

Can Indigenous Australians be deported as 'aliens'? A High Court decision will show us the strength of m

Written by Dominic O'Sullivan, Adjunct Professor, Faculty of Health and Environmental Sciences, Auckland University of Technology and Associate Professor of Political Science, Charles Sturt University

Federal Immigration Minister David Coleman has [cancelled the visas of two overseas born Indigenous men](#) with a criminal past. They are, Coleman says, aliens with no automatic right to live in Australia.

[In 2018](#), Daniel Love and Brendan Thoms left prison. They had been sentence to 12 and 18 months respectively. This means they are not of good character and may be deported, according to [the character test](#) for non-citizens living in Australia that the minister is applying.

Neither Love nor Thoms are Australian citizens, but have lived in Australia since their early childhood. Love is a Kamileroi man born in Papua New Guinea, and Thoms is a native title holder and Gunggari man, born in New Zealand.

The men appealed the minister's decision, and a hearing was held at the High Court [on Thursday](#). The court has reserved its decision.

For the men, the decision will effectively determine whether they can keep the associations that make them Indigenous.

This includes their right to keep their ancestral connections to country, to be part of an Indigenous family, to language and, ultimately, whether the minister may lawfully deny their human right to culture.

Read more: [***Indigenous people no longer have the legal right to say no to the Adani mine - here's what it means for equality***](#)

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The federal government's position is that they need state citizenship to belong to their land, even though their ancestral presence predates colonisation by at least [65,000](#) years.

These men are not 'aliens'

Since [both men are citizens of other countries](#), the federal government says they owe allegiance to a foreign power. This, along with their non-citizen status, makes them "alien" and so eligible for deportation.

[The men's lawyers](#) disagree, arguing Love and Thoms aren't alien because culture and ancestry give them a "special relationship" to Australia. They cite the definition of a judge used in a 1988 case:

An alien [...] is in essence a person who is not a member of the community which constitutes the body politic of the nation state.

The High Court will make its decision from nuances in the law. But important political points must also be considered.

The power to remove an Indigenous person from their traditional country is a power over that person's indigeneity. It shows how Australia is still asserting colonial power over the identity of its First Peoples.

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[The Victorian Government](#) also appeared in court in support of Love and Thoms, arguing it

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was “unthinkable” Indigenous people didn’t belong to Australia.

It argued that because they’re Indigenous Australians “[it is irrelevant](#) [they] were born outside Australia, are citizens of another country, and are not citizens of Australia”.

The right to culture

I believe the men’s “special relationship” to Australia should be understood as an allegiance to their own Indigenous nations – a “belonging” that the Indigenous nation, not the state, should define.

This is what’s asserted under the [United Nations’ Declaration on the Rights of Indigenous Peoples](#), which states:

Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right.

[The UN declaration](#) also insists:

Indigenous peoples [...] have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders.

States, in consultation and cooperation with Indigenous peoples, shall take effective measures to facilitate the exercise and ensure the implementation of this right.

In other words, while self-determination is a right that belongs to everybody, it occurs in context,

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requiring geographic, cultural and familial associations.

Australia was one of [just four states](#) to vote against the declaration when it was adopted in 2007.

Read more: [*No, Mr Dutton, DNA testing ISIS brides won't tell you who's an Australian citizen*](#)

But in 2009, [it changed its position](#), accepting the declaration as an “aspirational” statement and to recognise the “fundamental freedoms” of Indigenous people.

One of these freedoms is the right to culture, a right the Australian government is ignoring in this case.

Challenging citizenship claims around the world

This is the same right descendants of the Maori diaspora population claim against the New Zealand state.

[New Zealand born Maori citizens](#) may pass citizenship on to their children born overseas, but not to their grandchildren. They have no automatic right to part of what makes them Maori – a physical association with an identifiable place.

But belonging is a matter of *whakapapa* (ancestry), not place of birth.

The state's position is that state citizenship comes before membership of an Indigenous nation,

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and may be required for access to one's ancestral home.

Read more: [The Crown is Mori too - citizenship, sovereignty and the Treaty of Waitangi](#)

It's also a state position Indigenous peoples on the [US-Canadian border](#) and in the [Arctic Circle](#) have challenged. In each case international borders have been drawn across Indigenous territories.

A [Haudenosaunee member](#) in North America proposes a simple solution:

We were and are not citizens of the United States, Britain or Canada and as it was agreed when the US Canadian border was drawn it ought to remain 'ten feet above our heads'.

In the case of Love and Thoms, the legal questions the present Australian High Court case must resolve may be complicated. However, the political question is straightforward. Should the state be able to take away a person's indigeneity?

Dominic O'Sullivan does not work for, consult, own shares in or receive funding from any company or organisation that would benefit from this article, and has disclosed no relevant affiliations beyond their academic appointment.

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