

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

37
No. P 22 of 2015

BETWEEN

W LLOYD NIRMALEEN FERNANDO

By his tutor John Robert Broderick Ley

Appellant

and

COMMONWEALTH OF AUSTRALIA

First Respondent

and

HONOURABLE GARY HARDGRAVE

Second Respondent

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APPELLANT'S SUBMISSIONS

Part I: Form of submissions

1. I certify that this submission is in a form suitable for publication on the internet.

20 **Part II: Issues arising in the proceeding**

2. The respondents led no evidence that the appellant would have been lawfully detained even without their tortious acts. The issue in the appeal is whether in the absence of such evidence a person unlawfully detained has suffered no loss and damage, and is entitled, as the primary judge and the Full Court held, to only nominal damages.

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Part III: Section 78B Notices

3. The appellant does not consider that any notice should be given in compliance with section 39B of the *Judiciary Act 1903* (Cth).

Part IV:

4. *Fernando v Commonwealth of Australia* (2014) 315 ALR 547; [2015] FCAFC 181.
5. *Fernando v Commonwealth of Australia (No 5)* [2013] FCA 901.
6. *Commonwealth of Australia v Fernando* [2012] 200 FCR 1; (2012) 287 ALR 267; (2012) 126 ALD 10.
- 10 7. *Fernando v Commonwealth of Australia (No 4)* (2010) 119 ALD 371; [2010] FCA 1475.
8. *Fernando v Commonwealth of Australia* [2010] 188 FCR 188; (2010) 271 ALR 521; [2010] FCA 753.

Part V: Factual background

9. **In 1989 the appellant [“Fernando”] arrives in Australia.** He is a citizen of Sri Lanka, and is granted a permanent residence visa in 1995.
 10. **In July 1998 he is convicted of sexual assault and sentenced to eight years imprisonment.** In September 2003, learning that he is due to be released on parole on 5 October 2003, officers of the Department of Immigration and Multicultural Affairs embark upon a process directed at having the Minister of the Department make a decision whether to cancel Fernando’s visa by no later than 3 October 2003. They also give Fernando notice of the Minister’s intention to consider cancelling his visa. On 2 October 2003, Fernando applies to the Federal Court for judicial review of the Minister’s notice of intention.
 11. **On 3 October 2003 the second respondent [“the Acting Minister”] cancels the permanent residency visa Fernando**
- 20
- 30

has held since 1995. Released on parole two days later, Fernando is apprehended and placed in immigration detention. A litigation guardian, appointed to represent him after he is found to be legally incompetent, amends the application for judicial review of the Minister's notice of intention, converting it into an application to review the Acting Minister's decision to cancel his visa.

12. **That application is heard in December 2006 and judgment is reserved.** On 18 January 2007, Fernando is released from detention. Six days later consent orders are made quashing the Acting Minister's decision to cancel his visa. He has spent 1,203 days in immigration detention. Today he remains in Australia on the visa he has held for some twenty years.
13. **Fernando brings a claim for damages, including aggravated and exemplary damages, against the first respondent ["the Commonwealth"] and the Acting Minister.** He relies upon various causes of action including false imprisonment. At the hearing, the Commonwealth agrees to meet any finding of tortious liability on the part of the Acting Minister.
14. **On facts that are largely undisputed, the primary judge finds that the respondents falsely imprisoned Fernando for one day on 5 October 2003.** He awards damages of \$3,000 against both. He dismisses other causes of action against the Commonwealth. He finds the Acting Minister liable for false imprisonment and misfeasance in public office, and makes him effectively jointly and severally liable for the damages of \$3,000.
15. **In a separate judgment in December 2010, dealing with Fernando's claim for aggravated and exemplary damages, the primary judge finds that there are grounds for an award of exemplary damages against the Commonwealth and the Acting Minister.** He awards Fernando \$25,000 by way of exemplary damages, but rejects his claim for aggravated damages. In light of the

Commonwealth's agreement to meet any finding of tortious liability on the part of the Acting Minister, the primary judge makes the award of exemplary damages against the Commonwealth only.

16. **The Commonwealth and the Acting Minister appeal against the primary judge's orders.** They appeal against the holdings that: (1) Fernando had been falsely imprisoned for one day; (2) the Acting Minister had engaged in misfeasance in public office; and (3) the Commonwealth was to pay exemplary damages.

10 17. **Fernando cross appeals, principally on the grounds that he had been falsely imprisoned by both respondents for the entire period of 1,203 days that he had been detained.**

18. **The first Full Court dismisses the appeal in part.** It (1) dismisses the appeal against the primary judge's finding that Fernando had been falsely imprisoned on 5 October 2003; (2) upholds the appeal against the finding that the Acting Minister had engaged in misfeasance in public office; and (3) remits the assessment of substantial damages to the primary judge.

20 19. **The first Full Court allows the cross-appeal.** It holds that Fernando had been falsely imprisoned for the entire period of 1,203 days, during which he had been kept in immigration detention. The proceeding is remitted to the primary judge "*to assess the substantial damages, including, if warranted, aggravated and exemplary damages, to which Mr Fernando is entitled because of his unlawful imprisonment for 1,203 days.*"

30 20. **After the first Full Court makes its orders, but before he has considered the issue of damages on the remitter, the primary judge introduces a new issue:** whether Fernando should be awarded no more than nominal damages for his false imprisonment "*because he could and would have been lawfully detained in any event*". The primary judge orders that the Commonwealth and the

Acting Minister pay Fernando nominal damages of \$1.00, and that the Commonwealth pay \$25,000 exemplary damages.

21. **Fernando appeals against both orders, and the Commonwealth cross-appeals against the second order.** The Acting Minister does not cross appeal. The grounds of the Commonwealth's cross appeal are materially identical to the grounds advanced before the first Full Court. The second Full Court dismisses Fernando's appeal, and allows the cross-appeal, quashing the order that the Commonwealth pay \$25,000 exemplary damages. It refuses the Commonwealth's application to join the Acting Minister to the cross appeal.

Part VI: Argument

(a) The error of law complained of

22. The Full Court erred when it held that it was not necessary for the respondent, the Commonwealth, to support, by evidence, its claim that Fernando had suffered no loss or damage as a result of his false imprisonment, and, accordingly, was entitled to no more than nominal damages. Evidence was required to prove that, even without the unlawful acts and omissions of those acting on behalf of the Commonwealth, Fernando could and would have been detained in any event. No such evidence was adduced.

(b) The applicable principle of law

23. Upon a finding of false imprisonment, the evidentiary burden of proving that the party detained suffered no loss, entitling him or her to no more than nominal damages, moves to the tortfeasor. The burden of proof is discharged by evidence proving that the detainee would have been lawfully detained even without the tortious acts and omissions found.

24. The existence of a lawful power to detain is not sufficient to discharge the burden falling upon the tortfeasor to show that the detainee suffered

no loss and damage. The tortfeasor must lead evidence and prove that the detainee would inevitably have been lawfully detained under the power, even without the tort. Proof that there was a power to detain is insufficient to discharge the burden.

25. Neither the Commonwealth nor the Acting Minister led such evidence in the present case.

(c) The rationale of the principle of law

26. The tort of false imprisonment is a tort of strict liability, and plaintiff is not required to prove special damage.¹

10 27. Members of the Supreme Court of the United Kingdom, in the cases relied upon by the second Full Court, expressed the view that an award of nominal damages devalued the importance of the tort as a guardian of liberty.²

28. An award of nominal damages to a person who has been falsely imprisoned is novel and rare in Australia.

(d) The principle applied to the facts

20 29. Section 189(1) of the *Migration Act 1958* (Cth) [**“the Act”**] that was relied upon by the Commonwealth and the Acting Minister in their Further Re-Amended Defence, casts a duty upon an “officer” to detain a person found in the migration zone who is known or suspected to be an unlawful non-citizen.

30. The Commonwealth and the Acting Minister led no evidence at trial to prove that those person who detained Fernando were “officers” empowered to do so under the *Act*.

31. At no material time was Fernando an unlawful non-citizen and liable to detention under the section.

¹ *Lumba v Secretary of State for the Home Department* [2011] UKSC 12 : at

² At [181], [209], [212], [252] and 344

32. After the first hearing before the primary judge, the respondents, by consent, produced a Gazette Notice purporting to authorise those responsible for Fernando's detention.
33. The first Full Court held that the Gazette Notice did not prove that those who had detained Fernando over the 1,203 days of his detention were "officers" authorised by the Gazette Notice.
34. Upon remittal, the parties were given leave to adduce further evidence. No party availed itself of that opportunity. The Commonwealth did not lead evidence that the persons who detained Fernando over the period of 1,2003 days fell within the terms of the Gazette Notice, and were "officers" within the meaning of section 189(1).
35. Accordingly, there was no evidence before the second Full Court or the primary judge upon remittal that, within the facilities in which Fernando was detained over the 1,203 days, there were persons qualified as "officers" under the provisions of section 189(1), and that there were in place procedures ensuring that those officers knew or reasonably suspected that Fernando was an unlawful non-citizen liable to detention.
36. There was in this case no relevant counterfactual, established by evidence, available to either the primary judge or the Full Court from which it could be determined that Fernando would have been lawfully detained even in the absence of the acts and omissions that established the finding of false imprisonment.
37. In the cases of *Lumba* and *Mighty* relied upon by the Commonwealth, the primary judge, and the second Full Court, the appellants' criminal records and the risk of them absconding, established by evidence, were such that, even if the lawful published policy had been applied, it was inevitable, on the evidence, that they would have been detained.³

³ *Abdi & Ors v Secretary of State for the Home Department* [2008] EWHC 3166 (Admin). Davis J was satisfied that *Mighty* "would have been and was kept in detention irrespective of the new policy, and that such detention was

38. In the case of Kambadzi, the appellant's criminal record and the risk of him absconding, established by evidence, were such that, even if the prescribed reviews had been carried out, it was inevitable, on the evidence, that he too would have remained in immigration detention. 4

39. In *CPCF v Minister for Immigration and Border Protection & Anor Kiefel J*⁵ and *Keane J*⁶ held on the agreed facts that, if the detainee had not been taken to waters off the coast of India, it was inevitable that he would have been brought to Australia, where he would have been detained in immigration detention. He had, therefore, suffered no loss that would have entitled them to more than nominal damages. Hayne and Bell JJ found that damages could not be decided on the facts recorded in the Special Case, and would have remitted the question to be determined at trial.⁷

40. No such counterfactual was established by evidence or agreed facts in the present case. A series of counter-hypotheticals was required to demonstrate that Fernando would have been detained without the tort and had therefore suffered no loss. The tort of false imprisonment commenced when he was taken into custody upon his release on parole from Acacia prison and continued thereafter for 1,203 days. Without the tort, unlike Messrs Lumba, Mighty, Kambadzi and the maritime

lawful and justifiable.": at [196]. On the evidence he had a very bad record of serious criminality, and a very high risk of reoffending, and absconding: at [191]. His claim for damages for unlawful detention accordingly failed.

There was nothing to show that Lumba was initially or subsequently detained by application of the unlawful policy. On the reviews carried out there was a high risk of serious reoffending and absconding. On the evidence "*not only could the defendant properly and lawfully detain Mr Lumba, but the defendant properly and lawfully did so.*": at [203]

4 *R(SK) v Secretary of State for the Home Department* [2008] 98 (Admin). By the time of the hearing Kambadzi had been in immigration detention for 22 months: at [38]. Munby J details evidence of the required reviews and the failure to carry them out at [38] to [40]; and to the inadequacy of those that were carried out: at [76] to [78]. He dismissed Kambadzi's application for an order that he be discharged from detention, but concluded that there would have to be an inquiry as to the damages to which he was entitled for his previous unlawful detentions: at [135].

5 At [325]

6 At [512].

7 At [157], Answer to Question 7.

powers detainee, he would have been free to go about his business and rebuild his life.

Part VII: Applicable Statutes

41. The Part is set out on a separate page.

Part VIII: Orders sought

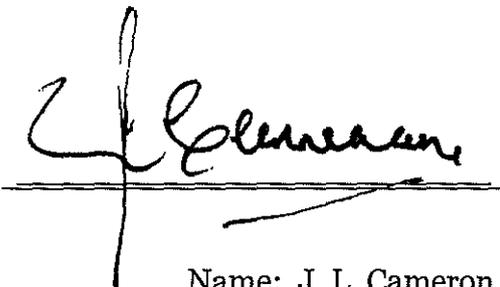
42. The proceeding be remitted to the primary judge for the assessment of the substantial compensatory damages, including, if warranted, aggravated and exemplary damages, compensating him for his unlawful imprisonment for 1,203 days.

10 43. The respondents pay the appellant's costs.

Part IX: Estimate of time

44. Counsel estimates than one and a half hours will be required for the presentation of the appellant's oral argument.

Dated: 18 September 2015



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Part VII

Section 189(1) of the Migration Act 1958(Cth)

189 Detention of unlawful non-citizens

- (1) If an officer knows or reasonably suspects that a person in the migration zone (other than an excised offshore place) is an unlawful non-citizen, the officer must detain the person.
- (2) If an officer reasonably suspects that a person in Australia but outside the migration zone:
- 10 (a) is seeking to enter the migration zone (other than an excised offshore place); and
- (b) would, if in the migration zone, be an unlawful non-citizen;
- the officer may detain the person.
- (3) If an officer knows or reasonably suspects that a person in an excised offshore place is an unlawful non-citizen, the officer must detain the person.
- (4) If an officer reasonably suspects that a person in Australia but outside the migration zone:
- 20 (a) is seeking to enter an excised offshore place; and
- (b) would, if in the migration zone, be an unlawful non-citizen;
- the officer may detain the person.
- (5) In subsections (3) and (4) and any other provisions of this Act that relate to those subsections, **officer** means an officer within the meaning of section 5, and includes a member of the Australian Defence Force.

Amendments

- 30 44. The *Migration Amendment (Detention Arrangements) Act 2005* (Cth) added at the end of section 189(1):

Note: See Subdivision B for the Minister's power to determine that people who are required or permitted by this section to be detained may reside at places not covered by the definition of *immigration detention* in subsection 5(1).

45. The *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* (Cth) inserted after subsection 189(3) subsection 3A:

10 46. By consequential amendment, in subsection 189(3) the words "*other than a person referred to in subsection (3A)*" were inserted after the words "*a person*"; for the words "*may detain*" were substituted "*must detain*"; and in subsection 189(5) "*, (3A)*" was inserted after "*subsections (3)*".

47. The *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act* amended subsection 189(2) by omitting the words "*must detain*" and substituting "*may detain*", and repealed paragraph 189(3A)(3) substituting:

(a) is a citizen of Papua New Guinea; and

Section 196 of the *Migration Act 1958* (Cth)

20 **Duration of detention**

(1) An unlawful non-citizen detained under section 189 must be kept in immigration detention until:

(a) he or she is removed from Australia under section 198 or 199; or

(b) he or she is deported under section 200; or

(c) he or she is granted a visa.

(2) To avoid doubt, subsection (1) does not prevent the release from immigration detention of a citizen or a lawful non-citizen.

- (3) To avoid doubt, subsection (1) prevents the release, even by a court, of an unlawful non-citizen from detention (otherwise than as referred to in paragraph (1)(a), or (b)) unless the non-citizen has been granted a visa.
- (4) Subject to paragraphs (1)(a), (b) and (c), if the person is detained as a result of the cancellation of his or her visa under section 501, the detention is to continue unless a court finally determines that the detention is unlawful, or that the person detained is not an unlawful non-citizen.
- 10 (4A) Subject to paragraphs (1)(a), (b) and (c), if the person is detained pending his or her deportation under section 200, the detention is to continue unless a court finally determines that the detention is unlawful.
- (5) To avoid doubt, subsection (4) or (4A) applies:
- (a) whether or not there is a real likelihood of the person detained being removed from Australia under section 198 or 199, or deported under section 200, in the reasonably foreseeable future; and
- (b) whether or not a visa decision relating to the person detained is, or may be, unlawful.
- (5A) Subsections (4) and (4A) do not affect by implication the continuation of the detention of a person to whom those subsections do not apply.
- (6) This section has effect despite any other law.
- 20 (7) In this section:
- "visa decision "* means a decision relating to a visa (including a decision not to grant the visa, to cancel the visa or not to reinstate the visa).

Amendments

48. The section was substantially amended by the Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012:

196 Duration of detention

- 30 (1) An unlawful non-citizen detained under section 189 must be kept in immigration detention until:
- (a) he or she is removed from Australia under section 198 or 199; or
- (aa) an officer begins to deal with the non-citizen under subsection 198AD(3); or

- (b) he or she is deported under section 200; or
 - (c) he or she is granted a visa.
- (2) To avoid doubt, subsection (1) does not prevent the release from from immigration detention of a citizen or a lawful non-citizen.
- (3) To avoid doubt, subsection (1) prevents the release, even by a court, of an unlawful non-citizen from detention (otherwise than as referred to in paragraph (1)(a), (aa) or (b)) unless the non-citizen has been granted a visa.
- 10 (4) Subject to paragraphs (1)(a), (b) and (c), if the person is detained as a result of the cancellation of his or her visa under section 501, the detention is to continue unless a court finally determines that the detention is unlawful, or that the person detained is not an unlawful non-citizen.
- (4A) Subject to paragraphs (1)(a), (b) and (c), if the person is detained pending his or her deportation under section 200, the detention is to continue unless a court finally determines that the detention is unlawful.
- (5) To avoid doubt, subsection (4) or (4A) applies:
- (a) whether or not there is a real likelihood of the person detained
20 being removed from Australia under section 198 or 199, or deported under section 200, in the reasonably foreseeable future; and
 - (b) whether or not a visa decision relating to the person detained is, or may be, unlawful.
- (5A) Subsections (4) and (4A) do not affect by implication the continuation of the detention of a person to whom those subsections do not apply.
- (6) This section has effect despite any other law.
- (7) In this section:

visa decision means a decision relating to a visa (including a decision not to grant the visa, to cancel the visa or not to reinstate the visa)

Section 5, “officer”.

1. Paragraph (c) has been amended by substituting “*Australian Federal Police Act 1979*” for “*Australian Protective Service Act 1987*”.