HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 22 Oct 2021 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	B56/2021
File Title:	Thoms v. Commonwealth of Australia
Registry:	Brisbane
Document filed:	Applicant's Submissions
Filing party:	Applicant
Date filed:	22 Oct 2021

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA B56/2021
BRISBANE REGISTRY

BRENDAN CRAIG THOMS
Applicant

and

COMMONWEALTH OF AUSTRALIA
Respondent

APPLICANT'S SUBMISSIONS

Part I: Certification

1. These submissions are in a form suitable for publication on the internet.

Part II: Issues

2. The question presented is whether the power in s 189 of the *Migration Act 1958* (Cth) (***Migration Act***) empowered the Commonwealth to detain Mr Thoms, an Aboriginal Australian, when, in *Love v Commonwealth* [2020] HCA 3; 94 ALJR 198 at [81] (***Love***), a majority of the High Court concluded that Aboriginal Australians (as understood according to the tripartite test in *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 70) are not within the reach of the 'aliens' power conferred by the *Constitution* in s 51(xix).
3. Mr Thoms submits that he is not susceptible to the powers bestowed on the Commonwealth by s 51(xix) of the *Constitution*, in particular, s 189 of the *Migration Act*, and that the Commonwealth (and its officers) had no legislative authority to detain him on the basis of a subjective knowledge or suspicion of the officer as to his immigration status.

Part III: s 78B Notices

4. Notices have been issued under s 78B of the *Judiciary Act 1903* (Cth).[1]

Part IV: Reasons for judgment below

5. This matter arises following removal of a question arising in proceedings before the Federal Court.

Part V: Material facts

6. The material facts are set out in the reasons for judgment in ***Love*** and Exhibit NLM-8 to the affidavit of Niamh Lenagh-Maguire filed on 6 September 2021, a summary of which is below.
7. Mr Thoms, currently 33 years of age[2], was born in New Zealand[3]. At the time of his birth, he acquired the status of a New Zealand citizen[4].
8. It is common ground that Mr Thoms identifies as a member of the Gunggari people; is descended from an apical ancestor of the Gunggari people; is accepted by people holding traditional authority in relation to the Gunggari People, as a Gunggari person; and is a common law holder of native title as recognised by the determinations of native title made by the Federal Court of Australia[5].
9. Mr Thoms was two months of age when he first arrived in Australia[6]. He was granted a Subclass 444 Special Category (temporary) visa (**visa**) which permitted him to temporarily reside in Australia[7].
10. On 17 September 2018, Mr Thoms was sentenced for an offence to a period of imprisonment of 18 months [8]. Mr Thoms' court-ordered parole was due to commence

---

1 Cause Removed Book (**CRB**) at 157-160.

2 Having been born on 16 October 1988 – Exhibit NLM-8 to the affidavit of Niamh Lenagh-Maguire filed 6 September 2021 (**Exhibit NLM-8**) at [2] (**CRB** at 37).

3 Exhibit NLM-8 at [2] (**CRB** at 37).

4 Exhibit NLM-8 at [2] (**CRB** at 37); ***Love*** (2020) 94 ALJR 198 at 231, [156] (Keane J).

5 *Kearns on behalf of the Gunggari People #2 v State of Queensland* [2012] FCA 651; *Foster on behalf of the Gunggari People #3 v State of Queensland* [2014] FCA 1318; and *Foster on behalf of the Gunggari People #4 v State of Queensland* [2019] FCA 1402.

6 ***Love*** (2020) 94 ALJR 198 at 271, [377] (Gordon J).

7 Exhibit NLM-8 at [3] (**CRB** at 37).

8 ***Love*** (2020) 94 ALJR 198 at 231, [159] (Keane J).

on 28 September 2018[9]. On 27 September 2018, a delegate of the Minister for Home Affairs cancelled Mr Thoms' visa[10]. At 9:15am on 28 September 2018, at a time when he was otherwise due to be released from the Woodford Correctional Centre, Mr Thoms was detained, in purported exercise of lawful authority pursuant to s 189 of the *Migration Act*, by an officer of the Commonwealth in the employ of the Department of Home Affairs and taken to, and further detained at, the Brisbane Immigration Transit Accommodation[11] where he remained detained until 11 February 2020[12].

Proceedings in the High Court in *Love*

11. On 5 December 2018, Mr Thoms commenced proceedings in the High Court against the Commonwealth seeking, relevantly, a declaration that he was not an alien nor a person requiring naturalisation for the purpose of s 51(xix) of the *Constitution,* a declaration that his detention was unlawful, an injunction directing his release from imprisonment, and damages for false imprisonment.
12. On 1 March 2019, the parties filed a Special Case in the High Court pursuant to r 27.08 of the *High Court Rules 2004* (Cth)[13]. A question of law was posed for the opinion of the Full Court. The High Court ordered the Special Case to be heard with a related proceeding (B43 of 2018, plaintiff Daniel Love).
13. On 11 February 2020, the High Court of Australia gave judgment in ***Love***. The High Court ordered that the answer to the question, 'Is the plaintiff [being, relevantly, Mr Thoms] an 'alien' within the meaning of s 51(xix) of the *Constitution*?' was:

    Aboriginal Australians (understood according to the tripartite test in Mabo v Queensland [No 2] (1992) 175 CLR 1 at 70) are not within the reach of the "aliens" power conferred by s 51(xix) of the Constitution. The plaintiff is an Aboriginal Australian and, therefore, the answer is "No".

14. At 11:51 a.m. on 11 February 2020, having been detained by the Commonwealth for 502 days (or 1 year, 4 months and 15 days), Mr Thoms was released from detention[14].

---

9 ***Love*** (2020) 94 ALJR 198 at 231, [159] (Keane J).
10 Exhibit NLM-8 at [3] (**CRB** at 37); ***Love*** (2020) 94 ALJR 198 at 271, [378] (Gordon J).
11 Exhibit NLM-8 at [4]-[7] (**CRB** at 37-38).
12 Exhibit NLM-8 at [28] (**CRB** at 41).
13 Proceeding B64 of 2018.
14 Exhibit NLM-8 at [28] (**CRB** at 41).

Proceedings in the Federal Court

15. By Order dated 1 July 2020, the matter was remitted to the Federal Court for further hearing and determination in accordance with the reasons of the High Court. On 6 July 2021, Jagot J ordered, pursuant to r 30.01 of the *Federal Court Rules 2011* (Cth), for the separate hearing of the following question[15]:

    Was the detention of the applicant between 28 September 2018 and 11 February 2020 unlawful?

16. Following an application made by the Attorney-General of the Commonwealth, Keane J ordered, on 11 October 2021, that pursuant to s 40(1) of the *Judiciary Act 1903* (Cth), the question posed at paragraph 15 above, be removed into the High Court[16].

Part VI: Argument

17. Section 189(1) of the *Migration Act* provides[17]:

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

18. In its application to Mr Thoms (and all other non-alien, non-citizen Aboriginal Australians), s 189 of the *Migration Act* is not a law 'with respect to aliens' pursuant to s 51(xix) of the *Constitution.* Because of the High Court's decision in ***Love,*** it is beyond the constitutional competence of the Commonwealth Parliament to visit a consequence upon Mr Thoms by reference to his 'alien' status.

19. Analysis of the reasons for decision in ***Love*** (both majority and minority), along with orthodox principles of statutory construction and constitutional interpretation, necessitates this conclusion.

20. Once s 189 of the *Migration Act* is read down or dis-applied in the manner in which a majority of the High Court determined that it must be, the formation of any 'suspicion' by an officer that Mr Thoms was an unlawful non-citizen (during any period) does not shield the Commonwealth from liability for its detention of Mr Thoms. Evidence of the

---

15 **CRB** at 30-31.

16 **CRB** at 154-155.

17 The section has been in these terms at all times material to these proceedings.

officer's 'suspicion' (whether reasonable or not) that Mr Thoms was an 'unlawful non-citizen' in the 'migration zone' is simply not relevant to the determination of the lawfulness of his imprisonment.

21. But even if, contrary to Mr Thoms' argument, s 189 of the *Migration Act* was capable of applying to him, at least from 5 November 2018, the Commonwealth was on notice that Mr Thoms asserted that he was an Aboriginal Australian. Despite that notice, it took no steps to enquire into that assertion (which was, in fact, correct) and justified his continuing detention on the basis that the claim to be of Aboriginal descent was not a relevant matter. In those circumstances, any suspicion formed by an officer was incapable of constituting a reasonable suspicion that Mr Thoms was a person in respect of whom a power of removal under s 198 of the *Migration Act* could be used.

Section 189 is incapable of applying to Mr Thoms

22. That s 189 of the *Migration Act* is incapable of applying to Mr Thoms is established by the following propositions, taken cumulatively:

    (a) **Proposition 1** – a law of the Commonwealth Parliament must be supported by a valid head of power in s 51 of the *Constitution*[18]. The *Migration Act* is supported by s 51(xix) of the *Constitution*.

    (b) **Proposition 2** - Mr Thoms is not an 'alien' as that word is used in s 51(xix) of the *Constitution.*

    (c) **Proposition 3** - in its application to Mr Thoms, s 189 of the *Migration Act* is not a law 'with respect' to 'aliens' as that word is used in s 51(xix) of the *Constitution.*

    (d) **Proposition 4** - the use of s 189 of the *Migration Act* to detain Mr Thoms offends the principle established by *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 (the ***Lim* principle**).

[18] Including matters incidental to those powers: *Constitution* s 51(xxxix).

(e) **Proposition 5** – any purported mistaken yet reasonable belief as to the validity of s 189 of the *Migration Act* in its application to Mr Thoms held by the officers responsible for his detention or continuing detention is irrelevant.

(f) **Proposition 6** - a mistake of law (namely, that s 189 of the *Migration Act* provided a lawful basis for Mr Thoms' detention) cannot shield the Commonwealth from liability for false imprisonment. False imprisonment is a tort of strict liability.

23. Each of those six propositions is addressed, below.

Proposition 1: Laws of the Commonwealth must be supported by a head of power in s 51 of the *Constitution*

24. The *Migration Act* has, since the *Migration Amendment Act 1983* (Cth) came into effect on 2 April 1984, relied on s 51(xix) of the *Constitution*[19].

Proposition 2: Mr Thoms is not an 'alien'

25. The Special Case question presented to the High Court in ***Love*** was, relevantly, whether Mr Thoms was an 'alien' within the meaning of s 51(xix) of the *Constitution.* The constitutional question being answered '… was whether the statutory authority conferred on the Executive is within the competence of the Parliament …'[20] By a majority of four justices to three, the Court decided that Mr Thoms was not an alien (Bell[21], Nettle[22], Gordon[23], Edelman[24] JJ; Kiefel CJ[25], Gageler[26], Keane[27] JJ, dissenting).

---

19 ***Love*** (2020) 94 ALJR 198 at 229, [139] (Gageler J); *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566 at 574-575 [10] and [13] (Gummow and Hayne JJ).

20 *Commonwealth of Australia v AJL20* [2021] HCA 21 at [43] (Kiefel CJ, Gageler, Keane and Steward JJ).

21 ***Love*** (2020) 94 ALJR 198 at 218, [81]-[82] (Bell J).

22 ***Love*** (2020) 94 ALJR 198 at 257, [288] (Nettle J).

23 ***Love*** (2020) 94 ALJR 198 at 272, [390] (Gordon J).

24 ***Love*** (2020) 94 ALJR 198 at 292, [468] (Edelman J).

25 ***Love*** (2020) 94 ALJR 198 at 212, [47] (Kiefel CJ).

26 ***Love*** (2020) 94 ALJR 198 at 229, [141] (Gageler J).

27 ***Love*** (2020) 94 ALJR 198 at 240-241, [220] (Keane J).

Proposition 3: In its application to Mr Thoms, s 189 is not a law 'with respect to' aliens

26. In ***Love***, Nettle J reframed the Special Case question in this way[28]:

> *... the principal question for decision may now more conveniently and more precisely be restated as being whether it is within the legislative competence of the Parliament under s 51(xix) of the Constitution to treat either plaintiff as an "unlawful non-citizen" (within the meaning of s 14(1) of the Migration Act), and thus to detain and possibly to deport him under ss 189, 196 and 200 of the Migration Act.*

27. His Honour answered that question by concluding[29]:

> *... it is beyond the legislative competence of the Parliament under s 51(xix) of the Constitution to treat a member of such an Aboriginal society as an unlawful non-citizen, and ... s 14(1) of the Migration Act must be read down accordingly under s 15A of the Acts Interpretation Act 1901 (Cth)[30].*

28. In a similar manner, Gordon J concluded[31]:

> *...neither plaintiff is within the reach of the legislative power in s 51(xix) of the Constitution. Accordingly, ss 189 and 198 of the Migration Act must be read down so as not to apply to the plaintiffs. In each special case, the answer to question 1 should be "No"...*

29. Likewise, Edelman J concluded[32]:

> *... Insofar as the Migration Act purports to apply to Aboriginal people of Australia, such as Mr Love and Mr Thoms, as aliens, it must be disapplied ...*

30. The *ratio* in ***Love*** was expressed by Bell J as follows[33]:

---

28 ***Love*** (2020) 94 ALJR 198 at 244, [241] (Nettle J).

29 ***Love*** (2020) 94 ALJR 198 at 272, [390] (Gordon J).

30 Which provides: '*Every Act shall be read and construed subject to the Constitution, and so as not to exceed the legislative power of the Commonwealth, to the intent that where any enactment thereof would, but for this section, have been construed as being in excess of that power, it shall nevertheless be a valid enactment to the extent to which it is not in excess of that power.*'

31 ***Love*** (2020) 94 ALJR 198 at 272 [390] (Gordon J).

32 ***Love*** (2020) 94 ALJR 198 at 274 [398] (Edelman J).

33 ***Love*** (2020) 94 ALJR 198 at 218 [81] (Bell J).

I am authorised by the other members of the majority to say that although we express our reasoning differently, we agree that Aboriginal Australians (understood according to the tripartite test in Mabo) are not within the reach of the "aliens" power conferred by s 51(xix) of the Constitution…

31. That the consequence of an affirmative answer to the Special Case question was that s 189 of the *Migration Act* must be read down or dis-applied was acknowledged by those members of the Court who constituted the minority. Kiefel CJ summarised the effect of Mr Thoms' argument as follows[34]:

…The plaintiffs … contend that they are outside the purview of those statutes and s 51(xix) because they have a special status as a "non-citizen, non-alien". They say that they have that status because although they are non-citizens they cannot be aliens because they are Aboriginal persons…

32. Gageler J wrote[35]:

[Mr Thoms'] argument is that, as persons of Aboriginal and Torres Strait Islander descent who identify with and are acknowledged as members of Aboriginal or Torres Strait Islander communities, they fall within the unique constitutional category of "non-citizen non-aliens". Recognition of that constitutional category would have the effect of placing beyond legislative power the enactment of criteria directed to the question of their alienage or non-alienage, regardless of whether the status of non-alienage is citizenship or any another nomenclature Parliament might choose to adopt.

33. Keane J expressed the matter succinctly in these terms[36]:

All parties are agreed that [Mr Love and Mr Thoms] are not subject to ss 189 and 198 of the Migration Act if they are outside the scope of the naturalisation and aliens power in s 51(xix) of the Constitution, pursuant to which, ss 189 and 198 of the Migration Act were enacted. On that basis, the question of law stated for the opinion of the Full Court in these special cases is whether each of the plaintiffs' is an "alien" within the meaning of s 51(xix).

34. Since the decision in ***Love***, the majority in *Chetcuti v Commonwealth of Australia* [2021] HCA 25 (Kiefel CJ, Gageler, Keane, Gordon, Edelman and Gleeson JJ)

---

34 ***Love*** (2020) 94 ALJR 198 at 205 [3] (Kiefel CJ).

35 ***Love*** (2020) 94 ALJR 198 at 225 [112] (Gageler J).

36 ***Love*** (2020) 94 ALJR 198 at 230 [145] (Keane J).

recognised at [11] that Parliament has treated all non-citizens as aliens, '*[s]ubject to providing through s 15A of the* Acts Interpretation Act 1901 *(Cth) for the* Migration Act *to have a distributive and severable operation to the extent of any constitutional overreach…'.* This observation was confirmed by Kiefel CJ and Gageler, Keane and Steward JJ in *Commonwealth of Australia v AJL20* [2021] HCA 21 at [35][37].

35. Orthodox application of principles of constitutional and statutory interpretation confirm the judicial observations made in the passages cited above.

36. The Commonwealth Parliament, in enacting the *Migration Act*, has chosen the discrimen in separating aliens from non-aliens as 'those who hold statutory citizenship pursuant to the *Australian Citizenship Act 2007* (Cth)' (non-aliens) and those who do not (aliens). Persons who hold Australian citizenship, whether alien born or not, are persons whom the Commonwealth Parliament has chosen to treat as non-aliens. So much is reflected in ss 13 and 14 of the *Migration Act* which draw a distinction between 'lawful non-citizens' and 'unlawful non-citizens'[38].

37. The constitutional competence of the Commonwealth Parliament to decide who is, and who is not, an alien has been emphasised by the High Court, subject however, to the limit expressed in *Pochi v Macphee* (***Pochi***)[39] that:

> *…the Parliament cannot, simply by giving its own definition of 'alien', expand the power under s 51(xix) to include persons who could not possibly answer the description of 'aliens' in the ordinary understanding of the word.*

38. ***Love*** is an example of the operation of the '***Pochi*** limit'. Mr Thoms is both a non-alien and a non-citizen[40], or a 'constitutional non-alien'[41].

---

37 See also *Commonwealth of Australia v AJL20* [2021] HCA 21 at [116] and [155] (Edelman J).

38 *Commonwealth of Australia v AJL20* [2021] HCA 21 at [13]-[14] (Kiefel CJ, Gageler, Keane and Steward JJ), citing *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1 at 78 [178]

39 (1982) 151 CLR 101 at 109 (Gibbs CJ), with the agreement of Mason J at 112 and Wilson J at 116.

40 ***Love*** (2020) 94 ALJR 198 at 258, [295] (Gordon J).

41 ***Love*** (2020) 94 ALJR 198 at 280 [418] (Edelman J).

39. Section 51(xix) is a subject-matter head of power, rather than a purposive head of power. The power is to be construed with all the generality that the words permit[42]. In the majority of circumstances, the constitutional validity of s 189 as it applies to a non-citizen will not fall for consideration because, subject to the '***Pochi*** limit', non-citizens are almost always 'aliens'. But a law, enacted pursuant to the aliens power, that purports to visit consequences upon a person who is not, and cannot be regarded as, an alien, must be read down so as not to apply to the non-alien. The Commonwealth Parliament cannot bestow power upon itself enacting a law against anyone it considers an 'alien'. As Fullagar J explained in *Australian Communist Party v Commonwealth*[43]:

10 *A power to make laws with respect to lighthouses does not authorize the making of a law with respect to anything which is, in the opinion of the lawmaker, a lighthouse.*

40. In *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 (***Re Patterson***), the High Court decided that a person born in the United Kingdom and who arrived in Australia in or before 1966, and who had lived in Australia permanently since that time, was a non-alien, non-citizen[44]. That conclusion was subsequently overruled in *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 (***Shaw***) to the extent that, for some time, it was the case that the aliens power reached all persons who entered Australia after the commencement of the 1948 Act on 26 January 1949[45]. Between *Shaw* and ***Love***, constitutional law knew of no distinction between non-citizen and alien.
20 Following ***Love***, that is no longer the case. For that reason, ***Re Patterson*** remains instructive for what it says about the reading down or dis-application process.

41. The approach to reading down or dis-applying a provision of the *Migration Act* to a 'non-citizen, non-alien' or a 'constitutional non-alien' was explained as follows by Gaudron J in ***Re Patterson***[46]:

---

42 *Grain Pool of WA v Commonwealth* [2000] HCA 14; 202 CLR 479 at 491 [16] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

43 [1951] HCA 5; (1951) 83 CLR 1 at 258, a passage cited in *Love* (2020) 375 ALR 597 at 677-678, [329] (Gordon J). And to similar effect, see *Singh v The Commonwealth* [2004] HCA 43; (2004) 222 CLR 322 at 383 [153], also cited by Gordon J in *Love* at [330].

44 *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 (***Re Patterson***); *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 8 at 48 [50] (McHugh J).

45 ***Shaw*** (2003) 218 CLR 8 at 43 [32] (Gleeson CJ, Gummow and Hayne JJ).

46 ***Re Patterson*** (2001) 207 CLR 391 at 412-413, [52].

… the provisions of the Act providing for the detention and removal of prohibited non-citizens from Australia are valid only in their application to non-citizens who are also aliens…

42. Where a particular class of persons (or things) falls outside the constitutional basis of the law, the terms of the statute must be read down or disapplied to maintain the validity of the provision.[47] In *Re Dingjan; Ex parte Wagner* [1995] HCA 16; (1995) 183 CLR 323, McHugh J, dealing with the 'corporations power' in s 51(xx) of the *Constitution*, said at 370:

…where a law seeks to regulate the conduct of persons other than s 51(xx) corporations or the employees, officers or shareholders of those corporations, the law will generally not be 10 *authorised by s 51(xx) unless it does more than operate by reference to the activities, functions, relationships or business of such corporations.*

43. In *McHugh v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 223; (2020) 385 ALR 405 (***McHugh***), the Full Court of the Federal Court doubted that, in its application to a non-citizen Aboriginal Australian, s 189 was a law 'with respect to aliens'.[48] Most relevantly, Allsop CJ said[49]:

If the Minister cannot deport a citizen or Aboriginal Australian, notwithstanding the reasonableness of any suspicion that he or she was neither, it may be difficult to understand how s 189 can be supported by the same necessary underlying constitutional aliens power to require his or her detention.

20 44. That part of the Chief Justice's judgment was in the context of considering whether a writ of habeas corpus could issue under s 23 of the *Federal Court of Australia Act 1976* (Cth) in respect of a person asserting that he was a 'non-alien Aboriginal Australian'[50]. Critically, Allsop CJ wrote[51], after considering the ratio in ***Lim***:

It is relevant to note that although reasonable suspicion of the relevant non-citizen status was on the face of the relevant provision sufficient to detain, it was part of a power linked to the act

---

47 *Acts Interpretation Act 1901,* s 15A has been enacted to ensure that that approach is taken, wherever possible, in order to avoid the provision in question being held to be invalid in its entirety.

48 ***McHugh*** (2020) 385 ALR 405 at 416, [51] (Allsop CJ); Besanko J agreeing at 426, [83]; Mortimer J at 475, [338]-[339].

49 ***McHugh*** (2020) 385 ALR 405 at 416, [51] (Allsop CJ).

50 ***McHugh*** (2020) 385 ALR 405 at 410-417, [24]-[52] (Allsop CJ), Besanko J relevantly agreeing at 423-424, [83].

51 ***McHugh*** (2020) 385 ALR 405 at 416, [48] (Allsop CJ).

of removal of the alien from the country, which act could never be ultimately founded upon suspicion of alienage, but only upon alienage itself. This much must be immanent within the above authoritative expression of the power.

45. It is therefore plain, both from the reasons expressed by each of the judges in ***Love*** and orthodox principles of constitutional interpretation and statutory construction[52], that the effect of Mr Thoms not being an 'alien', as that word is used in s 51(xix) of the *Constitution*, is that s 189 of the *Migration Act* must be read down so as not to apply to him. In addition, as is explained in the context of addressing Proposition 4 below, because the power to detain cannot be used other than in aid of the power to remove or deport a person from Australia, s 189 of the *Migration Act* can have no valid application to a person in respect of whom the Commonwealth has no power to remove or deport.

Proposition 4: The use of s 189 to detain Mr Thoms offends the *Lim* principle

46. Section 189 of the *Migration Act* is solely directed at detaining unlawful non-citizens who are also aliens. The purpose of the power to detain was said in *Robtelmes v Brenan* (1906) 4 CLR 395 at 415 to be 'the complement of the right to exclude'. As was explained at 32 in ***Lim***[53] by Brennan, Deane and Dawson JJ (Mason CJ agreeing at 10):

It can therefore be said that the legislative power conferred by s 51(xix) of the Constitution encompasses the conferral upon the Executive of authority to detain (or to direct the detention of) an alien in custody for the purposes of expulsion or deportation. Such authority to detain an alien in custody, when conferred upon the Executive in the context and for the purposes of an executive power of deportation or expulsion, constitutes an incident of that executive power. By analogy, authority to detain an alien in custody, when conferred in the context and for the purposes of executive powers to receive, investigate and determine an application by that alien for an entry permit and (after determination) to admit or deport, constitutes an incident of those executive powers.

47. In *Plaintiff S4/2014 v Minister for Immigration and Border Protection* [2014] HCA 34 (***Plaintiff S4/2014***) at [25]-[26]; (2014) 253 CLR 219 at 231 [25]-[26], French CJ, Hayne, Crennan, Kiefel and Keane JJ explained the ***Lim*** principle as requiring that the

---

52 In accordance with s 3A of the *Migration Act*, a provision that was added to the Migration Act by *Migration Legislation Amendment Act (No. 6) 1995* following this Court's judgment in ***Lim***.

53 ***Lim*** (1992) 176 CLR 1.

purpose of detention, in order for that detention to be valid, must be directed to one of three purposes, namely, removing the person from Australia; investigating and determining an application for a visa to allow that person to remain in Australia; or determining whether to permit a valid application for a visa[54].

48. None of the purposes identified either in ***Lim*** or ***Plaintiff S4/2014*** are of relevance to Mr Thoms: he cannot be removed from Australia under s 198[55] (purpose one); and he does not require a visa to remain in the Australian community (purposes two and three). Accordingly, s 189 cannot have a valid operation in respect of Mr Thoms. It follows that the whole period of his detention was never 'authorised or required' by s 189 of the *Migration Act*.

Proposition 5: Any mistaken yet reasonable belief as to as to the validity of s 189 in its application to Mr Thoms is irrelevant

49. Once it is accepted that s 189 of the *Migration Act* cannot validly apply to Mr Thoms, questions of the reasonableness of the suspicion of an officer, necessarily, fall away. The 'reasonable suspicion' of an officer is only relevant as a criterion within s 189(1). If s 189 has no valid application to Mr Thoms, the suspicion of any of the officers who detained him or authorised his continuing detention is irrelevant. Were it otherwise, the characterisation of a provision of law (that is, whether an enactment is a law 'with respect to aliens') would depend on the formation of an opinion by a person nominated by the Executive. That would offend the principle enunciated (at paragraph 39 above) from the *Communist Party Case*[56].

50. The Commonwealth cannot draw assistance from *Ruddock v Taylor* [2005] HCA 48; 222 CLR 612 (***Ruddock***). ***Ruddock*** is not authority for the proposition that a mistaken belief by an officer of the Commonwealth that a person is an alien provides a lawful basis for the person's imprisonment.

51. When the High Court pronounced its decision in ***Ruddock***, it had already decided ***Shaw***. The majority in ***Shaw*** overruled so much of the reasoning in ***Re Patterson*** that had held

---

54 This passage is also cited in *Commonwealth v AJL20* [2020] HCA 21 at [27] per Kiefel CJ and Gageler, Keane and Steward JJ.

55 A matter which the Commonwealth admits: Defence [21.2.2] (**CRB** at 22).

56 [1951] HCA 5; (1951) 83 CLR 1 at 258.

that Mr Taylor was not an alien. The plurality in ***Ruddock*** explained that ***Re Patterson*** 'should be regarded as authority for what it decided respecting s 64 of the Constitution and the constructive failure in the exercise of jurisdiction by the Minister'[57].

52. Prior to the High Court's decision in ***Ruddock***, certiorari and prohibition had issued with respect to two separate decisions (one of a Minister and one of a Parliamentary Secretary) to cancel Mr Taylor's visa under s 501 of the *Migration Act*[58]. Mr Taylor was detained, following each cancellation decision, for 161 days and 155 days, respectively[59].

53. In ***Ruddock***, the central question for the Court's consideration was whether s 189 of the *Migration Act* operated to provide lawful authority for an officer to detain him, even though the decisions taken to cancel his visa were subsequently quashed (so as to be void, ab initio)[60]. The constitutional validity of the Act (as it applied to Mr Taylor) was not in question[61]. The majority (Gleeson CJ, Gummow, Hayne and Heydon JJ) held[62] that an officer was capable of having a reasonable suspicion that Mr Taylor was an unlawful non-citizen even though each cancellation decision was affected by jurisdictional error. The High Court held that Mr Taylor's detention during the two discrete periods was required by s 189 of the *Migration Act*[63].

54. Critically, for present purposes, the majority in ***Ruddock*** observed that Mr Taylor had raised no constitutional argument as to whether s 189 was capable of operating in respect of him[64]. Kirby J (in dissent in the result) identified[65] the importance of the lack of a constitutional argument about the applicability of s 189 to Mr Taylor in these terms:

Constitutional error is not reasonable: Had the authority of this Court on the constitutional question decided in Re Patterson been maintained, and not overruled by Shaw, I would have

---

57 ***Ruddock*** (2005) 222 CLR 612 at 620, [17] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

58 ***Ruddock*** (2005) 222 CLR 612 at 617, [2] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

59 ***Ruddock*** (2005) 222 CLR 612 at 617, [3] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

60 See, for example, ***Ruddock*** (2005) 222 CLR 612 at 624, [35] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

61 ***Ruddock*** (2005) 222 CLR 612 at 624 [35], 626 [39] and 627 [47] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

62 ***Ruddock*** (2005) 222 CLR 612 at 622, [28] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

63 ***Ruddock*** (2005) 222 CLR 612 at 623, [31] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

64 ***Ruddock*** (2005) 222 CLR 612 at 626, [39] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

65 ***Ruddock*** (2005) 222 CLR 612 at 661 [177]-[178] (Kirby J).

rejected the possibility that the officers who detained the respondent could shelter behind provisions such as s 189 of the Act, claiming to have had a reasonable suspicion that the respondent was an "unlawful non-citizen". If such a status were rejected, as a matter of law, any belief of the officers' parts could not amount to a reasonable belief. No other approach would suffice to uphold the Constitution … In short, a provision such as s 189 could not have effect to contradict the Constitution.

55. The reasoning of Kirby J is directly applicable to the present case.

56. In ***Ruddock***, the plurality observed that Mr Taylor 'conflated' two inquiries in the presentation of his case: the first being the 'lawfulness of the decision to cancel [his visa]' and 'the other about the lawfulness of the detention'. The plurality said that it was erroneous to treat 'the former inquiry as determinative of the latter'[66]. That observation distinguishes ***Ruddock*** from Mr Thoms' case. Mr Thoms' right to remain in Australia is not dependent upon his holding a visa. Inferentially, the Commonwealth accepts that that is so given that it released Mr Thoms from immigration detention following the High Court pronouncing its orders on 11 February 2020 (despite Mr Thoms' detention not coming to an end in one of the ways prescribed in s 196 of the *Migration Act*[67]).

57. Mr Thoms does not attack the cancellation of his visa on the basis that it was affected by jurisdictional error. To the contrary, he asserts that he never needed a visa to enter or remain in Australia and the cancellation of his visa was not capable of enlivening the power under s 189 to detain him.

58. In ***Ruddock***, it was not disputed that the Minister and Parliamentary Secretary had cancelled Mr Taylor's visa on two separate occasions. The question was whether s 189 could found a reasonable (but erroneous) suspicion by an officer that Mr Taylor was an unlawful non-citizen. The visas were, in fact, cancelled, although, in law, the decisions to cancel the visas were no decisions at all[68]. The erroneous conclusion formed by officers as to Mr Taylor's status as an unlawful non-citizen arose not because he was a non-alien but because he was a non-citizen without a valid visa. ***Ruddock*** says nothing more than that an erroneous understanding by an officer of the legal effect of an

---

66 ***Ruddock*** (2005) 222 CLR 612 at 621, [24] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

67 Cf: *Commonwealth of Australia v ALJ20* [2021] HCA 21 at [49].

68 *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2001) 209 CLR 597 at 614-5 [51] (Gaudron and Gummow JJ).

administrative decision (that has been taken, *in fact*) does not render the detention of the non-citizen unlawful[69].

59. The ratio in ***Ruddock*** is that s 189 provides lawful authority for an officer to detain a non-citizen whose visa has been cancelled (and, thus, has become an 'unlawful non-citizen') even if the decision to cancel the visa is later set aside by a court because it is affected by jurisdictional error. As stated above, no question of the constitutionality of the application of s 189 arose for determination[70].

60. These submissions are supported by the analysis of Allsop CJ in *McHugh* when the Chief Justice said[71]:

> *... I do not consider that [Ruddock] is authority for any proposition that a reasonable suspicion (contrary to what might be shown to be the fact) that someone is an alien (here that the person is an Aboriginal Australian if he or she is a non-citizen) founds a valid engagement of s 189.*

61. ***Ruddock*** is plainly distinguishable from the circumstances of Mr Thoms' case and, as such, is of no assistance in resolving the issue before this Court.

Proposition 6: False imprisonment is a tort of strict liability

62. The question of liability for false imprisonment rests on ordinary application of common law principles. The tort of false imprisonment is one of strict liability[72].

63. A mistaken belief that the detainer has a lawful authority to detain cannot provide a good defence in law, no matter how reasonably held. In *R v Governor of Brockhilll Prison; Ex parte Evans (No 2)* [2001] 2 AC 19 (***Brockhill Prison***), a prison governor had calculated a prisoner's release date in accordance with the governor's understanding of the law as declared by a line of cases from the Divisional Court. On a writ of habeas corpus, the Divisional Court held that the prisoner was imprisoned for some 59 days more than she ought to have been before she was released from prison.

---

69 ***Ruddock*** (2005) 222 CLR 612 at 626-627, [40]-[47] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

70 ***Ruddock*** (2005) 222 CLR 612 at 626, [39] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

71 ***McHugh*** (2020) 385 ALR 405 at 415-416 [49] (Allsop J).

72 ***Ruddock*** (2005) 222 CLR 612 at 650, [140] (Kirby J). See also *Lewis v Australian Capital Territory* [2020] HCA 26; 94 ALJR 740 at [45] (Edelman J).

64. On appeal, all of the Law Lords concluded that the prisoner had been falsely imprisoned. That was so even though the prison governor could 'not be criticised'[73] and was 'blameless'[74]. Lord Hobhouse of Woodborough said at 42:

Imprisonment involves the infringement of a legally protected right and therefore must be justified. If it cannot be lawfully justified, it is no defence for the defendant to say he believed he could justify it. … bad faith is not an ingredient of the tort.

65. His Lordship rejected an argument that reliance on decisions of a court that later turned out to be erroneous constituted a 'special defence' to an action for false imprisonment[75]. Similarly, his Lordship rejected that there was any principle of non-retrospectivity in English law[76].

66. So it is in the present case. The decision in ***Love*** did not effect a 'change' in the law. Rather, it was an orthodox application of well-settled principles to recognise a previously unrecognised category of 'non-alien non-citizen'. As ***Brockhill Prison*** shows[77], that recognition does not operate only prospectively. The imprisonment of Mr Thoms was not authorised by s 189 and he is entitled to damages.

67. The decision of this Court in ***Love*** also operates to declare the true construction of s 51(xix) of the Constitution. As Latham CJ said in *South Australia v Commonwealth ("First Uniform Tax case")* [1942] HCA 14; (1942) 65 CLR 373 at 408:

A pretended law made in excess of power is not and never has been a law at all. Anybody in the country is entitled to disregard it. Naturally he will feel safer if he has a decision of a court in his favour – but such a decision is not an element which produces invalidity in any law. The law is not valid until a court pronounces against it – and thereafter invalid. If it is beyond power it is invalid ab initio.

---

73 ***Brockhill Prison*** [2001] 2 AC 19 at 26 (Lord Slynn of Hadley).

74 ***Brockhill Prison*** [2001] 2 AC 19 at 27 (Lord Steyn).

75 ***Brockhill Prison*** [2001] 2 AC 19 at 42 (Lord Hobhouse of Woodborough).

76 ***Brockhill Prison*** [2001] 2 AC 19 at 43 (Lord Hobhouse of Woodborough).

77 [2001] 2 AC 19: see, particularly, the discussion of judicial decisions as "no more than evidence of the law" and "only conclusive as between the parties" at 45, per Lord Hobhouse of Woodborough, and the further discussion of the "constitutional role of the courts" [in the Blackstonian sense] to declare the law as it has always been (retrospectively), also, per Lord Hobhouse of Woodborough.

68. Finally, a mistaken belief made by an officer does not have the cloaking of an order of a court which, under ordinary principles, is valid until set aside[78].

69. The six propositions relied upon by Mr Thoms are, for the reasons outlined above, made out and lead to the conclusion that the answer to the question posed for this Court, namely, 'was the detention of Mr Thoms between 28 September 2018 and 11 February 2020 lawful', is no.

Rejection of an alternative 'reading down' process

70. But, even if, contrary to Mr Thoms' submissions, it is possible to construe s 189 in a manner that assists the Commonwealth, from at least 5 November 2018, the Commonwealth was on notice that Mr Thoms claimed to be an Aboriginal Australian. Its officials made no enquiry, being content to rely on the view of Mr. Rowell from the 'Citizenship Help Desk', that his claim of Aboriginal descent was 'not a relevant matter when determining if he is an Australian citizen'[79]. By no later than 1 March 2019, the facts and documents that established that Mr Thoms was an Aboriginal Australian according to the tripartite test in *Mabo (No 2)* were known to the Commonwealth. An officer acting on behalf of the Commonwealth, taken to have such knowledge, was incapable of forming a *reasonable* suspicion that Mr Thoms was a person in respect of whom a power of removal under s 198 of the *Migration Act* could be used.

71. The Commonwealth was 'called upon' to provide answers as to the lawfulness of the detention of Mr Thoms following the filing of Mr Thoms' writ of summons in the High Court on 4 December 2018[80]. In his Statement of Claim filed 4 January 2019 (**SoC**)[81], Mr Thoms traced his descent and asserted his status as an Aboriginal person[82].

---

78 *State of New South Wales v Kable* [2013] HCA 26; (2013) 252 CLR 118 at 113 [32] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

79 Exhibit NLM-8 at SAF-11 (**CRB** at 112).

80 Which relevantly stated at p 2, ln 18-25: "The actions of the defendant and its agents in detaining him are unlawful in that the Plaintiff, as a member of the Aboriginal race of Australia and the child of an Australian citizen, also a member of the Aboriginal race of Australia […] is a member of the Australian community and is not an alien and is not susceptible to any powers purportedly bestowed by the [Migration] Act on the executive government to take actions to remove the [First Respondent's] right to reside permanently in Australia or to remove him from Australia."

81 At [2], [4] and [6k].

82 SoC [1c] (in proceeding B64 of 2018).

72. In *Burgess v Commonwealth of Australia* [2020] FCA 670, Besanko J concluded that, 'for the purposes of s 189, an officer or officers must hold a reasonable suspicion throughout the detainee's detention'[83]. The reasonableness of any suspicion held by an officer was capable of changing according to new information received by an officer.

73. Ms Ellis became aware, on 5 November 2018, of Mr Thoms' Aboriginal identification and descent[84]. The information was considered to be 'worth some further investigation'[85].

74. The Commonwealth admits that it knew, no later than 1 March 2019, that Mr Thoms self-identified as a Gunggari man; was descended from Aboriginal Australians who lived in Australia immediately prior to European settlement (the Gunggari people); and was a holder of common law native title.

75. Having regard to this material, from at least 5 November 2018 but no later than 1 March 2019, an officer of the Commonwealth was not capable of forming a reasonable suspicion that Mr Thoms was not a constitutional non-alien (because he was a non-citizen Aboriginal Australian according to the tripartite test in *Mabo (No 2)*). From those dates, the Commonwealth was unable to maintain a reasonable suspicion that Mr Thoms was not an Aboriginal Australian.

76. For the reasons outlined with respect to Proposition 6 of Mr Thoms' principal contention, the fact that ***Love*** may have been seen to 'alter' the understanding of the constitutional term 'alien' and 'changed' the relevant nature of the inquiry to be addressed does not excuse an officer from asking the correct questions, even if the officer is not morally blameworthy in misunderstanding the law. The tort of false imprisonment is a strict liability tort.

---

83 *Burgess v Commonwealth of Australia* [2020] FCA 670 at [66]-[68], in the latter paragraph, citing *Guo v Commonwealth* [2017] FCA 1355; (2017) 257 FCR 31 at [83] (Jagot J).

84 Exhibit NLM-8 at [14]-[15] (**CRB** at 39) and SAF-11 (**CRB** at 105-113).

85 Exhibit NLM-8 at SAF-11 (**CRB** at 106).

Part VII: Order sought

77. For the reasons outlined above, the Court should answer the question referred for consideration as follows:

    Section 189 of the *Migration Act* was invalid in its application to Mr Thoms during the period from 28 September 2018 and 11 February 2020. Consequently, Mr Thoms' detention between those dates was unlawful.

Part VIII: Estimate of time for oral submissions

10

78. The Applicant requires 1 hour to advance his oral argument.

Dated: 22 October 2021

Stephen Keim SC
Higgins Chambers
T: (07) 3229 0381
s.keim@higginschambers.com.au

Kate Slack
Higgins Chambers
T: (07) 3221 2182
kslack@qldbar.asn.au

Arron Hartnett
John Jerrard Chambers
T: (07) 3211 2109
ahartnett@qldbar.asn.au

IN THE HIGH COURT OF AUSTRALIA B56/2021

BRISBANE REGISTRY

BRENDAN CRAIG THOMS

Applicant

and

COMMONWEALTH OF AUSTRALIA

Respondent

ANNEXURE TO APPLICANT'S SUBMISSION

Constitutional provisions	s 51(xix), s 51(xxxix) and s 64
Statutes	*Acts Interpretation Act 1901* (Cth) (current) *Judiciary Act 1903* (Cth) (current) *Nationality and Citizenship Act 1948* (as passed) *Migration Act 1958* (Cth) (current) *Federal Court of Australia Act 1976* (Cth) (current) *Migration Amendment Act 1983* (Cth) (as passed) *Migration Legislation Amendment Act (No 6) 1995* (Cth) (as passed) *High Court Rules 2004* (Cth) (current) *Australian Citizenship Act 2007* (Cth) (current)