

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

Each of the Plaintiffs, Mr Daniel Love and Mr Brendan Thoms, identifies as Aboriginal and is accepted by others (of their respective tribes) as an Aboriginal person. Both men were born overseas, however, and neither has Australian citizenship. Each held an Australian visa until it was cancelled in 2018.

Mr Love is a citizen of Papua New Guinea (“PNG”), where he was born in 1979. 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 a part of PNG 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 since the age of six he has resided continuously in Australia. In 2018 he was sentenced to imprisonment for 12 months for an offence of assault occasioning bodily harm, with court-ordered parole 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”), 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 is a citizen of New Zealand who was born in that country in 1988 to an Aboriginal Australian mother and a New Zealand father. He has resided in Australia since 1994. In 2018 Mr Thoms was sentenced to imprisonment for 18 months, for a crime of assault occasioning bodily harm. On 27 September 2018 the Minister for Home Affairs cancelled Mr Thoms’s 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, however, 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 simply on account of their respective citizenship of those countries.

Each of the Plaintiffs has filed a Notice of a Constitutional Matter. At the time of writing, no Attorney-General had given notice to the Court of an intention to intervene in either proceeding.