HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, KIRBY, HAYNE, CALLINAN AND HEYDON JJ

PHILIP RUDDOCK & ORS APPELLANTS

AND

GRAHAM ERNEST TAYLOR RESPONDENT

Ruddock v Taylor [2005] HCA 48
8 September 2005
S421/2004

ORDER

1. *Appeal allowed.*

2. *Set aside paragraph 1 of the orders of the Court of Appeal of the Supreme Court of New South Wales made on 18 September 2003 to the extent to which it dismissed the appeal to that Court and in its place order that:*

   (a) the appeal to that Court is allowed;

   (b) set aside paragraphs 1 and 3 of the orders of the District Court of New South Wales made on 18 December 2002 and in their place order that there be judgment for the defendants.

3. *Appellants to pay the costs of the respondent of the appeal to this Court.*

On appeal from the Supreme Court of New South Wales

Representation:

D M J Bennett QC, Solicitor-General of the Commonwealth with G T Johnson for the appellants (instructed by Australian Government Solicitor)

C J Birch SC with D P M Ash for the respondent (instructed by Teakle Ormsby Conn Lawyers)

CATCHWORDS

Ruddock v Taylor

Statutes – Acts of Parliament – Statutory powers and duties – Power to detain – Respondent's permanent transitional visa twice cancelled unlawfully – Respondent twice detained in immigration detention – Whether detention lawful under s 189(1) of the *Migration Act* 1958 (Cth) ("the Act") – Whether officers of the Commonwealth knew or reasonably suspected that the respondent was an unlawful non-citizen – Whether a reasonable suspicion may rest upon a mistake of law – Whether s 189(1) of the Act confers protection against mistakes concerning reach of Commonwealth power.

False imprisonment – Unlawful cancellation of respondent's visa – Whether respondent's subsequent detention unlawful – Whether s 189(1) of the Act provides a defence to a claim for wrongful imprisonment.

Words and phrases – "knows", "reasonable suspicion", "mistake of law", "unlawful detention", "false imprisonment".

Migration Act 1958 (Cth), ss 189, 196, 501.

1 GLEESON CJ, GUMMOW, HAYNE AND HEYDON JJ. The respondent, born in the United Kingdom in 1959, came to Australia, with his family, in 1966. He is not an Australian citizen. Under the *Migration Act* 1958 (Cth) ("the Act") he has held a permanent transitional visa[1] permitting him to remain in Australia.

2 In 1996, the respondent pleaded guilty to eight sexual offences against children. He was sentenced to a term of imprisonment. Twice after he had been released from prison, steps were taken to cancel his visa under s 501 of the Act (a provision permitting cancellation of a visa "on character grounds"). Twice the decisions to cancel the respondent's visa were quashed by orders of this Court. The first decision, made in September 1999 by the first appellant, Mr Ruddock, then Minister for Immigration and Multicultural Affairs, was quashed by an order of Callinan J made by consent in April 2000. The second decision, made in June 2000, by the second appellant, Senator Patterson, then Parliamentary Secretary to the Minister for Immigration and Multicultural Affairs, was quashed by order of the Full Court made on 7 December 2000[2].

3 Following each decision to cancel his visa, the appellant was detained in immigration detention. The first period of detention lasted 161 days, the second 155 days. For some time during each period of detention he was kept in prison under arrangements made for detention of some persons subject to immigration detention. After his release he brought action in the District Court of New South Wales claiming damages for false imprisonment. He sued the Ministers who had made the two decisions to cancel his visa and the Commonwealth. He did not sue those officers of the Department of Immigration and Multicultural Affairs who had actually detained him.

4 The respondent succeeded in the District Court. He obtained judgment for $116,000 and costs.

5 The Ministers and the Commonwealth appealed to the Court of Appeal of New South Wales. Their appeal was dismissed[3].

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1 The legislative provisions leading to this result were not examined in argument. They are traced in *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 445 [161]-[162] per Gummow and Hayne JJ.

2 *Patterson* (2001) 207 CLR 391.

3 *Ruddock v Taylor* (2003) 58 NSWLR 269.

6 By special leave the Ministers and the Commonwealth appeal to this Court. The appeal should be allowed. The respondent's detention was not unlawful.

7 Consideration of the issues raised in this matter must begin with the relevant provisions of the Act – especially those provisions dealing with the subject of immigration detention – as those provisions stood at the times relevant to this matter.

Detention and the *Migration Act*

8 The operation of the Act hinged upon the distinction made in Div 1 of Pt 2 (ss 13-17) between "lawful non-citizens" and "unlawful non-citizens". A non-citizen in the migration zone (for present purposes the States or Territories[4]) who held a visa that was in effect was a lawful non-citizen[5]. Other non-citizens were unlawful non-citizens[6]. If a visa was cancelled the former holder of the visa, on the cancellation, became an unlawful non-citizen unless immediately after the cancellation that person held another visa that was in effect[7].

9 Part 2 of the Act (ss 13-274) dealt with control of arrival and presence of non-citizens. Division 7 of that Part (ss 188-197) provided for detention of unlawful non-citizens; Div 8 (ss 198-199) dealt with their removal from Australia.

10 Chief attention in this appeal was given to s 189 of the Act. It was that provision upon which the appellants relied in their Notice of Grounds of Defence in the District Court as an answer to the respondent's allegations that the Ministers and the Commonwealth had wrongfully detained him. It provided:

> "(1) If an officer knows or reasonably suspects that a person in the migration zone is an unlawful non-citizen, the officer must detain the person.

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4 s 5.

5 s 13(1).

6 s 14.

7 s 15.

(2) If an officer reasonably suspects that a person in Australia but outside the migration zone:

(a) is seeking to enter the migration zone; and

(b) would, if in the migration zone, be an unlawful non-citizen;

the officer must detain the person."

An "officer" was defined in s 5 as:

"(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 Protective Service Act 1987*, 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) any other person authorised by the Minister, by notice published in the *Gazette*, to be an officer for the purposes of this Act."[8]

11 Section 189 must be understood in its statutory context, particularly the context supplied by the other provisions of Div 7 of Pt 2. Section 188 provided that an officer may require a person whom the officer knew or reasonably suspected of being a non-citizen "to show the officer evidence of being a lawful non-citizen". Section 196 fixed the period of detention. It provided:

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

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8 Some amendments were made to this provision by the *Migration Legislation Amendment Act (No 1)* 2000 (Cth) but their detail need not be noticed.

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

(b) deported under section 200; or

(c) granted a visa.

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

(3) To avoid doubt, subsection (1) prevents the release, even by a court, of an unlawful non-citizen from detention (otherwise than for removal or deportation) unless the non-citizen has been granted a visa."

12 Special provision was made in ss 190 and 191 for persons who were bound, on entering Australia, to seek immigration clearance but bypassed or tried to bypass that step, or could not or would not produce the required information or evidence.

13 Section 192 provided for the detention of those whose visa may be cancelled and who it was reasonably suspected would attempt to evade officers or not co-operate with officers.

14 Although the provisions of s 189 were central to the defence filed on behalf of the Ministers and the Commonwealth, the operation of that section was not the chief focus of the reasoning in either the District Court or the Court of Appeal. To understand why that is so, it is necessary to identify not only the way the respondent put his case but also some relevant decisions of this Court.

The state of authorities in this Court

15 The course of argument in the courts below, and in the appeal to this Court, must be understood against the background provided by the respondent's earlier litigation in this Court. In particular, it is necessary to understand the place occupied by the decision in *Re Patterson; Ex parte Taylor*[9] (which culminated in the quashing of the second decision to cancel his visa) in the history of the Court's decisions about s 51(xix) and s 51(xxvii) of the Constitution, the aliens and immigration powers.

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9 (2001) 207 CLR 391.

16 Some years before the first decision to cancel the respondent's visa was made, this Court had held in *Nolan v Minister for Immigration and Ethnic Affairs*[10] and *Pochi v Macphee*[11] that a person who had been born outside Australia to non-Australian parents and who had not been naturalised, was an alien. After the second decision to cancel the respondent's visa, some members of the Court concluded, in *Patterson*, that British subjects who had resided in Australia since before the enactment of the *Australian Citizenship Amendment Act* 1984 (Cth) (as the present respondent had) did not fall within either the aliens or the immigration power.

17 Two years after *Patterson* was decided, and after the Court of Appeal had given judgment in the present matter, this Court held in *Shaw v Minister for Immigration and Multicultural Affairs*[12] that a person born outside Australia to non-Australian parents, even if a British subject, was, if not naturalised, an alien. A majority of the Court also held[13] that *Patterson* should be regarded as authority for what it decided respecting s 64 of the Constitution and the constructive failure in the exercise of jurisdiction by the Minister.

The respondent's case

18 The respondent made four submissions in this appeal. The first, in its simplest form, founded the respondent's claim upon three propositions:

(a) each decision to cancel the respondent's visa was legally infirm and, having been quashed by order of this Court, was to be treated as if never made;

(b) the respondent's detention was an inevitable consequence of the (invalid) decisions to cancel; and

(c) because the decisions that brought about the respondent's detention were not lawful, the detention was unlawful.

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10 (1988) 165 CLR 178.

11 (1982) 151 CLR 101.

12 (2003) 78 ALJR 203; 203 ALR 143.

13 (2003) 78 ALJR 203 at 211 [39] per Gleeson CJ, Gummow and Hayne JJ, 235 [190] per Heydon J; 203 ALR 143 at 152-153, 187.

This argument may be called the "unlawful decision contention".

19 Against the possibility that the unlawful decision contention was rejected, the respondent advanced three other submissions. He submitted that the Court had held in *Patterson* that there was no power to cancel the respondent's visa and that "even if s 189 protected against mistake of law it could not protect against mistakes about the reach of Commonwealth power" (the "power contention").

20 He further submitted that an officer could not have reasonably suspected that the respondent was an unlawful non-citizen where the cancellation decision was legally infirm. Section 189 was said not to "protect" officers in circumstances where their belief or suspicion rested on a mistake of law (the "mistake of law contention").

21 Finally, it was submitted that, notwithstanding the Court's subsequent decision in *Shaw*[14], the Court's decision in *Patterson* worked some estoppel against the appellants. The exact content of that estoppel was not elaborated in argument beyond a general assertion that the appellants were precluded from denying the respondent had succeeded in those proceedings and that it had thus been determined that "he was not a person in regard to whom power [under s 189] could be exercised" (the "estoppel contention").

The unlawful decision contention

22 The simplest form of the respondent's argument did not depend upon identifying why the Minister's decision had been quashed. It was submitted that the relevant fact was that the decision had been quashed. It mattered not whether it was quashed for want of procedural fairness in making the decision, for want of power to make it or for constructive failure in the exercise of jurisdiction.

23 In this form of the argument, reference was made to s 189 only to make good the second step: that detention was a direct and inevitable consequence of the decision to cancel. When it is recognised that s 189 *requires* an officer to detain a person whom the officer knows or reasonably suspects to be an unlawful non-citizen, the second step in the respondent's argument is readily taken. It may then be right to say, as the respondent did, that some analogy might be drawn between the position of the Minister and cases like *Myer Stores Ltd v Soo*[15]

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14 (2003) 78 ALJR 203; 203 ALR 143.

15 [1991] 2 VR 597.

where a person *directing* the arrest of another may be liable for false imprisonment. But it is not necessary to consider the validity of those analogies. The argument breaks at its third step.

24 The third step in the respondent's argument was that *because* the decision to cancel his visa pursuant to s 501 was unlawful, the detention was unlawful. This conflates two separate inquiries – one about the lawfulness of the decision to cancel; the other about the lawfulness of the detention. It treats the former inquiry as determinative of the latter.

25 The first inquiry, about the lawfulness of the decision to cancel the respondent's visa, turned upon identifying valid legislative power to do so, and upon whether that power had been lawfully exercised. That directed attention, principally, to s 501 of the Act. By contrast, the lawfulness of the respondent's detention turned upon whether there was statutory or other authority to detain him. That required consideration of s 189.

26 It may be accepted that in so far as s 189 required, and thus authorised, the detention of those who *are* unlawful non-citizens, a want of power to cancel a visa, or failure in lawful exercise of that power, would lead to the quashing of the decision to cancel. It would then be apparent that the person was *not* an unlawful non-citizen and not within that aspect of the operation of s 189.

27 But that does not exhaust the operation of s 189. Section 189 is directed not only to cases where an officer *knows* that a person is an unlawful non-citizen, it extends to cases where the officer *reasonably suspects* that a person has that status. It follows that demonstrating that a person is not an unlawful non-citizen does not necessarily take the person beyond the reach of the obligation which s 189 imposes on officers. Had it been intended that those who were to be subject to detention by an officer should be confined to those who are in fact unlawful non-citizens, s 189 would have been much simpler. The section would have read, "an officer shall detain an unlawful non-citizen". The reference to an officer's state of mind is explicable only if the section is understood as not confined in operation to those who are, in fact, unlawful non-citizens. Further, the condition upon which the obligation to detain is premised, "[i]f an officer knows or reasonably suspects that a person … is an unlawful non-citizen", is not to be read as excluding from its reach the case where an officer is subjectively convinced that a person is an unlawful non-citizen but later examination reveals that opinion to have been legally flawed. The phrase "knows or reasonably suspects" is expressed disjunctively. Its primary reference is to the officer's subjective state of mind. But the disjunctive expression of the necessary state of mind does not leave, as a middle ground, falling outside the operation of the expression, a case where an officer's subjective opinion has passed from

suspicion to certainty of belief but the subject-matter of the belief (what the officer "knows") is legally inaccurate. Rather, in such a case the officer "knows or … suspects" that the person is an unlawful non-citizen and the critical question would be whether the certainty of belief professed by the officer was reasonably based.

28 That is, it follows from the considerations just mentioned 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. And if the Minister brought about a state of affairs where an officer knew or reasonably suspected that a person was an unlawful non-citizen by steps which were beyond the lawful exercise of power by the Minister, it does not automatically follow that the resulting detention is unlawful. Rather, separate consideration must be given to the application of s 189 – separate, that is, from consideration of the lawfulness of the Minister's exercise of power. If it were suggested that the Minister had exercised power where the Minister knew or ought to have known that what was done was beyond power an action may lie for the tort of misfeasance in public office[16]. But that has never been the respondent's case in this matter.

29 The Court of Appeal did not consider the application of s 189 separately from its examination of the lawfulness of the Minister's exercise of power. It is convenient to deal at this point with why the Court of Appeal's reasoning took the path it did.

The Court of Appeal's reasons

30 In the Court of Appeal, much attention was directed[17] to whether the respondent's detention was a direct or inevitable consequence of the decision to cancel his visa. That was treated as the determinative issue. The premise for this reasoning was that the respondent's detention was necessarily unlawful. Thus, Spigelman CJ held[18] that it followed from what had been decided in *Patterson*[19]

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16 *Northern Territory v Mengel* (1995) 185 CLR 307.

17 (2003) 58 NSWLR 269 at 276-278 [25]-[40] per Spigelman CJ, 283-284 [72] per Meagher JA.

18 (2003) 58 NSWLR 269 at 274 [15]-[16].

that s 189 could have no valid application to the respondent. And although Meagher JA held[20] that the officers who detained the respondent had reasonably suspected him to be an unlawful non-citizen, and presumably had therefore acted lawfully in detaining him, s 189 (and ss 196 and 501) "were inapplicable to the present case"[21]. In his Honour's view, this "inapplicability" followed from *Patterson*. Ipp JA agreed[22] in the reasons of both Spigelman CJ and Meagher JA. And because the detention was thus assumed to be unlawful, the focus was upon whether the Ministers had brought it about.

31 There is an additional reason why the Court of Appeal took the path it did. In their written submissions to the Court of Appeal, the Commonwealth and the Ministers submitted that:

> "[I]f the Ministers were seen as the relevant tortfeasors, for whom the Commonwealth is vicariously liable, s 189 would provide no defence, because that section applies only to an 'officer' and not to a 'Minister'."

Further, in that submission, and it appears elsewhere in argument in the Court of Appeal, the Commonwealth and the Ministers repeatedly sought to characterise that part of s 189 which provided for detention where an officer reasonably suspects a person to be an unlawful non-citizen as a "defence" or "excusing provision". These submissions misstate the relevant operation of s 189. It is not an excusing provision. Treating s 189 as an excusing provision distracts attention from what the section does. It both authorised and required officers to detain certain persons. The resulting detention cannot be unlawful.

32 The respondent contended that the written submission to the Court of Appeal, on behalf of the Commonwealth and the Ministers, about s 189 amounted to a concession from which they should not now be permitted to depart. Even if the submission is properly to be characterised as some form of concession, and we doubt that it is, there is no injustice in permitting the Commonwealth and the Ministers now to depart from it. It was not a concession

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19 (2001) 207 CLR 391.

20 (2003) 58 NSWLR 269 at 285 [79].

21 (2003) 58 NSWLR 269 at 285 [80].

22 (2003) 58 NSWLR 269 at 285 [84].

of fact but an argument about the legal effect of the relevant provision[23]. The respondent is not prejudiced in any way if the Commonwealth and the Ministers are now permitted to make some other argument about the legal effect of that provision.

33 The premise which underpinned the attention given in the Court of Appeal to whether the Ministers' decisions caused the respondent's detention is flawed. *Patterson* did not establish that s 189 could have no valid application to the respondent. After the Court of Appeal gave its judgment in this matter, this Court decided in *Shaw*[24] that *Patterson* should be regarded as authority for what it decided respecting s 64 of the Constitution and the constructive failure in the exercise of jurisdiction by the Minister. *Patterson* established no principle about the reach of the aliens or immigration powers to which effect should be given. But altogether apart from the subsequent consideration of these matters in *Shaw*, the Court in *Patterson* did not examine, let alone decide, any question about the validity of s 189 in its application to the present respondent.

34 In *Patterson*, the Court considered the validity of s 501 in its application to the present respondent. Even if *Patterson* were to be understood as holding that s 501 was invalid in that operation, it by no means follows that the respondent was beyond the valid operation of other provisions of the Act. Indeed, his holding a visa demonstrates why that is not so. And, in particular, whether or not the respondent was a person whose visa might lawfully be cancelled, and thus a person who might be removed from Australia as an unlawful non-citizen, it does not follow that s 189 could never have valid application to him.

35 In this appeal the respondent did not submit that s 189 was invalid. So far as the appeal book reveals, that has never been the respondent's contention. Rather, the respondent contended in the courts below, and on appeal, that s 189 could not apply in his case because an officer could not entertain the necessary reasonable suspicion. That argument was an argument about the construction of the provision. It was elaborated by reference to the power contention, the

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23 *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 at 36 [31] per Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ.

24 (2003) 78 ALJR 203 at 210-211 [35]-[39] per Gleeson CJ, Gummow and Hayne JJ, 212 [49]-[50] per McHugh J, 235 [190] per Heydon J; 203 ALR 143 at 152-153, 154-155, 187. See also *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162 at 185-188 [80]-[89] per McHugh J.

mistake of law contention and the estoppel contention. We will turn to those shortly. Before doing so, however, it is necessary to say something further about the suggestion that *Patterson* decided that the respondent was a person to whom s 189 could have no application.

36 There is no advantage to be gained by examining again what *Patterson* decided. On that particular question we adhere to the view expressed[25] by five Justices in *Shaw*. But not only is this a question which was authoritatively settled in *Shaw*, its revival is an irrelevant distraction from the issues tendered for decision in the present matter. It is irrelevant because *Patterson* did not consider, and did not decide, any issue about the constitutional validity of s 189. It is a distraction because it suggests that it is useful to ask whether the Act, as a whole, applied to the respondent when the relevant question is whether a particular provision of the Act (s 189), when properly construed, validly applied to authorise and require the respondent's detention. Asking whether the Act applied to the respondent obscures the more precise question that must be asked in respect of each of the two periods of detention in issue in this case. And in doing that, it is necessary to recognise that the first period of the respondent's detention terminated when the first decision to cancel his visa was quashed for reasons which were not founded upon any allegation of constitutional invalidity.

The power contention

37 Upon analysis, the power contention depends upon the same conflation of two distinct questions which underpins the respondent's unlawful decision contention. That is, when it is said that s 189 "could not protect against mistakes about the reach of Commonwealth power" it is said, in effect, that s 189 can have no valid application to require detention of a non-citizen whose visa has not been lawfully cancelled. For the reasons given earlier, the conflation implicit in this form of the respondent's argument is impermissible. The power contention should be rejected.

The mistake of law contention

38 The respondent's third contention was that the Court's orders quashing each of the decisions to cancel the respondent's visa showed that each decision

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25 (2003) 78 ALJR 203 at 210-211 [35]-[39] per Gleeson CJ, Gummow and Hayne JJ, 212 [49]-[50] per McHugh J, 235 [190] per Heydon J; 203 ALR 143 at 152-153, 154-155, 187. See also *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162 at 185-188 [80]-[89] per McHugh J.

had been legally infirm. It followed, so the argument ran, that the belief or suspicion that the respondent was an unlawful non-citizen could not ultimately be considered "reasonable". That is, it was submitted that a belief or suspicion could not be reasonable if it was based on a mistake of law, even if the mistake was not then apparent and was identified only after the detention commenced.

39 The contention was an argument about the construction of the Act and the word "reasonably" in particular. No constitutional reason was asserted for reading the section in the manner suggested.

40 The short answer to the contention is that what constitutes reasonable grounds for suspecting a person to be an unlawful non-citizen must be judged against what was known or reasonably capable of being known at the relevant time. In this case, when each detention of the respondent was first effected, *Nolan* required the conclusion that his visa could lawfully be cancelled and it had been cancelled – in the first instance by the Minister, and in the second by the Parliamentary Secretary to the Minister. And as soon as the relevant decision to cancel the respondent's visa was quashed, he was released from detention. Even if *Patterson* were to be understood as overruling *Nolan* (and, as a majority of the Court in *Shaw* held, it is not) what were reasonable grounds for effecting the respondent's detention did not retrospectively cease to be reasonable upon the Court making its orders in *Patterson* or upon the Court later publishing its reasons in that case. And, as pointed out earlier, *Patterson* said nothing about the validity of s 189.

41 There is, however, another reason to reject the mistake of law contention. The contention turns on distinguishing between cases in which the suspicion held by an officer that a person was an unlawful non-citizen is "reasonable", and those in which that suspicion is not. The distinction was said to be between suspicions which later were found to turn upon some mistake of fact, and those which were found to turn upon a mistake of law. This contention should be rejected. The asserted distinction should not be drawn.

42 First, and foremost, there is nothing in the words of the Act that warrants drawing such a distinction. In particular, contrary to the respondent's submissions, nothing said in *Little v The Commonwealth*[26] supports that conclusion.

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26 (1947) 75 CLR 94.

43 *Little* concerned legislative provisions cast in a form very different from s 189. The legislation considered in *Little*[27] had two distinct elements. It provided for an officer to arrest a person whom an officer suspected of committing an offence against the Act and then, separately, provided that no action would lie against the Commonwealth or any Commonwealth officer who had acted in pursuance of the section, subject to the proviso that, if the Governor-General were satisfied that an arrest was made without reasonable cause, compensation might be paid. Dixon J held[28] that the first part of the provision should be read as authorising arrest for doing acts or making omissions that amounted to an offence. Errors about what constituted an offence were to be covered by the later part of the provision. The two distinct elements of the section provided an evident textual basis for reading the provisions in this way. In s 189 there is no such textual basis for reading the provision in the same way as the section under consideration in *Little*.

44 That there is no textual basis found in the Act for distinguishing between cases of mistake of law and mistake of fact is reason enough to reject the contention. There are, however, further reasons to reject it.

45 The second reason to reject the contention is that there would be many cases under s 189 in which a distinction between mistake of law and mistake of fact could not readily be drawn, if drawn at all. Reference to cases like *Collector of Customs v Agfa-Gevaert Ltd*[29] provides ready illustration of the difficulties. Especially is that task difficult where, as here, the subject-matter of the relevant suspicion is a statutory status – being an unlawful non-citizen. Errors about the conclusion cannot safely be divided between errors of law and errors of fact. Often, perhaps much more often than not, the error will be one of mixed law and fact.

46 Thirdly, to draw such a distinction would generate great uncertainty about the application of an obligation evidently intended to be exercised in aid of the administration of the Act. Decisions about migration status must be made not only at the point of entry but subsequently. Decisions at the point of entry are, for the most part, governed by ss 190 and 191 and their provision for detention of

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27 *National Security Act* 1939 (Cth), s 13.

28 (1947) 75 CLR 94 at 108.

29 (1996) 186 CLR 389. See also *Ostrowski v Palmer* (2004) 78 ALJR 957; 206 ALR 422.

certain persons bound to seek immigration clearance. But s 189 is evidently intended to have wider application than that, and is to be engaged in cases which include those emerging from the application of s 188 and its provision for requiring a person known or reasonably suspected of being a non-citizen to show evidence of being a lawful non-citizen.

47 Lastly, there is no constitutional reason asserted for reading s 189 down in the manner suggested.

The estoppel contention

48 Finally, the respondent sought to take advantage of what was asserted to be an estoppel flowing from the decision in *Patterson*. The relevant determination in *Patterson* was said to be "the determination that he [the respondent] was not a person in regard to whom power [under s 189] could be exercised". The short and complete answer to the contention is that this point was not decided in *Patterson*. It is, therefore, not necessary to consider the more complex questions of whether or when doctrines of estoppel may find application in constitutional cases[30].

Lawful detention

49 At the trial of these proceedings, those officers who had been responsible for effecting the respondent's detention gave unchallenged evidence of the steps each had taken before detaining the respondent. Each officer had been provided with what, on its face, appeared to be a regular and effective decision of the Minister to cancel the respondent's visa. Each officer checked whether the respondent held any other visa. Upon finding that he did not, the officer concerned detained the respondent.

50 Plainly, each suspected that the respondent was an unlawful non-citizen. It was not suggested that either had acted in bad faith. The conclusion that each reasonably suspected that the respondent was an unlawful non-citizen follows inevitably.

51 It also follows from that fact, and the reasons given earlier, that the respondent's detention was lawful and required by the Act. Nothing was said to

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30 cf *Queensland v The Commonwealth* (1977) 139 CLR 585 at 614 per Aickin J; *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 564-565 [79] per McHugh J, 590-592 [156]-[162] per Gummow and Hayne JJ, 633 [297] per Callinan J.

have occurred during either period of detention that would affect the conclusions that, until an order was made quashing the relevant decision to cancel the respondent's visa, those who detained the respondent reasonably suspected that he was an unlawful non-citizen, and that accordingly, his detention was lawful and required by the Act.

Conclusion and orders

52 The appeal should be allowed. Paragraph 1 of the orders of the Court of Appeal of New South Wales made on 18 September 2003 to the extent to which it dismissed the appeal to that Court should be set aside and in its place there be orders:

(a) appeal allowed;

(b) set aside the judgment and orders of the District Court of New South Wales made on 18 December 2002 (other than the order for costs) and in their place order that there be judgment for the defendants.

The order of the Court of Appeal dismissing the respondent's cross-appeal should stand unaffected by these orders.

53 In accordance with the undertaking given on the grant of special leave to appeal, the appellants should pay the respondent's costs of the appeal. The costs orders made in the courts below stand.

54 McHUGH J. The principal issue in this appeal is whether the Commonwealth, one of its Ministers and one of its Parliamentary Secretaries can justify the false imprisonment of Graham Ernest Taylor because Commonwealth officers thought they were required to detain him in accordance with decisions made by the Minister and Secretary, which were invalid. The issue arises in a context where officers of the Commonwealth detained Mr Taylor because they thought that he was an "unlawful non-citizen" present in the migration zone (s 189 of the *Migration Act* 1958 (Cth) ("the Act")). The Commonwealth contends that the officers reasonably suspected that Mr Taylor was an "unlawful non-citizen" within the meaning of s 189, that that suspicion constituted lawful authority for the detention and that, at common law, lawful authority for imprisonment is a complete answer to an action for damages for false imprisonment.

55 In my opinion, the contention of the Commonwealth must be rejected. First, the trial judge made no specific finding that the relevant officers suspected that Mr Taylor was an unlawful non-citizen. And, on the facts, the more probable view is that they did not hold a suspicion to that effect. Rather, they believed or thought that they knew he was an "unlawful non-citizen", and a belief or supposed knowledge about a fact or conclusion is not a suspicion. Second, even if the mental state of the officers did constitute a suspicion, it was not a reasonable suspicion for the purpose of s 189 of the Act. That is because it was based on an erroneous belief that the Minister and Secretary had validly cancelled the visa issued to Mr Taylor with the result that he was an unlawful non-citizen who had to be detained in accordance with s 189 of the Act. A mistaken belief that a visa has been lawfully cancelled is a mistake of law, and there cannot be a reasonable suspicion within the meaning of s 189 where the suspicion is based on a mistaken belief as to the legal quality of the facts that led to the detention.

Statement of the case

56 Mr Taylor arrived in Australia with his parents in 1966. He was then aged seven. He has not taken out Australian citizenship. As from 1 September 1994, the Act deemed him to be a holder of a transitional (permanent) visa that permitted him to remain in Australia indefinitely. In 1996, he was convicted and imprisoned for offences against the *Crimes Act* 1900 (NSW).

The first period of detention

57 Acting under s 501(2) of the Act, the first appellant, the then Minister for Immigration and Multicultural Affairs, cancelled Mr Taylor's visa on the ground that he was not of good character. An officer of the Commonwealth, who was responsible for suspected "unlawful non-citizens" in the area in which Mr Taylor resided, examined his file and concluded that he was an "unlawful non-citizen" for the purpose of the Act. The officer had incorrectly assumed that the "cancellation" of Mr Taylor's visa made him an "unlawful non-citizen". On

4 November 1999, and purportedly acting under s 189 of the Act, two officers of the Commonwealth and two police officers, placed Mr Taylor in immigration detention for the purpose of deporting him. Mr Taylor was so detained for 161 days. He was not released until a Justice of this Court made a consent order on 12 April 2000 which caused the Court to issue a writ of certiorari quashing the cancellation decision and a writ of prohibition preventing further action on the decision of the Minister. The consent order procured Mr Taylor's release from detention and the restoration of his visa.

The second period of detention

58 On 30 June 2000, the second appellant in her capacity as Parliamentary Secretary to the Minister, and acting under s 501(3) of the Act, cancelled the restored visa on character grounds. On 6 July 2000, officers of the Commonwealth again detained Mr Taylor and took him into custody. He remained there until 7 December 2000 (a period of 155 days) when this Court quashed the cancellation order[31]. In reaching its decision, a majority of the Court held that the second appellant had fallen into jurisdictional error when she purported to cancel Mr Taylor's visa. A different majority of the Court also held that s 501(3) did not apply to Mr Taylor because he was not an alien but a subject of the Queen of Australia and could not be deported under legislation enacted under the aliens power of the Constitution. Two years after reasons were given in Mr Taylor's case, a majority of this Court overruled so much of the reasoning and decision in his case as held that persons such as Mr Taylor were not aliens for the purpose of the Constitution[32]. However, that overruling does not affect the quashing by this Court of the decision of the Minister in the first case and the decision of the Secretary in the second case. Both decisions were invalid on administrative law grounds quite apart from the constitutional ground that a majority of Justices relied on in the second case.

59 After his release from the second period of detention, Mr Taylor commenced proceedings in the District Court of New South Wales seeking damages for false imprisonment. He sought aggravated compensatory and exemplary damages from the appellants for being "wrongfully detained" for the periods between 4 November 1999 to 12 April 2000 and 6 July 2000 to 7 December 2000. Mr Taylor pleaded that the appellants made decisions under s 501 of the Act that led to his detention, even though "[a]t all material times neither s 501 nor other relevant operative parts of the Act applied to [him]". Mr Taylor also pleaded that the Commonwealth (the third appellant), or its

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31 *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391.

32 *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 78 ALJR 203; 203 ALR 143.

servants or agents, "was active in promoting the respective wrongful imprisonments and is thereby jointly and severally liable".

60 In their Notice of Grounds of Defence, the appellants denied that Mr Taylor's detention was wrongful. They did so on the ground that the officers who took him into detention were "obliged ... to detain [him] under Section 189 of the Act." They asserted that s 189 applied to his detention because the "officer had such knowledge or reasonable suspicion because the officer knew or reasonably suspected that [his] visa had been cancelled and he had no operative visa. The said officer also knew, or reasonably suspected, that [Mr Taylor] was not an Australian Citizen."

61 The case was tried by Murrell DCJ. Her Honour held that the appellants were guilty of the tort of false imprisonment in respect of both periods of detention. Judge Murrell held that s 189 of the Act did not authorise Mr Taylor's detention because:

> "*Re Patterson; Ex parte Taylor* establishes that ss 189 and 196 have no application to [Mr Taylor] and are invalid so far as any application to [him] is concerned."

62 Her Honour ordered the appellants to pay damages of $116,000.

63 The New South Wales Court of Appeal dismissed the appellants' appeal against her Honour's judgment and orders.

The tort of false imprisonment

64 The appellants concede that Mr Taylor was imprisoned for the purpose of the tort of false imprisonment. But, as the appellants claim, that tort is not made out if the defendant can prove[33] that the plaintiff was imprisoned in the exercise of a statutory power of arrest or detention[34]. The appellants contend that s 189 of the Act authorised, and thereby justified, Mr Taylor's detention.

The Migration Act

65 At the relevant time, s 189(1) of the Act declared that:

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33 *Dumbell v Roberts* [1944] 1 All ER 326 at 331; *Lynch v Hargrave* [1971] VR 99 at 108; *Mailau v Riordan* [2001] ACTSC 13 at [28].

34 *Little v The Commonwealth* (1947) 75 CLR 94 at 105; *Marshall v Watson* (1972) 124 CLR 640 at 643-644; *Cowell v Corrective Services Commission (NSW)* (1988) 13 NSWLR 714.

> "If an officer knows or reasonably suspects that a person in the migration zone is an unlawful non-citizen, the officer must detain the person."

66 Section 5 states that "***unlawful non-citizen*** has the meaning given by section 14." Section 14(1) provides that:

> "[a] non-citizen in the migration zone who is not a lawful non-citizen is an unlawful non-citizen."

67 The Act also defines elements of the s 14(1) definition. Section 5 defines "non-citizen" to mean "a person who is not an Australian citizen"; s 13(1) states that a "lawful non-citizen" is:

> "[a] non-citizen in the migration zone who holds a visa that is in effect".

68 The net result of these definition provisions is that an officer must detain a person who is in the migration zone if the officer "knows or reasonably suspects that a person":

(i) is "a person who is not an Australian citizen"; and

(ii) does not "hold[] a visa that is in effect".

69 The appellants' reliance on s 189 of the Act raises two questions of statutory construction. First, what state of mind constitutes reasonable suspicion? Second, if an officer's suspicion is grounded on a mistake of law as to the legal validity of a decision to cancel a person's visa, can the officer reasonably suspect that that person does not "hold a visa that is in effect"?

Reasonable suspicion

70 Legislatures often vest powers in administrative officers that are exercisable when the officer has a "reasonable suspicion" that specified factual circumstances prevail[35]. Under s 189 of the Act, an officer may (and must)

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35 See, eg, *Director of Public Prosecutions v Darby* [2002] NSWSC 1157 (concerning s 37(4)(a) of the *Drug Misuse and Trafficking Act* 1985 (NSW)) and *Birkett v Director-General of Family and Community Services* unreported, Supreme Court of New South Wales, 3 February 1994 (concerning s 62A(1)(a) of the *Children (Care and Protection) Act* 1987 (NSW)); cf *Marshall v Watson* (1972) 124 CLR 640 (concerning s 42(3) of the *Mental Health Act* 1959 (Vic)). See also *O'Hara v Chief Constable of the Royal Ulster Constabulary* [1997] AC 286 (concerning s 12(1) of the *Prevention of Terrorism (Temporary Provisions) Act* 1984 (UK)), s 14(1) of the *Prevention of Terrorism (Temporary Provisions) Act* 1989 (UK), s 2(1) of the *Prevention of Terrorism Act* 2005 (UK).

exercise the power to detain a person if the officer "knows or reasonably suspects" that that person is an "unlawful non-citizen". The section authorises a drastic interference with the liberty of persons. It impinges on the liberty of persons such as Mr Taylor because "[l]iberty ends where the power of arrest begins."[36] The liberty of the individual is "the most elementary and important of all common law rights"[37] and is protected by the common law doctrine of false imprisonment. So far as its language permits, s 189 must be interpreted strictly and in a manner that preserves the liberty of the subject. In particular, it should not be given a purposive construction and its terms stretched to give effect to some policy thought to be inherent in the section. In *Nolan v Clifford*, Griffith CJ said[38]:

> "the common law and the Statute law should not be taken to be abrogated, especially on matters affecting the liberty of the subject, unless a plain intention on the part of the legislature to make so important a change was to be found."

The need for a strict construction of s 189 is reinforced by the fact that *otherwise* a person could be deprived of liberty and left without remedy. Hence, s 189 should be construed, *inter alia*, so that a person cannot be lawfully detained unless the detaining officer holds one or other of the precise mental states referred to in the section. And, as will appear, it should not be construed to authorise the detention of individuals where the officer acts on a mistaken view as to the legal effect of acts or omissions.

71 In *George v Rockett*[39], this Court approved the definition of "suspicion" given by Lord Devlin in *Hussien v Chong Fook Kam*[40]:

> "Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking: 'I suspect but I cannot prove.'"

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36 *Webster v McIntosh* (1980) 32 ALR 603 at 607.

37 *Trobridge v Hardy* (1955) 94 CLR 147 at 152.

38 (1904) 1 CLR 429 at 447. See also *Baker v Campbell* (1983) 153 CLR 52 at 122; *Williams v The Queen* (1986) 161 CLR 278 at 304; *Corporate Affairs Commission of New South Wales v Yuill* (1991) 172 CLR 319 at 322, 331, 339, 346-347.

39 (1990) 170 CLR 104 at 115.

40 [1970] AC 942 at 948.

72 The *Oxford English Dictionary*[41] states that to "suspect" is to have a lower standard of knowledge, and merely "to have a faint notion or inkling of" something.

73 In *George*[42], the Court pointed out "suspicion and belief are different states of mind". And, as s 189 itself acknowledges, so are suspicion and knowledge.

74 The *Oxford English Dictionary*[43] states that to "know" is:

> "[t]o have cognizance of (something), through observation, inquiry, or information; to be aware or apprised of ...; to become cognizant of, learn through information or inquiry, ascertain, find out".

75 In s 189, the distinction between suspicion, belief and knowledge is fundamental. The mental state of a person who believes something to exist is different from the mental state of a person who suspects that something exists or a person who knows something exists. In *Homes v Thorpe*[44], Angas Parsons J, after examining various decisions and dictionaries, said:

> "According to the plain meaning of the words there is therefore a clear distinction between things that are 'suspected' of having a certain quality or characteristic, namely, in this case, of having been stolen or unlawfully obtained, and things which are believed to have this peculiarity. The gradation in mental assent is 'suspicion' which falls short of belief, 'belief' which approaches to conviction, and knowledge which excludes doubt."

76 In *Homes*, the issue was whether a Magistrate had erred in law in dismissing a charge of possessing property which was reasonably suspected of being stolen or unlawfully obtained because the arresting officer had believed, and not merely suspected, that the property was stolen. Angas Parsons J upheld the dismissal of the charge. His Honour said[45]:

> "I think, therefore, that the learned Special Magistrate was correct in finding as a fact that Dayman did not suspect the goods were of the

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41 2nd ed (1989), vol 17 at 317.

42 (1990) 170 CLR 104 at 115.

43 2nd ed (1989), vol 8 at 513.

44 [1925] SASR 286 at 291.

45 [1925] SASR 286 at 291.

> character stated in the charge, but, on the contrary, he believed them to be stolen".

77 In *Henderson v Surfield and Carter*[46], the Full Court of the Supreme Court of South Australia also recognised a clear distinction between suspicion and belief saying: "To feel absolutely certain of the guilt of a really innocent man is not to 'suspect' him. Suspicion lives in the consciousness of uncertainty."

78 In *George*, the joint judgment of this Court cited *Homes* for the proposition "that suspicion and belief are different states of mind"[47]. However, a series of cases decided in State courts between 1927, when *Henderson*[48] was decided, and 1990, when *George* was decided, assert that belief is not inconsistent with suspicion in enactments where a person is found in possession of property that is reasonably suspected of being stolen or unlawfully obtained. In *Lenthall v Newman*[49], the Full Court of the Supreme Court of South Australia – one of the judges being Angas Parsons J – said:

> "we are unable to see anything, either in the Statute or in the authorities, which warrants the view that belief, in the sense of 'regarding as true' is at all inconsistent with the suspicion intended by the Statute. On the contrary, we think that the suspicion contemplated by sec 71 is a state of mind in which the witness thinks, or believes, that the property is, or, at the least, that it may be, stolen or unlawfully obtained."

79 However, the Full Court thought that both *Homes* and *Henderson* were correctly decided. In respect of *Homes*, the Full Court said[50]:

> "[W]e agree with the view that a witness, who is able to testify *of his own knowledge to a specific larceny* of the property in question cannot be said to suspect that the goods are stolen property. If that is the substance of his evidence, the case is not brought within the spirit, or the words, of the section, in which it is implied that some element of doubt, or uncertainty in the proof, will remain, although the evidence for the prosecution is believed in its entirety."

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46 [1927] SASR 192 at 196.

47 (1990) 170 CLR 104 at 115.

48 [1927] SASR 192.

49 [1932] SASR 126 at 132.

50 [1932] SASR 126 at 131-132.

80 In *Raynal v Samuels*[51], the Full Court of the Supreme Court of South Australia affirmed the approach in *Lenthall* saying:

> "Although we think that the state of mind of Constable Poole and Constable Beard had reached the stage of belief rather than mere suspicion in the non-technical sense of the word, *Lenthall v Newman* and *Hewitt v O'Sullivan* are authorities for the proposition that belief comes within the technical meaning of the word suspicion. We accept those authorities on this point, with which we respectfully agree. For reasons already given it is not necessary or desirable to go further in this case".

81 In *R v Grace*[52] – decided two years before *Lenthall* – the Court of Criminal Appeal of New South Wales also refused to accept that, for the purposes of legislation dealing with property "reasonably suspected of being stolen", a belief that the property was stolen did not constitute reasonable suspicion that it was stolen.

> "In our opinion Parliament did not intend that a nice distinction between suspicion and belief should be drawn in such a way as to limit the offence to cases of 'suspicion and no more.' We think that the words were intended to indicate a minimum and not a maximum as regards proof; that no man should be called upon to answer unless there were at least reasonable suspicion, but not that a man should be entitled to avoid answering, and go free of a charge, if there were some stronger feeling of mind than suspicion. In any case where there is belief there must be more than ground for suspicion, and we are of opinion that the legislature did not intend that the magistrate should embark on inquiry as to whether or not the mind of the person suspecting had passed from one stage to another – a matter which would necessarily vary according to the mental equipment and disposition of that person."

82 *Grace* was cited[53] and applied by Herring CJ in *Fisher v McGee* where his Honour said[54]: "The constable's suspicion with regard to the matter was not ... excluded, so far as the section is concerned, by his belief in the matter." However, Herring CJ said that knowledge will exclude suspicion and that the

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51 (1974) 9 SASR 264 at 273 (footnotes omitted).

52 (1930) 30 SR (NSW) 158 at 163.

53 [1947] VLR 324 at 328.

54 [1947] VLR 324 at 331.

degree of knowledge required is "accurately described by their Honours in the Full Court of South Australia in ... *Lenthall v Newman*"[55].

83 The view that knowledge did not constitute suspicion for the purposes of this class of legislation was also adopted by the Supreme Court of Western Australia in *O'Brien v Reitze*[56]. Wickham J said that, if the arresting officer "knew (or thought that he knew) that the goods were stolen and were stolen by the accused, a conviction under the section could not be supported."

84 In *Wicks v Marsh; Ex parte Wicks*[57], however, the Court of Appeal of the Supreme Court of Queensland refused to follow statements in the above cases to the effect that knowledge did not constitute suspicion for the purpose of this class of legislation. The Court of Appeal described[58] the distinction as "illogical and incorrect". However, the Court of Appeal did not refer to this Court's statement in *George v Rockett* that there was a distinction between "suspicion" and "belief". Nor did counsel appearing for the parties cite that case to the Court of Appeal.

85 The issue as to whether there was a distinction between suspicion and other mental states again came before the Court of Criminal Appeal of the Supreme Court of South Australia in *R v Zotti*[59] in considering charges under s 82(1) of the *Proceeds of Crime Act* 1987 (Cth). That section made it an offence to have or dispose of property "that may reasonably be suspected of being proceeds of crime". After citing the passage from *George v Rockett* to which I have referred, Gray J said[60]:

> "A reasonable suspicion is something less than a belief, and a belief is something less than satisfaction beyond reasonable doubt."

86 In *Roderick v Police*[61], sitting in the Supreme Court of South Australia, Besanko J said that it was:

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55 [1947] VLR 324 at 330.

56 [1972] WAR 152 at 154.

57 [1993] 2 Qd R 583 at 586.

58 [1993] 2 Qd R 583 at 587.

59 (2002) 82 SASR 554.

60 (2002) 82 SASR 554 at 574 [133].

61 (2004) 88 SASR 47 at 53 [28].

> "clear enough from the authorities that if the suspector has knowledge that the personal property has been stolen or obtained by unlawful means, then he or she does not have a reasonable suspicion. I think that it is also clear that knowledge has been narrowly defined to mean first-hand knowledge and does not include a state of mind based on information or belief. Belief is suspicion not knowledge."

87 In *McLennan v Campbell*[62], Pullin J, sitting in the Supreme Court of Western Australia, said that "the ordinary meanings of 'suspicion' and 'belief' and 'knowledge' reveal that the words are located on a graded scale of meaning." However, his judgment indicates, without deciding, that the reasons expressed in *Wicks* and *Grace* represent the better view of the law at least so far as concerns legislation dealing with goods suspected of being stolen.

88 This extended discussion of the case law on legislation concerned with goods suspected of being stolen shows that the prevailing view among the State courts is that having a belief that property is stolen does not prevent a person having a reasonable suspicion that it is stolen. The State courts are divided, however, on the issue of whether knowledge in the sense described in *Lenthall* can constitute reasonable suspicion. Courts in South Australia, Victoria and probably Western Australia would answer this question in the negative. But courts in Queensland and New South Wales would answer it in the affirmative. However, the debate over issues concerning legislation dealing with property suspected of being stolen is not decisive of the issues in the present case.

89 First, the courts of the various States have adopted a purposive interpretation of the suspected property legislation of their States in holding that belief – and, in the case of Queensland and New South Wales, knowledge – is not inconsistent with reasonable suspicion. They have expanded the literal meaning of the legislation to give effect to its purpose. Second, the suspected property legislation deals with only one mental state: reasonable suspicion. In contrast, s 189 deals with two states of mind: knowledge and reasonable suspicion. In that respect, s 189 is similar to the legislation considered by this Court in *George*, which dealt with both suspicion on reasonable grounds and belief. Given the terms of s 189, there can be no doubt that knowledge is not reasonable suspicion for the purposes of the section. The critical question is whether "belief" can constitute reasonable suspicion.

90 In answering that question, a consideration of great weight is that, if the terms of the section are satisfied, a person can be deprived of his or her liberty by executive action with no appeal to the courts of law. In that context, ordinary principles of statutory construction require s 189 to be read strictly. To use the

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62 [2003] WASCA 145 at [11].

words of Kitto J[63], when confronted with an immunity provision that affected the rights of individuals, s 189:

> "operates, then, to derogate, in a manner potentially most serious, from the rights of individuals; and a presumption therefore arises that the Legislature, in enacting it, has chosen its words with complete precision, not intending that such an immunity, granted in the general interest but at the cost of individuals, should be carried further than a jealous interpretation will allow."

91 Accordingly, s 189 must be read strictly and with the presumption that the Parliament has used the terms "knows" and "reasonably suspects" with complete precision. Because that is so, an officer who knows, believes or is convinced that a person is an "unlawful non-citizen" in the migration zone cannot reasonably suspect that that person is an "unlawful non-citizen" in the migration zone.

92 The difference in meaning between the two alternate states of mind in s 189 is not one of degree, so that the disjunctive phrase of "knows or reasonably suspects" signposts the outermost states of mind that sit at either end of a sliding scale and thereby encompasses a middle ground of belief that falls within the operation of the expression. It is a condition of the state of mind of knowledge that the subjective belief as to a state of affairs matches the objective reality. In contrast, it is immaterial to the state of mind of suspicion whether the state of affairs that is suspected is real or not. While there may be different degrees of certainty with which a suspicion is held, there is no middle ground between a belief that is correct and a belief that is not borne out in reality. There is no middle ground between true and false. Where a belief is false, it does not constitute knowledge. And as a belief is a strongly held conviction, the absence of doubt makes the state of mind far removed from suspicion. Thus, a belief constitutes neither of the two alternate states of mind of s 189.

The apprehending officers did not have a reasonable suspicion

93 The learned trial judge made no finding as to the state of mind of either of the officers who were responsible for Mr Taylor's detention.

94 In respect of Mr Crighton, the officer concerned with the first detention, her Honour said:

> "He examined the file to confirm that [Mr Taylor] was an 'unlawful non-citizen' and, inter alia, noted the minute signed by the first [appellant] which had the effect of cancelling [Mr Taylor's] visa. He understood that,

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63 *Board of Fire Commissioners (NSW) v Ardouin* (1961) 109 CLR 105 at 116.

> pursuant to s 189 of the Act, he had a duty to locate and detain [Mr Taylor]."

95 In respect of Ms Campbell, the officer concerned with the second detention, her Honour said:

> "She read the file and undertook checks of the DIMIA system to confirm the contents of the file. She noted the minute signed by the second [appellant], which evidenced the second [appellant's] decision to cancel [Mr Taylor's] visa. Having considered the file, Ms Campbell formed the view that [Mr Taylor] was liable to be detained under s 189 of the Act and decided to travel to Gunnedah to take [him] into immigration detention."

96 In evidence, Mr Crighton had said he "had a reasonable suspicion at that time". But that evidence was struck out. Hence there was no evidence from him concerning his state of mind. In evidence, Ms Campbell said: "I suspected that Mr Taylor, not having citizenship of Australia, held no visa was liable for detention under section 189 of the Migration Act." Her Honour made no finding that her state of mind was that of suspicion. And in my view, it is far more probable than not that, having read the file, both Ms Campbell and Mr Crighton firmly believed that Mr Taylor was an "unlawful non-citizen". The probability is strengthened in the case of both officers by their evidence that they knew that a person whose visa has been cancelled under s 501 on character grounds is not eligible to apply for any other visa.

97 The onus was on the appellants to establish that Mr Taylor's detention was made with lawful authority, and they failed to do so. The argument for the appellants assumed that the officers had "a reasonable suspicion". But the trial judge made no finding that the officers had either of the mental states referred to in s 189. It is far more probable than not they did not have *either* of the mental states that that section requires before a person can be lawfully detained.

98 For the reasons I have given, an officer who believes or knows that a person is an "unlawful non-citizen" does not suspect that the person is an "unlawful non-citizen". The officers involved in this case did not "surmise or conjecture" that Mr Taylor was an "unlawful non-citizen". They had a belief – almost certainly amounting to a conviction having regard to the cancellation decision – that Mr Taylor was indeed an "unlawful non-citizen". Indeed, they probably thought that they knew he was an "unlawful non-citizen". Neither officer is likely to have had the slightest doubt that Mr Taylor was an "unlawful non-citizen". If, when detaining Mr Taylor, the officers had been asked whether they suspected that he was an "unlawful non-citizen", their answer would probably have been, "No. We *know* he is an unlawful non-citizen because the Minister has cancelled his visa." But whether their mental state at relevant times was belief or conviction or knowledge, it is impossible to conclude that it was

merely suspicion, despite Ms Campbell's evidence that she "suspected" Mr Taylor was an "unlawful non-citizen".

99 Nor, unless the term "knows" in s 189 includes erroneous states of mind – a construction that makes little, if any, sense – did the officers "know" that he was an "unlawful non-citizen". They could not "know" that he was an "unlawful non-citizen" when he was not an "unlawful non-citizen". Knowledge of something implies that it exists or has existed.

100 Accordingly, the appeal must be dismissed because the appellants have failed to prove that the relevant officers held either of the mental states that is a condition precedent to the detaining of a person.

"Reasonable suspicion" and mistakes of law

101 Furthermore, if contrary to the view I have expressed, the officers' mental states can be described as a suspicion, it was not a reasonable suspicion for the purpose of s 189. If they did actually have a suspicion that Mr Taylor was an "unlawful non-citizen", they did not have a reasonable suspicion within the meaning of s 189. That is because their suspicion was based on the legally mistaken view that Mr Taylor's visa had been cancelled.

102 Statutory provisions concerning powers of arrest or detention are often ambiguous as to whether the exercise of the power is conditioned upon the administrative officer not only making factual observations but also reaching correct legal conclusions concerning those facts. In *Little v The Commonwealth*, for example, s 13 of the *National Security Act* 1939 (Cth) empowered "any constable" to arrest any person "who is suspected of having committed, or of being about to commit ... an offence". Police officers had arrested the plaintiff because they believed that a ministerial order (which was not validly made) had been breached. Dixon J held that, in arresting the plaintiff, the officers had acted under the legally mistaken belief that the order was valid. Accordingly, the plaintiff could not be "suspected of having committed" an offence. His Honour said[64]:

> "I think that s 13(1) should be read as referring to the doing of acts or the making of omissions which amount to an offence. It means that, if a man is found doing such acts or making such omissions or is suspected of having done or made them or of being about to do or make, then he may be arrested without warrant. But it does not cover an erroneous belief on the part of the constable or officer as to the legal significance or quality of the acts or omissions, actual or suspected, past or threatened, of the

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64 *Little v The Commonwealth* (1947) 75 CLR 94 at 108.

> persons arrested. An error on the part of the constable or officer as to what constitutes an offence is, in my opinion, covered by sub-s (3) of s 13[65] or not at all."

103 Dixon J went on to hold that, although the police officers had made a mistake of law, they were "acting in pursuance of this section" within the meaning of s 13(3) with the result that no action would lie against them. His Honour said:

> "The truth is that a man acts in pursuance of a statutory provision when he is honestly engaged in a course of action that falls within the general purpose of the provision. The explanation of his failure to keep within his authority or comply with the conditions governing its exercise may lie in mistake of fact, default in care or judgment, or ignorance or mistake of law. But these are reasons which explain why he needs the protection of the provision and may at the same time justify the conclusion that he acted bona fide in the course he adopted and that it amounted to an attempt to do what is in fact within the purpose of the substantive enactment."

104 Of these two passages, it is the one dealing with s 13(1) which is relevant in this case. It holds that an official is not acting under a provision that authorises the official to arrest a person on suspicion of committing an offence if the official's suspicion is based on a mistake as to the legal quality of the acts of which the official knows. In contrast, the second passage shows that, for the purpose of an immunity provision, an officer may still be "acting in pursuance of" the arrest power despite an erroneous belief as to the legal quality of the acts that induced the arrest.

105 Section 189 is not an immunity provision. It is only indirectly concerned with whether the officer has legal immunity for his or her conduct in detaining a person. It is concerned with *power* and whether the officer's conduct was lawful, not whether the officer should escape liability because his or her conduct was unlawful. Like s 13(1), and unlike s 13(3), of the *National Security Act* 1939, it is an empowering provision. What Dixon J said about s 13(1) applies directly to s 189. In principle, his Honour's construction of s 13(1) applies to s 189. Indeed, the fact that s 189 refers to an officer who "reasonably suspects" and not merely "suspects" as in s 13(1) strengthens the case for applying the remarks of Dixon J. Because that is so, an officer of the Commonwealth cannot have a suspicion – let

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65 Section 13(3) of the *National Security Act* 1939 (Cth) was a protective provision that provided that "[n]o action shall lie against the Commonwealth, any Commonwealth officer, any constable or other person acting in pursuance of this section".

alone a reasonable suspicion – within the meaning of s 189 when the suspicion is not based on facts but on the erroneous legal quality of certain facts known to the officer.

106 The distinction between mistakes of law and fact is implicit in the language of s 189 of the Act and is required by a fundamental principle of statutory construction. I have already referred to the statements of Griffith CJ in *Nolan v Clifford*[66] and Kitto J in *Board of Fire Commissioners (NSW) v Ardouin*[67] to the effect that a section like s 189 should not be construed so as to interfere with the rights of individuals unless the section evinces a plain intention to do so. The wording of s 189 does not evince an intention to permit an officer to detain a person when, as a matter of law, the person is not an "unlawful non-citizen". Indeed, it evinces a contrary intention.

107 While a person may have "cognizance" or an "awareness" of a state of fact, it does not make sense to say that a person has cognizance or an awareness of a conclusion of law. Instead, a person has an understanding, or a satisfaction as to the correctness, of a legal conclusion. This is because a conclusion of law is not observed, but is reasoned on the basis of observations made. An officer may have had cognizance of a document that purports to record a decision to grant or to cancel a visa. But an officer cannot have had "cognizance" of the validity or invalidity of the decision. Accordingly, an officer cannot know that a person is an "unlawful non-citizen" when the person is not, as a matter of law, an "unlawful non-citizen".

108 The inability of a person to have cognizance of the legal quality of a matrix of facts also provides a strong reason for concluding that the issue of suspicion in s 189 is concerned with the details of a person's identity and connections to Australia or lack of them and not the legal quality of those facts. In many cases, it is the absence of facts indicating that a person is a citizen or lawful non-citizen that enables the officer to reasonably suspect that the person is an "unlawful non-citizen". If, for example, an officer finds an adult person in the migration zone who cannot speak English, who appears to have no residential address or employment with Australia and who fails, when asked, to produce a visa, the officer may "reasonably suspect" that the person is an "unlawful non-citizen". If no more appears, that is a clear case of reasonable suspicion. Many less compelling facts may establish a reasonable suspicion. But in all such cases, the officer, although having no proof that the person is an "unlawful non-citizen", is aware of facts that do exist or is unable to ascertain facts that should exist *and* those facts or their absence reasonably suggest that the person is an "unlawful

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66 (1904) 1 CLR 429 at 447.

67 (1961) 109 CLR 105 at 116.

non-citizen". If the facts upon which the officer relies are incapable in law – for whatever reason – of making the person an "unlawful non-citizen", however, the officer cannot reasonably suspect that the person has that status.

109 If the Parliament had intended the officer's power of detention to be exercisable even when the officer had inaccurately, though reasonably, concluded that the facts, of which the officer was aware, were legally sufficient to ground the conclusion that the person is an "unlawful non-citizen", the section would surely have been worded differently. It would empower (and require) officers to detain a person "[i]f an officer is *satisfied* that a person ... is an unlawful non-citizen". The officer's satisfaction – not his knowledge or reasonable suspicion – would trigger the detention power. In the absence of words such as "is satisfied", the section should not be interpreted to abrogate the common law doctrine of false imprisonment and restrict the liberty of Mr Taylor.

110 Accordingly, s 189 of the Act authorises detention only when the officer has knowledge of, or a reasonable suspicion based on, facts that are sufficient in law to categorise a person as an "unlawful non-citizen". Section 189 does not authorise detention merely because the officer knows facts that the officer believes are sufficient in law to make the person an "unlawful non-citizen". Thus, s 189 does not authorise the detention of a person that an officer suspects to be an "unlawful non-citizen" when the suspicion is grounded in a mistaken assumption as to the legal validity of a Minister's decision to cancel the person's visa. The absence of clear words permitting the detention of persons who are *not* "unlawful non-citizens" strongly indicates that Parliament did not intend lawful non-citizens to be detained under s 189. Indeed, if the argument for the appellants is correct, s 189 would authorise the detention of an Australian citizen in cases where an officer acted on a reasonable but legally erroneous conclusion concerning facts. Accordingly, s 189 does not apply to an erroneous, even if reasonable, belief on the part of an officer or Minister as to what connections are sufficient to ground Australian citizenship or as to the legal validity of a decision to grant or cancel a visa.

111 Accordingly, s 189 did not authorise the detention of Mr Taylor on either occasion.

Responsibility for false imprisonment

112 The first and second appellants are liable for Mr Taylor's wrongful detention if their decisions to cancel Mr Taylor's visa were an "active [step] in promoting and causing the imprisonment"[68]. In this case, the Court of Appeal held that "[t]he element of directness – the sufficiency of the nexus between the

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68 *Myer Stores Ltd v Soo* [1991] 2 VR 597 at 629.

defendant's act and the imprisonment – is satisfied, in the present case" because Mr Taylor's detention was "an inevitable step brought about by the self-executing operation of the statute, of which the Ministers must have been aware."[69] The Court also held that "[t]here can be no doubt that each Minister had an intention that [Mr Taylor] be removed from Australia" because that removal "was the very point of the decision to cancel the visa"[70].

113 The appellants claim the Court of Appeal's decision was wrong for four reasons. First, the appellants contend that the detention of Mr Taylor was not an "inevitable consequence"[71] of the Minister's decision because the Act was not "self-executing"[72] or "virtually automatic"[73]. Section 189 of the Act required the officer to exercise a discretion independently of the Minister's decision to cancel a visa in order to determine whether the person was an "unlawful non-citizen". Second, they contend that the test to determine a defendant's liability in tort is not whether the plaintiff's detention is the "inevitable consequence" of the defendant's acts, but whether the defendant's acts "directly" caused the plaintiff's detention. They argued that this test was not satisfied in the present case because the officers' reasonable suspicion that Mr Taylor was an "unlawful non-citizen" intervened to make the Ministers' decisions an indirect cause of Mr Taylor's detention. Third, the appellants contend that there was no evidence that the first and second appellants had any intention to detain Mr Taylor. Fourth, the appellants contend that the tort of wrongful imprisonment should not:

> "extend to a case where a Minister does no more than engage in a bona fide exercise of power under section 501 that is unknowingly flawed by jurisdictional error. That is so because of public policy, as well as the elements of 'directness' and 'intention' and the distinction under the Act between cancellation and detention."

114 Since the middle of last century, the common law has held that a defendant is liable for a ministerial officer's detention of a plaintiff whenever the defendant does an act that enlivens the officer's duty to detain the plaintiff. Proof of such an act satisfies the test of causation even though the officer ordinarily has a discretion to detain or arrest. If the complainant has issued the direction, then the officer need not independently assess the accurateness of the complaint. In

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69 *Ruddock v Taylor* (2003) 58 NSWLR 269 at 277 [34], 278 [37].

70 *Ruddock v Taylor* (2003) 58 NSWLR 269 at 277 [37].

71 [2005] HCATrans 065 (2 March 2005) at line 1845.

72 *Ruddock v Taylor* (2003) 58 NSWLR 269 at 274 [12].

73 *Ruddock v Taylor* (2003) 58 NSWLR 269 at 274 [12].

Dickenson v Waters Ltd, the defendant was liable for a constable's detention of the plaintiff because it was "extremely unlikely that Constable Pedler, if left to the exercise of his own discretion, would have taken the extreme step of arresting the plaintiff."[74] The defendant was liable because the officer's power of detention was exercisable (and required to be exercised) whenever a complainant "desire[s] the police to arrest the plaintiff"[75].

115 So the question in such cases is whether a complainant has issued a direction to arrest the plaintiff or has merely complained of the plaintiff's behaviour. If the arrest of the plaintiff is the result of the officer's independent assessment of the evidence of the complainant, the defendant is not liable. But if the officer acts on a direction of the defendant, the defendant will be liable. In *Hopkins v Crowe*[76], for example, the Court of King's Bench held that the defendant was liable when he had not only informed a police officer of the plaintiff's alleged criminal misconduct, but also told the policeman that he would charge the plaintiff. The defendant was liable because he had taken "upon himself to direct the officer to apprehend the plaintiff."[77] Similarly, in *Mooney v King*[78], the defendant had told the policeman: "I wish you to take action. I leave the matter in your hands. I'm afraid if you don't overtake him he may plant her, and you may have a difficulty in finding her." The Supreme Court of New South Wales upheld the jury's verdict as to the defendant's liability, because "there was more than a mere scintilla of evidence to go to the jury upon the question whether the defendant directed the sergeant to arrest or not."

116 This case law is applicable to the power of detention that s 189 of the Act vests in the detaining officers. Once the officers were aware of the first and second appellants' "decisions" to cancel Mr Taylor's visa, s 189 imposed a duty on the officers to detain Mr Taylor. It is inaccurate to speak of officers having a discretion under s 189. Once an officer knows or reasonably suspects that a person is an "unlawful non-citizen" in the migration zone, the officer has a statutory duty to detain that person.

117 Section 189 does not require the officers to assess the validity of the Ministers' decisions. Thus, it was the Ministers' purported cancellations of

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74 *Dickenson v Waters Ltd* (1931) 31 SR (NSW) 593 at 596.

75 *Dickenson v Waters Ltd* (1931) 31 SR (NSW) 593 at 596.

76 (1836) 4 Ad & E 774 [111 ER 974].

77 (1836) 4 Ad & E 774 at 777 [111 ER 974 at 975]. See also *Webster v McIntosh* (1980) 32 ALR 603 at 608 citing *Austin v Dowling* (1870) LR 5 CP 534 at 539.

78 (1900) 16 WN (NSW) 203 at 204.

Mr Taylor's visa – erroneous though they were – that led the officers to believe that they had a duty to detain Mr Taylor. The Ministers were therefore "active in promoting and causing the imprisonment"[79].

118 Accordingly, the first and second contentions of the appellants must be rejected.

119 The appellants' third contention must also be rejected. To say the least, it is highly probable that, by cancelling Mr Taylor's visa, the first and second appellants intended that he should be detained. Indeed, it is a near certainty that they had that intention[80]. The briefing notes provided to each appellant expressly stated that, upon cancellation of his visa, Mr Taylor would be detained in custody and deported from Australia. The Solicitor-General of the Commonwealth suggested that Mr Taylor might voluntarily leave the country when his visa was cancelled. The prospect of Mr Taylor, who had left England when he was seven years of age, voluntarily leaving Australia before he was taken into immigration detention was so remote that it can fairly be dismissed as fanciful. And after his High Court challenge to his first detention, no one could rationally think that he would voluntarily leave when his visa was cancelled for the second time.

120 The bulk of the argument in support of the fourth contention was contained in the appellants' arguments in respect of the first and second contentions. In so far as the appellants relied on public policy to protect the appellants from what would otherwise be tortious conduct, neither principle nor authority supports the contention. As Gibbs CJ pointed out in *A v Hayden*[81] "[i]t is fundamental to our legal system that the executive has no power to authorize a breach of the law". And in *Re Bolton; Ex parte Beane*[82], Deane J declared:

> "The common law of Australia knows no lettre de cachet or executive warrant pursuant to which either citizen or alien can be deprived of his freedom by mere administrative decision or action. Any officer of the Commonwealth Executive who, without judicial warrant, purports to authorize or enforce the detention in custody of another person is acting lawfully only to the extent that his conduct is justified by clear statutory mandate."

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79 *Myer Stores Ltd v Soo* [1991] 2 VR 597 at 629.

80 *Cross on Evidence*, (looseleaf service), vol 1 at [7255]; *Vallance v The Queen* (1961) 108 CLR 56 at 82.

81 (1984) 156 CLR 532 at 540.

82 (1987) 162 CLR 514 at 528.

121 In the absence of a statute relevantly giving Ministers immunity from liability for tortious conduct, a Minister incurs the same liability for his or her torts as any other citizen. A Minister is not exempted from tortious liability because the Minister believed that he or she was bona fide acting within power. The only defence to the tort of false imprisonment is lawful authority.

122 By their conduct in signing the cancellation order with its inevitable consequences for Mr Taylor, the appellants caused him to be detained. That detention constituted the tort of false imprisonment unless those responsible for detaining Mr Taylor had lawful authority to detain him. In the absence of a statutory command, a good faith exercise of power is not a defence to the tort of false imprisonment. Neither the appellants nor the officers who detained him had lawful authority to detain him. Because that is so, the appellants had no defence to Mr Taylor's action for false imprisonment.

Order

123 The appeal should be dismissed with costs.

124 KIRBY J. This appeal concerns executive detention and the remedies available to a person who establishes in court that he or she was wrongly detained pursuant to an unlawful administrative decision. It involves a claim by the respondent for damages for the tort of wrongful imprisonment. That claim was upheld in the District Court of New South Wales and the New South Wales Court of Appeal. By special leave, the appellants now appeal to this Court, submitting that the respondent's claim in tort should have been denied. In my opinion the appeal fails.

The facts, legislation and common ground

125 *The facts*: The facts up to the time of this Court's decision in *Re Patterson; Ex parte Taylor* appear in the report of that case[83]. In the present appeal, they are restated, and brought up to date, in other reasons[84]. More detail appears in the description of the matters in contest in the District Court of New South Wales[85] and in the Court of Appeal[86]. It is unnecessary for me to repeat this material. Sufficient additional facts will be stated, as necessary to explain my conclusions.

126 *The legislation*: Similarly, it is unnecessary for me to repeat the relevant provisions of the *Migration Act* 1958 (Cth) ("the Act"), as they appeared at the time of each of the detentions. Those provisions, and in particular ss 189, 196 and 501, are stated in other reasons[87]. I incorporate them by reference.

127 *The proceedings below*: Following the decision in *Re Patterson* and his release from detention, Mr Graham Taylor (the respondent) commenced proceedings in the District Court of New South Wales for damages for wrongful imprisonment. The respondent's case had two limbs. First, he brought an action against each of the appellant Ministers, who had cancelled his visa, in relation to the first and second periods of detention. It was conceded below, and uncontested in this Court, that the third appellant, the Commonwealth, was liable

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83 (2001) 207 CLR 391 at 421-423 [92]-[97] per McHugh J, 508 [351]-[357] per Callinan J.

84 See reasons of Gleeson CJ, Gummow, Hayne and Heydon JJ ("joint reasons") at [1]-[5]; reasons of McHugh J at [56]-[63]; reasons of Callinan J at [184]-[189].

85 See reasons of Callinan J at [190]-[191].

86 *Ruddock v Taylor* (2003) 58 NSWLR 269. See reasons of Callinan J at [192]-[195].

87 Joint reasons at [10]-[11]; reasons of McHugh J at [65]-[68]; reasons of Callinan J at [205]-[210].

to the respondent for any tort of wrongful imprisonment proved by him against the appellant Ministers. Secondly, the respondent brought an action against the Commonwealth on the basis that it was liable for the conduct of the officers who physically effected the detention on both occasions[88]. To succeed in his action for damages, the respondent needed to make good only one of those arguments.

128 The trial judge accepted both of the arguments[89]. She awarded the respondent $116,000 in damages. The Court of Appeal upheld this conclusion, on the basis, it appears, of the respondent's first submission only[90]. That is, the Court found that the appellant Ministers were liable to the respondent in the tort of false imprisonment because they had each caused the respondent's detention and did not have lawful justification for their actions. This therefore rendered the Commonwealth liable. It is from this decision that the appellants now appeal to this Court.

129 As an added complication, after the Court of Appeal handed down its judgment, but before the appeal to this Court was heard, this Court pronounced its decision in *Shaw v Minister for Immigration and Multicultural Affairs*[91]. That decision, in my view, overruled the Court's earlier reasoning on the constitutional issue decided in *Re Patterson*[92]. However, as I will explain, this conclusion is not fatal to the respondent's case. The overruling of *Re Patterson* does not alter the orders made in that case. Those orders remain in force, as between the parties and as addressed to the world. They do so notwithstanding the supervening change in legal doctrine[93]. I shall return to this distinction[94]. It is critical to the continuing legal rights of the respondent in this appeal. As I shall

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88 See Amended Ordinary Statement of Claim, 4 April 2002; cf joint reasons at [3].

89 *Taylor v Ruddock* unreported, District Court of New South Wales, 18 December 2002 at [111]-[112], [115] per Murrell DCJ.

90 *Ruddock* (2003) 58 NSWLR 269 at 274 [12], 278 [40] per Spigelman CJ, 283-284 [72] per Meagher JA, 285 [84] per Ipp JA; cf at 275 [22] per Spigelman CJ, 285 [78]-[79] per Meagher JA.

91 (2003) 78 ALJR 203; 203 ALR 143.

92 *Singh v Commonwealth* (2004) 78 ALJR 1383 at 1437 [265]; 209 ALR 355 at 430-431.

93 See *Residual Assco Group Ltd v Spalvins* (2000) 202 CLR 629 at 656 [67], 661-662 [80]; *Re Macks; Ex parte Saint* (2000) 204 CLR 158 at 177-178 [20]-[23], 185-186 [53], 235-236 [216], 248-249 [256]-[257], 279 [343].

94 See below these reasons at [171]-[172].

show, those rights remain, despite the changed exposition of constitutional law in *Shaw* and in later decisions of this Court that have followed *Shaw*[95].

130 *The common ground*: Some issues were uncontested before this Court. It is useful to restate them. Chief amongst them are: (1) that the Commonwealth was liable to the respondent for any tort of wrongful imprisonment proved by him against the appellant Ministers; (2) that the Ministers acted as they did in "cancelling" the respondent's visa in the course of the performance of their duties as such; (3) that the detention of the respondent successively by Mr Crighton and Ms Campbell was effected by those members of the Ministers' department and they were "officers" within the meaning of ss 5 and 189 of the Act; (4) that neither of those officers had acted for improper personal motives or maliciously; and (5) that both of the Ministers had acted bona fide in proceeding to "cancel" the respondent's visa, in accordance with the then understanding of the Act as stated in *Nolan v Minister for Immigration and Ethnic Affairs*[96] and in the application of that decision to persons in the class of the respondent[97].

131 There are two further issues that should, in my view, be taken to have been correctly decided below. They are (1) that the respondent was not prevented by any principle of issue estoppel[98] from later pursuing against the Ministers or the Commonwealth his civil right to damages for wrongful dismissal in the District Court, although he had omitted to make such a claim in the proceedings for constitutional and administrative relief in this Court[99]; and (2) that there was no substance in the respondent's complaint about the damages awarded to him: a matter that was subject to a cross-appeal in the Court of Appeal but not pursued in this Court[100].

132 The appellants submitted that it was essential for the respondent to prove mala fides to recover damages from the Ministers or the Commonwealth. The

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95 eg *Singh* (2004) 78 ALJR 1383; 209 ALR 355.

96 (1988) 165 CLR 178.

97 See reasons of Callinan J at [189]. See also *Ruddock* (2003) 58 NSWLR 269 at 283 [70].

98 *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589 at 602-603.

99 *Ruddock* (2003) 58 NSWLR 269 at 278-279 [43]-[44] per Spigelman CJ, 285 [82] per Meagher JA, 285 [84] per Ipp JA.

100 *Ruddock* (2003) 58 NSWLR 269 at 279-280 [45]-[56] per Spigelman CJ, 285 [81] per Meagher JA, 285 [84] per Ipp JA.

best authority that could be cited for this proposition was *Sullivan v Moody*[101], a negligence case concerned with the alleged liability of social workers and department officers. I am unpersuaded by this argument. I would reject it as unsupported by authority and inconsistent with the basic principle that, in cases such as this, the Commonwealth and officers of the Commonwealth are in the same position as to their liability to persons such as the respondent as private persons and entities are – no better and no worse[102]. On this point, I agree with what McHugh J has written[103].

133 This brings me to the crux of the appeal. This is whether the respondent could make out his claim against the appellants in the tort of false imprisonment. More specifically, it is whether the fact that, as the law is now revealed[104], ss 189 and 501 did apply to the respondent means that his claim must fail in this appeal.

The issues

134 The issues for the decision of this Court are straightforward:

(1) *The liability of the Ministers*: Whether the appellant Ministers are liable to the respondent for false imprisonment. That is, whether either or both of the Ministers caused the respondent's imprisonment on the relevant occasion in the requisite sense, and if so, whether the appellant Ministers can rely on one or more provisions of the Act (notably ss 189 and 501) as providing a defence of lawful justification for their actions; and

(2) *The liability of the officers*: Alternatively, whether the judgment against the Commonwealth may be upheld on the basis that the Commonwealth was liable to the respondent through its officers, because s 189 did not operate to protect the officers in circumstances where their respective beliefs or suspicions that the respondent was an unlawful non-citizen were the result of a mistake of law, namely a mistaken belief that the respondent's visa had been lawfully cancelled.

The liability of the Ministers in tort

135 *A common law action*: The respondent's claim was framed in the common law tort of false imprisonment. It was on this basis that the respondent recovered

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101 (2001) 207 CLR 562 at 581 [55]-[56].

102 *Judiciary Act* 1903 (Cth), s 64.

103 Reasons of McHugh J at [120]-[121].

104 Following *Shaw* (2003) 78 ALJR 203; 203 ALR 143.

judgment at trial, subsequently upheld by the Court of Appeal. Unless displaced by statute, it is the law of that tort that governs this appeal. It is open to the Federal Parliament, acting within its heads of power, to abrogate or modify the tort of false imprisonment. It could, for example, do so within the particular context of defined migration decisions. However, such a step would require clear and unambiguous action on the part of the Parliament. In *Coco v The Queen*, Mason CJ, Brennan, Gaudron and McHugh JJ stated that[105]:

> "Statutory authority to engage in what otherwise would be tortious conduct must be clearly expressed in unmistakable and unambiguous language."

136 No argument was advanced by the appellants that the tort of false imprisonment had been abrogated, in whole or in part, by the Act. In my view, the provisions of that Act, including s 189, do not meet the strict standard required to do so[106]. This is especially so given the fundamental right of individual liberty that the tort protects. The respondent's claim must therefore be approached by the application of the common law, considered in light of any relevant statutory provisions that might have provided a defence to the appellants against the common law action.

137 *False imprisonment and executive detention*: The tort of false imprisonment has a long history[107]. It is a species of the tort of trespass to the person. It is concerned with direct and intentional forms of harm. It reflects the fundamental interest of the common law in protecting individual liberty and freedom of movement[108]. As Fullagar J observed in *Trobridge v Hardy*[109]:

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105 (1994) 179 CLR 427 at 436. See also *Morris v Beardmore* [1981] AC 446 at 455; Trindade and Cane, *The Law of Torts in Australia*, 3rd ed (1999) at 292-293.

106 cf *Australian Postal Corporation Act* 1989 (Cth), s 34; *Superannuation Industry (Supervision) Act* 1993 (Cth), s 378; *Australian Crime Commission Act* 2002 (Cth), s 59B; *Banking Act* 1959 (Cth), s 70A.

107 See *Macpherson v Brown* (1975) 12 SASR 184 at 190-191, 203-205; Trindade, "The Modern Tort of False Imprisonment", in Mullany (ed), *Torts in the Nineties*, (1997) 229 at 230.

108 See eg Trindade, "The Modern Tort of False Imprisonment", in Mullany (ed), *Torts in the Nineties*, (1997) 229 at 229.

109 (1955) 94 CLR 147 at 152. See also *Ruhani v Director of Police [No 2]* [2005] HCA 43 at [63]-[65].

> "The mere interference with the plaintiff's person and liberty constituted prima facie a grave infringement of the most elementary and important of all common law rights."

138 This concern is especially significant in respect of a claim for wrongful imprisonment made against members or officers of the Executive Government. It is a fundamental principle of Australia's constitutional law that the executive may not interfere with the liberty of an individual without valid authorisation. In *Re Bolton; Ex parte Beane*, Deane J explained[110]:

> "The common law of Australia knows no lettre de cachet or executive warrant pursuant to which either citizen or alien can be deprived of his freedom by mere administrative decision or action. Any officer of the Commonwealth Executive who, without judicial warrant, purports to authorize or enforce the detention in custody of another person is acting lawfully only to the extent that his conduct is justified by clear statutory mandate. ... It cannot be too strongly stressed that these basic matters are not the stuff of empty rhetoric. They are the very fabric of the freedom under the law which is the prima facie right of every citizen and alien in this land. They represent a bulwark against tyranny."

139 To similar effect, the House of Lords has described the tort of false imprisonment as one of the "important constitutional safeguards of the liberty of the subject against the executive"[111]. When a claim for false imprisonment is made in respect of a good faith, but mistaken and unlawful, attempt by an administrative decision-maker to apply the law, courts are forced to choose between two "stark alternatives"[112]. Should a claim for damages by the individual who has been wrongly detained be upheld? Or should the fact that the detention was effected bona fide, and in reasonable reliance on the law, be held to justify the defendant's conduct, thereby foreclosing liability?

140 Throughout the common law world, the conclusion consistently reached by courts addressing this question is that, in the absence of statutory provisions that clearly afford an immunity or defence to the administrator, the result must favour the individual whose rights have been violated[113]. Wrongful

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110 (1987) 162 CLR 514 at 528-529.

111 *R v Governor of Brockhill Prison; Ex parte Evans (No 2)* [2001] 2 AC 19 at 43.

112 *Cowell v Corrective Services Commission (NSW)* (1988) 13 NSWLR 714 at 717.

113 See eg *Brockhill* [2001] 2 AC 19; *Cowell* (1988) 13 NSWLR 714.

imprisonment is a tort of strict liability[114]. Lack of fault, in the sense of absence of bad faith, is irrelevant to the existence of the wrong[115]. This is because the focus of this civil wrong is on the vindication of liberty and reparation to the victim, rather than upon the presence or absence of moral wrongdoing on the part of the defendant[116]. A plaintiff who proves that his or her imprisonment was caused by the defendant therefore has a prima facie case. At common law it is the defendant who must then show lawful justification for his or her actions[117].

141 The heavy burden placed on the defendant, at least in contrast to some other torts[118], is explicable in two senses. First, the onus on the defendant to establish a lawful justification is mitigated to some extent by the fact that a plaintiff must prove that the defendant was a direct cause of the injury[119], as well as prove the existence of the requisite intent[120]. Secondly, as discussed above,

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114 *Brockhill* [2001] 2 AC 19 at 26, 27, 28, 32; cf *The Laws of Australia*, Title 33, "Torts", Subtitle 33.8, "False Imprisonment" at 81 [96].

115 *Marshall v Watson* (1972) 124 CLR 640. Compare the tort of malfeasance in public office, which has bad faith as an element: see *Northern Territory v Mengel* (1995) 185 CLR 307. See also *Eshugbayi Eleko v Government of Nigeria* [1931] AC 662 at 670-671 (PC).

116 See Cane, "The Temporal Element in Law", (2001) 117 *Law Quarterly Review* 5 at 6.

117 *Trobridge* (1955) 94 CLR 147 at 152; *Marshall* (1972) 124 CLR 640; *Williams v Minister, Aboriginal Land Rights Act 1983* (1994) 35 NSWLR 497 at 512; *Spautz v Butterworth* (1996) 41 NSWLR 1 at 13; *Carnegie v Victoria* unreported, Full Court of the Supreme Court of Victoria, 14 September 1989; *Myer Stores Ltd v Soo* [1991] 2 VR 597; *Blundell v Attorney-General* [1968] NZLR 341; *Holroyd v Doncaster* (1826) 3 Bing 492 [130 ER 603]; *Hicks v Faulkner* (1878) 8 QBD 167 at 170 per Hawkins J (affirmed (1882) 46 LT 127 (CA)).

118 Contrast the tort of negligence, in which the plaintiff bears the onus of establishing all of the ingredients of the tort, including establishing a duty of care and proving breach of that duty by the defendant.

119 *Myer* [1991] 2 VR 597; *Spautz* (1996) 41 NSWLR 1; Balkin and Davis, *Law of Torts*, 3rd ed (2004) at 60-61 [3.34]; Trindade and Cane, *The Law of Torts in Australia*, 3rd ed (1999) at 50; Fleming, *The Law of Torts*, 9th ed (1998) at 36. See *Ruddock* (2003) 58 NSWLR 269 at 276 [28]-[30].

120 The requisite intent is an intention to cause the imprisonment: *Williams v Milotin* (1957) 97 CLR 465 at 474; *McHale v Watson* (1964) 111 CLR 384 at 388. See Trindade, "The Modern Tort of False Imprisonment", in Mullany (ed), *Torts in the Nineties*, (1997) 229 at 235-237.

the principal function of the tort is to provide a remedy for "injury to liberty"[121]. It is not, as such, to signify fault on the part of the defendant. Damages are awarded to vindicate personal liberty, rather than as compensation for loss *per se*[122].

142 In light of these principles, it is understandable why, if the respondent can show that the Ministers caused his imprisonment on each occasion, each Minister is obliged to point to a clear lawful justification for his or her actions in order to escape liability. It is also understandable why any asserted lawful justification must be strictly scrutinised by this Court. As explained by the House of Lords[123]:

> "The defence of justification must be based upon a rigorous application of the principle that the liberty of the subject can be interfered with only upon grounds which a court will uphold as lawful."

143 *The Ministers caused the detention*: The question of causation, raised by the appellants, can be easily disposed of. I agree with what McHugh J has written on this issue[124]. Causation is a question of fact. On this factual question, the respondent has concurrent findings in his favour in the courts below. I accept such findings. For the purpose of the tort of wrongful imprisonment, the Ministers, by their successive acts in "cancelling" the respondent's visa, caused, and indeed intended to cause, the respondent's loss of liberty. Such loss of liberty, in the form of "detention" under the Act, was the inevitable consequence of each Minister's act of "cancelling" the respondent's visa under s 501 of the Act[125]. This was so notwithstanding the interposition of an administrative power belonging to the respective officers who effected the detention. In the words of Meagher JA in the Court of Appeal, the Ministers were "the real cause of that imprisonment"[126].

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121 Trindade and Cane, *The Law of Torts in Australia*, 3rd ed (1999) at 302.

122 Balkin and Davis, *Law of Torts*, 3rd ed (2004) at 62 [3.37]. Contrast the tort of negligence, where damages are awarded to compensate for loss or damage.

123 *Brockhill* [2001] 2 AC 19 at 35.

124 Reasons of McHugh J at [113]-[118].

125 See *Ruddock* (2003) 58 NSWLR 269 at 276 [25]-[29], 277-278 [37] per Spigelman CJ, 283-284 [72] per Meagher JA, 285-286 [84] per Ipp JA. See reasons of Callinan J at [192].

126 *Ruddock* (2003) 58 NSWLR 269 at 284 [72].

144 In addition, each of the officers acted in accordance with his or her perceived statutory duty, as that duty was understood to apply to persons in the class of the respondent. Because there was no real scope for a separate and different decision by the officers concerned, or either of them, following the ministerial "cancellations" of the respondent's visa rendering him an "unlawful non-citizen"[127] (with no other basis to permit him lawfully to remain within Australia), no break in the causal chain was proved to exempt the Ministers from responsibility, in fact and law, for the imprisonment. This was so although the detention was physically effected by the officers concerned[128]. This is not a case where there was exercised a real and separate discretion or a power to reach a distinct and contrary conclusion.

145 *The need for lawful justification*: By the common law, to escape liability, the Ministers must therefore show lawful justification for their actions, either under the common law or by statute[129]. The appellants relied on s 189 of the Migration Act as providing such a defence. The only other provision of the Act that might provide lawful authority for the Ministers' actions is s 501. I will consider each of these sections in turn. Neither, in my view, exempts the appellants from the liability found against them.

146 *Section 189 of the Migration Act*: Following *Shaw*, it must now be accepted that s 189 of the Act is (and always was) valid in its application to the respondent[130]. Yet this is not the end of the matter. Even if it is accepted that, on each occasion, the conduct of the officers in detaining the respondent fell within the ambit of s 189, a further question arises as to whether that section is effective to afford a lawful justification for the anterior conduct of the Ministers. I am not convinced that s 189 has this effect. An application of the principles of statutory construction and consideration of the history and nature of the tort of false imprisonment lead me to this conclusion.

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127 cf *Goldie v Commonwealth* (2002) 117 FCR 566 at 569 [6].

128 *Ruddock* (2003) 58 NSWLR 269 at 283-284 [72]; cf *Myer* [1991] 2 VR 597 at 601, 617, 629 applying *Aitken v Bedwell* (1827) Mood & M 68 [173 ER 1084]. See also *Spautz* (1996) 41 NSWLR 1 at 26. The appellants conceded that the Ministers "would have appreciated that detention was likely or perhaps that it would be the natural and probable result" of their actions.

129 *Marshall* (1972) 124 CLR 640; *Myer* [1991] 2 VR 597; *Holroyd* (1826) 3 Bing 492 [130 ER 603]; *Washburn v Robertson* (1912) 8 DLR 183 (SC Sask).

130 See *Singh* (2004) 78 ALJR 1383 at 1437 [265], cf at 1412-1413 [127]; 209 ALR 355 at 395-396, 430-431.

147 First, s 189 of the Act is directed in its terms to "an officer". "Officer" is defined by s 5 of the Act. The definition does not include a Minister. The appellants did not contend otherwise. Section 189, in fact, says nothing about the powers, duties or responsibilities of the Minister. To overcome this deficiency, the appellants submitted that, where the actual arrest by an officer was authorised by law (as here, by s 189), any person who instigated (or caused) that officer's action could not be liable for false imprisonment. Therefore, it was argued, if s 189 of the Act was valid in its application to the respondent and applied to the conduct of the officers in respect of the contested periods of detention, the Ministers would likewise not be liable for damages.

148 This submission should not be accepted. It conflates the liability of the officers with that of the Ministers. It is contrary to authority. As an examination of the case law reveals, the question posed by the tort of wrongful imprisonment is not the lawfulness of the imprisonment at an abstract level[131]. What is required is a specific inquiry directed to the lawfulness of the conduct of the alleged tortfeasor. No statutory provisions, whether under the Act or otherwise, abrogate or modify this statement of the law.

149 The tort of wrongful imprisonment contemplates that a person might be liable for damages notwithstanding that another person involved in the imprisonment can prove lawful justification for his or her actions. For example, in *Cowell v Corrective Services Commission (NSW)*[132], a former prisoner brought proceedings for false imprisonment against the Corrective Services Commission of New South Wales and a nominal defendant representing the governor of the prison. The prisoner had been imprisoned for a period longer than was legally authorised. This was the result of miscalculations of the term of imprisonment. The incorrect calculation was based on an understanding of the applicable statute, subsequently overturned by this Court[133]. Both respondents relied on s 46 of the *Prisons Act* 1952 (NSW) as providing them with an immunity. That section stated:

> "No action or claim for damages shall lie against any person for or on account of anything done or commanded to be done by him and purporting to be done for the purpose of carrying out the provisions of this Act, unless it is proved that such act was done or commanded to be done maliciously and without reasonable and probable cause."

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131 cf joint reasons at [18], [23]-[24], [28].

132 (1988) 13 NSWLR 714.

133 *Smith v Corrective Services Commission (NSW)* (1980) 147 CLR 134.

150 A majority of the Court of Appeal held that the governor of the prison was protected by s 46. Consequently the prisoner's action against the governor was dismissed[134]. However, the majority observed that "the unavailability of an action against the governor does not determine the liability of the [Commission] which also relies on s 46"[135]. Because that section was directed, in its terms, to a "person", it did not apply to protect the Commission[136] which, it was held, had directed the continued detention of the prisoner. The prisoner was therefore entitled to succeed against the Commission.

151 The decision in *Cowell* illustrates two points relevant to the present appeal. First, in considering statutory provisions in this context, courts read any nominated statute strictly, in deference to the high value placed on individual liberty which the tort of wrongful imprisonment helps to defend. Secondly, the fact that one party enjoys a type of statutory immunity for their tortious conduct is not an automatic defence for any other parties involved in the breach. Each party must prove a separate immunity or defence and the onus of doing so is a heavy one.

152 Similar conclusions are also demonstrated by the long line of "police informant" cases. These concern the circumstances in which a person, who gives information to police that leads to a wrongful arrest, will be liable to the person falsely imprisoned for false imprisonment[137]. The liability of the informant remains open although the police officers concerned may be immune from liability under statutory provisions authorising them to arrest persons on the basis of reasonable suspicion.

153 A clear example of this differentiation is *Davidson v Chief Constable of North Wales*[138]. The plaintiff in that case was arrested by police on suspicion of theft after police received information from a store "detective". The plaintiff had not committed any offence. She subsequently brought an action for false imprisonment against the police and the employers of the store detective. The

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134 *Cowell* (1988) 13 NSWLR 714 at 731 per Clarke JA, with whom Priestley JA agreed; cf at 724 per McHugh JA, in dissent.

135 *Cowell* (1988) 13 NSWLR 714 at 731.

136 *Cowell* (1988) 13 NSWLR 714 at 739.

137 See eg *Dickenson v Waters Ltd* (1931) 31 SR (NSW) 593; *Blundell* [1968] NZLR 341; *Myer* [1991] 2 VR 597; *Davidson v Chief Constable of North Wales* [1994] 2 All ER 597. See also *Bahner v Marwest Hotel Co Ltd* (1969) 6 DLR (3d) 322 (BC SC).

138 [1994] 2 All ER 597.

English Court of Appeal held that the police involved in the arrest and imprisonment were not liable. They were protected by s 24(6) of the *Police and Criminal Evidence Act* 1984 (UK)[139]. However, the Court considered separately the liability of the store detective. The outcome ultimately turned on factual questions concerning causation. However, the Court of Appeal was not in doubt that it was necessary to consider the distinct liability of those who initiated the steps leading to imprisonment and those who effected it. This approach is obviously correct in principle. The submission of the appellants, that there is a general principle of law that whoever causes imprisonment cannot be liable if the conduct of the detaining officer is authorised by statute, must be rejected as inconsistent with authority and legal principle.

154 In determining whether s 189 applies to excuse from liability the actions of the Ministers in respect of the respondent, it is also necessary to remember the basic principles of statutory construction which, from the very earliest days of this Court, have insisted that the fundamental rights of the individual may not be invaded by statute unless this is done with "irresistible clearness"[140]. The strictest approach will apply where rights such as liberty of the person and freedom of movement are in question[141].

155 On this basis, the terms of s 189 (which do not mention "a Minister") fall well short of affording the first and second appellants, or either of them, statutory authority to engage in conduct that would otherwise constitute wrongful imprisonment. The Commonwealth can be in no better position. If the Parliament had a purpose to provide the Ministers and the Commonwealth with immunity from a claim of wrongful imprisonment in the context of immigration detention, it might have enacted a specific provision to this effect[142]. This it did not do. Because of this, and in light of the fundamental right protected by the

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139 *Davidson* [1994] 2 All ER 597 at 600-601, 605. That section provided, in terms similar to s 189, that: "Where a constable has reasonable grounds for suspecting that an arrestable offence has been committed, he may arrest ... anyone whom he has reasonable grounds for suspecting to be guilty of the offence."

140 *Potter v Minahan* (1908) 7 CLR 277 at 304. See also *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at 553 [11], 555 [16], 577 [90], 578 [94].

141 See eg *Nolan v Clifford* (1904) 1 CLR 429 at 447 per Griffith CJ.

142 cf *Judicial Officers Act* 1986 (NSW), s 48; *Police Act* 1990 (NSW), s 213; *Sheriff Act* 2005 (NSW), s 15; *Police Regulation Act* 1958 (Vic), s 123; *Police Act* 1998 (SA), s 65; *Police Powers and Responsibilities Act* 2000 (Q), s 193; *Police Act* 1892 (WA), s 137; *Criminal Procedure (Summary) Act* 1902 (WA), s 230; *Justices Act* 1959 (Tas), s 126.

tort and the strict rules of statutory construction that apply when such a right is endangered, immunity for persons other than an "officer", referred to in s 189 of the Act, does not exist.

156 *Conclusion: the Ministers cannot rely on s 189*: The appellants' submission, that s 189 provided lawful justification for the Ministers' actions sufficient to support a defence against the respondent's claim for wrongful imprisonment, must therefore be rejected. It follows that it is unnecessary to consider the respondent's separate argument that, earlier in the proceedings, the appellants conceded that s 189 could not apply to the Ministers and that they should not be allowed to resile from that concession[143]. The respondent does not need to rely on that argument.

157 *Section 501 and the cancellation decisions*: But is an immunity afforded by s 501 of the Act? It was under this section that the decision of each Minister to cancel the respondent's visa was purportedly made. The issue thus arising is whether the Ministers may rely on that section to provide justification in law for their respective actions. Or do the earlier orders of this Court quashing both decisions, made under that section of the Act, prevent the Ministers from doing so in the circumstances of this case?

158 *The first period of detention*: There were two relevant ministerial decisions. Each of them resulted in a period of detention. The two periods aggregated to the "imprisonment" for which the respondent brought his action in tort.

159 The respondent first commenced proceedings in the original jurisdiction of this Court on 16 March 2000. Pursuant to s 75(v) of the Constitution, he sought a writ of prohibition (he also sought certiorari) on the ground of breach of the requirements of natural justice by the first appellant in deciding to cancel his visa on 4 September 1999 ("the first decision"). By consent, orders absolute for prohibition and certiorari were made by Callinan J on 12 April 2000[144]. The respondent was then released from detention. However, before his release he had spent 161 days in detention. He complained that this was unlawful and entitled him to damages.

160 *Certiorari renders the Minister's decision void*: Where a writ of certiorari issues to quash an administrative decision, it operates with retrospective effect.

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143 See *Ruddock* (2003) 58 NSWLR 269 at 275 [23]; cf joint reasons at [32].

144 See *Re Patterson* (2001) 207 CLR 391 at 508 [355].

That is, it operates from the date of the decision itself[145]. The result of the writ is that the impugned decision has no legal effect[146]. In the eye of the law the decision is void *ab initio*[147].

161 It follows that the effect of Callinan J's order on 12 April 2000 was to render the first ministerial decision to cancel the respondent's visa under s 501 a legal nullity. Accordingly, in legal terms, the first decision was made without any lawful basis. It was not authorised by s 501. For this reason, the Minister is unable to rely on s 501 as providing a defence of lawful justification to a claim of wrongful imprisonment in respect of the first period of imprisonment, assuming the section otherwise provides such justification.

162 *Detention without legal authorisation is unlawful*: Two decisions should be mentioned, consistent with this approach. The first is *Park Oh Ho v Minister for Immigration and Ethnic Affairs*[148], a decision of this Court. In that case, following the making of a deportation order by a delegate of the Minister, the appellants were detained under s 39(1) of the Act. That sub-section provided:

> "Where an order for the deportation of a person is in force, an officer may, without warrant, arrest a person whom he reasonably supposes to be that person, and a person so arrested may, subject to this section, be kept in custody as a deportee in accordance with sub-section (6)."

163 The deportation order in question was subsequently set aside because it was made for an impermissible purpose. One of the issues then arising was whether the period of detention, effected pursuant to the void deportation order,

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145 *Forbes v New South Wales Trotting Club Ltd* (1979) 143 CLR 242 at 277; *Macksville & District Hospital v Mayze* (1987) 10 NSWLR 708 at 718; *R v Industrial Appeals Court; Ex parte Henry Berry & Co (Australasia) Ltd* [1955] VLR 156 at 165; *R v Muirhead and Bracegirdle; Ex parte Attorney-General* [1942] SASR 226; *Agua Marga Pty Ltd v Minister for the Interior* (1973) 1 ACTR 27 at 40; *Calvin v Carr* [1980] AC 574; Aronson, Dyer and Groves, *Judicial Review of Administrative Action*, 3rd ed (2004) at 693.

146 *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 580, 595. See also *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2001) 209 CLR 597 at 630-634 [101]-[110].

147 *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147; *Ackroyd v Whitehouse* (1985) 2 NSWLR 239 at 249-250; *Calvin v Carr* [1980] AC 574; *Macksville & District Hospital v Mayze* (1987) 10 NSWLR 708 at 718.

148 (1989) 167 CLR 637.

was unlawful. Relying on *Re Bolton*[149], this Court unanimously held that because the deportation order had been set aside and was void *ab initio*, the detention was not authorised by law[150]. It was, and always had been, unlawful.

164 At the heart of this Court's reasoning in *Park Oh Ho* was an acceptance that "the voidness of the deportation orders removed the only lawful basis of the appellants' incarceration during the relevant period"[151]. The detention provision considered by the Court in that case was not identical to s 189, now appearing in the Act. Nevertheless, the Court's reasoning supports the principle that the quashing by a court of an administrative decision that forms the basis for detention has a retrospective effect on the legality of such detention.

165 A similar approach was taken by the House of Lords in *R v Governor of Brockhill Prison; Ex parte Evans (No 2)*[152]. That case, like the case of *Cowell*[153] mentioned earlier, concerned a claim of wrongful imprisonment by an applicant who, as the result of an incorrect calculation of her sentence, had been imprisoned beyond her correct release date. The prison governor had calculated the release date on the basis of judicial decisions that were subsequently overturned.

166 Their Lordships rejected the prison governor's argument that lawful justification was to be assessed at the time the detention of the prisoner was effected on the basis of an earlier legal understanding. They held that the ultimate judicial decision, which correctly stated the law, operated with retrospective effect to make the applicant's imprisonment during the excessive period unlawful[154]. As such, the applicant was entitled to succeed in her claim for wrongful imprisonment. This was so notwithstanding that the governor was "blameless" in any moral sense[155]. It was so despite the fact that the governor had acted in reliance on the state of the law as earlier expounded by the courts.

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149 (1987) 162 CLR 514 at 528-529.

150 *Park Oh Ho* (1989) 167 CLR 637 at 644.

151 *Park Oh Ho* (1989) 167 CLR 637 at 645.

152 [2001] 2 AC 19.

153 *Cowell* (1988) 13 NSWLR 714 was referred to and approved by the House of Lords: see *Brockhill* [2001] 2 AC 19 at 29.

154 *Brockhill* [2001] 2 AC 19 at 26-27, 28-29, 32-33.

155 *Brockhill* [2001] 2 AC 19 at 27.

167 *Conclusion: the respondent succeeds for the first period*: It follows that this Court's orders quashing the first decision deprived that decision of any statutory or other legal authority to ground a defence of lawful justification based on s 501 of the Act. The respondent's claim for wrongful imprisonment against the first appellant, in respect of the first period of detention, was therefore correctly upheld by the Court of Appeal. The Commonwealth is liable by its concession, which I accept. No error is shown warranting the intervention of this Court. Nothing that happened subsequently in *Re Patterson*, or in the later decisions of this Court on the legal questions decided in that case, alters this conclusion. The respondent was, and is, entitled to recover damages for wrongful imprisonment in respect of the first period of detention. Whatever decision is made with respect to the second period of detention, the respondent's entitlements in respect of the first are unassailable.

168 *The second period of detention*: The respondent submitted that the same reasoning applied to the order in *Re Patterson*, quashing the decision of the second appellant made on 30 June 2000 to cancel the respondent's visa ("the second decision"). According to the respondent, because of that order, the second decision, too, was a legal nullity. Accordingly, the second appellant could not rely on s 501 as providing lawful authority for the decision.

169 It is here that the complication arises in relation to the second period of detention because of the later decision in *Shaw*. Does the fact that the *ratio decidendi* of *Re Patterson* has been overruled by this Court in *Shaw* affect the validity or effectiveness of this Court's orders in *Re Patterson*? In my view it does not. Those orders remain binding and effective notwithstanding the Court's later holding in *Shaw*.

170 First, the orders of this Court, even if made for reasons later held to have been incorrect, are binding until set aside or permanently stayed[156]. This principle flows from the constitutional character of the courts mentioned in Ch III of the Constitution, including this Court[157], as well as longstanding authority of the common law. Orders of this Court, made in the exercise of its original jurisdiction under the Constitution, represent a final and binding disposition of the matters in a controversy between the parties[158]. As explained

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156 *Cameron v Cole* (1944) 68 CLR 571 at 590, 598-599, 607; *Re Macks* (2000) 204 CLR 158 at 177-178 [20]-[23], 185-186 [53], 235-236 [216], 248 [255], 279 [343].

157 *Residual Assco* (2000) 202 CLR 629 at 660 [76]; *Re Macks* (2000) 204 CLR 158 at 248-249 [255]-[256].

158 Constitution, s 75; *Judiciary Act* 1903 (Cth), s 32; cf Constitution, s 73: "and the judgment of the High Court in all such cases shall be final and conclusive".

in *Residual Assco Group Ltd v Spalvins*[159], finality of litigation is an hypothesis on which Ch III of the Constitution is founded[160]. The orders in *Shaw* made no reference to the respondent personally or to the orders made earlier in *Re Patterson*. The orders in *Re Patterson* therefore stand. They remain in force.

171 Secondly, the effect of overruling the reasoning in a previous decision of this Court is that the *ratio decidendi* so overruled will no longer be considered a source of binding legal authority[161]. However, a distinction must be drawn between a court's reasons for judgment and the judgment (or order) itself. Following overruling, the *reasons* for judgment are deprived of effect as a legal precedent. However, the validity and effect of the *orders* are not, as such, affected. Those orders remain enforceable[162]. They are binding and effective unless further and different orders are made. It is easy to fall into the mistake of confusing the effect of overruling a holding in a case (as happened when *Shaw* overruled *Re Patterson*) with overruling or reversing the Court's actual orders and judgment in the earlier case. Accurate analysis requires that the distinction be carefully observed. It is one critical to the claims of the respondent against the first and second appellants and hence the outcome of this appeal.

172 Any other consequence would be inconsistent with the function of a Ch III court to determine, finally and conclusively, matters brought before it[163]. It would be a "recipe for chaos"[164]. Particularly so, because it will often be impossible to state with certainty that the *reasons* for overruling legal doctrine remove any lawful basis for the *orders* made in the earlier decision. Before a party – or the community – is excused from compliance with the orders of this Court it is necessary for the Court to examine the question and itself set aside, or vary, any orders earlier made, if that course is justified. No person may decide for themselves to ignore orders of this Court or treat them as invalid so long as such orders remain in force.

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159 (2000) 202 CLR 629.

160 (2000) 202 CLR 629 at 661 [79].

161 See *Consett Industrial and Provident Society v Consett Iron Co* [1922] 2 Ch 135 at 166-167.

162 *Judiciary Act* 1903 (Cth), s 77M, s 31, s 2 (definition of "judgment"); High Court Rules 2004, Pt 10.

163 *Residual Assco* (2000) 202 CLR 629 at 656-660 [68]-[76], 661-662 [79]-[80].

164 See *M v Home Office* [1992] QB 270 at 299; *Residual Assco* (2000) 202 CLR 629 at 661 [79].

173 In any event, there were two bases for the orders that this Court made in *Re Patterson*. One was the constitutional reasoning that has subsequently been overturned in *Shaw*. The other was a second basis supported by a majority of the Court[165]. This was that the second decision was infected by a separate jurisdictional error. That basis for the orders in *Re Patterson* has never been overruled. It follows that there remains a lawful, indeed unquestioned, legal foundation for those orders, notwithstanding the decision in *Shaw*. The orders in *Re Patterson*, in their entirety, remain binding and effective. They were made within the jurisdiction and authority of this Court. They were made pursuant to this Court's constitutional function[166]. They must therefore be given full force and effect. It is the duty of this Court to uphold them when called upon to do so.

174 It will sometimes be open to a party to apply for additional orders or remedies as may be appropriate in the light of a restatement of the law in a later case[167]. The power of this Court to reopen its judgments or orders is well established[168]. It is a power exercised in exceptional cases only. Particular restraint is observed where orders have been finally entered[169]. However, unless and until a correction or variation of this Court's orders occurs, those orders remain valid and effective. This is no less so because the reasons, or some of the reasons, that sustained those orders may have been subsequently overruled in later decisions of this Court.

175 *Conclusion: the respondent succeeds for the second period*: From the foregoing analysis it is clear that the second decision was of no legal effect when made. The second appellant cannot rely on s 501 as providing authority for her conduct. The respondent was therefore also entitled to succeed in his claim for damages for wrongful imprisonment with respect to the second period of

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165 Gleeson CJ, Gaudron, Gummow and Hayne JJ and myself.

166 Constitution, s 75(v).

167 cf *British American Tobacco Australia Ltd v Western Australia* (2003) 217 CLR 30.

168 *Autodesk Inc v Dyason [No 2]* (1993) 176 CLR 300 at 302; *De L v Director-General, NSW Department of Community Services [No 2]* (1997) 190 CLR 207 at 215.

169 *State Rail Authority of NSW v Codelfa Construction Pty Ltd* (1982) 150 CLR 29 at 38; *Autodesk Inc v Dyason [No 2]* (1993) 176 CLR 300 at 308, 317; *De L v Director-General, NSW Department of Community Services [No 2]* (1997) 190 CLR 207 at 216. See also *In re Harrison's Share Under a Settlement* [1955] Ch 260, where orders were set aside following a decision of the House of Lords which overruled authorities on the basis of which the orders had been made.

detention. The Court of Appeal was correct to so hold. Nothing in the decisions of this Court since *Re Patterson* alters that conclusion.

The liability of the officers

176 *Section 189 does not provide a defence*: The foregoing conclusions are strictly enough to dispose of this appeal in the respondent's favour. However, I will make some brief observations on the respondent's alternative submission that s 189 does not operate in circumstances where the suspicion of the officer is infected by an error of law.

177 *Constitutional error is not reasonable*: Had the authority of this Court on the constitutional question decided in *Re Patterson* been maintained, and not overruled by *Shaw*, I would have rejected the possibility that the officers who detained the respondent could shelter behind provisions such as s 189 of the Act, claiming to have had a reasonable suspicion that the respondent was an "unlawful non-citizen". If such a status were rejected, as a matter of law, any belief on the officers' parts could not amount to a reasonable belief. No other approach would suffice to uphold the Constitution, to vindicate constitutional rights, to ensure the observance of the basic law by public officials, including Ministers, and to discourage unlawful detention, arrest and other deprivations of liberty[170]. In short, a provision such as s 189 could not have effect to contradict the Constitution.

178 I would hesitate to embrace a legal doctrine that expanded official powers of detention, arrest or otherwise to deprive persons of liberty sourced not to a constitutional head of power but to opinions, beliefs or suspicions (reasonable or otherwise) of public officials. Where the Constitution denies a power to act, I would, like McHugh J in *Coleman v Power*[171], resist the notion that it is permissible for the legislature to expand such a power on a footing so potentially personal, ephemeral and insubstantial. In my opinion this Court should not enlarge the scope of protected official detention, any more than it already has in its recent decisions[172].

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170 cf *Trobridge* (1955) 94 CLR 147 at 152 per Fullagar J.

171 (2004) 78 ALJR 1166 at 1192-1193 [142]-[143]; 209 ALR 182 at 217-218.

172 See eg *Behrooz v Secretary of the Department of Immigration and Multicultural and Indigenous Affairs* (2004) 78 ALJR 1056; 208 ALR 271 and *Al-Kateb v Godwin* (2004) 78 ALJR 1099; 208 ALR 124; cf *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 32; *Rasul v Bush* 159 L Ed 2d 548 at 562-563 (2004); *A v Secretary of State for the Home Department* [2005] 2 AC 68.

179 *Reasonable suspicion and mistake of law*: Given that the authority of *Re Patterson* has been overruled in this respect by *Shaw*, and that I have accepted that the decision prevails until later enlightenment[173], the respondent cannot rely, in this case, on an argument which excludes a constitutional error from the ambit of "reasonable suspicion" in s 189. However, I agree with McHugh J, for the reasons that he gives, that the respondent's alternative argument, that s 189 does not operate to protect against an error of law, should be accepted[174].

180 A "reasonable suspicion" within the meaning of s 189 does not cover a suspicion which is based on a mistake as to the legal validity of a ministerial decision. In this respect, the distinction between a provision that empowers or authorises a person to detain another (like s 189) and one that provides an immunity from liability, is critical. The reasons of Dixon J in *Little v The Commonwealth* on this issue are apposite[175]. This is a point that distinguishes the present case from *Coleman*[176]. That distinction warrants a different conclusion in this case. In addition, as I explained earlier in these reasons (and as McHugh J also observes), basic principles of statutory construction protective of fundamental rights and freedoms dictate that a section which purports to empower the Executive Government to deprive a person of his or her liberty must be strictly construed[177]. That construction, in this case, denies the officers of the Department, in detaining the respondent pursuant to a mistake of law, a statutory defence to the tort of false imprisonment.

Conclusion and orders

181 The respondent's claim for wrongful imprisonment against the appellants was therefore entitled to succeed. The appellant Ministers, by their purported decisions under s 501 of the Act, caused the respondent's detention on both occasions. Because of the orders of the Full Court of this Court in *Re Patterson* and earlier of Callinan J acting by consent, together quashing those decisions, neither Minister is entitled to rely on the Act as affording a defence of lawful

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173 *Singh* (2004) 78 ALJR 1383 at 1437 [265]; 209 ALR 355 at 430-431.

174 Reasons of McHugh J at [101]-[110].

175 (1947) 75 CLR 94 at 108; see reasons of McHugh J at [102]-[104].

176 (2004) 78 ALJR 1166 at 1214 [263]-[264]; 209 ALR 182 at 248-249. In addition, the policy considerations relevant to the exercise of police powers of arrest and detention, mentioned by me in *Coleman*, do not apply to the regime of mandatory detention in the migration context.

177 See above these reasons at [135], [154]; reasons of McHugh J at [90], [106].

justification. The orders and judgment of this Court in *Re Patterson* remain valid and binding until set aside. They do so despite later decisions of this Court overruling part of the reasons that led to them. The respondent was, and is, entitled to succeed. No statutory provision displaces the application of the common law in this case or requires a different result. The Court of Appeal was correct to hold that the respondent had established his entitlement to the damages recovered for wrongful imprisonment.

182 The appeal should be dismissed with costs.

183 CALLINAN J. The ultimate question in this appeal is whether the appellants can resist a claim in tort for the wrongful imprisonment of the respondent on two separate occasions, on the asserted basis that at the time of the detentions, the appellants wrongly, but mistakenly, considered him to be an unlawful non-citizen for the purposes of s 189 of the *Migration Act* 1958 (Cth) ("the Act"), and therefore liable to deportation. The substantial issue is however of statutory interpretation, including whether, for the purposes of the provision in question, a "suspicion" based on a genuine misapprehension of the law, cannot, on that account, be a reasonable one.

Facts

184 The respondent was born in England on 26 September 1959 and migrated to Australia with his family when he was 7 years old[178]. He was granted a Transitional (Permanent) Visa on 1 September 1994. On 7 February 1996, he was convicted under the *Crimes Act* 1900 (NSW) for sexual offences involving young boys, and was sentenced to a term of imprisonment.

185 On 4 September 1999, following the respondent's release from prison, the first appellant, who was then Minister for Immigration and Multicultural Affairs, cancelled the respondent's visa under s 501 of the Act on "character grounds". Acting under s 189 of the Act, Mr Crighton, an officer of the Department of Immigration and Multicultural Affairs ("the Department"), detained the respondent on 4 November 1999. He had earlier been provided with a file containing a copy of the minute recording the first appellant's decision to cancel the respondent's visa. The respondent was kept in detention from that date until 12 April 2000, when he was released on the making of consent orders by this Court. The orders included certiorari quashing the cancellation of the respondent's visa, and prohibition of any further action to give effect to that cancellation.

186 On 30 June 2000 the respondent's visa was again cancelled, this time by the second appellant acting as the Minister[179] pursuant to the power conferred under s 501 of the Act. On 6 July 2000, Ms Campbell, an officer of the Department, took the respondent into detention acting under s 189 of the Act. She too had earlier been provided with a copy of the minute recording the second

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178 The circumstances of the respondent's migration to, and residence in Australia are referred to in *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 508 [351]-[352].

179 The second appellant was the Parliamentary Secretary to the Minister for Immigration and Multicultural Affairs: see *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 401 [9]-[10] per Gleeson CJ, 404 [21] per Gaudron J.

appellant's decision to cancel the respondent's visa. The respondent remained in detention until 7 December 2000 when orders in his favour were made in contested proceedings in this Court in *Re Patterson; Ex parte Taylor*. The orders made were similar to the orders earlier made by consent.

187 After the decision in *Ex parte Taylor*, the respondent sued for damages in the District Court of New South Wales for wrongful imprisonment. He alleged that the first and second appellants were jointly and severally responsible for that imprisonment.

188 That the first and second appellants had been acting in the course of their duty and that the Commonwealth, the third appellant, would be vicariously liable for each of them, were not in dispute at the trial. There, the appellants argued that the respondent's detention had been effected on each occasion by an "officer" acting lawfully upon the basis of a reasonable suspicion within the meaning of s 189 of the Act.

189 It was not contended that Mr Crighton and Ms Campbell were not "officers" as defined by the Act, or acted improperly or maliciously. It was also conceded by the respondent, at least in the Court of Appeal, that the first and second appellants had been acting bona fide in making the respective decisions to cancel the respondent's visa.

Decision of the trial judge

190 The trial judge, Murrell DCJ, allowed the respondent's claim, and awarded him $116,000 in damages. Her Honour accepted that the first and second appellants actively caused, or promoted, and were therefore liable for the wrongful imprisonment of the respondent. Her Honour found:

> "When the first and second [appellants] decided to cancel his visa, the [respondent] immediately became an apparent 'unlawful non-citizen' by virtue of s 15 of the Act. The actions of Mr Crighton and Ms Campbell could only occur because of the cancellation decisions. The inevitable consequence of communicating the cancellation decisions to DIMIA officers was that those officers would act in accordance with their perceived statutory duty and would detain the [respondent].
>
> The conduct of the first and second [appellants] in cancelling the [respondent's] visa is analogous to the magistrate's issue of a warrant in *Spautz*[180]. Just as the arresting police officer in *Spautz* exercised some independent judgment in determining to arrest the plaintiff (eg a judgment

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180 *Spautz v Butterworth* (1996) 41 NSWLR 1.

> that the [respondent] was the person named in the warrant and that the warrant was current), so Mr Crighton and Ms Campbell exercised judgment under s 189 of the Act. However, in each case, the police officer/DIMIA officer was essentially engaged in a checking process, which, all else being equal, would have the inevitable consequence that the [respondent] would be arrested/detained. There was no scope for the exercise of a discretion to alter the intended outcome of the original and critical administrative decision."

191 The trial judge was of the view that *Ex parte Taylor* established that ss 189 and 196 of the Act could not apply to the respondent. Her Honour said that if the aliens power did not support s 501 of the Act insofar as that section purports to apply to a person who is neither an alien nor an Australian citizen, the aliens power could not support ss 189 and 196 insofar as they purported to apply to such a person. Her Honour said:

> "The legal situation is that, at the time that the s 189 decisions were made, there was no visa cancellation, the [respondent] had not become an unlawful non-citizen by reason of a visa cancellation, and there was no justification for detaining him under s 189."

The trial judge also found that any mistake made by the officers of the Department who arrested the respondent was a mistake of law, rather than a mistake of fact, and that s 189 did not operate to protect them against the consequences of a mistake of law.

The Court of Appeal

192 The Court of Appeal (Spigelman CJ, Meagher JA and Ipp JA) rejected an appeal by the appellants[181]. Spigelman CJ was of the view that the scheme of the Act was "self-executing"[182]; that is, that once a decision to cancel a visa is made, the Act operates automatically so that detention of the person whose visa is cancelled will be an "inevitable consequence" of the decision[183]. His Honour accepted that the effect of *Ex parte Taylor* was to render s 189 inapplicable to the respondent[184]. His Honour said[185]:

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181 *Ruddock v Taylor* (2003) 58 NSWLR 269.

182 (2003) 58 NSWLR 269 at 274 [12].

183 (2003) 58 NSWLR 269 at 276 [27].

184 (2003) 58 NSWLR 269 at 274 [15].

185 (2003) 58 NSWLR 269 at 275 [18].

> "When the High Court quashed the cancellation decision on the basis that the power to cancel could not constitutionally apply to the respondent, it necessarily decided that any other direct consequence of the cancellation could not constitutionally apply to him. In the circumstances of this case, and in the context of the specific statute under consideration, detention was such a direct consequence."

The Chief Justice's opinion was that the first and second appellants intended the consequence (detention of the respondent) of their actions (cancelling the respondent's visa). His Honour said[186]:

> "There can be no doubt that [the first and second appellants] had an intention that the respondent be removed from Australia. That was the very point of the decision to cancel the visa and whether or not that should occur was the substance of the departmental paper before each Minister. Detention was an inevitable step brought about by the self-executing operation of the statute, of which the Ministers must have been aware."

193 Spigelman CJ agreed with Meagher JA in rejecting the appellants' submission that the respondent was estopped from pursuing his claim for wrongful imprisonment because he did not raise it in *Ex parte Taylor*. His Honour also rejected an appeal and a cross-appeal on the issue of damages.

194 Meagher JA too was of the view that the respondent's detention was the inevitable consequence of the first and second appellants' decisions to cancel the respondent's visa. His Honour said[187]:

> "By cancelling the visa, the [first and second appellants] immediately exposed [the respondent] 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. The [first and second appellants] did not 'actively promote' the detention, and perhaps did not 'participate' in it[188]. However they were the real cause of that imprisonment, and its proximate cause."

Meagher JA was of the opinion that the officers of the Department had a "reasonable suspicion" that the respondent was an "unlawful non-citizen" but that

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186 (2003) 58 NSWLR 269 at 277-278 [37].

187 (2003) 58 NSWLR 269 at 283-284 [72].

188 See *Myer Stores Ltd v Soo* [1991] 2 VR 597.

the suspicion depended upon a misapprehension, that is, a mistake of law[189]. A mistake of law, according to his Honour, could ground a "reasonable suspicion", but even so the appellants should fail.

195 Ipp JA, in a separate judgment agreed with the reasons and orders of Spigelman CJ and Meagher JA, adding some observations of his own with respect to the necessity of the existence of a connexion between the first and second appellants' actions and the respondent's imprisonment.

The appeal to this Court

196 The appellants' Notice of Appeal lists four grounds of appeal.

"(a) The Court of Appeal erred in finding that the decision of each of Mr Ruddock and Senator Patterson, acting as Minister for Immigration and Multicultural Affairs, to cancel the respondent's visa:

(i) met the element of 'directness' or was the proximate cause of the respondent's detention; and/or

(ii) involved an intention to detain the respondent; and/or

(iii) rendered each Minister liable for wrongful imprisonment with respect to the subsequent detention of the respondent.

(b) The Court of Appeal ought to have found that the *Migration Act* 1958 delineates between decisions to cancel visas and decisions to detain and that a bona fide exercise of the power to cancel a visa under section 501, subsequently found to be beyond power, does not render the Minister personally liable for any imprisonment resulting from a separate exercise of power by an 'officer' under section 189 based on reasonable suspicion that the person whose visa has purportedly been cancelled is an 'unlawful non-citizen'.

(c) The Court of Appeal erred in finding that *Re Patterson; Ex parte Taylor* decided that the detention provisions of the *Migration Act* 1958 did not apply to the respondent as a person who an officer reasonably suspected of being an unlawful non-citizen.

(d) *Re Patterson; Ex parte Taylor* was wrongly decided."

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189 (2003) 58 NSWLR 269 at 284 [74]-[75].

Appellants' submissions

197 The appellants made a number of submissions which I will briefly summarize. But as will appear, it is necessary to deal fully with one only of them, that is, that the respondent's detentions were not unlawful: they were authorized by s 189 of the Act because the officers who detained him on each occasion held the requisite reasonable suspicion for which the section provides, that the respondent was an unlawful non-citizen in the migration zone. The appellants submitted that the decision of this Court in *Ex parte Taylor* did not in some way, retrospectively render the respondent's earlier detentions unlawful or the first and second appellants liable for effecting the detentions, because, at all relevant times, they reasonably suspected the respondent to be an unlawful non-citizen. Something will also however need to be said about the appellants' submission that the respondent was an alien at the time when he was detained, by reason of the subsequent decision in *Shaw v Minister for Immigration and Multicultural Affairs*[190].

198 The appellants contended that the suspicion held by the officers who detained the respondent (the holding of which was not challenged) was reasonable and could not be affected or altered by the subsequent determinations that the decisions to cancel the respondent's visa may have involved jurisdictional error.

199 The appellants argued that *Ex parte Taylor* does not affect the application of s 189 to the respondent because that decision was wholly concerned with the purported operation of s 501 of the Act upon the respondent. The appellants submitted that merely because the respondent could not be removed from Australia pursuant to s 501 did not necessarily mean that the respondent could not be detained pursuant to s 189.

200 As to any constitutional challenge to s 189 of the Act, the appellants submitted that a law may still be constitutionally valid even if its operation depends upon a reasonable suspicion that a state of affairs is within Commonwealth legislative power. Accordingly, s 189 is constitutionally valid to the extent that it permits detention of persons who may not be unlawful non-citizens, because its operation depends upon the holding by the officer of a reasonable suspicion that the relevant person is an unlawful non-citizen. That sometimes the suspicion may turn out to be well-founded, and sometimes not, is not to the point.

201 The appellants next submitted that the reasoning of the Court of Appeal, to the extent that it relied upon *Ex parte Taylor* as authority for the proposition

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190 (2003) 78 ALJR 203; 203 ALR 143.

that s 189 had no application to the respondent, cannot be correct in light of the Court's decision in *Shaw*.

202 Finally the appellants submitted that an action for damages for the tort of wrongful imprisonment cannot lie against a Minister when an officer, holding a reasonable suspicion that a person is an unlawful non-citizen within the migration zone, detains that person under s 189 of the Act, following a bona fide decision by the Minister to cancel a visa, and the Minister's decision is subsequently determined to involve jurisdictional error.

Respondent's submissions

203 The respondent submitted that his detentions were unlawful on the basis that the provisions of the Act which were said to authorize them could not constitutionally apply to him as a result of the decision of this Court in *Ex parte Taylor*. He also submitted that the appellants are liable for his detentions because they were the direct and proximate cause of them; the arrests and detentions were not the product of independent decisions taken by the officers, but rather an automatic consequence of the first and second appellants' decisions to cancel the respondent's visa pursuant to the Act.

204 The respondent also submitted that the appellants are not "protected" by s 189 of the Act, and are not relieved of liability on the basis that the officers reasonably suspected that the respondent was an unlawful non-citizen in the migration zone. He relied upon what was said in the Court of Appeal, that a mistake of law cannot ground a reasonable suspicion.

The statutory scheme

205 At the time of the decisions to cancel the respondent's visa, s 501 of the Act enabled the Minister to cancel a visa if a person did not satisfy the character test.

> "**501 Refusal or cancellation of visa on character grounds**
>
> *Decision of Minister or delegate – natural justice applies*
>
> ...
>
> (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:

...

(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.

...

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

...

Substantial criminal record

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

...

(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 (whether on one or more occasions), where the total of those terms is 2 years or more ..."

206 By the operation of s 15, the respondent became an *unlawful non-citizen* upon cancellation of his visa.

"**15 Effect of cancellation of visa on status**

To avoid doubt, subject to subsection 13(2) (certain inhabitants of protected zone), if a visa is cancelled its former holder, if in the

migration zone, becomes, on the cancellation, an unlawful non-citizen unless, immediately after the cancellation, the former holder holds another visa that is in effect."

207 Section 14 defined an *unlawful non-citizen* as follows:

"**14 Unlawful non-citizens**

(1) A non-citizen in the migration zone who is not a lawful non-citizen is an unlawful non-citizen.

..."

208 On each occasion that the respondent was detained, s 189 required an officer to detain a person whom the officer knew or reasonably suspected to be an *unlawful non-citizen*. That section relevantly provided:

"**189 Detention of unlawful non-citizens**

(1) If an officer knows or reasonably suspects that a person in the migration zone is an unlawful non-citizen, the officer must detain the person.

(2) If an officer reasonably suspects that a person in Australia but outside the migration zone:

(a) is seeking to enter the migration zone; and

(b) would, if in the migration zone, be an unlawful non-citizen;

the officer must detain the person."

209 Section 191 also provided:

"**191 End of certain detention**

A person detained because of section 190 must be released from immigration detention if:

(a) the person gives evidence of his or her identity and Australian citizenship; or

(b) an officer knows or reasonably believes that the person is an Australian citizen; or

(c) the person complies with section 166 and either:

(i) shows an officer evidence of being a lawful non-citizen; or

(ii) is granted a visa."

210 Section 196 provided that an *unlawful non-citizen* was not to be released from detention unless he or she was granted a visa.

"**196 Period of detention**

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

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

(b) deported under section 200; or

(c) granted a visa.

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

(3) To avoid doubt, subsection (1) prevents the release, even by a court, of an unlawful non-citizen from detention (otherwise than for removal or deportation) unless the non-citizen has been granted a visa."

Section 5 relevantly provided as follows:

"**5 Interpretation**

(1) In this Act, unless the contrary intention appears:

...

detain means:

(a) take into immigration detention; or

(b) keep, or cause to be kept, in immigration detention;

and includes taking such action and using such force as are reasonably necessary to do so.

...

> ***migration zone*** means the area consisting of the States, the Territories, Australian resource installations and Australian sea installations ...
>
> ***non-citizen*** means a person who is not an Australian citizen."

The case law from time to time

211 In *Nolan v Minister for Immigration and Ethnic Affairs*[191], six members of the Court[192] confirmed the proposition stated by Gibbs CJ (with whom Mason and Wilson JJ agreed) in *Pochi v Macphee*[193] that a person born outside of Australia, whose parents are not Australians, and who has not been naturalized as an Australian, is an alien for the purposes of the Constitution[194]. The Court also held that a person who was a British subject by birth, or a subject of the Queen by reason of birth in another country, but whose parents were not Australian, and who had not become a citizen of Australia could be classified as an alien for the purposes of the Constitution[195].

212 This Court, by a narrow majority overruled *Nolan* in *Ex parte Taylor*. The prosecutor in that case is the present respondent. In *Ex parte Taylor*, the four Justices in the majority (Gaudron, McHugh, Kirby and Callinan JJ) found that the constitutional power of the Commonwealth did not extend to the making of a law that could render the prosecutor liable to deportation pursuant to s 501 of the Act.

213 Gaudron J held that the provisions of the Act relating to detention and removal did not apply to the prosecutor. Her Honour said[196]:

> "A law providing for the detention otherwise than upon conviction for a criminal offence and for the compulsory removal from Australia of persons who have been integrated into the Australian community cannot be supported as a law with respect to immigration and emigration ... It follows, therefore, that the provisions of the Act providing for the

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191 (1988) 165 CLR 178.

192 Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ.

193 (1982) 151 CLR 101 at 109-110.

194 (1988) 165 CLR 178 at 185.

195 (1988) 165 CLR 178 at 184.

196 (2001) 207 CLR 391 at 412-413 [52].

detention and removal of prohibited non-citizens from Australia are valid only in their application to non-citizens who are also aliens."

214 Despite granting an order for prohibition, Gaudron J would have declined to grant an order that the decision of the Minister be quashed. Her Honour said[197]:

> "Although the power to legislate with respect to immigration does not extend to laws for the detention and removal of persons who have been integrated into the Australian community, there is no reason, in my view, why that power does not enable the Parliament to legislate so as to provide for the conferral of visas on persons who have migrated to Australia. Nor in my view, is there any reason why, having legislated to confer visas on such persons, the Parliament cannot legislate to provide for their cancellation. That being so, s 501(3) is not, in my view, invalid and certiorari does not lie to quash the Parliamentary Secretary's decision on that account."

215 McHugh J, with whom I agreed on the point, was of the view that a person who is a subject of the Queen for the purpose of the Constitution cannot also be an alien under it[198]. His Honour said[199]:

> "Until the commencement of [the *Royal Style and Titles Act* 1973 (Cth)] – and maybe later – all British subjects resident in Australia, whether born here or overseas, owed their allegiance to the Queen of the United Kingdom. That being so, those British subjects, born in the United Kingdom, who were living in Australia at the commencement of the *Royal Style and Titles Act* 1973 became subjects of the Queen of Australia as well as subjects of the Queen of the United Kingdom. Accordingly, they were not and did not subsequently become aliens within the meaning of s 51(xix) of the Constitution.
>
> ...
>
> The prosecutor migrated from the United Kingdom to Australia in 1966 and has lived here ever since. He is therefore a subject of the Queen of Australia, not an alien. Neither the Minister nor the Parliamentary Secretary had the power to deport him because s 501 of the *Migration Act* cannot constitutionally apply to him."

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197 (2001) 207 CLR 391 at 413 [54].

198 (2001) 207 CLR 391 at 435 [132].

199 (2001) 207 CLR 391 at 436-437 [135]-[136].

216 Kirby J was of the view that the decision of the Minister to cancel the prosecutor's visa rested on a statutory provision that was beyond power because s 501(3) of the Act could have no application to the prosecutor[200]. His Honour's view, with which I also agreed, rested on the premise that the prosecutor was not an alien for the purpose of the Constitution because he was a British subject (a member accordingly of a class of persons not traditionally regarded as aliens) and had been absorbed into the Australian community.

217 At the time of the first and second appellants' decisions to cancel the respondent's visa, the law was as stated in *Nolan*, and upon which it may fairly be assumed the first and second appellants proceeded.

218 There has since however been another shift in the law, again by a narrow margin, in *Shaw* in which the majority (Gleeson CJ, Gummow, Hayne and Heydon JJ) held that *Ex parte Taylor* should not be followed. The practical result was the restoration of the legal position as it was held to be in *Nolan*.

Disposition of the appeal

219 It is of course always unfortunate when courts propound a different, particularly a radically different, principle of law, or interpretation of the Constitution from that which until then has been taken to be settled. Because courts cannot treat conduct and actions taken, or defences entered to them, before the new statement of the law, transitionally, as if the subsequent different legal view were not to apply to them, great inconvenience, uncertainty and hardship may be caused by shifts in judicial opinion and decisions[201] of which this case is an example. In *Kleinwort Benson Ltd v Lincoln City Council*[202], a case directly concerned with a mistake of law, Lord Browne-Wilkinson (dissenting) went so far as to say, in effect, that for some purposes, the fiction that the law has not been changed by a judicial decision should be seen as that, a pure fiction and should therefore be disregarded for the purposes of assessing the legal quality of conduct before the change. His Lordship said[203]:

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200 (2001) 207 CLR 391 at 497 [318].

201 *Astley v Austrust Ltd* (1999) 197 CLR 1 at 57-58 [158]; *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 at 104-105 [164]; *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269 at 315-316 [129].

202 [1999] 2 AC 349 at 358-359.

203 [1999] 2 AC 349 at 359.

> "If that [transitional application of the law] be true of statutory legislation, the same must a fortiori be true of judicial decision. In my judgment, therefore, if a man has made a payment on an understanding of the law which was correct as the law stood at the date of such payment he has not made that payment under a mistake of law if the law is subsequently changed."

220 As attractive as his Lordship's reasoning and conclusion are, they no more represent the law, as harsh or unfair as its operation may on occasions be, in this country than they do in England, Wales and Northern Ireland.

221 It follows that this appeal must be approached upon the basis, despite the different decisions of this Court, to which I have referred, that the mistake that was made by the first and second appellants, was a mistake of law (if only so by reason of the subsequent decision in the respondent's case in this Court), no matter how well-founded in law at the time the relevant belief, and therefore the suspicion of each of the appellants was. At the time of each of the first and second appellants' decisions to cancel the visa, there was every reason to rely upon the decision in *Nolan*, and there can be no doubt that they in fact did so.

222 The appellants' submission that they are not liable for the respondent's detention by reason of s 189 is correct.

223 Section 189 has these features. It is directed to officers, in practice, officials of the Department. By referring to an "officer" in the way that it does, it contemplates the imposition of an *obligation* upon any officer holding the relevant reasonable suspicion, to act to detain. A person so detained may, pursuant to s 191, continue to be detained until the occurrence of one or more of the events referred to in that section, none of which is relevant here. The reasonable suspicion is a reasonable suspicion at large. There is nothing in the Act to suggest that a distinction may or must be made between a reasonable suspicion founded on a reasonable, but mistaken view of the relevant law, and one founded upon a reasonable but mistaken view of the relevant facts.

224 It is simply impossible to say here that the understanding and belief of the first and second appellants and the Departmental officers involved, with respect to the relevant law, and, in consequence, the respondent's suspected status as an alien, and the consequential right, indeed obligation, to detain the respondent, was unreasonable. Throughout the period from the respondent's first detention until the moment that this Court published its decision in *Ex parte Taylor*, the decision in *Nolan* stood and was binding on everyone capable of being affected by it.

225 The reliance in the courts below, and by the respondent here, on the decision of Dixon J in *Little v The Commonwealth*[204] is misplaced. It does not in my opinion have anything conclusive to say about, or indeed of much relevance to a provision such as s 189 of the Act. In that case, his Honour said this[205]:

> "Protective provisions requiring notice of action, limiting the time within which actions may be brought or otherwise restricting or qualifying rights of action have long been common in statutes affecting persons or bodies discharging public duties or exercising authorities or powers of a public nature. In provisions of this kind it is common to find such expressions as 'act done in pursuance of this section' or 'statute,' 'anything done in execution of this statute' or 'of the powers or authorities' given by a statute, or 'under and by virtue of' a statutory provision. Such enactments have always been construed as giving protection, not where the provisions of the statute have been followed, for then protection would be unnecessary, but where an illegality has been committed by a person honestly acting in the supposed course of the duties or authorities arising from the enactment."

226 What his Honour was doing was construing a protective provision of a familiar, but quite different kind from s 189 of the Act. He was not required to consider and accordingly had nothing to say about the effect and reach of such a provision as s 189. His Honour did not say that there were not other forms of provisions which would have the effect of justifying or excusing, or, as here, requiring persons to act in certain ways in certain circumstances. His Honour certainly did not hold that a mistake of law could not found a reasonable belief or suspicion, or that an enactment could not both alter the relevant common law, and provide an excuse or justification, or perhaps more accurately, create an obligation for certain persons to undertake a particular course.

227 The respondent's primary response is that by final and conclusive orders of this Court, twice made, the first and second appellants' cancellations of the respondent's visa were quashed because the cancellations were unlawful. In consequence, the respondent's visa was legally extant at all times. And whilst the visa was extant, the respondent could not be regarded as, and was not an unlawful non-citizen liable to detention and deportation. It does not matter, indeed it is irrelevant, that *Nolan* and *Shaw* may have been to a different effect from *Ex parte Taylor*, or that *Ex parte Taylor* itself may now be regarded as having been wrongly decided. The orders for certiorari, having been duly made, cannot now be treated as not having been made, either in consequence of the

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204 (1947) 75 CLR 94.

205 (1947) 75 CLR 94 at 108.

decision in *Shaw*, or otherwise, and produce the irreversible result that throughout the period of detention, the respondent was not an unlawful non-citizen and should have been free. This is so, even if the application of *Shaw* would have produced a different result: this Court's orders are inviolate.

228 These arguments fail however to come to grips with the language of s 189. The section does not require for its operation that persons act under it only upon the basis that they know and correctly understand in absolute terms all of the relevant facts and law. All it requires for its operation is that persons acting under it, hold a reasonable suspicion of a particular state of affairs, that is, that the person in question is an unlawful non-citizen. And as to that, the evidence and inferences from it are all one way, and in the appellants' favour. It can be seen therefore that much of the argument in the courts below was advanced with insufficient attention to the language of the Act and missed the point.

229 True it may be, with hindsight, that the respondent can be seen to have been detained upon a basis that has turned out to be erroneous, but the basis was nonetheless a lawful one, because it did not require for its lawfulness, absolute certitude of the precise legal status of the respondent. In this regard, the respondent's position is not unique. Many people, who subsequently are acquitted of criminal charges are lawfully held in detention without bail pending that event, upon the basis of reasonable suspicions and available evidence as to possible guilt. The analogy is not of course a complete one. Aliens are not criminals, and appropriately, s 191 of the Act is directed to their release from detention if officers have mistaken their true status once evidence is available as to that status.

230 The notion, that conduct based upon a mistake of law cannot be regarded as reasonable is patently absurd. Almost daily the courts assess, and often find such conduct to be reasonable. The trilogy of cases, including the respondent's earlier case in this Court, demonstrate just how uncertain the law, and therefore the outcome of cases, can be. Indeed mistake of law can now of itself found a claim for recovery of money or property[206].

231 What I have said so far really disposes of all of the respondent's other arguments except as to an estoppel, and the constitutionality of s 189. It may readily be accepted that there was a connexion between the first and second appellants' decisions, and the arrest and detention of the respondent by officers of the Department. The former led inevitably to the latter. The officers personally may have known little of the law, but could not be regarded as having acted improperly in proceeding upon the basis that the first and second appellants

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206 *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353; see also *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 at 358-359.

either knew, or had a reasonable suspicion about the respondent's status as an alien, which provided them with a basis for the raising of a sufficient, that is, a reasonable suspicion in their own minds.

232 The decision in this Court in the respondent's own case does not provide a basis for some kind of plea in estoppel against the appellants. The fact that after the event, the detentions, a decision was made in his favour, has nothing to say about the matters leading to his detentions and the states of mind of the persons responsible for them at that time. In any event the respondent's earlier case in this Court was not directly concerned with the operation of s 189 upon him. What was in issue was the validity of s 501 of the Act so far as it applied or purported to apply to him.

233 The steps in the respondent's "constitutional" argument in this Court were not entirely clear. The first plank of it seems to have been to the effect that attempts to immunize Commonwealth officers against liability for excesses of power were futile. That is not what s 189 does. It arms officers with a power and burdens them with an obligation, if, but only if they act reasonably, to do an act which is reasonably incidental to the aliens power.

234 In view of the presence of s 191 in the Act, I cannot regard s 189 as being remote, or in any way disconnected from a reasonable exercise of the aliens power. It is important for its efficacy that there be means available to officers to act expeditiously, and in circumstances in which certainty of status cannot be quickly, or readily established. *Al-Kateb v Godwin*[207] holds that, in some circumstances, indefinite detention is not unlawful in the exercise of the power. Detention of the kind contemplated here, terminable as mandated by s 191 must also at least equally be so.

235 It is unnecessary to deal any further with the various arguments on either side.

236 The appeal must be allowed. I agree with the orders proposed in the joint reasons of Gleeson CJ, Gummow, Hayne and Heydon JJ.

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207 (2004) 78 ALJR 1099; 208 ALR 124.