



**International Covenant on  
Civil and Political Rights**

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**Human Rights Committee**

**102<sup>nd</sup> session**

11-29 July 2011

**Views**

**Communication No. 1557/2007**

<u>Submitted by:</u>	Stefan Lars Nystrom (represented by the Human Rights Law Resource Centre)
<u>Alleged victim:</u>	The author, his mother, Britt Marita Nystrom and his sister, Annette Christine Turner.
<u>State party:</u>	Australia
<u>Date of communication:</u>	22 December 2006 (initial submission)
<u>Document references:</u>	Special Rapporteur's rule 97 decision, transmitted to the State party on 1 May 2007 (not issued in document form)
<u>Date of adoption of Views:</u>	18 July 2011

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\* Made public by decision of the Human Rights Committee.

Subject matter:	Expulsion of the author from his country of residence.
Substantive issues:	Arbitrary interference with right to privacy, family and home; right to protection of the family; right to enter one's own country; freedom from arbitrary detention; ne bis in idem; and prohibition of discrimination.
Procedural issue:	Non substantiation
Articles of the Covenant:	2, paragraph 1; 9, paragraph 1; 12, paragraph 4; 14, paragraph 7; 17; 23, paragraph 1; and 26.
Articles of the Optional Protocol:	2 and 5, paragraph 2 (b)

On 18 July 2011, the Human Rights Committee adopted the annexed text as the Committee's Views under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 1557/2007.

[Annex]

## Annex

### **Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights (102<sup>nd</sup> session)**

concerning

#### **Communication No. 1557/2007\*\***

Submitted by: Stefan Lars Nystrom (represented by the Human Rights Law Resource Centre)

Alleged victim: The author, his mother, Britt Marita Nystrom and his sister, Annette Christine Turner.

State party: Australia

Date of communication: 22 December 2006 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 18 July 2011,

Having concluded its consideration of communication No. 1557/2007, submitted to the Human Rights Committee by Stefan Lars Nystrom under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the authors of the communication and the State party,

Adopts the following:

#### **Views under article 5, paragraph 4, of the Optional Protocol**

1.1 The author of the communication, dated 22 December 2006, is Stefan Lars Nystrom, a Swedish citizen born in Sweden on 31 December 1973. He submits his communication on his behalf and on behalf of his mother, Britt Marita Nystrom, a Swedish citizen born on 27 March 1942 in Finland; and on behalf of his sister, Annette Christine Turner, an Australian citizen born on 12 October 1969 in Australia. He claims to be a victim of a violation by Australia of his rights under articles 9, paragraph 1; 12, paragraph 4; 14, paragraph 7; 17;

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\*\* The following members of the Committee participated in the examination of the present communication: Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabian Omar Salvioli and Ms. Margo Waterval.

Pursuant to rule 90 of the Committee's rules of procedure, Committee member, Mr. Krister Thelin did not participate in the adoption of the present Views.

The texts of two individual opinions signed by Committee members, Mr. Gerald L. Neuman, Mr. Yuji Iwasawa, Sir Nigel Rodley, Ms. Helen Keller and Mr. Michael O'Flaherty are appended to the text of the present Views.

23, paragraph 1; and 26, of the International Covenant on Civil and Political Rights, as well as a violation of article 2, paragraph 1, read in conjunction with the foregoing articles. He also claims that his mother and sister are victims of a violation of articles 17 and 23, paragraph 1 of the International Covenant on Civil and Political Rights. He is represented by the Human Rights Law Resource Centre<sup>1</sup>

1.2 On 23 December 2006, the Committee, pursuant to rule 97 of its rules of procedure, acting through its Special Rapporteur on New Communications and Interim Measures, denied the author's request for interim measures to prevent his expulsion to Sweden. The author was deported to Sweden on 29 December 2006.

### **The facts as submitted by the author**

2.1 The author's mother was born in Finland and migrated to Sweden in 1950 where she got married. In 1966, the couple migrated to Australia. Their first child, Annette Christine Turner, was born in Australia. In 1973, while pregnant a second time, the author's mother travelled back to Sweden with her daughter to visit family members. She stayed in Sweden for the author's birth. When the author was 25 days old he travelled to Australia on a Swedish passport with his mother and his sister. They arrived in Australia on 27 January 1974.

2.2 The author's parents separated when he was 5 years old and are now divorced. His mother, father and sister continue to live in Australia. There has been little contact between the author and his father since his parents' divorce. His mother is a permanent resident and his sister was born in Australia and therefore holds an Australian passport. The author remained in Australia all his life since he was 27 days old, holding a Transitional (Permanent) Visa. He has few ties with Sweden, having never learned the Swedish language and not having been in direct contact with his aunts and uncles and cousins there. On the other hand, the author has close ties with his mother and sister as well as his nephews living in Australia. The author has held an Australian Medicare (governmental healthcare) card and an Australian driver's licence. He has received Centre link unemployment benefits from the Australian government at several points in his life. He has paid taxes to the State as a car detailer and fruit picker.

2.3 The author has a substantial criminal record within the meaning of Section 501(7) of the Migration Act<sup>2</sup>. Since the age of 10, he has been convicted of a large number of offences, including aggravated rape when he was 16 years old on a child 10 years old, arson and various offences relating to property damage, armed robbery, burglary and theft, various driving offences; and offences relating to possession and use of drugs. In relation to all of these offences, the author has been punished under the domestic criminal justice system. At the age of 13, he was committed to the care of the State. At the time of deportation, the author was not subject to any outstanding or incomplete sentences or punishments. The author suffered from a drinking problem at the origin of most of the offences he was accused of. He was partially treated for this drinking problem and learned to control it.

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<sup>1</sup> The Optional Protocol entered into force for the State party on 25 September 1991.

<sup>2</sup> Section 501 (2) of the Migration Act 1958 provides that the Minister may cancel a visa granted to a person if the Minister reasonably suspects that the person does not pass the character test (s. 501 (2) (a)), and the person does not satisfy the Minister that he or she in fact passes the character test (s. 501 (2) (b)).

Section 501 (6) (a) provides that a person does not pass the character test if he or she has a substantial criminal record within the meaning of s. 501 (7).

Section 501 (7) (c) provides that a person is deemed to have a substantial criminal record if he or she has been sentenced to a term of imprisonment of 12 months or more.

2.4 On 12 August 2004, the Minister cancelled the author's Transitional (Permanent) Visa on the basis of his failure to meet the character test specified in Section 501(6) of the Act by reference to his substantial criminal record. As a result, the author was arrested and detained at Port Phillip Prison where he stayed for 8 months. The author's application for judicial review of the decision to cancel his visa was dismissed by a federal magistrate but subsequently allowed by the Full composition of the Federal Court. The judgement dated 30 June 2005, ruled that "it is one thing to say that the responsibility to determine who should be allowed to enter or to remain in Australia in the interests of the Australian community ultimately lies with the discretion of the responsible minister. That has little to do with the permanent banishment of an absorbed member of the Australian community with no relevant ties elsewhere". As a result of his successful appeal to the Full Federal Court, the author was released, started working and found some stability in his life.

2.5 The Minister successfully appealed to the High Court, which ruled on 8 November 2006 that the author's visa should be cancelled and the author deported from Australia. The author was therefore re-arrested on 10 November 2006 and imprisoned at the Maribyrnong Immigration Detention Centre pending deportation, which occurred on 29 December 2006. During his detention period, the author was classified as a "high risk" detainee and he was accordingly subjected to solitary confinement through the entire course of his detention. Prior to the author's deportation to Sweden, the Swedish authorities requested the State party not to deport him based on humanitarian grounds.

2.6 The author thought he was an Australian citizen, having lived all his life in Australia. He realized he was a foreigner in his own country when the State party authorities raised the possibility of cancelling his visa in August 2003. He was not aware he had a visa as the visas held were conferred on him automatically by Australian legislation. They did not consist of visas made or stamped on a passport. The author's mother herself thought the author was an Australian citizen. In the earlier time of their stay in Australia (including for two to three years after the author's birth), the author's mother and her husband received letters from the Australian authorities inviting the two of them to become citizens. However, these letters never referred to their children, which reinforced the impression that the children were, in fact, Australian citizens.

2.7 The author signed a statutory declaration agreeing to his deportation to Sweden as he was told by the State party authorities that he would face indefinite detention pending consideration of the matter by the Committee if he decided not to sign this declaration. The author was offered no legal advice before signing this declaration. Upon arrival in Sweden, the author was not met at the airport by the Swedish authorities. The Swedish Justice Department claimed in the press that they received no request of any kind by the Australian authorities for transitional assistance to be provided to the author. As he was not deported to Sweden to serve any type of prison sentence, the author has received no government support, other than unemployment benefits, since his arrival. The author temporarily lived with his mother's brother-in-law and then rented a small apartment, using half of his unemployment benefit.

2.8 The author arrived in Sweden entirely unprepared for the culture, language and climate. He has suffered considerable confusion, exhaustion, anger and unhappiness as a result of the process to which he has been subjected. Apart from the provision of unemployment benefits, the author has received no governmental or community support in relation to language training and social aspects. This distress has led to a return to alcohol abuse. His mother and sister are unable to visit him due to a lack of financial means. Such separation has caused great emotional distress to the family, which is irreparably and indefinitely disrupted.

### The complaint

3.1 The author considers that the State party's decision to expel him to Sweden violates articles 9, paragraph 1; 12, paragraph 4; 14, paragraph 7; 17; 23, paragraph 1; and 26, of the Covenant as well as article 2, paragraph 1, read in conjunction with articles 14, paragraph 7; 17; and 23, paragraph 1. The author further claims that the State party has violated his mother and sister's rights under articles 17 and 23, paragraph 1 of the Covenant.

#### *Article 12, paragraph 4*

3.2 The author alleges that by cancelling his Transitional (Permanent) Visa, leading to his deportation, the State party has breached his right to enter his own country, set forth in article 12, paragraph 4, of the Covenant. He refers to the Committee's jurisprudence<sup>3</sup>, including General Comment No. 27 on the freedom of movement, where the Committee has stated that the wording of article 12, paragraph 4 does not distinguish between nationals and aliens; that persons entitled to exercise this right can be identified only by interpreting the meaning of the phrase "his own country"; that the concept of "his own country" is broader than the concept "country of his nationality"; and that it is not limited to nationality in a formal sense, that is, nationality acquired at birth or by conferral but that it embraces, at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien. The author attaches particular importance to the separate opinion of Committee members Evatt, Medina Quiroga and Aguilar Urbina (joined by Ms. Chanet, Mr. Prado Vallejo and Mr. Bhagwati) who, in *Charles E. Stewart v. Canada* considered that "for the rights set forth in article 12, the existence of a formal link to the State is irrelevant; the Covenant is here concerned with the strong personal and emotional links an individual may have with the territory where he lives and with the social circumstances obtaining in it. This is what article 12, paragraph 4 protects."

3.3 The author notes that by contrast with *Stewart v. Canada* and *Canepa v. Canada*<sup>4</sup>, the author has lived all his life in Australia which he therefore considers his own country. The author emphasizes that the *travaux préparatoires* of the Covenant also strongly indicate a willingness to broadly interpret the concept of "his own country" as such wording was preferred to the initial concept of "country of which he is a national". The author also refers to the judgement of the Australian Full Federal Court, which ruled that the author was an absorbed member of the Australian community with no ties to Sweden. Indeed, the Australian Government had accepted that from 2 April 1984 (a date relevant in relation to certain legislative changes), the author had ceased to be an immigrant by reason of his absorption into the Australian community. That year, he was indeed granted an Absorbed Person Visa. In an Australian legal context, ceasing to be an immigrant by reason of absorption occurs when a person becomes a member of the Australian community or is absorbed into the community of the country<sup>5</sup>. In this regard, the ties existing between absorbed members and the State are as important as the ties between the State and Australian citizens. Thus the author was obliged to comply with the laws regarding taxation, he could vote and be elected for office in local government in Victoria, and could be eligible to serve in the Australian Defence Force, which is not confined to citizens. The author further argues that he could have served in the police or similar public services if he

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<sup>3</sup> The author refers to communication No. 538/1993, *Stewart v. Canada*, Views adopted on 1 January 1996, para 12.4

<sup>4</sup> The author refers to communication No. 558/1993, *Canepa v. Canada*, Views adopted on 3 April 1997.

<sup>5</sup> The author refers to Australian jurisprudence in *Ex parte Walsh and Johnson*; *In re Yates* (1925) 37 CLR 36, 62-5 (Knox CJ), and *O'Keefe v. Calwell* (1948) 77 CLR 261, 277 (Latham CJ).

had wished so. Therefore, the ties binding him to Australia are as strong as the ties the State would have with any of its citizens.

3.4 Due to his criminal record, once deported to Sweden, the author is unlikely to be allowed to return to Australia. In this regard, the author submits that the commission of criminal offences alone does not justify the expulsion of a person from his own country, unless the State could show that there are compelling and immediate reasons of necessity, such as national security or public order, which require such a course. Both the delay in taking action after the author's most serious offences (offences committed mainly during the author's teenage years) and the fact that only moderate weight was given to the risk of recidivism suggest that protection of the Australian community from future conduct on the part of the author was not a major factor for the Minister in reaching her decision. The author therefore considers that the State party's decision to deport him and subsequently prohibit him from ever returning to Australia is arbitrary and contravenes article 12, paragraph 4 of the Covenant.

*Article 14, paragraph 7*

3.5 The author further contends that the State party has violated his rights under article 14, paragraph 7, which states that no one shall be tried or punished again for an offence for which he has already been convicted. The author submits that his visa cancellation and consequential deportation constitutes another punishment for offences in respect of which he has already served his time in accordance with Australian law. The author notes the use of "tried or punished" in article 14, paragraph 7. In this sense, he acknowledges that he has not been retried for his crimes. However, he claims he has been punished again, through the cancellation of his transitional (permanent) visa, his consequential detention and his deportation to Sweden years after the events in question took place. The author insists that his detention for a period of 8 months at Port Philip Prison which is not an approved immigration facility but rather a maximum-security regular prison, where convicted and remand prisoners are held in relation to indictable offences, are strong evidence that the State party's actions against the author amount to punishment within the meaning of article 14, paragraph 7 of the Covenant.

*Articles 2, paragraph 1, and 26*

3.6 The author submits that the denial of his right to be free from double punishment amounts to a breach of articles 2, paragraph 1, and 26 of the Covenant in that he was unreasonably discriminated against based on his nationality. As stated previously, the author considers that he has been punished twice for the same offence. Such double punishment could not be imposed on an Australian national. A person's long term residency, as opposed to citizenship, is not a reasonable and objective criterion to form the basis of a decision to infringe the rights enshrined in article 14, paragraph 7. The author therefore considers that the State party has violated his rights under article 2, paragraph 1 and article 26, read in conjunction with article 14, paragraph 7 of the Covenant.

*Articles 17, and 23, paragraph 1*

3.7 The author contends that the State party has violated his right to protection from arbitrary interference with his family life on the one hand, thus violating article 17, read in conjunction with article 23, paragraph 1; and his right to protection from arbitrary interference with his home on the other hand, in violation of article 17 of the Covenant. The bonds between his mother, his sister and him constitute family for the purposes of both articles 17 and 23. Being a nuclear family, this relationship satisfies even the most restrictive interpretation of both provisions. Requiring one member of a family to leave, while the other members of the family remain in Australia, amounts to an interference with

the family life of the author, his mother and his sister. When not imprisoned or placed in foster care, the author used to live with his mother.

3.8 While acknowledging that his mother and his sister are not *per se* prohibited from visiting him in Sweden, the author refers to the Committee's jurisprudence where it has considered that a State party's refusal to allow one member of a family to remain in its territory, while the other members of the family unit are allowed to remain in its territory, can still amount to an interference with that person's family life<sup>6</sup>. Therefore a decision by the State party to deport him and to compel his immediate family to choose whether they should accompany him or stay in the State party would result in substantial changes to long-settled family life<sup>7</sup> in either case, in a manner which would violate article 17, read in conjunction with article 23, paragraph 1.

3.9 As for the notion of home, the author refers to the Committee's General Comment No. 16 on the right to privacy, where it has stated that the term "home" in English as used in article 17 of the Covenant is to be understood to indicate the place where a person resides or carries out his usual occupation. The author submits that the term home should here be interpreted broadly to include the community in which a person resides and of which he is a member. The fact that the author is not an Australian citizen is not relevant for the Committee's understanding of the notion of home under article 17 of the Covenant. By uprooting the author from the only country he has ever known, severing his contact with family, friends and regular employment, and deporting him to an alien environment such as Sweden, without any support networks, settlement initiatives, or prospects of meaningful integration, the State party has interfered with the home life of the author. With regard to the arbitrariness of such measure, the author refers to the Committee's jurisprudence where it has considered that in cases where one member of a family must leave the territory of a State party, while the other members of a family are entitled to remain, the relevant criteria for assessing whether or not the specific interference with family life can be objectively justified must be considered on the one hand, in light of the significance of the State party's reasons for the removal of the person concerned and, on the other hand, the degree of hardship the family and its members would encounter as a consequence of such removal<sup>8</sup>.

3.10 The State party has justified his deportation on the basis that he had a substantial criminal record and was therefore deemed to be of a "bad character" for the purposes of the criteria set out under the Act. In commenting on the seriousness and nature of the author's conduct, the Minister placed the greatest emphasis on the convictions for rape and intentionally causing serious injury which occurred in December 1990 and then on two armed robbery convictions in February 1997. Thus, the Minister's decision to deport the author was made almost 14 years after the conviction for rape and intentionally causing injury and over nine years after his release from prison on those charges, seven years after the armed robbery convictions and a number of years after his release from prison on the latter charges. The author therefore concludes that the timing of the Minister's decision does not demonstrate any sense of an urgent need to protect the Australian community, but rather a willingness to further punish the author for the crime he has committed. For all the reasons mentioned, the author considers that the State party has violated articles 17 and 23, paragraph 1 in that it has arbitrarily interfered with his rights to privacy, family and home and his right to protection of his family. It has uprooted him from his "home" which he

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<sup>6</sup> The author refers to communication No. 1011/2001 *Madafferi v. Australia*, Views adopted on 26 July 2004, para. 9.7; communication No. 930/2000, *Winata v. Australia*, Views adopted on 26 July 2001, para. 7.1; communication No. 558/1993, *Canepa v. Canada*, *op. cit.*, para. 11..

<sup>7</sup> The author refers to communication No. 1011/2001 *Madafferi v. Australia*, *op. cit.*, para. 9.8; communication No. 930/2000, *Winata v. Australia*, *op. cit.*, para. 7.2.

<sup>8</sup> The author refers to communication No. 1011/2001 *Madafferi v. Australia*, *op. cit.*, para. 9.8.

defines as the Australian community in which he has lived all his life. Due to his criminal record, it is unlikely that he will ever be in a position to return to Australia and thus be close to his family in the near future.

3.11 The author also considers that as a person with a different nationality, he has suffered discrimination in his entitlement to his right to protection from arbitrary interference with his home and his right to protection of his family. He therefore considers that the State party has also violated articles 2, paragraph 1, and 26, read in conjunction with articles 17 and 23, paragraph 1 of the Covenant.

#### *Article 9*

3.12 The author finally claims that his detention period of over 9 months, mainly at Port Phillip Prison (8 months) constitutes a violation of article 9, paragraph 1 of the Convention. He points out that article 9, paragraph 1 permits deprivation of liberty as long as such detention is provided by law and is not arbitrary. Australian authorities have not provided any justification for his detention during the course of his legal appeals or in preparation for his deportation that takes into account the nature of his individual circumstances. The author has not entered Australia illegally or purported fraudulently or dishonestly to have any visa or citizenship status he does not possess, and the State party has never alleged he has done so. The author's substantial criminal record could not be the basis for his detention as he has already served his sentences for those crimes. His detention on such grounds would therefore be unnecessary and unreasonable. The author adds that he did not represent a flight risk so as to render incarceration in immigration detention a proportionate response. At that time, the author had a steady employment and prospects of success in regaining his visa. He had no advantage in fleeing. The State party could have used alternatives to imprisonment, such as the imposition of reporting obligations, sureties or other conditions, to achieve the same goal. The author therefore claims that his detention was arbitrary, thus violating article 9, paragraph 1 of the Covenant.

#### **The State party's observations on admissibility and merits**

4.1 On 7 February 2008, the State party submitted its observations on the admissibility and merits. It rejects the authors' claims as insufficiently substantiated and for failing to exhaust domestic remedies as far as article 14, paragraph 7 is concerned. The State party further claims that the author's allegations are without merit.

#### *Article 9, paragraph 1*

4.2 Regarding the author's claims under article 9, paragraph 1, the State party considers that the author's detention *per se* cannot constitute sufficient substantiation for his claim of arbitrariness and that there was ample justification for detaining the author. The author's detention was specifically adapted to the purpose of processing him for removal, which is considered to be a lawful purpose under the Covenant.

4.3 On the merits, the State party argues that the author was detained following the lawful revocation of his visa on character grounds under the Migration Act. Immigration officers are obliged to detain people in Australia without valid visas under Section 189 of the Act. Section 196 provides for the duration of detention. It states that non-citizens detained under section 189 must be kept in immigration detention until they are a) removed from Australia under Section 198 or 199; b) deported under section 200; or c) granted a visa. The State party considers this legislative regime to be appropriate and proportional to the ends of preserving the integrity of Australia's immigration system and protecting the Australian community. As such, it cannot be considered arbitrary.

4.4 The State party refutes the author's claim that his detention for 8 months in Port Phillip prison was so long as to render it arbitrary. The Minister for Immigration was exercising her lawful powers under Section 501 of the Migration Act when she decided to cancel the author's visa. His detention was a predictable consequence of this decision, as it was a corollary of his removal, which flowed automatically from the Minister's decision. Furthermore, the author's appeal to the Full Federal Court took some time to be resolved but it was the author's decision to make such an appeal. Once the Full Federal Court handed down its decision in favour of the author, he was promptly released from detention, until the State party successfully contested it in the High Court, at which time he was rearrested. The State party adds that contrary to the author's argument, his long history of contempt for Australian law and alcoholism suggested he could not be relied on to present himself for removal. This view was vindicated when he did not comply with such an order after the High Court's decision on 8 November 2006, necessitating an escort on 10 November 2006.

4.5 Several factors demonstrate that the author was treated in a reasonable, necessary, appropriate and predictable manner, which was proportional to the ends sought given the circumstances of the case. First, he was always treated in accordance with domestic law. Secondly, he failed to meet the character test established by section 501 of the Migration Act due to his substantial criminal record. The author was accorded a hearing, but failed to convince the Minister of his suitability to remain in Australia. Finally the author made threats at various stages of the process which led immigration authorities to consider him to be unsuitable for mainstream immigration detention.

4.6 The State party further claims that the Minister was guided by Ministerial Direction No. 21 on the exercise of powers under section 501 of the Migration Act when she made her decision to cancel the author's visa. The author's relationship with his mother, sister and nephews were relevant considerations. However, the potential for disruption to these relationships had to be weighed against the risk to the Australian community of allowing him to stay and the expectations of the Australian community in this regard. The State party insists that it takes all reasonable measures to protect the Australian community, especially vulnerable members of the community such as children and young people. The author was convicted of rape and assaulting a 10 year-old boy when he was 16 years old. In assessing the author's character and the need to protect the community, the Minister took into account the seriousness of the offences, the risk he would re-offend and whether cancelling his visa would serve as a deterrent. The State party notes that since the rape and assault of the ten year old boy, the author has been convicted of around 80 other offences, including two counts of armed robbery resulting in substantial prison sentences. The author's last conviction occurred in 2002 and he was making apparent efforts to reform his behaviour. However he established a pattern of recidivism in his lifetime which meant it was reasonable for the Minister to form the view that he still constituted a risk to the community. The Minister also recognized that the author had no ties to Sweden and did not speak Swedish but eventually decided that the seriousness and frequency of his crimes would outweigh these considerations.

*Article 12, paragraph 4*

4.7 With regard to article 12, paragraph 4, the State party considers the author's claims to be inadmissible for failure to substantiate. The author's claims that Australia is his own country are based on circumstantial evidence which does not assist his case. The author is not a national of Australia for the purposes of the Covenant, and is therefore subjected to the domestic rules which apply to non-citizens. Without a valid visa, the author does not

lawfully reside in Australia. The State party refers to the Committee's General Comment No 15 *on the position of aliens under the Covenant*, where it has stated that "it is in principle a matter for the State to decide who it will admit to its territory"<sup>9</sup>.

4.8 On the merits, the State party notes that the author relies heavily on the Committee's jurisprudence in *Stewart v. Canada*<sup>10</sup>. Despite the high number of individual opinions in this case, the Committee's Views themselves do not support the author's conclusion that Australia is his own country for the purpose of article 12, paragraph 4 of the Covenant. In *Stewart v. Canada*, the Committee lists some circumstances in which an author's "own country" would not be dependent on his nationality. However, none of the exceptions covers the author's particular situation. He has not been stripped of his nationality, nor has the country of nationality ceased to exist as a State, nor is he stateless. All of these exceptions involve aliens whose nationality is in doubt, illusory or has ceased to exist. The author's Swedish nationality on the other hand, has never lapsed. The State party quotes the critical passage of *Stewart v. Canada*, where the Committee considered that the question was "whether a person who enters a given State under that State's immigration laws, and subject to the conditions of those laws, can regard that State as his own country when he has not acquired its nationality and continues to retain the nationality of his country of origin. The answer could possibly be positive were the country of immigration to place unreasonable impediments on the acquiring of nationality by new immigrants. But when [...] the country of immigration facilitates acquiring its nationality, and the immigrant refrains from doing so, either by choice or by committing acts that will disqualify him from acquiring that nationality, the country of immigration does not become "his own country" within the meaning of article 12, paragraph 4, of the Covenant"<sup>11</sup>. In this regard it is to be noted that while in the drafting of article 12, paragraph 4, of the Covenant the term 'country of nationality' was rejected, so was the suggestion to refer to the country of one's permanent home".

4.9 The State party emphasizes that far from placing unreasonable impediments on the acquisition of citizenship, it offered the author's mother and her husband the opportunity to apply for citizenship more than once. Not only did the Nystrom family not take up this offer, the author also committed several crimes, any one of which would disqualify him from eligibility for a visa to remain in Australia, let alone citizenship. As for the strong connection tying the author with Australia, the State party refers to the Committee's jurisprudence in *Madafferi v. Australia*<sup>12</sup>, where the Committee rejected the author's claim that Australia was his own country within the meaning of article 12, paragraph 4 despite his being married to an Australian citizen, having Australian children and running a business in Australia. The State party concludes that if the Committee did not consider Australia as Mr. Madafferi's own country, *a fortiori*, it could not consider Australia as the author's own country, within the meaning of article 12, paragraph 4 of the Covenant. The State party adds that Absorbed Person Visa holders fall squarely within the category of non-citizens and are subject to the same visa rules under the Migration Act as other non-citizens. The Absorbed Person Visa does not grant the same rights as an Australian citizen, and specifically does not grant the visa holder implied protection from removal. The State party concludes that the author's own country is nothing other than Sweden.

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<sup>9</sup> The State party refers to Committee's General Comment No. 15 related to article 12 of the Covenant, para. 5.

<sup>10</sup> Communication No. 538/1993, *Stewart v. Canada*, *op. cit.*.

<sup>11</sup> Communication No. 538/1993, *Stewart v. Canada*, *op. cit.*, para. 12.5.

<sup>12</sup> The State party refers to communication No. 1011/2001 *Madafferi v. Australia*, *op. cit.*, para. 9.6.

*Article 14, paragraph 7*

4.10 With regard to article 14, paragraph 7, the State party argues that the author has failed to exhaust domestic remedies as he has never raised the prospect of double punishment before any domestic tribunal. The State party further contests admissibility of the communication for lack of substantiation since nothing in the author's communication constitutes evidence of an intention on the part of the State party, in cancelling the visa, to further punish him for crimes he had already committed.

4.11 On the merits, the State party refers to Section 5 of the Migration Act which defines Immigration Detention to include detention in a prison or remand centre of the Commonwealth, a State or a Territory. When the responsible immigration officer adjudges a detainee to be unsuited to a detention centre established under the Migration Act (for example because the detainee has a history of violence), the decision may be made to detain him or her in a prison or remand centre. The author has a significant and sustained history of violent crime. When his last custodial sentence ceased, he made threats to attack staff and detention centre inmates, if he were to be transferred to an immigration detention centre. Immigration detention centres are low security and there is very limited capacity to manage violent incidents. The State party therefore contends that to protect the welfare of staff and other inmates, between November 2004 and July 2005, the author was detained under section 189 of the Migration Act at Port Phillip Prison in Victoria.

4.12 Regarding the author's claim that his conditions of detention at Maribyrnong Immigration Detention Centre constituted punishment, the State party replies that the conditions were adequate and meant to monitor his acute alcohol withdrawal and anxiety. He was placed in an individual room for that purpose with all the medical attention needed. When he returned to the Detention Centre in December 2007, the author refused to be held in another area than the one where he was during the first period. He stated that he did not want to mingle with other inmates especially those from different ethnic groups than his. The State party concludes that the author's conditions of detention could not be considered to be a punishment within the meaning of article 14, paragraph 7 of the Covenant.

*Articles 17 and 23, paragraph 1*

4.13 With regard to author's claims under articles 17 and 23, paragraph 1 of the Covenant, the State party contends that the author has not sufficiently substantiated his claims as his communication does not demonstrate that the State party failed to take into account all relevant considerations in making the decision to cancel his visa. The State party's obligations under articles 17 and 23, paragraph 1 were specifically considered by the Minister in making her decision to cancel the author's visa. Direction No. 21 guiding the exercise of powers provides for consideration of a broader range of impact on the individual's life than articles 17 and 23, paragraph 1. The State party specifies as well that the claims related to the author's mother and sister will not be distinguished from that of the author as they relate to the same issue.

4.14 On the merits, the State party insists that articles 17 and 23, paragraph 1 should be read in light of the State party's right, under international law, to control the entry, residence and expulsion of aliens. In accordance with this right, the Covenant allows the State party to take reasonable measures to maintain the integrity of its migration regime, even where such measures may involve removal of one member of a family.

4.15 Regarding article 17, the State party refers to the Committee's General Comment No. 16 on the right to privacy, which when defining home as "a place where a person resides or carries out his usual occupation" refers to dwelling houses and possibly places of

business, not the whole country<sup>13</sup>. The State party refers for this purpose to Manfred Nowak's CCPR Commentary where he defines home as "all types of houses" and "that area over which ownership (or any other legal title) extends"<sup>14</sup>. The State party therefore rejects the author's assumption that "home" in article 17 could extend to the whole of Australia.

4.16 With regard to the author's claims under article 23, paragraph 1, the State party agrees that it has interfered in his family life. It however contends that it has not done so unlawfully or arbitrarily. The State party recalls the Committee's General Comment No 16 on the right to privacy, which states that no interference can take place except in cases envisaged by the law, which must comply with the provisions, aims and objectives of the Covenant<sup>15</sup>. The State party argues that the Migration Act envisages the removal from Australia of persons with substantial criminal records who are not Australians. This is in accordance with the provisions, aims and objectives of the Covenant because its object is to protect the Australian community from threats to the fundamental right to life, liberty and security of individuals. The character test in section 501 specifies precisely the circumstances under which the decision may be taken to cancel or refuse a visa, and each decision is made on the individual merits after consideration of the principles in Direction 21.

4.17 The State party insists that the Committee in its jurisprudence allowed and applied a balancing test between considerations under article 23, paragraph 1 and the State party's reasons for removing an individual<sup>16</sup>. Accordingly, the disruption of the author's family was weighed against factors such as the protection of the Australian community and the expectations of the Australian community. In these circumstances it was decided that the seriousness of the author's crimes and risk to the Australian community outweighed the interference with the author's family. This decision was taken in full respect of Australian law. The State party refers to Committee's jurisprudence in *Johnny Rubin Byahuranga v. Denmark* where it has considered that Mr. Byahuranga's criminal conduct was of a serious enough nature to justify his expulsion from Denmark<sup>17</sup>. In the present case, the author committed crimes resulting in far longer sentences. Therefore, it was reasonable for the Australian community to expect protection from the State party through legal mechanisms, including visa cancellation under the Migration Act.

*Articles 2, paragraph 1, and 26*

4.18 As for articles 2, paragraph 1, and 26 of the Covenant, the State party argues that the author's claims have been insufficiently substantiated for purposes of admissibility. Since the State party admits no breach of the Covenant in relation to articles 14, paragraph 7, 17 and 23, paragraph 1, it categorically refutes allegations of discrimination in this case and therefore requests the Committee to dismiss those claims as lacking substance.

4.19 On the merits, while agreeing to the application of the rights of the Covenant to all individuals including non-citizens, the State party considers that States parties have the right to control the entry, residence and expulsion of aliens. Referring to the Committee's General Comment No. 15 *on the position of aliens under the Covenant*, as well as its General Comment No. 18 *on non-discrimination*, the State party insists that the Minister acted reasonably and in good faith in applying the provisions of the Migration Act. She

<sup>13</sup> The State party refers to the Committee's General Comment No. 16, para 5.

<sup>14</sup> Manfred Nowak, CCPR Commentary, Engel, 1993, p. 302.

<sup>15</sup> Committee's General Comment No. 16, para. 3

<sup>16</sup> The State party refers to communication No. 1011/2001 *Madafferi v. Australia*, *op. cit.*, para. 9.8.

<sup>17</sup> The State party refers to communication No. 1222/2003, *Johnny Rubin Byahuranga v. Denmark* Views of 1 November 2004.

took into account the impact on the author's family and carefully weighed this aspect against the other considerations outlined in Direction 21, with the ultimate aim being to safeguard the rights of the broader Australian community, which is, in the State party's view, entirely legitimate under the Covenant. The State party remarks that the author had the opportunity to present his case at first instance, but also to challenge the Minister's decision in court. The State party therefore considers that it has guaranteed the right to equality before the law in the present case.

#### **Authors' comments on the State party's observations on admissibility and merits**

5.1 On 18 April 2008, the author provided comments on the State party's observations. After rejecting the State party's contention that the author's mother and sister are not victims under articles 17 and 23, paragraph 1, and giving his own interpretation of article 2 of the Optional Protocol, the author argues that he did not consent to his deportation. He signed a declaration accepting to be deported solely because immigration officials told him that he would otherwise remain in indefinite detention until the Committee's examination of his communication.

#### *Article 9, paragraph 1*

5.2 Regarding article 9, paragraph 1, the author adds that contrary to the arguments of the State party, he has not claimed that his detention was unlawful. Rather, he has submitted that his detention was not reasonable, necessary, proportionate, appropriate and justifiable in all the circumstances and was thus arbitrary within the meaning of article 9, paragraph 1. The State party has not provided evidence to the contrary. In this regard, the State party has ignored the Committee's jurisprudence in respect of Australia's mandatory detention policy regarding unlawful non-citizens under the Migration Act<sup>18</sup>.

5.3 The State party alleges that the author made threats at various stages of the process, without however making specific reference to those threats. On the State party's contention that the author has a long history of contempt for Australian law and of alcoholism, the author replies that he has completed all the sentences imposed on him and, prior to his detention and deportation, was very positively dealing with his alcohol abuse problems. The author rejects the arguments of the State party related to the High Court of Australia's decision on 8 November 2006 and the required escort of the author due to his non-compliance on 10 November 2006. He concludes that the State party has not been able to refute his arguments under article 9, paragraph 1 of the Covenant.

#### *Article 12, paragraph 4*

5.4 Regarding article 12, paragraph 4, the author claims that contrary to *Stewart v. Canada* he is not in a situation where the State party has facilitated the acquisition of citizenship and he is the one who has made a conscious decision not to acquire it. The author has never made a decision related to his citizenship because he never thought it was necessary to do so. He arrived in Australia when he was only 27 days old. He could not form an opinion on this matter at that time. He has subsequently gone through his childhood and adulthood unaware that he was not an Australian citizen. The author only realized he was not an Australian citizen when the State party raised the possibility of cancelling his visa in August 2003. The State party has failed to act to remedy his erroneous belief regarding his citizenship. In the first instance, the State party invited the author's

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<sup>18</sup> The author refers to communication No. 560/1993, *A. v. Australia*, Views adopted on 3 April 1997; communication No. 900/1999, *C. v. Australia*, Views adopted on 13 November 2002; communication No. 1069/2002, *Bakhtiyari v. Australia*, Views adopted on 29 October 2003.

parents to become Australian citizens without referring to their children. Secondly, the status of the author's citizenship was ignored by the State party when in 1986, he was placed in the State party's care. The author being removed from his parents' care, the State became his legal guardian and as such should have acted in his best interest. The author was only 13 years old at that time, and although he had a minor criminal record, he would have been able to obtain Australian citizenship had the process been undertaken on his behalf by the State party. The author insists that the State party's assertion that his circumstances do not fall into one of the exceptions articulated in *Stewart v. Canada* is misplaced as these exceptions do not represent an exhaustive list.

5.5 Reiterating his previous arguments on the notion of "own country" the author notes that his social, cultural and family ties to Australia, his age when he arrived in the country and the fact that he was for a period legally a ward of the State mean that the author has forged links with Australia that possess the characteristics necessary to call Australia his own country within the meaning of article 12, paragraph 4.

*Article 14, paragraph 7*

5.6 Regarding the State party's contention on non-exhaustion of domestic remedies related to his claim under article 14, paragraph 7, the author is unaware of any Australian jurisprudence that supports the suggestion that the author could be afforded an effective remedy occasioned by the rule of common law which protects individuals against double punishment. The State party does not indicate what the domestic remedies would be. In Australia, common law is subject to statute law. If validly enacted legislation provided for measures leading to double punishment, the common law would not prevent effect being given to the legislation. The Minister relied on statutory power given to her by the Migration Act to cancel the author's visa. Unless the State party is arguing that the relevant provision of the Act is invalid or should be read down to give it a more restrictive meaning, there is no basis for arguing that any common law doctrine concerning double punishment would overcome, or give rise to a domestic remedy in respect of the Minister's power under section 501 of the Act. The author therefore contends that no domestic remedies are available in this regard.

5.7 On the merits, while acknowledging the State party's argument that the reasonable regulation of aliens under immigration law cannot be said to constitute punishment, the circumstances under which the author himself had his visa cancelled is punishment. The author refers to his being uprooted from his home, family and employment and denied the possibility to return to Australia once deported. The author therefore reaffirms that his visa cancellation and subsequent deportation is a punishment in that it directly derives from his criminal record and convictions. The author rejects the State party's contention that the Minister never intended to inflict double punishment upon the author since the focus should be on the substantive impact of such measure. The author also considers that his detention at both Port Phillip Prison and Maribyrnong Immigration Detention Centre constituted punishment for the purpose of article 14, paragraph 7. The State party has not established that he was unsuitable for conventional detention. Moreover, the mere fact that his imprisonment in Port Phillip Prison for 8 months was lawful does not obviate the fact that it amounted to punishment. The State party's arguments related to his adequate conditions of detention are irrelevant. He rejects the characterization of his criminal record as a significant and sustained history of violent crime, which misrepresents his record, and in particular the position over the past ten years.

*Articles 17 and 23, paragraph 1*

5.8 Regarding article 17 and the interpretation of the expression "home" the author maintains that this term should be interpreted broadly to include the community and social

network where a person resides or carries out his usual occupation. The author's home is his immediate community and not the whole of Australia.

5.9 Regarding the State party's alleged interference with the author's family, in violation of articles 17 and 23, paragraph 1, the author submits that such interference was arbitrary and that he never argued about its unlawfulness. The State party failed to adequately balance reasons for deporting him with the degree of hardship his family would encounter as a consequence of such removal. The author rejects the assertion that his deportation is the direct consequence of his misconduct. Rather, the direct consequence of his misconduct was criminal conviction. Regarding the Australian community's expectations, the author submits the absence of evidence to indicate the nature of these expectations. It may be that community expectations are that a person who has spent all his life in Australia should be entitled to remain in that country and not deported to a country with which he has no relevant ties. When he committed the offences that were most relevant for the Minister in her decision, the author was under State guardianship. In determining the weight these offences should be given, the State party ignored its own responsibility as the author's guardian at the time. The author finally observes the lack of substantiation given to the State party's assumption that the author continues to pose a risk to the Australian community. The author therefore considers that articles 17 and 23, paragraph 1 have been violated since the interference with his family was arbitrary.

#### *Articles 2, paragraph 1, and 26*

5.10 As for the author's claims under articles 2, paragraph 1 and 26, contrary to the State party's argument, the author does not claim that the State party should not be able to distinguish between citizens and non-citizens. Rather, the State party can distinguish between citizens and non-citizens as long as the treatment does not amount to a violation of articles 14, paragraph 7, 17 or 23, paragraph 1 of the Covenant. The author refers to Committee's General Comment No 15 on the position of aliens under the Covenant, where the Committee states that "in certain circumstances, an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhumane treatment and respect for family life arise"<sup>19</sup>.

### **Issues and proceedings before the Committee**

#### *Consideration of admissibility*

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its Rules of Procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for purposes of article 5, paragraph 2 (a), of the Optional Protocol.

6.3 The Committee notes the State party's contention that the author did not exhaust domestic remedies pursuant to article 5, paragraph 2 (b) of the Optional Protocol in relation to his claim under article 14, paragraph 7 of the Covenant, that by having his visa cancelled, being detained and deported, he was punished again for offences in respect of which he had already served a prison term. The Committee notes that the State party's argument relates to the author's failure to raise such claims before domestic tribunals.

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<sup>19</sup> The author refers to General Comment No. 15, para. 5.

6.4 Notwithstanding this argument, the Committee refers to its General Comment No. 32 on the right to equality before courts and tribunals and to a fair trial, where it has stated that paragraph 7 of article 14 prohibits punishing a person twice for the same offence, but does not prohibit subsequent measures “that do not amount to a sanction for a criminal offence within the meaning of article 14 of the Covenant.”<sup>20</sup> Proceedings for the expulsion of a person not holding the nationality of the State party are ordinarily outside the scope of article 14,<sup>21</sup> and the author has not shown that the proceedings at issue were intended to impose additional punishment upon him rather than to protect the public. Accordingly, the Committee declares this part of the communication inadmissible for failure to substantiate pursuant to article 2 of the Optional Protocol. The author’s claim of discrimination with regard to articles 2, paragraph 1, and 26, in conjunction with article 14, paragraph 7, is inadmissible for the same reason.

6.5 The Committee notes that the State party has contested the admissibility of the author’s claims under articles 9, paragraph 1; 12, paragraph 4; 17; and 23, paragraph 1 of the Covenant, and articles 2, paragraph 1; and 26 in conjunction with articles 17 and 23, paragraph 1, for lack of substantiation. Despite the State party’s contention, the Committee finds that the author has sufficiently substantiated these claims, as they relate to the author himself, and the claims under articles 17 and 23, paragraph 1, relating to the author’s mother and sister. It therefore declares the communication admissible insofar as it appears to raise issues under articles 2, paragraph 1; 9, paragraph 1; 12, paragraph 4; 17; 23, paragraph 1; and 26 of the Covenant, and proceeds to the consideration on the merits.

#### *Consideration of merits*

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as required under article 5, paragraph 1, of the Optional Protocol.

#### *Article 9*

7.2 The Committee notes the State party’s contention that the author’s detention for 9 months pending deportation was lawful and reasonable and derived directly from the author’s visa cancellation, which was decided upon by the Minister in compliance with national legislation. The Committee also takes note of the State party’s argument regarding the necessity to detain the author in a prison rather than in an immigration detention centre due to the threats he allegedly made against the detention centre staff and inmates and the risk of flight. The Committee takes note of the author’s argument related to alternatives to imprisonment which could have been chosen such as the imposition of reporting obligations, sureties or other conditions, to achieve the same goal.

7.3 The Committee recalls its jurisprudence that, although the detention of aliens residing unlawfully on the State party’s territory is not *per se* arbitrary, remand in custody could be considered arbitrary if it is not necessary in all the circumstances of the case: the element of proportionality becomes relevant<sup>22</sup>. In the present case, the Committee observes that the author was lawfully arrested and detained in connection with his visa cancellation, which made him an unlawful resident under the Migration Act. Furthermore, the author was

<sup>20</sup> See General Comment No. 32, CCPR/C/GC/32, para. 57.

<sup>21</sup> See communications No. 1494/2006, *Chadzjian v. The Netherlands*, inadmissibility decision adopted 22 July 2008, para. 8.4; No. 1341/2005, *Zundel v. Canada*, inadmissibility decision adopted 20 March 2007, para. 6.8.; No. 1234/2003, *P.K. v. Canada*, inadmissibility decision adopted 20 March 2007, para. 7.4-7.5.

<sup>22</sup> Communication No. 1011/2001, *Madafferi v. Australia*, *op. cit.*, para. 9.2.

detained pending his deportation, which could not occur until such time as all domestic remedies were exhausted. The Committee notes the State party's argument that the author's imprisonment was necessary in view of his substantial criminal record, risk of recidivism and the State party's need to protect the Australian community. Given the State party's decision to cancel the author's visa, the concern that he might harm the detention centre personnel and inmates and his risk of flight, the Committee considers the author's detention pending deportation to be proportionate in the particular circumstances of the case. It therefore finds no violation of article 9, paragraph 1 of the Covenant.

*Article 12, paragraph 4*

7.4 With regard to the author's claim under article 12, paragraph 4, of the Covenant, the Committee must first consider whether Australia is indeed the author's "own country" for purposes of this provision and then decide whether his deprivation of the right to enter that country would be arbitrary. On the first issue, the Committee recalls its General Comment No. 27 on freedom of movement where it has considered that the scope of "his own country" is broader than the concept "country of his nationality". It is not limited to nationality in a formal sense, that is, nationality acquired at birth or by conferral; it embraces, at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien<sup>23</sup>. In this regard, it finds that there are factors other than nationality which may establish close and enduring connections between a person and a country, connections which may be stronger than those of nationality<sup>24</sup>. The words "his own country" invite consideration of such matters as long standing residence, close personal and family ties and intentions to remain, as well as to the absence of such ties elsewhere.

7.5 In the present case, the author arrived in Australia when he was 27 days old, his nuclear family lives in Australia, he has no ties to Sweden and does not speak Swedish. On the other hand, his ties to the Australian community are so strong that he was considered to be an "absorbed member of the Australian community" by the Australian Full Court in its judgement dated 30 June 2005; he bore many of the duties of a citizen and was treated like one, in several aspects related to his civil and political rights such as the right to vote in local elections or to serve in the army. Furthermore, the author alleges that he never acquired the Australian nationality because he thought he was an Australian citizen. The author argues that he was placed under the guardianship of the State since he was 13 years old and that the State party never initiated any citizenship process for all the period it acted on the author's behalf. The Committee observes that the State party has not refuted the latter argument. Given the particular circumstances of the case, the Committee considers that the author has established that Australia was his own country within the meaning of article 12, paragraph 4 of the Covenant, in the light of the strong ties connecting him to Australia, the presence of his family in Australia, the language he speaks, the duration of his stay in the country and the lack of any other ties than nationality with Sweden.

7.6 As to the alleged arbitrariness of the author's deportation, the Committee recalls its General Comment No. 27 on freedom of movement where it has stated that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances. The Committee considers that there are few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable. A State party must not, by stripping a person of nationality or by expelling an individual to a third country,

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<sup>23</sup> General Comment No. 27 on freedom of movement, para. 20.

<sup>24</sup> Communication No. 538/1993, *Stewart v. Canada*, *op. cit.*, para. 6

arbitrarily prevent this person from returning to his or her own country. In the present case, the Minister's decision to deport him occurred almost 14 years after the conviction for rape and intentionally causing injury and over nine years after his release from prison on those charges, seven years after the armed robbery convictions and a number of years after his release from prison on the latter charges; and more importantly at a time where the author was in a process of rehabilitation. The Committee notes that the State party has provided no argument justifying the late character of the Minister's decision. In light of these considerations, the Committee considers that the author's deportation was arbitrary, thus violating article 12, paragraph 4 of the Covenant.

*Articles 17, and 23, paragraph 1*

7.7 As to the alleged violations under articles 17 and 23, paragraph 1, in respect of the author, his mother and his sister, the Committee recalls its General Comments Nos. 16 on the right to privacy, and 19 on the protection of the family, whereby the concept of the family is to be interpreted broadly.<sup>25</sup> The Committee also recalls its jurisprudence that there may be cases in which a State party's refusal to allow one member of a family to remain on its territory would involve interference in that person's family life. However, the mere fact that certain members of the family are entitled to remain on the territory of a State party does not necessarily mean that requiring other members of the family to leave involves such interference.<sup>26</sup> It recalls that the separation of a person from his family by means of expulsion could be regarded as an arbitrary interference with the family and a violation of article 17 if, in the circumstances of the case, the separation of the author from his family and its effects on him were disproportionate to the objectives of the removal.<sup>27</sup>

7.8 The Committee considers that the decision by a State party to deport a person who has lived all his life in the country leaving behind his mother, sister and nephews, to a country where he has no ties apart from his nationality, is to be considered "interference" with the family. The Committee notes that the State party has not refuted the existence of interference in the present case. The Committee must then examine if the said interference could be considered either arbitrary or unlawful. The Committee first notes that such interference is lawful as it is provided by the State party's Migration Act, according to which the Minister may cancel a visa, if a person has been sentenced to a term of imprisonment of 12 months or more. In the present case, the author has been convicted for serious criminal offences and for a minimum of 9 years in prison<sup>28</sup>.

7.9 As to the balance between on the one hand, the significance of the State party's reasons for the author's removal and, on the other, the degree of hardship the family and its members could encounter as a consequence of such removal<sup>29</sup>, the Committee notes the State party's observation that it has weighed all these aspects and concluded in favour of the author's deportation to protect the Australian community and address the Australian community's expectations.

<sup>25</sup> See General Comment No. 16, the right to respect of privacy, family, home and correspondence, and protection of honour and reputation (Art. 17), 8 April 1988; General Comment No. 19, Protection of the family, the right to marriage and equality of the spouses (Art. 23), 27 July 1990.

<sup>26</sup> See, for example, communications No. 930/2000, *Winata v. Australia*, Views adopted on 26 July 2001, para. 7.1; No. 1011/2001, *Madafferi v. Australia*, *op. cit.*, para. 9.7; and No. 1222/2003, *Byahuranga v. Denmark*, *op. cit.*, para. 11.5; No. 1792/2008, *Dauphin v. Canada*, Views of 28 July 2009, para. 8.1.

<sup>27</sup> See communication No. 558/1993, *Canepa v. Canada*, *op. cit.*, para. 11.4.

<sup>28</sup> The total amount of time spent in detention is not mentioned by either party to the case.

<sup>29</sup> Communication No. 1011/2001, *Madafferi v. Australia*, *op. cit.*, para. 9.8.

7.10 The Committee acknowledges the significance of the author's criminal record. On the other hand, it notes the author's claim that he has maintained a close relationship to his mother and sister despite the time he spent either in detention centres or under the care of the State; that he was engaged in reducing his alcohol addiction and was steadily employed when the State party decided to cancel his visa; that he does not have any close family in Sweden and that his deportation led to a complete disruption of his family ties due to the impossibility for his family to travel to Sweden for financial reasons. The Committee further notes the author's argument that his criminal offences arose from alcoholism, which he had partly overcome and that the Minister's decision to deport him occurred almost 14 years after the conviction for rape and intentionally causing injury and over nine years after his release from prison on those charges, seven years after the armed robbery convictions and a number of years after his release from prison on the latter charges.

7.11 In light of the information made available before it, the Committee considers that the Minister's decision to deport the author has had irreparable consequences on the author, which was disproportionate to the legitimate aim of preventing the commission of further crimes, especially given the important lapse of time, between the commission of offences considered by the Minister and the deportation. Given that the author's deportation is of a definite nature and that limited financial means exist for the author's family to visit him in Sweden or even be reunited with him in Sweden, the Committee concludes that the author's deportation constituted an arbitrary interference with his family in relation to the author, contrary to articles 17 and 23, paragraph 1 of the Covenant.

7.12 As to the author's claim made in relation to his mother and sister that their rights have been directly violated under articles 17 and 23, paragraph 1 of the Covenant, the Committee notes that most, if not all of the arguments invoked by the author are related to the consequences of the disruption of family life for the author who has been deported to another country. The Committee further notes that the mother and sister were not uprooted from their family life environment, which was established in Australia. In the light of the information before it, the Committee cannot therefore conclude that there has been a separate and distinct violation of articles 17 and 23, paragraph 1 in relation to the author's mother and sister.

7.13 In the light of the Committee's conclusion, it deems it unnecessary to address the author's claims under articles 2, paragraph 1 and 26 of the Covenant.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the author's deportation to Sweden has violated his rights under articles 12, paragraph 4, 17 and 23, paragraph 1, of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including allowing the author to return and materially facilitating his return to Australia. The State party is also under an obligation to avoid exposing others to similar risks of a violation in the future.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective remedy when it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. In addition, it requests the State party to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

## Appendix

### **Individual opinion of Committee members Mr. Gerald L. Neuman and Mr. Yuji Iwasawa (dissenting)**

1. We cannot join the majority in its analysis and conclusions on this communication. We disagree with the majority's evaluation of the proportionality of deporting the author to Sweden, in light of articles 17 and 23 of the Covenant. But more fundamentally, we dissent from the majority's overturning of the Committee's established jurisprudence concerning the right to enter "one's own country," recognized in article 12, paragraph 4, of the Covenant.

2.1 In the past, the Committee has interpreted article 17 of the Covenant, protecting family life against arbitrary interference, and article 23 of the Covenant, entitling the family to protection by the state, as limiting the traditional authority of states to expel individuals who are not their nationals, when the expulsion would unreasonably interfere with their family life. The Committee's proportionality standard for evaluating the reasonableness of such interference represents an important safeguard for the human rights of immigrants, and we fully agree with it. On the facts of the present communication, however, we do not believe that the application of this standard should lead to the finding of a violation of the author's rights.

2.2 The State party is responsible for ensuring both the author's rights and the rights of its other residents. The author's extensive criminal record gave the State party reason to exercise its authority, recognized in its domestic legislation and in international law, to protect its residents by sending the author back to his country of nationality. The competent officials considered the arguments for and against exercising this authority, and concluded in favor of deportation. If we had been the competent officials in Australia, we would not have chosen to deport the author; instead, we would have accepted Australia's responsibility for his upbringing, and permitted him to remain. But we do not believe that the Covenant requires the State party to adopt this perspective, and under the circumstances its contrary decision was not disproportionate.

2.3 At the time of the relevant decision, the author was over thirty years old, without spouse, partner or children in Australia. His family in Australia consisted of his mother, his sister and her own family, and a father with whom he had no contact. The author denies that he had ties to his relatives in Sweden, but his Australian family remained in touch with them, and one of his uncles took him in after his arrival in Sweden. Both Sweden and Australia are countries with advanced communications technology.

2.4 Neither this Committee's prior Views nor the jurisprudence of the regional human rights courts would support the conclusion that deportation of an adult in this family situation and with this criminal record represents a disproportionate interference with family life. Until now, the Committee has given greater weight to the interest of states in preventing crimes than it does on this occasion.

2.5 The majority also faults the State party for waiting too long after the author's most serious crimes before deciding to deport him. We believe this objection is counterproductive to the protection of human rights. This is not a case in which an individual has led a blameless life after a youthful transgression and then is needlessly confronted with additional consequences. Here, the author's release from prison after his armed robbery convictions was soon followed by a series of further offences, including thefts of automobiles and reckless endangerment of life, that prompted the State party's action. The Committee should not discourage states from giving deportable residents a

chance to demonstrate their rehabilitation, by maintaining that the delay forfeits the option of deportation even if further crimes occur.

2.6 For these reasons, we cannot say that the State party violated the author's rights under articles 17 and 23 by deporting him to Sweden. But our disagreement with the majority's Views does not end here.

3.1 The majority also departs from its established interpretation of article 12, paragraph 4, of the Covenant, which provides that "No one shall be arbitrarily deprived of the right to enter his own country." The primary function of this provision has been to protect strongly the right of a state's own citizens not to be exiled or blocked from return.<sup>1</sup> The structure of the Covenant suggests, and its *travaux préparatoires* confirm, that article 12 was carefully drafted so that this right would not be subject to the limitations on freedom of movement permitted by article 12, paragraph 3.<sup>2</sup> Nor would citizens be exposed to a two-stage process of first denationalizing them and then applying the procedures for expulsion of aliens contemplated by article 13. In its Views in *Stewart v. Canada*,<sup>3</sup> after mentioning this problem of denationalization, the Committee identified other types of manipulation of nationality law that should not be permitted to circumvent the protection of article 12, paragraph 4, such as cases "of individuals whose country of nationality has been incorporated into or transferred to another national entity whose nationality is being denied them," and possibly "stateless persons arbitrarily deprived of the right to acquire the nationality of the country of such residence." When, however, "the country of immigration facilitates acquiring its nationality and the immigrant refrains from doing so, either by choice or by committing acts that will disqualify him from acquiring that nationality, the country of immigration does not become 'his own country' within the meaning of article 12, paragraph 4, of the Covenant."<sup>4</sup> The Committee's interpretation avoided making the right depend entirely on the state's formal ascription of nationality, but it preserved a relationship between the right and the concept of nationality, a fundamental institution of international law whose importance is also recognized in article 24, paragraph 3, of the Covenant.

3.2 In its present Views, the majority abandons any link to nationality, and pursues a broader approach that had been advocated in dissents, and mentioned but not endorsed in the Committee's General Comment No. 27 on article 12. The majority's paragraph (7.4) borrows language from a dissenting opinion in *Stewart v. Canada*,<sup>5</sup> and omits any mention of unreasonable impediments to naturalization. It suggests that long standing residence and

<sup>1</sup> See, for example, communication No. 1011/2001, *Madaferri v. Australia*, Views adopted on 28 July 2004, para. 9.6 (stating that article 12, paragraph 4, applies to unnaturalized immigrants only in limited circumstances); communication No. 859/1999, *Jiménez Vaca v. Colombia*, Views adopted on 24 March 2002, para. 7.4 (finding that the State party had not ensured a national's right to enter his own country where it failed to protect him against death threats that drove him into involuntary exile); concluding observations on the second periodic report of the Syrian Arab Republic (CCPR/CO/71/SYR), para. 21 (2001) (expressing concern about denial of passports to Syrian citizens in exile abroad, depriving them of the right to return to their own country).

<sup>2</sup> See especially the summary records of the debate in the Third Committee, fourteenth session (1959), A/C.3/SR.954 through A/C.3/SR.959. Article 12, paragraph 3, subjects other aspects of freedom of movement to restrictions that "are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant."

<sup>3</sup> Communication No. 538/1993, *Stewart v. Canada*, Views adopted on 1 November 1996, para. 12.4.

<sup>4</sup> *Stewart v. Canada*, para. 12.5.

<sup>5</sup> Compare the final sentence of the majority's paragraph (7.4) with paragraph 6 of the dissenting opinion of Members Evatt, Medina Quiroga, and Aguilar Urbina in *Stewart v. Canada*.

subjective (and often unprovable) ties supply the criteria that determine whether non-nationals can claim a state as their “own country” under article 12, paragraph 4.

3.3 This expansion of the scope of article 12, paragraph 4, presents at least two dangers. On one alternative, it vastly increases the number of non-nationals whom a state cannot send back to their country of nationality, despite strong reasons of public interest and protection of the rights of others for terminating their residence. Presumably the prohibition under article 12, paragraph 4, applies even where deportation would represent a proportionate interference with family life under articles 17 and 23, because otherwise the majority’s new interpretation would be superfluous. Moreover, the majority repeats in paragraph (7.6) the observation in General Comment No. 27 that “few, if any circumstances” would justify deprivation of the right to enter one’s own country, an observation that had previously been used to limit the banishment of nationals.

3.4 Or, alternatively, the result of the majority’s approach will be to dilute the protection that article 12, paragraph 4, has traditionally afforded to nationals and a narrow category of quasi-nationals. That dilution might even result from a shift in emphasis from the structure and purpose of article 12, paragraph 4, to the literal wording of the sentence, which refers to one’s “own country” but prohibits only “arbitrarily” imposed deprivations of the right to enter it.

3.5 In our view, the Committee should neither undermine the safeguard of article 12, paragraph 4, by lowering its rigorous standard, nor extend a kind of *de facto* second nationality to vast numbers of resident non-nationals.

3.6 On the peculiar facts of the present case, we can imagine a very limited conclusion that the author should be treated like a national of Australia because the authorities of the State party failed to secure naturalization for him when he was an adolescent under state guardianship. But that is not the interpretation of article 12 that the majority expounds in paragraph (7.4), and it is not the interpretation that the majority applies in another set of Views adopted this session, *Warsame v. Canada*,<sup>6</sup> where the issue of thwarted naturalization does not arise. The present decision rests on an expansive reinterpretation of article 12, paragraph 4, from which we respectfully dissent.

[*signed*] Gerald L. Neuman

[*signed*] Yuji Iwasawa

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee’s annual report to the General Assembly.]

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<sup>6</sup> Communication No. 1959/2010, *Warsame v. Canada*, Views adopted 21 July 2011, paras. 8.4-8.6. So far as article 12, paragraph 4, is concerned, our dissenting opinion in the present communication also applies to the Committee’s Views in *Warsame v. Canada*.

**Individual Opinion of Committee members, Sir Nigel Rodley,  
Ms Helen Keller and Mr. Michael O’Flaherty (dissenting)**

We find it difficult to join the Committee’s finding of a violation of article 12, paragraph 4, generally for the reasons given by Mr. Neuman and Mr. Iwasawa in their dissent. The Committee gives the impression that it relies on General Comment 27 for its view that Australia is the author’s own country. Certainly, the General Comment states that ‘the scope of “his own country” is broader than the concept of “country of his nationality”’. What the Committee overlooks is that all the examples given in the General Comment of the application of that broader concept are ones where the individual is deprived of any effective nationality. The instances offered by the General Comment are those relating to ‘nationals of a country who have been stripped of their nationality in violation of international law’; ‘individuals whose country of nationality has been incorporated in or transferred to another national entity, whose nationality is being denied them’; and ‘stateless persons arbitrarily denied the right to acquire the nationality of the country of ... residence’ (General Comment 27, paragraph 20).

None of the examples applies to the present case. Nor is there any doubt that the author has an effective nationality, namely, that of Sweden. On the other hand, the State party has not addressed the author’s assertion that he did not know that he was not an Australian citizen, an assertion whose plausibility is bolstered by the fact that the State party assumed responsibility for his guardianship for a substantial and formative period of his life. In such an exceptional, borderline case, we are unwilling to conclude definitively that article 12, paragraph 4, could not be violated. However, we consider that, in the light of its finding of a violation of articles 17 and 23, paragraph 1, the Committee could and should have refrained from going down the path that it was to tread far less explicably in *Warsame v Canada*.

[*signed*] Sir Nigel Rodley

[*signed*] Helen Keller

[*signed*] Michael O’Flaherty

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