

Aboriginal spiritual connection to land no bar to deportation, Morrison government says

Appeal argues high court ruling implies residual Aboriginal sovereignty



The Morrison government says that Aboriginal connection to land is insufficient to create a special relationship with the Commonwealth of Australia.

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Tue 1 Feb 2022

The high court should overturn a landmark decision finding Aboriginal Australians cannot be aliens because it threatens to confer “political sovereignty on Aboriginal societies”, the Morrison government has argued.

Government lawyers made the claim in an appeal, warning that the Love and Thoms decision barring the deportation of Aboriginal non-citizens threatened the principle that Aboriginal sovereignty did not survive the colonisation of Australia.

In submissions lodged on Friday, the commonwealth also argued that Aboriginal people’s spiritual connection to the land does not create a “special relationship” to the commonwealth.

In February 2020 the high court held in a four-three split that Aboriginal Australians were not aliens for the purpose of the constitution and could not be deported.

Guardian Australia revealed in October that the government was seeking to overturn the decision, which by April 2021 had resulted in nine people being released from immigration detention.

In November, the federal court ordered the release of Shayne Montgomery, finding it was “not reasonable” to conclude the New Zealand citizen was not Aboriginal because although he lacked biological descent from an Aboriginal person he had been culturally adopted as Aboriginal.

In its appeal against that decision, the government has asked the high court to overrule Love and Thoms. Two of the judges in the original majority have since retired, prompting Amanda Stoker, now the assistant attorney general, to note in a June 2020 research paper that “there is a significant possibility that a reconstituted bench would reconsider the decision in the event of challenge”.

In submissions for the commonwealth the solicitor general, Stephen Donaghue, argued no leave was required to reopen the case because there was no “consistent reasoning” from the four majority judges, who came to the same conclusion through different reasoning.

Donaghue argued that it “does not follow” from the “spiritual connection between Aboriginal persons and the land that those persons have a special relationship with the ... Commonwealth of Australia”.

Connection to land existed before British sovereignty and “would continue unaffected even if the Australian body politic ceased to exist”, he said.

Donaghue said the “overwhelming majority” of Aboriginal Australians were not aliens but the few who never acquired Australian citizenship were likely to be citizens of other countries and therefore could belong elsewhere and be aliens with respect to Australia, despite their connection to land.

In a section titled “implicit conferral of political sovereignty on Aboriginal societies”, Donaghue noted that under Australian law Aboriginal people “did not retain any residual sovereignty over the territory of Australia” after colonisation.

Even the landmark Mabo land rights decision was “entirely at odds” with the idea that “sovereignty adverse to the Crown resides in the Aboriginal people of Australia”, he said, quoting former chief justice Anthony Mason.

“Love implicitly challenges that state of affairs, because it makes the question [of] whether some people are members of the Australian body politic dependent on whether they have been recognised as members of an Aboriginal society.”

Donaghue noted Stephen Gageler’s minority judgment in Love, warning that to find Aboriginal Australians could not be aliens would give a “non-constitutional and non-representative non-legally-accountable sub-national group” powers even state parliaments lack, ie to determine whether a person can be excluded from a polity.

Donaghue said immigration officials were now faced with claims from people they were seeking to detain or deport that they were Aboriginal, “commonly at least initially on the basis of little or no evidence”.

“Those are difficult issues for administrative officers, including those tasked with high volume of decision-making,” he said, citing the need to check with members of Aboriginal societies that a person is recognised as Indigenous.

Donaghue submitted that even if Love and Thoms were correctly decided, the federal court decision to release Montgomery should be overturned because he lacked Aboriginal biological descent.

According to court documents, Montgomery was born in 1981 in New Zealand before coming to Australia in 1997 to live with his mother and stepfather.

After Montgomery was convicted of a non-violent aggravated burglary in March 2018, the Australian government cancelled his visa. He was taken to immigration detention after his release from prison on 21 February 2019.

Montgomery argues that because he has been culturally adopted by the Mununjali people, he is Aboriginal.

In October the immigration minister, Alex Hawke, claimed that the government had “no intent to deport an Aboriginal from Australia” despite the fact he and the home affairs minister, Karen Andrews, applied to the high court to restore their power to do so.

Hawke said the case was about “a complex question of law, it’s not about an opinion of the government, and it has to be tested and resolved”.

“That’s what the government is doing. Of course, there is no intent to deport an Aboriginal from Australia, ever.”

The shadow home affairs minister, Kristina Keneally, has said Labor “respects the decision of the high court” in Love and Thoms and the government should “abide by the ruling”.

The matter is yet to be listed for hearing.