HIGH COURT OF AUSTRALIA

11 February 2020

LOVE v COMMONWEALTH OF AUSTRALIA; THOMS v COMMONWEALTH OF AUSTRALIA
[2020] HCA 3

Today, the High Court, by majority, answered a question in two special cases to the effect that Aboriginal Australians (understood according to the tripartite test in *Mabo v Queensland [No 2]* (1992) 175 CLR 1) are not within the reach of the power to make laws with respect to aliens, conferred on the Commonwealth Parliament by s 51(xix) of the *Constitution* ("the aliens power"). That is the case even if the Aboriginal Australian holds foreign citizenship and is not an Australian citizen under the *Australian Citizenship Act 2007* (Cth). The tripartite test requires demonstration of biological descent from an indigenous people together with mutual recognition of the person's membership of the indigenous people by the person and by the elders or other persons enjoying traditional authority among those people.

The plaintiffs, Mr Thoms and Mr Love, were both born outside Australia and are not Australian citizens. Mr Thoms was born in New Zealand on 16 October 1988 and became a New Zealand citizen by birth. He has resided permanently in Australia since 23 November 1994. Mr Thoms is a descendant of the Gunggari People through his maternal grandmother. He identifies as a member of that community and is accepted as such by members of the Gunggari People. He is also a common law holder of native title. Mr Love was born on 25 June 1979 in the Independent State of Papua New Guinea. He is a citizen of that country but has been a permanent resident of Australia since 25 December 1984. Mr Love is a descendant, through his paternal great-grandparents, of Aboriginal persons who inhabited Australia prior to European settlement. He identifies as a descendant of the Kamilaroi tribe and is recognised as such by an elder of that tribe.

The plaintiffs were sentenced for separate and unrelated offences against the *Criminal Code* (Qld). After their convictions, the visas of both men were cancelled by delegates of the Minister for Home Affairs under s 501(3A) of the *Migration Act 1958* (Cth). They were taken into immigration detention, under s 189 of that Act, on suspicion of being "unlawful non-citizen[s]" and were liable to deportation. In the case of Mr Love, the decision to cancel his visa has since been revoked pursuant to s 501CA(4) of the *Migration Act* and he has been released from immigration detention. The Commonwealth relied upon the aliens power to support the validity of the *Migration Act* in its application to Mr Thoms and Mr Love.

In their separate reasons, the Justices forming the majority held that it is not open to the Parliament to treat an Aboriginal Australian as an "alien" because the constitutional term does not extend to a person who could not possibly answer the description of "alien" according to the ordinary understanding of the word. Aboriginal Australians have a special cultural, historical and spiritual connection with the territory of Australia, which is central to their traditional laws and customs and which is recognised by the common law. The existence of that connection is inconsistent with holding that an Aboriginal Australian is an alien within the meaning of s 51(xix) of the *Constitution*.

The High Court held, by majority, that as an Aboriginal Australian Mr Thoms is not within the reach of the aliens power. However, the majority was unable to agree, on the facts stated in the

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special case, as to whether Mr Love has been accepted, by elders or others enjoying traditional authority, as a member of the Kamilaroi tribe. For that reason, the majority was unable to answer the question of whether he is an "alien" within the meaning of s 51(xix).

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*