

## Government seeks legal power to deport Aboriginal non-citizens

*Commonwealth is trying to overturn a landmark high court ruling that Aboriginal people cannot be deported from Australia*



*The federal government wants the power to define who is an 'alien', giving it the right to potentially deport Aboriginal people.*

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Parliament should have the power to define “aliens”, including to allow the deportation of Aboriginal non-citizens or even dual nationals, the Australian government has argued.

The solicitor general, Stephen Donaghue, made the submission on behalf of the commonwealth in a high court appeal seeking to overturn an earlier ruling that Aboriginal people cannot be deported, even if they lack Australian citizenship.

At a hearing on Wednesday, the commonwealth urged the court to junk the landmark decision of Love and Thoms handed down in February 2020 or, if it is accepted, to rule that people without Aboriginal biological ancestors are not exempt from deportation.

In November, the federal court ordered the release of Shayne Montgomery, a New Zealand citizen who has argued that because he is culturally adopted as Aboriginal he cannot be an alien for the purposes of the constitution.

The immigration minister, Alex Hawke, has appealed to the high court and in doing so sought to reopen Love and Thoms on the basis it was wrongly decided.

The case is an important test not just of whether Aboriginal people can be aliens, but the circumstances in which the court will revisit one of its own decisions.

On Wednesday Donaghue argued that the parliament should have the power to define “aliens”, unless it seeks to exclude people who “could not possibly answer that description”, such as people born in Australia.

Justice James Edelman asked if this meant that parliament could define a person born overseas with dual citizenship due to an Australian parent or grandparent who had “lived in Australia as a citizen for 60 years, served in the military, voted, and fulfilled every civic duty” as an alien.

Donaghue said this was an “extreme example” that was politically “unlikely” but, yes, parliament would have that power – subject to one qualification, that it may not be fair to be ejected from the Australian polity if it was not possible to renounce foreign citizenship.

Justices Edelman and Michelle Gordon appeared to take issue with parliament being allowed to define who is an “alien”.

But justice Patrick Keane suggested it was “preferable to leaving who is a member of the Australian community to a court”, to which Donaghue added “or the elders of a traditional” society – picking up one of the main objections of the minority in Love and Thoms.

Craig Lenahan, also representing the commonwealth, argued “there is no universal one-size-fits-all test of Aboriginality”, but a test for the purposes of immigration law should include biological descent because it provided an “unambiguous” limit.

He warned if cultural adoption were accepted then Aboriginal societies could be the “exclusive determinant” of who is an alien.

Earlier, Gordon and Edelman grilled Donaghue about the attempt to revisit Love and Thoms through his claim there was no clear common reasoning between the majority judges.

Edelman suggested Donaghue was isolating “slight differences” between the judgments, adding that identifying common reasoning “since first year law school” has always been about finding the level on which the judges agree.

Edelman also warned against a “fairytale” view of the law about retrospectivity of changes, noting that “as a matter of fact” Montgomery and other non-citizens released due to Love and Thoms will lose their liberty.

Former solicitor general Justin Gleeson began the case for Montgomery on Wednesday afternoon.

He warned against any ruling about whether cultural adoption was sufficient for Aboriginality, citing the fact Montgomery had not been allowed to lead all of his evidence about his Aboriginality in the federal court.

Gleeson also noted that if Hawke decided to give Montgomery a visa, after the federal court ordered he remake his decision according to law, the entire proceeding would be “moot”.

On Thursday the Victorian government, Australian Human Rights Commission, National Native Title Council, and Northern Land Council will be heard – all of which have intervened on Montgomery’s side.

Since the February 2020 Love and Thoms decision, two justices in the majority retired and were replaced by Jacqueline Gleeson and Simon Steward.