LOVE v COMMONWEALTH OF AUSTRALIA (B43/2018)
THOMS v COMMONWEALTH OF AUSTRALIA (B64/2018)

Dates writs of summons filed: 10 September 2018
5 December 2018

Date special cases referred to Full Court: 5 March 2019

Mr Daniel Love and Mr Brendan Thoms identify as Aboriginal and are accepted as such by their respective tribes. Both men were born overseas and neither has Australian citizenship. Each held an Australian visa until it was cancelled in 2018.

Mr Love was born Papua New Guinea ("PNG") in 1979 and is a citizen of that country. His mother was a citizen of PNG and his father is a citizen of Australia. Mr Love's father was born in the Territory of Papua (as it then was), to a Papuan mother and an Aboriginal Australian father. From the age of five Mr Love held an Australian permanent residency visa and has resided continuously in Australia since the age of six. In 2018 he was sentenced to 12 months' imprisonment for assault occasioning bodily harm, with court-ordered parole due to commence on 10 August 2018. On 6 August 2018 a delegate of the Minister for Home Affairs cancelled Mr Love's visa under s 501(3A) of the *Migration Act 1958* (Cth) ("the Migration Act"). This was on the bases that: (1) Mr Love was serving a sentence of full-time imprisonment, and (2) Mr Love had been sentenced to a term of imprisonment for 12 months or more. On the day on which his parole commenced, Mr Love was released from prison into the custody of Border Force officers, who handcuffed him and took him directly to an immigration detention facility. This was done pursuant to s 189 of the Migration Act, on suspicion that Mr Love was an unlawful non-citizen. Mr Love was released from immigration detention on 27 September 2018 when a delegate of the Minister for Home Affairs revoked the cancellation of Mr Love's visa.

Mr Thoms was born in New Zealand in 1988 to an Aboriginal Australian mother and a New Zealand citizen father. He is a citizen of New Zealand but has lived in Australia since 1994. In 2018 Mr Thoms was sentenced to 18 months' imprisonment for assault occasioning bodily harm. On 27 September 2018 the Minister for Home Affairs cancelled Mr Thoms' visa under s 501(3A) of the Migration Act (on the same bases on which Mr Love's visa was cancelled). The next day, Mr Thoms commenced court-ordered parole. Like Mr Love, Mr Thoms was immediately handcuffed and placed in immigration detention by Border Force officers.

Each of the Plaintiffs seeks the payment of damages for false imprisonment, on the basis that his being held in immigration detention was (and is) unlawful. Mr Thoms also seeks to be released from immigration detention. The Plaintiffs argue that s 189 of the Migration Act cannot apply to them, since they have a special connection to Australia such that neither of them is an "alien" within the meaning of s 51(xix) of the *Constitution* ("the aliens power"). Each contends that

he has a continuing right to remain in Australia regardless of whether he has Australian citizenship or a current visa.

In each proceeding the parties filed a Special Case, which Justice Edelman referred for consideration by the Full Court. Each Special Case raises the following two questions:

1. Is the Plaintiff an "alien" within the meaning of s 51(xix) of the *Constitution*?

2. Who should pay the costs of this Special Case?

The Plaintiffs jointly submit that their Aboriginality (by descent, self-identification and community acceptance), bolstered by their longstanding residence in Australia and their owing no allegiance to a foreign power (on account of their having emigrated from PNG and New Zealand as children), takes them beyond the reach of the aliens power.

The Defendant submits that any person who does not have the status of a citizen of Australia under the *Australian Citizenship Act 2007* (Cth) is necessarily an alien. The Defendant further submits that Mr Love and Mr Thoms owe allegiance to PNG and New Zealand respectively on account of their respective citizenship of those countries.

Notices of a Constitutional Matter have been filed in both proceedings. The Attorney-General for the State of Victoria has intervened in each proceeding.

Subsequent to the Full Court reserving its decision on 8 May 2019, the parties were invited by the Court to make submissions on the following proposition:

In general terms the question is whether members of an Aboriginal society have such a strong claim to the protection of the Crown that they may be said to owe permanent allegiance to the Crown. More particularly the question arises in this way:

- *Section 51(xix) of the Constitution does not allow the Parliament to treat as an alien a person who cannot answer the description of an alien according to the "ordinary understanding" of that word;*
- *The ordinary understanding of an alien is informed by the common law of Australia;*
- *According to the common law an alien is a person who does not have the permanent protection of and owe permanent allegiance to the Crown in right of Australia;*
- *The common law's recognition of customary native title logically entails the recognition of an Aboriginal society's laws and customs and in particular that society's authority to determine its own membership;*
- *The common law must be taken to have comprehended a unique obligation of protection owed by the Crown to an Aboriginal society, requiring it to protect each member of that society;*

- *Corresponding to the Crown's obligation of protection is the permanent allegiance which each member of an Aboriginal society owes to the Crown.*
- *It follows that a person whom an Aboriginal society has determined to be one of its members cannot answer the description of an alien according to the ordinary understanding of that word.*

Both matters have been relisted for further hearing before the Full Court on 5 December 2019.