IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

NO P37 OF 2015

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

BETWEEN: W LLOYD NIRMALEEN FERNANDO
BY HIS TUTOR
JOHN ROBERT BRODERICK LEY
Appellant

AND: COMMONWEALTH OF AUSTRALIA
First Respondent

HONOURABLE GARY HARDGRAVE
Second Respondent

RESPONDENTS' SUBMISSIONS

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PART I PUBLICATION

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

PART II ISSUES

2. There are two problems with the appellant's statement of issues and consequent claims to relief.

3. First, special leave was granted to determine an issue of principle whether the appellant was entitled to no more than nominal damages for the 1,203 days he had been unlawfully detained.[1]

4. Special leave was not granted in terms to determine the "no evidence" issue stated at paragraph two of the appellant's written submissions. Special leave was confined to the ground of appeal appearing at paragraph 2(a) in the earlier proposed Notice of Appeal, which now appears at paragraph 2.1 in the filed Notice of Appeal. The "no evidence" issue stated by the appellant instead reflects paragraph 2(b)(iii) of the earlier proposed Notice of Appeal, which was excluded by members of this Court upon granting special leave.

5. The argument in support of the "no evidence" issue is found at Appellant's Submissions (**AS**) [30]-[36]. Against the possibility that the Court considers the matter within the grant of special leave, this issue is addressed at paragraph [63] below.

6. Secondly, the relief sought by the appellant that the proceedings be remitted "for the assessment of substantial compensatory damages, including, if warranted, aggravated and exemplary damages",[2] undoubtedly exceeds the grant of special leave. As the filed Notice of Appeal shows, the appellant has not challenged the second decision of the Full Court of the Federal Court dismissing his appeal in relation to the compensatory damages award on the primary judge's alternate hypothesis; nor has the appellant challenged the second Full Court decision to allow the Commonwealth's appeal against the award of aggravated and exemplary damages.

7. Accordingly these issues are dealt with summarily only: see paragraphs [76] to [77] below.

PART III SECTION 78B OF THE *JUDICIARY ACT 1903* (CTH)

8. No notices have been issued pursuant to s 78B of the *Judiciary Act* 1903 (Cth) nor are they required.

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[1] Extract of Transcript of Special Leave Application [2015] HCATrans 190 (14 August 2015).

[2] See paragraph 3.1 of the filed Notice of Appeal.

PART IV FACTS

9. The summary of the facts at AS[9]-[21] is only partially complete. It is necessary to place the facts in full context.

10. In 2001 the appellant's permanent residency visa was cancelled by the Minister for Immigration and Multicultural Affairs acting pursuant to s 501(2) of the *Migration Act 1958* (Cth) (**Migration Act**). The appellant sought judicial review of that decision in the Federal Court of Australia. The application for judicial review was successful,[3] but ultimately led to a renewed decision by the second respondent (**the Acting Minister**) to cancel the appellant's permanent residency visa on 3 October 2003.

11. Ms Lorilee Lockhart, an officer then employed in the Removals Team in the Compliance Section of the Department in Perth, gave affidavit and oral evidence at trial that she was aware of the Acting Minister's decision to cancel the appellant's permanent residency visa on 3 October 2013. Ms Lockhart testified to a standard practice or procedure following visa cancellations by the Minister pursuant to s 501 of the Migration Act whereby the National Office of the Department in Canberra would communicate with its Section 501 Cancellation Team in Perth and advise it of a cancellation. The Manager of that Team would then ensure that all relevant persons within the Removals Team were informed of the cancellation.[4] Ms Lockhart was also aware that the appellant was being held in Acacia Prison and was due to be released on 5 October 2003.[5]

12. There was also evidence at trial that departmental officers in Canberra, and in the Section 501 Cancellation and Removals Teams in Perth, were aware that the appellant's visa had been cancelled by the Acting Minister under s 501 of the Migration Act.[6]

13. Ms Lockhart and such other departmental officers had no knowledge that there was any infirmity in the 3 October 2003 decision to cancel the visa. The cancellation was lawful on its face. Nothing was put to the second Full Court to suggest that any officer would have viewed the cancellation of the appellant's visa as other than regular and effective.[7]

14. The upshot following the Acting Minister's decision to cancel the appellant's visa on 3 October 2003 was that: (i) Ms Lockhart and such other departmental officers knew or reasonably suspected that the appellant, in lacking a visa that

[3] *Fernando v Commonwealth of Australia* [2014] FCAFC 181 at [5].
[4] *Fernando v Commonwealth of Australia* [2014] FCAFC 181 at [87].
[5] *Fernando v Commonwealth of Australia* [2014] FCAFC 181 at [87].
[6] *Fernando v Commonwealth of Australia* [2014] FCAFC 181 at [87].
[7] *Fernando v Commonwealth of Australia* [2014] FCAFC 181 at [88].

was in effect, was an unlawful non-citizen within ss 13 and 14 of the Migration Act; (ii) those officers were then subject to an obligation under s 189(1) of the Migration Act to detain the appellant; and (iii) Ms Lockhart initiated arrangements to effect the detention of the appellant pursuant to that visa cancellation.

15. Based on the findings in the first Full Court decision,[8] Ms Lockhart was mistaken in considering that she had taken sufficient steps to discharge the obligation to effect the appellant's lawful detention.

16. Specifically there was a problem with the respondents' proof that the persons doing the actual detaining had been appointed "officers" under the Migration Act, and a problem in proving that the communication from Ms Lockhart to the actual detainers sufficiently apprised them of the facts which would give them a s 189 state of mind. But, given the facts stated at [11] above,[9] and the absence of any notice of any defect in the decision and the plain terms and effect of s 189, the primary trial judge and the second Full Court found that had proper processes been initiated by Ms Lockhart the appellant could and would have been lawfully detained under s 189 following the decision to cancel his visa on 3 October 2003.

17. The appellant states at AS[20] that the primary judge introduced a "new issue" – the question of *Lumba's* applicability – at the hearing on remittal. That description of the primary judge's steps misstates his Honour's treatment of the issue. The primary judge drew the parties' attention to the case at a directions hearing. The primary judge also ordered that the parties attend a mediation conference with a view to settling settle the matter. The parties did not reach a settlement. Further opportunities were provided by the primary judge for the parties to file submissions and produce further evidence in support of the question of damages.

18. The appellant fails to mention that, on 6 September 2013, the primary judge reached a conclusion on the remitter from the first decision of the Full Court of the Federal Court of Australia, inter alia, that the respondents should pay, in addition to nominal damages and exemplary damages,[10] compensatory damages to the appellant in the amount of $265,000. This was on the "alternate hypothesis" that the appellant was entitled to compensatory damages, his primary conclusion of course being that no more than nominal damages were payable ("the primary judge's third decision").[11]

19. The appellant appealed from, in effect, all of the damages findings and orders in the primary judge's third decision, and the Commonwealth cross-appealed

[8] *Commonwealth of Australia v Fernando* [2012] FCAFC 18 at [74], [75], [82], [84]-[86], [96].

[9] *Fernando v Commonwealth of Australia* [2014] FCAFC 181 at [87].

[10] *Fernando v Commonwealth of Australia (No 5)* [2013] FCA 901.

[11] *Fernando v Commonwealth of Australia* [2014] FCAFC 181 at [2], [16].

against the award of exemplary damages. The main issues on the appellant's appeal were that the primary judge erred in not awarding compensatory damages and aggravated damages to the appellant, and what was alleged by the appellant to be the manifest inadequacy of the exemplary damages award. The main issue on the Commonwealth's cross-appeal was whether the primary judge erred in awarding exemplary damages against the Commonwealth.[12]

20. On 22 December 2014, the second Full Court delivered its judgment on appeal. The Full Court ordered, inter alia, that the appeal be dismissed and the cross-appeal be allowed.[13] The Full Court upheld the non-alternate part of the primary judge's third decision that the appellant was entitled to nominal damages only, and not compensatory damages, in respect of his period of false imprisonment.[14]

21. The non-alternate part of the primary judge's third decision and second Full Court decision each relied upon the UK Supreme Court's decisions in *R (Lumba) v Secretary of State for the Home Department*[15] (***Lumba***) and *R (Kambadzi) v Secretary of State for the Home Department (Bail for Immigration Detainees intervening)* (***Kambadzi***),[16] which state, as a matter of English law, that a claimant should be awarded no more than nominal damages for his or her false imprisonment if the proper conclusion is that the claimant could and would have been lawfully detained in any event.

PART V LEGISLATIVE PROVISIONS

22. In addition to the relevant legislative provisions identified by the appellant, the respondents rely on the legislative provisions in Annexure A.

PART VI SUBMISSIONS

23. In summary, the respondents submit that:

    (a) the decisions in *Lumba* and *Kambadzi* were correctly applied in the second Full Court decision. *Lumba* and *Kambadzi* applied, in turn, ordinary compensatory principles in tort which the common law of Australia recognises; and there is no principled reason why these ordinary compensatory principles should not apply to the circumstances surrounding the appellant's detention (**Proposition One**);

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[12] *Fernando v Commonwealth of Australia* [2014] FCAFC 181 at [17], [101].

[13] *Fernando v Commonwealth of Australia* [2014] FCAFC 181.

[14] *Fernando v Commonwealth of Australia* [2014] FCAFC 181 at [89] (Besanko and Robertson JJ), [164] (Barker J).

[15] [2012] 1 AC 245.

[16] [2011] 1 WLR 1299.

(b) the principle in *Lumba* requires the respondents to bear, as a minimum, the burden of adducing some evidence to put in issue the liability of the appellant to lawful detention (absent the administrative defects which preceded the detention actually effected) (**Proposition Two**);

(c) even if any more onerous burden or standard of proof were adopted in a *Lumba* type case, here sufficient evidence was adduced at trial to demonstrate that, in accordance with the terms and effect of s 189 of the Migration Act, the appellant could and would have been detained lawfully at all material times (specifically he was subject, at all times, to mandatory and lawful detention by an officer acting pursuant to s 189(1) following the Acting Minister's decision to cancel the appellant's visa on 3 October 2003 and absent any notice of any defect in that decision);[17] (**Proposition Three**); and

(d) the relief sought by the appellant should in any event be denied to the extent that it exceeds the grant of special leave and contradicts the unchallenged findings and orders made in the courts below (**Proposition Four**).

24. Based on the above propositions, the appellant should receive nominal damages only.

PROPOSITION ONE – THE APPLICABILITY OF LUMBA

25. It is worth considering the reasons in *Lumba* and *Kambadzi* before addressing Proposition One in detail. It should also be noted at the outset that the appellant does not seem to challenge that some version of the *Lumba* principle is good law in Australia; the debate is more about how to frame it and apply it in the present context: see AS[22]-[28].

R (LUMBA) V SECRETARY OF STATE FOR HOME DEPARTMENT

26. In *Lumba*, a majority of the UK Supreme Court concluded that the Secretary of State was liable to both appellants for the tort of false imprisonment, because she had unlawfully exercised her statutory power to detain them pending deportation. That unlawfulness stemmed from the Secretary of State's application of an unpublished policy which was inconsistent with her published policy to detain pending deportation.[18] Nonetheless, the majority of the Court held that the appellants were not entitled to an award of substantive damages

[17] The Acting Minister's decision was quashed shortly *after* the appellant's release from detention: see *Fernando v Commonwealth of Australia* [2014] FCAFC 181 at [11].

[18] *Lumba v Secretary of State for the Home Department* [2012] 1 AC 245 at [89] (Lord Dyson JSC), [175] (Lord Hope DPSC), [194] (Lord Walker JSC), [207] (Baroness Hale JSC), [221] (Lord Collins JSC) and [251] (Lord Kerr JSC).

in respect of the appellants' unlawful detention. Four members of the Court restricted the appellants' award to nominal damages.[19]

27. Lord Dyson JSC delivered the leading majority judgment and characterised the nominal damages issue as "simply whether ... the victims of the false imprisonment have suffered any loss which should be compensated in more than nominal damages".[20] His Lordship answered that question in the negative, because the appellants could and would have been detained in any event (had the correct policy/procedures been followed). That conclusion, the respondents submit, rested on a *critical premise*: "[e]xemplary damages apart, the purpose of damages is to compensate the victims of civil wrongs for the loss and damage that the wrongs have caused".[21]

28. Lord Kerr JSC agreed with Lord Dyson JSC and held that a distinction is merited between those cases where it is plain that the detainees would have been released and those cases where it can be shown that they would have been lawfully detained had the correct procedures been followed.[22]

29. Lord Hope, Lord Walker and Baroness Hale JJSC also would not have awarded damages on a substantive basis. Their Lordships would have awarded "vindicatory damages" of either £1000 or £500,[23] although a majority of the Court rejected the introduction of vindicatory damages into the law of tort.[24]

30. Lord Phillips PSC, and Lord Brown JSC (with whom Lord Rodger JSC agreed), dissented on the ground that the failure to adhere to the published policy did not render the detention unlawful. Lord Phillips PSC stated that he would have shared Lord Dyson JSC's approach to damages had he agreed with his Lordship on the question of liability.[25]

R (KAMBADZI) V SECRETARY OF STATE FOR THE HOME DEPARTMENT

31. The UK Supreme Court's decision in *Kambadzi* was delivered two months after *Lumba*. The appellant in *Kambadzi* claimed damages for false imprisonment. He argued that his detention was unlawful due to irregularities in the exercise of the Secretary of State's power to detain and the Home Office's failure to review

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[19] *Lumba v Secretary of State for the Home Department* [2012] 1 AC 245 at [169] (Lord Dyson JSC), [237] (Lord Collins JSC), [256] (Lord Kerr JSC), [335] (Lord Phillips DPSC). While Lord Phillips DPSC found that there was no unlawful detention, he agreed with Lord Dyson, Lord Collins and Lord Kerr JJSC that the appellants were only entitled to nominal damages, and that there should not be any award of "vindicatory damages".

[20] *Lumba v Secretary of State for the Home Department* [2012] 1 AC 245 at [93].

[21] *Lumba v Secretary of State for the Home Department* [2012] 1 AC 245 at [95].

[22] *Lumba v Secretary of State for the Home Department* [2012] 1 AC 245 at [253], [256].

[23] *Lumba v Secretary of State for the Home Department* [2012] 1 AC 245 at [180] (Lord Hope DPSC), [195] (Lord Walker JSC) and [217] (Baroness Hale JSC).

[24] *Lumba v Secretary of State for the Home Department* [2012] 1 AC 245 at [101] (Lord Dyson JSC), [233] (Lord Collins JSC), [335] (Lord Phillips PSC) and [362] (Lord Brown JSC, with whom Lord Rodger agreed JSC).

[25] *Lumba v Secretary of State for the Home Department* [2012] 1 AC 245 at [335].

his detention regularly in accordance with administrative (non-statutory) requirements.

32. Lord Hope DPSC held, on the authority of *Lumba*, that the appellant in *Kambadzi* was entitled to no more than nominal damages, because his detention was capable of being justified at all times.[26] While quantum is fact-sensitive, his Lordship concluded that an award of nominal damages may sufficiently recognise that fundamental rights have been breached. Baroness Hale JSC agreed with those reasons and considered that *Lumba* supported that outcome.[27] Lord Kerr JSC substantively reaffirmed his Lordship's position in *Lumba*.[28] Lord Brown JSC (with whom Lord Rodger JSC agreed) dissented again on the ground that the appellant's detention was not unlawful.

33. The principle enunciated in *Lumba*, and repeated in *Kambadzi*, has not been doubted in subsequent UK decisions. The Court of Appeal of England and Wales has applied the principle, such that a claimant will only be entitled to nominal damages if his or her unlawful detention caused no loss or damage, in the sense that he or she could and would have been detained had the power to detain been exercised lawfully.[29] The respondents pause to note that, if that is the position with respect to a *power* to detain, the position is even clearer in relation to a *duty* to detain, which is what s 189 supplies here.

ANALYSIS

34. In short, the majority of the UK Supreme Court in *Lumba* held that the appellants were only entitled to nominal damages because they could and would have been detained in any event. That conclusion proceeded from the critical premise that the appellants should not be compensated where no loss or damage has actually been suffered as a result of the wrongdoing in question.

35. The second Full Court reasoned that *Lumba* was persuasive, because it reflected ordinary compensatory principles in tort - principles that are equally applicable to the common law of Australia. *Lumba* enabled the second Full Court to conclude that the appellant was entitled to nominal damages only, because he could and would have been lawfully detained pursuant to the duty imposed by s 189(1) of the Migration Act (but for the shortcomings in the steps initiated by Ms Lockhart to comply with that duty).[30] In *Lumba*, Lord Kerr JSC said that "it is surely right that the actual impact on the individual who has been

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[26] *R (Kambadzi) v Secretary of State for the Home Department (Bail for Immigration Detainees* intervening) [2011] 1 WLR 1299 at [27].

[27] *R (Kambadzi) v Secretary of State for the Home Department (Bail for Immigration Detainees intervening)* [2011] 1 WLR 1299 at [77].

[28] *R (Kambadzi) v Secretary of State for the Home Department (Bail for Immigration Detainees intervening)* [2011] 1 WLR 1299 at [89].

[29] *LE (Jamaica), R (on the application of) v Secretary of State for Home Department* [2012] EWCA 1770; *R (on the application of OM) v Secretary of State for Home Department* [2011] EWCA Civ 909.

[30] See the statements of Lord Dyson JSC and Lord Kerr JSC in *Lumba* cited in *Fernando v Commonwealth of Australia* [2014] FCAFC 181 at [72], [75] (Besanko and Robertson JJ), [166] (Barker J).

falsely imprisoned (*or perhaps more importantly, the impact that could have been avoided*) should feature prominently in the assessment of the appropriate amount of compensation" (emphasis added).[31] Here the appellant could not have lawfully "avoided" detention under s 189.

36. In *Kambadzi*, Baroness Hale JSC recognised that false imprisonment is a trespass to the person and therefore actionable per se, without proof of loss or damage. But, according to her Ladyship, that principle does not derogate from the separate principle that the defendant is only liable to pay substantial damages for the loss or damage his or her wrongful act has actually caused. The amount of compensation to which a person is entitled must be affected by whether he or she would have suffered loss or damage had things been done as they should have been done.[32] The tort of false imprisonment is not exceptional. Lord Hope DPSC arrived at a similar conclusion and approved Smith LJ's statement in *Iqbal v Prison Officers Association*[33] to the effect that an award of damages for false imprisonment is based on normal compensatory principles.[34]

37. The same principles apply under the common law of Australia. As Windeyer J recognised in *Skelton v Collins*,[35] this compensatory principle is the "one principle that is absolutely firm, and which must control all else". Or, as Mason CJ, Dawson, Toohey and Gaudron JJ said in *Haines v Bendall*,[36] "compensation is the cardinal concept".

38. Ordinary compensatory principles in tort have a long pedigree in this Court. In *Butler v Egg and Egg Pulp Marketing Board*,[37] Taylor and Owen JJ recognised that ordinary compensatory principles operate to put the plaintiff back into the position he or she would have been had the tort not been committed. Mason, Wilson and Dawson JJ in *Gates v City Mutual Life Assurance Society Limited* held to similar effect,[38] as did Mason CJ, Dawson, Toohey and Gaudron JJ in *Haines v Bendall*.[39] The *Lumba* outcome conforms to ordinary compensatory principles in tort; it thereby accords with the common law of Australia.[40]

CPCF v MINISTER FOR IMMIGRATION AND BORDER PROTECTION

[31] *Lumba v Secretary of State for the Home Department* [2012] 1 AC 245 at [253].

[32] *R (Kambadzi) v Secretary of State for the Home Department (Bail for Immigration Detainees intervening)* [2011] 1 WLR 1299 at [74].

[33] [2010] QB 732.

[34] Lord Hope DPSC also referred to *Langley v Liverpool City Council* [2006] 1 WLR 375 at [70].

[35] *Skelton v Collins* (1966) 115 CLR 94 at 128 (Windeyer J). Approved in *Haines v Bendall* (1991) 172 CLR 60 at 63 (Mason CJ, Dawson, Toohey and Gaudron JJ).

[36] *Haines v Bendall* (1991) 172 CLR 60 at 63 (Mason CJ, Dawson, Toohey and Gaudron JJ).

[37] *Butler v Egg and Egg Pulp Marketing Board* (1966) 114 CLR 185 at 191 (Taylor and Owen JJ).

[38] *Gates v City Mutual Life Assurance Society Limited* (1986) 160 CLR 1 at 12 (Mason, Wilson and Dawson JJ).

[39] *Haines v Bendall* (1991) 172 CLR 60 at 63 (Mason CJ, Dawson, Toohey and Gaudron JJ).

[40] *Fernando v Commonwealth of Australia* [2014] FCAFC 181 at [82] (Besanko and Robertson JJ), [164], [166] (Barker J).

39. Statements of four Justices in *CPCF v Minister for Immigration and Border Protection*[41] (***CPCF***) provide limited, obiter, support for the view that the principle identified in *Lumba* reflects part of the common law of Australia.

40. In *CPCF*, Question 6 of the Special Case asked whether the detention of the plaintiff was unlawful for any period and, if so, whether he could claim damages in respect of that detention. The Commonwealth had submitted that the plaintiff's entitlement to damages would be limited to nominal damages even if his detention had not been authorised by s 72 of the *Maritime Powers Act 2013* (Cth): the plaintiff could and would have been lawfully detained under s 189(3) of the Migration Act but for the impugned actions of the maritime officers. The Commonwealth relied on the decision in *Lumba* as persuasive.

41. The majority in *CPCF* (French CJ, Crennan, Gageler and Keane JJ) held that the detention was not unlawful. Keane J noted, albeit in strict obiter, that the majority judgments in *Lumba* had determined that if the power to detain had been exercised lawfully it would have been inevitable that the appellants would have been detained and would therefore be entitled to recover nominal damages only.[42] Keane J stated that the plaintiff in *CPCF* would be in a worse position than the appellants in *Lumba,* as even nominal damages would not be recoverable by virtue of the operation of s 189 of the Migration Act.

42. Keifel J held that the plaintiff had been unlawfully detained and was entitled to nominal damages.[43] Keifel J discerned similarity between the situations dealt with in *CPCF* and *Lumba*.[44] Her Honour rejected the claimant's submission that the question of quantum should be left to be assessed on remitter, on the basis that only nominal damages could be awarded.[45]

43. Hayne and Bell JJ held that the plaintiff's detention was unlawful for some or all of the period claimed and that the plaintiff could claim damages in respect of that detention.[46] Although their Honours stated that the nominal damages should not be resolved on the facts recorded in the Special Case,[47] they considered that such a verdict would plainly be "open in a case where a form of lawful detention was available and would have been effected".

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[41] (2015) 89 ALJR 207.

[42] *CPCF v Minister for Immigration and Border Protection* (2015) 89 ALJR 207 at [510]-[512].

[43] *CPCF v Minister for Immigration and Border Protection* (2015) 89 ALJR 207 at [325].

[44] *CPCF v Minister for Immigration and Border Protection* (2015) 89 ALJR 207 at [324].

[45] *CPCF v Minister for Immigration and Border Protection* (2015) 89 ALJR 207 at [325].

[46] *CPCF v Minister for Immigration and Border Protection* (2015) 89 ALJR 207 at [164].

[47] *CPCF v Minister for Immigration and Border Protection* (2015) 89 ALJR 207 at [157].

PROPOSITION TWO – EVIDENTIARY ASPECTS OF THE LUMBA PRINCIPLE

44. Consistent with general principle, the *Lumba* principle should:

    (a) *require* the respondents to bear, as a minimum, the *burden* of adducing evidence to put in issue the liability of the appellant to lawful detention in any event;

    (b) *not require*, as the *standard* of proof, that the defendant establish that the claimant would "inevitably" have been detained: cf AS[24];

    (c) *require* that once the defendant adduces some evidence to suggest that the claimant could and would otherwise have been lawfully detained, the burden to prove that there is loss or damage requiring more than nominal damages reverts to (or more strictly remains for overall discharge by) the plaintiff.

45. While this should be the position to be adopted here, it should be acknowledged that the UK authorities reveal differences of opinion on these questions.

46. Davis J, the primary judge at first instance in *Lumba*, concluded that the defendant bears the burden to show *at the damages stage* that the claimant would otherwise have been lawfully detained.[48] Davis J also concluded that the standard of proof, in accordance with ordinary principles, is on the balance of probabilities.[49] The issue was not addressed expressly on appeal.[50]

47. The majority judgments in *Lumba* established that the defendant bears the burden of showing lawful justification for imprisonment at the liability stage, but said nothing as to any burden on the defendant to disprove loss or damage. The majority judgments in *Kambadzi* were also silent on these elements.

48. In *R (on the Application of Amin Sino) v The Secretary of State for the Home Department*,[51] the claimant, who was the subject of a deportation order, had sought a declaration that he had been unlawfully detained, and damages for false imprisonment. That claimant had been in immigration detention for four years and eleven months at the time of his hearing. At trial the Secretary of State accepted that the claimant had not been lawfully detained at the relevant time. In deciding whether the claimant was entitled to more than nominal damages for the false imprisonment that he had undergone, Deputy Judge Howell referred to *Lumba* and *Kambadzi* and concluded:[52]

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[48] *Lumba v Secretary of State for the Home Department* [2008] EWHC 3166 (Admin) at [151].

[49] *Lumba v Secretary of State for the Home Department* [2008] EWHC 3166 (Admin) at [152].

[50] But see implicitly (*R (on the application of WL (Congo) v Secretary of State for the Home Department* [2010] EWCA Civ 111 at [29(6)]) where the Court of Appeal appeared to endorse Davis J's approach.

[51] [2011] EWHC 2249 (Admin).

[52] [2011] EWHC 2249 (Admin), [88].

> The normal rule is that it is for the claimant to establish that the defendant's conduct did in fact result in the damage of which he complains. In accordance with normal principles, therefore, *the onus must be on the claimant to prove on the balance of probabilities that he would not have been detained had the tort not been committed.* (Emphasis added)

49. That is the correct approach. However, an apparently different view was taken in *R (on the application of OM) v Secretary of State for the Home Department*[53] (***OM***). In that case, Richards LJ (Hughes and Ward LJJ agreeing) noted that "an award of damages for false imprisonment is based on normal compensatory principles", and "on normal compensatory principles it would be for a claimant to prove his loss, on the balance of probabilities".[54] However, his Lordship went on to say that "in circumstances such as these the burden shifts to the defendant to prove that the claimant would and could have been detained if the power of detention had been exercised lawfully". In *R (on the application of EO) v Secretary of State for the Home Department*,[55] Burnett J considered that the opposite result would "transform the tort of false imprisonment from being one actionable without proof of damage into one in which the claimant, in a large number of cases, would have to prove loss".There are at least two reasons to question that part of Richards LJ's judgment in *OM*. First, the burden supported by the respondents would not transform the tort of false imprisonment into one in which loss or damage must be proved. As Baroness Hale JSC recognised in *Kambadzi*, the fact that false imprisonment is actionable per se, without proof of loss or damage, remains unaltered by *Lumba*. The judicial tasks of determining liability and assessing damages remain conceptually and practically distinct.

50. Secondly, accepting that ordinary compensatory principles apply, that position is also consistent with the conventional approach to measuring damages confirmed by this court in *Purkess v Crittenden*.[56] In that case, the defendant asserted that the appellant would have been similarly disabled even if she had not suffered her injuries. Like the present case there was some evidence adduced to support that counterfactual. The plaintiff argued, on the strength of *Watts v Rake*,[57] that the defendant bore the burden of proof to establish that by reason of a pre-existing condition the plaintiff would in any event have become permanently disabled. Barwick CJ, Kitto and Taylor JJ rejected that argument:

> We *do not* regard [*Watts v Rake*] as formulating the proposition that once a plaintiff has established a prima facie case that he has been incapacitated as a

[53] [2011] EWCA Civ 909.

[54] *R (on the application of OM) v Secretary of State for the Home Department* [2011] EWCA Civ 909 at [23].

[55] *R. (on the application of EO) v Secretary of State for the Home Department* [2013] EWHC 1236 (Admin) at [74].

[56] (1965) 114 CLR 164.

[57] (1960) 108 CLR 158.

> result of the injuries inflicted upon him by the defendant's negligence the burden of establishing that his incapacity is wholly or partially the result of, or that total or partial incapacity would, in any event, have resulted from, some pre-existing condition in the plaintiff *passes to the defendant in the sense that, when the whole of the evidence in the case has been given, the onus of proof on this issue rests upon him.*

51. Their Honours adopted the distinction between the burden of "establishing a case" and "introducing evidence" and concluded that the defendant simply bore "the onus of adducing evidence" of a pre-existing condition in these circumstances.[58] Ultimately it is for the plaintiff "upon the whole of the evidence to satisfy the tribunal of fact of the injury caused by the defendant's negligence".[59] The reasons of Windeyer J, who agreed with the plurality judgment, are all the more instructive:[60]

> It is not incumbent on the plaintiff to lead evidence to displace or discount the inference to which the facts would otherwise give rise. But he must prove his case: and when the whole of the evidence is before the tribunal of fact the burden is on him to establish the measure of his damages.

52. *Purkess* has not been doubted by subsequent authority,[61] which, if anything, affirms that proof or disproof of a counterfactual or past hypothetical event goes to the assessment of compensatory damages and rests with the plaintiff if that is what he or she seeks.[62]

53. As a separate point, in *OM*, the relevant "test" or standard of proof was not that substantial damages should be awarded unless it is shown that the plaintiff would "inevitably" have been detained by the lawful exercise of the power to detain. That formulation, which is now relied upon by the appellant in the present case at AS[24], misunderstands Lord Dyson JSC's reference to "inevitable" in *Lumba* as dictating the standard of proof, rather than referring to the fact of detention as being inevitable on the facts in *Lumba*.[63] Richards LJ concluded that there is no reason why the defendant's standard of proof (if the burden rests with the defendant) should be anything other than on the balance of probabilities.

54. So correctly viewed, the in present case, the respondents were required to adduce some evidence to point to a counterfactual in which the appellant could

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[58] (1965) 114 CLR 164 at 168 (Barwick CJ, Kitto and Taylor JJ).

[59] (1965) 114 CLR 164 at 168 (Barwick CJ, Kitto and Taylor JJ).

[60] (1965) 114 CLR 164 at 170 (Windeyer J).

[61] *Dillingham Constructions Pty Ltd v Steel Mains Pty Ltd* (1975) 132 CLR 323, 327 (Barwick CJ), 330 (Stephen J), 330 (Mason J); *CSR Ltd v Della Maddalena* (2006) 80 ALJR 458 at [202] (Callinan and Heydon JJ).

[62] See e.g. *Malec v JC Hutton Pty Ltd* (1990) 169 CLR 638; *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332.

[63] *R (on the application of OM) v Secretary of State for the Home Department* [2011] EWCA Civ 909 at [22].

and would have been lawfully detained in any event. Once that was done the appellant as part of his overall burden of proof had to establish on the balance of probabilities that he had suffered loss or damage requiring more than nominal damages.

55. But even if a defendant (i) bears the ultimate burden of proof on this issue, and (ii) must discharge that burden on the balance of probabilities, as *OM* suggests, the respondents submit that sufficient evidence was adduced at trial to discharge that burden and standard of proof, as will be explained under the next proposition.

10 ***PROPOSITION THREE – DISCHARGING THE BURDEN OF PROOF HERE***

56. Sufficient evidence was adduced by the respondents at trial to show that, whoever bore the burden and whether it was discharged on the balance of probabilities or on some lesser standard of proof, the appellant could and would have been lawfully detained by an officer acting pursuant to s 189(1) of the Migration Act.

57. Ms Lockhart's evidence that she, as an officer in the Removals Team in the Department's Compliance Section in Perth, was aware that the Acting Minister had cancelled the appellant's visa on 3 October 2003 was accepted at trial.[64] Evidence was also accepted that other departmental officers based in Canberra
20 and Perth were aware that the Acting Minister had cancelled the appellant's visa.[65] Evidence of Ms Lockhart's suspicion was not challenged on appeal in the first Full Court decision. She assumed, as she was entitled to assume, that the visa cancellation decision was valid and regular. The defects in the visa cancellation process did not emerge until a much later time, following the decision of Allsop J in *Sales v Minister for Immigration and Multicultural Affairs*.[66] Until that time the cancellation could be presumed to be valid.[67]

58. The conclusion that the claimant could and would otherwise have been detained is required by the relevant statutory regime, particularly the provisions of ss 13, 14, 189(1), 196(1), (4), (5) and 501 of the Migration Act.

30 59. In *Ruddock v Taylor*,[68] Meagher JA in the NSW Court of Appeal explained the presumptive and mandatory effect of s 189 of the Migration Act in the context of wrongful visa cancellations:

> It is conceded that the detention was the likely result of the cancellation of the visa, and it was its natural and probable result. The Solicitor-General, however, quibbled at the description that it was the "inevitable" result, as her Honour

[64] *Fernando v Commonwealth of Australia* [2010] FCA 753 at [52]-[60].

[65] *Fernando v Commonwealth of Australia* [2010] FCA 753 at [50],[54].

[66] [2006] FCA 1807.

[67] *Minister for Immigration v Bhardwaj* (2002) 209 CLR 597 at 646 [151] (Hayne J).

[68] *Ruddock v Taylor* (2003) 58 NSWLR 269 at [72] (Meagher JA).

found. I find this disingenuous, and think her Honour was perfectly correct, by cancelling the visa, the Minister immediately exposed Mr Taylor as an apparent "unlawful non-citizen" within the meaning of s 189, *triggering an obligation to detain; they caused the detention, knowing their actions would lead to that result and could not lead to any other result.* (Emphasis added)

60. That view of the presumptive and mandatory effect of s 189(1) of the Migration was affirmed by the majority of this Court on appeal.[69] The majority said that "s 189 may apply in cases where the person detained proves, on later examination, not to have been an unlawful non-citizen. So long always as the officer had the requisite state of mind, knowledge or reasonable suspicion that the person was an unlawful non-citizen, the detention of the person concerned *is required* by s 189"[70] (emphasis added).

61. Armed with the knowledge that the appellant's visa has been cancelled on 3 October 2003, and being entitled to presume that the cancellation was valid, Ms Lockhart reasonably suspected that the appellant was an unlawful non-citizen, and that she was therefore required to detain the appellant under s 189(1) of the Migration Act.[71] Moreover, every other officer in the Department's Section 501 Cancellation and Removals Teams who was aware of the Acting Minister's decision to cancel the appellant's visa, was required to detain the appellant by taking him into, or causing him to be kept in, immigration detention.

62. The respondents' position is, therefore, if anything stronger within this statutory scheme than the respondents' positions in *Lumba* and *Kambadzi*. It is not just that there was an alternative route potentially available to the government officials which could have avoided the unlawfulness of the detention, calling for an assessment of the likelihood that such a route might have been followed or some presumption that it would have been; there was a mandatory *duty* to detain here on the facts.

OFFICER

63. The appellant submits under his "no evidence" argument that the persons who actually detained the appellant were not "officers" for the purposes of s 189(1) of the Migration Act: AS[32]-[35]. The problem with that argument is that, as noted by the Full Court below, it misunderstands the counterfactual exercise required by *Lumba* and *Kambadzi*.[72] As Baroness Hale JSC recognised in *Kambadzi*, the amount of compensation to which a person is entitled must be affected by whether he or she would have suffered loss or damage "had things

[69] (2005) 222 CLR 612 at [23] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

[70] (2005) 222 CLR 612 at [28] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

[71] *Ruddock v Taylor* (2005) 222 CLR 612 at [49] to [51] (emphasis added).

[72] See *Fernando v Commonwealth of Australia* [2014] FCAFC 181 at [86] (Besanko and Robertson JJ) and [164]-[168] (Barker J).

been done as they should have been done".[73] Even if the authority of the actual detaining officers might be impugned, the counterfactual exercise is constructed on the basis that the first respondent *would have* followed the proper procedures for detaining the appellant. The hypothetical is that Ms Lockhart (and other departmental officers with the requisite knowledge or suspicion) would have performed the s 189 duty imposed on them, whether directly or by appropriately causing other persons who met the description of "officer" to effect the detention. The *means* by which she and they would have performed the s 189 duty matters not. The relevant point is the *existence* of the duty and the law's approach that a plaintiff cannot prove loss where he or she could and would have been detained had the correct legal procedures been followed.

ADDITIONAL MATTERS

64. There are certain additional matters not raised squarely by the appellant, but which ought be addressed as they bear on the issues of principle raised by the grant of special leave:

    (a) whether there is a reason in principle to distinguish *Lumba* in circumstances where the respondents rely upon s 189 of the Migration Act;

    (b) whether the respondents' present argument can be reconciled with the first Full Court decision;

    (c) whether and how a claim based in public law can influence a concurrent claim for damages in private law; and

    (d) whether a claimant can ever get more than nominal damages in the migration context on the respondents' approach.

65. Regarding (a), *Lumba* was a case in which the Secretary of State could point to a counterfactual in which she could have engaged in administrative action that would have been lawful, both as a matter of public law and private law (tort). Here the respondents point to a counterfactual in which Ms Lockhart's initiation of arrangements to detain the appellant could and would have resulted in his detention, as required by s 189 of the Migration Act. The respondents do not advert to a counterfactual in which the Acting Minister could and would have lawfully cancelled the appellant's visa on 3 October 2003. Significantly, however, the lawfulness of the appellant's mandatory detention under s 189 did not depend on such a counterfactual: see *Ruddock v Taylor*.

66. Once the Minister (rightly or wrongly in law, as later found) cancelled the appellant's visa, any "officer" as defined under the Migration Act (and the

[73] *R (Kambadzi) v Secretary of State for the Home Department (Bail for Immigration Detainees intervening)* [2011] 1 WLR 1299 at [74].

definition captures a large range of persons) with knowledge or suspicion of that fact (and with no knowledge or suspicion that the Minister's decision was infirm) had a statutory duty to detain the appellant.

67. It is true that the first Full Court decision established, beyond challenge in this matter, that the actual process of detention, followed at the time, and as pleaded in defence in that matter, was insufficient to engage s 189 of the Migration Act in fact. This was essentially due to administrative shortcomings in the arrangements Ms Lockhart (wrongly) put in place to effect the appellant's detention as required by s 189.

68. But that leaves the critical question in this appeal, which is whether s 189 of the Migration Act needs to be given further work to do at the damages stage. The fact of the cancellation of the appellant's visa was enough, given the mandatory dictates of s 189 of the Migration Act, for any "officer" aware of that fact to be required to detain the appellant. That duty could be satisfied by direct performance, or by causing another officer to do the detaining. The primary officer pointed to by the respondents, Ms Lockhart, was only one of the many persons within the Department who were defined "officers" and who were under such an obligation.

69. So the question arises, can the appellant, who seeks damages under a private law claim in tort, assert a breach of public law which sets the tort claim in motion, but have loss and damage assessed on a basis that ignores a critical part of the dictates of the relevant public law in question?

70. Ms Lockhart, or any other "officer" in her position, was required to take steps to detain the appellant, once informed of the visa cancellation. If the public law dictates of s 189 were observed as they could and should have been, the appellant would always have been detained. How can the appellant assert loss or claim damages on any other footing?

71. As to (b), the appellant, correctly, does not challenge the second Full Court's conclusion that there were no problems in terms of res judicata.[74] The first Full Court decision focused on one question: whether the actual process of detention, as sought to be justified by the Minister on the pleadings in that case, was properly effected pursuant to s 189 of the Migration Act. The second Full Court decision focused on a different question: namely, accepting deficiencies in how s 189 was applied as a matter of fact in the case, was it nonetheless *required* to have been applied to detain the appellant in the circumstances which prevailed? These are conceptually discrete questions and the appellant is (now) correct to accept that a decision on one by the first Full Court did not preclude the second Full Court considering the second.

[74] *Fernando v The Commonwealth of Australia* [2014] FCAFC 181 at [47]-[53] (Besanko and Robertson JJ) and [164] (Barker J).

72. As to (c), it is submitted above that importing *Lumba* into the Australian common law conforms to the ordinary principles of compensatory damages in tort. But there is a larger point about the conformity between public law and tort law. As the tort is actionable per se, nominal damages are available. But to recover substantial damages there is a burden on the appellant to prove actual loss or damage and its amount. In doing so the appellant must grapple with the full statutory scheme including its requirements for detention.

73. *Private* law dictates that loss and damage be assessed on a basis that respects the relevant public law. *Public* law dictates that s 189 of the Migration Act be observed. Since s 189 of the Migration Act on the facts required the appellant's detention, the private law of tort, both at the liability and damages stages, must respond accordingly. That is an appropriate reconciliation of public and private law in this area.

74. As to (d), the point is that a person who suffers a wrongful visa cancellation and corresponding detention is not always shut out from substantial damages. But that person must prove actual loss or damage. If the officers who would otherwise have a duty to detain under s 189 have knowledge that a visa cancellation is wrongful, then they would lack the state of mind required by s 189 and any detention effected by them would not only be unlawful but would found more than nominal damages. And lest it go unnoticed, the mere fact that a person may file a legal challenge to a visa cancellation decision (see appellant's statement of facts at [10]-[12]) does not mean that an officer such as Ms Lockhart was required to assume that the challenge would be made good or treat a visa cancellation which is lawful on its face as if it were infirm.

CONCLUSION

75. On any view of the burden and standard of proof, the appellant would have been lawfully detained had the proper procedures required by s 189 been followed. As Lord Kerr JSC recognised in *Lumba*, the impact of the detention "that could have been avoided is critical".[75] Detention could not be avoided, on the strength of *Ruddock v Taylor*, once Ms Lockhart or any other officer knew that the appellant's visa had been cancelled by the Acting Minister and had no reason to doubt the validity of the cancellation. That state of mind triggered reasonable suspicion that the appellant was an unlawful non-citizen. Section 189 then required his detention. Accepting that the appellant could and would have been detained produces the conclusion that the appellant is entitled to receive nominal damages only, because he has suffered no loss or damage in the *Lumba* sense.

[75] *Lumba v Secretary of State for the Home Department* [2012] 1 AC 245 at [25] per Lord Kerr JSC.

PROPOSITION FOUR – PROBLEMS IN THE RELIEF SOUGHT BY THE APPELLANT

76. The appellant seeks an order that the proceedings be remitted "for the assessment of substantial compensatory damages, including, if warranted, aggravated and exemplary damages". The relief sought in those terms exceeds the grant of special leave, which was limited to considering whether the award of nominal damages was correct.

77. As the filed Notice of Appeal shows, the appellant has not challenged the second Full Court decision dismissing his appeal in relation to the compensatory damages awarded on the primary judge's alternate hypothesis; nor has the appellant challenged the second Full Court decision to allow the Commonwealth's appeal against the award of exemplary damages. Those failures preclude the appellant from seeking relief in the terms he now puts.

PART VII NOTICE OF CONTENTION OR NOTICE OF CROSS-APPEAL

78. There is no notice of contention and no notice of cross-appeal.

PART VIII LENGTH OF ORAL ARGUMENT

79. Approximately one and half hours will be required for the presentation of the oral argument of the respondents.

Dated: 14 October 2015

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IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

NO P37 OF 2015

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

BETWEEN: W LLOYD NIRMALEEN FERNANDO BY HIS TUTOR JOHN ROBERT BRODERICK LEY
Appellant

AND: COMMONWEALTH OF AUSTRALIA
First Respondent

HONOURABLE GARY HARDGRAVE
Second Respondent

ANNEXURE "A"

10 # LEGISLATIVE PROVISIONS REFERRED TO IN PART V

Filed on behalf of the Respondents by:

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Migration Act 1958 (Cth)

5 Interpretation

officer means:

(a) an officer of the Department, other than an officer specified by the Minister in writing for the purposes of this paragraph; or

(b) a person who is an officer for the purposes of the *Customs Act 1901*, other than such an officer specified by the Minister in writing for the purposes of this paragraph; or

(c) a person who is a protective service officer for the purposes of the *Australian Federal Police Act 1979*, other than such a person specified by the Minister in writing for the purposes of this paragraph; or

(d) a member of the Australian Federal Police or of the police force of a State or an internal Territory; or

(e) a member of the police force of an external Territory; or

(f) a person who is authorised in writing by the Minister to be an officer for the purposes of this Act; or

(g) any person who is included in a class of persons authorised in writing by the Minister to be officers for the purposes of this Act, including a person who becomes a member of the class after the authorisation is given.

501 Refusal or cancellation of visa on character grounds

Decision of Minister or delegate—natural justice applies

(1) The Minister may refuse to grant a visa to a person if the person does not satisfy the Minister that the person passes the character test.

Note: ***Character test*** is defined by subsection (6).

(2) The Minister may cancel a visa that has been granted to a person if:

(a) the Minister reasonably suspects that the person does not pass the character test; and

(b) the person does not satisfy the Minister that the person passes the character test.

Decision of Minister—natural justice does not apply

(3) The Minister may:

(a) refuse to grant a visa to a person; or

(b) cancel a visa that has been granted to a person;

if:

(c) the Minister reasonably suspects that the person does not pass the character test; and

(d) the Minister is satisfied that the refusal or cancellation is in the national interest.

(3A) The Minister must cancel a visa that has been granted to a person if:

(a) the Minister is satisfied that the person does not pass the character test because of the operation of:

(i) paragraph (6)(a) (substantial criminal record), on the basis of paragraph (7)(a), (b) or (c); or

(ii) paragraph (6)(e) (sexually based offences involving a child); and

(b) the person is serving a sentence of imprisonment, on a full-time basis in a custodial institution, for an offence against a law of the Commonwealth, a State or a Territory.

(3B) Subsection (3A) does not limit subsections (2) and (3).

(4) The power under subsection (3) may only be exercised by the Minister personally.

(5) The rules of natural justice, and the code of procedure set out in Subdivision AB of Division 3 of Part 2, do not apply to a decision under subsection (3) or (3A).

Character test

(6) For the purposes of this section, a person does not pass the ***character test*** if:

(a) the person has a substantial criminal record (as defined by subsection (7)); or

(aa) the person has been convicted of an offence that was committed:

(i) while the person was in immigration detention; or

(ii) during an escape by the person from immigration detention; or

(iii) after the person escaped from immigration detention but before the person was taken into immigration detention again; or

(ab) the person has been convicted of an offence against section 197A; or

(b) the Minister reasonably suspects:

(i) that the person has been or is a member of a group or organisation, or has had or has an association with a group, organisation or person; and

(ii) that the group, organisation or person has been or is involved in criminal conduct; or

(ba) the Minister reasonably suspects that the person has been or is involved in conduct constituting one or more of the following:

(i) an offence under one or more of sections 233A to 234A (people smuggling);

(ii) an offence of trafficking in persons;

(iii) the crime of genocide, a crime against humanity, a war crime, a crime involving torture or slavery or a crime that is otherwise of serious international concern;

whether or not the person, or another person, has been convicted of an offence constituted by the conduct; or

(c) having regard to either or both of the following:

(i) the person's past and present criminal conduct;

(ii) the person's past and present general conduct;

the person is not of good character; or

(d) in the event the person were allowed to enter or to remain in Australia, there is a risk that the person would:

(i) engage in criminal conduct in Australia; or

(ii) harass, molest, intimidate or stalk another person in Australia; or

(iii) vilify a segment of the Australian community; or

(iv) incite discord in the Australian community or in a segment of that community; or

(v) represent a danger to the Australian community or to a segment of that community, whether by way of being liable to become involved in activities that are disruptive to, or in violence threatening harm to, that community or segment, or in any other way; or

(e) a court in Australia or a foreign country has:

(i) convicted the person of one or more sexually based offences involving a child; or

(ii) found the person guilty of such an offence, or found a charge against the person proved for such an offence, even if the person was discharged without a conviction; or

(f) the person has, in Australia or a foreign country, been charged with or indicted for one or more of the following:

(i) the crime of genocide;

(ii) a crime against humanity;

(iii) a war crime;

(iv) a crime involving torture or slavery;

(v) a crime that is otherwise of serious international concern; or

(g) the person has been assessed by the Australian Security Intelligence Organisation to be directly or indirectly a risk to security (within the meaning of section 4 of the *Australian Security Intelligence Organisation Act 1979*); or

(h) an Interpol notice in relation to the person, from which it is reasonable to infer that the person would present a risk to the Australian community or a segment of that community, is in force.

Otherwise, the person passes the ***character test***.

Substantial criminal record

(7) For the purposes of the character test, a person has a ***substantial criminal record*** if:

(a) the person has been sentenced to death; or

(b) the person has been sentenced to imprisonment for life; or

(c) the person has been sentenced to a term of imprisonment of 12 months or more; or

(d) the person has been sentenced to 2 or more terms of imprisonment, where the total of those terms is 12 months or more; or

(e) the person has been acquitted of an offence on the grounds of unsoundness of mind or insanity, and as a result the person has been detained in a facility or institution; or

(f) the person has:

(i) been found by a court to not be fit to plead, in relation to an offence; and

(ii) the court has nonetheless found that on the evidence available the person committed the offence; and

(iii) as a result, the person has been detained in a facility or institution.

Concurrent sentences

(7A) For the purposes of the character test, if a person has been sentenced to 2 or more terms of imprisonment to be served concurrently (whether in whole or in part), the whole of each term is to be counted in working out the total of the terms.

Example: A person is sentenced to 2 terms of 3 months imprisonment for 2 offences, to be served concurrently. For the purposes of the character test, the total of those terms is 6 months.

Periodic detention

(8) For the purposes of the character test, if a person has been sentenced to periodic detention, the person's term of imprisonment is taken to be equal to the number of days the person is required under that sentence to spend in detention.

Residential schemes or programs

(9) For the purposes of the character test, if a person has been convicted of an offence and the court orders the person to participate in:

(a) a residential drug rehabilitation scheme; or

(b) a residential program for the mentally ill;

the person is taken to have been sentenced to a term of imprisonment equal to the number of days the person is required to participate in the scheme or program.

Pardons etc.

(10) For the purposes of the character test, a sentence imposed on a person, or the conviction of a person for an offence, is to be disregarded if:

(a) the conviction concerned has been quashed or otherwise nullified; or

(b) both:

(i) the person has been pardoned in relation to the conviction concerned; and

(ii) the effect of that pardon is that the person is taken never to have been convicted of the offence.

Conduct amounting to harassment or molestation

(11) For the purposes of the character test, conduct may amount to harassment or molestation of a person even though:

(a) it does not involve violence, or threatened violence, to the person; or

(b) it consists only of damage, or threatened damage, to property belonging to, in the possession of, or used by, the person.

Definitions

(12) In this section:

court includes a court martial or similar military tribunal.

imprisonment includes any form of punitive detention in a facility or institution.

sentence includes any form of determination of the punishment for an offence.

Note 1: ***Visa*** is defined by section 5 and includes, but is not limited to, a protection visa.

Note 2: For notification of decisions under subsection (1) or (2), see section 501G.

Note 3: For notification of decisions under subsection (3), see section 501C.