FEDERAL COURT OF AUSTRALIA

CRK16 v Minister for Home Affairs [2020] FCA 743

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| Appeal from: | Application for an extension of time: *CRK16 v Minister for Immigration* [2018] FCCA 2513  |
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| File number: | VID 1378 of 2018 |
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| Judge: | **KENNY J** |
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| Date of judgment: | 2 June 2020 |
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| Catchwords: | **PRACTICE AND PROCEDURE** – application for an extension of time to file an appeal under r 36.05 of the *Federal Court Rules 2011* (Cth) – extension of time granted**MIGRATION** – appeal from a judgment of the Federal Circuit Court – whether the primary judge erred in dismissing an application for judicial review of a decision of the Immigration Assessment Authority affirming the refusal of an application for a Safe Haven Enterprise visa – whether the Authority failed to consider whether the bribery and extortion the applicant was subject to gave rise to a well-founded fear of persecution – appeal dismissed |
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| Legislation: | *Federal Court Rules 2011* (Cth) rr 36.03. 36.05*Migration Act 1958* (Cth) ss 5H, 5J, 36*Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth) |
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| Cases cited: | *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* [2003] HCA 71; 216 CLR 473*BTT16 v Minister for Home Affairs* [2019] FCA 251*CRK16 v Minister for Immigration* [2018] FCCA 2513*DCP16 v Minister for Immigration and Border Protection* [2019] FCAFC 91*DOP17 v Minister for Immigration and Border Protection* [2019] FCA 129*Dranichnikov v Minister for Immigration and Multicultural Affairs* [2003] HCA 26; 197 ALR 389*Hunter Valley Developments Pty Ltd v Cohen* (1984) 3 FCR 344*Minister for Immigration and Border Protection v SZSCA* [2014] HCA 45; 254 CLR 317*Minister for Immigration and Border Protection v WZAPN* [2015] HCA 22; 254 CLR 610*Rajaratnam v Minister for Immigration and Multicultural Affairs* [2000] FCA 1111; 62 ALD 73*SZTAP v Minister for Immigration* [2015] FCAFC 175; 238 FCR 404*SZTEO v Minister for Immigration and Border Protection* [2016] FCAFC 44; 239 FCR 1*SZVRQ v Minister for Immigration and Border Protection* [2020] FCA 375 |
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| Date of hearing: | 27 May 2019 |
|  |  |
| Date of last submissions: | 24 June 2019 |
|  |  |
| Registry: | Victoria |
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| Division: | General Division |
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| National Practice Area: | Administrative and Constitutional Law and Human Rights |
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| Category: | Catchwords |
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| Number of paragraphs: | 62 |
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| Solicitor for the Applicant: | Mr E Rajadurai of Divine Lawyers |
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| Counsel for the First Respondent: | Mr N Wood |
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| Solicitor for the First Respondent: | Mills Oakley |
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| Counsel for the Second Respondent: | The Second Respondent filed a submitting notice, save as to costs |

ORDERS

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|  | VID 1378 of 2018 |
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| BETWEEN: | CRK16Applicant |
| AND: | MINISTER FOR HOME AFFAIRSFirst RespondentIMMIGRATION ASSESSMENT AUTHORITYSecond Respondent |

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| JUDGE: | KENNY J |
| DATE OF ORDER: | 2 june 2020 |

THE COURT ORDERS THAT:

1. The applicant be granted an extension of time under r 36.05 of the *Federal Court Rules 2011* (Cth) to file a notice of appeal.
2. The draft notice of appeal filed on 24 October 2018 be taken to include a further ground:

3. There is jurisdictional error in the purported decision of the second respondent in that the second respondent failed to consider whether the bribery and extortion to which Sri Lankan authorities subjected the applicant in the running of his fishing business in the past gave rise to a well-founded fear of persecution on Convention grounds.

1. Subject to Order 2 above, the draft notice of appeal filed on 24 October 2018 be treated as the notice of appeal filed in this proceeding and further compliance with rr 36.01-36.06 of the *Federal Court Rules 2011* (Cth) be dispensed with.
2. The appeal be dismissed.
3. Unless a party notifies the Court in writing by 4.00pm on Wednesday, 3 June 2020 indicating opposition to this order as to costs, there be no order as to costs.

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

REASONS FOR JUDGMENT

KENNY J:

1. This is an application for an extension of time within which to file a notice of appeal, and an appeal, if the extension of time is granted, from a judgment of the **Federal Circuit Court** of Australia.
2. On 10 September 2018, the Federal Circuit Court delivered judgment dismissing the applicant’s application for judicial review of a decision of the second respondent (**the Authority**). This decision was to affirm a decision of a delegate of the first respondent (**the Minister)** to refuse the applicant a Safe Haven Enterprise **Visa**: see *CRK16 v Minister for Immigration* [2018] FCCA 2513 (**J**).
3. At the relevant time, r 36.03 of the ***Federal Court Rules*** *2011* (Cth) provided that any notice of appeal against a judgment of the Federal Circuit Court was required to be filed within 28 days after the date on which the judgment appealed from was pronounced: see ***Federal Court Rules*** *2011* (Cth) r 36.03. Any notice of appeal with respect to the judgment delivered on 10 September 2018 was required to be filed by 8 October 2018. The applicant did not file a notice of appeal by that date. The applicant therefore required an extension of time under r 36.05 of the *Federal Court Rules* to file a notice of appeal.
4. The applicant filed an application for an extension of time in which to appeal on 24 October 2018. This application was accompanied by an affidavit affirmed by the applicant on 19 October 2018 and a draft notice of appeal.
5. The Minister’s legal representatives filed an affidavit affirmed by Ms Charlotte Elizabeth Saunders, a solicitor, annexing a copy of the judgment and reasons of the primary judge and a copy of the Authority’s decision record.
6. Some days prior to the scheduled hearing date, at 5:48 pm on 24 May 2019, Chambers staff received an email from a solicitor attaching a “Notice of Acting – appointment of lawyer”. This document had been incorrectly filed on 22 May 2019 in the Federal Circuit Court, rather than in this Court. The same document was filed in this Court on 28 May 2019.
7. The applicant was represented by his lawyer, Mr E Rajadurai, at the hearing fixed for this matter on 27 May 2019. Having regard to Mr Rajadurai’s late involvement in the proceeding, the Court ultimately ordered that: (1) the applicant file written submissions in support of his extension of time application, and in support of any appeal if the Court were to grant an extension of time; (2) the Minister file written submissions in response; and (3) subject to a request from either party for a further oral hearing, the application and, if the Court were to grant an extension of time, the appeal, be determined on the papers.
8. For the following reasons, the application for an extension of time should be granted and the appeal dismissed.

# Background

## The decision of the Authority

1. The Authority accepted that the applicant was a citizen of Sri Lanka, a Tamil and a Muslim. The applicant had arrived in Australia in 2012 and applied for theVisa a few years later. A delegate of the Minister decided to refuse this application, and the delegate’s decision was referred to the Authority for review. As already indicated, the Authority affirmed the delegate’s decision not to grant the applicant the Visa.
2. The presently relevant aspects of the Authority’s decision concern the applicant’s claims regarding his work as a fisherman. “Based on the country information and his generally consistent evidence”, the Authority accepted:

… as plausible that the applicant needed to obtain annual permits for his fishing boats and regular permission for the boats to go out fishing from the [Sri Lankan Navy]; he paid bribes to the [Sri Lankan Navy] to obtain the permits; he paid bribes in the form of food, alcohol and phone cards to lower level [Sri Lankan Navy] officers to obtain permission to fish and avoid delays; he was prevented from continuing conch diving in 2010 or 2011 … because he refused to bribe [a Sri Lankan Army Officer]; he was detained, hit and made to strip naked, by the [Sri Lankan Navy] for half an hour or so about a month before leaving Sri Lanka; and, a few days later, the [Sri Lankan Navy] stepped on the food he had brought for his crews.

The Authority also accepted that the applicant “had some fishing gear and a boat seized by a court order in 2013 and another boat of his was seized in 2015”. The Authority noted, however, that the applicant “has not claimed that the court acted illegally or the order was otherwise invalid” and rejected the applicant’s claim that the court order was obtained at the instigation of the Sri Lankan Navy (**SLN**) to force his return as “mere conjecture”.

1. The Authority accepted that, based on the country information and the applicant’s “generally consistent statements on his [United National Party] activities and the incidents”, that “the applicant was actively involved with the [United National Party] … in the campaign for the 5 September 2012 election”. The Authority also accepted that:

… while he and his crew were putting up posters the [Sri Lankan Army] tore down a poster and made threats; that the police asked to use his jeep and he refused; that on his way to vote the [Sri Lankan Army] stopped him and told him who he should vote for; that just before the election he was stopped by the police, his jeep checked and they sent him home; that later that day a group of four men came to his house and asked questions about his crew, but left when he refused to answer their questions; and the same four men turned up at his house just after the election, drunk, and asked for him, used abusive language and made threats.

The Authority also accepted “as plausible that his wife was visited two or three times after his departure by people asking after his whereabouts”, although it was not satisfied that “these visits [were] connected to his [United National Party] campaigning”.

1. The applicant sought to attribute “all the actions taken against him”, to the one Sri Lankan Army (**SLA**) officer and “Associates”. The Authority found, however, that “[t]here are only the applicant’s assertions to support his suspicions”. The Authority continued:

… [b]ased on the evidence … I accept the delays to his fishing work, his short detention and the spoilage of food by the SLN and the police attempt to ‘borrow ‘his jeep for a holiday are all attributable to those SLN and police actors seeking to obtain money or other benefits from the applicant’s business. Similarly, I accept the poster incident with the SLA, the SLN stopping him on election day and the visits by the group of four men are attributable to his involvement in the 2012 election with the [United National Party].

1. The Authority did not, however, accept that there was a link between the conduct of a particular SLA officer and “Associates” and his interactions with the SLN in connection with his fishing business, as the applicant claimed.
2. The Authority accepted that the applicant had regularly to pay bribes of money, food, alcohol and phone cards to members of the SLN, and faced harassment and delays in his fishing business. It also accepted that the police tried to ‘borrow’ his jeep and that a particular SLA officer had stopped him pursuing conch fishing when he refused to pay a bribe. It also accepted that a month or so before he left Sri Lanka, the applicant “was detained for a short period by the SLN, after a confrontation about the SLN delaying his boats going out to fish, where he was assaulted and made to strip”; and “that there have been subsequent visits by different people seeking bribes, in connection to his business, to his home in Sri Lanka to enquire about his whereabouts”.
3. Significantly, the Authority found that:

Notwithstanding these incidents, the applicant was able to run his fishing business and support himself and his family, including his parents and parents-in-law throughout the later war years when his area was under SLN control and the post war period in Sri Lanka. He confirmed at the SHEV interview that his detention involved the only physical harm he has actually suffered in his dealings with the Sri Lankan authorities. In these circumstances, I do not consider the incidents to impact to such an extent that it threatens the applicant’s capacity to subsist or otherwise constitutes serious harm. I am satisfied that the incident of physical harm was an isolated one and find that the chance of the applicant suffering similar harm, now or in the foreseeable future, as remote.

I accept the applicant as a Tamil fisherman was subject to the military registration/day pass system and I am prepared to accept that the applicant may face the same situation, together with possible approaches for bribes, while conducting his fishing business if he returns.

I accept that this is discriminatory and systematic conduct by the Sri Lankan authorities for reason of the applicant’s Tamil ethnicity and presents a level of day to day harassment while undertaking his fishing business that impacted, and may impact in the future, on the applicant’s capacity to earn a living. However, his evidence does not suggest that he or his family were unable to maintain and support themselves through his fishing business. I do not accept that the day to day harassment on his fishing business is to such an extent that it threatens the applicant’s capacity to subsist or otherwise constitutes serious harm.

… I note the applicant was able to live, run businesses and support himself and his family from the same address … throughout his working life in Sri Lanka, without encountering problems other than those that arose from his business activities with the authorities and from his support for the UNP. I find that there is not a real chance the applicant would, as a Tamil fisherman and businessman, face official or societal discrimination amounting to serious harm upon his return to Sri Lanka, now or in the foreseeable future.

1. After considering the significance of his political involvement, his status as a Muslim and as a failed asylum seeker who departed Sri Lanka illegally, the Authority concluded that the applicant “will experience some discrimination and harassment as a Tamil fisherman and businessman from the east”. It accepted that he would face “some non-discriminatory penalties” owing to his illegal departure from Sri Lanka. The Authority was not satisfied, however, that the applicant faced a real chance of persecution in the reasonably foreseeable future, either in the period following his arrival or on his return home, whether because of his illegal departure, having made a claim for asylum in Australia, as a Muslim, as a supporter of the United National Party (**UNP**), as a Tamil fisherman and businessman from the east or any combination of these factors.
2. For these reasons, the Authority concluded that the applicant did not meet the requirements of s 36(2)(a) of the ***Migration Act*** *1958* (Cth)*.*
3. The Authority also concluded that the applicant did not meet the requirements of s 36(2)(aa) of the *Migration Act*. Relevantly to the current application, the Authority said:

I accept that the applicant may face some discrimination and harassment as a Tamil fisherman and businessman and a level of societal discrimination. Having considered the evidence discussed above however, I find that the discrimination or harm the applicant faces from the government or from society, is low level and primarily has an economic impact. I do not accept the such harm would amount to significant harm as defined in ss.36(2A) and 5 of the Act.

There is no suggestion that the applicant faces the death penalty for any reason. I do not accept that there is a real risk that the applicant would face being arbitrarily deprived of life or tortured for any reason connected with being a Muslim, his support of the UNP, as a Tamil fisherman and businessman from the east, as a failed Tamil asylum seeker or any combination of these. Nor do I accept that there is a real risk that he would be subjected to cruel, inhuman or degrading treatment or punishment, intentionally inflicted for any of those reasons or as a result of any discrimination he might suffer as a Tamil. I am not satisfied that there is a real risk that the applicant will be subject to discrimination amounting to significant harm based on his Tamil ethnicity and/or as a Tamil fisherman and businessman from the east.

## The proceeding in the Federal Circuit Court

1. The applicant subsequently challenged the Authority’s decision in the Federal Circuit Court by way of an application for judicial review. The reasons of the Federal Circuit Court judge (**the primary judge**) record that the applicant relied on the following two grounds: see *CRK16 v Minister for Immigration* [2018] FCCA 2513 at [20]:

**Ground 1**

IAA misapplied the well-founded fear test.

Particulars

[a] IAA failed to understand the aspects of well-founded fear test for grant of a protection visa

[b] IAA failed to distinguish between harassment and fear of harm

**Ground 2**

IAA constructively failed to exercise its jurisdiction by failing to discern a Convention nexus.

Particulars

IAA failed to discern that the Applicant was extorted, mistreated and threatened because of his race and or religion

1. These reasons also recorded that the applicant relied on two additional grounds, described as “(a) apprehended bias; and (b) taking irrelevant matters into account”.
2. In considering ground 1(a) (see [19] above) the primary judge stated that the applicant’s argument was that “the extortion, if paid, amounted to serious harm that affected the applicant’s subsistence, and that if not paid, would expose him to serious harm as a result of the threats underlying the extortion” (at J[23]). His Honour observed (at J[24]) that the Authority did not accept the applicant’s argument that he could not subsist whilst paying bribes. His Honour added (at J[25]):

The question which arises in this case is the extent to which the applicant would be at risk if he ceased paying bribes and whether or not that claim was determined by the [Authority]. This argument requires a consideration of the cases put by the applicant to obtain the visa and its submissions to the delegate and [Authority].

1. The primary judge then examined (at J[26]-[28]) the various claims made by the applicant throughout the Visa application and review process. His Honour held (at J[36]-[38]):

In this case the applicant pursued the protection visa on the basis that the cause of the extortion was his Tamil ethnicity and that whilst objecting to paying from time to time, he had regularly met the extortion, and the [Authority] found that his ability to do so was such that it did not amount to serious harm. It was not put that an essential characteristic of this applicant, for the purposes of the convention nexus, was that he would not meet an extortion demand and would not pay it.

… [I]t does not appear that the [Authority] in this case impermissibly asked what the applicant could do to avoid persecution, but rather considered what was likely to occur to the applicant if he returned to Sri Lanka given his particular characteristics. The [Authority] did not suggest that the applicant should hide or conceal any of his particular characteristics that formed a basis for his claim.

In these circumstances the applicant has not been able to establish a ground for judicial review in this regard.

1. As to ground 1(b) (see [19] above), the primary judge held (at J[39]-[41]) that:

… A fair reading of the decision makes clear that the [Authority] did consider in some detail the precise nature of the harassment alleged, and what the allegations were in this regard it accepted. It was apparent that the [Authority] accepted that he genuinely held fears for his safety … However, a subjective fear of an applicant is not sufficient to satisfy the relevant statutory criteria.

To the extent that this ground articulates an argument that the [Authority] failed to have regard to the potential harm in the future, based upon the evidence of harassment in the past, it appears to be a merits review argument seeking to have this court come to a different view to that reached by the [Authority] as set out above.

The applicant has not established a ground for judicial review in this regard.

1. In relation to ground 2 (see [19] above), the primary judge emphasised that the Authority accepted that the applicant had been the subject of discriminatory and systematic conduct by the authorities by reason of his Tamil ethnicity. His Honour held (at J[42]) that, contrary to the applicant’s allegation in ground 2, the core finding by the Authority was not that the conduct complained of had no nexus to the applicant’s ethnicity or religion, but “rather that the conduct complained of was not harm of a level that it came within the definition of a real risk of serious harm”.
2. The primary judge also considered and rejected additional arguments raised by the applicant. It rejected the applicant’s allegations that the Authority acted on prejudged assumptions about his case; that the Authority took into account irrelevant matters; and that the Authority erred in failing to consider the question of relocation (at J[44]-[46]).
3. Accordingly, the primary judge dismissed the applicant’s judicial review application.

#  application for an extension of time

## Submissions

1. A draft notice of appeal, which accompanied the applicant’s extension of time application, identified the following two proposed grounds of appeal:

1. Applicant thinks the order, which is based on the application has a question of law and it should be investigated.

2. Applicant has provided lot of information and supporting documents for his protection Visa application. Applicant believes this information was not considered properly and not granted a fair order.

1. In written submissions filed before the hearing, the applicant stated that, if granted an extension of time, he would argue that the primary judge erred by failing to uphold the grounds of review advanced below. The applicant, via his lawyer (Mr Rajadurai) subsequently filed further submissions in accordance with the Court’s orders of 27 May 2019. These submissions affirmed that the applicant's case raised the question “should [a] person fearing persecution modify his behaviour to become subject to extortion at the behest of the persecutors to avoid harm”, and that this question “must be answered in the negative”.
2. The applicant submitted that “[t]he critical question in this case is extortion”, and that it is “important to discern whether extortion was part of persecution giving rise to a well-founded fear of persecution. In other words whether Applicant’s refusal or attempt to refuse will lead to persecution for a Convention reason”.
3. The applicant submitted that he was not required to put his case on the basis of the threat to his subsistence. Rather, citing ***Dranichnikov*** *v Minister for Immigration and Multicultural Affairs* [2003] HCA 26; 197 ALR 389 and ***Rajaratnam*** *v Minister for Immigration and Multicultural Affairs* [2000] FCA 1111; 62 ALD 73, the applicant submitted that it was sufficient that he “fears harm”. In this regard the applicant submitted that he “claimed that he was targeted because he was a Tamil, of Muslim faith and was involved in [a] fishing business employing several people under him”. The applicant submitted that it was clear that he was discriminated against for these reasons.
4. The applicant further submitted that “[e]xtortion in this case is part of persecution and may be inextricably intertwined to harm as in *Rajaratnam case* [sic]” and “the provision of bribes after being subject to extortion cannot be endorsed by s 5J(3) … in a civilized society”.
5. The Minister addressed the merits of the proposed appeal in written submissions filed before the hearing and in further written submissions filed in conformity with the Court’s orders of 27 May 2019.
6. Amongst other things, the Minister submitted that the applicant had not clearly identified how the applicant alleged the Authority or the primary judge erred, and that the applicant’s submissions appeared in some respects to invite the Court to engage in merits review. The Minister agreed that the “critical question” arising in this proceeding relates to extortion, but submitted that in light of the factual findings that the Authority had made, it was open to the Authority not to be satisfied that there was a real risk that the applicant would experience persecution involving serious harm in Sri Lanka in the future.

## Principles applicable to exercise of discretion

1. The principles applicable to the exercise of the Court’s discretion to grant an extension of time are well established. Generally speaking, the Court has treated the principles and factors referred to by Wilcox J in *Hunter Valley Developments Pty Ltd v Cohen* (1984) 3 FCR 344 (in respect of applications for extension of time under s 11 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth)) as relevant to a decision whether to extend the time in which to appeal under r 36.05 of the *Federal Court Rules*. The factors that fall for consideration include the length of the delay and the explanation for it, any prejudice to the respondent if the extension is allowed, and whether there is sufficient merit in the proposed appeal to justify an extension of time. These considerations are not, however, exhaustive, and the outcome of an extension of time application will depend on the particular circumstances of the case.
2. In the affidavit filed in support of his application, the applicant relevantly deposed that:

I attended court hearings and believe my case is not heard properly and my evidence were not taken into consideration properly.

When my case was failed, I was very upset and searching help for further proceedings.

I have lack of English knowledge and understanding. Therefore, it took some time for me to file this application.

1. The applicant’s explanation for his delay is very general and not especially compelling. It remains unclear why the applicant was able to commence the proceeding when he did, but not within the time permitted. I am, however, prepared to accept that the delay was due at least in part to the applicant’s disadvantages, including his limited command of English and that he did not have access to legal advice at the relevant time. The delay was, moreover, relatively slight and the Minister has not claimed that he would be prejudiced if an extension of time were granted.
2. As to the merits, it must be accepted that the draft notice of appeal is unpromising. The grounds are stated here in very general terms, and do not identify any particular information or documents that were not “considered properly”, or in what respect they were not “considered properly”. It was common ground, however, that the critical question, identified by the applicant in his written submissions, related to extortion. Considered as a whole, the applicant’s proposed case on appeal would appear to be that the Authority fell into jurisdictional error because it did not consider whether the extortion he experienced in the past in Sri Lanka gave rise to a well-founded fear of persecution on Convention grounds if he were to return to Sri Lanka.
3. It was also common ground that, during the administrative assessment process, the applicant had consistently raised claims relating to extortion or bribery by the Sri Lankan authorities in connection with his work as a fisherman. At his entry interview, in response to the question, “What happened with the navy?”, the applicant was recorded as saying:

There are some people working under me so I have to supply food for those workers and I take the food and the navy is always giving me trouble. I have to get a pass for the fisherman to work for me and the navy are giving me too much trouble and they don’t issue passes or they throw away the food for the workers.

1. In the same interview, the applicant stated that he had been “detained about 6 years ago for 2 days when fishing by the navy”. The applicant is also recorded as saying:

I had a permit. I was not mistreated.

1. In a statutory declaration in support of his Visa application, the applicant claimed that he fled from Sri Lanka because his life was under threat from the SLN. He said:

… I used to own four fishing boats, which was registered, under my name. I also had arrangements with six other contract fisherman. I was responsible for the permits and was subdued by the Navy to their procedure for fisherman, and had to renew it once a year.

As a Tamil I had to pay bribes to the Navy to get these permits renewed. The Singhalese Fisherman did not have to face these issues. Even though I paid bribes and renewed the permits, I still faced a lot of problems to get the boats out to sea. If we did not pay the bribes we were forced to leave the fish on board to dry in the heat of the day while[] held hostage on the beach watching it all happen and our catch went to ruin.

The Navy were never satisfied and I had to face a lot of humiliation and discrimination as a result. Even though I had the papers I still were prevented to go out to sea.

A month[] before I fled to Australia I was detained by the Navy who did not want my boats to go out to sea. When I confronted them the Navy locked me away for one day. They told me to strip off my clothes and made me to kneel down while[] laughing at me and bashing me with their fists on my chest. They did not allow me to put my clothes on and kept me naked for thirty minutes. I told the Navy men if they continued with their treatment I would lodge a complaint to higher authority. When they heard this they said they would kill me should that happen[].

Whilst I was detained people from my Muslim Community heard that I was detained. They came to the Navy camp and negotiated for my release. I was released but the Navy did not stop with their campaign against me. A few days later I brought food and bait for the fisherman who worked for me. The Navy took the food and stepped on it and in doing so made it impossible for human consumption. The guys then did not want to go on the water without food, but was forced by the Navy to go out on the sea as they (Navy) already took the permits off them and did not want to return it to the fishermen.

1. Furthermore, the delegate’s statement of reasons recorded that:

… The applicant stated at interview he was primarily involved in purchasing fish from local fisherman and relatives in his home area and then selling and distributing the fish to various purchasers. At interview the applicant stated his business was legitimately and legally operated and he owned six fishing boats and was responsible for organising all permits and licences necessary for the operation of the boats at sea and the workers he employed.

The applicant stated the primary issues he encountered with the Sri Lankan authorities stemmed from the Sri Lankan Navy not allowing his boats to enter the sea for fishing or allowing the fish caught to be transported from the docks for selling without paying bribes to Navy officers stationed at the nearby Navy camp despite having the appropriate permits. The applicant stated he did not pay bribes in cash but with commodity’s such as food, alcohol and phone cards and would do this on a daily basis so he could continue fishing.

… The applicant also claims he was detained and physically harmed one month prior to departing Sri Lanka for Australia. He stated he confronted the Navy regarding his boats not being allowed to depart the dock. He was then locked in a cell for one day and physically beaten, threatened and humiliated. The applicant claims that he was released by the Navy when people from the Muslim community were able to negotiate his release. The applicant claims the Navy continued to harass him after his release from detainment.

1. There were further references to the alleged fact that the applicant was targeted by the SLN for substantial bribes because he was a Tamil businessperson working in the fishing industry in a submission prepared for the applicant by the Refugee Advice & Casework Service after his interview with the delegate.
2. As the above account demonstrates, the applicant clearly made extortion-related claims in support of his claimed refugee status from the outset of the administrative assessment process. As Logan J said in *SZTAP v Minister for Immigration* [2015] FCAFC 175; 238 FCR 404 at [15], “[e]xtortion related refugee claims require very particular care in the analysis of the underlying occasion for the claimed extortion”. The question that the applicant ultimately sought to agitate on appeal is an important one for his case. It is not without some difficulty.
3. Bearing this in mind, as well as the brevity of the delay that put the applicant out of time, the lack of prejudice to the Minister if an extension is granted, and the fact that the parties have both advanced submissions on the outcome of the appeal, I would grant the extension of time sought in the applicant’s case.

# The appeal

1. The Authority was required to address and assess the applicant’s claims concerning bribery and extortion according to law. For the following reasons, I have concluded that it did so.
2. To give effect tos 36(2)(a) of the *Migration Act*,the Authority was required to address whether it was satisfied that the applicant has a well-founded fear of persecution in the sense that it was satisfied that there is a real chance that the applicant would suffer “persecution” involving “serious harm” (relevantly here, on account of being a Tamil and/or a Muslim): see ss 5H(1)(a), 5J(1) and 5J(4)(b). If the Authority is not so satisfied that the adverse treatment that the applicant would suffer can be characterised as “persecution” involving “serious harm” and “systematic and discriminatory conduct”, then the fact that he would suffer adverse treatment of a lesser kind on account of being a Tamil and/or a Muslim is not relevant to the statutory inquiry: see s 5J(4)(b) and (c). (A further requirement in s 5J(4)(a) was not a part of any argument in this case.) The Authority was therefore required to consider whether there is a real chance that the applicant would suffer persecution involving serious harm and systematic and discriminatory conduct, on account of being a Tamil and/or a Muslim, if he returned to Sri Lanka, in circumstances where, relevantly, the SLN and/or SLA had in the past prevented him taking out his fishing boats unless he paid bribes, and had harassed him in connection with his fishing business in other ways as a Tamil and/or Muslim fisherman.
3. It may be accepted that, in some circumstances, the Authority’s satisfaction that there was a real chance or a real risk that a person will be the victim of extortion involving threats of injury in the event of failure to comply with the demands made on him or her can amount to persecution involving serious harm. Whether this is the case depends very much on the facts of the particular case. These facts must be assessed by the Authority in order that the Authority can determine whether it is so satisfied.
4. In this case, the Authority did not overlook the applicant’s claims concerning bribery and extortion. On the contrary, its reasons for decision disclose that it paid close attention to them. The Authority’s reasons disclose that the Authority accepted that the applicant had regularly to pay bribes to members of the SLN, and faced harassment and delays in his fishing business on account of the Sri Lankan authorities: see [14] above. The Authority accepted that extortion in this case involved denying the applicant relevant permits, including to fish, unless the applicant paid a bribe: see [10], [15] above. The Authority accepted that the applicant had suffered this adverse treatment on account of his Tamil ethnicity. As noted above, however, accepting that the applicant might suffer the same treatment in the future in Sri Lanka, the Authority was not satisfied that this admittedly “discriminatory and systematic conduct by the Sri Lankan authorities” would threaten the applicant’s capacity to subsist or otherwise constitute serious harm: see [15] above. This was because the applicant had in the past been able to run his fishing business and support himself and his family, notwithstanding this conduct. There is nothing to indicate that this conclusion was not open to the Authority on the material before it.
5. The Authority’s reasons also show that it accepted that a month or so before he left Sri Lanka, the applicant was “detained for a short period by the SLN, after a confrontation about the SLN delaying his boats going out to fish, where he was assaulted and made to strip”: see [14] above. It is also clear that the Authority accepted that “there have been subsequent visits by different people seeking bribes, in connection to his business, to his home in Sri Lanka to enquire about his whereabouts” see [14] above. The Authority accepted that this treatment was on account of the applicant being a Tamil. The Authority found, however, that the single incident of physical harm in the past was an isolated one, and that the chance of the applicant suffering similar harm in Sri Lanka in the future was remote: see [15] above. The applicant did not challenge this aspect of the Authority’s reasons. Once again, there is nothing to indicate that this conclusion was not open to the Authority on the material before it.
6. As set out above, the Authority concluded that, notwithstanding the difficulties created with respect to his fishing business by the Sri Lankan authorities, the applicant had been able to run his business and support his family from the same place, without encountering problems other than those arising from his fishing business (and his support for the UNP): see [15] above. With this in mind, the Authority concluded that it was not satisfied that the applicant faced a real chance of persecution in the reasonably foreseeable future if returned to Sri Lanka. For like reasons, the Authority found that the discrimination and harassment that he may suffer as a Tamil fisherman and businessman would not amount to significant harm within the meaning of ss 36(2A) and 5 of the *Migration Act*. These conclusions flowed from the Authority’s finding about the level of the harm done to the applicant by what the Authority accepted was the Sri Lankan authorities’ “discriminatory and systematic conduct”. Such an approach is consistent with the requisite statutory inquiry: see [56] below; compare *BTT16 v Minister for Home Affairs* [2019] FCA 251 at [33].
7. In these circumstances, there is no tenable basis for the proposition that the Authority here made the same kind of error as in *Appellant* ***S395****/2002 v Minister for Immigration and Multicultural Affairs* [2003] HCA 71; 216 CLR 473 at [39] (McHugh and Kirby JJ), [82], [88] (Gummow and Hayne JJ). In *Minister for Immigration and Border Protection v* ***SZSCA***[2014] HCA 45; 254 CLR 317 at [17], the majority said:

The essential reasoning in *S395* was that the Tribunal had diverted itself from its task of determining whether there would be a real chance that the applicants would be persecuted if they returned to Bangladesh, by focusing on the assumption about how the risk of persecution might be avoided. Gummow and Hayne JJ said that the inquiry was what might happen if the applicants returned, not whether adverse consequences could be avoided. It followed that the issue to which the correct inquiry was directed – whether the fear of persecution was well founded – had not been addressed.

(Citations omitted.)

See also *SZTEO v Minister for Immigration and Border Protection* [2016] FCAFC 44; 239 FCR 1 at [33].

1. The facts of the present case are very different from those in *SZTEO* and *S395,*but the principle remains the same.In this case, however, the Authority proceeded on the basis that that the applicant would likely continue to be the victim of the same discriminatory and systematic conduct as before.
2. The Authority was required to address whether there was a real chance that the applicant would suffer persecution involving serious harm (and/or real risk that the applicant would suffer significant harm: s 36(2)(aa)), on account of being a Tamil and/or a Muslim, if he returned to Sri Lanka, in circumstances where the Sri Lankan authorities had in the past and might well in the future prevent him taking out his fishing boats unless he paid bribes, and harass him in other ways in connection with his fishing business. The reasons of the Authority show that the Authority addressed this and related tasks directly as it was required to do: compare *DCP16 v Minister for Immigration and Border Protection* [2019] FCAFC 91 at [62]-[63] and *DOP17 v Minister for Immigration and Border Protection* [2019] FCA 129 at [23]-[24]. This case can be contrasted with *SZVRQ v Minister for Immigration and Border Protection* [2020] FCA 375, in which it was held that the decision-maker had failed to address what would happen to the applicant if he were returned to the receiving country: see [37].
3. It should also be borne in mind, as indeed the Minister submitted, that *S395* was decided before the *Migration Act* was amended by the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth) (**Caseload Amendment Act**). *SZSCA* and *SZTEO* were also cases arising under the *Migration Act* prior to its amendment by the *Caseload Amendment Act*. The *Caseload Amendment Act* introduced ss 5H and 5J into the *Migration Act*, with effect from 18 April 2015, and they were applicable at the time the Authority made its decision in the applicant’s case. As indicated above, the Authority’s analysis was entirely consistent with these two provisions.
4. The *Migration Act* then (as now) relevantly provided that a “refugee” is a person who, among other things, has a “well-founded fear of persecution” (s 5H). Section 5J(1) provided that “[f]or the purposes of the application of this Act … to a particular person, the person has a ***well-founded fear of persecution*** if:

(a) the person fears being persecuted for reason of race, religion, nationality, membership of a particular social group or political opinion; and

(b) there is a real chance that, if the person returned to the receiving country, the person would be persecuted for one or more of the reasons mentioned in paragraph (a); and

(c) the real chance of persecution relates to all areas of a receiving country.

Further, s 5J(4)(b) and (c) respectively provide that, in order for there to be a well-founded fear of persecution, the persecution must involve “serious harm” to the person, and “systematic and discriminatory conduct”. Section 5J(5)(d) provides that “significant economic hardship that threatens a person’s capacity to subsist” is an instance of “serious harm”. Although not directly relevant in this case, it may also be noted that s 5J(3) provides that a person does not have a well-founded fear of persecution if the person could take certain reasonable steps to modify their behaviour so as to avoid a real chance of persecution.

1. Read fairly and as a whole, the Authority clearly considered whether there was a real chance that the applicant would face persecution involving serious harm in the reasonably foreseeable future in Sri Lanka. In accordance with s 36(2)(a) of the *Migration Act*, read with ss 5H and 5J, the Authority made its decision on the basis that there was a real chance that the applicant would be required by the Sri Lankan authorities to pay bribes in order to run his fishing business in Sri Lanka in the reasonably foreseeable future but, for the reasons the Authority stated, the Authority was not satisfied that this would amount to “serious harm”, as s 5J(4)(b) required. The Authority was not satisfied that paying bribes would threaten the applicant’s capacity to subsist in the future; or that there was a real chance that the applicant would suffer physical harm based on this claim in the future: see [15] above and s 5J(5)(f); cf s 5J(5)(a)-(c); (d)-(e).
2. It is convenient here to deal with the authorities relied on by the applicant in his submissions. As noted above, the applicant relied on *Dranichnikov* and *Rajaratnam*. Both cases were decided before the *Caseload Amendment Act*, and therefore do not address the applicable terms of the *Migration Act*. Amongst the issues before the High Court in *Dranichnikov* was whether the class of people to which the applicant claimed to belong was capable of constituting a class for Convention purposes and, if so, whether the appellant fell within such a class. The failure to ask the correct statutory questions resulted in jurisdictional error. These issues did not arise in this case.
3. Like the present case, *Rajaratnam* related to claims made by a Tamil from Sri Lanka about extortion. The appellant in that case was a merchant, who allegedly supplied goods to an army officer. The officer did not pay for the goods. After the appellant complained to the army, the army officer abducted the appellant, threatening to kill him unless he withdrew his complaint and no longer demanded payment. A Full Court of this Court held that the Tribunal was required to consider whether the army officer’s actions in context had a Convention-related character. The Tribunal’s failure to do so resulted in jurisdictional error. While the circumstances in *Rajaratnam* and the present case have a superficial similarity, the issue arising in *Rajaratnam* does not arise in this case, where the Authority clearly addressed the Convention-related character of the applicant’s claims of bribery and extortion. Neither *Dranichnikov* nor *Rajaratnam* assist the applicant in this case.
4. The applicant also referred to *Minister for Immigration and Border Protection v* ***WZAPN***[2015] HCA 22; 254 CLR 610. This case concerned whether a threat to a person’s liberty involved serious harm for the purposes of s 91R(1)(b) of the *Migration Act*, the High Court holding that the temporary detention and questioning to which the appellants might be subject on return to their receiving country did not constitute serious harm for the purpose of s 91R(1)(b). *WZAPN* does not assist the applicant’s case.

# Disposition

1. I conclude that the Authority did not fall into jurisdictional error by failing to consider whether the extortion experienced by the applicant in the past gave rise to a well-founded fear of persecution on Convention grounds. It seems to me that no error has been shown in the primary judge’s conclusions that the Authority had not “misapplied the well-founded fear test” (J[22]-[41]) and that the Authority had not erred in failing to consider whether there was a Convention nexus for the claimed harm (J[42]‑[43]). I am, moreover, unable to discern any relevant error in his Honour’s other findings regarding the applicant’s allegations of apprehended bias (J[21],[44]), or claims that the IAA took into account irrelevant considerations or failed to consider the possibility of internal relocation (J[21],[45], [46]).
2. I note, for completeness, that in the applicant’s written submissions it was submitted, among other things, that: the applicant “was threatened” in Sri Lanka; it was “out of fear that he left” Sri Lanka; and it is clear that “[t]hreats and degrading treatment that he faced at the hands of the forces were due to [sic] despite his paperwork being in order”. These are, in substance, complaints about the merits of the Authority’s decision. It is not, however, for the Federal Circuit Court in review proceedings (or for this Court on appeal) to substitute its opinion about the merits for that of the Authority.
3. For the reasons stated, I would order:
4. The applicant be granted an extension of time under r 36.05 of the *Federal Court Rules 2011* (Cth) to file a notice of appeal.
5. The draft notice of appeal filed on 24 October 2018 be taken to include a further ground:

3. There is jurisdictional error in the purported decision of the second respondent in that the second respondent failed to consider whether the bribery and extortion to which Sri Lankan authorities subjected the applicant in the running of his fishing business in the past gave rise to a well-founded fear of persecution on Convention grounds.

1. Subject to Order 2 above, the draft notice of appeal filed on 24 October 2018 be treated as the notice of appeal filed in this proceeding and further compliance with r 36.01-36.06 of the *Federal Court Rules 2011* (Cth) be dispensed with.
2. The appeal be dismissed.
3. Unless a party notifies the Court in writing by 4.00pm on Wednesday, 3 June 2020 indicating opposition to this order as to costs, there be no order as to costs.

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| I certify that the preceding sixty-two (62) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Kenny. |

Associate:

Dated: 2 June 2019