FEDERAL COURT OF AUSTRALIA

VBAS v Minister for Immigration & Multicultural & Indigenous Affairs

[2005] FCA 212

CORRIGENDUM

VBAS V MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS

VID 542 of 2003

CRENNAN J
11 MARCH 2005 (CORRIGENDUM 19 APRIL 2005)
MELBOURNE

IN THE FEDERAL COURT OF AUSTRALIA

VICTORIA DISTRICT REGISTRY **VID 542 OF 2003**

On appeal from the Federal Magistrate's Court constituted by Federal Magistrate Hartnett

BETWEEN:	**VBAS** **APPELLANT**
AND:	**MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS** **RESPONDENT**

JUDGE:	**CRENNAN J**
DATE OF ORDER:	**11 MARCH 2005**
WHERE MADE:	**MELBOURNE**

CORRIGENDUM

1. On page 8 of the judgment, at paragraph 17 delete 'NAVG' and insert 'NAGV' and delete '[2003]' and insert [2005].

I certify that the preceding paragraph is a true copy of the Reasons for Judgment herein of the Honourable Justice Crennan.

Associate:

Dated: 19 April 2005

FEDERAL COURT OF AUSTRALIA

VBAS v Minister for Immigration & Multicultural & Indigenous Affairs

[2005] FCA 212

MIGRATION – judicial review – protection visa – whether death threats constituted serious harm for the purposes of s 91R of the *Migration Act 1958* (Cth).

Convention Relating to the Status of Refugees. Opened for Signature 28 July 1951. 189 UNTS 150. Arts 31 and 33 (entered into force 22 April 1954) ('Refugees Convention')
Federal Court of Australia Act 1976 (Cth), s 25(1A)
Migration Act 1958 (Cth), ss 36(2) and 91R
Protocol Relating to the Status of Refugees. Opened for Signature 31 January 1967. 606 UNTS 267. (entered into force 4 October 1967)

Ahwazi v Minister for Immigration and Multicultural Affairs [2001] FCA 1818 referred to
Avesta v Minister for Immigration and Multicultural Affairs [2002] FCAFC 121 referred to
Chan v Minister for Immigration and Ethnic Affairs (1989) 169 CLR 379 referred to
Hicks v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FCA 757 referred to
House of Peace Pty Ltd v Bankstown City Council (2000) 48 NSWLR 498 referred to
Mandavi v Minister for Immigration and Multicultural Affairs (2002) FCA 70 referred to
Milne v Attorney-General (Tas) (1956) 95 CLR 460 referred to
Minister for Immigration and Multicultural and Indigenous Affairs v VBAO of 2002 [2004] FCA 1495 followed
Minister for Immigration and Multicultural and Indigenous Affairs v VBAO of 2002 [2004] FCA 1581 considered
Minister for Immigration and Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259 referred to
NACV v Minister for Immigration and Multicultural Affairs [2002] FCA 411 referred to
NAFG v Minister for Immigration and Multicultural and Indigenous Affairs (2003) 131 FCR 57 referred to
NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs [2005] HCA 6 referred to
Prahastono v Minister for Immigration and Multicultural Affairs (1997) 77 FCR 260 referred to
Provincial Insurance Australia Pty Ltd v Consolidated Wood Products Pty Ltd (1991) 25 NSWLR 541 referred to
Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham (2000) 168 ALR 407 referred to
Ruddock and Ors v Vadarlis and Ors (No. 2) (2001) 115 FCR 229 referrred to
WAIW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs [2002] FCA 1621 referred to

VBAS V MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS

VID 542 of 2003

CRENNAN J
11 MARCH 2005
MELBOURNE

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

VICTORIA DISTRICT REGISTRY **VID 542 OF 2003**

On appeal from the Federal Magistrate's Court constituted by Federal Magistrate Hartnett

BETWEEN:	**VBAS** **APPELLANT**
AND:	**MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS** **RESPONDENT**

JUDGE:	**CRENNAN J**
DATE OF ORDER:	**11 MARCH 2005**
WHERE MADE:	**MELBOURNE**

THE COURT ORDERS THAT:

1. Appeal dismissed.

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

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY **VID 542 OF 2003**

On appeal from the Federal Magistrate's Court constituted by Federal Magistrate Hartnett

BETWEEN:	**VBAS** **APPELLANT**
AND:	**MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS** **RESPONDENT**

JUDGE:	**CRENNAN J**
DATE:	**11 MARCH 2005**
PLACE:	**MELBOURNE**

REASONS FOR JUDGMENT

1 The appellant appeals from a decision of Federal Magistrate Hartnett given on 27 June 2003 dismissing the appellant's application for a review of a decision of the Refugee Review Tribunal ('the Tribunal') affirming a decision of a delegate of the Minister refusing to grant a protection visa. The appellate jurisdiction of the Federal Court is being exercised in this appeal pursuant to a decision of Black CJ under the provisions of s 25(1A) of the *Federal Court of Australia Act 1976* (Cth).

Background to the appeal

2 The appellant is a citizen of Sri Lanka of Sinhalese ethnicity. He arrived in Australia on 5 November 2001 as the holder of a subclass 420 (entertainment) visa due to expire on 30 November 2001. Shortly after the appellant's arrival in Australia a delegate of the respondent cancelled the appellant's visa under s 116(1)(b) of the *Migration Act 1958* (Cth) ('the Act') on the ground that the appellant was not a genuine entertainer. On 9 November 2001 the appellant lodged an application for a protection visa under the Act, as a refugee under the *Convention Relating to the Status of Refugees* as amended by the *Protocol Relating to the Status of Refugees* ('the Convention'). He claimed to fear persecution from members

or supporters of the United National Party ('UNP') by reason of his past involvement and support of the Peoples Alliance ('PA').

3 A delegate of the Minister refused to grant a protection (Class XA) visa to the appellant on 6 December 2001 (the 'delegate's decision'). The appellant made an application to the Tribunal for review of the delegate's decision on 13 December 2001. The Tribunal affirmed the delegate's decision on 30 January 2002. The appellant then filed an application in the Federal Magistrate's Court for review of the Tribunal's decision.

4 On 27 June 2003 her Honour Hartnett FM dismissed the appellant's application on the ground that there was no error of law in the Tribunal's reasons for decision.

The grounds of appeal to the Federal Court

5 The appellant filed an amended notice of appeal from the judgment of her Honour Hartnett FM on 12 November 2003 and a further amended notice of appeal on 1 November 2004. The further amended notice of appeal claims five grounds of appeal which can be summarised as follows:

(1) the Federal Magistrate erred in finding that the Tribunal did not err in its interpretation and application of s 91R of the Act;

(2) the Federal Magistrate erred in finding that the Tribunal properly assessed whether the appellant faced a real chance of persecution in the future;

(3) the Federal Magistrate erred in holding that the Tribunal found that the abduction and assault of the appellant on 3 April 2001 was serious harm for the purposes of s 91R of the Act;

(4) the Federal Magistrate erred in finding that the Tribunal made findings on the appellant's level of political activity which were reasonably open to it on the evidence (there were nine such grounds under this heading); and

(5) (without reference to the Federal Magistrate) the Tribunal erred in failing to consider whether the modification of the appellant's behaviour in the expression of his political opinion after the death threats he received and his abduction constituted persecution for the purposes of the Convention.

The first ground of appeal, which raised the issue of the correct interpretation of s 91R(2)(a) of the Act, generated the most argument.

The Tribunal's decision

6 The country information before the Tribunal indicated that on 10 October 2000 the PA which is a left wing coalition of several parties, won government in Sri Lanka but lost power at the election held in December 2001 when the UNP won government. The country information also indicated that whilst Sri Lanka is a democracy the conduct of elections is marred by violence and accusations of electoral fraud. Apparently the main political groups, the UNP and the PA, accuse each other of political thuggery.

7 The evidence before the Tribunal was that the appellant became involved in the PA in 1996 and had been a local party youth leader in his area. According to the Tribunal's reasons for decision, the appellant gave evidence that he did not become active in the party until 1998. The appellant claimed that he had been involved on behalf of the PA in a number of election campaigns but mainly the October 2000 national election. The appellant gave evidence that as a consequence of his involvement in the PA he had received threatening phone calls and received threats in person at home and at his office. The appellant also claimed that following the October 2000 election the frequency of the threats intensified and he received phone calls containing death threats three or four times a day.

8 The appellant also gave evidence that in April 2001 he was physically assaulted after being taken somewhere in a jeep and detained for about an hour by UNP supporters. He claimed that as a result of the assault he suffered a broken elbow and spent six days in hospital, but was subsequently able to attend work with his injured arm. He said he did not report the assault to the authorities because he feared his parents would have been harmed had he done so. He also said he ceased political activities on behalf of the PA after this event and fears the PA may do him some harm as a result because the PA would assume that he had moved across to support the UNP.

9 The appellant stated he feared for his life because of his political support for the Sri Lankan Freedom Party ('SLFP'), a major participant in the PA. The appellant claimed that he would be at risk when the new government (the UNP) takes power and said the authorities would inflict harm on him. He does not appear to have given any evidence that he intended to resume political activities on behalf of the SLFP or the PA, if he returned to Sri Lanka, either at the level in which he engaged in such activity up until April 2001 or at any other different level of political activity.

10 After considering the evidence as a whole the Tribunal was not satisfied that the appellant satisfied the criterion set out in s 36(2) of the Act for grant of a protection visa. In considering the appellant's evidence, the Tribunal found:

> *'I have considered the nature and extent of the* [appellant's] *involvement in supporting the PA…*
>
> *I do not consider that the* [appellant] *had any active involvement in party affairs outside the October 2000 election campaign. The* [appellant's] *knowledge about the policies of the main parties in Sri Lanka was very limited and what he said while campaigning house to house so unconvincing so as to mean that I cannot accept that he did so. I consider he was a low level supporter or member of the PA whose involvement was limited to voting for it, assisting with practical support tasks during election campaigns and to attending rallies.*
>
> *…*
>
> *The* [appellant's] *evidence about the adverse consequences of his involvement was that he and his family received numerous death threats between 1996 and 2001, mostly by telephone but also in person, and that following the October 2000 election there had been three or four telephone calls almost every day.*
>
> *…*
>
> *I have reached the following conclusions about the mistreatment which the* [appellant] *claims to have experienced. I am prepared to accept that the* [appellant] *might have received threatening telephone calls during around the time of the 2000 election and that he may have also been spoken to in a threatening manner in person but I consider that he has either exaggerated the frequency of such calls or that the callers had no serious intent to harm him: he said that there were three or four calls almost every day for some months all saying the same thing about how the* [appellant] *should stop his political involvement yet nothing happened to him for a long time. I do not consider that the calls and threats he has described exhibit the characteristics necessary for them to constitute persecution within the meaning of the Refugees Convention and find that they did not involve serious harm. I also consider that the evidence indicates that the assault in April 2000 (sic), if it occurred as the applicant has described, was an isolated incident, followed by no further attempt to harm him. I am not satisfied that the reason why the applicant was able to avoid more serious harm was because there was no regular pattern to his life: on his own evidence he was visiting his family sometimes and going to work in the office with his injured arm. Had there been a serious intent to harm him, I consider that those determined to do so could have watched out for him or sought him out.'*

11 The Tribunal then found that it was not satisfied that PA supporters would seek to harm the appellant because he ceased his involvement. The Tribunal was also not convinced that the appellant would be unable to seek police protection in the circumstances. The Tribunal 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, undertaking practical support tasks during the October 2000 election and attending rallies during election campaigns – is remote. I do not accept that the nature and extent of his involvement was of a kind which would lead him to face serious harm upon return to Sri Lanka of a kind which would constitute persecution including if he were to resume his association with politics.'

The Federal Magistrate's decision

12 On an application for review of the Tribunal's decision the Federal Magistrate held that the Tribunal's decision was a privative clause decision for the purposes of s 474(1) of the Act. In doing so, the Federal Magistrate found:

> *'Whether there is . . . "serious harm" within the meaning of s 91R of the Act is a question of fact and degree for the Tribunal involving a qualitative assessment of evidence before it (see* Mandavi v Minister for Immigration and Multicultural Affairs *(2002) FCA 70 at 25, per Carr J.)*
> . . .
> *The Tribunal made findings reasonably open to it on the evidence before it with respect to each alleged persecutory act and then determined whether the applicant faced a real chance of persecution for reasons of his political opinion. Despite the contrary submissions made by the applicant the Tribunal is not required to give reasons for its findings on credibility nor the "sub-set of reasons why it accepted or rejected individual pieces of evidence" (See* Re Minister; Ex parte Durairajasingham (2000) *74 ALJR 405 at 417).*
>
> *The Tribunal considered the arguments put by the applicant and also considered country information that was in its possession and which it particularised in respect of the applicant himself. The Tribunal came to a conclusion that the applicant did not have a well-founded fear of persecution for Convention reasons although that is a conclusion with which the applicant disagrees. It is not for this Court to review the merits of the Tribunal's decision nor to substitute for the Tribunal's views of the evidence before it this Court's views. There is no arguable jurisdictional error in the Tribunal's decision.*'

Applicable law

13 Section 91R of the Act 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;
(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) . . .'

Ground 1

Applicant's submissions

14 In essence, it was submitted on behalf of the appellant that the death threats made to the appellant necessarily fell within the definition of 'serious harm' referred to in ss 91R(1)(b) and (2) without the need for any evaluative exercise. This was said to follow from the inclusion in s 91R(2)(a) of the expression 'a threat to the person's life or liberty'.

It was contended that the plain and ordinary meaning of 'threat' was a declaration of intention to harm and therefore 'threat' as it occurs in s 91R(2)(a) should be so construed. To support this, reference was made in the appellant's written submissions to dictionary definitions of 'threat' as follows:

> *'Threat is defined in the* Macquarie Dictionary *(3rd ed, 1997) to mean "*a declaration of an intention or determination to inflict punishment, pain or loss on someone in retaliation for, or conditionally upon, some action or course*." It is defined in the* Shorter Oxford English Dictionary *(5th ed, 2002) to mean "*a declaration of an intention to take some hostile action, **esp** a declaration of an intention to inflict pain, injury, damage or other punishment in retribution for something done or not done".'

15 Then it was submitted that if, and to the extent that s 91R(2)(a) was ambiguous, support for the construction for which the appellant contended was also said to lie in paras [22] and [23] of the Explanatory Memorandum to the Migration Legislation Amendment Act (No 6) 2001 which provides:

> *'22. Under new paragraphs 91R(1)(b) and 91R(1)(c), the persecution must involve serious harm to the person and systematic and discriminatory*

conduct. New subsection 91R(2) sets out a non-exhaustive list of the type and level of harm that will meet the serious harm test and fall within the meaning of persecution for the purposes of the Refugees Convention. New subsection 91R(2) makes it clear that serious harm ***includes*** *a reference to any of the following:*

- *a threat to the person's life or liberty; or*
- *significant physical harassment of the person; or*
- *significant physical ill-treatment of the person; or*
- *significant economic hardship that threatens the person's capacity to subsist; or*
- *denial of access to basic services, where the denial threatens the person's capacity to subsist; or*
- *denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.*

23. The above definition of persecution reflects the fundamental intention of the Convention to identify for protection by member states only those people who, for Convention grounds, have a well founded fear of harm which is so serious that they cannot return to their country of nationality, or if stateless, to their country of habitual residence. These changes make it clear that it is insufficient to establish an entitlement for protection under the Refugees Convention that the person would suffer discrimination or disadvantage in their home country, or in comparison to the opportunities or treatment which they could expect in Australia. Persecution must constitute serious harm. The serious harm test does not exclude serious mental harm. Such harm could be caused, for example, by the conducting of mock executions, or threats to the life of people very closely associated with the person seeking protection. In addition, serious harm can arise from a series or number of acts which, when taken cumulatively, amount to serious harm of the individual.'

Respondent's submissions

16 The respondent's counsel contended that s 91R of the Act operated to qualify Art 1A(2) of the Convention. Thus it was now necessary to establish a well-founded fear of 'persecution' within the meaning of Art 1A(2) and also necessary to establish that such persecution involves 'serious harm'. Art 1A(2) of the Convention and ss 91R(1)(b) and (2) operating together require an applicant to have a well-founded fear of *persecution involving serious harm*. In essence, it was then contended that in s 91R(2)(a) the legislature uses the term 'threat' in the sense of risk, danger, hazard or peril and was not intending to confine 'threat' to the making of oral or written threats. That submission then relied on a number of contextual points, and authorities, in support of the proposition that whether particular circumstances amount to 'persecution' within the meaning of the Convention and/or 'serious harm' within the meaning of s 91R, is a question of fact and degree. The applicant's response to this submission was that the construction of s 91R advanced on behalf of the

respondent impermissibly conflated the question of whether conduct involves serious harm and whether the fear of persecution is well-founded.

Consideration

17 The criteria for the grant of a protection visa are set out under s 36(2) of the Act: an applicant must be a person to whom the Minister is satisfied Australia has protection obligations under the Convention as amended by the Protocol*;* that is, a person who is a 'refugee' as defined in Art 1A(2) of the Convention: *NAVG and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] HCA 6 at [33]; see also *NAFG v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 131 FCR 57 at [4]. An element of the definition is that the person has a 'well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.'

18 However, the protection obligations owed to a refugee are those provided for in the Act. Section 91R, added in 2001, qualifies the application of Art 1A(2) of the Convention. Art 1A(2) does not apply in relation to persecution unless (among other things) the persecution involves 'serious harm' to the person (s 91R(1)(b)). The submission for the respondent is correct: whilst it remains necessary to establish a well-founded fear of 'persecution' within the meaning of Art 1A(2) of the Convention, is it now also necessary to establish that such persecution involves 'serious harm' to the relevant person. Subsections 91R(1)(b) and (2) do not replace the test of 'persecution' with a test of 'serious harm'; rather, those provisions require an applicant to have a well-founded fear of *persecution involving serious harm*. The first instance of 'serious harm' set out in s 91R(2)(a) – 'a threat to the person's life or liberty' – does not mean that every death threat or threat of imprisonment made against an applicant will fall within that paragraph and necessarily constitute 'serious harm'.

19 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.

20 Whilst courts frequently resort to dictionaries to aid in the construction of a word of ordinary meaning, in the final analysis a court must discern the legislative intention in a particular statutory provision by reference to the purpose, language and context of the provision, especially where, as here, the word 'threat' has more than one clear common meaning: *Provincial Insurance Australia Pty Ltd v Consolidated Wood Products Pty Ltd* (1991) 25 NSWLR 541 at 560/561 (per Mahoney JA) and *House of Peace Pty Ltd v Bankstown City Council* (2000) 48 NSWLR 498 at 504/505 (per Mason P).

21 The applicant's counsel has not referred to any dictionary entries for 'threat' other than those supporting the construction for which he contends. The Shorter Oxford English Dictionary (5th ed 2002) includes for 'threat' the meaning 'danger' and the phrase 'under threat' is defined as 'at risk'. The word 'threat' as an ordinary word with a common meaning has two common meanings, a general meaning, which is 'danger' or 'risk', and a narrower meaning of 'declaration of intention to harm'.

22 Having regard to the context, purpose (set out in s 91R(1)) and language of s 91R, I accept the respondent's submission that 'threat' as used in s 91R(2)(a) in the expression 'a threat to the person's life or liberty' is used in the general sense of 'danger' or 'risk', rather than used in the narrower sense of 'a declaration of intention or determination to cause harm or to take some hostile action.'

23 Such a construction is not only consistent with the express purpose of s 91R, it is also consistent with the language employed in Arts 31 and 33 of the Convention referring respectively to refugees coming from a territory 'where their life or freedom was threatened' (*était menacée* – was in danger/threatened) or being returned to a territory where 'life or freedom would be threatened' (*serait menacée* – would be in danger/threatened). Such language in either English or French (both versions being authoritative) is not confined to the making of threats, that is declarations of intention to harm, made either orally or in writing. See also *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 at 388 (per Mason CJ) and at 399-400 (per Dawson J) where respective references to 'harm or the threat of harm' or 'a threat to life or freedom' in the context respectively of Arts 1A(2), then 31 and 33, are references to 'threat' in the general sense of 'danger' or 'risk'.

24 Furthermore, 'threatens' is used in the more general sense of 'endangers' or 'poses a risk to' in ss 91R(2)(d), (e) and (f) of the Act. In accordance with common principles of statutory construction, the legislature can be assumed to be using the words 'threat' and 'threatens' consistently, in the absence of some clear indication to the contrary.

25 Further, if, and to the extent that, s 91(R)(2)(a) is ambivalent there is nothing in the Explanatory Memorandum to derogate from this construction. In particular it is made clear in the Explanatory Memorandum that it is not intended to broaden the definition of refugee under the Convention, rather s 91R is intended to qualify it.

26 Marshall J had occasion to consider a similar set of facts and a similar argument in respect of s 91R(2)(a) in *Minister for Immigration and Multicultural and Indigenous Affairs v VBAO of 2002* [2004] FCA 1495 (*"VBAO"*). In rejecting a submission that oral or written threats to a person's life are necessarily included in s 91R(2)(a), he considered the categorisation of instances of serious harm in the subsection then said:

> *'This is not to deny that threats of the kind directed at the respondent* (ie. oral and written threats) *can never constitute serious harm, but they do not, of themselves, automatically qualify for that description.'*

In an opportunity to make written submissions in respect of *VBAO,* which was published shortly after the hearing of this matter concluded, it was submitted on behalf of the appellant that for the reasons advanced before me Marshall J's decision was plainly incorrect and I ought not to follow it. Criticism was also made of some observations by Marshall J, which were *obiter*. Further it was suggested Marshall J made observations supporting a submission of the appellant's that the construction of s 91R(2)(a) advanced for the respondent conflated the questions of whether the conduct involves serious harm and whether the fear of persecution is well-founded (a submission with which I do not agree). The respondent's counsel relied on the decision of Marshall J as being directly in point and plainly correct.

27 There is a high value to be placed upon consistency in judicial decisions, especially those concerning an issue of statutory construction dealt with in the appellate jurisdiction, as here, and I should follow Marshall J's decision unless persuaded it was clearly or plainly wrong: *Applicant WAIW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 1621 at [7] (Finkelstein J); *Hicks v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 757 at [74]-[76] (French J). In accordance

with established principle, I propose to follow Marshall J.

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: See *Mandavi v Minister for Immigration and Multicultural Affairs* [2002] FCA 70 at [13] and [25] (Carr J); *Ahwazi v Minister for Immigration and Multicultural Affairs* [2001] FCA 1818 at [45] (Carr J); *Prahastono v Minister for Immigration and Multicultural Affairs* (1997) 77 FCR 260 at 268, 271 (Hill J), which was of assistance to Conti J in the context of s 91R of the Act in *NACV v Minister for Immigration and Multicultural Affairs* [2002] FCA 411 at [3].

29 The Tribunal found that either the frequency of the calls containing threats, in the sense of expressing an intention to harm, had been exaggerated or that the callers had no serious intent to harm the appellant. As a consequence, the Tribunal made a finding of fact, that the threats did not involve 'serious harm'. The Tribunal is the final arbiter of such an issue and no error arises as alleged.

Ground 2

30 The second ground of appeal was that the Federal Magistrate erred in finding the Tribunal properly assessed whether there was a real chance of persecution in the future.

31 The complaint was that the Tribunal based its conclusion about a real chance of future persecution on the appellant's past level of support of the PA and failed to consider whether, if he were to resume his activity, he would, in the future, face the harm he had experienced in the past. It was also alleged the Tribunal failed to make a finding on whether the circumstances and assault on 3 April 2001 constituted serious harm or persecution.

32 Dealing with the last complaint first, it is clear from the whole of the Tribunal's reasons it regarded the assault as one of serious, but isolated harm, which did not, however, evidence a serious intent to harm the appellant in the future. This is clear from the Tribunal's reference to avoidance of 'more serious harm' in the extract in paragraph 10 above, which on a fair

reading according to the principle established in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 (‘*Wu’)* must be a reference to ‘additional or further serious harm’ rather than constituting a reference to “more” as an intensive. Even assuming that the Tribunal implicitly found that the assault constituted serious harm, within the meaning of s 91R(2)(c) for example, it is still open to the Tribunal to find that notwithstanding the instance of serious harm (as per s 91R), it is still not satisfied the appellant faced a real chance of persecution involving harm in the future. The requirements of s 91R(1) are cumulative requirements making it necessary for a Tribunal to not only make a finding as to whether conduct constituted ‘serious harm’ but to also make a finding that the conduct is systematic and discriminatory.

33 As to the first complaint, it was no part of the appellant’s case that he intended to resume his past political activities at the same or a different level. Accordingly, the Tribunal assessed the case as it was presented to it, that is on the basis that the appellant feared persecution from the ‘new government’ (the UNP) because he had been actively involved with the party that lost government (the PA). There can be no jurisdictional error arising from not considering hypotheses, which formed no part of the appellant’s case. There is no error in the Federal Magistrate’s conclusions under this ground of appeal.

Ground 3

34 The third ground of appeal was that the Federal Magistrate erred in holding that the Tribunal found that the detention of the applicant and assault by UNP supporters was ‘serious harm’ for the purposes of s 91R of the Act. This allegation of error turned on an assertion that the Tribunal never made such a finding explicitly. This ground of appeal has already been covered by discussion of the fact that the Tribunal’s reasons for judgment made it plain that the Tribunal treated the occasion of the assault as one of serious, albeit isolated, harm. It treated the incident as isolated by reference to the fact that no further, or additional, incidents of serious harm were alleged by the appellant. Such findings were open on the evidence and there is no error in the Federal Magistrate’s decision.

Ground 4

35 The fourth ground of appeal was that the Federal Magistrate erred in finding that the Tribunal made findings reasonably open to it on the evidence, it being the appellant’s contention that

such findings of fact as were made were not open on the evidence. There were nine complaints under this ground of appeal and some overlapped with complaints made under other grounds of appeal. Grounds 4(a), 4(b), 4(c) and 4(d) overlapped with the complaint in Ground 2 already dealt with above and, again, depended on asserting that since the Tribunal accepted the appellant's evidence of assault, after which he ceased political activity, the Tribunal was precluded from finding that the appellant would not be at risk, on his return, if he were to resume his political activity because of his past level of support for the PA. The finding the Tribunal made was however open on the evidence because it found the assault was an isolated occasion, which while serious, was not likely to be repeated. It also found there would be a level of police protection available. The conduct complained of does not necessarily satisfy s 91R(1)(c) even if it satisfies s 91R(1)(b). Furthermore, the appellant did not lead evidence of any intentions or plans for political activity in the future.

36 Grounds 4(e) to 4(h) (inclusive) are further variations on these complaints; complaint is made that there was no evidence before the Tribunal (and it was inconsistent with the evidence for the Tribunal to find) that the risk of future harm to the appellant was solely referable to his level of support for the PA. The appellant's case was that he was at risk of future harm by the incoming government by the UNP as a result of past support for the PA. However, the Tribunal's findings went beyond the appellant's past involvement with the PA. The Tribunal found that the nature and extent of the appellant's involvement would not lead him to face persecution involving serious harm 'if he were to resume his association with politics'. The Tribunal also found that the availability of some police protection 'further limits the chance that the (appellant) would face serious harm because of political activity in which he might take part on his return.'

37 These are all complaints about the way in which the Tribunal dealt with the evidence before it and the adequacy of the Tribunal's reasons and its failure to refer to all the evidence before it. A decision maker is not required to give a line-by-line refutation of evidence contrary to its findings; See *Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham* (2000) 168 ALR 407 at [65] ('*Durairajasingham'*).

38 Further, adverse findings on credibility (which is the basis of ground 4(i)), which here involved the finding that the appellant's descriptions of political campaigning were 'so unconvincing' as to be not worthy of belief, do not, without more, give rise to jurisdictional

error as complained of: *Durairajasingham's* at [67] and *Avesta v Minister for Immigration and Multicultural Affairs* [2002] FCAFC 121 at [13] to [15].

39 In determining whether the appellant faced a real chance of future persecution or serious harm if he were to return to Sri Lanka, the Tribunal accepted as fact some threats had been made to the appellant, but it found the facts did not amount to persecution or serious harm, within s 91R(2)(a) of the Act.

40 The Tribunal was also prepared to assume that the alleged detention and assault had taken place (and even implied this did constitute serious harm within the meaning of s 91R(2)(c)), but concluded that, although serious, it was an isolated incident which had not been followed by any further harm to the appellant, and did not evidence that there was a serious intent to harm the appellant in the future.

41 The Tribunal also considered the country information. Then the Tribunal concluded that there was no real chance that the appellant would face persecution or serious harm if he were to return to Sri Lanka, even if he were to resume his political activities. These findings are findings as to matters of fact, which were open on the evidence. This ground of appeal is an attempt to appeal the decision on the merits and there is no error in the Federal Magistrate's decision.

Ground 5

42 It was alleged under this ground that the Tribunal erred in not considering whether the appellant's modified behaviour (desisting from expressing his political opinion) after the threats, detention and assault, amounted to persecution. On the Tribunal's findings of fact, the modified behaviour was a reaction to threats which were found not to constitute serious harm within the meaning of s 91R(2)(a) and an assault, which if it were serious harm within the meaning of s 91R(2)(c), was found to be an isolated incident not evidencing any risk of future harm. Accordingly, it was not necessary for the Tribunal to make a discreet finding as to whether the effect of the threats and assault amounted to persecution. In any event, the Tribunal subsumed into its inquiry as to whether the applicant faced serious harm in the future, a consideration of whether the conduct complained of gave rise to a well-founded subjective fear of persecution or harm and it found it did not. There is no substance in this ground.

Conclusion

43 There was no error made out in respect of the Federal Magistrate's decision under any of the grounds of appeal. The Federal Magistrate did not err in finding that the Tribunal's decision was a privative clause decision under s 474(1) of the Act. The appeal is dismissed.

Costs

44 The respondent applied for costs in the event of success. It was submitted for the appellant that in the event of failure by the appellant this was an appropriate case to decline to make a costs order following the event, ie. not follow the usual position under the statutory power to award costs: *Milne v Attorney-General (Tas)* (1956) 95 CLR 460 at 477.

45 The appellant's counsel submitted that this was so because there was a conflict between Walters FM and Hartnett FM as to the correct construction of s 91R(2)(a) and Marshall J's decision was not available when the hearing in this matter occurred. He also relied on Marshall J's approach to costs in *Minister for Immigration and Multicultural and Indigenous Affairs v VBAO of 2002* [2004] FCA 1581. Marshall J accepted a submission that the appeal raised a novel question of much general importance and some difficulty: *Ruddock and Ors v Vadarlis and Ors* (2001) 115 FCR 229 at [19].

46 The principles in relation to precedent do not apply to the exercise of discretion in respect of costs. I propose to adopt an approach in respect of costs similar to the approach encompassed in the orders made by Marshall J but for somewhat different reasons. The case involves a straightforward issue of statutory construction. The Federal Magistrates Service hears many matters in which judicial review is sought in respect of Tribunal decisions made under the Act. It is important to the first respondent that there be a determination by the Federal Court, at the appellate level, of a statutory construction issue, as here, when there is a direct conflict among magistrates as to the correct meaning of a section of the Act. It is axiomatic that costs orders are not made to punish the unsuccessful party. This is of relevance when there has been a conflict in decisions on the interpretation of a statutory provision, especially a provision in respect of whether or not a person is a 'refugee' as governed by the Convention and the Act. It appears to me to be an appropriate exercise of the discretion in all the circumstances of this appeal to make no order for costs of the appeal.

I certify that the preceding forty-six (46) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Crennan.

Associate:

Dated: 11 March 2005

Counsel for the Appellant:	Cahal Fairfield (Pro Bono)
Counsel for the Respondent:	Chris Horan
Solicitor for the Respondent:	Clayton Utz
Date of Hearing:	3 November 2004
Date of Judgment:	11 March 2005