

FERNANDO (BY HIS TUTOR LEY) v COMMONWEALTH OF AUSTRALIA & ANOR (P37/2015)

Court appealed from: Full Court of the Federal Court of Australia
[2014] FCAFC 181

Date of judgment: 22 December 2014

Date special leave granted: 14 August 2015

The appellant is a Sri Lankan citizen who was granted a permanent residency visa in 1995. In July 1998, he was convicted of three counts of sexual penetration without consent, and was sentenced to eight years' imprisonment. In 2001, the Minister cancelled the appellant's visa under s 501(2) of the *Migration Act 1958* (Cth) ("the Act"). The appellant brought a successful application for judicial review of that decision in the Federal Court. The Minister then decided to reinstate the cancellation process and the Acting Minister cancelled the appellant's visa on 3 October 2003. When the appellant was released on parole on 5 October 2003, he was immediately taken into immigration detention.

On 2 October 2003, the appellant had brought an application for judicial review in respect of the Acting Minister's decision to cancel his visa. Following the Federal Court decision in *Sales v Minister for Immigration and Multicultural Affairs* [2006] FCA 1807, the Department conducted a review of cases which might, in effect, be similar to *Sales*. The appellant's case was identified as one such case and he was released from detention on 18 January 2007. On 24 January 2007, orders were made by consent in the proceedings then on foot, quashing the cancellation of the appellant's visa. He had spent 1,203 days in immigration detention. The appellant then brought a claim for damages against the respondents relying on various causes of action, including the tort of false imprisonment. The primary judge (Siopis J) found that he had been falsely imprisoned for one day and awarded him the amount of \$3,000 in damages. His Honour found that the appellant's detention had been lawful on and from the second day. (In a separate judgment Siopis J awarded the appellant \$25,000 by way of exemplary damages against the 1st respondent).

The respondents appealed to the Full Federal Court, and the appellant cross-appealed. The appeal was dismissed, but the appellant's cross-appeal against the primary judge's holding that he had not been falsely imprisoned on and from the second day of his detention was successful and the issue of damages was remitted to the primary judge. After the Full Court had made its orders, but before the primary judge had considered the issue of damages on the remitter, two United Kingdom decisions (*Kambadzi v Secretary of State for the Home Department* [2011] 1 WLR 1299 and *Regina (Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245) were handed down. These decisions provided the basis for a new issue: whether the appellant should be awarded no more than nominal damages in respect of his false imprisonment because he could and would have been lawfully detained in any event.

On the remitter, the primary judge ordered that the respondents pay the appellant nominal damages in the amount of \$1.00. The primary judge found the provisions of the Act rendered the appellant's detention following the cancellation of his visa inevitable or virtually inevitable. His Honour said that it followed by reference to the

application of ordinary compensatory principles in tort that the appellant did not suffer any loss by reason of his unlawful detention for 1,203 days which warranted an award of substantial damages. (The primary judge ordered that the 1st respondent pay the appellant \$25,000 in exemplary damages).

The appellant appealed and the 1st respondent cross-appealed. In the Full Federal Court (Besanko, Barker and Robertson JJ), one of the main issues was whether the primary judge had erred in awarding nominal damages only. The respondents submitted that, even though the appellant had been unlawfully detained for 1,203 days, he could, and would, have been lawfully detained in any event, and it followed that he was not entitled to compensatory damages. This was because, having regard to the cancellation of his visa by the Acting Minister, an officer could, and would, have formed the reasonable suspicion referred to in s 189(1) of the Act. The appellant would then have been kept in immigration detention under s 196(1) of the Act, and the fact that he was challenging the decision to cancel his visa on the ground that it was unlawful, would not have affected the statutory requirement in s 196 of the Act to keep him in immigration detention.

The Court found that contention was correct. It was consistent with the principle identified in *Lumba* and subsequent cases in the United Kingdom. This was not a new principle: it was a basic principle relevant to the award of compensatory damages under Australian common law as much as the common law of the United Kingdom. Unless there was reason to think that the principle had been excluded by the particular statutory context, then it should be applied. No statutory provisions suggesting the exclusion of the principle were identified in this case. The Full Court dismissed the appellant's appeal and allowed the cross-appeal quashing the order for payment of \$25,000 by way of exemplary damages.

The ground of appeal is:

- In dismissing the appellant's appeal, and allowing the respondent's cross-appeal, the Full Court erred when it upheld the finding of the primary judge that the appellant was entitled to only nominal damages for the 1,203 days on which he had been unlawfully detained.