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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Article 12(4) of the International Covenant on Civil and Political Rights 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 article analyses the relationship between international law and domestic law on the availability of art 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 préparatoires of the article to the 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 s 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".

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I INTRODUCTION

Lee Barber is one of the many deportees who has been sent back to New Zealand from Australia as a result of Australia's "501" policy.[1] Having moved to Australia at 10 years old, Barber was deported at the age of 51 as a result of the crimes he committed to feed his 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", left behind his ageing 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, all due to s 501 of Australia's Migration Act 1958 (the Act).

Despite thousands of similar stories, Australia persists in using this contentious provision which results in the "permanent banishment" of permanent residents who for all purposes consider themselves Australian.[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 "tak[ing] out the trash".[7]

The focus of this article is on the use of art 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. This article seeks to analyse the relationship between international law and domestic law on the availability of art 12(4) as a method of protection for individuals who face deportation under Australia's 501 policy. It highlights the tension that exists between the two spheres in regard to what it means to belong to a country and the rights associated with such belonging.

This article begins in Part II by setting out the legislative background and history of s 501 of Australia's Migration Act. It then analyses the policy and the reasons for its design. Part III then

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1 Andrea Vance, Blair Ensor and Iain McGregor "Product of Australia" (13 December 2019) Stuff <www.stuff.co.nz>.

2 Vance, Ensor and McGregor, above n 1.

3 Vance, Ensor and McGregor, above n 1.

4 Vance, Ensor and McGregor, above n 1.

5 *Nystrom v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 121, (2005) 143 FCR 420 (V) at [1] and [26].

6 Michelle Foster "An alien by the barest of threads" (2009) 33 MULR 483 at 514.

7 Mat Henderson "Once were one colony: 501 deportations and the history of Māori in Australia" (7 June 2022) The Spinoff <www.thespinoff.co.nz>.

introduces art 12(4) of the ICCPR and the potential scope of the article to be utilised by long-term residents seeking protection from deportation. This includes a discussion on the purpose of art 12(4), including examining the travaux préparatoires. Part IV looks at how one's "own country" under art 12(4) has been understood in international law, notably by decisions of the Human Rights Committee (HRC), and the developments that have arisen out of the changing nature of society. This leads to a discussion on the distinction between "nationality" and "citizenship" in both international and domestic law. Part V then turns 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 gives the Minister for Home Affairs the right to refuse or cancel the visa of any person who fails the "character test" contained in the Act.[8] A person whose visa has been cancelled is rendered an "unlawful non-citizen" under s 15. The person is then subject to mandatory detention under s 189 and subsequent removal from Australia as per s 198.[9] The character test is defined in s 501(6) of the Act. An individual is deemed to have not passed the character test if they: have a substantial criminal record;[10] 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. A person needs only to fail on one of the grounds to fail the character test.[11] 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.[12]

In its original form, the Act did not contain s 501 nor the character test.[13] These provisions were introduced in 1992 with the insertion of s 180A (becoming s 501 in 1998[14]) which provided special powers to refuse or cancel a visa if the Minister was satisfied that the person was "not of good

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8 Migration Act 1958 (Cth), s 501.

9 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 Ombudsman, Report No 01/2006, February 2006) at [2.2].

10 See Migration Act, s 501(7).

11 Andrew Giles *Direction under section 499: Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA* (Minister for Immigration, Citizenship and Multicultural Affairs, Direction No 99 Migration Act 1958, 23 January 2023) at 15.

12 Foster, above n 6, at 507.

13 At 507.

14 Australian Human Rights Commission *Background paper: Human rights issues raised by visa refusal or cancellation under section 501 of the Migration Act* (June 2013) at 11.

character".[15] Although 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.[16] 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.[17]

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.[18] Under ss 200 and 201, the Minister could only deport a non-citizen if they had been a resident in Australia for less than 10 years.[19] However, the Australian High Court has held that s 501 applies regardless of s 201.[20] Thus, s 501 has effectively been used to circumvent the protection of long-term permanent residents once enshrined in s 201 of the Act.[21]

When exercising the right of refusal or cancellation of a visa, there are mandatory factors that the Minister must take into consideration.[22] These are currently set out under Ministerial Direction No 99.[23] 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 Australia.[24] This includes considering the impact on immediate family members, how long they have resided in Australia (and whether they arrived as a young child) and the strength, duration and nature of ties to the Australian community.[25] Although these considerations may support a decision not to cancel a visa, they can be outweighed by other primary considerations.[26] Other primary considerations include the expectations and protection of the Australian community, whether the person's criminal or other serious conduct constituted family violence, and the best interests of minor children in Australia.[27] 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-

15 Foster, above n 6, at 507.

16 At 510–511.

17 McMillan, above n 9, at [2.10].

18 Australian Human Rights Commission, above n 14, at 11.

19 McMillan, above n 9, at [2.2].

20 Foster, above n 6, at 486–487.

21 At 487.

22 Giles, above n 11, at 5.

23 At 5–14.

24 At 5.

25 At 4.

26 At 5.

27 At 5.

citizen re-offend. Therefore, it is ultimately up to the Minister to make a decision that they believe is in the best interests 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.[28]

These discretionary powers have attracted significant criticism both domestically and internationally, being described as unjust and a breach of human rights obligations.[29] This criticism rings especially 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 essentially become a part of the Australian community. For example, in May 2008, there were 25 individuals in immigration detention awaiting deportation. Of these individuals, 24 had been in Australia for between 11 and 45 years.[30] Further, the majority of individuals were 15 years old or younger when they first arrived in Australia.[31] Thus, the policy is acting most harshly to individuals who, for all reasons but citizenship, consider Australia to be their home.

A disproportionate amount of New Zealanders are 501 deportees.[32] Since 2014, approximately 2,000 individuals have been deported from Australia to New Zealand as "501 deportees".[33] Additionally, upwards of 60 per cent of those who have been deported since 2015 are of Māori or Pacific Islander descent.[34] A significant contributing factor to this overrepresentation is the effects of the Special Category Visa (SCV) that is open to New Zealand citizens in Australia. The SCV allows New Zealand citizens to live, study and work in Australia indefinitely.[35] 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.[36]

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28 At 3.

29 Vance, Ensor and McGregor, above n 1.

30 Foster, above n 6, at 486.

31 Australian Human Rights Commission, above n 14, at 11.

32 Julie Hill "'You can easily fall off the edge': NZ detainees on the mental toll of Australia's deportation policy" (26 September 2019) The Spinoff <www.thespinoff.co.nz>.

33 *G v Commissioner of Police* [2022] NZHC 3514, [2023] 2 NZLR 107 at [2].

34 Patrick Keyzer and Dave Martin "Why New Zealanders are feeling the hard edge of Australia's deportation policy" (12 July 2018) The Conversation <www.theconversation.com>.

35 New Zealand Foreign Affairs and Trade "Immigration status - visa, residency, and citizenship" <www.mfat.govt.nz>.

36 Don Rowe "A brief look at the harm Australia's 501 policy has caused" (1 December 2022) The Spinoff <www.thespinoff.co.nz>.

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".[37] For Sinoti, his deportation included leaving his children without even the chance to say goodbye.[38] These deportations destroy families, and also leave them with considerable debt as they are forced to take on the costs of the $450 per day detention fees.[39] The effect it is having on New Zealand is also immense. Since 2015, more than 8,000 offences have been committed by 501 deportees, a quarter of which comprise violent crimes and sexual assault.[40] Police have also blamed 501 deportees for the escalating gang problems that New Zealand is currently facing.[41]

III ARTICLE 12(4) AND THE MEANING OF ONE'S "OWN COUNTRY"

This part examines art 12(4) of the ICCPR, analysing its role in safeguarding the individual right to remain in one's own country. It begins by delving into the article's travaux préparatoires to uncover its intended meaning and scope. The focus then shifts to exploring how the provision has been interpreted in international law.

A Travaux Préparatoires

Article 12(4) recognises that "No one shall be arbitrarily deprived of the right to enter his own country".[42] This includes the rights to remain, return after having left, and enter, even if never having been to that country before.[43] The exact meaning and scope of art 12(4) 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, although lacking formal citizenship, have extensive connections to the country such that they can call it their "own".[44] The

37 Zane Small "Impact of Australia's 'cruel' deportations and number of 501 crimes in New Zealand revealed" (5 March 2022) Newshub <www.newshub.co.nz>.

38 Small, above n 37.

39 Henderson, above n 7.

40 Small, above n 37.

41 Craig Kapitan and Dubby Henry "Auckland shootings: Australian 501 policy blamed for rise in gang violence" *The New Zealand Herald* (online ed, Auckland, 27 December 2021).

42 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).

43 Paul M Taylor *A Commentary on the International Covenant on Civil and Political Rights: The UN Human Rights Committee's Monitoring of ICCPR Rights* (Cambridge University Press, Cambridge, 2020) at 345.

44 Jamil Ddamulira Mujuzi "The Right to Enter One's Own Country: The Conflict between the Jurisprudence of the Human Rights Committee and the *Travaux Préparatoires* of Article 12(4) of the ICCPR" (2021) 10 HRLR 75 at 76.

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 a broader meaning is permitted.[45]

The travaux préparatoires accompanying art 12(4) help shed light on the controversy surrounding the choice of wording of "own country" and its intended scope. 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.[46] 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 was in the midst of a cold war between the United States and the Soviet Union.[47] Countries were motivated to work together to achieve peace, but tensions between countries were high and relationships, especially between larger powers, were fragile and strained.[48] Therefore, while countries were cooperating, they were reluctant to agree to anything that infringed on their sovereignty and were acting first and foremost to promote their independent agendas.[49]

The original drafting of art 12(4) was narrow in scope, providing for the individual's right to "return to the country of which he is a national".[50] The reference to "return" was subsequently replaced with "enter".[51] It was envisioned to cover cases such as persons born abroad who had never been to their country of nationality.[52] However, some states believed that individuals who were not citizens could nevertheless establish a home in a country, and were thus sceptical of the narrow formulation of the right.[53] 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".[54] This was rejected by states that felt

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45 Ryan Liss "A Right to Belong: Legal Protection of Sociological Membership in the Application of Article 12(4) of the ICCPR" (2013) 46 NYU J Intl Law & Pol 1097 at 1115.

46 Mujuzi, above n 44, at 77.

47 Seth Center and Emma Bates (eds) *After Disruption: Historical Perspectives on the Future of International Order* (Center for Strategic & International Studies, September 2020) at 41.

48 At 53.

49 Phillip C Aka and Gloria J Browne "Education, Human Rights, and the Post-Cold War Era" (1999) 15 NYL Sch J Hum Rts 421 at 431.

50 Liss, above n 45, at 1132.

51 At 1132.

52 *Draft International Covenants on Human Rights: Annotation prepared by the Secretary-General* UN Doc A/2929 (1 July 1955) at 111.

53 Liss, above n 45, at 1132.

54 At 1132.

that the provision should be restricted to citizens.[55] In response, Australia, following the language of the Universal Declaration of Human Rights, proposed an alternative formulation that replaced the wording of "national" with "his own country".[56] A compromise was then reached based on this amendment and the draft wording of art 12 submitted to the UN General Assembly referenced the right to return to "his own country".[57]

Subsequent debates and negotiations took place at the UN General Assembly.[58] These debates highlighted the conflicting views held by states concerning art 12(4) and its intended scope. The debates focused on three key issues: first, whether the right was absolute; secondly, if the right was not absolute, what limitations should be imposed on it; and thirdly, whether the right was available to citizens only.[59]

The debates concerning the wording of the right to enter one's own country were extensive. Various states submitted amendments on how they believed the right should be formulated.[60] Canada submitted a proposed amendment, changing the wording of "his own country" to "the country of which he is a citizen".[61] This amendment was then 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".[62] 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 for the provision.[63] A group amendment was submitted by Argentina, Belgium, Iran, Italy and the Philippines (the five-power amendment)[64] that proposed the wording "no one shall be arbitrarily deprived of the right to enter his own country".[65] States were initially wary of this wording, believing it to be too broad.[66] The Japanese delegate was

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55 At 1133.

56 At 1133.

57 *Draft International Covenants on Human Rights*, above n 52, at 111.

58 Mujuzi, above n 44, at 90.

59 At 90.

60 Liss, above n 45, at 1133.

61 *Draft International Covenants on Human Rights: Report of the Third Committee* UN Doc A/4299 (3 December 1959) at [9].

62 *General Assembly Fourteenth Session, Third Committee, 957th Meeting* UN Doc A/C.3/SR.957 (16 November 1959) at [1].

63 Liss, above n 45, at 1134.

64 *Report of the Third Committee*, above n 61, at [5].

65 At [19].

66 Mujuzi, above n 44, at 95.

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".[67] 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".[68] Similar views regarding the scope of the wording were shared by the United Kingdom, Indian and El Salvador delegates.[69] 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.[70] Following these debates, a vote was called and art 12(4) of the five-power amendment was adopted by 44 votes to six, with 22 abstentions.[71]

The travaux préparatoires illustrate the controversial and unclear nature surrounding the envisioned scope of art 12(4) and the intended meaning of the wording "his own country". Commentary on the travaux remains as unclear as the materials themselves. 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.[72] This argument is reinforced by the fact that Canada's amendment to limit the scope of art 12(4) to citizens was unable to garner enough support from other states and was thus rejected.[73] Other scholars have remained firm in their perspective that the wording could not be read any wider than to recognise citizens or nations.[74] Bearing both of these perspectives in mind, when taking the travaux as a whole, the most likely conclusion is that neither interpretation was strongly supported or intended during the drafting and negotiation process.[75] 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.[76]

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67 At 96.

68 At 96.

69 At 96.

70 Timothy E Lynch "The Right to Remain" (2022) 31 Wash Intl LJ 315 at 321.

71 *Report of the Third Committee*, above n 61, at [18].

72 Liss, above n 45, at 1135.

73 Lynch, above n 70, at 327.

74 Liss, above n 45, at 1136.

75 At 1136.

76 At 1136.

B The Human Rights Committee's Interpretation of One's "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.[77] For example, art 3(2) of Protocol IV to the European Convention on Human Rights and art 22(5) of the American Convention on Human Rights both refer to the "state of which he is a national".[78] The difference in the choice of wording suggests that the rights could be regarded as distinct from one another. If the right conferred by art 12(4) was limited to citizenship, then it would make sense that other instruments adopted the same wording.[79] Additionally, the ICCPR itself refers to "citizens" and "nationals" in other provisions.[80] This suggests that the right contained in the article was not confined to citizenship or nationality but reflects a right that goes beyond these ideas.[81]

Although a strong argument can be made for a broader interpretation of the provision based on the wording of subsequent treaties, the extent of its scope remains unclear. An examination of leading decisions made by the 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.[82] However, in recent decisions, the Committee has placed greater significance on the sociological connections one has to a state and how these may enable a country to be considered one's "own" for the purpose of art 12(4).[83]

The restrictive approach established by the HRC was first illustrated in 1996 in *Stewart v Canada*. Mr Stewart had resided in Canada since age seven as a long-term permanent resident. He was to be deported to his country of birth, the United Kingdom, as a result of obtaining a substantial criminal record.[84] He argued that art 12(4) was applicable as the United Kingdom could no longer be considered his own country, given that he left at such a young age and that his entire life was by that

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77 Liss, above n 45, at 1137.

78 Protocol 4 to the European Convention on Human Rights ETS 46 (16 September 1963), art 3(2); and American Convention on Human Rights 17955 UNTS 144 (opened for signature 22 November 1969, entered into force 18 July 1978), art 22(5).

79 Foster, above n 6, at 517.

80 Lynch, above n 70, at 321.

81 At 321.

82 Liss, above n 45, at 1137.

83 See Liss, above n 45.

84 *Stewart v Canada* CCPR/C/58/D/538/1993 (16 December 1996) at [1].

time based in Canada.[85] As such, it was argued that Canada was then the applicant's own country for all practical purposes.[86] 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.[87] The Committee found that the provision, at the very least, embraced individuals who, while not nationals in the formal sense, could not be considered mere aliens either.[88] Three exceptions were listed in which a broader interpretation of art 12(4) could be permitted.[89] These included persons who are stripped of their nationality, whose country of nationality has ceased to exist, or who are considered stateless.[90] The majority dismissed Mr Stewart's claim on the basis that he could not regard Canada as his own country as he had never attempted to acquire formal nationality, despite the state facilitating his ability to do so. He instead chose to retain the nationality of his country of origin.[91] Therefore, it was Mr Stewart's own inaction that prevented art 12(4) from applying to him.

It is important to note that in the dissenting judgment, delivered by Elizabeth Evatt and Cecilia Medina Quiroga, the majority's decision was regarded as incorrect.[92] In the minority's opinion, the narrow interpretation taken by the majority was too restrictive and failed to consider the raison d'etre of its formulation.[93] The provision exists because it is deemed unacceptable to deprive any individual of close contact with their general "web" of relationships that form their social environment; that is, family and friends.[94] Based on this consideration, the right that art 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.[95] In light of this, the dissenting judgment outlined that establishing what one's "own country" is invites considerations of one's "enduring connection" with their state, including factors such as long-standing residence, close personal and family ties and their intention to remain.[96] Therefore, the minority considered that Mr Stewart had

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85 At [3.4].

86 At [3.4].

87 At [12.3].

88 At [12.4].

89 At [12.4].

90 At [12.4].

91 At [12.5]–[12.6].

92 At [1] per Elizabeth Evatt, Cecilia Medina Quiroga and Francisco José Aguilar Urbina dissenting.

93 At [5].

94 At [5].

95 At [5].

96 At [6].

established Canada to be his "own country". This was due to his extensive sociological connections to Canada, which included his family, children and his role as a member of the Canadian community.[97]

The HRC reaffirmed the restrictive interpretation held by the majority in *Stewart v Canada* in the case of *Canepa v Canada* in 1997.[98] Similar to *Stewart*, Mr Canepa brought a claim on the basis of art 12(4), arguing that Canada was "his own country". He pointed towards the fact he was a long-term resident of Canada, having lived there for most of his life.[99] Additionally, he considered himself to be a Canadian citizen, only realising he was not when he was contacted by immigration officials who informed him that he was only a permanent resident.[100] The state argued that the definition of "his own country" could not be extended beyond the country of nationality, as a broader definition would seriously erode the ability of states to exercise their sovereign powers through border control and granting access to citizenship.[101] The HRC held that Mr Canepa had failed to acquire nationality due to his own negligence, rather than impediments by the state, meaning he was prevented from treating Canada as his "own country".[102]

Following *Stewart v Canada* and *Canepa v Canada*, General Comment No 27 was issued in 1999.[103] This re-examined the strict interpretation previously adopted in these decisions.[104] 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".[105] The HRC reiterated the language from *Stewart* regarding the scope of the phrase being broader than country of nationality.[106] Upon this reading, the Committee considered that the provision could apply to the three same categories of persons recognised in *Stewart*.[107] However, the Committee also considered that this was not a limited list and that other factors may result in the establishment of

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97 At [7].

98 Taylor, above n 43, at 347.

99 *Canepa v Canada* CCPR/C/59/D/558/1993 (20 June 1997) at [4.5].

100 At [2.2].

101 At [9.2].

102 At [11.3].

103 *General Comment No 27 regarding ICCPR, art 12 (freedom of movement)* CCPR/C/21/Rev.1/Add.9 (1 November 1999).

104 At [20].

105 At [20].

106 At [20].

107 At [20].

close and enduring connections between a person and a country.[108] This demonstrated a possible encroachment into the narrow interpretation taken by the majority in *Stewart*.[109] It also indicated that the Committee might be receptive to developing an interpretation of art 12(4) based on an individual's sociological membership rather than formal membership alone, similar to the decision outlined by the minority in *Stewart*.[110]

In recent decisions, the HRC has developed a broader approach to art 12(4) which focuses on sociological connections one has to a state rather than formal links of nationality or citizenship.[111] In *Nystrom v Australia*, the appellant, Mr Nystrom, was a 31-year-old Swedish national who moved to Australia at 27 days old.[112] He had no existing ties to Sweden and was considered an "absorbed member of the Australian community".[113] He was being deported as a result of obtaining an extensive criminal record, which brought him within the scope of s 501(7) of the Act.[114] Mr Nystrom argued that his deportation to Sweden violated his rights under art 12(4).[115] 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 art 12(4).[116] He noted that his ties to Australia were so extensive that he possessed all the characteristics necessary to call Australia his own country.[117] The HRC stated that there are other factors aside from nationality that may establish close and enduring connections between a person and their country.[118] In light of this, the HRC decided that Mr Nystrom's 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 art 12(4).[119] This was significant, as it was the first time that the HRC had accepted that the right

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108 At [20].

109 Liss, above n 45, at 1144.

110 At 1144.

111 Barbara Rütte *The Human Right to Citizenship: Situating the Right to Citizenship within International and Regional Human Rights Law* (Koninklijke Brill NV, Leiden, 2022) at 361.

112 *Nystrom v Australia* CCPR/C/102/D/1557/2007 (18 July 2011) at [2.1].

113 At [3.3].

114 At [2.3].

115 Mujuzi, above n 44, at 112.

116 *Nystrom v Australia*, above n 112, at [3.2].

117 At [5.5].

118 At [7.4]

119 At [7.5].

applied not just to citizens but also to non-citizens with special ties to that country.[120] It also illustrated that the list of exceptions outlined in *Stewart* where art 12(4) could be invoked was not exhaustive.[121] This represented a new approach to the question of what one's "own country" means, adopting a more liberal application that focused more on the sociological ties one has to a state rather than exclusively on formal membership.[122]

This liberal interpretation was upheld by the HRC in the case of *Warsame v Canada*. Mr Warsame was a Somali national by descent but had resided in Canada since the age of four as a permanent resident.[123] He had never lived or even visited Somalia.[124] He was awaiting deportation from Canada on the basis of "serious criminality".[125] He claimed that his rights under art 12(4) would be violated if he was deported to Somalia.[126] Following the liberal approach established in *Nystrom*, the Committee held that Mr Warsame had established Canada to be his own country.[127] The Committee placed significant weight on the fact he arrived in Canada when he was four years old, that his nuclear family lived in Canada and that he had no existing ties to Somalia, noting also that his Somali citizenship was an assumption rather than a certainty.[128]

Both of 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 art 12(4).[129] The new approach established in *Stewart* and *Warsame* illustrates a more robust meaning and places greater emphasis on the sociological ties one has to a state, rather than just questions of formal membership.[130]

C Nationality as a Concept of Belonging in International Law

The liberal, rights-based interpretation of one's "own country" established in international law by the HRC demonstrates a shift in international norms regarding the conferral of nationality. Human rights committees associated with human rights treaties, including the HRC, have begun to apply

120 Human Rights Law Center "Government defies UN directive to return deported man to Australia" (25 April 2012) <www.hrlc.org.au>.

121 Rütte, above n 111, at 361.

122 Liss, above n 45, at 1100.

123 *Warsame v Canada* CCPR/C/102/D/1959/2010 (21 July 2011) at [1.1].

124 At [2.1].

125 At [2.3].

126 At [3.8].

127 At [8.5].

128 At [8.5].

129 Liss, above n 45, at 1147.

130 At 1153.

treaty terms to shape citizenship practices.[131] The shifting trends reflect a shift from citizenship as an identity-based frame to a rights-based frame.[132]

The importance of connections and belonging to a state is not new to international law. It was first explored with the introduction of the "genuine link" principle by the International Court of Justice (ICJ) in the landmark case of *Nottebohm* in 1955.[133] 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.[134] The central matter concerned the admissibility of a claim for diplomatic protection by Liechtenstein against Guatemala in respect of injuries against a Liechtenstein national.[135] The Court held that the claim was inadmissible because Mr Nottebohm lacked a sufficient genuine connection to Liechtenstein, which was required for a state to bring a claim of diplomatic protection.[136] In the most famously cited passage of the case, the ICJ held:[137]

> … nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties.

The Court saw nationality as being more than a formal classification, being something that also depended on a relationship of belonging to that state through meaningful connections.[138] Although the case did 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.[139]

Although "citizenship" and "nationality" are often used synonymously, the two terms have quite distinct meanings.[140] "Nationality" is understood to stress the international, whereas "citizenship" stresses the domestic and municipal aspects.[141] Traditionally, international law has rarely interfered

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131 Peter J Spiro "A New International Law of Citizenship" (2011) 105 AJIL 694.

132 At 694.

133 Rayner Thwaites "The Life and Times of the Genuine Link" (2018) 49 VUWLR 645 at 646.

134 *Nottebohm (Liechtenstein v Guatemala) (Second Phase Judgment)* [1955] ICJ Rep 4 at 24.

135 Thwaites, above n 133, at 646.

136 *Nottebohm*, above n 134, at 26.

137 At 23.

138 Spiro, above n 131, at 705.

139 Rütte, above n 111, at 11.

140 At 13.

141 Alice Edwards "The meaning of nationality in international law in an era of human rights: Procedural and substantive aspects" in Alice Edwards and Laura van Waas (eds) *Nationality and Statelessness under International Law* (Cambridge University Press, Cambridge, 2014) 11 at 11.

with states' rights to regulate membership.[142] 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.[143] Citizenship is described as the "internal, national and municipal" aspect of membership of a state.[144] While, in a sense, both confer a legal relation between an individual and a state, they reflect two different respective legal frameworks, being the international and the domestic.[145] Therefore, although 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 part, although a person may come within the bounds of one's "own country" for the purposes of art 12(4) on the international level regarding nationality, this protection does not necessarily translate across to domestic law.

IV AUSTRALIA'S DOMESTIC LAW APPROACH TO THE APPLICATION OF ART 12(4) IN RELATION TO S 501 CASES

Despite the international trend toward a more liberal interpretation of one's "own country", 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 Migration Act persists. Australia's approach has been unwavering, leading to the deportation of many individuals who consider the country their only home. This part of the article examines how Australia's handling of s 501 cases contrasts with the HRC's approach. By analysing Australian court cases and relevant legislation, it becomes clear that there is a reluctance to extend the interpretation of one's "own country" under art 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.[146] Dualist systems of law revolve around two distinctly operating legal systems, being the international and the domestic, which do not overlap each other.[147] This means that in order for international instruments to be binding on the state, they must

142 Spiro, above n 131, at 694.

143 Rütte, above n 111, at 14.

144 At 14.

145 At 14.

146 Alice de Jonge "Australia" in Dinah Shelton (ed) *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (Oxford University Press, Oxford, 2011) 23 at 26.

147 Trischa Mann (ed) *Australian Law Dictionary* (online ed, Oxford University Press, Oxford, 2015), definition of "dualism".

be incorporated through domestic laws.[148] Despite Australia signing and ratifying the ICCPR in 1980, it has not implemented the ICCPR into domestic legislation. Accordingly, the rights contained in the treaty cannot be used as a direct source of rights for in Australia.[149]

This becomes particularly important considering that Australia does not have a comprehensive federal human rights framework.[150] Rather, it relies on a "patchwork" of human rights protections across both Commonwealth and state jurisdictions.[151] This approach lacks uniformity of standards and protection across Australia, as both the Commonwealth and states can enact concurrent – and inconsistent – legislation.[152] The Commonwealth has enacted some legislation to broadly protect specific rights, such as the Racial Discrimination Act 1975.[153] Additionally, some state jurisdictions have chosen to enact their own human rights instruments: namely, the Human Rights Act 2004 (ACT) and the Charter of Human Rights and Responsibilities Act 2006 (Victoria).[154] 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".[155] 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 art 12(4) as the basis for the revocation of deportation orders under s 501.

Although unincorporated treaties cannot be a direct source of rights in Australia, they do have relevance as an indirect source of rights and considerations that helps to shape the common law.[156] 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 it will act in

148 Fiona de Londras "Dualism, Domestic Courts, and the Rule of International Law" in Mortimer Sellers and Tadeusz Tomaszewski (eds) *The Rule of Law in Comparative Perspective* (Springer, New York, 2010) 217 at 218.

149 Joint Standing Committee on Foreign Affairs, Defence and Trade *Interim Report: Legal Foundations of Religious Freedom in Australia* (November 2017) at [6.1] and [6.3].

150 Julie Debeljak "The Fragile Foundations of Human Rights Protections: Why Australia Needs a Human Rights Instrument" in Paula Gerber and Melissa Castan (eds) *Critical Perspective on Human Rights Law in Australia* (Thomson Reuters, Pyrmont (NSW), 2021) vol 1 39 at 39.

151 At 40.

152 At 46.

153 At [3.50].

154 Joint Standing Committee on Foreign Affairs, Defence and Trade, above n 149, at [5.6]–[5.8].

155 National Human Rights Consultation Committee *National Human Rights Consultation Report* (September 2009) at 127, as cited in Debeljak, above n 150, at [3.10].

156 Mark Jennings, Senior Adviser, Office of International Law, Commonwealth Attorney-General's Department "Treaties in the Global Environment: Practical Treaty Making" (6 November 2003).

accordance with that convention.[157] Accordingly, domestic courts should favour a construction of ambiguous legislation which best upholds Australia's obligations under a treaty.[158] In *Teoh*, the Court had to consider whether Australia's commitment to the United Nations Convention on the Rights of the Child (UNCROC) 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.[159] It was held that 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.[160]

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.[161] This case concerned the cancellation of the applicant's visa under s 501 of the Migration Act.[162] The applicant argued that, following *Teoh*, he had a legitimate expectation that he would not be arbitrarily deprived of the right to enter his own country under art 12(4) of the ICCPR.[163] The Court found that the argument must fail, as the decision of the Administrative Appeals Tribunal 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.[164]

B Australian Case Law

Case law dating back to the inception of the character test highlights the strict approach that has been adopted by the Australian government and courts toward the 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.[165] Before complaining to the HRC, the applicant challenged the decision to cancel his visa in the Australian courts. The cancellation order was successful in the Full Federal Court.[166] 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

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157 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 291.

158 At 288.

159 At 288.

160 At 291.

161 *Amohanga v Minister for Immigration and Citizenship* [2013] FCA 31, (2013) 209 FCR 487 at [37].

162 At [8].

163 At [30].

164 At [41].

165 *Nystrom v Minister for Immigration and Multicultural and Indigenous Affairs*, above n 5, at [1]–[2].

166 At [31].

had little to do with the permanent banishment of an absorbed member of the Australian community with no relevant ties elsewhere.[167]

This decision was overturned by the High Court, which asserted that the Minister's judgement was sound, given that all mandatory considerations had been considered and the provision made no exceptions for those holding an absorbed persons' visa.[168] Subsequent to this ruling, the applicant 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.[169] 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 art 12(4).[170] 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.[171]

Australia's rigid approach to the deportation of non-citizens has been firmly established for some time. The position was notably articulated in 1982 in the case of *Pochi v Minister for Immigration and Ethnic Affairs*.[172] In this case, the plaintiff, 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).[173] Despite the plaintiff's total absorption, the Court maintained that a prolonged association with the country and its community did not alter one's status as an alien.[174] The sole path to changing this status was through an act of parliamentary naturalisation and gaining formal citizenship.[175] This same approach was upheld in the *ex parte Te* case, where it was reiterated that

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167 At [29].

168 *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* [2006] HCA 50, (2006) 228 CLR 566 at [40].

169 *Nystrom v Australia*, above n 112, at [7.5].

170 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) at [4].

171 Human Rights Law Center, above n 120.

172 *Pochi v Minister for Immigration and Ethnic Affairs* (1982) 151 CLR 101.

173 At 111.

174 At 111.

175 At 111.

integration in the Australian community did not exempt an individual from the statutory classification of an alien, in accordance with s 51(xix) of the Constitution of Australia.[176]

Numerous recent cases have tried, and ultimately failed, to find ways of circumventing the provisions of s 501. Claimants have sought to engage art 12(4) by contending that their integration into the Australian community means that it can be considered their "own country", thus bringing them outside the scope of s 501. Australia has maintained its refusal to acknowledge such a classification. In the case of *Steve v Minister for Immigration*, the applicant, born in New Zealand in 1967 and having relocated to Australia at 13 months old,[177] had his visa cancelled on mandatory character grounds under s 501(3A). The applicant's connections to Australia were so substantial, he stated:[178]

> 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.

The applicant sought judicial review of the Administrative Appeals Tribunal's decision not to rescind his deportation orders.[179] 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 art 12(4).[180] It was first submitted to the Court on behalf of the applicant that the Court should find that Australia was the applicant's "own country" notwithstanding his lack of citizenship.[181] The decision expressed by the HRC in *Nystrom v Australia* was argued to be applicable as an authority.[182] Recognising the similarities between this case and *Nystrom*, the Court conceded that Australia might indeed be considered the applicant's "own country" within the meaning of art 12(4).[183]

The applicant then asserted that the Tribunal made a jurisdictional 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

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176 *Re Minister for Immigration and Multicultural Affairs, ex parte Meng Kok Te* [2002] HCA 48, (2002) 212 CLR 162 at [211] per Kirby J and [229] per Callinan J.

177 *Steve v Minister for Immigration and Border Protection* [2018] FCA 311 at [3].

178 At [14].

179 At [1].

180 At [38].

181 At [40].

182 At [41].

183 At [43]–[44].

meaning of the provision.[184] Referencing the principle of legality,[185] 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 legislature's intention not to interfere with the applicant's asserted right to remain in Australia.[186] As part of this argument, the applicant submitted that the courts should expand the common law to recognise a fundamental right of the applicant to enter and remain in Australia as "his own country".[187] However, despite acknowledging that Australia was the applicant's "own country", the Court was unable to find jurisdiction for expanding the common law to recognise such a right.[188] The Court held that the right to stay and remain in Australia was one that extends only to formal citizens.[189] The Court explained that art 12(4) cannot be relied upon by a non-citizen as a fundamental right until it becomes reflected in the domestic law of Australia.[190] 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.[191] Consequently, the Court diverged from the international standard established by the Committee's ruling in *Nystrom*.

In the judgment in *Azar v Minister for Immigration and Border Protection*, issued subsequent to the judgment 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).[192] Much like the applicant in *Steve*, Mr Azar had extensive ties to Australia, having resided there since age one and having an established life there, including a child.[193] 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.[194] The key issue was whether subs 501(3A) should be read down to exclude applicants for whom Australia is their "own

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184 At [55].

185 At [56]. The principle of legality refers to the requirement that it is presumed that, in the absence of unmistakable and unambiguous language in legislation, Parliament did not intend to interfere with fundamental rights, immunities and freedoms.

186 At [55].

187 At [57].

188 At [58].

189 At [58].

190 At [60].

191 At [59]–[69].

192 *Azar v Minister for Immigration and Border Protection* [2018] FCA 1175, (2018) 261 FCR 1 at [4].

193 At [11]–[17].

194 At [21].

country".[195] It was contended that the reference to "person" in subs 501(3A) should be read down to exclude those who considered Australia to be their "own country" in regard to the principle of legality.[196] 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 art 12(4).[197]

The Court dismissed the applicant's 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 the visa of a person for whom Australia is their "own country".[198] This was because, with "persons" not being defined in the section, the Act only envisages there being two categories of persons: citizens and non-citizens.[199] Therefore, a "person" in this provision could only be a non-citizen.[200] Further, the Act creates two subcategories of non-citizens, being "lawful non-citizens", who are defined as those who hold a valid visa;[201] and "unlawful non-citizens", being those who are not "lawful non-citizens".[202] The Act provides no middle ground between a lawful and unlawful citizen.[203]

Equally, the Court concluded that when regard is had to the construction of the Act, there is no scope for implying that the duty to cancel a visa under s 501(3A) is limited, so as to carve out a subcategory of non-citizens whose ties to Australia are sufficient to engage art 12(4). The construction put forward by the applicant effectively would have created a "middle ground" between "citizen" and "non-citizen", which would have entitled non-citizens who fell within the meaning of art 12(4) to remain in Australia.[204] If a construction of this kind were 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 that of "non-citizen".[206]

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195 At [20].

196 At [29].

197 At [28].

198 At [32].

199 At [34].

200 At [35].

201 Migration Act, s 13.

202 Section 14; and *Azar*, above n 192, at [36].

203 At [36].

204 At [41].

205 At [41].

206 At [44].

The Court also agreed with the conclusion reached by Bromwich J and the Court in *Steve* that the common law cannot be developed by art 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 this is something that can only be achieved by an Act of Parliament.[208]

Although Australia has not been willing to carve out a limitation to s 501 for non-citizens who fall within the ambit of art 12(4), a limitation was held to exist by a majority of the High Court in *Love v Commonwealth of Australia* in respect of Aboriginal persons with Indigenous connections to the land.[209] The case of *Love* concerned s 501(3A) deportation orders against two individuals: Mr Love, a Papua New Guinean 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 had to Australia by being Aboriginal persons.[211] The central issue revolved around the reference to "alien" within s 51(xix) of the Constitution.[212] The key question put to the Court was whether it was open for Parliament to treat persons with the characteristics 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 maintained a spiritual and cultural connection with the land now, in a very real sense, "belong" to that land.[214] This relationship of belonging to the land is so deep and enduring that it means that they cannot be treated as strangers to the land.[215] Rather, they hold a special status as "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]

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207 At [45].

208 At [48].

209 *Love v Commonwealth of Australia* [2020] HCA 3, (2020) 270 CLR 152.

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] per Gageler J.

216 At [3] per Kiefel CJ and [117] per Gageler J.

217 At [74] Kiefel CJ and [285] per Nettle J.

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 Migration Act must be read down accordingly to exclude Aboriginal persons.[218]

In 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 their Aboriginal heritage and membership.[219] The Court adopted the criteria established in the case of *Mabo v Queensland (No 2)* to discern such Aboriginal status.[220] Consequently, the Court concluded that only Mr Thoms met these requirements, enabling him to avoid being labelled an "alien" for the purposes of the Migration Act.[221] Mr Love's connection to his Aboriginal heritage was not as clear, and therefore the Court could not definitively ascertain whether he qualified as an "alien" under 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 situations of Aboriginal persons are distinct from those who rely on their absorption into 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 judgment delivered by Edelman J. Justice Edelman explained that s 51(xix) gives Parliament the power to control the 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 acknowledged 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 posited 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

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218 At [285] Nettle J and [397] per Edelman J.

219 At [391] per Edelman J.

220 At [76] per Bell J; see *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

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.

into the Australian community might be a relevant factor in determining non-alienage, Edelman J found it was unnecessary to explore the issue further as the plaintiff's identity as an Aboriginal person was sufficient to find non-alienage.[227] This suggests that a test for non-alienage based on absorption into the Australian community is something that the courts may be willing to re-examine.

V CONCLUSION

The human right protected by art 12(4) is important, as it protects the 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 right 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 an individual 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 art 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 raises the question of whether it is time for domestic laws to adapt to reflect the standards established in international law to better protect the rights of those who consider Australia to be their "own country".

As Australia lacks 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 1 July 2023, New Zealand citizens who have been living in Australia for four or more years are 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 an 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 both in informing the individual of the risks associated with failing to acquire citizenship and in facilitating the process to obtain it.

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227 At [464] per Edelman J.

228 New Zealand Foreign Affairs and Trade, above n 35.

229 New Zealand Foreign Affairs and Trade, above n 35.

Arguably, Australia also needs to look at implementing a comprehensive federal human rights framework that incorporates 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 to be their home.