that his life had been threatened by members of the United National Party ("UNP"), the parliamentary arm of which was in opposition in Sri Lanka. The appellant claimed that he would be killed if the UNP were soon to come to power in Sri Lanka, a likely event according to him.

30 The appellant provided additional information to the delegate of the first respondent about his political activities. He said that he had worked from time to time as a musician, and had performed at PA rallies; that one day in December 2000 or in January 2001, on his way home from a wedding, he had been pulled into a van, beaten, and his hair had been cut, allegedly by UNP members; that he had lost his job as a musician because of his political involvement; that he had received many threats to his life from UNP members; that he had been obliged to leave his home; and, that he would be in grave danger should the UNP win the next election. The appellant claimed that after the incident in December or January he had received countless threats, and on one occasion, two or three months earlier, he had been struck, apparently intentionally, by the rear-view mirror of a passing van, and that eggs had been thrown at him. He said that his parents also had been directly threatened. The appellant said that he went into hiding because of the threats, although he was still able to visit his family occasionally. His explanation for his failure to complain about the threats was that because his father was a police officer and police officers did not become involved in political matters, it would have been inappropriate for him to do so.

31 The delegate of the first respondent refused the appellant a protection visa. He then applied to the Refugee Review Tribunal ("the Tribunal") for review of the delegate's decision.

The Tribunal

32 The Tribunal found that the appellant had not been actively involved in politics:

> "It is in my view not plausible that a person who had been actively involved in the way described by the [appellant] – in particular his involvement in organising and attending rallies and pasting posters and attending meetings – could fail to recall the 1999 Presidential election and could not know what the long-standing PA leader of the Provincial Council left the role to do. I do not accept that the [appellant] had any active involvement in politics outside election campaigns or that he had any practical involvement with organisational aspects of the PA or its component parties and note that he told me he attended meetings at other times only when I told him that meetings of political parties at other times occurred. The [appellant's] knowledge about the policies of the main parties in Sri Lanka was very limited and in my view supports a conclusion that while he was a supporter of the PA, or a member, his involvement was limited to voting for it, assisting with practical support tasks during election campaigns and to attending rallies and providing musical entertainment on some of these occasions."

33 Even so, the Tribunal was prepared to consider the appellant's case on the basis that he may have received intimidating and threatening telephone calls and letters, and that he may have been assaulted in December 2000 or January 2001, possibly by UNP thugs. The Tribunal was not satisfied, however, that these would constitute persecution within the meaning of the Convention. The telephone calls and letters, although they may have been "troubling", did not constitute "serious harm": they were no more than isolated incidents, and not precursors to further attempts to harm the appellant. The account of other events, of egg-throwing, and the collision with the passing van, was "unconvincing". But again, if it was to be assumed that the events did occur as the appellant alleged, they did not amount to harm "of a severity ... as to constitute persecution". The Tribunal also rejected the appellant's evidence that he had been in hiding, and that he had lost his job as a result of his political activities, the job referred to being "a series of casual engagements". Further, the Tribunal disbelieved the appellant's claimed reasons for his decision not to complain to police officers about the assaults upon and threats to him.

34 The Tribunal accordingly affirmed the delegate's decision not to grant the appellant a protection visa.

Federal Magistrates Court

35 The appellant applied to the Federal Magistrates Court (Walters FM) for relief against the Tribunal's decision[17]. The ground relied on was that, in determining that the appellant was not entitled to a protection visa, the Tribunal had erred in the construction and application of s 91R of the Act, by failing to hold that the threats made to the appellant's life constituted persecution, within the meaning of s 91R(2)(a).

36 The Magistrate accepted[18] that not all death threats or threats of imprisonment could amount to "serious harm". But he regarded a threat, even a threat made in the past, to a person's life or liberty as sufficient to amount to persecution under the Act[19]:

> "The fact of the matter is, however, that s 91R(2)(a) clearly states that 'a threat to (a) person's life or liberty' is an instance of serious harm for the purposes of s 91R(1)(b). The other sub-paragraphs of s 91R(2) use adjectives or descriptive phrases to qualify or elucidate the scope of the relevant behaviour described within them. For example, s 91R(2)(b) and (c) refer to *significant* physical harassment or ill treatment of a person, and s 91R(2)(d) refers to *significant* economic hardship *that threatens the persons* [sic] *capacity to subsist*. But no such descriptive or qualifying words or phrases adhere to s 91R(2)(a). In my view, the absence of such qualifying or descriptive words or phrases is of importance. I can see no reason why the plain meaning of the relevant words should be read down in the manner urged ... Whilst the term 'threat' may cover any actual (objective) risk, danger, hazard or peril to a person's life or liberty, it clearly cannot *exclude* the making of oral or written threats against the person." (original emphasis)

37 The Magistrate then posed this further question: whether "the words spoken or written, or the actions taken, could fairly engender in the mind of a reasonable person a reasonable apprehension that his or her life or liberty is genuinely at risk"[20]. He was of the view that the Tribunal had failed properly or fairly to address the appellant's claims, and had failed to apply in its terms s 91R

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17 *VBAO v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 182 FLR 446.

18 (2004) 182 FLR 446 at 454 [31].

19 (2004) 182 FLR 446 at 454 [31].

20 (2004) 182 FLR 446 at 454 [33].

of the Act. The Magistrate in consequence granted relief in the form of a declaration, certiorari to quash the Tribunal's decision, mandamus, and costs.

Appeal to the Federal Court of Australia

38 The first respondent appealed to the Federal Court of Australia[21].

39 Marshall J, sitting as the Full Court of the Federal Court[22], thought relevant[23] to the construction of s 91R the Explanatory Memorandum to the Bill to insert s 91R in the Act in its current form[24]:

> "[C]laims of persecution have been determined by Australian courts to fall within the scope of the Refugees Convention even though the harm feared fell well short of the level of harm accepted by the parties to the Convention to constitute persecution".

40 His Honour rejected a non-contextualist literal construction of s 91R(2)(a)[25]:

> "The principles of statutory construction, applied to s 91R(2)(a), favour the definition of 'threat' advanced by the [respondent]. When regard is had to extrinsic material, in particular the Explanatory Memorandum referred to ... the position is put beyond doubt.
>
> Section 91R is a relatively recent addition to the Act, designed to set the parameters and raise the threshold of what can properly amount to 'serious harm', within the spirit of the Refugees Convention. Against this backdrop, the word 'threat', in the context of s 91R(2)(a), cannot sensibly be construed to have the meaning contended for by the [appellant].
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> It could not, in my view, have been the intention of Parliament that threats in the form of declarations of intent, could prima facie constitute

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21 *Minister for Immigration and Multicultural and Indigenous Affairs v VBAO* (2004) 139 FCR 405.

22 *Federal Court of Australia Act* 1976 (Cth), s 25(1AA).

23 (2004) 139 FCR 405 at 409 [20].

24 Explanatory Memorandum to the Migration Legislation Amendment Bill (No 6) 2001 at [19].

25 (2004) 139 FCR 405 at 411 [35]-[38].

> serious harm. Even with the qualification to s 91R(2)(a), which the [appellant] submits must operate to exclude from its scope, threats which do not have the capacity to instil fear, it is clear that application of the [appellant's] definition would be productive of anomalous consequences.
>
> For example, a threat to kill, inadvertently directed to an individual in a case of 'mistaken identity', may well engender fear in the unsuspecting recipient not appraised of the circumstances in which the threat has been made. However, this could not be serious harm of the type contemplated by either Parliament or the Refugees Convention."

41 His Honour accordingly allowed the first respondent's appeal, set aside the orders of the Federal Magistrates Court, and dismissed the application for judicial review of the Tribunal's decision.

The appeal to this Court

42 In substance the appellant adopts as his submission the reasoning of the Federal Magistrate which appears in the passages from his judgment that we have quoted.

43 In our opinion the Federal Magistrate proceeded upon a misconception. The Tribunal did not[26] make findings of fact favourable to the appellant calling for the application of s 91R(2)(a) of the Act. This appears clearly from the Tribunal's several findings adverse to the appellant with respect to his political activities which in turn were to provide the foundation for his assertions that it was these that provoked the dangerous threats to which he was subjected. That this is so, also appears from the language, carefully chosen by the Tribunal, with respect to the possible application of s 91R(2)(a) of the Act, if the appellant's factual claims were true. The key, and effectively decisive, factual finding, was that it was "not plausible that a person who had been actively involved in the way described by the [appellant] ... could fail to recall ... and ... not know" various relevant political matters about which he had been asked.

44 Thereafter, with one possible exception only, the Tribunal used only provisional language – the language of assumption or hypothesis, not belief – about the facts to which s 91R(2)(a) might be applicable had the appellant's assertions about them been believed. This follows from the repeated references to the appellant's "claims". It follows from the use of the words, "I am *prepared* to accept that the [appellant] *might* have received intimidating and threatening telephone calls" and "I am also *prepared* to accept that he was assaulted in

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26 cf (2004) 182 FLR 446 at 454 [30].

December 2000/January 2001 and that this *may have been done* to him by UNP thugs" (emphasis added). It follows from the Tribunal's later significant use of some contrasting expressions turning on the notions of "finding" and "view": "I *found* the [appellant's] evidence [about the incident involving a collision with a van and the egg-throwing] *unconvincing*. Even if it occurred *as the [appellant] claimed* ... it ... is not *in my view* harm ... of a severity so as to constitute persecution" (emphasis added). It follows from the fact that this statement was succeeded by a statement in the language of a finding: "I am not satisfied that the [appellant] was in hiding as he claimed". And it follows from the Tribunal's next statement:

> "*Had* there been a serious intent to harm him [during the van incident, he would have been harmed] ... Nor am I satisfied, *against the background of all of the [appellant's] evidence*, that it was his political involvement which led him to lose his job as a musician ... I *found* very unconvincing the [appellant's] evidence about why he did not report the incidents to the police". (emphasis added)

45 The only possible exception to the consistently provisional language is to be found in a later paragraph of the Tribunal's reasoning which begins with this sentence:

> "I have concluded that the chance of the [appellant] coming to serious harm upon return to Sri Lanka because of his past involvement – which *I have found was limited* to voting for the PA, attending rallies during election campaigns, providing musical entertainment at some gatherings and undertaking practical support tasks during election campaigns – is remote." (emphasis added)

46 But the sentence following it[27], and the other findings and the manner of expression of the Tribunal to which we have earlier referred, leave little doubt that the evidence before the Tribunal regarding the claims and evidence of the appellant, as evaluated by the Tribunal, could provide no factual foundation for a claim of persecution for the Convention reason relied on, the holding of a political opinion or membership of a political group. In those circumstances the decision of the Tribunal was not open to challenge on the basis of jurisdictional or like error. Occasion for the application and therefore consideration of the

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27 "I do not accept that the nature and extent of his involvement was of a kind which led to the sustained adverse interest of political opponents to an extent where he was subjected to serious harm of a kind which can, even if seen altogether, reasonably be regarded as persecutory or that his past involvement would lead to such treatment if he were to return."

meaning of s 91R(2)(a) of the Act by the Federal Magistrate did not therefore strictly arise.

47 The latter matters were however fully argued. In those circumstances, we are prepared, as did the Federal Court, to give consideration to them.

48 The correct starting point for this is the language of s 91R and not the Convention, although of course regard must be had to it to the extent that it can be seen to be incorporated in, or otherwise adopted by the Act.

49 Section 91R(1) emphasizes that Art 1A(2) of the Convention will not apply to persecution unless three conditions are satisfied, relevantly: that membership of a political group or the holding of a political opinion is the *essential and significant* reason for the persecution; that the persecution involves serious harm to the person; and, that the persecution involves *systematic* and discriminatory conduct. For the reasons which we have given, it must be concluded that not all of those necessary conditions have been satisfied, and indeed none have. However, the requirement that they must be in any particular case, provides a manifestation of a statutory intent to define persecution, and therefore serious harm, in strict and perhaps narrower terms than an unqualified reading of any unadapted Art 1A(2) of the Convention might otherwise require.

50 We come then to s 91R(2). No one would doubt that what has occurred in the past may provide a good indication of what might, but not always necessarily will, happen in the future. Section 91R is not concerned exclusively with, or applicable to events in the past, rather than current or future circumstances. The Convention is framed to ensure that persons will not be exposed to persecution, as defined by Australian law, if they were to return to the country which they have left. If any threat or relevant risk is not current or prospective, then there can be no well-founded fear of persecution. Neither the Convention nor s 91R of the Act can be read as if a threat of sufficient gravity which has passed, has not been renewed or revived, and is unlikely to be renewed or revived for a Convention reason, will suffice to give rise to the requisite *well-founded* fear. Accordingly the Federal Magistrate erred in holding that the fact that a threat for a Convention reason to life or liberty, made in the past, but neither current nor prospective, satisfied the requirements of s 91R of the Act. The Federal Court did not err in allowing the appeal from the Magistrates Court to it.

51 The appeal to this Court should be dismissed with costs.