HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 06 Apr 2022 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:	S192/2021
File Title:	Minister for Immigration, Citizenship, Migrant Services and M
Registry:	Sydney
Document filed:	Form 27F - Outline of oral argument
Filing party:	Applicant
Date filed:	06 Apr 2022

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

SYDNEY REGISTRY

NO S192 OF 2021

BETWEEN: **MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS**

First Appellant

MINISTER FOR HOME AFFAIRS

Second Appellant

AND: **SHAYNE PAUL MONTGOMERY**

Respondent

OUTLINE OF ORAL SUBMISSIONS OF APPELLANTS AND ATTORNEY-GENERAL FOR THE COMMONWEALTH (INTERVENING)

PART I INTERNET PUBLICATION

1. This outline of oral submissions is in a form suitable for publication on the internet.

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

The primary judgment (AS [6]-[12]) and scope of the appeal (AR [12]-[16])

2. The Respondent was released from immigration detention because the primary judge found that *Love* required ss 13 and 14 of the *Migration Act 1958* (Cth) to be read down so as to require the detaining officer to hold a reasonable suspicion that the Respondent was not an Aboriginal person according to the tripartite test. The detaining officer in fact held such a suspicion, on the ground that the Respondent is not biologically descended from any indigenous person (and on the basis of her conclusion that cultural adoption was not sufficient to satisfy the first limb of the tripartite test). However, the Court held that that suspicion was unreasonable, and granted habeas on that basis: **CRB 10 [1]-[5], 18-31 [45]-[69]; ABFM pp 8-9 [13.1], [15], p 18 (SLM-2)**.

3. Given the basis for the decision below, the Court cannot decide the appeal without considering the meaning of the first limb of the tripartite test. The question is whether, in the absence of evidence that a person is biologically descended from any indigenous person, it is objectively reasonable to suspect that that person is an alien. If it is, s 189 operates according to its terms, there being no basis for its partial disapplication.

***Love* does not have a *ratio* (AS [13]-[18]); alternatively if leave to re-open is required then it should be granted (AS [19]-[24])**

4. Notwithstanding *Love* at [81], the majority disagreed about the boundaries of the class of people held to be non-aliens. Nettle J alone understood the third limb to require recognition under laws and customs deriving from before the Crown acquired sovereignty over Australia: *Love* (2020) 270 CLR 152 at [262], [268]-[272], [278], [280], [282], [287]; cf [451] (Edelman J) (**JBA 8, Tab 49**); *Chetcuti* (2020) 95 ALJR 1 at [39]-[40] (**JBA 16, Tab 87**). This difference explains the Court's order concerning Mr Love.

5. Leave is not required to re-open *Love* because, in light of the different definitions of the class of non-alien, the decision does not contain a *ratio*. Further, the statement at [81] is not a statement of principle which, applied to the material facts, explains the result: *Oxford Companion to Law* (1980) at 1033.8 (**JBA 22, Tab 148**); Cross and Harris, p 72 (**JBA 22, Tab 159**); *Love* at [82], [390] and [468]; cf [221], [287]-[288].

6. Alternatively, leave to re-open *Love* should be granted. The decision did not rest upon a principle worked out in a succession of cases; there were differences in reasoning between the majority Justices; the decision has caused considerable difficulty in administering the Act; and there is no basis to find that *Love* has been independently acted upon: see *Wurridjal* (2009) 237 CLR 309 at [65]-[71] (**JBA 15, Tab 81**).

***Love* should be overruled (AS [25]-[50]; appeal ground 1(a))**

7. It is the "settled understanding" that s 51(xix) has two aspects. The first is to determine the criteria for the legal status of alienage: *Chetcuti* (2021) 95 ALJR 704 at [12] (**JBA 16, Tab 88**). The word "alien" in s 51(xix) has a range of available meanings, though there are limits: *Pochi v Macphee* (1982) 151 CLR 101 at 109 (**JBA 10, Tab 63**). Section 12 of the *Australian Citizenship Act 2007* (Cth) complies with those limits (**JBA 3, Tab 11**).

8. *Love* is inconsistent with the settled understanding. It denies the significance of valid citizenship laws in determining who has the status of alien, in favour of the Court directly applying what it considers to be the "essential meaning" of "alien": cf RS [70]-[71]; *Love* at [300], [325]-[334] (Gordon J); [394], [433]-[437] (Edelman J); cf [5], [10] (Kiefel CJ), [166], [172] (Keane J), [84]-[94], [100], [131]-[132] (Gageler J) (**JBA 8, Tab 49**).

9. The "essential meaning" of "alien" which Bell, Gordon and Edelman JJ adopted ("outsider", "belonging to another", "foreigner") conveys no more about the concept of the alienage than the word "alien" itself.

10. A communal connection to particular lands and waters in Australia should not be equated with an individual person's connection to the body politic of Australia: *Love* at [22], [29]-[31] (Kiefel CJ), [192], [194], [207]-[208] (Keane J) (**JBA 8, Tab 49**).

11. The effect of *Love* is that an Aboriginal elder's decision as to whether a person is a member of an Aboriginal society has determinative consequences for whether or not the person is a member of the Australian body politic: *Love* at [14], [25] (Kiefel CJ), [125], [130], [137] (Gageler J), [199], [205] (Keane J) (**JBA 8, Tab 49**).

12. The decision in *Love* re-introduces a distinction involving race into the Constitution, of the kind removed from s 51(xxvi) by the 1967 referendum: *Love* at [126], [133] (Gageler J); also [44] (Kiefel CJ), [147], [177], [210] (Keane J) (**JBA 8, Tab 49**).

The appeal is competent, and no leave to appeal is required (AR [21]-[27])

13. The Respondent's reliance on an English common law principle is misplaced. *First*, s 73 of the Constitution confers a right of appeal against the grant of habeas: *Ah Sheung* (1906) 4 CLR 949 (**JBA 4, Tab 27**); cf *Wall v The King [No 1]* (1927) 39 CLR 245 (**JBA 12, Tab 75**). *Second*, at the time the *Federal Court of Australia Act 1976* (Cth) was enacted, appeals against grants of habeas were well established. *Third*, and in any event, s 24(1)(a) is sufficiently clear to exclude any such common law principle.

14. Leave to appeal is not required because, even if the orders were interlocutory, they were orders "affecting the liberty of an individual" within s 24(1C)(a): *Ryan v AG (Vic)* [1998] 3 VR 670 at 672, 681 (**JBA 18, Tab 115**). In any event, leave should be granted.

Even if *Love* is correct, the primary judge erred in holding that the detaining officer's suspicion was not reasonable (AS [51]-[62]; AR [12]-[19]; appeal grounds 1(b)(i) and 2)

15. There is no "universal test" of Aboriginality: French, "Aboriginal Identity" at 18-19 (**JBA 22, Tab 157**); *AG v Qld* (1990) 25 FCR 125 at 147-148 (**JBA 16, Tab 84**). The majority in *Love* – in applying *Mabo (No 2)* at 70 – did not seek to develop such a test. The point was rather to identify a class of people who cannot possibly be aliens on the ordinary understanding of the word. In that context, a requirement for biological ancestry from the people who inhabited Australia prior to British sovereignty is understandable. The modification of the first limb to include traditional adoption would subsume the first limb into the third limb. The native title cases relied on by other parties were decided in a different context and for a different purpose. If biological descent is essential, it follows that the Respondent's detention was authorised by s 189 given he did not claim biological descent.

16. As for the primary judge's alternative reasoning, the failure of the detaining officer to make enquiries of other government agencies did not undermine the reasonableness of the suspicion because such enquiries were unlikely to produce any relevant information (**CRB 29-30, [63]-[65]**). In any event, it was irrelevant to the disapplication of s 189(1).

The notice of contention should be dismissed (AR [20])

17. As Dr Powell's report did not independently investigate the Respondent's biological heritage, any failure to consider the report is irrelevant.

Dated: 6 April 2022

Stephen Donaghue Craig Lenehan Patrick Knowles Zelie Heger