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THE RIGHT TO STAY

The scope of the right to enter one's own country as a legal protection for long-term permanent residents deported under Australia's '501 policy'

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Abstract

Article 12(4) of the ICCPR states "No one shall be arbitrarily deprived of the right to enter his own country". Australia's continued practice of using the controversial 501 policy to deport individuals, who for all purposes but citizenship can be considered Australians, is a violation of this right. This paper analyses the relationship between international law and domestic law on the availability of Article 12(4) as a method of protection for individuals who face deportation under Australia's 501 policy. It discusses the meaning of one's "own country" and how its interpretation has developed in international law from the Travaux Preparatoires of the Article to decisions of the Human Rights Committee. It then assesses how Australia's domestic legal framework has responded to the standards established in international law in relation to cases concerning 501 deportees. It demonstrates how Australia has been reluctant to exclude individuals from the scope of s 501 on the basis of their absorption into the Australian community, such that it renders Australia their "own country". Overall, it demonstrates how Australia is failing to recognise the right enshrined in Article 12(4) by continuing to employ the 501 policy to deport individuals with sufficient connections to Australia such that it can be considered their "own country".

Key terms: *'501 Policy', 'Article 12(4) of the ICCPR', 'own country',*

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I. Introduction

Lee Barber is one of the many deportees sent back to New Zealand from Australia every year as a result of the 501 policy.[1] Having moved to Australia at 10 years old Barber was deported at age 51 as a result of a developed drug addiction.[2] His deportation saw him enter a country he had not known for 40 years with nothing more than $250, a suitcase, three plastic bags and the heavy consequence of never being able to return to the country he calls home.[3] Barber, who describes himself as "Australian through and through" leaves behind his aging parents, whom he fears he may never be able to see again.[4] Barber's story is not unique, rather he is just one of many long-term residents of Australia who have been forced to uproot their entire lives and leave behind all that they know for a country foreign to them based on this provision.

Despite thousands of similar stories, Australia persists in using the contentious 501 policy which results in the 'permanent banishment' of permanent residents who for all purposes consider themselves Australians.[5] The practice has been criticised as a breach of Australia's international human rights obligations as it thrusts individuals, like Barber, into isolation from their families, communities and for many the only home they've ever known.[6] However, to members of the Australian government, it is considered a means of "taking out the trash".[7]

The focus of this paper will be centred around the use of Article 12(4) of the International Covenant on Civil and Political Rights (ICCPR) as a method of protection for long-term permanent residents of Australia faced with deportation under s 501 of Australia's Migration Act 1958. The central aim of this paper is to illustrate developments in international law regarding the concept of one's "own country" and to analyse these developments in relation

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[1] Andrea Vance, Blair Ensor and Iain McGregor "Product of Australia" (2019) Stuff < https://interactives.stuff.co.nz/2019/12/product-of-australia/>
[2] Ibid.
[3] Ibid.
[4] Ibid.
[5] *Nystrom v minister for immigration and multicultural and indigenous affairs* [2005] FCAFC 121 (V) at [1], [26].
[6] Michelle Foster "An alien by the barest of threads" (2009) 33, Melbourne University Law Review, 483 at 514.
[7] Mat Henderson "once were one colony: 501 deportation and the history of Māori in Australia" The Spinoff < https://thespinoff.co.nz/atea/07-06-2022/once-were-one-colony-501-deportations-and-the-history-of-maori-in-australia>

to Australia's domestic legal framework. It highlights the tension that exists between the two respective spheres in regards to what it means to belong to a country and the rights associated with such belonging.

This paper will begin in Part II by first setting out the legislative background and history of s 501 of Australia's Migration Act 1958. Analysing what the policy says and the reasons for its design. Part III will then introduce Article 12(4) of the International Covenant on Civil and Political Rights and the potential scope of this article to be utilised by long-term residents seeking protection from deportation. This will include a discussion on the intention of the article, including examining the *travaux preparatoires* to help understand the intended scope of the wording. Part IV will then look at how one's "own country" under article 12(4) has been understood in international law, notably by decisions of the Human Rights Committee (HRC), and the developments that have occurred given the changing nature of society. This will then lead to a discussion on the distinction between "nationality" and "citizenship" in both international and domestic law. Part V will then turn to consider how Australia's domestic law considers international law and its approach to s 501 cases.

II. The '501 policy'

Section 501 of Australia's Migration Act 1958 (hereafter referred to as The Act) gives the Minister of Foreign Affairs the right to refuse or cancel any person's visa who fails the 'character test' contained in The Act.[8] A person whose visa has been cancelled is rendered as an "unlawful non-citizen" under s15; the person is then subject to mandatory detention under s 189 and subsequently removed from Australia as per s 198.[9] The character test is defined in s 501(6) of The Act.[10] An individual will be deemed to not pass the character test if they; have a substantial criminal record, are reasonably suspected to be associated with a group of individuals engaged in criminal conduct, represent a danger to the Australian community or if the minister is not satisfied that the person is of good character due to past and present criminal or general conduct.[11] A person needs only to be found to fail on one of

[8] Migration Act 1958 (Cth) s 501.
[9] Prof. John McMillan *Department of Immigration and Multicultural Affairs: Administration of s 501 of the Migration Act 1958 as it applies to Long-Term Residents* (Commonwealth and Immigration Ombudsman, Report No. 01/2006, February 2006) at 12.
[10] Migration Act s 501(6)
[11]Section 501(7).

the grounds to fail the character test.[12] The effect of this provision is jarring, as the arguably low threshold for failure of the character test has seen many long-term permanent residents forced to leave the only country they have ever called home.[13]

In its original form, The Act did not contain s 501 nor the character test.[14] These provisions were introduced in 1992 with the insertion of s 180A (later becoming s 501 in 1998)[15] which provided special powers to refuse or cancel a visa if the minister was satisfied that the person was 'not of good character'.[16] While s 501 was originally designed to be a method of exclusion, it is now much more frequently used as a method for deportation by cancelling a resident's visa.[17] It has been suggested by the Commonwealth ombudsman that the use of s 501 to cancel long-term resident visas goes beyond the intended scope of the provision.[18]

Before the insertion of s 501, the deportation of non-citizens who committed criminal offences was covered by ss 200 and 201 of The Act.[19] Under this section, the minister could only deport a non-citizen if they had been a resident in Australia for less than 10 years.[20] However, it has been held by the Australian High Court that s 501 applies regardless of s 201.[21] Thus 501 has effectively been used to circumvent the protection of long-term permanent residents once enshrined under s 201 of the Act.[22]

When exercising the right of refusal or cancellation of a visa there are mandatory factors that must be taken into consideration.[23] These are currently set forth under Ministerial Direction No. 99.[24] The primary considerations that the minister exercising the discretion must take into account include the strength, nature and duration of the individual's ties to

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[12] Minister for Immigration and Multicultural Affairs *Direction No 99 – Direction under section 499 Visa Refusal an cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA* at *15*
[13] Michelle Foster, above n 6 at 507.
[14] At 507.
[15]Australian Human Rights Commission "What are the human rights issues raised by refusal or cancellation of visas under section 501?"<https://humanrights.gov.au/our-work/4-what-are-human-rights-issues-raised-refusal-or-cancellation-visas-under-section-501>
[16] Michelle Foster, Above n 6 at 507.
[17] At 510.
[18] John McMillan, above n 9 at 12
[19] Australia Human Rights Commission, above n 15.
[20] John McMillan, above n 9 at 12.
[21]Michelle Foster, Above n 6 at 487
[22] At 487.
[23] Direction No.99, above n 12 at 5.
[24] At X.

Australia.[25] This includes considering the impact on immediate family members, how long they have resided in Australia, including whether they arrived as a young child and the strength, duration and nature of ties to the Australian community.[26] While this consideration may support a decision not to cancel a visa, it can be outweighed by other primary considerations.[27] Other primary considerations include; the expectations and protection of the Australian community, whether the conduct constituted family violence and the best interests of minor children in Australia.[28] Section 8.1 of the direction outlines that the protection of the Australian community should be given particular regard by the minister, especially regarding subsequent risk to the Australian community should the non-citizen re-offend. Therefore it is ultimately up to the minister to make a decision that he believes is in the best interest of the Australian community. Additionally, these considerations are irrelevant to the application of s 501(3A) under which the minister *must* cancel the visa of an individual who is deemed to have a substantial criminal record.[29]

These discretionary powers have attracted significant criticism both domestically and internationally, being described as unjust and a breach of human rights obligations.[30] This criticism especially runs true when the individual subject to deportation is someone who has been living in Australia for most, if not all, of their lives and has for all purposes become a part of the Australian community. For example, in May 2008 there were twenty-five individuals in immigration detention awaiting deportation. Twenty-four of these individuals had been in Australia for between 11 and 45 years.[31] Further, the majority of individuals were 15 years old or younger when they first arrived in Australia.[32] Thus the policy is acting most harshly to the detriment of individuals who for all reasons but citizenship, consider Australia to be their home.

New Zealanders are often disproportionately represented as 501 deportees.[33] Approximately two thousand individuals have been deported from Australia to New Zealand as "501

[25] At 5.
[26] At 4.
[27] At 5.
[28] At 5.
[29] At 3.
[30] Product of Australia, Above n 1.
[31] Michelle Foster, above n 6 at 486
[32] Australian Human Rights commission, above n 15.
[33] Julie Hill "you can easily fall off the edge: NZ detainees on the mental toll of Australia's deportation policy" The Spinoff, 26 September 2019 <https://thespinoff.co.nz/society/26-09-2019/you-can-easily-fall-off-the-edge-nz-detainees-on-the-mental-toll-of-australias-deportation-policy>

deportees" since 2014.[34] Additionally, more than 60% of those who have been deported since 2015 are of Māori or Pacific Islander descent.[35] A contributing factor to this overrepresentation is the effects of the Special Category Visa (SCV) that is open to New Zealander Citizens in Australia.[36] The SCV allows New Zealand citizens to live, study and work in Australia indefinitely.[37] This means that New Zealand Citizens may be more susceptible to the effects of s 501 as there is little need to take the step of acquiring formal citizenship.[38]

The effects of this provision are harmful on many levels, affecting not only the individual but also their families. As Brad Sinoti described "You don't just lose your freedom – you lose everything'.[39] For Sinoti his deportation included leaving his children without even the chance to say goodbye.[40] These deportations destroy families, also leaving them with considerable debt as they are forced to take on the costs of the $450 per day detention fees.[41] The effect it is having on New Zealand is also immense. More than 8,000 offences since 2015 have been committed by 501 deportees, a quarter of which comprise violent crimes and sexual assault.[42] Police have also blamed 501 deportees for the escalating gang problems that New Zealand is currently facing.[43]

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[34] G v Commissioner of Police [2023] 2 NZLR 107 at [2].

[35] Patrick Keyzer and Dave Martin "Why New Zealanders are feeling the hard edge of Australia's deportation policy" (12 July 2018) The Conversation < https://theconversation.com/why-new-zealanders-are-feeling-the-hard-edge-of-australias-deportation-policy-99447>

[36] Community Law, above n 34 at [6].

[37] New Zealander Foreign Affairs and Trade "Immigration status – visa, residency and citizenship" <https://www.mfat.govt.nz/en/countries-and-regions/australia-and-pacific/australia/new-zealand-high-commission-to-australia/living-in-australia/moving-to-australia/immigration-status-visa-residency-and-citizenship/#:~:text=New%20Zealanders%20can%20apply%20to,be%20granted%20a%20permanent%20visa. >.

[38] Dow Rowe "A brief look at the harm Australia's 501 policy has caused" The Spinoff <https://thespinoff.co.nz/politics/01-12-2022/a-brief-look-at-the-harm-australias-501-policy-has-caused>

[39] Zane Small "Impact of Australia's 'cruel' deportations and number of 501 crimes in New Zealand revealed" NewHubs < https://www.newshub.co.nz/home/politics/2022/03/impact-of-australia-s-cruel-deportations-and-number-of-501-crimes-in-new-zealand-revealed.html>

[40] Ibid.

[41] Mat Henderson, above n 7.

[42] Zane Small, above n 41.

[43] Craig Kapitan and Dubby Henry "Auckland shootings: Australian 501 policy blamed for rise in gang violence" The Herald, 27 December 2021 <https://www.nzherald.co.nz/nz/crime/auckland-shootings-australian-501-policy-blamed-for-rise-in-gang violence/EQ26GY2ZJDUPGPUHVLD4HL2YM4/#:~:text=A%20M%C4%81ori%20leader%20has%20slammed,Roskill%20within%20the%20last%20week>

III. Article 12(4) and the Meaning of One's "Own Country"

This section of the paper examines Article 12(4) of the ICCPR, analysing its role in safeguarding the right to remain in one's own country. It begins by delving into the articles *Travaux preparatoires* to uncover its intended meaning and scope. The focus will then shift to exploring how the provision has been interpreted in international law.

A. Travaux Preparatoires

Article 12(4) recognises that "no one shall be arbitrarily deprived of the right to enter his own country".[44] This includes the right to remain, return after having left, and enter, even if never having been to that country before.[45] The exact meaning and scope of this article remain somewhat unclear. The defining phrase "own country" seems to imply a broader scope being permitted beyond formal citizenship, such that it could embrace certain other individuals, who while lacking formal citizenship have extensive connections to the country that they can sufficiently call it their "own".[46] The ambiguous wording has often caused debate among countries and scholars alike on who is protected under this right, arguing whether it is exclusive to citizens or if this broader meaning is permitted.[47]

The *Travaux preparatoires* accompanying Article 12(4) shed light on the controversy surrounding the choice of wording of "own country" and the intended scope of it. The draft provisions of the ICCPR were debated in two key forums: the Commission on Human Rights in 1952 and the UN General Assembly in 1959.[48] It is important to bear in mind that at the time these debates were taking place the world was still recovering from the aftermath of World War II and were in the midst of a cold war between the United States and the Soviet Union.[49] Countries were motivated to work together to achieve peace, but tensions between countries were high and relationships, especially between larger powers, were fragile and

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[44] United Nations International Covenant on Civil and Political Rights 999 UNTS 171 (Opened for signature 16 December 1966, entered into force 23 March 1976), Art 12 (4).
[45] Paul Taylor "Article 12: Freedom of Movement of the Person" in a Commentary on the International Covenant on Civil and Political Right (Cambridge University Press, 2020) 325 at 345.
[46] Jamil Mujuzi "The Right to Enter One's Own Country: The Conflict between the Jurisprudence of the Human Rights Committee and the *Travaux Preparatoires* Of Article 12(4) of the ICCPR" 10 IHRL 75 at 76.
[47] Ryan Liss, "A right to Belong: Legal Protection of Sociological Membership in the Application of Article 12(4) of the ICCPR" (2013) 46 NYU journal of international law and politics 1097 at 1115.
[48] Jamil Mujuzi, above n 47 at 77.
[49] Seth Center and Emma Bates "After Disruption: Historical perspectives on the future of international order" (2020) CSIS at 41.

strained.[50] Therefore, while countries were working together, they were reluctant to agree to anything that infringed on their sovereignty and were acting first and foremost to promote their independent agendas.[51]

The original drafting of Article 12(4) was narrow in scope, providing for the individual's right to "return to the country of which he is a national".[52] The reference to "return" subsequently was replaced with "enter".[53] It was envisioned to cover cases such as those of persons born abroad who had never been to their country of nationality.[54] However, States who believed that individuals who were not citizens, yet had established a home in a country, were sceptical of this narrow formulation of the right.[55] This led to Australia, in the 1952 debates at the UN Commission of Human Rights, proposing an amendment to the wording which provided for individuals to enter a country of which he or she is a citizen or "in which he has a permanent home."[56] This was rejected by states who felt that the provision should be restricted to citizens.[57] In response, Australia, following the language of the UDHR proposed an alternative formulation that replaced the wording of "national" with "his own country".[58] A compromise was then reached based on this amendment and the draft wording submitted to the UN General Assembly for article 12 referenced the right to return to "his own country".[59]

Subsequent debates and negotiations took place at the UN General Assembly.[60] These debates highlighted the conflicting views held by states concerning Article 12(4) and its intended scope. The debates focused on three key issues: 1) whether the right is absolute; 2) if the right is not absolute, what limitations should be imposed on the right? 3) whether the right was available to citizens only.[61]

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[50] At 53.
[51] Phil Aka and Gloria Browne "Education, human Rights, and the Post-Cold War Era" (1998-1999) 15 NYL Sch J Hum Rts 421 at 431.
[52] Ryan Liss, above n 48 at 1132.
[53] At 1132.
[54] *Draft International Covenants on Human Rights: annotation / prepared by the Secretary-General* UN Doc A/2929 (01 July 1955) at 111.
[55] Ryan Liss, above n 48 at 1132.
[56] At 1132.
[57] At 1133.
[58] At 1133.
[59] Draft International Covenants on Human Rights, above n 55 At 111.
[60] Jamil Mujuzi, above n 47 at 90.
[61] At 90.

The debates concerning the wording of the right to enter his own country were extensive, with various states submitting amendments on how they believed the right should be formulated.[62] Canada submitted a proposed amendment, changing "his own country" to "the country of which he is a citizen".[63] This amendment was retracted by the delegate who noted that "she was nonetheless convinced that the phrase 'to enter his own country' was open to various interpretations, and a state could not be legally bound to agree to all of them".[64] The withdrawal of Canada's amendment was met with both enthusiasm by states who believed it was too "restrictive" and disappointment by states who favoured a narrow scope of the provision.[65] A group amendment was submitted by Argentina, Belgium, Iran, Italy and the Philippines (the five-power amendment).[66] This amendment proposed the wording "no one shall be arbitrarily deprived of the right to enter his own country."[67] States were initially sceptical of this wording believing it to be too broad.[68] The Japanese delegate was prepared to vote for the five-power amendment on the understanding that the words "his own country" could be taken to mean country of nationality.[69] Canada upon the withdrawal of their amendment also expressed support for the five-power amendment but only on the understanding that the wording to 'enter one's own country' could only mean 'country of citizenship'.[70] Similar views regarding the scope of the wording were shared by the UK, Indian and El Salvador delegates.[71] The Saudi Arabian delegate was one of the few who believed that the wording should be interpreted to mean both citizens and non-citizens as it would be "dangerous" to make the right dependent on the fact of being a national.[72] Following these debates, a vote was called and Article 12(4) of the five-power amendment was adopted by 44 votes to six, with 22 abstentions. [73]

The travaux preparatoires illustrate the controversial and unclear nature surrounding the envisioned scope of Article 12(4) and the intended meaning of the wording "his own country". Commentary on the Travaux remains just as unclear as the materials themselves.

[62] Ryan Liss, above n 48 at 1133.
[63] *Draft International Covenants on Human Rights: Report of the Third Committee* XIV, UN Doc A/4299 (3 December 1959) at 3.
[64] Jamil Mujuzi, above n 47 at 96.
[65] Ryan Liss, above n 48 at 1134.
[66] Report of the Third committee, above n 64 at 4.
[67] At 4.
[68] Jamil Mujuzi, above n 47 at 95.
[69] At 96.
[70] At 96.
[71] At 96.
[72] Timothy Lynch "The Right to Remain" (2022) 31 WILJ 315 at 321.
[73] Report of the Third committee, above n 64 at 6.

Proponents of a broadened meaning of "own country" argue that the review of the compromise reached in the 1959 debate illustrates that a broad interpretation was accepted, which allowed the provision to extend to include permanent residents and other individuals with strong attachments to the state.[74] This argument is reinforced by the fact that Canada's amendment to limit the scope of the article to citizens was unable to garner enough support from other states and was thus rejected.[75] Other scholars have remained firm in their perspective that the wording could not be read any wider than to allow for citizens or nations.[76] Bearing both of these perspectives in mind, when taking the travaux as a whole, it seems that the most likely conclusion is that neither interpretation was strongly supported or intended for during the drafting and negotiation process.[77] Rather the wording of the article was left intentionally undefined and vague as a way for countries to ensure that they were not signing on to a treaty that contradicted their respective perspectives.[78]

B. Human Rights Committee Interpretation of Ones "Own Country"

The scope of Art 12(4) and how it is to be interpreted remains a controversial and contentious issue. The subsequent drafting of other international human rights instruments, which refer explicitly to the country of nationality or citizenship, can help to shed light on this issue.[79] For example, Protocol IV to the European Convention on Human Rights to Art 3(2) and the American Convention on Human Rights Art 22(5) both of which refer to the "state of which he is a national".[80] The difference in choice of wording suggests that the rights could be regarded as distinct from one another as if the right conferred by Article 12(4) was limited to citizenship, then it would make sense that other instruments adopted the same wording.[81] Additionally, the ICCPR itself refers to "citizens" and "nationals" in other provisions.[82] This

[74] Ryan Liss, above n 48 at 1135.
[75] Timothy Lynch, above n 73 at 327.
[76] Ryan Liss, above n 48 at 1136.
[77] At 1136.
[78] At 1136.
[79] Ryan Liss, above n 48 at 1137.
[80] European Convention for the Protections of Human Rights and Fundamental Freedoms ETS 46 (opened for signature 4 November 1950, Came into force 3 September 1953) (Protocol IV, 16 September 1963) Article 3(2); and American Convention on Human right: "Pact of San José, Costa Rica" 17955 UNTS (22 November 1969, entered into force 18 July 1978) Art 22(5).
[81] Michelle Foster, above n 15, at 517
[82] Timothy Lynch, above n 76 at 321.

suggests that the right contained in the article was not confined to citizenship or nationality but reflects a right that goes beyond these ideas.[83]

While a strong argument can be made based on the wording of subsequent treaties for a broader interpretation of the provision, the extent of its scope remains unclear. An examination of leading decisions made by the Human Rights Committee (HRC) seems to indicate a clear trend towards a more liberal interpretation being permitted. Early decisions made by the HRC adopted a fairly restrictive interpretation.[84] However, in more recent decisions, the committee has begun to place greater significance to the sociological connections one has to a state and how these can enable a country to be considered one's own for the purpose of Article 12(4).

The restrictive approach established by the HRC was first illustrated in *Stewart v. Canada.* The claimant, having resided in Canada since age seven as a long-term permanent resident was being deported to his country of birth as a result of having obtained a substantial criminal record.[85] The claimant argued that Article 12(4) was applicable as The UK could no longer be considered his own country given that he left at such a young age and his entire life is now in Canada.[86] Thus it was argued that Canada is now the applicant's own country for all practical purposes.[87] The HRC examined the provision and somewhat controversially acknowledged that the scope of "his own country" could be interpreted to be broader than the concept of "nationality" but only to a limited extent.[88] The committee found that the provision, at the very least, embraced individuals who while not nationals in the formal sense, also could not be considered mere aliens either.[89] Three exceptions were listed in which a broader interpretation of Article 12(4) could be permitted.[90] These included; persons stripped of their nationality, their country of nationality ceases to exist or they are considered stateless.[91] The majority dismissed the claimant's claim on the basis that he could not regard Canada as his own country given that he had never attempted to acquire formal nationality, despite the state facilitating his ability to do so, and instead chose to retain the nationality of

[83] At 321.
[84] Ryan Liss, above n 48 at 1137.
[85] *Stewart v Canada (Decision on merits)* HRC 538/1993 16 December 1996 at [1].
[86] At [3.4].
[87] At [3.4].
[88] At [12.3].
[89] At [12.4].
[90] At [12.4].
[91] At [12.4].

his country of origin. [92] Thus it was his own inaction which prevented Article 12(4) from applying to him.

It is important here to note that in the dissenting judgement, delivered by Elizabeth Evatt and Cecilia Medina Quiroga, the majority's decision was regarded as incorrect.[93] In their opinion, the narrow interpretation taken by the majority was too restrictive and failed to consider the *raison d'etre* of its formulation.[94] The provision existed because it is deemed unacceptable to deprive any individual of close contact with their "general web" of relationships which form their social environment i.e. family and friends.[95] Based on this consideration, the right that Article 12(4) ultimately seeks to protect is not concerned with the existence of a formal link to a state, but more importantly, the personal and emotional links one may have with a particular state.[96] In light of this, the dissenting judgement outlined that establishing what one's "own country" is invites considerations of one's "enduring connection" with their state and factors such as long-standing residence, close personal and family ties, and their intention to remain.[97] Therefore, the minority considered that the claimant had established Canada to be his "own country" given his extensive sociological connections to Canada, which included his family, children and his role as a member of the Canadian community.[98]

The HRC reaffirmed this restrictive interpretation held by the majority in the case of *Canepa v Canada.*[99] Similar to *Stewart*, the claimant in this case brought a claim on the basis of Article 12(4) arguing Canada was "his own country" given he was a long-term resident of Canada where he had lived for most of his life and considered himself to be a Canadian citizen.[100] It was only when he was contacted by Immigration officials that he realised he was only a permanent resident.[101] The state argued that the definition of "his own country" could not be extended beyond country of nationality as this would seriously erode the ability of states to exercise their sovereign powers through border control and granting access to

[92] At [12.5] - [12.6].
[93] At [1] per dissenting judgement.
[94] At [5] per dissenting judgement.
[95] At [5] per dissenting judgement.
[96] At [5] per dissenting judgement.
[97] At [6] per dissenting judgement.
[98] At [7] per dissenting judgement.
[99] Paul Taylor, above n 46 at 347.
[100] *Canepa v Canada (decision on merits)* HRC 558/1993 20 June 1997 at [4.5].
[101] At [2.2].

citizenship.[102] The HRC held that the claimant had failed to acquire nationality due to his own negligence, rather than impediments by the state, meaning Mr Canepa was prevented from holding Canada as his "own country".[103]

Several years following *Stewart v Canada* and *Canepa v Canada* general comment no.27 was issued in 1999.[104] This re-examined the strict interpretation adopted previously in these decisions.[105] The HRC declared that the language of Art 12(4) does not distinguish between nationals and aliens, thus those entitled to exercise the right can only be identified by interpreting the phrase "his own country".[106] The HRC reiterated the language from *Stewart* regarding the scope of the phrase being broader than country of nationality.[107] Upon this reading, the committee considered that the provision could apply to the three same categories of persons recognised in *Stewart*.[108] However, the committee also considered that this was not a limited list and other factors may result in the establishment of close and enduring connections between a person and a country.[109] This demonstrated a possible encroachment into the narrow interpretation taken by the majority in *Stewart.*[110] It also indicated that the committee might be receptive to developing an interpretation of Article 12(4) based on an individual's sociological membership rather than formal membership alone, similar to the one outlined by the Minority in *Stewart*.[111]

In recent decisions, the HRC has developed a new broader approach to Article 12(4) which focuses on the sociological connections one has to a state rather than formal links of nationality or citizenship.[112] In *Nystrom v Australia,* the claimant was a 31-year-old Swedish national who moved to Australia at 27 days old.[113] He had no existing ties to Sweden and was considered an "absorbed member of the Australian community".[114] He was being deported as a result of obtaining an extensive criminal record bringing him within the scope

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[102] At [9.2]
[103] At [11.3]
[104] General Comment No. 27: Article 12 (Freedom of Movement) HRC CCPR/C/21/Rev. 1/Add.9 (1 November 1999).
[105] At [20].
[106] At [20].
[107] At [20].
[108] At [20].
[109] At [20].
[110] Ryan Liss, above n 48 at 1144.
[111] At 1144.
[112] Barbara Ruttee "An Individual Right: Realising the Right to Citizenship" in The Human Right to Citizenship: Situating the Right to Citizenship within International and Regional Human Rights Law (Brill, Leiden the Netherlands, 2022) 329 at 361
[113] *Stefan Lars Nystrom v Australia (decision on merits)* HRC 1557/2007 (18 July 2011) At [2.1].
[114] At [3.3].

of s 501(7) of the Act.[115] Mr Nystrom argued that his deportation to Sweden violated his rights under Article 12(4).[116] In support of this argument, he relied on the minority decision in *Stewart* and General Comment No.27 to demonstrate that a broader interpretation can be applied to Article 12(4).[117] He noted that his ties to Australia were so extensive that he had forged links with Australia such that he possessed all the characteristics necessary to Call Australia his own country.[118] The HRC stated that there are other factors aside from nationality that may establish close and enduring connections between a person and their country.[119] In light of this, The HRC decided that his ties to Australia, which included his family, language, duration of stay and lack of ties to Sweden aside from nationality, were so extensive that Australia could be considered his own country for the purpose of Article 12(4).[120] This was significant as it was the first time that the HRC had accepted that the right applied not just to citizens but also to non-citizens with special ties to that country.[121] Further, it also illustrated that the lists of exceptions outlined in *Stewart* where Art 12(4) could be invoked, was not exhaustive.[122] This represented a new approach to the question of what one's own country means, adopting a more liberal application that focuses more on the sociological ties one has to a state rather than exclusively on formal membership.[123]

This liberal interpretation was upheld by the HRC in the case of *Jama Warsame v Canada.* The claimant was a Somali national by descent but had resided in Canada since the age of four as a permanent resident.[124] He had never lived or even visited Somalia.[125] He was awaiting deportation from Canada on the basis of "serious criminality".[126] He claimed that his rights under Art 12(4) would be violated if he was deported to Somalia.[127] Following the liberal approach established in *Nystrom,* the committee held that the he had established Canada to be his own country.[128] The Committee placed significant weight on the fact the

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[115] At [2.3].
[116] Jamil Mujuzi, above n 47 at 112.
[117] *Nystrom v Australia,* above n 89 at [3.2].
[118] At [5.5]
[119] At [7.4]
[120] At [7.5].
[121] Human Rights Law Center "Government defies UN directive to return deported man to Australia (25 April 2012) < https://www.hrlc.org.au/human-rights-case-summaries/government-defies-un-directive-to-return-deported-man-to-australia-25-apr-2012 >
[122] Barbara Ruttee, above n 119 at 361
[123] Ryan Liss, above n 48 at 1100.
[124] *Jama Warsame v. Canada* (inadmissibility decision) HRC 1959/2010 21 July 2011 at [1.1].
[125] *Jama Warsame v. Canada* (inadmissibility decision) HRC 1959/2010 21 July 2011At [2.1]
[126] At [2.3]
[127] At [3.8].
[128] At [8.5].

author arrived in Canada when he was four years old, his nuclear family lived in Canada and he had no ties to Somalia, noting also that the his Somali citizenship was an assumption rather than a certainty.[129] Both these cases demonstrate how there has been a shift in the meaning attributed to one's "own country" by the HRC for the purpose of Article 12(4).[130] The new approach established in *Stewart* and *Warsame* illustrates a more robust meaning, placing greater emphasis on the sociological ties one has to a state, rather than just questions of formal membership.[131]

C. Nationality as a Concept of Belonging in International Law

The reviewed approach established in international law by the HRC towards a more liberal and rights-based interpretation of one's *"own country"* demonstrates a shift in international norms regarding the conferral of nationality. Human rights committees associated with human rights treaties, such as the HRC, have begun to apply treaty terms to shape citizenship practices.[132] The shifting trends reflect a shift from citizenship as an identity-based frame to a rights-based frame.[133]

The importance of connections and belonging to a state is not a new concept to international law. It was first explored with the introduction of the "genuine link" link principle by the International Court of Justice (ICJ) in the landmark case of *Nottebohm* in 1955.[134] In this case, the ICJ emphasised the requirement of an individual having an "effective" or "genuine link" between themselves and a state for the conferral of nationality.[135] The central matter concerned the admissibility of a claim for diplomatic protection by Liechtenstein against Guatemala in respect of injuries against a Liechtenstein national.[136] The court found that the claim was inadmissible because the author lacked a sufficient genuine connection to Liechtenstein which was required for a state to bring a claim of diplomatic protection.[137] In the most famously cited passage of the case, the ICJ held; *"nationality is a legal bond having*

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[129] At [8.5].
[130] Ryan Liss, above n 48 at 1147.
[131] At 1153.
[132] Peter Spiro "An International Law of Citizenship" (2011) 105 AJIL 695.
[133] At 694.
[134] Rayner Thwaites "The Life and Times of the Genuine Link" (2018) 49:4 VUWLR 645 at 646.
[135] *Nottebohm (Liechtenstein v. Guatemala) (Judgement)* [1955] ICP No 18 at 24.
[136] Rayner Thwaites, above n 142 at 646.
[137] *Nottebohm,* above n 143 at 26.

at its basis a social fact of attachment, a genuine connection of existence interests and sentiments, together with the existence of reciprocal rights and duties."[138] The court in this case saw nationality as something more than a formal classification, but rather something which also depended on a relationship of belonging to that state through meaningful connections.[139] While the case does not concern the conferral of nationality, it has been paramount in international law for demonstrating what nationality is and the significance of having a real and effective link for the conferral of nationality.[140]

While citizenship and nationality are often used synonymously with one another, the two terms have quite distinct meanings.[141] Nationality is understood to stress the international, while citizenship stresses the domestic and municipal aspects.[142] Traditionally, international law has had little to do in interfering with the states right to regulate membership.[143] Nationality has traditionally been understood to refer to the international aspect of belonging to a state, linking an individual to a state vis-à-vis other states.[144] Citizenship is described as the "internal, national and municipal" aspect of membership to a state.[145] While both confer a legal relation in a sense between an individual and a state, they reflect two different respective legal frameworks, being the international and the domestic.[146] Therefore, while developments have been made in the international sphere's conceptualisation of nationality, these are not reflected in regard to domestic citizenship as this remains a practice reserved for the discretion of the state. Consequently, as will be discussed in the following paragraph, while one may come within the bounds of *"own country"* for the purposes of Art 12(4) on the international plane regarding nationality, this protection does not necessarily transcribe to domestic law.

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[138] At 23.
[139] Peter Spiro, above n 140 at 705.
[140] Barbara Ruttee "Citizenship and nationality: Terms, Concepts and Rights" in The Human Right to Citizenship: Situating the Right to Citizenship within International and Regional Human Rights Law (Brill, Leiden the Netherlands, 2022) 11 at page 11.
[141] At 13.
[142] Alice Edwards "The Meaning of Nationality in International Law in an Era of Human Rights: Procedural and Substantive aspects" in Laura Van Waas (ed) Nationality and Statelessness under International law (Cambridge University Press, 2014) 11 at 11.
[143] Peter Spiro, above n 137, at 694.
[144] Barbara Ruttee "citizenship and nationality: terms, concepts and rights", above n 145 at 14.
[145] At 14.
[146] At 14.

IV. Australia's Domestic Law Approach to the Application of Article 12(4) in relation to s 501 Cases

Despite the international trend toward a more liberal interpretation of one's "own country," as discussed earlier, this shift has not been reflected in domestic law. This is particularly evident in Australia, where despite global movements, a stringent stance on deportations under s 501 of the Act persists. Australia's approach has been unwavering, leading to the deportation of many individuals who consider the country their only home. This section of the paper examines how Australia's handling of s 501 cases contrasts with the HRC's approach. By analysing domestic court cases and relevant legislation, it becomes clear that there is a reluctance to extend the interpretation of one's "own country" under Article 12(4) to provide legal protection to integrated members of Australian society against s 501 deportation orders.

A. Domestic Human Rights Framework

In order to understand how domestic law diverges from the standards established at international law, it is important to first outline Australia's system for incorporating international law into domestic law. Australia operates a strictly dualist system of law.[147] Dualist systems of law revolve around two distinctly operating legal systems, being the international and the domestic, which do not overlap with each other.[148] This means that in order for international instruments to be binding on the state it must be incorporated through domestic laws.[149] While Australia has signed and ratified the ICCPR in 1980, it has not implemented the ICCPR into domestic legislation, therefore the rights contained in the treaty cannot be used as a direct source of rights.[150]

[147] Alice De Jonge "Australia" in Dinah Shelton (ed) "International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion" (Oxford, online edn, 2011) 23 at 26.
[148] Trischa Mann "Australia Law Dictionary" (2nd ed, Oxford University Press, 2013)
[149] Fiona De Leondra's "Dualism, Domestic Court, and the Rule of International Law" in Dr, Mortimer Sellers and Tadeusz Tomaszewski (Ed) The Rule of Law in Comparative perspective (Springer, New York, 2010) 217 at 218
[150] Foreign Affairs, Defence and Trade Committee "interim report: Legal Foundations on Religious freedom in Australia (November 2019) at 6.

This becomes particularly important considering that Australia does not have a comprehensive federal human rights framework.[151] Rather, it relies on a 'patchwork' of human rights protections across both Commonwealth and State jurisdiction.[152] This approach lacks a uniformity of standards and protection across Australia as both the Commonwealth and States can enact concurrent legislation.[153] The Commonwealth has decided to enact some legislation to broadly protect specific rights, such as *The Racial Discrimination Act 1976.*[154] Some State jurisdictions have also chosen to enact their own human rights instruments for example *The Victoria Charter, the Human Rights Act 2004.*[155] This patchwork fails to comprehensively protect human rights and has been criticised as being "fragmented and incomplete" hurting most significantly those described as "marginalised and vulnerable".[156] This means that for many individuals the only source of protection of their human rights is through international treaties, such as the ICCPR. This is precisely the case for those relying on Article 12(4) as the basis for the revocation of deportation orders under s 501.

While unincorporated treaties cannot be a direct source of rights in Australia, they do still have relevance as an indirect source of rights and considerations which helps to shape the common law.[157] In the case of *Teoh v Minister for immigration and Citizenship* the High Court held that Australia's ratification of a convention is a positive statement by the executive government that they will act in accordance with that convention.[158] This includes domestic courts favouring a construction of ambiguous legislation which best upholds Australia's obligations under a treaty.[159] In that case, the court had to consider whether Australia's commitment to the UN Convention on the Rights of the Child (UNCORC) gave rise to the legitimate expectation that the decision-maker would exercise their discretion to deport the individual in conformity with the terms of the convention.[160] It was found that

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[151] Julie Debelijak "The Fragile Foundations of Human Rights Protections: Why Australia Needs a Human Rights Instrument" in Melissa Castan (Ed) Critical Perspective on Human Rights Law in Australia (Thomas Reuters, Australia, 2021) 39 at 39
[152] At 40.
[153] At 46.
[154] At [3.50].
[155] Foreign Affairs, Defence and Trade Committee, above n 156 at 6.
[156] Julie Debelijak, above n 157 at [3.10].
[157] https://www.dfat.gov.au/news/speeches/Pages/the-relationship-between-treaties-and-domestic-law 4
[158] *Minister for Immigration and ethnic Affairs v Teoh* [1995] HCA 20 (ACT), (1995) 128 ALR 353 at 385.
[159] At 362.
[160] At 363.

there was a legitimate expectation that the best interests of the child would be treated as a primary consideration by the relevant decision-maker in decisions under The Act.[161]

However, in the subsequent case of *Amohanga v Minister for Immigration and Citizenship* the Federal Court of Australia held that it was not bound by the ratio of *Teoh* in respect of claims regarding the ICCPR.[162] This case concerned the cancellation of the applicant's visa under s 501 of The Act.[163] The applicant argued that following *Teoh,* the applicant had a legitimate expectation that he would not to be arbitrarily deprived of the right to enter his own country under Art 12(4).[164] The court found that the argument must fail as the tribunal's decision was not a departure from the terms of the ICCPR, unlike in *Teoh* where the decision was a clear departure from the obligations under UNCROC.[165]

B. Case law

Case law dating back to the inception of the character test highlight the strict approach that has been adopted by the Australian government and courts towards that deportation of long-term permanent residents under s 501. In the significant case of *Nystrom v Australia,* discussed earlier, the applicant, a long-term permanent resident of Australia, had his visa cancelled under s 501(2) of The Act. [166] Before the complaint to HRC, the applicant challenged the decision to cancel his visa in the Australian courts. The cancellation order was successful in the full Federal Court.[167] The court’s ruling emphasised that the discretionary powers granted to the responsible minister to determine who should be allowed to enter and remain in Australia in the best interests of the Australian community had little to do the permanent banishment of an absorbed member of the Australian community with no relevant ties elsewhere.[168]

This decision was overturned by the High Court, asserting that the minister’s judgement was sound, given that all mandatory considerations had been considered and the provision made

[161] At 365.
[162] *Amohanga v Minister for Immigration and citizenship and another* [2013] FCA 31 (NSW) at [37].
[163] At [8].
[164] At [30].
[165] At [41].
[166] *Nystrom v minister for immigration and multicultural and indigenous affairs*, above n 5 at [1]-[2].
[167] At [31].
[168] [29]

no exceptions for those holding an absorbed persons' visa.[169] Subsequent to this ruling, the author lodged a complaint with the HRC. A new international standard was established which affirmed that the right to enter one's own country could apply to non-citizens with extensive sociological ties to the state.[170] Nevertheless, Australia remained firm in upholding Mr Nystrom's deportation, informing the committee that they "respectfully disagree" with the finding that Australia was in breach of Article 12(4).[171] This refusal from the Australian government was criticised as a blatant violation of its human rights commitments, undermining not only the United Nations framework but also the fundamental rule of law.[172]

Australia's rigid approach to the deportation of non-citizens has been firmly established for quite some time. The position was notably articulated in 1982 in the case of *Pochi v Minister for Immigration and Ethnic Affairs.*[173] In this case, the author, a long-term resident of Australia, argued that his complete assimilation into the Australian community meant that he could no longer be considered a statutory "alien" under s 51 (xix) of the Commonwealth of Australia Constitution Act 1977 (The Constitution).[174] Despite the authors 'total absorption', the court maintained that a prolonged association with the country and its community did not alter one's status as an alien. [175] The sole path to changing this status was through an act of parliamentary naturalisation and gaining formal citizenship.[176] This same approach was upheld in the *EX parte Te* case, where it was reiterated that integration in the Australian community did not exempt an individual from the statutory classification of an alien, in accordance with section 51 (xix) of The Constitution.[177]

Numerous recent cases have tried, and ultimately failed, in finding ways to circumvent the provisions of s 501. Arguments have sought to engage Art 12(4) by contending that their integration into the Australian community, such that it can be considered their "own country" brings them outside the scope of s 501. Australia has maintained its refusal to

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[169] *Minister for Immigration and Multicultural and indigenous affairs v Nystrom* [2006] HCA 50 at [40].
[170] *Nystrom v Australia,* above n 120 at [7.5].
[171] Australian Government "Response of the Australian government to the views of the committee in Communication No. 1557/2007, Nystrom et al v Australia" (Human Rights Communication, 16 April 2012)
[172] Human rights Law Center, above n 125
[173] *Pochi v Minister for immigration and ethnic affairs and Another* (1982) 43 ALR 261 (ACT)
[174] At 268; The Commonwealth of Australia Constitution Act 1977.
[175] At 268.
[176] At 268.
[177] Minister for Immigration and Multicultural Affairs; *Ex parte Meng Kok Te* (2003) 193 ALR 37 (ACT) at [211] Per Kirby J and [229] Per Callinan J.

acknowledge such a classification. In the case of *Steve v Minister for Immigration,* the author, born in New Zealand in 1967 and relocated to Australia at 13 months old,[178] had his visa cancelled on mandatory character grounds under s 501(3A). The applicant's connections to Australia were so substantial he stated;

> "*I have no memory of or connection to New Zealand. All of my family are Australian citizens. My mother, brother and daughter are here. I grew up, went to school, and have lived my life here, and I consider Australia my home. I have no family or friends in New Zealand, and I have never even been back to visit".*[179]

The applicant sought judicial review of the tribunal's decision not to rescind his deportation orders.[180] An essential component of the applicant's argument was that he had a human right to remain in Australia as "his own country", enshrined in Article 12(4) of the ICCPR.[181] It was firstly submitted to the court on behalf of the applicant that the court should find that Australia is the applicant's *"own country"* notwithstanding his lack of citizenship.[182] The decision expressed by the HRC in *Nystrom v Australia* was argued to be applicable as authority.[183] Recognising the similarities between the current case and *Nystrom,* the court conceded that Australia might indeed be considered the applicant's "own country" within the meaning of Art 12(4).[184]

The applicant then asserted that the tribunal made a jurisdiction error by purporting to enforce s 501CA(4) of The Act in relation to the application when the applicant was not a "person" within the meaning of the provision.[185] Referencing the principle of legality,[186] it was submitted that a construction of s 501CA(4) which excludes the applicant from the scope of the term "person" is one that accords with the legislatures intention not to interfere with the applicant's asserted right to remain in Australia.[187] As part of this argument, the applicant submitted that the courts should expand the common law to recognise a

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[178] *Steve v Minister for Immigration and Border Protection* [2018] FCA 311 (NSW) at [3].
[179] At [14].
[180] At [1].
[181] At [38].
[182] At [40].
[183] At [41].
[184] At [43] – [44]
[185] At [55].
[186] The principle of legality refers to the requirement that it is to be presumed that, in the absence of unmistakable and unambiguous language in legislation, Parliament did not intend to interfere with fundamental rights, immunities and freedoms. At [56].
[187] At [55].

fundamental right of the applicant to enter and remain in Australia as "his own country".[188] However, despite the acknowledgement that Australia was the author's *own country* the court was unable to find jurisdiction for expanding the common law to recognise such a right.[189] Holding that the right to stay and remain in Australia was one that extends only to formal citizens.[190] Thus, the court explained that Article 12(4) cannot be relied on by a non-citizen as a fundamental right until it becomes reflected in the domestic law of Australia.[191] Ultimately the application was dismissed, with the court highlighting the fundamental distinction between the rights of citizens and non-citizens asserting that the concept of "own country" offers no legal protection for non-citizens based on this distinction.[192] Consequently, the court diverged from the international standard established by the committees ruling in *Nystrom.*

In the case of *Azar v Minister for Immigration & Border Protection,* submitted following the judgement in *Steve,* the applicant sought judicial review of the minister's decision to refuse to revoke the cancellation of his visa under s 501CA(4).[193] Much like the applicant in *Steve,* Azar had extensive ties to Australia, having resided there since the age of one and had an established life there which included a child.[194] Mr Azar raised similar grounds as those presented in *Steve,* contending that the ruling in that case was "plainly wrong" and should not be followed.[195] The key issue revolved around whether subs 501(3A) should be read down to exclude applicants for whom Australia is their "own country".[196] It was contended that the reference to "person" within subs 501(3A) should be read down to exclude those who considered Australia to be their "own country" in regards to the principle of legality.[197] Additionally it was submitted that the common law right of an Australian citizen to reside in Australia should be extended to an alien in their "own country" within the meaning of Article 12(4).[198]

[188] At [57].
[189] At [58].
[190] At [58].
[191] At [60].
[192] At [59] and [69].
[193] *Azar v Minister for Immigration and Border Protection* [2018] FCA 1175 (NSW) at [4].
[194] At [11] - [17].
[195] At [21].
[196] At [20].
[197] At [29].
[198] At [28].

The court dismissed the applicants arguments. The majority found that there was no scope to read s 501(3A) down so as to "carve out" from the duty to cancel a visa "persons" for whom Australia is their "own country".[199] This was because, while 'persons' is not defined in the section, The Act only envisaged there being two categories of persons, citizens and non-citizens.[200] Therefore, a 'person' in this provision could only be a non-citizen.[201] Further, The Act creates two subcategories of non-citizens, being "lawful non-citizens" defined as someone who is holding a valid visa (s 13) and "unlawful non-citizens" being someone who is not a "lawful non-citizen" (s 14).[202] The Act provides no middle ground between a lawful and unlawful citizen.[203]

Equally, the court regarded that there is no scope when regard is had to the construction of The Act for implying a limitation upon the duty to cancel a visa under subs 501(3A) so as to also carve out a subcategory of non-citizens who ties to Australia are sufficient enough to engage Article 12(4). The construction put forward by the applicant effectively would have created a "middle ground" between 'citizen' and 'non-citizen' which would entitle non-citizens falling within the meaning of Article 12(4) to remain in Australia.[204] If a construction of this kind was to be accepted, the integrity and purpose of the act would be undermined to the extent that the power to regulate the entry into Australia of non-citizens would be restricted.[205] Therefore, the court found that the principle of legality could not be relied on here as there was no construction available other than non-citizen.[206]

The court then also went on to agree with the conclusion reached by Bromwich J and the court in *Steve*, that the common law cannot be developed by Article 12(4) to recognise the right of non-citizens, for whom Australia is their "own country", to enter and remain as citizens do.[207] Relying on the well-established principle in *Pochi,* the court reiterated that the right to enter and remain is reserved only for citizens and a non-citizen cannot gain this right by way of absorption into the community, as it is something that can only be achieved by an act of parliament.[208]

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[199] At [32].
[200] At [34].
[201] At [35].
[202] At [36].
[203] At [36].
[204] At [41].
[205] At [41].
[206] At [44].
[207] At [45].
[208] At [48].

While Australia has not been willing to carve out a limitation to s 501 for non-citizens who fall within the ambit of Article 12(4), a limitation was held to exist by a majority of the High Court in *Love v Commonwealth of Australia; Thoms v same* in respect of Aboriginal Persons with indigenous connections to land.[209] The case of *Love v Commonwealth of Australia*, concerned s501(3A) deportation orders against two respective individuals – Mr Love, a Papua New Guinea citizen and Mr Thoms, a New Zealand citizen.[210] The applicants sought to distinguish their circumstances from the cases mentioned above by arguing on the basis of the "special connection" they have to Australia being aboriginal persons.[211] The central issued revolved around the reference to "alien" within s 51 (xix) of The Constitution Act.[212] The key question put to the court was whether it was open for Parliament to treat persons with the characteristic of the plaintiffs as non-citizens for the purposes of the Migration Act.[213]

The plaintiffs argued that the common law has recognised that members of self-determining indigenous societies who have maintain a spiritual and cultural connection with land, now in a very real sense "belong" to that land. [214] This relationship of belonging to the land is so deep and enduring it means that they cannot be treated as a stranger to the land.[215] Rather they hold a special status as a "non-citizen, non-alien" which takes them outside the purview of s 51(xix).[216] Considering these arguments, the majority held that Aboriginal Australians cannot be considered "aliens" for the purpose of s 51(xix) as they cannot be said to belong to a place other than Australia.[217] Accordingly, it was found that since it was beyond the legislative competence of Parliament under s 51(xix) of The Constitution to treat an aboriginal person as an unlawful non-citizen, s 14(1) of The Act must be read down accordingly to exclude Aboriginal persons.[218]

While arriving at this decision, the court maintained a clear stance on the precise boundaries of this exception. The court emphasised that this exception was exclusive to Aboriginal persons, due to their distinct spiritual and cultural connection to Australia resulting from

[209] *Love v Commonwealth of Australia; Thoms v Same* (2020) ALR 597.
[210] At [2] Per Kiefel CJ .
[211] At [20] Per Kiefel CJ.
[212] At [21] Per Kiefel CJ.
[213] At [4] Per Kiefel CJ.
[214] At [117] Per Gageler J.
[215] At [117].
[216] At [3] and [117].
[217] At [74] Kiefel CJ, [285] per Nettle J..
[218] At [285] Nettle J and [397] Per Edelman J .

their aboriginal heritage and membership.[219] The court adopted the criteria established in the case of *Mabo v Queensland* to discern such aboriginal status.[220] Consequently, the court concluded that only Mr Thoms met these requirements, enabling him to elude being labelled an "alien" for the purposes of The Act.[221] Mr Love's connection to his aboriginal heritage was not as clear, therefore the court could not definitively ascertain whether he qualified as an "alien" under the scope of s 51(xix).[222] This illustrates how cautiously the court approached the task of carving out this exception, Showcasing the limited extent to which Australia is willing to confer formal legal protections upon non-citizens to shield them from deportation.

While the case of Aboriginal persons is distinctly different from those who rely on their absorption in the Australian community to protect them from deportation, it is interesting to consider whether this decision could one day be extended to include individuals who belong to Australia as a result of their absorption. This distinction was touched on in the judgement delivered by Edelman J. Justice Edelman explains that s 51(xix) gives parliament the power to control membership of the Australian political community by defining who is a citizen.[223] "Alien" within The Act is described as the antonym of citizen. However, he acknowledges that legal concepts, such as citizen and alien, are subject to evolution.[224] Thus it would be wrong to tie the meaning of "alien" to "statutory citizen" as the requirements are subject to change.[225] Rather he posits that the antonym of "alien" is a "belonger" to the political community.[226] But who is a "belonger" if not a statutory citizen? Is there scope for a "belonger" to be someone who notwithstanding their status as a citizen is an absorbed member of the political community? However, while considering this issue and noting that absorption into the Australian community might be a relevant factor in determining non-alienage he found it was unnecessary to explore the issue further as the plaintiff's identity as an Aboriginal persons was sufficient to find non-alienage.[227] This potentially show that that a test for non-alienage based on absorption into the Australian community is something the courts may be willing to re-examine.

[219] At [391] Edelman J.
[220] At [76] per Bell J
[221] At [74] per Bell J and [288] per Nettle J.
[222] At [74] per Bell J and [288] per Nettle J.
[223] At [393] per Edelman J.
[224]At [393] per Edelman J.
[225] At [394] Per Edelman J.
[226] At [437] Per Edelman J.
[227] At [464] Per Edelman J.

V. Conclusion

The human right protected by Article 12(4) is important as it protects the most basic right of an individual to remain where they consider home. The 501 policy is a clear violation of this right. The tension between the international and domestic spheres on questions regarding the scope of a non-citizen to remain in their "own country" is intense. The developments in the international sphere reflect a global shift towards paying greater significance to individual human rights and recognising that belonging is not dependent on formal ties to a country but takes account of the sociological connections one has to that country.

Australia has failed to reflect these international developments in its domestic approach to questions concerning one's "own country" and the legal protections that can be afforded to non-citizens engaging the right contained in Article 12(4). The result has been the continued deportation of long-term permanent residents who for all purposes, but formalities can be regarded as Australians. This begs the question of whether it is time for domestic laws to adapt to reflect the standards established at international law to better protect the rights of those who consider Australia to be their "own country".

As Australia lacks both a willingness to develop domestic law to be in line with standards established in the international sphere and a comprehensive federal human rights framework, those seeking protection from the harsh 501 policy are left with few options. Currently, the only real avenue is to become a formal member of Australia by acquiring citizenship. Recent changes made to the citizenship pathways for New Zealanders have made the process of acquiring citizenship simpler.[228] From July 1 2023 New Zealand citizens who have been living in Australia for four or more years will be eligible to apply directly for Australian citizenship without first needing to be granted a permanent visa.[229] Having a clear pathway for citizenship may mean that New Zealanders looking to establish their lives in Australia may be more inclined to obtain formal citizenship rather than relying on a SCV. As this is the only real method of protection against the 501 policy questions need to be raised concerning the duty the State has in both informing the individual of the risks associated with failing to acquire citizenship and facilitating the process to obtain it.

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[228] New Zealander Foreign Affairs and Trade, above n 39.
[229] Ibid.

Arguably, Australia also needs to look at implementing a comprehensive federal human rights framework which enshrines the rights contained in the ICCPR into domestic legislation. Without a document of this kind Australia is falling short of its international obligations and more importantly, is failing to protect the rights of those who consider it their home.

Word count

The text of this paper (excluding table of contents, footnotes, and bibliography) comprises exactly 8,120 words.

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