FEDERAL COURT OF AUSTRALIA

SZAYT v Minister for Immigration and Multicultural and Indigenous Affairs

[2005] FCA 857

IMMIGRATION – Application for protection visa by Indo Fijian woman – Refugee Tribunal accepted claims by appellant of harassment by indigenous Fijians, including a threat to kill her, and activities which affected her ability to live alone – whether the Tribunal fell into jurisdictional error by failing to evaluate the significance of the threat to kill the appellant or consider whether she had a well-founded fear of persecution as a member of a particular social group, single Indo Fijian women living alone – whether any claim was excluded by circumstances under which police protection was not provided.

Migration Act 1958 (Cth) ss 36, 91R

Minister for Immigration and Multicultural and Indigenous Affairs v VBAO of 2002 [2004] FCA 1495 followed and explained
Minister for Immigration and Multicultural Affairs v Khawar [2002] HCA 14; 210 CLR 1 discussed
Minister for Immigration and Multicultural and Indigenous Affairs v Respondents S152/2003 [2004] HCA 18; 205 ALR 487 applied

SZAYT v MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS and REFUGEE REVIEW TRIBUNAL
NSD 526 of 2005

WILCOX J
24 JUNE 2005
SYDNEY

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY **NSD 526 OF 2005**

BETWEEN:	**SZAYT** **APPELLANT**
AND:	**MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS** **FIRST RESPONDENT**
	REFUGEE REVIEW TRIBUNAL **SECOND RESPONDENT**
JUDGE:	**WILCOX J**
DATE OF ORDER:	**24 JUNE 2005**
WHERE MADE:	**SYDNEY**

THE COURT ORDERS THAT:

1. The appeal be allowed.
2. The orders made by Mowbray FM on 17 March 2005 be set aside and, in lieu thereof, it be ordered that the decision of the Refugee Review Tribunal, handed down on 11 June 2003, be quashed and the matter remitted to the said Tribunal for further hearing and determination according to law.
3. The first respondent, the Minister for Immigration and Multicultural and Indigenous Affairs, pay the costs of the appellant in both the Federal Magistrates Court and this Court.

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

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NEW SOUTH WALES DISTRICT REGISTRY **NSD 526 OF 2005**

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JUDGE:	**WILCOX J**
DATE:	**24 JUNE 2005**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

1 This is an appeal against a decision of Mowbray FM of the Federal Magistrates Court of Australia delivered on 17 March 2005. Pursuant to s 25(1A) of the *Federal Court of Australia Act 1976* (Cth), the Chief Justice directed the appeal be heard and determined by a single judge.

2 Mowbray FM dismissed an application under s 39B of the *Judiciary Act 1903* (Cth) for review of a decision of the Refugee Review Tribunal ('the Tribunal') handed down on 11 June 2003. The Tribunal had affirmed a decision of a delegate of the Minister for Immigration and Multicultural and Indigenous Affairs ('the Minister') not to grant a protection visa to the appellant. The Minister and the Tribunal are respondents to this appeal. The Minister appeared by counsel to oppose the appeal. The Tribunal did not appear. Counsel for the Minister, Ms Kate Morgan, said she was instructed the Tribunal did not wish to participate in the hearing.

3 Both the delegate and the Tribunal found the appellant was not a 'refugee' within the definition contained in Article 1A(2) of the 1951 *Convention Relating to the Status of Refugees*, as amended by the 1967 *Protocol Relating to the Status of Refugees* (collectively

'the Convention'). Accordingly, they found the appellant did not fulfil the criterion for the grant to her of a protection visa laid down by s 36 of the *Migration Act 1958* (Cth) ('the Act').

Background

4 The appellant is a single woman now aged 25 years. She is a Fijian national of Indo-Fijian ethnicity.

5 In June 1999, the appellant entered Australia legally on a Fijian passport issued in her own name. She was granted a visitor's visa, valid for three months. Apparently, the appellant's purpose was to visit members of her family who resided in this country. At the expiration of her visa, the appellant returned to Fiji, where she continued to reside until she again travelled to Australia in January 2002.

6 On 5 March 2002, the appellant applied for a protection visa. On 11 June 2002, the delegate refused that application. The appellant sought Tribunal review of the delegate's decision. After an oral hearing on 1 May 2003, the Tribunal handed down its decision on 11 June 2003.

The Tribunal's decision

7 At paras 20-25 of its reasons for decision, the Tribunal summarised the appellant's pre-hearing claims:

> *'The Applicant's case is that after she completed her secondary education she was employed in a family restaurant. The Applicant could not find other work. Because of day to day harassment and burglary by indigenous Fijians the parents of the Applicant were forced to close the restaurant. The parents of the Applicant travelled to Australia for a better life.*
>
> *Alone in Fiji the Applicant was harassed by indigenous Fijians on a number of occasions while travelling to her home. In December of 2001 the Applicant had her handbag and purse snatched by an indigenous Fijian youth. The Applicant reported the theft to police but no action was ever taken by the police.*
>
> *The Applicant was told by a friend in late February 2002 that most of the houses near where the Applicant lived had been robbed and land leases had expired. In rural areas indigenous Fijian landlords are insisting upon having their land back.*
>
> *The Applicant was also informed that Indo Fijians are being terrorized and*

Indo Fijian women are being raped. A number of Indo Fijian girls had committed suicide rather than face the stigma of being a woman who had been raped. It is even dangerous to walk to a bus stop to catch a bus. The friend of the Applicant advised her not to return to Fiji.

There is racism, corruption and discrimination in Fiji.

The Applicant has no relatives in Fiji. If she goes back to Fiji she fears persecution and fears that her life will be in danger.'

8 The Tribunal also summarised (at paras 28-31) the evidence given by the appellant at the oral hearing:

'I asked the Applicant to summarise for me in her own words why she believed she should be granted a protection visa. She said that in Fiji indigenous Fijians came to know that she was living alone. They harassed her. They would bang on the door of her home and steal her clothes off the clothesline. On a few occasions they even robbed her of her jewellery. On occasions she felt that she had to stay at home. Sometimes indigenous Fijians would inquire if the house was vacant. Stones were thrown on the roof of the house at night. The Applicant complained to police about this harassment. They would say that they did not have transport. If the police could not come the Applicant would have to sleep with neighbours because she was afraid and did not have any close relatives.

I asked the Applicant if the particular indigenous Fijians lived nearby. She said that she believed that they didn't live nearby. She was not sure. The Applicant added that the restaurant business had been doing well but because of threats and trouble with indigenous Fijians it had become necessary to close the business. The Applicant said that there was too much unemployment in Fiji after the coup. For Indians jobs are scarce. One could only obtain casual work. The government does not support Indo Fijians.

I asked the Applicant what she thought would happen to her if she went back to Fiji. She said that she does not have anyone there. She has no place to live. Indigenous Fijians don't want Indo Fijians. She is afraid that she will have the same threats and harassment. She had informed the police many times of the trouble she was experiencing with indigenous Fijians and they could not help her.

I asked the Applicant when she was first mistreated in Fiji. She said this was in December 2000 when her purse had been snatched and she had been assaulted. She had fallen to the ground and she had been kicked. Stones had been thrown on her home. Stones were the thrown [sic] every second or third day. The last occasion on which she had suffered mistreatment in Fiji was in 2001 when clothes were stolen from her clothes line and some boxes which were lying in the yard will [sic] *set on fire. On one occasion money sent to her by her mother had been stolen. On another occasion indigenous Fijians came drinking in her compound. Threats were made that if she complained to the*

police they would kill her.'

9 In the section of the Tribunal's decision headed 'Findings and Reasons', the Tribunal member said:

> *'I found the Applicant to be a pleasant young woman. At the hearing she did not seek to exaggerate her claims or introduce fresh claims of any significance. I am prepared to accept her as a truthful witness.'*

10 However, the member thought the appellant's evidence did not establish a well-founded fear of persecution. He said:

> *'Even accepting at face value the claims of the Applicant that in December 2000 her purse had been snatched and she had been assaulted, that stones had been thrown on her home every second or third day, that clothes were stolen from her clothesline, that boxes which were lying in the yard were set on fire, that indigenous Fijians came drinking in her compound and that threats had been made that she would be killed if she complained to the police, I am not satisfied that looked at individually or in their totality the mistreatment suffered by the Applicant in the past is any more than low level harassment. I am satisfied that it is not of sufficient severity to amount to serious harm …*
>
> *Incidents of harm in the past are not determinative of a claim for a protection visa, although they may of course be useful indicators of the risk or nature of future harm. The issue remains whether the Applicant faces a real chance of Convention based persecution in the foreseeable future upon her return to Fiji.'*

11 The Tribunal accepted 'that there is ongoing mistrust between indigenous Fijians and Indo Fijians and that from time to time this manifests itself in race based violence'. However, the member said: 'I am also satisfied that the present government is genuine in its attempts to restore the confidence of the Indo Fijian community'.

12 The member cited country information which, he said, 'satisfies me that law and order has been restored in Fiji and that the general situation in Fiji is stable'. He said: 'There is no evidence of any significant mistreatment of Indo Fijians other than localised low level harassment and theft'. The member went on:

> *'I am satisfied that significant efforts are being undertaken to restore the economy of Fiji as a basis for re-establishing a stable and inclusive society and that these efforts are bearing fruit. For example, I note that in the last twelve months there has been a substantial increase in the tourist industry in*

Fiji. I also note that other key industries such as clothing manufacturers and the sugar industry are still struggling.

I also note that since the conviction of Mr George Speight there has been no destabilising backlash from the indigenous Fijian community and there is no evidence from independent sources within the last year to suggest that Indo Fijians, at least in the major centres, have suffered any more than minor harassment in the streets in the form of swearing, petty theft and common assault.' (Citation omitted)

13 The Tribunal discussed the issue of government protection:

'A further difficulty for the Applicant is that under the Refugees Convention persecution by private individuals or groups does not, by itself, fall within the Convention unless the State encourages the persecution or appears powerless to prevent the persecution, the object of the Convention being to provide refuge for persons, who having lost the de jure or de facto protection of their government, are reluctant to return to their country of nationality.

I am satisfied that the Qarase government has been elected in elections which observers had found to be free and fair. I accept independent evidence from DFAT that the government continues to enjoy a high degree of support. I am satisfied that its stated policies are borne out by recent independent information that while some of its policies discriminate against Indo Fijians the government does not persecute any Fijian citizens for racial reasons.

It is well established that the concept of "state protection" does not include a proviso that the authorities must, or can, provide absolute guarantees against harm.

Fijian Applicants, including the present applicant, routinely claim that effective protection is not available from the Fijian police because the police do not respond to requests by Indo Fijians for protection. It was the view of the Applicant that the protection available is not good protection. There is not much protection.

After the coup in May of 2000 there was unrest in many parts of the country accompanied by violence against Indo Fijians. In that unrest and violence there is even evidence that some police participated. I accept that at that time police resources of both manpower and equipment were stretched to the limit and that police were simply unable to cope with all the calls for assistance made to them.

There is some evidence of corruption in the Fijian police force and this, together with experiences at the time of the coup and its aftermath, led to a loss of confidence in the police force which continues in the Indo Fijian community until today.

That said, reports back to 1996 speak of a small but efficient police force,

> *albeit it one that appears to be under-resourced. There is evidence that by April 2001 increased police protection in trouble spots during the coup had led to a significant reduction in communal violence. There is also evidence that senior police officers, local community leaders and government officials have worked to reduce ethnic tensions and have helped to foster reconciliation at a local level.*
>
> *While I am prepared to accept there are shortcomings in the Fijian police and they do suffer from a lack of resources, I am not satisfied that the protection which is available to all Fijians through their police force is so ineffective that it could be said to give rise to a real chance that the Applicant would suffer Convention based persecution. I am satisfied that, generally speaking, the Indian community is protected by the existing laws of Fiji which include a sophisticated criminal justice system and I am further satisfied that effective protection is available to all Fijian citizens, particularly in or near the major centres, as in the case of the present Applicant, Nadi.'* (Citations omitted)

14 The Tribunal member considered that, for 'all the above reasons', he could not be satisfied that the appellant faced a 'real chance of Convention related persecution upon her return to Fiji'. Consequently, he was 'not satisfied that the applicant is a person to whom Australia has protection obligations under the [Convention]'.

The magistrate's decision

15 At the hearing before Mowbray FM, the appellant was represented by Mr Tony Silva, solicitor. The Minister appeared by counsel, Ms Rachel Francois. Mr Silva argued eight grounds of review. All failed. It is not necessary for me to discuss all the grounds; only two of them ('the pressed grounds') were advanced in this appeal. The two pressed grounds are that:

(i) the Tribunal failed to determine the significance of the appellant's accepted evidence that indigenous Fijians had threatened to kill her if she complained to the police about their behaviour; and

(ii) the Tribunal failed to consider whether the appellant had a well-founded fear of persecution upon the basis of her membership of a 'particular social group', being 'single young Indian woman living alone in Fiji' or 'single Indian woman living alone in Fiji'.

16 In relation to both these grounds, Ms Morgan was essentially content to support the reasoning of Mowbray FM. However, Ms Morgan argued it did not matter whether either of the pressed grounds could be made good. She said any persecution that had been suffered by the

appellant in the past, or was feared by her in respect of the future, was, or would be, persecution by non-State agents, protection against which was not denied by the State (the Fijian government) on grounds falling within Article 1A(2) of the Convention. Consequently, Ms Morgan submitted, any such persecution fell outside Article 1A(2) of the Convention; it could not furnish a basis for the granting of a protection visa.

17 I will consider separately the two pressed grounds and Ms Morgan's wider response.

Failure to determine significance of threat to kill

18 The first pressed ground was expressed, in the Further Amended Notice of Appeal, in this way:

> *'His Honour erred by failing to hold that the Tribunal made jurisdictional error in finding that the applicant was only subject to low level harassment. His Honour further failed to hold that there is no basis (either factual or legal basis) whatsoever for the Tribunal to hold impliedly that life threat made to her was serious or genuine.*
>
> *This ground could be put forward on an alternative basis as 'The Tribunal made jurisdictional error as it impliedly held without evidence (or it was unreasonable in the Wednesbury sense) that the threat to kill made to the applicant was not [a] genuine or serious one and it was also not a serious or genuine threat to cause serious injury or harm'.*

19 This ground of appeal is not well-framed. However, Mr Silva (who again appeared for the appellant) explained his point was that the Tribunal committed a jurisdictional error in failing to evaluate the extent of the threat to the appellant's life; in particular, in failing to determine the genuineness and seriousness of the threat to kill the appellant, if she complained to the police. Mr Silva emphasised that the Tribunal accepted such a threat had been made. Mr Silva acknowledged it was for the Tribunal to find the relevant facts and to assess whether the degree of harm it found to have been suffered by the appellant amounted to 'persecution', within the meaning of Article 1A(2) of the Convention. Mr Silva also accepted that, in determining this matter, the Tribunal was required to have regard to s 91R of the Act. That section relevantly provides:

> *'(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 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;*
>
> *…'*

20 Mr Silva noted s 91R(2)(a) which instances, as 'serious harm', 'a threat to the person's life or liberty'. He argued that any genuine and serious threat to kill a person falls within this paragraph. Mr Silva acknowledged it is not uncommon for someone to make a non-serious statement about killing someone else and that a non-serious statement would not be 'a threat to the person's life' within the meaning of the paragraph. However, he argued, the Tribunal accepted that the relevant words were spoken by people who were antagonistic to the appellant. It was for the Tribunal to determine the seriousness of the threat. Its conclusion about that matter would be a finding of fact and not vulnerable to judicial review. However, he contended, the Tribunal was obliged to address that question; its failure to do so constituted jurisdictional error.

21 A similar submission was put to Mowbray FM. His Honour dealt with it at paras 11-17 of his reasons:

> *'11. The Tribunal had accepted the applicant as a truthful person and had found that a series of incidents occurred, particularly one suggesting that if the applicant had complained to the police she would be killed. On the basis of these findings, the applicant, through her advocate Mr Silva, contended that the Tribunal could not have concluded consistent with the law that these incidents constituted nothing more than low-level harassment and were not of sufficient severity to amount to serious harm.*
>
> *12. Mr Silva asserted that the Tribunal had failed to look at the impact of all the incidents on the applicant as a whole. He added that it was important to note that under the legislation serious mental harm was*

classified as serious harm and that it was not necessary that there be significant physical ill-treatment. In particular he asserted that it was sufficient that the applicant had suffered a threat to her life.

13. *Ms Francois for the Minister submitted there had been no misunderstanding of the requirements of the [Act], in particular ss 91R(1) and (2). The Tribunal set out in its decision at paragraph 12 its understanding of the requirements of these provisions and that formulation was indisputably correct. No error could be discerned from its application to the facts as found. It was open to the Tribunal to find that the incidents which had been described by the applicant were not of sufficient severity to amount to serious harm as required by s 91R. In particular it was within the Tribunal's powers to find that the threat to kill the applicant was not a genuine threat.'*

Mowbray FM set out s 91R(1) and (2) and continued:

15. *In my view what the Tribunal has said at paragraph 12 about this section is both unexceptional and correct. It does not fall into the error which Merkel J identified in* VTAO v Minister for Immigration & Multicultural & Indigenous Affairs *[2004] FCA 927, starting at paragraph 60. That is, the Tribunal did not treat s 91R(2) as an exhaustive statement of what amounts to "serious harm" for the purposes of s 91R(1)(b). Rather it looked at the incidents described by the applicant individually and in their totality and reached the conclusion that the incidents amounted to low-level harassment. It then found that they were not of sufficient severity to amount to serious harm.*

16. *Implicit in this finding is one that any threat to the applicant's life was not a genuine threat. As accepted by Walters FM in* VBAO v Minister for Immigration & Multicultural & Indigenous Affairs *(2004) 182 FLR 446:*

> *"Not all death threats or threats of imprisonment made against a person will necessarily constitute "serious harm". Such threats may (for example) be patently hollow, or they may even have been made in jest.*
> *…*
>
> *… the threat constituted by words or actions must be a real threat to the person's life or liberty."*

17. *Although the Tribunal could have spelt out its reasoning more carefully, on a fair reading of the Tribunal's decision it is clear that it did not accept that the threat to kill the applicant was a serious or genuine one. It amounted to no more than "low-level harassment". Such a finding was clearly open to the Tribunal. This Court is enjoined in* Minister for Immigration & Ethnic Affairs v Wu Shan Liang *(1996) 185 CLR 259 not to examine the reasons of the Tribunal*

with a fine-tooth comb.

18. Furthermore, even if the applicant suffered a subjective fear for her life, the Tribunal was unable to find anything higher than a remote prospect of her "suffering serious harm amounting to Convention based persecution upon her return to Fiji". The Tribunal said that "[h]er fears of persecution are not well founded." There was no objective evidence to support her fear.'

22 At para 12 of the Tribunal's reasons, referred to by Mowbray FM in his para 15, the Tribunal noted the requirement, in Art 1A(2) of the Convention definition, that the person must fear persecution. The Tribunal there referred to s 91R of the Act. At that stage in its reasons, the Tribunal was not discussing the appellant's claims or its findings of fact.

23 In argument before me, Mr Silva accepted that the reasons of the Tribunal 'are not be read with an eye attuned to the ready perception of error'. On the other hand, he insisted, 'it is important to review the Tribunal's reasons to be satisfied that the Tribunal has in fact had regard to the matters which it must address'. He went on:

> *'Serious threat to kill someone is no doubt serious harm. If there was an objective basis for the Tribunal to say that it was not genuine or serious threat to kill, then the Tribunal should have asked "If the threat to kill is not genuine then is it still a threat to cause serious injury but not amounting to threat to kill", only if the Tribunal consider[s] this issue and only if it has some reason to say that it was neither a serious threat to kill nor a serious threat to cause serious injury, could it say that it was low level harassment. Thus the Tribunal failed to engage in an inquiry it should have undertaken, thus it failed to exercise its jurisdiction.'*

24 Responding to the comment of Mowbray FM about the Tribunal not spelling out its reasons, Mr Silva said:

> *'[T]he Appellant is not complaining about the tribunal not spelling out its reasons. It is about the tribunal not exercising its power in inquiring about a critical matter and not giving proper consideration and recklessly without any objective reason deciding that it is low level harassment. The Tribunal did not say that had the applicant gone and complained to police nothing would have happened to her or that there would not have been any serious harm to her because for whatever reason that the Tribunal stated.'*

25 Mr Silva pointed out that in *VBAO* (noted by Mowbray FM), counsel for the Minister had argued (and the magistrate had accepted) that the evidence of a threat to kill does not, of itself, establish the existence of serious harm; however, once one accepts that a 'bare' threat

to a person's life or liberty is not enough to comprise 'serious harm', then it is necessary to undertake an analysis of the actual risk posed by the threat. Mr Silva's complaint was that, in the present case, the Tribunal did not undertake such an analysis.

26 Ms Morgan argued it was open to the Tribunal to conclude that the appellant had only been subjected to low-level harassment. She submitted the Tribunal correctly understood the requirements of s 91R of the Act. She pointed out that the decision of Walters FM in *VBAO* had been reversed on appeal: see *Minister for Immigration and Multicultural and Indigenous Affairs v VBAO* of 2002 [2004] FCA 1495. The appeal judge, Marshall J, accepted a submission of counsel for the Minister that the word 'threat' in s 91R(2)(a) of the Act connotes 'risk', in the sense of danger or hazard, so that s 91R(2)(a) 'contemplates persecution involving an instance of serious harm which manifests itself as danger to life or liberty, as distinct from a possibility of danger'.

27 Ms Morgan also cited the decision of Crennan J in *VBAS v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 212. At [19], her Honour said:

> *'Whilst it is clear from the dictionary definitions relied on by the applicant, the common meaning of the word "threat" can include a declaration of intention or determination to cause harm or take some hostile action, common sense dictates that there is a distinction to be made between a real or genuine threat to cause harm or a hollow threat to do so. There is also a distinction to be made between a threat to kill intended to be acted upon, and a threat to kill intended to intimidate, but not to be acted upon.'*

28 Crennan J thought she should follow the decision of Marshal J in *VBAO*. She added, at [28]:

> *'Given the construction of s 91R(2)(a) as a reference to "threat" in the sense of "danger" or "risk", it follows that when a Tribunal finds such threats have been made, that does not foreclose further enquiry to determine whether such threats amount to "serious harm" within the meaning of the subsection. Whether such threats are sufficiently serious to amount to persecution within the meaning of Art 1A(2) of the Convention and serious harm within the meaning of s 91R is a question of fact and degree for the Tribunal.'*

29 I also think I should adopt the view of s 91R(2)(a) taken by Marshall J, with which, subject to one clarification, I respectfully agree.

30 The clarification concerns his Honour's distinction between a 'danger to life or liberty' and a 'possibility of danger'. In making that distinction, I do not think Marshall J was intending to

depart from the well-understood principle that a person who has to assess whether somebody else has a well-founded fear of persecution for a Convention reason is required to determine whether there is a 'real chance' that the person will suffer persecution if he or she is returned to the country of nationality: see *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 at 389 (Mason CJ), 398 (Dawson J), 407 (Toohey J), 429 (McHugh J). I do not think Marshall J was referring to the future situation, but merely speaking about the past; the threatening words must have connoted real danger, as distinct from a non-serious possibility of danger.

31 I agree with what Crennan J said about the consequences of Marshall J's view. Plainly, persecution is not established merely by proof that somebody has made a statement (the 'threat') about an intention to kill the person seeking recognition as a refugee. The relevant decision-maker must evaluate the 'threat' and determine whether it amounts to 'serious harm' within the meaning of s 91R(2)(a) of the Act. That evaluation needs to take into account all the surrounding circumstances including: the nature of the relationship between the relevant people; the occasion and manner of making the 'threat'; any immediate effect of the 'threat' upon the threatened person; the opportunity (if any) for the threatener to carry out the threat; and so on. Subsequent events may also be relevant, bearing in mind that the ultimate question for the Tribunal is not what has already happened to the protection visa claimant, but what might happen to that person in the future, if he or she returns to the country of nationality.

32 If the Tribunal has regard to all these circumstances, in a particular case, its conclusion as to whether the 'threat' amounts to serious harm, within the meaning of s 91R of the Act, is, as Crennan J said, 'a question of fact and degree for the Tribunal'.

33 In the present case, the Tribunal appears not to have embarked upon such an evaluation. The Tribunal accepted the appellant as a truthful witness. It accepted her claim 'that indigenous Fijians came drinking in her compound and that threats had been made that she would be killed if she complained to the police'. Apparently the appellant did not complain to the police, so the occasion for the indigenous Fijians to carry out their threat never arose. Nevertheless, was this a serious threat of harm? How many indigenous Fijians were involved? Were they people with whom the appellant might have expected to have future contact? What opportunity would they have had to carry out their threat? What was the

effect of the threat on the appellant? What light (if any) is cast on the threat by subsequent events? The Tribunal seems not to have considered any of those matters.

34 The Tribunal member noted that he asked the appellant 'if the particular indigenous Fijians lived nearby', and she responded that she believed they did not live nearby, but she was not sure: see para 8 above. It is not clear to me that this exchange related to the people who said they would kill her if she complained to the police. Even if it did, the Tribunal's note does not deal with the issues I have identified. So far as is revealed by the Tribunal's reasons for decision, the member did not evaluate those issues at all. Yet the member said he was 'not satisfied that looked at individually or in their totality the mistreatment suffered by the [appellant] in the past is any more than low level harassment'; it 'is not of sufficient severity to amount to serious harm', within the meaning of s 91R of the Act.

35 Mowbray FM noted the Tribunal had described the appellant's travails as being not more than 'low level harassment'. He said, at [16], that it was implicit in this finding 'that any threat to the applicant's life was not a genuine threat'. That may be so, but the Tribunal was not entitled to reject the genuineness of the threat without giving some consideration to its nature and the circumstances under which it was made. The Tribunal did not do this.

36 It seems to me the Tribunal's failure to consider the seriousness, and likely effect, of the threat to kill the appellant amounted to jurisdictional error. In accordance with common practice, the Tribunal chose to evaluate the appellant's claimed fear of future persecution by reference to what had happened to her in the past. The appellant's claim in relation to the past is that she had suffered 'serious harm' within the meaning of s 91R(2)(a) of the Act, amongst other things, by receiving a threat to her life. If the Tribunal was to use the past as a guide to the future, it needed to evaluate that threat.

Failure to consider membership of a particular social group

37 Mr Silva argued that the Tribunal ought to have considered whether the appellant was a member of a 'particular social group', within the meaning of Article 1A(2) of the Convention. He suggested the relevant group could be described as 'single young Indian women living alone in Fiji' or 'single Indian women living alone in Fiji'. Mr Silva argued the Tribunal's omission to consider the appellant's membership of a particular social group was a further jurisdictional error and the magistrate erred in not recognising that to be the

case.

38 At paras 39-47 of his reasons for decision, Mowbray FM dealt with Mr Silva's argument in the following way:

> *'Mr Silva for the applicant referred me to a number of passages in the transcript of the Tribunal hearing, including at page 21:*
>
> > *"I thank you very much for your support and help and I really want to close with these lines, that since I am all alone and in our culture when a woman is all alone she faces so many difficulties and since I am facing that difficulty in Fiji that is why I request Australian Government to help and protect me"*
>
> *At page 27 of the Court Book in her original statement to the Department the applicant said:*
>
> > *"She told me that Indian Fijians are being terrorized and single girls are being raped so that Indian originated community can be eliminated. Some of Indian girls has [sic] committed suicide because of ashamed to face the society. It is very hard and difficulty [sic] even walk to the bus Stop to catch a Bus. I have no relative in Fiji any more and if I have to go back, I have a very real fear of persecution and my life will be in real danger."*
>
> *At the hearing the Tribunal reported at page 120 of the Court Book:*
>
> > *"I asked the Applicant to summarise for me in her own words why she believed she should be granted a protection visa. She said that in Fiji indigenous Fijians came to know that she was living alone. They harassed her."*
>
> *On page 121 the applicant further countered:*
>
> > *"that she is alone and that these things were more serious for her. … The Applicant said that she had been ill on one occasion for two days. She said that when she was living in Fiji she suffered a great deal of anguish."*
>
> *Reading the transcript in context of the applicant's statements to the Department and at the hearing, I do not agree that the claims were based on membership of any particular social group. Rather, her claims clearly related to her membership of a particular race - Indo-Fijian.*
>
> *The passages in the transcript do not suggest that the applicant was alleging that she was targeted because she was alone or because she was a woman. Rather she was putting the entirely reasonable proposition that it was more difficult for her to cope with the harassment she suffered because she was living alone and not with any immediate family. It was more difficult for her*

because of her personal circumstances. For example on one occasion she reports that as a result of the harassment she became sick but there was no-one there to take her to hospital (transcript page 17).

Her statutory declaration to the Department, properly read, amounts to a claim of harm where race is the motivation not her membership of any particular social group. For example, she referred to her family business having to be closed down because of attacks by native Fijians on Indian Fijians.

More fundamentally, in view of the Tribunal's findings that the mistreatment that the applicant had suffered was nothing more than low-level harassment and did not amount to serious harm, and that effective protection was available to all Fijian citizens, this ground can not succeed.

In my view, the Tribunal adequately and satisfactorily addressed the case raised by the written and the oral evidence provided by the applicant. That case did not include one based on membership of a particular social group. This ground must also be rejected.'

39 There is abundant authority for the proposition that, in reviewing a delegate's decision, the Tribunal is not limited to the 'case' articulated by the particular applicant. The Tribunal is bound to consider any 'case' that is 'squarely' raised by evidentiary material accepted by the Tribunal, even though that case has not been expressly articulated: see *NABE v Minister for Immigration and Multicultural and Indigenous Affairs* [No 2] [2004] FCAFC 263 ('*NABE*') and the authorities there discussed. In *NABE* at [58], the Full Court said the adverb 'squarely' 'does not convey any precise standard but it indicates that a claim not expressly advanced will attract the review obligation of the Tribunal when it is apparent on the face of the material before the Tribunal. Such a claim will not depend for its exposure on constructive or creative activity by the Tribunal.' Accordingly, it was no answer to this ground to say, as Mowbray FM did at para 43 of his reasons, that, reading the Tribunal transcript, 'I do not agree that the claims were based on membership of any particular social group'.

40 In the present case, as Mr Silva noted in his submissions to Mowbray FM, the appellant referred, on a number of occasions, to her position as a single Indo Fijian woman living alone. Some of the references may have meant no more than that 'it was more difficult for her to cope with the harassment she suffered because she was living alone and not with any immediate family'; as Mowbray FM said. However, even that meaning was surely relevant to the Tribunal's determination of the question whether the 'harassment', that it accepted she

had suffered and which included physical harassment, was properly to be regarded, in her case, as 'persecution' within the meaning of Article 1A(2) of the Convention. That was the point made by the appellant in an exchange with the Tribunal that was recorded at para 33 of the Tribunal's reasons:

> *'I put to the Applicant that even if I accepted the claims she had made as truthful what she had described was only low-level harassment. The Applicant countered that she is alone and that these things were more serious for her.'*

41 Some of the claims made by the appellant went beyond a claim of it being 'more difficult … to cope … because she was living alone'. There was, for example, a claim that 'Indian Fijians are being terrorized and single girls are being raped so that Indian originated community can be eliminated'. After referring to suicides, the appellant said it was difficult for her even to walk to the bus stop to catch a bus.

42 The Tribunal apparently accepted the truth of these claims. That being so, the claims raised an issue about possible future persecution of the appellant, if she returned to Fiji, on a basis she did not share with Indo Fijian men, or Indo Fijian women living with male protection or, perhaps, even older Indo Fijian women living alone. However, the Tribunal did not evaluate the claims at all. Still less did the Tribunal consider the claims with reference to the appellant's particular vulnerability, as a young single Indo Fijian woman living alone. The Tribunal was content to note the non-discriminatory policy of the Qarase government and to conclude with a statement that 'generally speaking, the Indian community is protected by the existing laws of Fiji'. It seems to me that was not enough. It was incumbent upon the Tribunal to consider whether, despite the government's policy and the existing laws, but taking into account the accepted inter-racial tension in Fiji and limitations in police resources, the appellant was particularly vulnerable because she was a young single Indo Fijian woman living alone. Its failure to do so constituted a further jurisdictional error.

Persecution by non-State agents

43 As I have indicated, Ms Morgan argued that it does not matter whether or not Mr Silva's pressed grounds are made good; as it was not contended that the persecution (if that is what it was) suffered by the appellant was inflicted by agents of the Fijian government, her case would fall into Article 1A(2) of the Convention only if it could be said the persecutors'

behaviour was tolerated or condoned by that government. Ms Morgan referred to two decisions of the High Court of Australia: *Minister for Immigration and Multicultural Affairs v Khawar* [2002] HCA 14; 210 CLR 1 ('Khawar') and *Minister for Immigration and Multicultural Affairs v Respondents S152/2003* [2004] HCA 18; 205 ALR 487 ('S152/2003').

44 In *Khawar*, the High Court was concerned with the claim of a Pakistani woman that she had suffered violence at the hands of her husband and his brother. She claimed she had reported the violence to the police on four occasions, but they took no action. She asserted the police inaction was part of systematic discrimination against women in Pakistan that was tolerated and sanctioned by the government. The High Court unanimously held that, if she could make good her factual claims, the case would fall within Article 1A(2) of the Convention.

45 At [26] Gleeson CJ said:

> *'As her case is argued, and as a matter of principle, it would not be sufficient for Ms Khawar to show maladministration, incompetence, or ineptitude, by the local police. That would not convert personally motivated domestic violence into persecution on one of the grounds set out in Art 1A(2). But if she could show state tolerance or condonation of domestic violence, and systematic discriminatory implementation of the law, then it would not be an answer to her case to say that such a state of affairs resulted from entrenched cultural attitudes.'*

46 At [29-30] the Chief Justice said:

> *'If there is a persecutor of a person or a group of people, who is a "non-state agent of persecution", then the failure of the state to intervene to protect the victim may be relevant to whether the victim's fear of continuing persecution is well-founded. That would be so whether the failure resulted from a state policy of tolerance or condonation of the persecution, or whether it resulted from inability to do anything about it. But that does not exhaust the possible relevance of state inaction.*
>
> *The references in the authorities to state agents of persecution and non-state agents of persecution should not be understood as constructing a strict dichotomy. Persecution may also result from the combined effect of the conduct of private individuals and the state or its agents; and a relevant form of state conduct may be tolerance or condonation of the inflicting of serious harm in circumstances where the state has a duty to provide protection against such harm'*

47 It might be thought, at first sight, that there is inconsistency between what was said by

Gleeson CJ in the first quoted passage and what he said in the second; in particular, as to the significance of a failure of protection that results from inability to do anything about the persecution. However, I think the first passage should be understood as dealing with the particular case advanced by Ms Khawar. That case did not assert the persecutors were actuated by a Convention reason, but sought to invoke the Convention by virtue of a discriminatory protection policy. The second passage was a statement about the general law.

48 McHugh and Gummow JJ thought the State's inactivity must be for a Convention reason, at least in a case where the persecutors' conduct was not for a Convention reason. At [84], they said:

> *'It should, in our view, be accepted that, whilst malign intention on the part of State agents is not required, it must be possible to say in a given case that the reason for the persecution is to be found in the singling out of one or more of the five attributes expressed in the Convention definition, namely race, religion, nationality, the holding of a political opinion or membership of a particular social group. If the reason for the systemic failure of enforcement of the criminal law lay in the shortage of resources by law enforcement authorities, that, if it can be shown with sufficient cogency, would be a different matter to the selective and discriminatory treatment relied upon here.'* (Footnote omitted)

49 At [86-87], their Honours said:

> *'Whilst the Tribunal appears to have treated the violence of non-State actors of which Ms Khawar complained as sufficiently severe to amount to "persecution", that classification is not determinative for several reasons. First, in any event, there would be the further requirement of a Convention reason; victims of domestic violence would meet the Convention definition only by showing more than the harm of which they complain.*
>
> *Secondly, and this is crucial for the basis propounded above, the persecution in question lies in the discriminatory inactivity of State authorities in not responding to the violence of non-State actors. Thus, the harm is related to, but not constituted by, the violence.'*

50 At para [115], Kirby J said:

> *'It is sufficient that there is both a risk of serious harm to the applicant from human sources and a failure on the part of the state to afford protection that is adequate to uphold the basic human rights and dignity of the person concerned. As a practical matter in most cases, save those involving a complete breakdown of the agencies of the state, decision-makers are entitled to assume (unless the contrary is proved) that the state is capable within its*

jurisdiction of protecting an applicant. (Footnote omitted)

51 Callinan J dissented. He thought the Minister's appeal should be allowed and found it unnecessary to offer an opinion about the matter under present discussion.

52 *S152/2003* concerned an asylum application by Ukrainian nationals who were Jehovah's Witnesses adherents. They claimed to have suffered persecution on account of their religion at the hands of unidentified fellow citizens and that the police had failed to respond to their calls for assistance. The Tribunal rejected their claim for a protection visa. The High Court re-instated a first instance decision dismissing an application for review of that decision.

53 In a joint judgment, Gleeson CJ, Hayne and Heydon JJ noted at [13] that the Tribunal had twice stated 'it was not satisfied that the Ukrainian authorities were unable or unwilling to protect citizens from violence based on antagonism of the kind here involved'. Their Honours said at [14] that it had been the respondents' case before the Tribunal that the Ukrainian government actively encouraged persecution of Jehovah's Witnesses. At [20]-[22], they referred, with apparent approval, to the decision of the House of Lords in *Horvath v Secretary of State for the Home Department* [2001] 1 AC 489. In that case, Lord Hope of Craighend (with whom Lord Browne-Wilkinson and Lord Hobhouse of Woodborough, agreed) said at 495.H:

> *'…the criterion must be whether the alleged lack of protection is such as to indicate that the home state is unable or unwilling to discharge* ***its*** *duty to establish and operate a system for the protection against persecution of its own nationals'* (Original emphasis)

See also Lord Lloyd of Berwick at 507.C and Lord Clyde at 510.H.

54 In *S152/2003*, at [53], McHugh J noted a difference of view, within the international community, 'as to the extent of a signatory's obligations where non-state agents carry out the persecution'. He referred to two contending theories: the 'accountability theory' and the 'protection theory'. At [54] he explained the 'accountability theory' in this way:

> *'Under this theory, a signatory state owes no obligation in respect of persecution caused by non-state agents that the government of the country of nationality does not condone or tolerate. Thus, no Convention obligation is owed where the government of the country of nationality has reacted effectively to prevent the persecution or the persecution is beyond its*

resources or capacity to prevent.'

55 McHugh J said the accountability theory is applied in the Federal Republic of Germany and, in the past, has also been applied in some other European countries. However, according to McHugh J, those countries have recently broken away from it, in practice if not in theory.

56 At [57], McHugh J said:

> *'The protection theory imposes greater obligations on signatory states than the accountability theory imposes. It can require a signatory state to provide protection in cases where a person is likely to be persecuted for a Convention reason as the result of the inability of the country of nationality to provide protection. State complicity – whether by perpetration, condonation or approbation – is not a requirement of the protection theory of the Convention because it is based on the premise that the purpose of the Convention is to help those who are in need of international protection. According to that theory, however, not all those who are persecuted for a Convention reason require international protection. Proponents of the theory also contend that "[t]he purpose of refugee law is to offer surrogate protection when [the country of nationality] fails in its duty" to protect its citizens. Consequently, there is no obligation on a signatory state to give refugee protection* ***merely*** *because, upon return to the home country, non-state agents might breach a person's rights, even if the breach will be committed for a Convention reason. Thus, according to proponents of the protection theory, persecution by non-state actors occurs only when there is a violation of a right and the state has a duty to prevent that violation.'* (Original emphasis, footnotes omitted)

57 For reasons which he explained, McHugh J favoured rejection of both theories. He preferred an approach that focused on the meaning of the word 'persecution', as used in Article 1A(2) of the Convention. At [76], he discussed the situation that applied where fear of persecution springs from the conduct of the State and also where the State is complicit in the persecutory conduct of private individuals. At [77-78], he discussed a different situation, arguably more relevant to the present case. He said:

> *'The case that presents most difficulty is one where harm to individuals for a Convention reason may come from any one or more of a widely dispersed group of individuals and the state is willing but is unable to prevent much of that harm from occurring. In societies divided by strongly held ethnic or religious views, it commonly happens that members of one group have a real chance of suffering harm — often violent harm — because of the pervasive but random acts of members of another group. Such harm occurs although the state makes every effort to prevent it. In such cases, it would be a misuse of language to say that the fear of persecution is not well-founded because the state has "a system of domestic protection and machinery for the detection,*

> *prosecution and punishment of actings contrary to the purposes which the Convention requires to have protected". In* Horvath, *relying on the protection theory, the House of Lords limited the scope of the definition of "refugee" by requiring that a state be unwilling or unable to eliminate persecutory conduct by private individuals. Nothing in the Convention, however, supports this limitation. It should not be read into the Convention.*
>
> *If there is a real chance that the asylum seeker will be persecuted for a Convention reason, the fear of persecution is well-founded irrespective of whether law enforcement systems do or do not operate within the state.'* (Footnotes omitted)

58 At [83], McHugh J concluded:

> *'… once the asylum seeker is able to show that there is a real chance that he or she will be persecuted, refugee status cannot be denied merely because the state and its agencies have taken all reasonable steps to eliminate the risk. Nothing in the Convention supports such a conclusion.'*

59 At [100] Kirby J treated *Khawar* as a rejection by the Court of the accountability theory. He stated his support for the protection theory. He commented (at [101]):

> *'The most obvious failure of state protection will arise when the state and its agencies and officials are the actual perpetrators of serious harm to a person who subsequently claims protection on the ground of refugee status. However, another class that will enliven the Convention is a case like* Khawar, *where the agencies of the state are unable or unwilling to provide protection to their nationals. Where the evidence establishes that this is the case it will potentially lend support to claims of "fear". It may sustain such claims of fear as "well-founded". This is because, to the extent that state agencies or officials engage in the harmful conduct or neglect or omit to provide protection or redress, they render subjective fears substantial and "well-founded". They are "well-founded" because of the protective role ordinarily to be attributed to a state and its functionaries, the resources that the state normally has to carry out its functions and the scope for sustained oppression where the state is actively or passively involved in the conduct amounting to "persecution".'* (Footnote omitted)

60 At the time of oral argument in this case, there was some confusion (at least in my mind) about the nature of the Minister's submissions concerning the effect of *Khawar* and *S152/2003*. It seemed Ms Morgan was contending that the effect of these decisions was that the actions of private individuals could be regarded as giving rise to a well-founded fear of 'persecution', within the meaning of Article 1A(2) of the Convention, only if the actions were tolerated or condoned by the State authorities for a Convention reason. While the judgment

of McHugh and Gummow JJ in *Khawar* might be thought to support such a proposition, I had difficulty reconciling it with the High Court's later decision in *S152/2003*. Ms Morgan asked leave to further consider the matter and to clarify the Minister's position by a later written submission.

61 Ms Morgan later supplied a written submission. It distinguishes between two situations:

(i) 'if, as was put, part of the persecution claimed is failure by the police to assist, that failure must be for a Convention reason'; reference is made to *Khawar* at [26] (Gleeson CJ) and [86] (McHugh and Gummow JJ);

(ii) '[t]his is a separate point to the issue of effective state protection'; reference is made to *S152/2003* at [18], [28]-[29], [33] (Gleeson CJ, Gummow and Hayne JJ).

62 In the present case, the appellant did claim the failure of police to assist her stemmed from a Convention reason, her ethnicity. However, the Tribunal rejected that claim. The Tribunal found that, 'while some of the [Qarase government's] policies discriminate against Indo Fijians the government does not persecute any Fijian citizens for racial reasons'. The member went on to refer to 'evidence that senior police officers, local community leaders and government officials have worked to reduce ethnic tensions and have helped to foster reconciliation at a local level'.

63 Under the accountability theory, that finding would mean an end of the appellant's refugee claim. However, it seems clear that no member of the *S152/2003* High Court adopted the accountability theory. As I have pointed out, Gleeson CJ, Hayne and Heydon JJ cited the decision in *Horvath*, which adopted as the criterion whether the home state is unable or unwilling to protect the person. McHugh and Kirby JJ explicitly looked at the home State's ability to protect the person.

64 In the present case, the Tribunal accepted the possibility that a State's inability (as distinct from unwillingness) to protect the person might suffice to turn private persecutory acts into 'persecution' within the meaning of Article 1A(2) of the Convention. In the passage that I quoted at para 13 above, the Tribunal said that persecution by private individuals or groups 'does not, by itself, fall within the Convention unless the State encourages the persecution or appears powerless to prevent the persecution'. If the protection theory applies in Australia, as seems to be the view of the majority in *S152/*2003, that statement was correct. However, it

meant the Tribunal was required to consider, not only the policy position of the Fijian government and the police hierarchy, but also whether, in practice, the police are able to provide adequate protection against actions such as those about which the appellant complained.

65 The Tribunal sought to address that issue by referring to the May 2000 unrest and violence, evidence of corruption in the Fijian police force and reports, going back to 1996, of a 'small but efficient police force'. The Tribunal accepted 'there are shortcomings in the Fijian police and they do suffer from a lack of resources'. However, the Tribunal member said: 'I am not satisfied that the protection which is available to all Fijians through their police force is so ineffective that it could be said to give rise to a real chance that the applicant would suffer Convention based persecution'. The member went on to say he was 'satisfied that effective protection is available to all Fijian citizens, particularly in or near the major centres, in the case of the present applicant, Nadi.'.

66 As I have pointed out, these statements pay no regard to the appellant's special vulnerability as a young, single Indo Fijian woman living alone. At least considered in that context, they are difficult to reconcile with the fact that the Tribunal accepted the truthfulness of the appellant's evidence. She mentioned police inactivity in two contexts. First, in the pre-hearing written material, there was a complaint about an incident in December 2001 when the appellant's handbag and purse were snatched by an indigenous Fijian youth. The appellant said she reported the theft to the police but no action was ever taken by them.

67 Perhaps the handbag snatch might be regarded as an isolated event that could happen at any time in any community and about which police can do little. It is difficult to see the second reference in this way. The Tribunal member recorded that the appellant spoke about stones being thrown on the roof of her house at night and that she complained to police about this harassment but '(t)hey would say that they did not have transport'. The member said: 'If the police could not come the Applicant would have to sleep with neighbours because she was afraid and did not have any close relatives'. The member's account of the evidence suggests the appellant alleged that stone throwing was a recurring event ('every second or third day') and it was commonplace for the police not to come because they did not have transport.

68 Particularly in the context of other intimidatory behaviour (clothes stolen from the appellant's

clothes line, boxes in her yard set on fire, money stolen, indigenous Fijians drinking in her compound), this evidence would have entitled the Tribunal to conclude that the conduct of the indigenous Fijians constituted 'persecution' of the appellant, within the meaning of s 91R(1) of the Act, against which the police were unable to protect her.

69 The probable explanation of the conflict between the Tribunal's acceptance of the appellant's evidence and its satisfaction of the availability of effective protection is that the Tribunal failed to appreciate, and to evaluate, the claim of special vulnerability that the appellant was making. Until that claim was adequately assessed, it was logically impossible for the Tribunal to apply to the appellant a general statement about effective protection to all Fijians.

70 It was for the Tribunal to determine the facts of the case. I bear in mind the principle, reiterated in *Wu Shan Liang* at 271-272 (cited by Mowbray FM, see para 21 above), that a court should not construe a tribunal's reasons for decision 'minutely and finely with an eye keenly attuned to the perception of error'. Nevertheless, I am left with the belief that the Tribunal's failure adequately to consider the case put before it by the appellant, in relation both to the 'threat' to kill her and her position as a single Indo-Fijian woman living alone, carried through into the Tribunal's satisfaction about effective police protection. Accordingly, I reject Ms Morgan's submission that, if the Tribunal did fall into either or both the jurisdictional errors claimed by Mr Silva, its conclusion about effective protection in any event required affirmation of the delegate's decision to refuse a protection visa.

Disposition

71 The appeal should be allowed. The orders made by Mowbray FM should be set aside and, in lieu thereof, it should be ordered that the decision of the Tribunal be quashed and the matter be remitted to the Tribunal for further hearing and determination according to law. It will be for the Presiding Member to determine whether or not the Tribunal should be reconstituted for this purpose.

72 The Minister must pay the appellant's costs in respect of the hearings in both the Federal Magistrates Court and this Court.

I certify that the preceding seventy-two (72) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Wilcox .

Associate:

Dated: 24 June 2005

Solicitor for the Appellant:	Mr T Silva of Silva Solicitors
Counsel for the First Respondent:	Ms K Morgan
Solicitor for the First Respondent:	Clayton Utz

The Second Respondent did not appear

Date of Hearing:	26 May 2005
Date of Judgment:	24 June 2005