HIGH COURT OF AUSTRALIA

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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-- respondent
Filing party:	Defendant
Date filed:	06 Apr 2022

Important Information

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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 THE ORAL SUBMISSIONS OF THE RESPONDENT

Part I: Certification

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

Part II: Outline of Propositions

1. **Orders under appeal**: The primary judge granted *habeas corpus* as an interlocutory order under s 23 of the *FCA Act* in a matter in which the court otherwise had jurisdiction: *McHugh v Minister* (2020) 283 FCR 602 at 611 [21], 622 [75], 650-651 [199]. The primary judge could not determine the correctness of *Love v Commonwealth* (2020) 270 CLR 152, nor its final application to the Respondent: **RS [11], [21], [23]-[25], [88]**.
2. **Competency**: The general language of s 24(1)(a) of the *FCA Act* does not express a sufficiently clear intention to overcome the fundamental common law principle that there shall be no appeal from a successful grant of *habeas corpus* (*Wall v The King [No 1]* (1927) 39 CLR 245 at 250-251; *Cox v Hakes* (1890) 15 App Cas 506 at 527), just as there can be no appeal from a successful acquittal: *Thompson v Mastertouch TV Service Pty Ltd [No 3]* (1978) 38 FLR 397 at 412-414; *Davern v Messel* (1984) 155 CLR 21 at 31-33, 46-54 and 63. Section 73 jurisdiction should be distinguished: **RS [13]-[20**].
3. **Leave**: Alternatively, leave to appeal is required under s 24(1A) of the *FCA Act*; and not dispensed with under s 24(1C) (*Bowden v Yoxall* [1901] 1 Ch 1; *Hastwell v Kott Gunning* [2021] FCAFC 70 at [20]-[23]). Leave should be refused, including because the Appellants suffer no substantial injustice from the orders: **RS [21]-[22]**.

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4. **No error:** Alternatively, there was no error in the grant of *habeas corpus*:

(a) Even if the Court were later to overturn *Love*, that could never retrospectively confer reasonableness on the officer's suspicion, nor demonstrate error in the grant of habeas (*Ruddock v Taylor* (2005) 222 CLR 612 at [40]): **RS [23]-[24]**.

(b) Nor can error be demonstrated by assertion that the Respondent does not qualify under *Love*. That issue was removed into this Court and her Honour did not permit a full trial upon it: **RS [83]-[88]**.

(c) The Appellants' onus was to prove lawful justification for the Respondent's detention under s 189 of the *Migration Act*. Such detention is ultimately for the purpose of removal under s 198. That removal can occur only if the Respondent qualifies as an 'alien'. Called upon to justify detention, the Appellants were required to prove at a minimum that the detaining officer's suspicion that the Respondent was not an Aboriginal Australian was reasonable (*McHugh* at 617-619 [51]-[57], 620-621 [61]-[66], 678 [340]-[341]): **RS [27]-[28]**.

(d) The Appellants failed to discharge that onus. The Commonwealth had treated the Respondent as an Aboriginal. Enquiries which should have been made were not made. And his claim to Aboriginality through adoption or otherwise could not at that stage be dismissed, in the light of *Love*, *McHugh*, *Hirama* and the native title authorities on adoption: **RS [29]-[31]RS [87]** fn 152.

(e) The officer's failure to consider Dr Powell's report only strengthens the conclusion that the Appellants failed to discharge the onus: **RS [12], [32]-[36]**.

5. ***Love*:** If the appeal has not been resolved at an earlier stage:

(a) The Appellants require leave to re-open *Love*. The *ratio* stated at [81] and in the answers to questions is not undermined by Nettle J's reasons: **RS [37]-[41]**.

(b) Leave to reopen should be refused because:

(i) Nothing relevant has changed since *Love* was decided.

(ii) A strongly conservative principle should be adopted to reopening earlier decisions, especially when constitutional questions are involved: *Second Territory Senators case* (1977) 189 CLR 520 at 602, 620.

(iii) *Love* is neither uncertain nor shown to have worked any mischief.

(iv) *Love* has been independently acted upon: **RS [42]-[51]**.

(c) *Love* was correctly decided:

(i) Given *Mabo [No 2]*, Aboriginal Australians, as such and without further enquiry into their place of birth, were members of the Colonies and this nation from its settlement in 1788 onwards: **RS [54]-[57]**.

(ii) Aboriginal Australians, as such and without further enquiry into their place of birth, formed part of 'the people' uniting in the new federation in 1901, as later confirmed by the 1967 referendum: **RS [58]-[59]**.

(iii) The court must be satisfied of every matter of fact and law bearing on whether the person affected is an 'alien': **RS [60]-[64]**.

(iv) 'Alien' has an essential meaning, or common understanding, of a person who belongs not here but to some other place: **RS [65]-[67]**.

(v) Immediately post-federation, Aboriginal Australians, as such and without further enquiry into their place of birth, could not have been deported under the aliens power: **RS [68]-[69]**.

(vi) 20th century developments do not alter these conclusions: **RS [70]-[74]**.

(vii) The various objections to *Love* should be rejected: **RS [75]-[82]**.

(d) Whether the Respondent qualifies under *Love* should not be reached:

(i) His evidence has not been fully received or tested: **RS [83]-[85]**.

(ii) Assumptions about genes are unproven: **RS [86]** fn 149-151.

(iii) Implications for native title law cannot be ignored: **RS [87]** fn 152.

(iv) To allow the Appellants to raise this new argument would be both unfair to the Respondent and futile: **RS [88]** fn 153.

(e) If reached, the first limb of the tri-partite test requires admission to the society, at birth or later, measured by its laws and customs. 'Biology' can include, or be supplemented by, adoptive relationships, whether immediate or more distant in the chain of descent from ancestors (cf *McHugh* at 620 [65], 686 [396]). The Respondent produced evidence, as yet unanswered, that he was adopted by a clan Elder, initiated on country so as to become a Mununjali and Aboriginal man, with ties strengthened by marriage and the rearing of Aboriginal children. This was sufficient to justify his liberty at the time of trial: **RS [89]-[96]**.

6. **Costs**: The Appellants should pay the costs of the Respondent, and the costs order below in his favour should not be disturbed, in any event: **RS [97]**.

Justin Gleeson

Justin Gleeson SC, Counsel for the Respondent 6 April 2022