

**IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY**

No. P37 of 2015

**ON APPEAL FROM THE FULL COURT OF THE
FEDERAL COURT OF AUSTRALIA**

BETWEEN:

W LLOYD NIRMALEEN FERNANDO
by his tutor **JOHN ROBERT BRODERICK LEY**
Applicant



and

COMMONWEALTH OF AUSTRALIA
First Respondent

and

HONOURABLE GARY HARDGRAVE
Second Respondent

APPELLANT'S REPLY

Part I. Publication

1. These submissions are in a form suitable for publication on the Internet.

Part II. Reply

2. Three issues raised in the respondents' submissions call for a response by way of a Reply.
3. Contrary to the assertions of the respondents, the appellant's Submissions fall within the grant of special leave. It is not possible to cover the ground of appeal without discussion of the evidence.
4. The authority of the Supreme Court in *R (on the application of Lumba) v The Secretary of State for the Home Department*¹ [*Lumba*], and *R (on the application of Kambadzi)*² [*Kambadzi*] provides an unstable foundation upon which to base a development of the common law of Australia dealing with nominal damages as a remedy in the tort of false imprisonment.

¹ [2012] 1 AC 245; [2011] UKSC 12.

² [2011] 1 WLR 1299; [2011] UKSC 23.

Filed on behalf of the Applicant by:

Mony de Kerloy
Barristers & Solicitors
1/26 Eastbrook Terrace
EAST PERTH WA 6004

Tel: 9221 5326
Fax: 9221 5402
Email: julia@mdk.com.au
Ref: Ms J M Allanson

5. In *Lumba*, a group of four members of the Supreme Court adopted a causation approach to the award of damages.³ They held that a person who has been falsely imprisoned, or unlawfully detained, cannot establish an entitlement to more than nominal damages, if it be established by the detaining authority that the detention could at all material times have been lawfully continued: in these circumstances, such a person has suffered no loss and damage caused by the public authority's unlawful act, and is entitled to no more than nominal damages.
6. A group of three Justices considered that nominal damages were not a sufficient acknowledgment of a breach of fundamental rights.⁴ This notwithstanding that, in circumstances where the detention of the person could and would have been continued lawfully, no compensable loss of liberty had been suffered.
7. Lord Brown SCJ, joined by Lord Rodger SCJ, held that the appellants had not been falsely imprisoned, and, accordingly, no damages should be awarded. But their Lordships disagreed with the majority, with whom they were in agreement on liability, on the issue of nominal damages. To deny compensation to a person falsely imprisoned '*would seriously devalue the whole concept of false imprisonment.*'⁵ It follows that, on the issue of nominal damages, this group of two aligns with the minority, rather than with the majority. Both Lord Walker SCJ and Lady Hale SCJ expressed agreement with the concern of this group that an award of nominal damages devalues the tort of false imprisonment.⁶
8. In *Kambadzi*, a bench of five of the Justices who heard the appeal in *Lumba* held that the appellant had been unlawfully detained. But, on this occasion, there was insufficient evidence to determine whether his detention could and would have continued had the required regular reviews been carried out. In those circumstances, the case was remitted to the primary judge to determine this issue.⁷ But in doing so, the Justices expressed views as to whether the claimant

³ Lord Dyson SCJ at [95]; Lord Collins SCJ at [235] to [237]; Lord Kerr SCJ at [256]; Lord Phillips SCJ at [335].

⁴ Lord Hope SCJ at [176]; Lord Walker SCJ at [195], and Lady Hale SCJ at [212].

⁵ At [343].

⁶ Lord Walker SCJ at [181]; Lady Hale SCJ at [209].

⁷ Lord Hope SCJ at [60].

could recover more than nominal damages.⁸ A majority of the Court explicitly followed *Lumba*, adopting the language of causation.⁹ Lord Hope SCJ noted that an award of damages for false imprisonment is based on normal compensatory principles.¹⁰ Lady Hale SCJ observed that the amount of compensation to which a person falsely imprisoned is entitled ‘*must be affected by whether he would have suffered the loss and damage had things been done as they should have been done.*’¹¹: in that case, had reviews been carried out as required.

9. The degree of disagreement shown by members of the Supreme Court might raise concern: should the concept of nominal damages in the context of false imprisonment, as applied to persons detained under statutory, as distinct from public law, powers, be recognised as forming part of the common law of Australia? Devaluing the cost of non-compliance with statutory powers may carry a risk that concomitant duties will not be respected, and lead to the creation of a culture in which persons may be arbitrarily detained with relative impunity. As Lord Walker noted in *Lumba*, the common law development of the causation approach ‘*sits uncomfortably with the pride that English law has taken for centuries in protecting the liberty of the subject against arbitrary executive action.*’¹² Similar concerns have been raised elsewhere in the United Kingdom.¹³
10. The *Lumba* principle applies where the evidence demonstrates that, at the material time, the defendant could and would have lawfully continued the detention of the plaintiff. There is no authority deriving from *Lumba* and *Kambadzi* extending the principle to circumstances where there was no lawful authority to detain the person in the first instance. In both cases, the Secretary of State had the authority to order the deportation of the claimants, such orders being a necessary precursor to their detention. The respondents’ **first proposition** does not accurately state the principle derived from the cases.

⁸ Lord Hope SCJ at [59]; Lady Hale SCJ at [77]; Lord Kerr at [89].

⁹ Lord Hope SCJ at [79]; Lady Hale SCJ at [79]; Lord Kerr at [88].

¹⁰ At [56].

¹¹ At [74].

¹² At [181].

¹³ Keene and Dobson, ‘*At what price liberty? The Supreme Court decision Lumba and compensation for false imprisonment.*’ (2012) Public Law, October, 628 to 638.

11. As to the **second proposition**, the balance of authority supports the principle that the evidential burden of proof lies upon a defendant who asserts that a person held to have been falsely imprisoned has suffered no loss, entitling him or her to only nominal damages.
12. Beyond the dicta referred to above, the Supreme Court did not in *Kambadzi* address either the burden or standard of proof required to determine the required counterfactuals. The approach taken by Deputy Judge Howell in *R (on the Application of Amin Sino v The Secretary of State for the Home Department*¹⁴, characterised as correct by the respondents¹⁵, has not attracted judicial support. Conversely, the dicta in *R (on the application of OM) v Secretary of State for the Home Department*¹⁶, criticised by the respondents¹⁷, have been cited with approval.
13. The weight of authority supports the dicta of Richards LJ, at least in relation to the evidential burden resting on the respondent. In *R (on the application of Pratima Das) v The Secretary of State for the Home Department*¹⁸, counsel for the Secretary of State conceded, for the purposes of the case, that what Richards LJ said in the paragraph referred to by the respondents, including the shifting of the burden of proof in such cases, was correct.¹⁹ In the Court of Appeal in the same case²⁰, a claim by counsel that the Secretary of State was under no obligation to file witness evidence in relation to whether there was or was not an entitlement to compensatory or nominal damages, was rejected.²¹ Nothing in these cases, requiring the Secretary of State to prove that the claimant suffered no loss, and was accordingly entitled to only nominal damages, is inconsistent with what was held in this Court in *Purkess v Crittenden*²² and *Watts v Rake*²³. Whether a person falsely imprisoned could and would have been lawfully detained under s 189(1), and, as a result, has suffered no loss, falls to be determined on the whole of the evidence, including evidence from the defendant

¹⁴ [2011] EWHC 2249 (Admin).

¹⁵ RS at [49].

¹⁶ [2011] EWCA Civ 909.

¹⁷ RS at [49] to [53].

¹⁸ [2013] EWHC 682 (Admin).

¹⁹ At [54].

²⁰ [2014] 1 WLR 3538; [2014] EWCA Civ 45;

²¹ At [80].

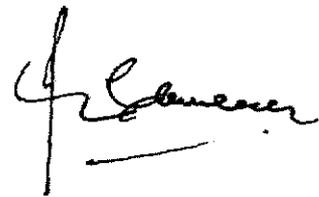
²² (1965) 114 CLR 164; [1965] HCA 34, 171.

²³ (1960) 108 CLR 158; [1960] HCA 58 [8].

proving the existence of the counterfactuals. While it need not be inevitable that detention would have continued, having regard to the importance of liberty, a high degree of satisfaction should be required before the victim of false imprisonment is deprived of damages compensating him for the loss.²⁴ The respondent's **second proposition** does not accurately describe the evidential burden of proof as applied in England and Wales. The relevant principle is not inconsistent with the common law applied in Australia.

14. The respondents' **third proposition** is based upon the evidence of Ms Lockhart. The primary judge, in his judgment on liability²⁵, rejected the respondents' contention that, as an 'officer' under the Act, Ms Lockhart could confer the power lawfully to detain upon a person not shown to be so qualified.²⁶ The Full Court upheld that finding.²⁷ The power to detain unlawful non-citizens is conferred by statute²⁸, further refined by regulation, as is shown by the Gazette Notice in the present case.²⁹ While Ms Lockhart may have intended to effect the detention of Fernando, at no time did she detain him herself, or intend to do so. In determining whether Fernando '*could and would have been detained lawfully at all material times*', the respondents cannot rely upon Ms Lockhart in demonstrating their counterfactual.
15. The respondents' **third proposition** is unsupported by the legislation and the evidence.

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Name: J. L. Cameron
 Telephone: (08) 9481 1550
 Fax: (08) 9268 1198
 Email: johncameron@jlcameron.com

²⁴ *Briginshaw v Briginshaw* (1938) 60 CLR 336, 361.

²⁵ *Fernando v Commonwealth* (2010) 188 FCR 188; [2010] FCA 753.

²⁶ At [107] to [108]; AB 77 to 78.

²⁷ *Commonwealth of Australia v Fernando* [2012] FCAFC 18 at [83]; AB 169.

²⁸ Initially *s 189(1)*.

²⁹ AB 49.