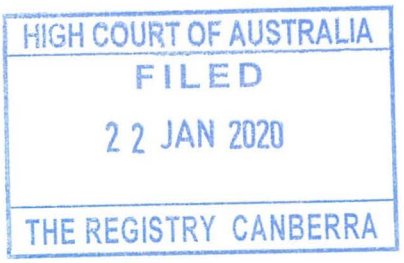
IN THE HIGH COURT OF AUSTRALIA

CANBERRA REGISTRY No. C14 of 2019

BETWEEN: **STEVEN JAMES LEWIS**

Appellant

and



THE AUSTRALIAN CAPITAL TERRITORY

Respondent

10

RESPONDENT'S SUBMISSIONS

Part I: Publication

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

Part II: Issue

2. The appeal presents the following issues:

   a. Whether the Appellant should receive substantial compensatory damages for his unlawful imprisonment in circumstances where his imprisonment was
20 inevitable and he cannot demonstrate any loss?

   b. In those circumstances, whether the Appellant should recover "vindicatory damages"?

Part III: Notice of constitutional matter

3. The Respondent considers that a notice under s 78B of the *Judiciary Act 1903* (Cth) is not required.

Part IV: Contested material facts

4. The Respondent agrees with the factual background at AS [7]-[11] and the
30 Appellant's Chronology, which are relevantly supplemented as follows.

Filed on behalf of the
Australian Capital Territory by:
ACT Government Solicitor
Level 5, 12 Moore Street
CANBERRA ACT 2601
DX 5602 Canberra

Date: 22 January 2020
Telephone: (02) 6205 2793
Fax: (02) 6207 0650
Email: verity.griffin@act.gov.au
Ref: Verity Griffin (636937)

5. On 24 January 2008, the Appellant was convicted of the offence of inflicting actual bodily harm on another person "by smashing a glass into that person's face"[1] after an altercation at a tavern in Fyshwick on 21 September 2007.

6. The Appellant was sentenced to a term of imprisonment of 12 months commencing on 24 January 2008 and ending on 23 January 2009, to be served by way of periodic detention. The first periodic detention period started on 25 January 2008.

7. Between 25 January 2008 and 11 May 2008, the Appellant reported to the Symonston Periodic Detention Centre (**PDC**) and performed periodic detention on 11 occasions.[2] In the same period, the Appellant breached his periodic detention obligations on at least 4 occasions:[3]

   a. By failing to report to the PDC for the periods commencing 1 February 2008, 28 March 2008 and 4 April 2008; and

   b. By reporting to the PDC on 11 April 2008, but providing a positive test sample for alcohol and being directed not to perform periodic detention on that date.

8. On or about 12 May 2008, the Appellant left Canberra to work on his father's farm in Griffith, New South Wales. The Appellant did not tell anyone at ACT Corrective Services that he was moving to Griffith because he feared that he would be forced to serve the periodic detention order.[4] The Appellant did not report for periodic detention thereafter.

9. Between 12 May 2008 and 7 July 2008, the Sentence Administration Board (**Board**) sent correspondence to the Appellant's mother's address in Wanniassa relating to the breaches above, other alleged breaches, its proposed inquiries and its directions for

---

1 *Lewis v Australian Capital Territory* [2019] ACTCA 16 (**CA**) at [4] (**CAB 101**).

2 *Lewis v Australian Capital Territory* (2018) 329 FLR 267; [2018] ACTSC 19 (**Primary Decision**) at [41(3)] (**CAB 17**); CA at [32(3)] (**CAB 104**). *Lewis v Australian Capital Territory* [2015] ACTSC 167 at [13]-[15] per Foster J.

3 Primary Decision at [41(4)] (**CAB 17**); CA at [32(4)] (**CAB 104**). Cf. *Lewis v Australian Capital Territory* [2015] ACTSC 167 at [13]-[24], [72] and [94] where Foster J determined the appellant had failed to perform periodic detention 5 times in this period with regard to the period commencing 21 March 2008.

4 Primary Decision at [52] (**CAB 19**).

him to attend the inquiries.[5] His mother did not send the correspondence onto the Appellant.

10. On 7 July 2008, the Appellant's father drove him back to Canberra. The Appellant knew that, on his return, there would be serious consequences and he was likely to be in serious trouble.[6] The Appellant made a conscious decision not to notify ACT Corrective Services of his return "to avoid any consequence".[7]

11. At his mother's address, the Appellant found five or six letters addressed to him which he knew were from ACT Corrective Services.[8] He thought that they would contain "bad news" and, again making a conscious choice, he did not open them.[9] He threw them out.[10]

12. On 8 July 2008, the Board met to consider breach reports in relation to the four periods of non-performance occasioned prior to the Appellant's move to Griffith (1 February, 28 March, 4 April and 11 April 2008) for the purpose of an inquiry under the *Crimes (Sentence Administration) Act 2005* (**CSA Act**). The Board also had before it the breach reports for six later absences (for periods commencing 16, 23 and 31 May 2008 and 6, 13 and 20 June 2008).[11]

13. While the Board was satisfied that notification of the hearing and a direction to attend had been sent to the Appellant at his last known address, it did not have knowledge that its letters were in fact received and the Appellant had therefore been afforded the opportunity to decide whether or not to attend the inquiry on 8 July 2008.[12] The Appellant was not present at the inquiry when the Board cancelled his periodic detention under ss 68(2)(f) and 69 of the CSA Act.[13]

---

5 CA at [32.8], [35] (**CAB 104-105**).
6 Primary Decision at [54] (**CAB 19**).
7 Primary Decision at [56] (**CAB 19**).
8 Primary Decision at [55] (**CAB 19**); CA at [35] (**CAB 105**).
9 Primary Decision at [55] (**CAB 19**); CA at [35] (**CAB 105**).
10 Primary Decision at [55] (**CAB 19**); CA at [35] (**CAB 105**).
11 *Lewis v Chief Executive of the Department of Justice and Community Safety of the Australian Capital Territory & Anor* [2013] ACTSC 198; (2013) 280 FLR 118 at [65], [67] per Refshauge J; Primary Decision at [340]–[341], [383] (**CAB 56, 62**); CA at [34] (**CAB 105**).
12 *Lewis v Chief Executive of the Department of Justice and Community Safety of the Australian Capital Territory & Anor* [2013] ACTSC 198; (2013) 280 FLR 118 at [203]–[206] per Refshauge J.
13 The Board decided to cancel the periodic detention order on the basis of the first four absences and accordingly took no further action in relation to the further six absences (Primary Decision at [340]–[341], **CAB 56**).

14. The Board issued a warrant for the Appellant's arrest and, under s 82(3) of the CSA Act, ordered that the Appellant serve the remainder of his sentence (9 months, 1 week and 3 days) by full-time detention commencing from the date he would be arrested and detained.

15. On 5 January 2009, members of the Australian Federal Police arrested the Appellant pursuant to the Board's warrant. The Appellant was held in full-time detention from that date until 27 March 2009 when he was granted bail. The Appellant did not serve any further period of detention thereafter.[14] Those 82 days of imprisonment are the subject of this litigation.

Part V: Argument

Basis of the decision below

16. Contrary to the submission of the Appellant at [12] and [15], the basis of the decision below was not that "had the Board's invalid decision of 8 July 2008 not been made", the Appellant's periodic detention would have been cancelled. Rather, it was that "had [the Appellant] either been given proper notice or attended" the hearing of the Board at which his periodic detention was cancelled, nevertheless, his detention would have been cancelled (Primary Decision at [336], [345]; **CAB 56, 57**).[15] The point of distinction between the two scenarios is the provision of procedural fairness; not the making of the decision, which the primary judge accepted (without considering the question of materiality) was a nullity for want of natural justice (Primary Decision at [216]; **CAB 41**).

17. This has significance in relation to the Appellant's submissions on the correct counterfactual (addressed below).

No conflict to resolve

18. There is no apparent conflict in this Court in *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514 (***CPCF***) regarding the application of the decision of the UK Supreme Court in *R (Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245 (***Lumba***) (cf. AS [18]). The correctness of *Lumba* was

---

14 See *Lewis v Australian Capital Territory* [2015] ACTSC 167 at [42], [108] per Foster J.

15 Nothing in CA at [47]–[52] (**CAB 110**) suggests otherwise.

not contested by the parties in *CPCF*, one who sought to apply and the other to distinguish that authority. It is not correct to characterise that scenario as one in which the Court assumed the correctness of the *Lumba* principle in the absence of argument, albeit that argument was limited and presented in the alternative (cf. AS [20], with reference to the principle enunciated in *CSR Ltd v Eddy* (2005) 226 CLR 1 at [13]).

19. In *CPCF* at [512], Keane J accepted that, as a consequence of s 189 of the *Migration Act*, the plaintiff would have been in lawful detention at all material times. This presented a difficulty for the plaintiff in light of *Lumba*, and which might well have left the plaintiff in a worse position than the claimant in *Lumba* so far as a claim for damages for unlawful imprisonment would be concerned, in that even nominal damages would not be recoverable.

20. Furthermore, contrary to the submission of the Appellant (at AS [22]), the reasoning of those Justices who addressed the point (in dissent) was not conflicting. Justices Hayne and Bell reasoned (at [155]) that demonstrating that a plaintiff suffered no substantial loss does not deny the availability of the action for false imprisonment nor provides a defence to it, nor does it *per se* require the conclusion that only nominal damages may be awarded. That reasoning does not conflict with the finding of Kiefel J (as her Honour then was) [at 325] that the circumstances of the case were such that, applying *Lumba* (which presented similar circumstances), only nominal damages could be awarded. It may be, for example, that a plaintiff suffers no loss but that the conduct of the defendant is such that a nominal award is not appropriate. That scenario is consistent with both the reasoning of Hayne and Bell JJ, and the finding of Kiefel J. In the absence of loss, however, the onus is on the Appellant to demonstrate that element or circumstance in the present case that warrants something other than a nominal award.

No basis for substantial compensatory damages

21. The Appellant seeks to demonstrate error in the reasoning of the Court below by reference to two simple examples in AS [24] in which otherwise lawful justification for the infringement of the tort would not provide a defence to the commission of that tort. That is not in issue. Furthermore, it cannot be said that as a consequence

of the Court of Appeal's view, the plaintiff in those examples is invariably entitled only to nominal damages. In the absence of the plaintiff demonstrating loss, the question of entitlement to damages is to be determined having considered the nature of the infringement, including by reference to the conduct of the tortfeasor.

(i) A counterfactual analysis is appropriate

22. It is not correct to say that the plaintiff to a tort is *entitled* to general damages without proof of special damage (cf. AS [25]). Rather, the cases cited by the Appellant (at AS fn 23) stand for the proposition that the tort is *actionable* even without proof of such damage. They do not support the proposition that "[s]ubstantial compensatory general damages go simply because the plaintiff's right not to be imprisoned was in fact infringed" (at AS [25]).

23. It is not contested that general damages *may* be awarded notwithstanding the absence of proof of special damage (AS [26]). It may be accepted that violation of a right imports damage. However, it does not follow that substantial damages must or should be awarded as a consequence of that violation. The damage may be substantial, but it may also amount to what is merely nominal.[16]

24. The statement in *Plenty v Dillon* (1991) 171 CLR 635 (***Plenty v Dillon***) at 645 (cited at AS [27]) does not take the Appellant far. As much may be accepted without embracing the Appellant's submission that substantial compensatory damages go simply because the right not to be imprisoned has been infringed. A declaration of infringement of right coupled with nominal damages provides a means to vindicate that right. The question as to the adequacy of that means of vindication is a matter of fact to be determined in the individual case.

25. The Appellant's observation that it is difficult to see how an award of $1 for 82 days of unlawful imprisonment is a vindication of the plaintiff's right not to be imprisoned (AS [28]), highlights the issue at the core of the Appellant's case: namely, adequacy

---

16 As acknowledged by the Appellant in AS fn 27 by reference to Viscount Haldane in *Neville v London Express Newspaper Ltd* [1919] AC 368 at 392–393, where nominal damages were found to be appropriate for the violation of a right to protection against maintenance.

of damages. The Respondent submits that such an award is appropriate vindication in circumstances where:

a. the Appellant was subject to an order of imprisonment to be served by way of periodic detention;

b. the Board was obliged to (and did) cancel the Appellant's periodic detention under the then statutory scheme, which provided lawful justification for the deprivation of the Appellant's liberty;

c. the Board failed to ensure that the Appellant had the opportunity to attend the inquiry at which the Appellant's periodic detention was cancelled; and

d. the Appellant received but did not read correspondence from the Board notifying him of its proposed inquiries and directions for him to attend those inquiries.

26. The Respondent's submission in this regard is not predicated on (the absence of demonstrating) loss (cf. AS [29]). The nominal award acknowledges the defect in the process by which the Appellant was to be afforded natural justice, but also the inevitability of (lawful) infringement of the right not to be unlawfully detained.

27. The Appellant argues that there is nothing in the passage in *Plenty v Dillon* at 654-655 (cited at AS [29]) that suggests the appropriateness of a counterfactual analysis of the kind adopted by the Court below (AS [31]). That is not surprising given that this Court in *Plenty v Dillon* was not concerned with an analogous scenario in which there was otherwise lawful justification for the infringement of the right in question (as acknowledged by the Appellant at AS [31]).

28. In similar vein, the Appellant adopts the observation of Lord Brown JSC in *Lumba* at [345] that in the judgments of both the Court of Appeal and of the House of Lords in *Christie v Leachinsky* (respectively [1946] KB 124 and [1947] AC 573), there is no hint of a suggestion that the false imprisonment which followed upon the unlawful arrest in that case might properly attract only a nominal award of damages. Two things may be said of this observation.

29. First, *Christie v Leachinsky* was concerned with the question of arrest without a warrant, which could only be justified if the charge was made known to the person arrested. In the absence of giving that information (a safeguard the Court sought to protect), and notwithstanding an otherwise lawful basis to arrest the plaintiff, the plea of justification failed. That provides no analogy with the present case. The case says nothing about the proper assessment of damages in a case of false imprisonment. It was concerned only with the question of whether the tort had been committed.[17]

30. Secondly, the observation of Lord Brown JSC in *Lumba* was an admonition of holding that a detainee was simultaneously rightly detained and falsely imprisoned. His Lordship's concern was that a court that speaks with two voices brings the law into disrepute (*Lumba* at [345]). In circumstances where there is lawful justification, the law should instead recognise that, notwithstanding a flaw in the decision-making process such as to involve the breach of a public law duty, the decision-maker has not in those circumstances committed the tort of false imprisonment. His Lordship observed that the courts have consistently shied away from such a conclusion (*Lumba* at [346]).

31. Similarly, the Appellant's reliance on *Kuchenmeister v Home Office* [1958] 1 QB 496 (AS [33]) is of no avail, as it is a case in which immigration authorities purported to exercise a power (to detain) that they did not possess.[18]

32. The Appellant claims that a rejection of a counterfactual approach for the quantification of general damages in a false imprisonment case is consistent with the approach to other trespassory torts (AS [35]). The cases cited by the Appellant in support of that proposition have nothing to say about a counterfactual approach. They either take a broad view of loss (as per Lord Lloyd in *Inverugie Investments Ltd v Hackett* [1995] 1 WLR 713 at 717-718; and Allsop P in *Bunnings Group Ltd v CHEP Australia Ltd* (2011) 82 NSWLR 420 at [170]-[175], cf. Giles JA at [193]-[199]); or otherwise propose an exception to the general rule whereby compensation is measured by reference to the benefit received by the trespassor (as per Megaw LJ

---

17 See *Bostridge v Oxleas NHS Foundation Trust* [2015] EWCA Civ 79 (***Bostridge***) at [24].

18 See *Lumba* at [201] per Lady Hale, [349] per Lord Brown JSC; *Bostridge* at [25].

in *Swordheath Properties Ltd v Tabet* [1979] 1 WLR 285 at 288; and Lord Nicholls in *Attorney-General v Blake* [2001] 1 AC 268 at 278).

33. The other cases relied upon by the Appellant are inapt insofar as they are concerned with damages for loss of use, including the right to control the use of private information, as distinct from the right to privacy *per se* (cf. AS fn 41 and fn 43), or otherwise with the question of causation of loss (cf. AS fn 42), which is addressed further below. They might demonstrate that there is no uniform causal requirement for liability in tort (AS [36]), but they do not demonstrate that the nature of the tort of false imprisonment denies recourse to a counterfactual analysis (cf. AS [36]).

34. It is not evident why a counterfactual analysis in inappropriate. The Appellant does no more than suggest that the approach of the majority in *Lumba* is unprecedented (AS [32]). Even so, that approach has been subsequently endorsed and applied by the House of Lords and Supreme Court,[19] and also outside the migration context by the Court of Appeal.[20] To say that *Lumba* does not represent orthodoxy because there would have been far fewer cases in which substantial damages were awarded is unverifiable speculation (cf. AS [34]).

35. The Appellant argues that the "loss" in this case comprises the right not to be imprisoned (AS [37]). This is a mischaracterisation. The relevant right is the right not to be unlawfully detained. The right may be infringed, but it cannot be lost by administrative action. Furthermore, it is inaccurate to describe the deprivation of liberty as a "loss" in circumstances where there was lawful justification for that deprivation. The Appellant does not contest the finding below that his imprisonment was inevitable as a consequence of the statutory obligation to cancel his periodic detention (CA at [52], **CAB 110**). Finally, loss of a right is not properly characterised as "loss" for the purposes of the assessment of damages.[21] Were it so, consideration of loss would be redundant. The characterisation of infringement as loss is not the

---

19 See, e.g., *R (Hemmati) v Secretary of State for the Home Department* [2019] UKSC 56; [2019] 3 WLR 1156; *R (on the application of O) (by her litigation friend the Official Solicitor) v Secretary of State for the Home Department* [2016] UKSC 19; [2016] 1 WLR 1717; *Kambadzi v Secretary of State for the Home Department* [2011] UKSC 23; 1 WLR 1299.

20 *Parker v Chief Constable Essex Police* [2018] EWCA Civ 2788; [2019] 1 WLR 2238; *Bostridge*.

21 Loss or impairment of a right, which is a normative concept, is not a loss experienced in the real world: Edelman J. (ed.), *McGregor on Damages* (12th ed., 2018), ¶17-020 (p 568).

basis upon which the cases relied upon by the Appellant, including *Gulati v MGN Ltd (No 2)* [2017] QB 149 (CA) (AS fn 43), have proceeded.

36. This error informs the Appellant's alternative argument that a counterfactual analysis does not lead to the result that substantial compensatory damages are unavailable in the present case (AS [38]). The Appellant argues that "[t]he wrong is interference with liberty in breach of the right not to be confined", and that illegality goes to the absence of any defence. As indicated above (at paragraph [35]), the Appellant misconceives the right that is in issue. It is not that there is a right not to be confined. It is that the Appellant enjoys a right not to be *unlawfully* detained. In this case, the unlawfulness or wrong was interference with liberty where the correct procedures had not been followed.

37. As such, and contrary to the submission of the Appellant, the correct counterfactual is one in which the correct procedures were followed (that is, procedural fairness was afforded to the Appellant in the course of the Board conducting its inquiry) (AS [38], fn 46). As indicated above, that is the basis on which the Courts below proceeded. It was not on the basis that the cancellation decision had not been made.

38. As much was recently acknowledged by the Court of Appeal in *Parker v Chief Constable of Essex Police* [2019] 1 WLR 2238 at [91]-[97] in commenting on the approach of the majority in *Lumba* as to the correct counterfactual, and at [104] in concluding that the counterfactual scenario envisaged by the majority in *Lumba* "required the court to assume the lawfulness of the procedure whereby the detention was effected."

39. Contrary to the Appellant's submission at AS [40], loss of liberty is the outcome of the tort, which is the *unlawful* deprivation of liberty. On that basis, there is no reason to doubt the approach of Lord Dyson JSC in *Lumba* at [91]-[93], and his Lordship's conclusion that the decision of the Court of Appeal in *Roberts v Chief Constable of the Cheshire Constabulary* [1999] 1 ELR 662 was wrongly decided (cf. AS [40]-[41]).

40. The submission at AS [41] is also infected by the Appellant's failure to distinguish the commission of the tort (namely, the failure to follow correct procedure) from its

outcome (that is, loss of liberty). Consistent with Lord Dyson JSC's reasoning in *Lumba* at [93], there is a real distinction between: (i) the Appellant who would have been imprisoned *even if* the correct procedures had been followed (that finding is not contested by the Appellant); and (ii) a detainee who would not have been imprisoned if the correct procedures had been followed. Both have been unlawfully detained, but one (not the Appellant) is detained in circumstances where they should not have been. It is one thing to say that the Appellant should not have been detained in the circumstances in which he was so detained, and another to say that the Appellant should not have been detained at all. This is not to ignore that an unlawful deprivation of liberty has occurred, but to acknowledge that the procedural failing does not *per se* merit an award of substantial compensatory damages.

(ii) Theory of "alternative causes" is inapt

41. The Respondent does not contest the finding of the primary judge that the Appellant's detention was unlawful and that it ensued from a decision (to cancel the Appellant's periodic detention) found to have been made in the absence of procedural fairness (Primary Decision at [216]-[217], **CAB 41-42**).

42. The Appellant submits that this matter involves Hart and Honoré's theory of "alternative causes" (AS [42]). It is not evident why that is so. There is no "alternative cause" in this case in the sense of a hypothetical act or event that did not in fact occur (cf. AS fn 52, with reference to Hart and Honoré, *Causation in the Law*, 2nd ed., 1985, p 249). In this case, the Appellant's periodic detention was cancelled pursuant to s 69 of the CSA Act, a provision that mandated cancellation in the circumstances of the case. This is not a case where there was other law or policy justifying detention, which was not invoked or relied upon by the decision-maker. The only thing that is hypothetical is the scenario whereby proper procedures were followed in cancelling the Appellant's periodic detention.

43. On the basis that the "harm" suffered by the Appellant is the deprivation of liberty (AS [42]), it cannot be said that the defendant's wrongful act (namely, the failure to afford procedural fairness) produced the "harm". As Hart and Honoré describe it (at 252), "the wrongful aspect of [the] defendant's act is causally irrelevant". Rather the decision to cancel the Appellant's periodic detention produced the "harm". This is

because that decision would have been made whether or not the Appellant was afforded procedural fairness (see Hart and Honoré at 252). The provision (or otherwise) of procedural fairness cannot be said to be a cause of imprisonment, and therefore cannot be seen as an "alternative cause" for the purposes of Hart and Honoré's theory.

44. The Court below did not embrace a "but for" test of causation (cf. AS [43]-[44]). It is not necessary to do so in order to defend or justify its approach. As indicated above (at paragraph [41]), the Respondent does not seek to deny responsibility for the "harm" caused to the Appellant. The Respondent accepts that it caused the "harm" by means of a decision infected by error. Nor does the Respondent deny that the Appellant has suffered an infringement of the right for which he claims compensation (see Hart and Honoré at 250). The question is whether the Appellant should receive an award of substantial damages in circumstances where the "harm" would have ensued in any event (that is, even where the proper procedures had been followed).

45. There is a distinction to be drawn between the question of responsibility for harm (which the Respondent submits does not arise in this case), on the one hand, and the question whether the harm would have ensued in any event, on the other. There is no denying responsibility for the harm in any of those events. There is no third actor or "overtaken cause" that brings the question of causation to the fore. However, when one set of circumstances is lawful and the other not, the further question arises as to whether the Appellant should receive substantial damages for harm that would have ensued lawfully. This case has a further dimension in that, unlike previous cases, including *Lumba*, the Appellant was detained on the basis of the correct statutory mandate (namely, s 69 of the CSA Act). The Court need not hypothesise as to what would have happened had some other mandate been exercised, or had the relevant decision-maker attained the requisite state of mind to enliven the relevant power.

46. As such, the question of a uniform approach to "alternative cases" does not arise in this case. (cf. AS [45]). The question whether the Appellant would have been imprisoned (lawfully or unlawfully) by another party, or imprisoned as a result of some external cause, does not arise. The Respondent does not seek to escape liability

to compensate the Appellant for the resulting harm. The question is the measure of that compensation, which is not answered by resort to Hart and Honoré's theory of "alternative causes".

No separate head of "vindicatory damages"

47. If, as the Appellant submits and the Respondent accepts, the award of compensatory damages, in addition to compensating a claimant's loss, is to vindicate the right that has been infringed, then it is not evident what (additional) purpose an award of "vindicatory damages" would serve.

48. Even as an alternative argument where substantial compensatory damages are unavailable (AS [48]), it is not evident what role a separate head of "vindicatory damages" would play. Recognition of vindication (of a plaintiff's right) as a legitimate purpose or element of an award of compensatory damages (AS [48]) undermines the utility of a separate head of damages predicated on vindication alone. The recognition of exemplary damages as a means of vindicating the rule of law in curbing the excesses of executive power (AS [49]) takes the matter no further.

49. While so-called "vindicatory damages" have been awarded in foreign jurisdictions in broadly two categories of cases: (i) in tort, where it is not possible to calculate damages or where for policy reasons the court is precluded from awarding compensation;[22] and (ii) for breaches of constitutional rights,[23] neither category or rationale is applicable in the present case.

50. The Privy Council in *Takiota*, in relation to breaches of constitutional rights protecting against inhumane and degrading treatment and the deprivation of liberty, declined to award "vindicatory damages" in circumstances where the award of exemplary damages (in the sum of $100,000) already achieved the intended vindicatory purposes. The Privy Council observed that the award of damages for breaches of constitutional rights serves much the same object as the common law

---

22 See, e.g., *Rees v Darlington Memorial Hospital NHS Trust* [2003] UKHL 52 (***Rees***) (cited at AS [50]).

23 See e.g., *Takiota v Attorney-General & Ors (Bahamas)* [2009] UKPC 11 (***Takiota***) (cited at AS [50] fn 73); *Taunoa v Attorney-General* [2007] NZSC 70 (cited at AS [50] fn 74).

award of exemplary damages,[24] and that damages may be aggravated by reason of the accompanying indignity and humiliation.[25]

51. Furthermore, the Appellant does not point to any case concerning breaches of constitutional rights where there has been an award of "vindicatory damages" absent any actual loss or harm.[26]

52. The Appellant claims that a separate head of non-compensatory "vindicatory damages" has been recognised by the Ontario Court of Appeal in *Jones v Tsige* (2012) 108 OR (3d) 241 (***Jones***) (AS [50], fn 71) in circumstances where the claimant has suffered no pecuniary loss so that the award is "modest but sufficient to mark the wrong that has been done" (*Jones* at [87]). While Sharpe JA did not classify the damages awarded for the tort of intrusion upon seclusion as compensatory, it is clear, by virtue of the factors considered at [87] and [90], that the Court was concerned to compensate for any loss or harm.

53. It is not correct to say that a separate head of "vindicatory damages" was recognised in a similar context prior to *Lumba*, with reference to *Mosley v News Group Newspapers Ltd* [2008] EMLR 20; [2008] EWHC 1777 (QB) (***Mosley***) (cf. AS [50], fn 72).[27] The Court accepted vindication as a legitimate consideration in the assessment of damages for infringement of a right. Nevertheless, vindication was recognised as an element of the award of compensatory damages (*Mosley* at [216] and [231]).

54. The Appellant argues that the explanation given by Lord Bingham in *Rees* at [8] would justify "perhaps with even greater force" an award of "vindicatory damages" where a person is subjected by the State (or Territory) to deprivation of "the most fundamental right" (AS [51]). It is not evident why that is so. It might also be reflected in an award of compensatory, exemplary or aggravated damages. It does not demonstrate the utility of a self-standing head of "vindicatory damages".

---

24 *Takiota* at [11], [13]-[14] (Lord Carswell, delivering the reasons of the Privy Council). See also *Lumba* at [233] (Lord Collins).

25 *Takiota* at [11] (Lord Carswell).

26 Cf. Cases cited by the Appellant at AS fns 73 and 74.

27 A decision that has been superseded by *Gulati v MGN Ltd (No 2)* [2017] QB 149 (see AS fn 72).

55. The Appellant acknowledges the criticism of the concept of an award of "vindicatory damages" as introducing uncertainty in the law, with reference to the concern of Lord Dyson JSC in *Lumba* at [101] (AS [52]). The Appellant, however, dismisses that concern as "overstated" (AS [52]), adding that the circumstances in which such an award would be available "can be expected to be limited". Again, it is not evident why that is so. Contrary to the submission at AS [52], the Appellant has not demonstrated the circumstances in which such an award operates. In particular, the Appellant has not demonstrated by reference to the cases on which he relies that such an award operates "only where ordinary compensatory damages are not available yet an award of nominal damages is inappropriate having regard to the right that has been infringed" (AS [52]). The measure of damage is also a thing of uncertainty, and the Appellant says nothing about how damages may be quantified.

56. Contrary to the submission of the Appellant at AS [53], there is no error in the finding of the Court below that the unlawfulness was "at fairly much the lowest level" (CA at [67], **CAB 113**]). There are degrees of wrongdoing. As the Court acknowledged at CA [67] (**CAB 113**), there was no dispute that the Appellant had deliberately not opened the letters that would have given him an opportunity to decide whether to attend the inquiry. Not that it would have made a difference, the Board's hands having been tied by the statutory scheme,[28] and the Appellant having already decided to avoid any engagement with the Board.[29] This is not to deny that imprisonment was unlawful, or to wrongly focus on the conduct of the Board.

57. The Appellant argues that inevitability of imprisonment is no answer to a claim for "vindicatory damages" (AS [53]). Assuming such a category of damages, it is difficult to see why inevitability would not be relevant to the measure of damages. Were such a consideration irrelevant, it is difficult to see how damages would be assessed in such a case and how a uniform award for infringement of a right could be avoided from case to case (absent exemplary damages for contumacious conduct, which the Appellant accepts is not present here).

---

28 CA at [68], **CAB 113**; see also CA at [52], **CAB 110**, and Primary Decision at [336] and [345], **CAB 56-57**.

29 Primary Decision at [56]-[57], **CAB 19-20**.

58. Contrary to the submission of the Appellant at AS [53], the Court below did not observe that the Appellant would "but for" the unlawful imprisonment, have been lawfully imprisoned (cf. CA at [68], **CAB [113]**). As submitted above (at paragraphs [45]-[46]), the unlawful imprisonment is not posited as an alternative or intervening cause.

59. In any event, the Appellant argues at AS [53] that, on the hypothesis that ordinary compensatory damages are not available, it is that very circumstance that makes an award of vindicatory damages the suitable remedy. Even if that were so, and assuming *arguendo* that such a head of damages exists, it is difficult to conceive why that award, which is to vindicate the Appellant's interest in having questions affecting his liberty determined in accordance with law (CA at [68], **CAB 113**), would be anything other than nominal.

60. Contrary to the submission of the Appellant at AS [53], the reasoning of the Court below at [67]-[68] (**CAB 113**) is not the kind of reasoning rejected by this Court in *Plenty v Dillon* (cf. AS [26]-[29]). It may be accepted that the Appellant is entitled to "some damages" in vindication of his right, irrespective of the question of loss. However, questions of exemplary and aggravated damages aside, the Appellant must invoke something other than the fact of infringement of that right in order to justify an award of substantial damages.

Costs of proceedings before primary judge

61. In relation to AS [10] and [54(2)(b)], the orders of the primary judge that each party bear their own costs, which was made on 6 April 2018 and again on 14 August 2018, was not the subject of appeal below (cf. **CAB 96-97**). The Appellant asks this Court to set aside those orders (Notice of Appeal, para 5(b), **CAB 129**). Even if the appeal were allowed, this Court should refuse the order sought as it takes no account of the issues raised by the Appellant below (which are not the subject of this appeal) and in relation to which the Appellant was unsuccessful.

Conclusion

62. The appeal should be dismissed with costs.

Part VI: Argument on notice of contention or notice of cross appeal

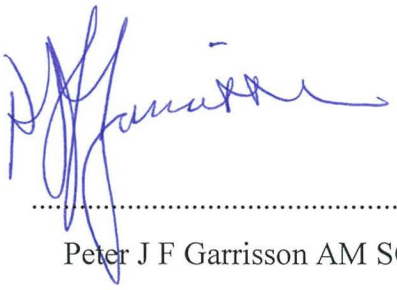
63. The Respondent has not filed a notice of contention or cross-appeal in this matter.

Part VII: Estimate of time

64. It is estimated that the Respondent will require 1.5 hours to present its oral argument.

Dated: 22 January 2020

10



.....

Peter J F Garrisson AM SC

Solicitor-General for the ACT

Telephone: (02) 6207 0654
Email: peter.garrisson@act.gov.au

20

.....

Houda Younan

Telephone: (02) 9231 6546
Email: hyounan@sixthfloor.com.au

Counsel for the

Australian Capital Territory

IN THE HIGH COURT OF AUSTRALIA

CANBERRA REGISTRY No. C14 of 2019

BETWEEN: **STEVEN JAMES LEWIS**

Appellant

and

THE AUSTRALIAN CAPITAL TERRITORY

Respondent

10

ANNEXURE

Respondent's List of Legislative Provisions

1. *Crimes (Sentence Administration) Act 2005* (ACT) as at 8 July 2008 (R7, effective 3 June 2008 – 25 August 2008), ss 68 and 69.

IN THE HIGH COURT OF AUSTRALIA

CANBERRA REGISTRY No. C14 of 2019

BETWEEN: **STEVEN JAMES LEWIS**

Appellant

and

THE AUSTRALIAN CAPITAL TERRITORY

Respondent

10 **ANNEXURE**

Respondent's List of Legislative Provisions

Crimes (Sentence Administration) Act 2005 (ACT) as at 8 July 2008 (R7, effective 3 June 2008 – 25 August 2008), ss 68 and 69.

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.

20 (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.

30 *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.