Case No: CO/9710/2009

Neutral Citation Number: [2014] EWHC 4317 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19 December 2014

Before :

MR. STEPHEN MORRIS QC
Sitting as a Deputy High Court Judge

- -

Between :

THE QUEEN **on the application of** **SHAHPOOR MOHAMMED**	**Claimant**
- and –	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

- -
- -

Omar Shibli (instructed by **French & Co Solicitors**) for the **Claimant**
Gemma White (instructed by **The Treasury Solicitor**) for the **Defendant**

Hearing dates: 28 and 31 October 2014

- -

Judgment

Mr Stephen Morris QC:

Introduction

1. The Claimant, Shahpoor Mohammed ("the Claimant") is an Afghanistani national, aged 23. By this claim for judicial review, he now seeks a declaration that his detention for 17 days between 24 August 2009 and 10 September 2009 by the Secretary of State for the Home Department ("the Secretary of State") pursuant to the Immigration Act 1971 ("the 1971 Act") was unlawful and damages for false imprisonment. In the event of a finding that the detention was unlawful, the parties have agreed that the issue of quantum of damages should be adjourned in order that they may explore settlement.

2. The Claimant seeks to raise two grounds to establish the unlawful nature of his detention. The first, and main ground ("Ground 1"), turns on a deceptively short question of law; namely whether the Secretary of State had "reasonable grounds for suspecting", within the meaning of paragraph 16(2) of Schedule 2 to the 1971 Act, that the Claimant could lawfully be removed to Italy under Council Regulation (EC) No. 343/2003 ("the Dublin II Regulation"), in circumstances where, at the time of his detention, it was genuinely and reasonably believed that, as a matter of law, he could be so removed but where it is now known, following a judgment of the Court of Justice of the European Communities ("CJEU"), that, as a matter of law, he could not have been lawfully so removed. In short, can an erroneous view of the law (as opposed to an erroneous view of the facts) amount to "reasonable grounds for suspecting" that a person is liable to removal? The second ground of challenge ("Ground 2") is that, on the basis of *Hardial Singh* principles, the Claimant could not be removed within a reasonable time and he should never have been detained or he should have been released on 25 August 2009, alternatively 1 or 2 September 2009, after which date, his detention was unlawful.

3. Mr Omar Shibli of counsel appeared for the Claimant and Ms Gemma White of counsel appeared for the Secretary of State.

The facts in summary

4. The Claimant entered the UK on 22 October 2008 and on that date, applied for asylum. He was was assessed as being 17 years old at that time and was thus an unaccompanied minor within the meaning of the Dublin II Regulation.

5. On 22 April 2009 the Secretary of State made a request to Italy to accept responsibility for the Claimant's asylum claim, relying upon the provisions of the Dublin II Regulation. The Secretary of State believes that the Claimant had previously claimed asylum in Italy. On 18 June 2009 the Secretary of State certified the Claimant's claim on safe third country grounds and stated that the Claimant would be removed to Italy where his asylum claim would be considered.

6. On 19 August 2009 the Secretary of State set removal directions, to be carried out 28 August 2009. On 24 August 2009, the Claimant was detained for the purpose of effecting that removal to Italy. Subsequently removal was re-fixed for 1 September 2009. On 1 September 2009, these proceedings were commenced. At that time, the Claimant's principal basis of challenge was that removal to Italy would be in breach of his rights under Article 3 ECHR. The Claimant remained in immigration detention until 10 September 2009, when he was released, on the basis that, due to then current litigation in the case of *EW v SSHD*, there was no prospect of him being removed for at least 7 to 9 weeks.

7. On 22 September 2009 the Claimant's claim was stayed by consent pending consideration of the legality of removals to Italy in *EW v SSHD*. Following the resolution of that case, in the Secretary of State's favour, on 17 August 2010 permission in present case was refused on the papers by Lord Carlile QC. The application for permission was renewed. Significantly, at that

stage and for the first time, the Claimant relied upon the fact that he had been an unaccompanied minor at the date of his asylum claim.

8. On 24 November 2010, the claim was further stayed by consent, pending the Court's judgment in ongoing litigation (the *BT* and *MA* cases) regarding the applicability of the Dublin II Regulation to unaccompanied minors Eventually that issue was resolved by the CJEU on a reference from the Court of Appeal. In its judgment of 6 June 2013, in Case C-648/11 *MA and others v United Kingdom* [2013] 1 WLR 2961, the CJEU held that the proper interpretation of the Dublin II Regulation is that where an unaccompanied minor has lodged an asylum application in more than one Member State, the Member State responsible for determining the asylum application is the one in which the unaccompanied minor is present, having lodged the application. Thus, in the present case, the UK - rather than Italy - was the Member State with responsibility for assessing the Claimant's claim. On 10 December 2013, Michael Kent QC sitting as a Deputy High Court Judge granted permission to bring the claim and to amend the grounds so as to allege that the Claimant's detention for 17 days had been unlawful, relying on the CJEU judgment in *MA.*

Relevant legal principles

Removal pending an asylum claim

9. Where a person has made an asylum claim in the UK, he or she generally cannot be removed while that asylum claim is pending. Section 77 of the Nationality, Immigration & Asylum Act 2002 ("NIAA") provides:

> **"*77 No removal while claim for asylum pending***
>
> *(1) While a person's claim for asylum is pending he may not be—*
>
> *(a) removed from the United Kingdom in accordance with a provision of the Immigration Acts, or*
>
> *(b) required to leave the United Kingdom in accordance with a provision of the Immigration Acts.*
>
> *(2) In this section—*
>
> *(a) "claim for asylum" means a claim by a person that it would be contrary to the United Kingdom's obligations under the Refugee Convention to remove him from or require him to leave the United Kingdom, and*
>
> *(b) a person's claim is pending until he is given notice of the Secretary of State's decision on it.*
>
> *…*
>
> *(4) Nothing in this section shall prevent any of the following while a claim for asylum is pending*
>
> *(a) the giving of a direction for the claimant's removal from the United Kingdom,..."*

10. This general provision is subject to certain exceptions, as set out in Schedule 3 to the Asylum & Immigration (Treatment of Claimants etc) Act 2004 ("the 2004 Act"). One of those exceptions

is where the Secretary of State has certified a country as being a 'safe third country'. Paragraph 2 of Part II of Schedule 3 lists Italy as a state to which Part II applies and paragraph 3 provides that the states to which Part II applies are to be treated as safe. Paragraph 4 of Part II of Schedule 3 provides:

> "*Section 77 of the Nationality, Immigration and Asylum Act 2002 (c. 41) (no removal while claim for asylum pending) shall not prevent a person who has made a claim for asylum from being removed—*
>
> *(a) from the United Kingdom, and*
>
> *(b) to a State to which this Part applies;*
>
> *provided that the Secretary of State certifies that in his opinion the person is not a national or citizen of the State. "*

The Immigration Act 1971

Removal directions

11. Schedule 2 of the Immigration Act 1971 ("the 1971 Act") provides for the giving of removal directions and the power to detain pending removal. Paragraphs 8 to 10 of Schedule 2 provide for removal in respect of individuals who are refused leave to enter and illegal entrants, inter alia as follows:

> "*8(1) Where a person arriving in the United Kingdom is refused leave to enter, an immigration officer may, subject to sub-paragraph (2) below—*
>
> *(a)...; or*
>
> *(b)...; or*
>
> *(c) give those owners or agents* [of a ship or aircraft] *directions requiring them to make arrangements for his removal from the United Kingdom in any ship or aircraft specified or indicated in the directions to a country or territory so specified, being either—*
>
> *...*
>
> *(iv) a country or territory to which there is reason to believe that he will be admitted.*
>
> *9(1) Where an illegal entrant is not given leave to enter or remain in the United Kingdom, an immigration officer may give any such directions in respect of him as in a case within paragraph 8 above are authorised by paragraph 8(1)."*

Directions under paragraph 8 apply where they are given within two months of the refusal to enter; where given later than that, similar removal directions can be given under paragraph 10. (The removal directions issued against the Claimant in the present case were purportedly made under paragraphs 9-10A of Schedule 2).

Power of detention: Paragraph 16(2)

12. Paragraph 16(2) of Schedule 2 of the 1971 Act ("Paragraph 16(2)") provides for a power to detain a person liable to removal under paragraphs 8 to 10A, in the following terms:

> "*If there are reasonable grounds for suspecting that a person is someone in respect of whom directions may be given under any of paragraphs 8 to 10A or 12 to 14, that person may be detained under the authority of an immigration officer pending—*
>
> *(a) a decision whether or not to give such directions;*
>
> *(b) his removal in pursuance of such directions*."
>
> *(emphasis added)*

The construction of paragraph 16(2) is at the heart of Ground 1.

13. The "reasonable grounds for suspecting" wording was introduced into Paragraph 16(2), by way of amendment, by the Immigration and Asylum Act 1999. Prior to that amendment, paragraph 16(2) read as follows:

> *"A person in respect of whom directions may be given under any of paragraphs 8 to 14 above may be detained under the authority of an immigration officer pending the giving of directions and pending his removal in pursuance of any directions given"*

14. The Immigration and Asylum Bill was scrutinised by Parliament by a Special Standing Committee. On 13 May 1999, the Home Office Minister, Mr Mike O'Brien explained to the Committee the purpose for the (then) proposed change of wording to Paragraph 16(2), in the following terms:

> *"There is a difficulty with the current detention provisions which the clause is intended to overcome. The present position under schedule 2 to the Immigration Act 1971 is that a person may be detained if he is liable to examination or removal. In some cases, although there has been compelling evidence that, prima facie, a person falls into one or other of those categories, it has subsequently been determined that that is not the case. Even where a person has not assisted the immigration officer to determine the true facts, such a detention is currently unlawful and as such exposes the immigration service to legal action and damages, even though it may have been effected honestly and properly. Indeed that issue has had to be addressed in a number of cases. We therefore seek to clarify the law so that, where there are reasonable grounds for suspecting that a person is in one of those categories, the immigration service can deal with it properly."*
>
> *(emphasis added)*

Dublin II Regulation

15. The Dublin II Regulation provided the relevant framework by which Member States of the EU determined which Member State had responsibility for examining asylum applications lodged in one Member State by a third-country national.

16. In relation to unaccompanied minors, Article 2(h) provides the following definition:

> *" "unaccompanied minor" means unmarried persons below the age of eighteen who arrive in the territory of the Member States unaccompanied by an adult responsible for them whether by law or by custom, and for as long as they are not effectively taken into the care of such a person ... "*

Article 3(1) and (2) is headed 'General Principles' and states:

> *"1. Member States shall examine the application of any third-country national who applies at the border or in their territory to any one of them for asylum. The application shall be examined by a single Member State, which shall be the one which the criteria set out in Chapter III indicate is responsible.*
>
> *2. By way of derogation from paragraph 1, each Member State may examine an application for asylum lodged with it by a third-country national, even if such examination is not its responsibility under the criteria laid down in this Regulation. …"*

In order to determine the Member State responsible for the purposes of Article 3(1), Articles 6 to 14, in Chapter III, list objective criteria set out in hierarchical order. Article 6 sets out the position in relation to unaccompanied minors, as follows:

> *"Where the applicant for asylum is an unaccompanied minor, the Member State responsible for examining the application shall be that where a member of his or her family is legally present, provided that this is in the best interest of the minor.*
>
> *In the absence of a family member, the Member State responsible for examining the application shall be that where the minor has lodged his or her application for asylum"*

17. In the present case, the Secretary of State's assertion that Italy was a safe third country to which Claimant could be removed was based on her view that Italy was the Member State responsible for determining the Claimant's asylum claim under the terms of Article 6 of the Dublin II Regulation.

Article 6: CJEU decision in MA and others v United Kingdom

18. In *MA and others* [2011] EWCA Civ 1446, the Court of Appeal (at §22) referred the following question to the CJEU on the interpretation of Article 6 of the Dublin II Regulation:

> "*In Regulation 343/2003/EC establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (OJ L50 25 February 2003, pl), where an applicant for asylum who is an unaccompanied minor with no member of his or her family legally present in another Member State has lodged claims for asylum in more than one Member State, which Member State does the second paragraph of Article 6 make responsible for determining the application for asylum?"*

19. On 6 June 2013 the CJEU - in *MA and others v UK* - answered the referred question (at §66 of its judgment), as follows:

> "*In the light of all the above considerations, the answer to the question referred is that the second paragraph of Article 6 of Regulation No 343/2003 must be interpreted as meaning that, in circumstances such as those of the main proceedings, where an unaccompanied minor with no member of his family legally present in the territory of a Member State has lodged asylum applications in more than one Member State, <u>the Member State in which that minor is present</u> after having lodged an asylum application there is to be designated the 'Member State responsible*'."
>
> *(<u>emphasis</u> added)*

Administrative Detention and *Hardial Singh* principles

20. The principles to be applied in determining the length of time for which a person may be subject to administrative detention were established by Woolf J in the leading case of *R v Secretary of State for the Home Department, ex parte Hardial Singh* [1984] 1 WLR 704 at §§7 and 8 (as further refined in a number of subsequent cases). In *R (I) v Secretary of State for the Home Department* [2002] EWCA Civ 888 at §§46 and 47, Dyson LJ summarised those principles as follows:

> *"46. The following principles emerge:*
> *(i) The Secretary of State must intend to deport the person and can only use the power to detain for that purpose;*
> *(ii) The deportee may only be detained for a period that is reasonable in all the circumstances;*
> *(iii) If, before the expiry of the reasonable period, it becomes apparent that the Secretary of State will not be able to effect deportation within that reasonable period, he should not seek to exercise the power of detention;*
> *(iv) The Secretary of State should act with reasonable diligence and expedition to effect removal.*
>
> *47. Principles (ii) and (iii) are conceptually different. Principle (ii) is that the Secretary of State may not lawfully detain a person 'pending removal' for longer than a reasonable period. Once a reasonable period has expired, the detained person must be released. But there may be circumstances where, although a reasonable period has not yet expired, it becomes clear that the Secretary of State will not be able to deport the detained person within a reasonable period. In that event, principle (iii) applies. Thus, once it becomes apparent that the Secretary of State will not be able to effect the deportation within a reasonable period, the detention becomes unlawful even if the reasonable period has not yet expired."*

In *R (Lumba) v Secretary of State for the Home Department* [2011] SC 12 the Supreme Court confirmed this statement as representing the law (see in particular Lord Dyson at §22).

21. There are further general aspects of these principles. First, the burden of justifying the lawfulness of detention is on the Secretary of State: see *Lumba*, supra, §§44 and 88. Secondly, it is for the Court to determine the reasonableness of the period of detention to date and of the prospective period within which detention may take place. The Court's role is not confined to reviewing, on *Wednesbury* reasonableness grounds, the decisions of the Secretary of State actually made from time to time: see *R (A) v Secretary of State for the Home Department* [2007] EWCA Civ 804 per Keene LJ at §§70–71.

The Facts in detail

22. In May or June 2008 the Claimant left Iran and travelled through Europe. The Secretary of State claims that the Claimant claimed asylum in Italy on or around 2 July 2008. This is disputed by the Claimant.

23. The Claimant entered the UK on 22 October 2008 and, on that date, applied for asylum. He was granted temporary admission, but not leave to enter the UK. On 30 October 2008 he was age assessed by Kent Social Services as having a date of birth of 1 June 1991, and so, at the time, was 17. Thus at the time of his asylum application, he was an unaccompanied minor.

24. On 22 April 2009, on the basis of the alleged claim for asylum in Italy, the Secretary of State made a request to Italy to accept responsibility for the Claimant's asylum claim, relying upon the provisions of the Dublin II Regulation. On 18 June 2009 the Secretary of State refused the Claimant's asylum claim on the ground that he had previously claimed asylum in a safe country, namely Italy and certified the Claimant's claim (as a third country claim) and stated that the Claimant would be removed to Italy where his asylum claim would be considered.

25. On 30 July 2009 the Claimant was required to report to Medway Police Station weekly. From that date he lived with a foster carer, and reported weekly as required.

26. On 31 July 2009 there was a directions hearing in the case of *EW v SSHD*, at which the case was set down for a rolled up permission/substantive hearing.

27. On 19 August 2009 the Secretary of State set removal directions, to be carried out 28 August 2009, and authority to detain the Claimant for the purposes of removal to Italy was granted. On 24 August 2009, whilst reporting to Medway Police Station, the Claimant was detained *for the purpose of effecting that removal to Italy*. At that time it was the Secretary of State's *understanding* that unaccompanied minors could be removed to safe third countries in accordance with the provisions of the Dublin II Regulation.

28. On 25 August 2009 Refugee and Migrant Justice, solicitors acting for the Claimant, wrote to the UKBA in relation to the removal directions set for 28 August, as follows:

> "*As you are aware there are currently three lead cases pending with the Administrative Court due to be heard on 27th -28th September, all of which raise similar issues in relation to removal to Italy. As you will be aware, in May of this year, the Italian government introduced proposed amendments to Italian asylum procedures which would create a presumption that people refused asylum would be force to leave the country to appeal that decision. A number of challenges to those proposed removals were based on that evidence. We are aware that in the case of a number of cases removals have been deferred pending the outcome of these proceedings.*
>
> *In the light of the above, we would request that similarly, removal directions be cancelled until the outcome of the lead cases are known. We wish to put you on notice that we will instigate Judicial Review proceedings but we would seriously question any benefit to be achieved in forcing us to take that route. It is a waste of public funds as if we are forced to do so, it is likely that as in other cases, the proceedings will be stayed in any event pending the outcome of the lead cases. We would suggest therefore that it is much more sensible to await the outcome of the lead cases and to defer removal in this instance.*
>
> *We would be grateful if you could let us know by 12 noon tomorrow by fax whether you agree to cancel the removal directions. ...*
>
> *In the event that you do not, and are merely suspending them for a temporary and limited time, we will then initiate Judicial Review proceedings*" *(emphasis added)*

On the same day, because there were insufficient seats on the scheduled flight, arrangements to remove on the Claimant on 28 August 2009 were cancelled, and directions were re-set for removal on 1 September 2009 and, on 26 August 2009, the Claimant was notified of this change of arrangements. On the same day, Refugee and Migrant Justice again requested immediate release on the grounds of the ongoing litigation in the High Court.

29. On 27 August 2009 the decision to maintain detention was reviewed but it was concluded that detention would continue in the light of the Claimant's imminent removal to Italy. Then, faced with the indication from Refugee and Migrant Justice of the imminent issue of proceedings, on 29 August 2009, an official within OSCU authorised the deferral of the Claimant's removal for three days to allow a judicial review claim to be lodged. On 31 August the decision to maintain detention was reviewed, but it was concluded that detention would continue.

30. On 1 September 2009, these proceedings were commenced. At that time, the principal basis of challenge was the claim that removal to Italy would be in breach of the Claimant's rights under Article 3 ECHR. It was also argued that the detention for the purpose of removal was unlawful, because the Claimant had been detained at a time when the legality of removals to Italy was the subject of challenge in the Administrative Court in the case of *EW*. On 2 September 2009, the Secretary of State received confirmation that the judicial review claim had been lodged.

31. On 7 September 2009, the decision to maintain detention was reviewed, but it was concluded that detention would continue. On 9 September 2009, an application for bail received. On 10 September 2009 the Claimant was released from detention, on the basis of ongoing litigation about returns to Italy generally under the Dublin II Regulation. According to the witness statement of Ms Janelle Roberts (referred to in paragraph 40 below), "*account was taken of the fact that there was ongoing litigation in relation to returns to Italy generally and that a hearing was listed for 28 and 29 September 2009 in the lead cases. ... the Claimant was returnable to Italy but with the likelihood of a judgment being handed down 4 to 6 weeks after the hearing, it was considered that the earliest date that the Claimant may be removed ... would be 7 to 9 weeks. This resulted in the decision to release the Claimant.*"

32. On 22 September 2009 the Claimant's claim was stayed by consent pending consideration of the legality of removals to Italy in *EW v SSHD.*

33. On 18 February 2010 amended grounds were filed in the cases of *MA and BT v SSHD* in the Administrative Court, arguing that an unaccompanied minor could not be removed to another Member State under Dublin II. The evidence of Ms Roberts is that this was the first time that this argument had been raised. On 28 April 2010 the Secretary of State made a further decision maintaining the safe third country certification on the basis of removal to Italy

34. In *EW v SSHD* Hickinbottom J rejected the challenge to removal to Italy based on reception conditions and the Court of Appeal then refused permission to appeal. On 17 August 2010, permission in the present case was refused on the papers by Lord Carlile QC. His reasons included that the decision in *EW v SSHD* in the Court of Appeal made the Claimant's case unarguable and, on unlawful detention, that there was no breach of *Hardial Singh* principles.

35. By notice dated 31 August 2010 the application for permission was renewed. The Claimant included for the first time the contention that, on the basis of *BT and MA v SSHD* (then listed to be heard in December 2010), it was arguable that Dublin II should not have applied to the Claimant at all, since he was an unaccompanied minor at the date of his asylum claim and for this reason his detention had been unlawful. On 24 November 2010, the claim was stayed by consent, pending the outcome of the ongoing litigation in the *BT* and *MA* cases.

36. On 21 December 2010, Davis J held in *BT and MA* that the Secretary of State's interpretation of Article 6 of Dublin II was correct and that unaccompanied minors could be returned: *R (BT) v SSHD* [2010] EWHC 3572 (Admin) at §47. At §40 Davis J pointed out that the claimants' point

had not previously been advanced anywhere. On 1 December 2011 the Court of Appeal heard the appeal in *MA and others*, referring to the CJEU the question set out in paragraph 18 above.

37. On 15 November 2012, the UKBA wrote to the Claimant's representatives to inform them that it had been decided, exceptionally, to withdraw the third country certificate and to allow his asylum claim to be considered substantively in the UK.

38. On 6 June 2013, the CJEU gave judgment in Case C-648/11 *MA and others v United Kingdom*. On the true construction of Article 6 of the Dublin II Regulation, in the present case, the UK - rather than Italy - was the Member State with responsibility for assessing the Claimant's claim.

39. Following the listing of the oral permission hearing, on 5 December 2013 the Claimant gave notice, with amended grounds, clarifying that the outstanding issue is the lawfulness of his detention in September and October 2009. On 10 December 2013, Michael Kent QC sitting as a Deputy High Court Judge granted permission to bring the claim and to amend the grounds.

Witness statement of Ms Roberts

40. In the lead up to the hearing before me, on 22 October 2014, the Secretary of State served a witness statement from Ms Janelle Roberts, a senior executive officer in the Third Country Unit within the Home Office. Her evidence covered both the general understanding of the Secretary of State as to the position of unaccompanied minors under the Dublin II Regulation and the particular facts of the Claimant's case.

41. As to the former, she stated that: "*At all times prior to the CJEU's decision in MA … it was the Secretary of State's understanding that unaccompanied minors in the position of the Claimant could be removed to a safe Third Country in accordance with the provisions of Council Regulation (EC) No 343/2003 ("Dublin II Regulation").*" She continued that she was unaware of any litigation challenging this view prior to the amended grounds filed in the in the *BT* and *MA* case on or around 18 February 2010; this is confirmed by the observations of Davis J. She also gave evidence that this understanding was held by others: "*Further it is my understanding that it was the common position amongst Member States, soon after implementation of the Dublin II Regulation … that "take back" transfers of unaccompanied asylum seeking children were possible under Articles 6 and 16 of the Dublin II Regulation*"; and that this understanding was demonstrated by the discussion of the issue at a Contact Committee of Dublin experts in 2005. It was also the understanding of NGOs that operated in the asylum field.

The Grounds in summary

42. The Claimant contends that his detention between 24 August and 10 September 2009 was unlawful on two grounds.

- By Ground 1, he contends that, at the relevant time, as an unaccompanied minor, under the terms of Article 6 of the Dublin II Regulation, his asylum claim fell to be determined in the United Kingdom. Accordingly he was not liable to be removed to Italy. Furthermore, the Secretary of State's misinterpretation of Article 6 was such that she did not have "reasonable grounds to suspect" that he was a person liable to removal to Italy under paragraphs 8 to 10A of the 1971 Act within the meaning of Paragraph 16(2). Accordingly the Secretary of State had no power to detain the Claimant under Paragraph 16(2) and the detention was unlawful.

- By Ground 2, he contends that, even if the Secretary of State did have "reasonable grounds to suspect" within Paragraph 16(2), nevertheless he was detained for a period which was longer than reasonable and in particular, as a result of the pending hearing in the *EW* case, that it was apparent that the Claimant could not be removed for 7 to 9 weeks and thus not within a reasonable period. Thus, he should not have been detained on 24 August 2009 or by 25 August 2009 (alternatively by 1 or 2 September 2009), his detention had become unlawful under *Hardial Singh* principles.

I address each ground in turn.

Ground 1: "reasonable grounds to suspect" and Paragraph 16(2)

Background

43. First, the following is not in dispute. The Claimant was detained on 24 August 2009 because he was considered at the time to be a person liable to removal under the terms of the Dublin II Regulation and part II of Schedule 3 to the 2004 Act. However it is now known and accepted that, as a result of the CJEU decision in *MA and others*, the Claimant was not, at the relevant time, a person liable to removal. The declaratory theory of judicial decisions (both of English Courts and of the CJEU) means that the law has always been as it has now been found to be in *MA and others*; namely that an unaccompanied minor's claim for asylum falls to be determined in the Member State in which he or she is present; in the present case, in the UK. The Secretary of State accepts that in 2009 she could not have lawfully removed the Claimant to Italy. Thus at the time of the Claimant's detention and on the facts about the Claimant's circumstances, as then known to the Secretary of State, there was no lawful authority on which he could have been removed to Italy.

44. Secondly, I accept, on the evidence and material before me, that at the time of the Claimant's detention, the Secretary of State "understood" and "believed" that unaccompanied minors in the position of the Claimant *could* lawfully be removed to Italy under the Dublin II Regulation. I further accept, on the evidence before me that this understanding was shared in other Member States and in fact no-one had thought that this was not the position, nor that Article 6 could be construed in any other way: see Davis J in the *MA* case at first instance §§40 and 52.

45. Thirdly, the Secretary of State also accepts that in having the understanding that she did as to the correct interpretation of the Dublin II Regulation, she made an error of law. She also accepts that, absent the "reasonable grounds to suspect" wording in Paragraph 16(2), the detention of the Claimant would necessarily have been unlawful.

46. But the Secretary of State says that her mistaken understanding of the law caused her to have "grounds for suspecting" that the Claimant could be removed, that that mistaken understanding was entirely reasonable, and thus that she had "*reasonable* grounds for suspecting" within the meaning of Paragraph 16(2). The Claimant responds by contending that such an error of law is not capable of giving rise to *reasonable* grounds to suspect.

47. Before considering the parties' arguments in more detail, I first summarise the main case authorities cited by the parties

The Authorities

48. I have been referred to a number of authorities said to relate to the question of an error of law and reasonable grounds for suspicion or belief, arising in a number of different fields (including in particular, employment and criminal law). In my judgment, there are four cases which are most directly relevant to the issue that arises here: *Walker v Lovell* [1975] 1 WLR 1141 (HL); *Percy v Hall* [1997] QB 924 (CA); *R v. Governor of Brockhill Prison ex parte Evans* [2001] 2 AC 19 (HL) and the decision of the High Court of Australia in *Ruddock v. Taylor* [2005] HCA 48 (2005) 221 ALR 32. I address each in turn.

Walker v Lovell

49. This case concerned the prosecution of a driver for two offences: failure to provide a specimen of breath contrary to s.8(3) Road Traffic Act 1972 and driving with excess alcohol in his blood contrary to s.6(1). On the second charge, a central issue was whether the driver had been arrested by the police constable under the correct power of arrest and in particular whether his arrest under s.8(5) RTA had been lawful. S.8(5) provided that "*If a person required by a constable ... to provide a specimen of breath for a breath test fails to do so and the constable has reasonable cause to suspect him of having alcohol in his body, the constable may arrest him*". On the facts, the constable, before checking the breathalyser bag, thought that the driver had not provided sufficient breath and arrested him for failure to supply a sample under s.8(5). In fact it turned out that the driver had provided sufficient breath and the test was positive. The House of Lords held, by a majority, that the constable did not have power to arrest under s.8(5) because he did not have reasonable cause to suspect that the driver had failed to provide a sufficient quantity of breath to enable the test to be carried out: see Lord Diplock at 1151G-1152C. Lord Diplock, with whom Lords Kilbrandon and Edmund-Davies agreed, considered first, whether, under the terms of s.8(5), a constable has a power to arrest where he has *reasonable cause for suspecting* that the driver has failed to provide a sufficient specimen, even if it turns out that in fact the driver has done so (and even though those words did not appear in the provision itself). Having examined a constable's right of arrest both at common law and under express statutory provision and specific cases under the RTA (at 1149E-1151B), Lord Diplock concluded at 1151B-C that under s.8(5), it is lawful for a constable to arrest a driver on the basis of "*reasonable cause to suspect*". There was thus a right to arrest upon "reasonable cause for suspicion". However, Lord Diplock went on to explain that "reasonable cause for suspecting" protects the constable only where he has made a mistake of fact, and not a mistake of law, in the following important passage (at 1151E-F):

> *"This, however, does not avail the appellant in the instant case. It is well settled by authority that in the context of arrest there can only be "reasonable cause" for suspecting a person of having committed an offence if what the person making the arrest reasonably believes to be the facts upon the information then available to him would, if they were true, amount in law to the offence for which the arrest is made. He is protected if he has made an honest and reasonable mistake of fact. <u>He is unprotected if he has made a mistake of law, however excusable the mistake might seem to be</u>. The same principle must, in my view, apply where the power of arrest is exercisable in respect of failure to comply with a statutory obligation even though that failure may not necessarily amount to a criminal offence"*
>
> *(<u>emphasis</u> added)*

Whilst in the course of argument before me, counsel were not able to identify the "authority" there referred to by Lord Diplock, Ms White for the Secretary of State nevertheless accepted that this important passage of Lord Diplock's speech does represent an authoritative view of the legal position in relation to reasonable grounds for suspicion in the context of a constable's power of arrest.

50. Lord Diplock then went on to conclude (at 1151G-1152B) that, on the facts, the constable had not had any reasonable cause for suspicion of failure to provide a sufficient quantity of breath. In particular, he held that once the constable could see that the breath test was positive, the constable could have no reasonable cause for arresting under s.8(5) (rather than s.8(4)): "*His belief that he had was not due to any mistake of fact. It was solely due to a mistake of law*". In this way, Lord Diplock's distinction between mistake of fact and mistake of law was significant on the facts of the case.

Percy v Hall

51. In *Percy v Hall*, the plaintiffs had been arrested on many occasions for trespassing at military installations, in breach of certain byelaws. Then, on the basis of an earlier decision of the Divisional Court that those byelaws were invalid, they brought actions for wrongful arrest and false imprisonment against, inter alia, the police officers who had carried out the arrests. The Court of Appeal held that the byelaws were not in fact invalid. They went on to hold, secondly, that even if they had been held to be invalid, the question whether the constables acted tortiously in arresting the plaintiffs fell to be determined at the time of the events complained of, and at that time the byelaws were presumed to be valid and needed to be enforced in the public interest. Thus the constables would in any event have had a defence of lawful justification, if they could show that there were acting in the reasonable *belief* that the plaintiffs were committing an offence under the byelaws.

52. Simon Brown LJ, giving the leading judgment, dealt with the second issue at 943B-948D. At 943B-944F he set out the parties' arguments. The plaintiffs argued that there could be no defence of lawful justification, since an invalid byelaw was void ab initio and incapable of having had any legal effect at all. The defendants relied upon the House of Lords decision in *Wills v Bowley* [1983] 1 AC 57 in support of the proposition that constables who arrest someone whom they honestly but mistakenly believe on reasonable grounds to have committed the relevant offence should be protected from actions for wrongful arrest. In response, the plaintiffs argued, inter alia, that *Wills v Bowley* is concerned only with honest and reasonable mistakes of fact, not of law. Simon Brown LJ addressed this argument as follows:

> **"***What then of the argument that such a construction cannot avail an arresting officer whose mistake was, as postulated here, one of law rather than fact?*
>
> *Clear it is that ordinarily a mistake of law, however understandable, cannot provide the lawful justification for an arrest where otherwise there is none: see, for example, Bentley v. Brudzinski (1982) 75 Cr.App.R. 217, Collins v. Wilcock [1984] 1 W.L.R. 1172 and Todd v. Director of Public Prosecutions [1996] Crim.L.R. 344. Here, however, submits Mr. Howell, looking at the matter as at the dates of these arrests, there was no mistake of law on the part of the arresting constables, certainly not in any conventional sense. It was not as if the constables had, as in the usual case, misunderstood their legal powers; on the contrary, they were enforcing what at the time appeared to be perfectly valid byelaws; to have done otherwise would seemingly have involved them in a clear breach of their duties. This essentially is Mr. Howell's second main argument and in support of it he relies heavily on the Hoffmann-La Roche case [1975] A.C. 295.*
>
> *The question arising there was whether the Crown should be required to give a cross-undertaking in damages when seeking an interlocutory injunction to enforce a statutory order which was under challenge on natural justice grounds. In holding not, it was emphasised by several of their Lordships that there is a duty to enforce the law and that*

the order had the full force of law unless and until it could be shown to be ultra vires. ... Lord Diplock said...:

> *"The duty of the Crown to see that the law declared by the statutory instrument is obeyed is not suspended by the commencement of proceedings in which the validity of the instrument is challenged. ... "*
>
> *(emphasis added)*

53. After dealing with the plaintiffs' response to this argument, Simon Brown LJ continued (at 947C-948D):

> *"Although I do not pretend to have found this part of the case altogether easy, I have come to the conclusion that Mr. Howell's arguments are to be preferred here also.*
>
> *The central question raised here is whether these constables were acting tortiously in arresting the plaintiffs or whether instead they enjoy at common law a defence of lawful justification. This question, as it seems to me, falls to be answered as at the time of the events complained of. At that time these byelaws were apparently valid; they were in law to be presumed valid; in the public interest, moreover, they needed to be enforced. It seems to me one thing to accept, as readily I do, that a subsequent declaration as to their invalidity operates retrospectively to entitle a person convicted of their breach to have that conviction set aside; quite another to hold that it transforms what, judged at the time, was to be regarded as the lawful discharge of the constables' duty into what must later be found actionably tortious conduct.*
>
> *I do not understand this point ever to have been addressed before. In my judgment it is not covered by the general doctrine of retrospectivity with regard to the annulment of invalid instruments. I am not prepared to regard the many broad statements of principle as going this far.*
>
> *.... In my judgment, therefore, even if these byelaws are properly to be regarded as void for uncertainty ... that would not serve to deprive the constables here of a defence of lawful justification wherever they can show they were acting in the reasonable belief that the plaintiffs were committing a byelaw offence". (emphasis added)*

Peter Gibson LJ and Schiemann LJ agreed on this issue, the latter adding some observations on the correct approach to legislation subsequently declared to be invalid.

54. I make the following observations on *Percy v Hall.* First, Simon Brown LJ recognises that the defence of lawful justification to the torts of wrongful arrest and false imprisonment does encompass the case where the defendants were acting in the reasonable belief that the plaintiff were committing an offence. Secondly, however, in this context, a distinction is drawn between, on the one hand, ordinary mistake of law, including, the usual case of misunderstanding, at the relevant time, of legal powers as they then existed and, on the other hand the case where, at the relevant time, the legal provision is valid and clear and there is no misunderstanding of it, but rather subsequently, the law is subsequently found to be invalid (even with retrospective effect). In the latter case a belief in the existence of an offence would be reasonable; in the former case it would not be. At 945C Simon Brown LJ confirmed Lord Diplock's basic principle in *Walker v Lovell*: mistake of law, "however understandable", cannot provide a lawful justification for an arrest. Thirdly, the factual basis for the second issue in *Percy v Hall* is the case of valid *legislation* subsequently being held to be invalid. This is not the same as the declaratory effect of a *judicial decision* as to what the law is, and, therefore, has always has been.

R v. Governor of Brockhill Prison ex parte Evans

55. Whilst *Percy v Hall* was concerned with the effect of a subsequent declaration of invalidity of delegated legislation, *R v. Governor of Brockhill Prison ex parte Evans* related to the effect of a subsequent court judgment finding the law to be - and thus always to have been - different from that which it had previously been reasonably assumed to have been. The applicant had been sentenced to concurrent prison sentences. The prison governor calculated her release date taking account of time spent in custody on remand and in doing so, applied the approach of then current Divisional Court decisions and of the Home Office. The applicant however successfully argued that that approach was incorrect and that, on correct analysis, her release date should have been some two months earlier. She then claimed damages for false imprisonment in respect of the additional 59 days she had spent in custody, unlawfully. The House of Lords upheld the applicant's claim, holding that the applicant's continued detention after the correctly calculated release date was unlawful and the prison governor had acted in excess of the powers conferred on him by Parliament; the fact that he had complied with the law as the court had at that time declared it to be was not sufficient justification for false imprisonment, which was a tort of strict liability. Whilst there was injustice in holding the prison governor liable, on balance it was outweighed by the injustice of leaving the applicant without a remedy, on the basis that common law principles dictated that no member of the executive could interfere with the liberty of the subject except when legally authorised to do so.

56. Lord Hope addressed the defendant's argument as follows (at 33F-35F, and 37B):

> *"But the issue was presented by the Solicitor General as being primarily one of principle. According to his argument the justification for the detention for the purposes of the tort of false imprisonment had to be determined according to the state of the law at the time of the detention. This argument was developed by analogy with a series of cases* [including Percy v Hall] *where a person had been detained in obedience to the order of a court which was ex facie lawful at the time when it was made or for breach of a byelaw which was only subsequently found to have been unlawful. My immediate impression was that there was quite a strong case for saying that the decisions reached in these cases could be applied to the position of the governor when he was fulfilling his functions under section 67(1) of the Act. It is his responsibility under the statute to calculate the length of the period of discount in each case where the sentence of imprisonment is subject to a discount, and he must carry out that calculation as required by law. But it seemed to me that he could reasonably say that the justification for what he did lay in the fact that he was following the guidance afforded by decisions of the court in similar cases as to how the calculation should be carried out.*
>
> *The Solicitor General developed his argument along these lines. ..... This argument was presented in a variety of ways.* [He then identified a series of points and continued] *And there was the byelaw point: the position of the governor was analogous to that of a constable enforcing a byelaw which he had reasonable grounds to think was being breached but was later held to be ultra vires.*
>
> *..... For his byelaw point the Solicitor General relied on Percy v Hall [1997] QB 924 which concerned the arrest and detention of the plaintiffs by constables on many occasions for breach of various byelaws. The constables were acting in pursuance of powers conferred on them by those byelaws which were in law presumed to be valid and which needed to be enforced in the public interest. Addressing the argument that, assuming the byelaws to have been invalid the constables were nevertheless entitled to*

> *rely on the defence of justification, the Court of Appeal held that the defence was available to the constables if they could show that they were acting in the reasonable belief that the plaintiffs were committing an offence under the byelaws for whose assumed invalidity they were not responsible.*
>
> *On further reflection I have reached the view that neither of these lines of authority can be applied by analogy to the position of the governor. ... . It is no answer to a claim based on a tort of strict liability to say that the governor took reasonable care or that he acted in good faith when he made the calculation. Nor can he say, as in the case of the constables who were seeking to enforce the byelaws in the reasonable belief that a byelaw offence was being committed, that he had a lawful justification for doing what he did. His position would have been different if he had been able to show that he was acting throughout within the four corners of an order which had been made by the court for the applicant's detention. The justification for the continued detention would then have been that he was doing what the court had ordered him to do. ...*
>
> *I respectfully agree with Judge LJ's observation in the Court of Appeal [1999] QB 1043, 1078e-f, that for the governor to escape liability for any extended period of detention on the basis that he was acting honestly or on reasonable grounds analogous to those which apply to arresting police officers would reduce the protection currently provided by the tort of false imprisonment. I can see no justification for limiting the application of the tort in this way. The authorities are at one in treating it as a tort of strict liability. That strikes the right balance between the liberty of the subject and the public interest in the detection and punishment of crime. 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. ..."*

Then at 37B Lord Hope concluded*:*

> *"As I have said, it is difficult to see how the court's order could be understood as having any application to the applicant's case other than that it was to be applied to her retrospectively. If ever there was a case where the declaratory theory should be applied it must surely be one where the liberty of the subject is in issue—as it plainly is where the point relates to the entitlement of the subject to be released from custody"*
>
> *(emphasis added)*

In this way, Lord Hope clearly distinguished the case from the position in *Percy v Hall*.

57. A number of further points emerge from the speeches of their Lordships in *Brockhill Prison. First*, the governor was entirely blameless; he had acted reasonably and in good faith in detaining the applicant for the longer period, which was in fact unlawful. Moreover there was justice in the position of both parties: Lord Slynn at 26D-G and Lord Steyn at 27F-G and 28E-H. *Secondly*, the situation, as in that case, where the defendant, as a result of of a subsequent judicial decision, acts in accordance with a view of the law which at the time was accepted as correct, but which turns out not to have been, is to be distinguished from the case where "a defendant has acted in accordance with statutory provisions which are subsequently held to be ultra vires and void" Lord Browne-Wilkinson at 27D-F. Similarly Lord Hobhouse in the course of his speech (at 45H-46C, 46G-H and 47E-F) also effectively made the distinction between a valid law which is subsequently set aside as being invalid and a valid law which is wrongly interpreted, indicating that *Percy v Hall* fell into the former category whilst that case fell into the latter.

Misunderstanding the law is not a defence. *Thirdly*, there is no general defence to a claim of false imprisonment of having acted in accordance with the law as it was understood at the time: Lord Steyn 29E-F.

Ruddock v. Taylor

58. In the Australian case of *Ruddock v. Taylor* there was, as in the present case, a statutory provision providing for immigration detention on the basis of "reasonable cause". The respondent, a British citizen, had held a permanent visa permitting him to remain in Australia. He was convicted of offences and sentenced to imprisonment. Upon release from prison, the appellants, ministers in the Australian Government, twice cancelled his visa. On each occasion, the respondent was detained in immigration detention. The two cancellations were subsequently quashed by the courts - the second in the case of *Re Patterson*. After his consequent release, he brought an action for false imprisonment against the ministers.

59. The High Court of Australia (by a majority of 5 to 2) held, overturning the decisions below, that the respondent's detention was not unlawful. Four of the judges in the majority gave a single judgment ("the principal majority judgment") and a further majority judgment was given by Callinan J. McHugh J and Kirby J each gave detailed dissenting judgments.

60. Central to the case was s.189(1) Migration Act 1958 (Cth) which provided:

> "*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*"

61. Under relevant legislation, a non-citizen with a valid visa was a "lawful" non-citizen; a non-citizen without a visa was an "unlawful" non-citizen. Upon cancellation of a visa, the former holder became an "unlawful" non-citizen. S.189(1) was similar to, but not the same as Paragraph 16(2). First, in particular, under s.189(1), there is an *obligation* upon officers to detain, whilst in Paragraph 16(2), officers have a discretion whether or not to detain. Secondly, s.189(1) refers to "knowledge or reasonable suspicion", whilst in paragraph 16(2) refers simply to "reasonable grounds for suspecting".

62. The respondent made a number of arguments; two of which are particularly relevant to the present case. First, the respondent argued simply that the quashed decisions to cancel the visa were to be treated as if never made and were unlawful, and since the detention was the inevitable consequence of the invalid decisions to cancel, the detention too was necessarily unlawful: see principal majority judgment §18. This "unlawful decision contention" is akin to the arguments in the *Brockhill Prison* and *Percy* cases.

63. The respondent further argued, in any event, that an officer could not have "reasonably suspected" that the respondent was an unlawful non-citizen where the cancellation decision was legally infirm. S.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" in the principal majority judgment §20. This argument is closer to the argument made by the Claimant in the present case.

The principal majority judgment

64. The principal majority judgment addressed the mistake of law argument at §§38-47. At §38 it was characterised as a submission that "the belief or suspicion that the respondent was an

unlawful non-citizen 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". The argument involved two elements: a mistake of *law* can never give rise to a *reasonable* suspicion; and a "state of law" is not something that can be "suspected"; rather it is something that is "believed" or "understood".

65. The reasoning in the principal majority judgment was as follows. First, at §27, they construed the words "knows or reasonably suspects" as also encompassing a state of mind somewhere in the middle, so as to include a certainty of belief but one founded on error of law. Then at §§40-46, they went on to reject the mistake of law contention, as follows:

> *"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. .... 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. ...*
>
> *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 supports that conclusion.*
>
> *43 .....* [In Little] *Dixon J held 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. ... 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. ... 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."*

The second majority judgment of Callinan J

66. Callinan J agreed that the appeal should be allowed. His reasons are stated relatively briefly at §§219 to 230. He accepted (§221) that the appellants were operating under a mistake of law, no matter how well founded in law at the time their belief or suspicion was. However (§223) there was nothing in the Act to suggest a distinction between suspicion based on mistake of fact and suspicion based on mistake of law. At §225, the reliance by respondent on *Little v Commonwealth* was misplaced - it had nothing to say on s.189(1). (In this regard I note that he cited the passage of Dixon J's judgment which addressed s.13 (3) and did not make the distinction between the power to detain and the separate immunity provision, which both McHugh J and Kirby J made in their judgments at §§104-105 and 180 respectively). He concluded that s.189(1) did not require the person to know and correctly understand all of the relevant facts and law; all it required is that the person hold a reasonable suspicion of a particular state of affairs (He did not address specifically either the use of the language of suspicion nor the reasoning at §§101-111 of McHugh J, below). At §229, he gave the example of many people held in detention on suspicion. He concluded by stating that "*the notion that conduct based upon a mistake of law cannot be regarded as reasonable is patently absurd*". Overall, his reasons do not add significantly to the analysis of the principal majority judgment.

The dissenting judgment of McHugh J

67. McHugh J rejected the appellants' case for two reasons, summarised at §55. First, there was no finding of fact that the officers "suspected" that the respondent was an unlawful non-citizen; the more probable view was that the officers in question did not hold a "suspicion" that the respondent was an unlawful non-citizen. Rather they *believed* or *thought that they knew* that he was "an unlawful non-citizen" and a belief or supposed knowledge about a fact or conclusion is not a suspicion. Secondly, even if the officers' mental state was suspicion, a suspicion based on a mistake of law could not be a reasonable suspicion within the meaning of the Act. He dealt with these two aspects separately – at §§ 70 to 100 and at §§101 to 111 respectively.

68. As to the first aspect, - what state of mind amounts to reasonable suspicion - McHugh J started by pointing out (§70) that s.189 had to be interpreted strictly and in a manner which preserves the liberty of the subject and so that a person cannot be detained unless the officer holds one or other of the precise mental states referred to. He then analysed in some detail suspicion, belief and knowledge as different states of mind (§§71 to 89). He cited general authority as to the meaning of "suspicion" being a state of conjecture only, rather than one of proof or knowledge, and that suspicion is different from belief. After reviewing, inconclusively, a number of authorities on the requisite state of mind in the context of property suspected of being stolen, he said that in the context of s.189, the critical question was whether "belief" could constitute "reasonable suspicion". He concluded (at §§90 to 92), adopting the correct approach to construction of statutes concerning the liberty of the individual, that the provision had to be read strictly and with precision. An officer who knows, believes or is convinced that a person is an "unlawful non-citizen" cannot *reasonably suspect* that he is an unlawful non-citizen. In his judgment, "belief" was a strongly held conviction and the absence of doubt made it far removed from "suspicion". Thus, belief was not the same either as knowledge or as suspicion and did not form part of the middle ground in a spectrum of degrees of states of mind. In this regard, he expressly disagreed with the principal majority judgment at §27.

69. Then turning to the evidence, he concluded that there was no finding that the officers had either of mental states specified in s.189. Rather the officers *believed* that the respondent was an "unlawful non citizen". The officers' state of mind was more than suspicion; nor could it not amount to knowledge, because knowledge requires that the thing known in fact exists; and in that case it did not exist: §§98 and 99.

70. As to the second aspect - whether mistake of law can amount to "reasonable" suspicion - McHugh J addressed this at §§101 to 111. His conclusion was that, if the officers' state of mind could be described as suspicion, it could not be a *reasonable* suspicion because it was based on a legally mistaken view that the respondent's visa had been cancelled. (This proposition is similar to the position stated by Lord Diplock in *Walker v Lovell*). Unlike the principal majority judgment, he considered that the case of *Little v Commonwealth* supported this conclusion. In that case, the statutory provision (s.13(1) and (3) National Security Act 1939) was in two parts: a power to act where there is suspicion of offence and immunity if acting in pursuance of section. McHugh J held that an officer cannot be acting under a suspicion of an offence if no offence has been committed and mistake of law could not be relied upon, but, secondly, that for the purposes of an immunity provision, mistake of law could be relied upon. Since s.189 was not an immunity provision, but rather concerned with the power to detain and whether conduct was lawful in the first place, what Dixon J said about s.13(1) applied directly; an officer cannot have even a suspicion if the suspicion is based on mistake of law. He continued:

> *"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 and Kitto J in Board of Fire Commissioners (NSW) v Ardouin 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". ..."*

71. After then stating that a person cannot "know" a conclusion of law, he went on:

> *"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 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 <u>reasonably</u> 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, <u>though reasonably</u>, 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. ... . 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." (emphasis added)

The dissenting judgment of Kirby J

72. Kirby J also dissented principally on the basis that the ministers in any event could not benefit from the protection of s.189 even if, in principle, the officers who detained the respondent could. As regards the officers, he agreed with McHugh J that a suspicion based on a mistake of law could not be reasonable suspicion under s.189 and that *Little v Commonwealth* did support the respondent's case. In the course of his judgment, he made noteworthy observations on the position at common law, on the *Brockhill Prison* case and that the liberty of the individual could not be threatened unless there is clear provision in statute to the contrary.

"135 A common law action: The respondent's claim was framed in the common law tort of false imprisonment. .... 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. ... 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:

> *"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. 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.

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. ...

139 To similar effect, the House of Lords [in the Brockhill Prison case] *has described the tort of false imprisonment as one of the "important constitutional safeguards of the liberty of the subject against the executive". 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. 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. ..."

...

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... [he then quoted directly from Lord Hope's speech at 35F set out in paragraph 56 above]*" (emphasis added)*

73. As regards detention without legal authorisation being unlawful, he also cited *Brockhill Prison* at length and with approval, saying:

"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. 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. 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"

74. As to the position of the officers, Kirby J expressly agreed with McHugh J's reasons at §§101 to 110, that s189 did not operate to protect against an error of law. He confined himself to some further brief observations. He also agreed with McHugh J's analysis of *Little v Commonwealth* . He stated:

"*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. ... 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. 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."*

75. I make the following observations on *Ruddock v Taylor*. The key issue was whether a mistake of law could give rise to a reasonable suspicion. The main point of difference between the views of the majority and those of the minority is that the former considered that the words of the statute were neutral on this issue and, for that reason, did not exclude mistake of law as being reasonable suspicion; by contrast the minority considered that the words of the statute did not expressly cover mistake of law and on the strict approach to construction where the liberty of the individual is in issue, the statutory provision must construed narrowly so as to limit the scope of any restriction on liberty; thus, absent clear words to the contrary, mistake of law could not be read into the words of the statute.

76. The dissenting judgments gave two reasons for finding that a mistake of law could not be a reasonable suspicion. Both McHugh J and Kirby J held that any suspicion based on mistake of law could not be reasonable. McHugh J also held that in any event a belief or understanding as to the legal position could not be a "suspicion" at all within the meaning of s.189. Only Kirby J considered the common law position more generally and the *Brockhill Prison* case expressly. Finally both the majority and the minority relied heavily upon the earlier case of *Little v Commonwealth*. There was a complete divergence of view as to the meaning and effect of Dixon J's judgment in that case.

77. Finally, in my judgment, other authorities cited to me are not sufficiently in point to assist in the resolution of the issue before the Court. The employment cases cited did not involve the liberty of the subject nor the declaratory effect of judicial decisions. The observations of Mr Ockleton at §15 in *Alsaadon v SSHD* [2013] EWHC 2184 (Admin) arose in a claim for unlawful detention under *Hardial Singh* principles, and in a case where, at the time of detention, there was in place a positive order for deportation, which the Secretary of State was entitled to rely upon until set aside; thus making that case closer on the facts to *Percy v Hall*. Finally the passage cited by the Secretary of State at §39 of the judgment of Cranston J in *McCreaner v Ministry of Justice* [2014] EWHC 569 (QB) arose in the context of the claim in negligence, rather than justification for the tort of false imprisonment. In the latter context, at §26, Cranston J confirmed that public law error (including a misunderstanding of the law) does not provide a defence to false imprisonment.

The Parties' submissions on Ground 1

78. *The Claimant* submitted that the Secretary of State's misunderstanding of Article 6 of the Dublin II Regulation, being an error of law, cannot constitute grounds for suspecting that the Claimant was liable to removal which were "reasonable" within Paragraph 16(2). "Reasonable grounds for suspecting" within Paragraph 16(2) should properly be read as relating to mistakes of fact only and cannot be read as protecting the Secretary of State for detaining people based on the legally erroneous assumption of the existence of a power to remove.

79. "Reasonable cause" type provisions to detain a person protect the officer detaining from mistakes of fact, but not mistakes of law: *Walker v Lovell* at 1151E-F. This reflects the general principle that ignorance of the law will not excuse unlawful conduct: *Millar v Dickson* [2002] 1 WLR 1615 per Lord Bingham at 1631B-C. This maxim should apply not only in the criminal context, but also in the sphere of deprivation of liberty of the individual. The Claimant's position is supported by the terms of Paragraph 16(2) itself, by the Minister's statement and by the case authorities.

80. First, as a matter of construction of the wording of Paragraph 16(2), reasonable grounds for suspecting in Paragraph 16(2) relates to the to the characteristics of *the person*. The words used are "grounds for suspecting that *a person is someone* ..." who can be removed.

81. Secondly, Mr O'Brien's statement to Parliament shows that the purpose of Paragraph 16(2) is to protect the Secretary of State against mistakes of fact. The reference to "categories" is a reference to the categories of persons who under the legislation can be removed. These categories do not change. The question is whether the evidence and facts point to the person falling within such a fixed category. By contrast in the present case, the facts did not change, but the category did.

82. Thirdly, as to the three principal English case authorities, *Walker v Lovell* is strong support in the related context where officers of the state can deprive individuals of their liberty on the basis of reasonable grounds. In *Percy v Hall*, Simon Brown LJ at 945C-D clearly distinguished a case of "misunderstanding of a legal power" from the case, there, of invalid legislation. There is no reason why a constable does not have "mistake of law" protection, but that an immigration officer doing essentially the same thing should have such protection. As regards *Brockhill Prison*, the Claimant accepts that the present case is different, because there was no express statutory provision providing some protection for the detaining officer. Nevertheless there is within the lawful justification defence to the common law tort of false imprisonment the potential for a reasonable belief or good faith defence, but the House of Lords chose not to allow such a defence where the person has misunderstood the scope of his legal powers. When choosing between the good faith position of the detainer and of the detainee, precedence should be given to the latter, since the liberty of the individual is at stake.

83. As for *Ruddock v Taylor*, the Claimant submitted that the decision is not binding. It was a majority decision and the majority judgments did not refer to the *Brockhill Prison* case. The Court should prefer the views of the minority. The majority's refusal to limit the statutory provision so as to exclude mistake of law, was very much based on a textual comparison with another Australian statute, the subject of the *Little* case. But that does not arise here. The Court should give precedence to the approach in *Walker v Lovell* and in the *Brockhill Prison* case and if that is done, the view of the minority is reached.

84. *The Secretary of State* submitted that the detention was lawful because throughout the period of detention, the relevant officers/the Secretary of State "reasonably believed" that the Claimant was a person in respect of whom removal directions might be made and thus, under Paragraph 16(2), it was lawful for her to detain the Claimant. Under the terms of paragraph 16(2), an immigration officer may have "reasonable grounds to suspect" that someone is a person in respect of whom removal directions may be made, even if that officer has made an error of law.

85. There is no reason of principle or public policy to construe Paragraph 16(2) so as to exclude from the category of "reasonable" decisions those which are based on a mistake of law. The paragraph should be given its natural meaning. The question for the Court is simply whether the Secretary of State had reasonable grounds for her suspicion that removal directions might be given.

86. The amendment to Paragraph 16(2) introduced by the Immigration and Asylum Act 1999 means that the power to detain is not conditional on the person being liable to removal, rather it is conditional on having "reasonable grounds to suspect" that the person is so liable. For that reason, the *Brockhill Prison* case is distinguishable and Lord Hope's concerns there about making inroads into the law of false imprisonment do not arise on the specific provision in issue here.

87. There is no reason for concluding that an error of law can *never* amount to "reasonable grounds" under Paragraph 16(2). That being so, on the facts of this case, the evidence shows that the Secretary of State did, in this case, have reasonable grounds for her belief. Whilst accepting the principle that ignorance of the law is not normally an excuse, that does not mean that it could never be the foundation for "reasonable grounds".

88. The words "person in respect of whom a direction may be given" involves considerations both of fact and of law, and "reasonable grounds" necessarily extend to both aspects. None of the English cases are directly in point. Whilst recognising that *Walker v Lovell* is strong authority in the Claimant's favour, it does not provide the answer to the specific question of interpretation of Paragraph 16(2). *Percy v Hall* demonstrates that the position in *Walker v Lovell* is not absolute, even in the case of arrest. A misapprehension as to the validity of a byelaw was a reasonable excuse. That approach should be applied in the present case because the Secretary of State's misapprehension here is analogous to such a misapprehension; the Secretary of State had not, at the time, misunderstood her legal powers; rather some three years later, her interpretation of the law turned out to be erroneous. *Percy v Hall* establishes that reasonable belief at the time is relevant and it can extend to matters of law as well as fact. As to the Minister's statement to Parliament, whilst referring expressly to questions of fact, nothing said there indicates any limit to the type of error intended to be covered by Paragraph 16(2).

89. Finally, *Ruddock v Taylor* is the case most in point, and the statutory provision there is materially identical to Paragraph 16(2). The Court should follow the view of the majority, as highly persuasive authority. Suspicion is just a lower threshold and here the Secretary of State's "belief" or "understanding" passes that threshold. In some cases it may be difficult to distinguish between fact and law. If the Claimant's case is correct, then the Secretary of State and any immigration officer cannot confidently proceed on a settled understanding of the law.

Discussion and analysis

90. The issue in Ground 1 is ultimately a question of construction of Paragraph 16(2) of Schedule 2 to the 1971 Act. The purpose of the introduction, by amendment, of the "reasonable grounds for suspecting" wording is to protect the Secretary of State and immigration officers from litigation and claims for damages where a person has been detained in circumstances which turn out to be unjustified. Paragraph 16(2) is plainly intended to give such protection where there has been a reasonable mistake of fact. The question is whether the protection given, and the removal of the right to damages for false imprisonment, is intended to extend to the situation where the Secretary of State or immigration officers have acted under a mistake of law. Is such a mistake of law capable of constituting "reasonable grounds for suspecting? (For the reasons set out in paragraph 44 above, I accept that if it is, then the mistake of law in the present case was, on the facts, a reasonable one to make).

Background context

91. The text of Paragraph 16(2) falls to be construed against the following background context.

92. First, the subject matter of Paragraph 16(2) is the liberty of the subject; it is a statutory provision which provides for an inroad into that liberty and the "reasonable grounds for suspecting" wording restricts an individual’s rights in relation to false imprisonment. Any such inroads should be construed narrowly, and the extent of any such curtailment should appear from clear words: see Lord Hope in *Brockhill Prison* at 35E-F and 37D; and McHugh J at §§90, 106, 110 and Kirby J at §§136, 140 and 142 in *Ruddock v Taylor*. The reduction in protection provided to

the individual should be no more than the minimum necessary to meet the intention of Parliament as provided for in the wording of Paragraph 16(2).

93. Secondly, the position, absent the "reasonable grounds" wording here, is that mistake of law would not provide a defence to a claim for false imprisonment. At common law, and even without express statutory wording, there can be a reasonable belief defence to a claim for false imprisonment: *Walker v Lovell* at 1149F-G and *Percy v Hall* per Simon Brown LJ at 948D. It is the case that, unlike the present case, in *Brockhill Prison* there was no express "reasonable cause" type protection. However, in my judgment, *Walker v Lovell* suggests that, at common law (and also in many statutes), such protection is implied. But at common law, and in statute where there is express or implied "reasonable cause" protection, it does not extend to the situation where the official is acting under a mistake of law: see Lord Diplock in *Walker v Lovell*, as confirmed by Simon Brown LJ in *Percy v Hall*. What is more both judges expressly stated that this principle applied no matter how "excusable" or "understandable" the mistake of law might have been. Further, the outcome in *Brockhill Prison* did not depend on whether the governor's action on the basis of a particular legal position was reasonable or not. *Walker v Lovell* provides the fundamental starting point, both at common law and in other statutes: where an officer may act on reasonable suspicion, reasonable suspicion relates to issues of fact, and not to issues of law; a suspicion based on a mistake of law is not reasonable. In my judgment, there is no reason why this principle should not apply equally to immigration officers acting under powers of detention.

94. Thirdly, *Percy v Hall* and *Brockhill Prison* establish that, in the context of mistake of law, there is a distinction to be drawn between a misunderstanding of law and legislation subsequently declared to be invalid: see paragraphs 54 and 57 above. In the former case, such a misunderstanding does not provide a justification for false imprisonment; in the latter case, acting in accordance with the legislation will do so. It is this distinction which led to the differing outcomes in *Percy v Hall* and *Brockhill Prison*, and accordingly the reasoning in the two cases is consistent. Further, I do not accept the Secretary of State's submission that the mistake of law in the present case is analogous to, or of the same type as, the "mistake" of law in *Percy v Hall*. As *Brockhill Prison* itself establishes, a judicial decision which is declaratory of the law means that acting contrary to that decision, even before the decision, amounts to a misunderstanding of law and cannot be relied upon as justification for false imprisonment, however reasonable it was so to have acted. Here, as a result of the declaratory effect of the CJEU's decision in *MA and others*, the Secretary of State acted on the basis of a misunderstanding of law as to the effect of Article 6 of Dublin II.

The wording of Paragraph 16(2) itself

95. The relevant words are "reasonable grounds for suspecting that a person is someone in respect of whom [removal] directions may be given". In my judgment, it is not clear that these words cover the case of an officer having an understanding of the legal position which is erroneous.

96. First, the concept or state of mind of "suspecting" does not apply readily to a state of law, rather than one of fact. The state of mind of "suspicion" is more immediately suited to a state of conjecture. "Suspicion" suggests a temporary and provisional view, suggests the existence of doubt, and that matters may be become clearer in the future. The Secretary of State or immigration officers are unlikely to have a temporary view of the law; by contrast they may well have a temporary and provisional view of the facts, based on as yet incomplete evidence. In this regard, the analysis of these concepts of suspicion and belief of McHugh J in *Ruddock v Taylor* at §§71 to 75, 91 and 92 is cogent. I note that the Secretary of State's case has been put on the basis of the reasonableness of her "belief" or "understanding" of the meaning of Article 6 of the Dublin II Regulation (see, for example, paragraph 41 above), and not in terms of her "suspecting" what

Article 6 might have meant. Whilst this is far from conclusive and the case could have been put by reference to the concept of suspicion, the language actually used by the Secretary of State, in evidence and submission, does illustrate how ill-fitting the notion of suspicion is when applied to a mistake of law. The words used in Paragraph 16(2) are reasonable grounds for "suspecting" and not reasonable grounds for "believing" or "understanding" (see also the alternative of "satisfied that" suggested by McHugh J in *Ruddock* at §109).

97. Secondly, the wording of the statute seems to point to the characteristics of *the person* who it is thought might be removable. There is a distinction between "reasonable grounds for suspecting that a person in X's situation is liable to removal" (which is likely to turn on a question of law) and "reasonable grounds for suspecting that X's situation is such that he is a person who is liable to removal" (which is likely to turn on a question of fact). The words refer to suspicion that X is a person in respect of whom a removal direction may be given; rather than "suspicion" that removal directions may be given in respect of X.

98. For these reasons, the wording of the statute itself suggests clearly that the grounds for suspecting relate to matters of fact; it does not suggest, clearly, that they extend to matters of law.

99. This view is supported by the Minister's statement to Parliament explaining the purpose of the amended wording (set out at paragraph 14 above), in which the Minister refers expressly only to matters of fact and evidence. This passage was cited and relied upon by the Secretary of State to support the submission that the provision includes within "reasonable grounds" grounds based on a mistake of law and that the Minister drew no distinction between individuals in respect of whom a mistake of fact had been made and those in respect of whom a mistake of law had been made. However, in my judgment, this passage is clearly addressed, at least expressly, to the situation where the immigration service has made a mistake of *fact* - this is clear from the references to "evidence" and the "determination of the true *facts*. Further he refers to there being two, fixed, "categories" of person liable to detention and to the question of whether a particular person falls into one of those categories, supporting the construction that Paragraph 16(2) is concerned with "suspicion" or doubt as to the characteristics of the person, rather than as to the legal consequences of those characteristics.

100. Thus the wording itself of Paragraph 16(2) does not *clearly* indicate that "reasonable grounds for suspecting" include grounds based on a mistake of law. Taking account then of the background context, both of legislation which reduces the protection provided for the liberty of the individual by the law of false imprisonment and of the fundamental common law position set out in *Walker v Lovell* that reasonable cause does not extend to a mistake of law, however reasonable, in my judgment this absence of clear wording to extend the protection to mistake of law means that the Paragraph 16(2) is, as a matter of construction, confined to grounds based on mistake of fact only.

101. *Ruddock v Taylor* is the case which is closest to the facts of the present case. Moreover, the views of the majority are, as a matter of precedent, if not binding, to be regarded as persuasive authority for this Court. Accordingly I have given those judgments substantial weight in my deliberations. Nevertheless I have decided not to adopt the reasoning of the majority judgments in Ruddock, for the following reasons. *First*, I place greater weight on the approach of the House of Lords in both *Walker v Lovell* and the *Brockhill Prison* case than on the majority judgments in *Ruddock*. In *Walker v Lovell* Lord Diplock makes clear that English law does start from the position that there is a distinction between mistake of fact and mistake of law. There is no express reference in the majority judgments to an equivalent distinction in Australian law. Indeed the principal majority judgment (at §§41 and 42) suggests that there is no reason to make such a distinction. I note in this regard too that, unlike the minority judgment of Kirby J, the majority judgments make no reference to *Brockhill Prison*. The reasoning of McHugh J at §§101-110 endorsed by Kirby J,

more closely reflects the position under English law in *Walker v Lovell*. *Secondly*, the decision in *Ruddock v Taylor* was not unanimous; there were two powerful dissenting judgments. The approach of the minority (and in particular Kirby J) to construction of a statute limiting the liberty of the subject more closely accords with the approach of the House of Lords in the *Brockhill Prison* case. Further, the reasoning of McHugh J as to the meaning of the word "suspicion" is more detailed than that of the majority (at §27). *Thirdly*, one difference on the facts is that in *Ruddock* until the visa cancellations were quashed, there were in place valid ministerial orders which effectively required detention of the respondent (thus making the case closer to the facts in *Percy v Hall*). *Fourthly*, the difference between the majority and the minority turned, to some considerable extent, on their starkly differing analyses of the judgment of Dixon J in the earlier case of *Little v Commonwealth*. Whilst this case was not fully explored in the course of argument before me, I venture to suggest, somewhat tentatively, that the analysis of McHugh J and Kirby J (at §102 to 105, and 180 respectively) of that case and the statutory provision under consideration there appears to be more persuasive.

102. For these reasons I conclude that, even assuming that having an understanding or belief may amount to "suspecting", a suspicion based on a misunderstanding of the legal position is not intended to be covered by the wording of Paragraph 16(2) and cannot, in any case, constitute "grounds for suspecting" which are reasonable within the meaning of that paragraph. Thus, the Secretary of State did not have reasonable grounds for suspecting that the Claimant was a person liable to removal to Italy under the Dublin II Regulation and she had no power to detain the Claimant. Accordingly the Claimant's detention between 24 August and 10 September 2009 was unlawful.

Ground 2: detention unlawful under *Hardial Singh* principles

103. Formally, permission to apply for judicial review on this ground was initially refused by Lord Carlile QC and the amended claim for which permission was granted did not seek to pursue this ground. The ground has been re-raised only following service of Ms Roberts' evidence just before the hearing, setting out for the first time the reasons for the Claimant's release on 10 September 2014 (see paragraph 31 above). For this reason, I am satisfied that it is appropriate to allow the grounds to be amended to include Ground 2 and to grant permission, on the basis that the claim is arguable. However the evidence before the Court is necessarily limited by reason of the grounds being raised in this way.

104. The Claimant submitted, in the alternative to Ground 1, that, at the time that he was detained, on 24 August 2009, on the facts as known to the Secretary of State and the law as erroneously understood at the time of detention, the Claimant could not have been removed to Italy within a reasonable timeframe and thus his detention was unlawful on the basis of *Hardial Singh* principles (ii) and (iii). As at that date, the Secretary of State knew that the hearing in *EW v SSHD*, the lead case on the safety of removals to Italy, was forthcoming and could not reasonably have believed that the Claimant would have been removed within a reasonable timeframe so as to justify detention. On 10 September 2009, the Claimant was released from detention because the Secretary of State considered that the forthcoming hearing in *EW* meant that the Claimant might not be removed for a further 7 to 9 weeks: paragraph 31 above. All the facts which led to that view on 10 September were equally known to the Secretary of State on 24 August 2009; if detention was not justified on 10 September, it was equally not justified on 24 August 2009. A period of 7 to 9 weeks detention was not reasonable, and, pursuant to *Hardial Singh* principle (iii), it was clear from the outset that the Secretary of State would not be able to remove the Claimant within that period, and thus within a reasonable period. Further, Refugee and Migrant Justice wrote to the Secretary of State on 25 August 2009 (paragraph 28 above) expressly relying on the three lead cases due for hearing as grounds for cancelling removal directions, and thus by

25 August, the Secretary of State knew that removal would not be effected within a reasonable time.

105. I do not accept this contention. As the Secretary of State pointed out in argument, at the time that the hearing of *EW v SSHD* was pending, there was no general stay on removals to Italy, merely because of the existence of that case. The Claimant had had since 18 June 2009 to challenge his removal to Italy but had not done so, and as at 24 and 25 August 2009, the Claimant had not issued judicial review proceedings. It was only once such proceedings were commenced that the Secretary of State could assess how similar the Claimant's claim was to those being made in the *EW* case. Whilst the position was not certain, due to the late point at which this issue was raised, the Secretary of State informed the Court that it was highly likely that the cases referred to in Refugee and Migrant Justice's letter of 25 August 2009 as having been deferred were cases where judicial review proceedings had been issued. I accept that the Secretary of State was entitled to remove the Claimant unless and until a judicial review claim had been issued, and thus, unless and until that happened, it could not have been apparent that removal would not be effected within a reasonable period.

106. The Claimant further submitted that, in any event after the judicial review was issued, the Secretary of State should have responded more quickly than within 10 days. If she had done so, she would have reached the decision that was, in fact, reached on 10 September, significantly earlier. She should have concluded by 2 September that the Claimant would not be removed for 7 to 9 weeks and thus detention became unlawful as at that date. This further contention is more finely balanced. The Secretary of State became aware of the judicial review proceedings on 2 September and the decision to release was made on 9 September 2009. I accept that the Secretary of State was properly entitled to a reasonable period in which to give consideration as to whether the Claimant's case was similar to the lead cases in *EW* and thus in which to assess whether he could still be removed within a reasonable period. On the facts, by 9 September it became apparent to the Secretary of State that removal would not be effected within that reasonable period. In my judgment, on the material before me, a period of one week in which to make this assessment was not excessive and that the Secretary of State acted with appropriate expedition in this regard.

107. For these reasons, I conclude that the Claimant's detention was not unlawful on *Hardial Singh* principles and Ground 2 fails.

Conclusions

108. For the reasons set out at paragraph 102 above, I conclude that the detention of the Claimant between 24 August 2009 and 10 September 2009 was unlawful.

109. I will hear submissions on the appropriate terms of the order, if the parties are unable to agree. I propose dealing with this and other consequential matters, including costs and the adjournment of the case, immediately following the handing down of this judgment, unless any party requests that they be dealt with subsequently and in which event, I will give further directions as to the procedure to be followed, including for the service of written submissions.

110. I am grateful to Mr. Shibli and Ms White for their assistance to the Court in the presentation of oral and written argument in this matter.