



High Court rules Indigenous people cannot be deported as aliens, but the fight for legal recognition remains

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The High Court made an important decision today about whether it is possible for Aboriginal Australians to be deported from the country if they are not citizens.

By a majority of 4:3, the court decided that

Aboriginal Australians ... are not within the reach of the 'aliens' power conferred by s 51(xix) of the Constitution.

The outcome of the decision is clear for one of the men, Brendan Thoms, who is a registered native title holder. As such, it is beyond the power of the Commonwealth to deport him.

However, the majority was divided on the question of whether the other

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plaintiff, Daniel Love, was an Aboriginal person as a question of fact, and so did not make a finding about whether or not he was an “alien”.

This case is significant. In some regards, it is about questions of deportation and immigration. But, crucially, it is a constitutional law case grappling with the deeper question of whether Aboriginal and Torres Strait Islander Australians can be aliens and therefore excluded from the Australian state.

Although the decision applies to only a small number of people - Indigenous Australians who are not citizens - it has a broader impact in recognising the special status of Indigenous Australians in Australia.

Background of the case

The case involved two Aboriginal men born overseas who were ordered to be deported from Australia because they each had a criminal conviction. Both men appealed to the High Court and their cases were heard together late last year.

Love, a Kamileroi man, was born in Papua New Guinea to an Aboriginal father and PNG mother. He moved to Australia in 1984 when he was five years old, but never applied for citizenship. After serving a 12-month sentence for assault occasioning bodily harm, his permanent residency visa was cancelled by the government. He was in detention but was released in 2018 pending the High Court’s decision.

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Thoms, a Gunggari man and declared native title holder, was born in New Zealand to an Aboriginal mother and New Zealand father. He has lived in Australia since 1994. Like Love, his visa was cancelled after he served part of an 18-month sentence for a domestic violence assault. He has remained in immigration detention pending the court’s decision.

The Commonwealth has maintained that since the men are not citizens of Australia, the minister for Home Affairs has the power to cancel their visas and deport them. Under Section 51 (xix) of the Constitution, the Commonwealth has the power to make laws relating to “naturalisation and aliens”.

However, lawyers for the two men argued that although they are not citizens, they cannot be aliens – and therefore cannot be deported.

appointment.

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As a question of law, an alien is a person who owes allegiance to another country because they were born there. For people recognised as Aboriginal Australians, with longstanding connections to community, culture and traditional land, this implies they do not belong in their own country.

As Love's lawyers argued to the court,

as a member of the Aboriginal race of Australia and the child of an Australian citizen ... [he] is not an alien.

This argument suggests a new category of person described as “non-citizen non-aliens”. And under this special category, the lawyers argued, the minister would not have the constitutional right to deport them.

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The conflict in this case arises because it seems contradictory for Aboriginal people to be thought of as strangers in their own land. This is especially so for registered native title holders, such as Thoms. As a native title holder, the law recognises his connection to the land.

The basis of the men's argument, therefore, rests on the connection of Aboriginal and Torres Strait Islander people to their country and the obvious implication of belonging.

Impact for Indigenous Australians

The court's decision is good news for Indigenous Australians, as it expresses a new form of relationship between Indigenous people and the state – that of a “non-citizen, non-alien”.

The category will protect Aboriginal and Torres Strait Islander Australians born overseas, ensuring they will not lose their right to traditional lands because of an accident of birth. The decision upholds the law's recognition of the importance of Indigenous Australians' connection to, and rights over, their lands.

But it does mean that a person must be able to prove their Aboriginality before the court as a question of fact.

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Because Thoms is a native title holder, his circumstances were clear. The majority was divided, however, on Love's status as an Aboriginal person, as he is not a native title holder. And there was ultimately no finding as to whether he qualifies as an alien under the law.

The case also highlights the ongoing challenges for Indigenous Australians in their fight for proper legal recognition in relations with the state.

The minister ignored the implications of these men's Aboriginality in seeking to deport them. And the Commonwealth argued before the High Court that these men did not belong in Australia – that they were aliens. Further, three of the seven judges agreed with that argument and decided there was no special category for “non-citizen, non-aliens”.

The fact this case was brought at all indicates that the relationship between Indigenous Australians and the state remains unresolved.

Despite the majority decision, it seems First Nations peoples' close connection with the land is *still* not enough on its own to guarantee their ongoing rights to be part of Australia, and to retain their ties to community and country.

This decision will be recognised as a milestone for Indigenous Australians. But the closeness of the decision and the qualified finding in relation to Love's case means this question of belonging for non-citizen Indigenous people will likely be raised again.