

BETWEEN:

STEVEN JAMES LEWIS

Appellant

AND:

THE AUSTRALIAN CAPITAL TERRITORY

Respondent

COMMONWEALTH'S OUTLINE OF ORAL SUBMISSIONS

PART I INTERNET PUBLICATION

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1. This outline of oral submissions is in a form suitable for publication on the internet.

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

The compensatory principle and its inherent counterfactual inquiry

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2. The “compensatory principle” in awarding damages is not in dispute: AS [37], Reply [7]. That principle requires damages to “put that party in the same position as he or she would have been in if ... the tort had not been committed”: *Haines v Bendall* (1991) 172 CLR 60 at 63 (JBA Tab 9); CS [8]. The principle necessarily involves a counterfactual enquiry: contra AS[36]; CS [16].
3. The compensatory principle applies in terms to all torts, including false imprisonment: *Bostridge v Oxleas NHS Foundation Trust* [2015] EWCA Civ 79 at [20], [23] (JBA Tab 25). That the tort of false imprisonment is actionable *per se* does not deny the application of this principle. While liability can exist without damage, substantial damages will only be awarded on proof of “actual damage”: CS [14], [15], [17]. The Supreme Court in *R (Lumba) v Secretary of State for the Home Department (Lumba)* [2012] 1 AC 245 (JBA Tab 30) held that false imprisonment is actionable *per se*, before holding that only nominal damages were appropriate. That was an orthodox application of the compensatory principle: *Fernando v Commonwealth* (2014) 231 FCR 251 at [82], [169] (JBA Tab 30), CS [12], [26].

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The Appellant’s claimed loss of the “right not to be imprisoned”

4. The appellant contends that, even though he would have been detained even if no tort

had been committed, he is entitled to substantial compensation for loss of “the right not to be imprisoned” [AS [27]-[28], [37], [41]; Reply [8]]. That submission is incorrect.

4.1. The right to liberty is of great importance, but it is not unqualified. A person who is under a lawful sentence of imprisonment does not have a “right not to be imprisoned”. While the appellant was sentenced to periodic detention, that sentence was imposed within a legislative framework the “inevitable operation” of which was that, the appellant having acted as he did, his periodic detention was required to be cancelled: CAB 110 [52], 111 [57]; ss 66(4) and 69(1) of the *Crimes (Sentence Administration) Act 2005* (ACT) (JBA Tab 1). In those circumstances, the appellant had no “right” not to be imprisoned: CS [11].

10 4.2. Damages in tort are not awarded for the “abstract” value of the right infringed, but to compensate for actual loss in the real world: see CS [12]; *Memphis Community School District v Stachura*, 477 US 299 (1986) (JBA Tab 45); CS [46].

4.3. The “user” cases (see AS [35]) do not concern compensation for the abstract loss of a “right”. Many of the cases appear best explained as cases where the award of damages is restitutionary, rather than compensatory for a loss. In any event, they provide no relevant analogy, as the Respondent did not get any “use” out of the appellant’s liberty or benefit from his imprisonment.

CPCF v Minister for Immigration and Border Protection (CPCF) (2015) 255 CLR 514

20 5. The considered reasons of four members of this Court in *CPCF* are relevant to the issues in this appeal: CS [22]-[25], contra Reply [3].

5.1. One of the questions in *CPCF* was whether the plaintiff was entitled to damages (including the appropriateness of nominal damages) if his detention had been unlawful: *CPCF* (2015) 255 CLR 514, questions 6 at 658 (JBA Tab 7). The parties’ submissions addressed that question (at 517, 523). It was not “assumed”.

5.2. Four members of the Court considered that issue (albeit in *dicta*). None doubted the correctness of *Lumba*: Hayne and Bell JJ at [157] and [164(6)] (dissenting); Kiefel J at [325] (dissenting), Keane J at [512] (in the majority).

30 Dated: 2 June 2020

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