



HIGH COURT OF AUSTRALIA

8 June 2022

THOMS v COMMONWEALTH OF AUSTRALIA [2022] HCA 20

Today, the High Court answered in the negative a question as to whether the detention of the applicant under s 189(1) of the *Migration Act 1958* (Cth) was unlawful. Section 189(1) provides that, if an officer knows or reasonably suspects that a person in the migration zone is an unlawful non-citizen, they must detain that person.

The applicant was a citizen of New Zealand and held a temporary visa to reside in Australia. On 27 September 2018, his visa was cancelled by the Minister pursuant to s 501(3A) of the *Migration Act*. Thereafter he was an "unlawful non-citizen" within the meaning of s 14(1) of the *Migration Act*. On 28 September 2018, the applicant was detained by an officer of the Department of Home Affairs in the purported exercise of s 189(1) of the *Migration Act*. His detention was continued by two other officers subsequently involved with reviewing his case. On 11 February 2020, the High Court delivered judgment in *Love v The Commonwealth* (2020) 270 CLR 152 ("*Love*"), in which a majority of the Court relevantly determined that the applicant was not an "alien" within the meaning of s 51(xix) of the *Constitution*. The applicant was released from detention on the same day.

The balance of the applicant's matter, including relevantly a claim for damages for wrongful imprisonment, was remitted to the Federal Court of Australia for determination. On 6 July 2021, a judge of that Court ordered that the question of whether the applicant's detention was unlawful be heard and determined separately. On 11 October 2021, that question was removed into the High Court.

The applicant's primary argument before the High Court was that his detention was unlawful because s 189(1) of the *Migration Act* is not supported by s 51(xix) of the *Constitution* in its application to a person who is reasonably suspected of being an unlawful non-citizen but who is in fact not an alien.

The High Court unanimously rejected the applicant's argument. All members of the Court held that *Ruddock v Taylor* (2005) 222 CLR 612 ("*Ruddock*") was dispositive of the applicant's case. *Ruddock* held that s 189(1) of the *Migration Act* could validly apply to non-alien who are reasonably suspected of being unlawful non-citizens. It followed from *Ruddock* that the lawfulness of the applicant's detention was to be determined by reference to the terms of s 189(1), judged as at the time of detention. The Court therefore concluded that the applicant's detention was lawful because the objective facts at the time provided reasonable grounds for each of the officers to suspect that he was an unlawful non-citizen. The decision of the majority in *Love* did not retrospectively make the suspicion unreasonable.

- *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.*