

VBAO v MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS & ANOR (M81/2006)

Court appealed from: Federal Court of Australia

Date of judgment: 19 November 2004

Date special leave granted: 2 June 2006

The appellant, a Sri Lankan of Sinhalese ethnicity, entered Australia on 5 November 2001 as a musician, with an entertainment visa. Upon cancellation of the visa on the basis he was not a genuine entertainer, the appellant then lodged an application for a protection visa on 9 November 2001. The first respondent's delegate refused the application. This decision was affirmed by the second respondent (the Tribunal) on 29 January 2002.

The appellant claimed a fear of persecution, from rival political party members, on the basis of his involvement with the Sri Lankan Freedom Party. This included assault (being dragged into a van, beaten and having his hair cut), receipt of threatening phone calls and letters, culminating in his going into hiding.

The Tribunal found that the appellant's political involvement was limited and he did not go into hiding as claimed, but was prepared to accept he might have received intimidating and threatening telephone calls and letters and was assaulted. It found that it was not satisfied that there was a real chance that the appellant would face persecution for the reasons of his political opinion, or for any other of the reasons in the Refugee Convention, and his fears, if he were to return to Sri Lanka, were unfounded.

The appellant appealed to the Federal Magistrates' Court. Walters FM found that the Tribunal failed to properly or fairly address the claims made, failed to properly apply s 91R of the *Migration Act*, (the Act), failed to apply or misunderstood the nature of, the opinion it was to form and fell into jurisdictional error.

The Federal Court (Marshall J) allowed the first respondent's appeal, finding it was open to the Tribunal to have considered that alleged death threats did not constitute serious harm and that it had correctly applied s 91R. Marshall J examined the parties' contentions regarding the meaning of the word "threat" in s 91R(2)(a), finding in favour of the first respondent's contention that it must involve a 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.

The ground of appeal is:

- Marshall J erred in the construction of s 91R(2) of the Act.

The first respondent has filed a Notice of Contention.