SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY
COURT OF APPEAL

Case Title:	**Lewis v Australian Capital Territory**
Citation:	**[2019] ACTCA 16**
Hearing Date:	15 May 2019
Decision Date:	24 June 2019
Before:	Elkaim, Loukas-Karlsson and Charlesworth JJ
Decision:	See [77]
Catchwords:	**APPEAL** – GENERAL PRINCIPLES – In general and right of appeal – Appeal against award of nominal damages – judgment awarded in the sum of $1.00 **HUMAN RIGHTS** – CIVIL AND POLITICAL RIGHTS – unlawful imprisonment – unlawful cancellation of periodic detention order – 82 days in custody – principle of inevitability – whether or not it was inevitable that the appellant would be imprisoned **DAMAGES** – PRINCIPLES OF DAMAGES – compensation and vindication – exemplary damages abandoned – vindicatory damages as a separate head of damages
Legislation Cited:	*Crimes* (*Sentence Administration*) *Act 2005* (ACT) ss 59, 66, 68, 69, 73, 75 *Crimes Act 1900* (ACT) s 23 *Human Rights Act 2004* (ACT) s 18
Cases Cited:	*Australian Capital Territory v Lewis* [2016] ACTCA 34; 311 FLR 77 *Fernando v Commonwealth & anor* [2014] FCAFC 181; 231 FCR 251 *Gray v Richards (No 2)* [2014] HCA 47; 315 ALR 1 *Jones v Dunkel* (1959) 101 CLR 298 *Lamb v Cotogno* (1987) 164 CLR 1 *Lewis v Chief Executive Department of Justice and Community Safety & Ors* [2013] ACTSC 198; 280 FLR 118 *Lewis v Chief Executive Department of Justice and Community Safety & Ors (No 2)* [2014] ACTSC 196 *Lewis v Australian Capital Territory* [2015] ACTSC 167; 301 FLR 102 *Lewis v Australian Capital Territory (No 2)* [2015] ACTSC 343 *R (Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245
Texts Cited:	*McGregor on Damages* (Sweet & Maxwell, 14th ed, 1980)

Parties:	Steven James Lewis (Appellant)	
	The Australian Capital Territory (Respondent)	
Representation:	**Counsel**	
	J Maconachie QC (Appellant)	
	P Garrison AM SC (Respondent)	
	Solicitors	
	Ken Cush & Associates (Appellant)	
	ACT Government Solicitor (Respondent)	
File Number:	ACTCA 35 of 2018	
Decision under appeal:	Court:	ACT Supreme Court
	Before:	Refshauge J
	Date of Decision:	16 February 2018
	Case Title:	Lewis v Australian Capital Territory
	Citation:	[2018] ACTSC 19

THE COURT:

The Appeal

1. On 16 February 2018, Refshauge J made the following orders:

    (a) There be judgment for Steven James Lewis in the sum of $1.00; and

    (b) Unless any party applies by written submission within seven days for any other order, each party pay their own costs.

2. A Notice of Appeal against the above orders was filed on 23 November 2018.

3. The appellant complains that his Honour erred in only awarding him nominal damages.

Background

4. The origin of this matter lies in the conduct of the appellant on 21 September 2007 when he inflicted actual bodily harm on another person by smashing a glass into that person's face.

5. On 24 January 2008, having pleaded guilty to an offence under s 23 of the *Crimes Act 1900* (ACT), the appellant was sentenced to a period of 12 months' imprisonment, by Magistrate Fryar, to be served by way of periodic detention.

6. The appellant, perhaps not appreciating the benefits of not having a full-time prison sentence, failed to attend on several of the weekends when he should have presented himself at the prison.

7. As a result of his conduct, on 8 July 2008 the Sentence Administration Board (the SAB), cancelled the periodic detention order. The appellant was arrested on 5 January 2009 and detained in prison until 27 March 2009 (82 days), when he was granted bail.

8. The appellant challenged the validity of the decision made by the SAB to cancel the periodic detention. The challenge was heard by Refshauge J in July and November 2009 but not decided until 1 October 2013 (*Lewis v Chief Executive Department of Justice and Community Safety* [2013] ACTSC 198; 280 FLR 118). His Honour found that "the decision to cancel the periodic detention of Mr Lewis was flawed and it should be set aside and the decision remitted for reconsideration" at [394].

9. The reason the decision was flawed was because the appellant had not attended at the SAB's hearing notwtithstanding that the SAB had sent him letters inviting him to attend (at [205]):

> In those circumstances, it cannot be said that I can be satisfied, from the evidence, that Mr Lewis has had the opportunity he should have been afforded to decide whether to attend before the Board or not. Whether he took advantage of the opportunity or not, he should have actually had it.

10. There was no appeal from that decision so that its seeming illogicality, against the background of all the correspondence from the SAB that had been ignored by the appellant, cannot here be the subject of further comment.

11. What can be the subject of comment however, is that this Court recognises that no matter what the subjective factors of the appellant are, including his criminal behaviour that began the process leading to this appeal, any legal rights that he has must be recognised and given effect to, no matter how apparently unmeritorious the background might seem.

12. On 14 August 2014 Refshauge J handed down his decision on costs (*Lewis v Chief Executive Department of Justice and Community Safety (No 2)* [2014] ACTSC 196). His Honour considered that the appellant had been partially successful in the proceedings and ordered that the respondents pay 35% of his costs.

13. In October 2014 and June 2015, Foster J heard an application brought by the appellant seeking a declaration that the imprisonment order that had been made by the Magistrate had expired. On 3 July 2015 his Honour declared, inter alia, that the sentence of imprisonment had expired (*Lewis v Australian Capital Territory* [2015] ACTSC 167; 301 FLR 102).

14. On 6 November 2015, Foster J made a costs orders arising from his decision on 3 July 2015 (*Lewis v Australian Capital Territory (No 2)* [2015] ACTSC 343).

15. On 15, 16 and 17 February 2016, Refshauge J heard the matter which is the subject of this appeal. He reserved his decision until 16 February 2018.

16. A separate decision on costs was handed down on 14 August 2018.

17. In the meantime an appeal by the ACT challenging the declarations made by Foster J was unsuccessful (*Australian Capital Territory v Lewis* [2016] ACTCA 34; 311 FLR 77). The appeal was heard on 10 May 2016 and decided on 4 August 2016.

The decision under appeal

18. The appellant sought damages, in tort, for false imprisonment and also compensation under s 18(7) of the *Human Rights Act 2004* (ACT) (the HRA). The right to the damages and compensation was said to arise from the 82 days imprisonment which followed the cancellation of the periodic detention order by the SAB.

19. The respondent submitted, before Refshauge J, that the appellant was not entitled to damages or compensation. His Honour reached this conclusion (at [216]-[217]):

> For these reasons, I am satisfied that the decision of the Board was a nullity; that is, it was void when made and not merely when I set it aside in *Lewis (No 1)* and that the detention of Mr Lewis resulting from it was unlawful.
>
> In those circumstances, Mr Lewis was not detained in custody under any legal power and his imprisonment was not justified. He was falsely imprisoned.

20. The primary judge considered damages arising in three ways: common law damages for false imprisonment, compensation derived from s 18 of the HRA and Public Law damages. The third of these categories of damages was not emphasised in the appeal. Rather, the focus was placed on a claim for "vindicatory damages".

21. In respect of the HRA, his Honour found, at [531]:

> Accordingly, I am satisfied that there is no public law remedy, especially compensation by vindicatory damages, available under the *Human Rights Act* or, at the very least, for a breach of the rights set out in s 18(1) and (2) and, in particular, the breaches of which I have found that Mr Lewis was a victim.

22. His Honour then found, at [541], that Public Law damages would not achieve any result, in this case, that was not achieved "by an award of exemplary damages in common law claims against the Territory…".

23. Consequently, the only avenue for the awarding of damages was common law damages arising from the tort of false imprisonment. His Honour concluded that "despite the false imprisonment" the appellant was only entitled to nominal damages. This finding extended to both compensatory and aggravated damages. His Honour noted that the claim for exemplary damages had been abandoned and any claim for special damages (essentially loss of wages) was not particularised and ultimately not pressed.

24. The primary judge went on to say that if he was wrong in finding an entitlement to only nominal damages, that he would have assessed damages at $100,000 and that he would not have included any amount for aggravated damages.

25. Put concisely, the primary judge concluded that the appellant was always going to serve the 82 days in prison. Accordingly there was no term of imprisonment giving rise to damages. This was described as the inevitability argument.

Inevitability

26. The inevitability argument, in this Court's view, determines this appeal. It is therefore necessary to examine the argument in some detail.

27. His Honour began the assessment of general damages with this fundamental observation, at [226]:

> A primary consideration is the loss of liberty occasioned by the imprisonment. Liberty is an important value which the courts recognise.

28. At [229] his Honour quoted from *McGregor on Damages* (Sweet & Maxwell, 14th ed, 1980) at 922:

> The principal head of damage would appear to be the injury to liberty, i.e. the losses of time considered primarily from a non-pecuniary point of view and the injury to feeling i.e. the indignity, mental suffering, disgrace and humiliation with any attendant loss of social status.

29. At [233] his Honour recognised that damages might include personal injury:

> In addition, any personal injury suffered by the plaintiff, including any deleterious effect on his or her health, is a matter that may be included in the damages for which the plaintiff is to be compensated: *New South Wales v Williamson* [2012] HCA 57; 248 CLR 417 at 428-9; [33].

30. The primary judge dealt with inevitability under the heading of Quantum of Damages, commencing at [316] of the judgment.

31. The appellant submitted that it was not inevitable that the appellant would have been sent to prison because it was not inevitable that the SAB would cancel his periodic detention order.

32. The first step is to set out the background facts. These are contained in an Agreed Statement of Facts:

> 1. On 3 December 2007, in the course of preparing a Pre Sentence Report, and by signing a document setting out the obligations of offenders under section 43 of the *Crimes (Sentence Administration) Act 2005* ("the *C(SA) Act*"), the plaintiff agreed to an order that he serve any sentence of imprisonment by way of periodic detention and signed an acknowledgement of his obligations under a periodic detention order.
>
> 2. On 24 January 2008 the plaintiff was convicted by Magistrate Fryar in the ACT Magistrate's Court in respect of an offence being CC2007/10691 (recklessly or intentionally inflict actual bodily harm). The Magistrate ordered:
>
> (i) STEVEN JAMES LEWIS, **[REDACTED]** of 9 BURROWES PLACE, WANNIASSA, ACT 2903 be sentenced to a total term of imprisonment of 12 months the sentence starts on 24 January 2008, ends on 23 January 2009 and is to be served as periodic detention;
>
> (ii) The periodic detention period starts on 25 January 2008; and
>
> (iii) The offender is to first report for periodic detention at Symonston Periodic Detention Centre, Mugga Lane, Red Hill ACT on 25 January 2008 at 7.00 pm.
>
> 3. Between 24 January 2008 and 11 May 2008, the plaintiff reported to the Symonston Periodic Detention Centre and performed periodic detention.
>
> 4. Between 24 January 2008 and 11 May 2008, the plaintiff breached his periodic detention obligations:
>
> (i) By failing to report to Symonston Periodic Detention Centre for the periods commencing 1 February 2008, 28 March 2008 and 4 April 2008; and
>
> (ii) By reporting for periodic detention, but providing a positive test sample for alcohol and being directed not to perform periodic detention on 11 April 2008.
>
> 5. On 11 April 2008, the plaintiff signed a breath screening analysis printout and summary statement and by signing an allegation of breach and direction to leave;
>
> 6. On 19 April 2008, the plaintiff signed an acknowledgement of having received a notice of inquiry relating to the alleged breaches for the periods commencing 1 February 2008, 28 March 2008, 4 April 2008 and 11 April 2008, dated 19 April 2008.
>
> 7. On or about 12 May 2008, without informing the defendant, the plaintiff left Canberra to work in Griffith. From that date, the plaintiff did not report for periodic detention, nor did he again reside with his mother at her home.
>
> 8. Between 12 May 2008 and 7 July 2008, the Board sent correspondence to the plaintiff's mother's address in Wanniassa, relating to the breaches above, other alleged breaches, its proposed inquiries and its directions for him to attend the inquiries. His mother did not send the correspondence onto the plaintiff.

9. On or about 7 July 2008, the plaintiff returned from Griffith to Canberra. At his mother's address, he saw that there were five to six letters addressed to him which he believed to be from ACT Corrective Services. The plaintiff panicked and left his mother's home. He did not read the letters.

10. On 8 July 2008 the defendant by its Board officials the Deputy Chair and Presiding member Ms S Willings, member Mr R Maxwell and member Mr P Budworth conducted a Section 66 inquiry in the absence of the plaintiff. Minutes of the meeting were taken and recorded by the Board.

11. At or about 9.25 am on 5 January 2009 the plaintiff was arrested by members of the Australian Federal Police acting on authority of a warrant issued by the Board at Capital Car Detailing, Fyshwick, ACT and taken to the Regional Watch House.

12. At or about 9:00 am on 6 January 2009, as part of his admission to the Alexander Maconochie Centre, the plaintiff completed an Induction Assessment form.

13. On 6 January 2009 the secretary of the Board executed a warrant for imprisonment under section 12(1) of the *C(SA) Act* directed to the Chief Executive of the Department of Justice and Community Safety and her delegates under the *C(SA) Act* to keep the plaintiff under full time detention under section 13 of the *C(SA) Act* and the *Corrections Management Act 2007* for 9 months 1 week and 3 days to commence from 5 January 2009 and expire 14 October 2009.

14. On 27 March 2009, in the plaintiff's application, the Chief Justice of the Supreme Court granted bail to the plaintiff and he was released from custody.

15. On 1 October 2013, by Order of the Supreme Court, the decision of the Board taken on 8 July 2008 was set aside.

33. It can be immediately seen from the facts that, commencing on 24 January 2008 the appellant breached his periodic detention obligations. On 19 April 2008, he signed an acknowledgement relating to the breaches that had occurred between 1 February 2008 and 19 April 2008. Then on 12 May 2008 the appellant, without telling the respondent, left Canberra and went to Griffith in New South Wales. Consequently he did not attend for periodic detention.

34. It was not disputed that the appellant was absent from periodic detention on 10 separate occasions.

35. The respondent wrote to the plaintiff at his mother's address on six occasions. His mother did not pass the letters onto the appellant. However when he came back from Griffith, on about 7 July 2008, the plaintiff saw the letters addressed to him and, believing they had emanated from ACT Corrective Services, he left his mother's home and did not read the letters.

36. The letters were in fact requests that the appellant attend upon the SAB for the question of his breaches to be considered. On 8 July 2008 the SAB revoked the appellant's periodic detention. He was arrested on 5 January 2009, which began his 82 days in custody until he was granted bail on 27 March 2009.

37. The next step is to set out a number of sections from the *Crimes* (*Sentence Administration*) *Act 2005* (ACT), as it was at the time:

> **59 Failing to perform periodic detention—referral to board**
>
> The chief executive must apply to the board for an inquiry under section 66 (Board inquiry—breach of periodic detention obligations) if section 58 applies to an offender for a second or subsequent detention period of the offender's periodic detention period.

66 Board inquiry—breach of periodic detention obligations

(1) The board may, at any time, conduct an inquiry to decide whether an offender has breached any of the offender's periodic detention obligations.

(2) To remove any doubt, the board may conduct the inquiry—

(a) before the start of the periodic detention period of the offender's sentence of imprisonment; and

(b) in conjunction with any other inquiry under this Act in relation to the offender.

(3) The board may conduct the inquiry—

(a) on its own initiative; or

(b) on application by the chief executive.

(4) If the chief executive applies under section 59 (Failing to perform periodic detention—referral to board) for an inquiry, the board must conduct the inquiry as soon as practicable.

(5) If an offender is arrested under section 64 (Arrest without warrant —breach of periodic detention obligations) or section 65 (Arrest warrant—breach of periodic detention obligations), the board must conduct the inquiry as soon as practicable.

68 Board powers—breach of periodic detention obligations

(1) This section applies, if after conducting an inquiry under section 66 (Board inquiry breach of periodic detention obligations) in relation to an offender, the board decides the offender has breached any of the offender's periodic detention obligations.

(2) The board may do 1 or more of the following:

(a) take no further action;

(b) give the offender a warning about the need to comply with the offender's periodic detention obligations;

(c) give the chief executive directions about the offender's supervision;

(d) change the offender's periodic detention obligations by imposing or amending an additional condition of the offender's periodic detention;

(e) suspend the offender's periodic detention for a stated period, but not past the end of the offender's periodic detention period;

(f) cancel the offender's periodic detention.

Note Section 69 and s 70 require the board to cancel the offender's periodic detention in certain circumstances.

(3) An additional condition of a periodic detention must not be inconsistent with a core condition of the periodic detention.

(4) To remove any doubt, if an inquiry under section 66 in relation to an offender is conducted in conjunction with another inquiry under this Act in relation to the offender, the board may exercise its powers under this division with any other powers of the board in relation to the other inquiry.

69 Cancellation of periodic detention—repeated failures to perform

(1) This section applies if—

(a) the chief executive applies to the board under section 59 (Failing to perform periodic detention—referral to board) for an inquiry in relation to an offender; and

(b) at the inquiry, the board decides that section 58 (Failing to perform periodic detention—extension of periodic detention period) applies to the offender in relation to 2 or more detention periods of the offender's periodic detention period.

Examples of s 58 applying to offender

1 or more of the following apply to the offender:

- without approval under section 55 (Periodic detention—approval not to perform etc), the offender fails to report to perform periodic detention for a detention period
- without approval under section 55 (Periodic detention—approval not to perform etc), the offender reports late to perform detention for a detention period and is directed under section 58 not to perform periodic detention and to leave the reporting place
- when reporting to perform periodic detention for a detention period, the offender gives a positive test sample in response to a direction under section 45 (Periodic detention—alcohol and drug tests) and is directed under section 58 not to perform periodic detention and to leave the reporting place

Note An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

(2) The board must, as soon as practicable, cancel the offender's periodic detention under section 68.

(3) To remove any doubt, this section does not limit the circumstances in which the board may cancel the offender's periodic detention under section 68.

73 Board inquiry—management of periodic detention

(1) The board may, at any time, conduct an inquiry to review an offender's periodic detention.

(2) Without limiting subsection (1), the board may conduct an inquiry to consider whether periodic detention is, or would be, suitable for the offender.

Examples

1 the indicators of unsuitability for periodic detention set out in the *Crimes (Sentencing) Act 2005*, table 79

2 the history of managing the offender under periodic detention

Note An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

(3) To remove any doubt, the board may conduct the inquiry—

(a) before the start of the periodic detention period of the offender's sentence of imprisonment; and

(b) in conjunction with any other inquiry under this Act in relation to the offender.

(4) The board may conduct the inquiry—

(a) on its own initiative; or

(b) on application by the offender or the chief executive.

75 Board powers—management of periodic detention

(1) After conducting an inquiry under section 73 (Board inquiry— management of periodic detention) in relation to an offender, the board may do 1 or more of the following:

(a) take no further action;

(b) give the chief executive directions about the offender's supervision;

(c) change the offender's periodic detention obligations by imposing an additional condition on, or amending a condition of, the offender's periodic detention;

(d) give the offender approval not to perform periodic detention for up to 8 detention periods if satisfied that is appropriate having regard to the offender's health or any exceptional circumstances;

(e) if subsection (4) applies—cancel the offender's periodic detention;

(f) if subsection (5) applies—refer the offender to the offender's sentencing court to be dealt with under section 82A (Re-sentencing offender etc—referral to court).

Example of additional condition for par (c)

a condition prohibiting association with a particular person or being near a particular place

Note An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

(2) An additional condition of a periodic detention must not be inconsistent with a core condition of the periodic detention.

(3) For each detention period for which an offender has the board's approval not to perform periodic detention, the periodic detention period of the offender's sentence of imprisonment, and the term of the sentence, are automatically extended by 1 week.

(4) This subsection applies if the board decides any of the following:

(a) that the periodic detention should be cancelled on the offender's application;

(b) that periodic detention is, or would be, no longer suitable for the offender. Examples of unsuitability—par (b) the indicators set out in the *Crimes (Sentencing) Act 2005*, table 79, the offender's health or exceptional circumstances Note An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see *Legislation Act*, s 126 and s 132).

(5) This subsection applies if the board decides that the offender is, for any reason, unlikely to be able to serve the remainder of the offender's periodic detention period by periodic detention, having regard particularly to—

(a) the offender's health; and

(b) any exceptional circumstances affecting the offender.

(6) To remove any doubt, if an inquiry under section 73 in relation to an offender is conducted in conjunction with another inquiry under this Act in relation to the offender, the board may exercise its powers under this division with any other powers of the board in relation to the other inquiry.

38. The third step is to examine the actions of the SAB in dealing with the appellant. On 21 June 2008, ACT Corrective Services submitted a Breach Report to the SAB recommending the cancellation of the appellant's periodic detention order (Appeal Folder A page 252). It is evident that the report is made on behalf of the Chief Executive, that it is made pursuant to s 59 and the cancellation recommendation is made under s 69.

39. The SAB was bound to conduct the inquiry sought in the Breach Report (s 66(4)). On 24 June 2008, the SAB met for this purpose (Appeal Folder A, page 262). The appellant was not present because he had not opened the letters inviting him to attend. The SAB found the breach of conditions had been proved and resolved to cancel the periodic detention order. It specifically stated that "in making this decision the board noted the submissions provided and that pursuant to s 69 of the Act, it was required to cancel Mr Lewis's periodic detention order because it had found proved the allegation that he failed to perform periodic detention on two or more occasions without reason."

40. Thus the result was dictated by the pre-conditions in s 69 having been met.

41. At the same time as it was conducting the inquiry under s 66 the SAB also conducted an inquiry under s 73. This is an inquiry concerned with the management of a periodic detention order. Section 75 provides the powers available to the SAB in conducting such an inquiry. In this matter, because the board had resolved to cancel the periodic detention orders, there was nothing left for it to do by way of management, and it therefore resolved to "TAKE NO FURTHER ACTION" (Appeal Folder A, page 267).

42. Sometime after 24 June 2008 the SAB, for reasons which are unclear, decided that the meeting on 24 June had lacked the required quorum. It therefore decided to meet again on 8 July 2008. The appellant was told about the problem with the 24 June 2008 meeting (Appeal Folder A, page 272) and was invited to make submissions for, and attend, the inquiry on 8 July 2008 (Appeal Folder A, page 282). He neither made submissions nor attended.

43. On 8 July 2008, the SAB again cancelled the periodic detention order (Appeal Folder A, page 301). It used different wording to that used on 24 June 2008. On this occasion the Evidentiary Certificate states:

> The board found proved the breach of conditions and pursuant to section 68 (2) (f) of the Act, resolved to CANCEL Steven Lewis PERIODIC DETENTION order.

44. The change in wording adopted by the board as between the above two Evidentiary Certificates, of 24 June and 8 July 2008 respectively, is central to the appellant's argument.

45. On 8 July 2008, the SAB also conducted a s 73 inquiry with the same result. It resolved to "TAKE NO FURTHER ACTION" (Appeal Folder A, page 309).

46. The appellant's argument is as follows:

    (a) The wording of the Evidentiary Certificate of 8 July 2008, and in particular the absence of any reference to s 69, suggests that the SAB was not necessarily conducting its inquiry as a result of the report made under s 59.

    (b) The SAB could equally consistently have been conducting the inquiry pursuant to s 66(3)(a). If that were the case it would not have been bound to act under s 69 and would have had all of the options available to it under s 68.

    (c) Because the respondent had not advanced any evidence before the primary judge, to suggest the inquiry was being conducted as a result of a s 59 report, the rules concerning the drawing of inferences (as set out in *Jones v Dunkel* (1959) 101 CLR 298) should be applied in favour of the appellant.

(d) It then followed, that if the inquiry on 8 July 2008 was not being conducted in response to a s 59 report, then it was not inevitable that cancellation would ensue.

(e) The conducting of the s 73 inquiry was consistent with this conclusion because there would have been no point in such an inquiry, namely a consideration of the management of the appellant's periodic detention, if the periodic detention was bound to be cancelled.

47. The flaw in the appellant's argument can be simply stated. Once the s 59 breach report had been submitted to the SAB it had no choice but to conduct the inquiry (s 66(4)). Upon conducting the inquiry, in turn, the SAB had no choice but to cancel the periodic detention order (s 69(1) and (2)).

48. The fact that the Evidentiary Certificate for 8 July 2008 refers only to s 68 is not any point of distinction. This is because the cancellation dictated by s 69, is actually made under s 68 (see s 69(2)).

49. The conducting of the inquiry under s 73 takes the matter no further because the SAB was clearly not concerned with the management of the periodic detention. This is a direct result of there being no management options consequent upon the cancellation of the periodic detention order.

50. The question of a *Jones v Dunkel* inference does not arise because there was no need for the respondent to call any evidence about the source of the s 66 inquiry. The inquiry, as shown above, was a direct and consequent result of the s 59 report.

51. The appellant's argument arising from the detail of the Evidentiary Certificates must therefore fail. To the extent that it was argued that the level of proof required to establish the inevitability had not been met, that argument is also without substance. The primary judge, at [339], said the test was "reasonably high" and "that a defendant must show that the imprisonment improperly imposed was, nevertheless, an inevitability". His Honour continued in the following paragraph:

> In this case, I am satisfied that this level of certainty has been reached. Mr Lewis had been absent for 10 occasions without approval by the time the Board met, though the Board initially only formally considered reports as to four of them. The Chief Executive had not even been approached to approve these absences, as was possible under s 55 of the *Sentence Administration Act*, much less actually approved them. While the Board could review a decision of the Chief Executive not to grant such approval (s 71), there was no application for or decision to review. In any event, under s 55, the Chief Executive could only give approval for two periods of periodic detention in any six-month period. There was no evidence of any kind to suggest why such approval should be given in this case to one such period, much less two.

52. In this Court's view the proof of inevitability was met to an even higher standard than reasonably high. The straightforward application of the sections of the Act, as described above, provides a clear pathway to a finding that imprisonment, consequent upon cancellation of the periodic detention order, was inevitable.

53. The next point, on inevitability, made by the appellant was that the authorities giving rise to the application of the principle of inevitability could be readily distinguished from the present case. The appellant's focus was on *R (Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245 (*Lumba*) and *Fernando v Commonwealth* [2014] FCAFC 181; 231 FCR 251 (*Fernando*). The latter case is important because it confirms that the law in Australia includes the principles stated in *Lumba*.

54. The appellant submitted that *Lumba* and *Fernando* both contained a fundamental, and distinguishing, feature which did not exist in the present case. This was that the inevitability of detention of the relevant detainees arose from a separate source to that which had improperly led to their detention. In other words even if the detainees had not been detained as they were, they would have been detained in any event for different reasons. Thus in *Lumba* it was said that:

> "there was extant an alternative published policy which could and would have been availed of, thereby justifying the 1,203 days that *Lumba* spent in immigration custody".

55. Similarly the Appellant, referring to *Fernando* in his oral submissions at Transcript 10 noted:

> There was the same extant alternative in Fernando. The state of mind of the Australian Federal Police officer which engaged section 199 of the Migration Act and thereby justified and made lawful the detention whilst the detention took place.

56. The difficulty with these submissions is that the inevitability of imprisonment in a given case necessarily depends upon the statutory context. It does not assist the appellant to show that the regime under which his imprisonment was mandated might differ from the regime under which other cases were decided. The underlying compensatory principle is the same.In *Lumba*, for example, Lord Dyson, in a concise conclusion, stated at [169]:

> The appellants are, however, only entitled to nominal damages because, if the Secretary of State had acted lawfully and applied her published policy, it is inevitable that both appellants would have been detained.

57. In this case, it might be said, adopting Lord Dyson's formulation, if the SAB had acted lawfully, applying the relevant provisions of the Act (ie ss 59, 66, 68 and 69), it is inevitable that the appellant would have been detained.

58. The primary judge also referred to an earlier passage from Lord Dyson's judgment, at [95]:

> The question here is simply whether, on the hypothesis under consideration, the victims of the false imprisonment have suffered any loss which should be compensated in more than nominal damages. Exemplary damages apart, the purpose of damages is to compensate the victims of civil wrongs for the loss and damage that the wrongs have caused. If the power to detain had been exercised by the application of lawful policies … it is inevitable that the appellants would have been detained. In short, they suffered no loss or damage as a result of the unlawful exercise of the power to detain. They should receive no more than nominal damages.

59. Turning to *Fernando*, the Full Court of the Federal Court of Australia expressly accepted the principles in *Lumba* as being applicable in Australia (Besanko and Robertson JJ from [81] – [84]):

> 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. He could and would have been lawfully detained if the tort had not been committed 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. He 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. We think that contention is correct.

> This conclusion certainly goes one step further than *Ruddock* (High Court) in that it relates to the damages to be awarded, not the lawfulness of the detention. However, the step is consistent with the principle identified in *Lumba* and subsequent cases in the United Kingdom. We say identified rather than established or enunciated because the principle is not a new one. It is 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 appellant submitted that the respondents' argument should not be accepted for four reasons.
>
> First, he submitted that *Lumba* and the decisions which followed it were of limited assistance because they were decided under different statutory regimes and because this Court is not bound by those decisions. It is true that the decisions were made under different statutory regimes and that this Court is not bound by them. However, as we have said, they identify a basic principle of compensatory damages which is part of the common law of Australia.

60. There is therefore no relevant point of distinction between this case and *Lumba* and *Fernando*.

Vindicative damages

61. There is no doubt that damages can be awarded by way of vindication of a wrong committed against a plaintiff. This is not uncommon, for example, in defamation cases. Even in such cases, the award of damages is compensatory in that its purpose is to vindicate the reputation harmed by the conduct giving rise to the tort. The appellant's position however is to assert that damages for vindication are not a subspecies of any recognised head of damages but are a head of damages in themselves.

62. Exemplary damages are often said to include vindictive damages. The High Court in *Lamb v Cotogno* (1987) 164 CLR 1 said this at page 8:

> Mayne & McGregor on Damages, 12th ed. (1961), p. 196 contains an oft-cited description of exemplary damages:
>
> > "Such damages are variously called punitive damages, vindictive damages, exemplary damages, and even retributory damages. They can apply only where the conduct of the defendant merits punishment, which is only considered to be so where his conduct is wanton, as where it discloses fraud, malice, violence, cruelty, insolence or the like, or, as it is sometimes put, where he acts in contumelious disregard of the plaintiff's rights."

63. The appellant quoted no authority recognising vindication, or vindictive, damages as a separate head, and in particular outside the chapeau of exemplary damages. As mentioned above, the request for exemplary damages had been abandoned. That abandonment took with it any right to vindicative damages.

64. The Court is not satisfied that there is any basis in Australian law upon which the claim for vindicative damages, as a separate head of damages, can be sustained.

65. If the entitlement to 'stand-alone' vindictive damages does exist, there are two reasons why the claim would fail in the present case.

66. Firstly, it was submitted by the appellant, that if his vindication meant no more than his entitlement to a declaration of the unlawfulness of the decision that put him in prison then he should at least be entitled to that declaration and an order for costs in his favour. The finding made by the primary judge about the unlawfulness of the SAB's

action is no different to a declaration. As far as costs are concerned, it is plain that this action was primarily a quest to obtain damages. The appellant failed in that regard and the primary judge endeavoured, through his costs orders, to achieve a just result. As precisely stated by the High Court in *Gray v Richards (No 2)* [2014] HCA 47; 315 ALR 1 at [2]:

> The disposition of costs is within the general discretion of the Court. Ordinarily, that discretion will be exercised so that costs are awarded to the successful party, but other factors may have a significant claim on the discretion of the Court. The disposition which is ultimately to be made in any case where there are competing considerations will reflect a broad evaluative judgment of what justice requires.

67. Secondly, when one looks at the scope of the unlawfulness it is very difficult to contemplate what sum of damages might have be awarded by way of vindication. The primary judge found that Mr Lewis did not have "the opportunity he should have been afforded to decide whether to attend before the Board or not". The respondent, and the Court agrees, described the unlawfulness "at fairly much the lowest level". There was no dispute that the appellant had deliberately not opened the letters that would have given him the opportunity to be heard.

68. Moreover, as has been demonstrated, the appellant was a person who was not entititled to his personal liberty as a matter of fact and law. If there be a separate head of vindicatory damages, a nominal amount would suffice to vindicate his interest in having questions affecting his liberty determined in accordance with the law.

Human Rights Act

69. The appellant submitted that s 18(7) of the HRA gave him a distinct entitlement to damages separate from any entitlement he had to damages at common law for wrongful imprisonment. The respondent submitted that there was no such right.

70. Section 18(7) is as follows:

> **18 Right to liberty and security of person**
>
> **…**
>
> (7) Anyone who has been unlawfully arrested or detained has the right to compensation for the arrest or detention.

71. The appellant referred to both some earlier first instance decisions in this Court and also to foreign decisions, in most particular in Canada and New Zealand.

72. The respondent said that the work to be done by s 18(7) was to ensure "only that there is an effective domestic remedy for unlawful detention". The submission continued at [64]:

> That is, the right in section 18(7) is given effect by the existence of the tort of unlawful imprisonment and the availability of that action as a remedy. The Explanatory Statement to the Human Rights Bill 2003 makes it plain that the main purpose of the Bill is to recognise fundamental civil and political rights in Territory law, and to ensure that, to the maximum extent possible, all Territory statutes and statutory instruments are interpreted in a way that respects and protects the human rights set out in Part 3 of the Bill (which includes the right to liberty in s 18).

73. The Court does not consider it necessary to decide whether or not the HRA provides a separate right to damages, distinct from the tort of unlawful imprisonment. This is for two reasons: firstly, this question will be better decided in a case where the only

available, or asserted, remedy is one arising from the HRA, and secondly, and more importantly for present purposes, because any damages that might have been awarded pursuant to s 18(7) would face precisely the same obstacle as the common law damages, namely the imposition on the claim of the inevitability that the appellant would have been sent to prison notwithstanding the unlawfulness of the SAB's actions, as identified by the primary judge.

74. The very wording of s 18(7), that a person has a right to be compensated for unlawful arrest or detention, confirms that any assessment of damages is to be performed against compensatory principles, so reflecting the tortious measure for damages at common law. There is no scope for damages, in this case, going beyond compensation for the 82 days in prison. Applying compensatory principles, and having regard to the inevitability of the appellant's imprisonment, the outcome of an assessment of HRA damages must mirror the effect on common law damages resulting in a nominal award.

75. The claim under the HRA must therefore also be rejected.

76. The overall result is that the appeal should be dismissed.

Orders

77. The Court makes the following orders:

(i) The appeal is dismissed.

(ii) The appellant is to pay the respondents costs of the appeal.

I certify that the preceding Seventy-Seven [77] numbered paragraphs are a true copy of the Reasons for Judgment of their Honours Justice Elkaim, Justice Loukas-Karlsson and Justice Charlesworth.

Associate:

Date: 24 June 2019