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**Human Rights Committee**

Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3208/2018[[1]](#footnote-1)\*,[[2]](#footnote-2)\*\*,[[3]](#footnote-3)\*\*\*

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| *Communication submitted by:* | John Isley (represented by James Wardlaw) |
| *Alleged victims:* | The author |
| *State party:* | Australia |
| *Date of communication:* | 3 July 2018 (initial submission) |
| *Document references:* | Decision taken pursuant to rule 97 of the Committee’s rules of procedure (now rule 92), transmitted to the State party on 10 July 2018 (not issued in document form) |
| *Date of adoption of Views:* | 19 July 2023 |
| *Subject matter:* | Expulsion of the author from his country of residence |
| *Procedural issues:* | *Ratione materiae*; Non-substantiation |
| *Substantive issues:* | Arbitrary interference with right to privacy, family and home |
| *Articles of the Covenant:* | 14, 17 (1) and 23 (1) |
| *Articles of the Optional Protocol:* | 2, 3 and 5 (2) (b) |

1.1 The author of the communication is John Isley, a national of the United Kingdom born in 1962. He is facing deportation to the United Kingdom following a criminal conviction in Australia. He claims that his deportation will amount to a violation of his rights under articles 14, 17 and 23 of the Covenant. The Optional Protocol entered into force for Australia on 25 September 1991.

1.2 On 10 July 2018, pursuant to rule 92 of its rules of procedure, the Committee, acting through its Special Rapporteur on new communications and interim measures, denied the author’s request for interim measures.

1.3 On 11 October 2021, the author requested once again the Committee to issue interim measures to stop his deportation to the United Kingdom. On 11 October 2021, the Committee, acting through its Special Rapporteur on new communications and interim measures, again denied the author’s request for interim measures.

Factual background[[4]](#footnote-4)

2.1 The author was born in the United Kingdom and arrived in Australia at the age of four with his parents and brother. They travelled back to the United Kingdom in 1970 and then in October 1971 returned permanently to Australia where they have been living since. The author’s entire family reside in Australia and all have citizenship except for him. The author always saw himself as Australian. On 16 February 2007, he was granted a Class BB Subclass 155 Resident Return Visa, which permits him to reside permanently in Australia.

2.2 On 8 April 2011, the author was convicted of “incest by stepparent”, “indecent act with child under 16”, committed between 1 June 2003 and 30 June 2004. He also pleaded guilty to the separate offence of “make/produce child pornography”, which occurred on 7 September 2006. The author was sentenced to a cumulative term of eight years and six months imprisonment, with a non-parole period of five years and eight months. The conviction was upheld on appeal by the Melbourne Supreme Court by decision of 18 December 2012.

2.3 On 12 October 2015, as a result of the author’s conviction, his visa was cancelled under section 501(3A) of the Migration Act and he was subject to immigration detention and removal. On 22 October 2015, the author applied for revocation of the cancellation decision pursuant to section 501CA(4) of the Migration Act. Under the Migration Act, the Minister for Immigration and Border Protection is authorized to revoke a visa cancellation if satisfied that the applicant passes the character test under the Act, or if there is another reason why the original decision should be revoked.

2.4 In support of his application, the author submitted an extensive package of documents including references from family, friends, work colleagues, the Federal Police, Corrections Victoria Officers, medical reports, prison management notes and prison program completion reports. The author submits that the Minister was advised of the history of severe heart disease in his family from which he also suffers, of his severe depression, and his vertebrae and ear issues, which will require surgeries.

2.5 On 11 October 2017, the Minister for Immigration and Border Protection denied the author’s application for a revocation of the visa cancellation. In its decision, the Minister noted that, under Section 501(6)(e), a person does not pass the character test if he or she has been convicted of one or more sexually based offences involving a child. The Minister noted that the author had been convicted of such offences and therefore did not pass the character test. The Minister also considered whether there were other reasons for revoking the visa cancellation and considered the reasons outlined by the author in his revocation application. The Minister noted that the author had no children but that he had indicated that he had four nieces and nephews living in Australia. The Minister concluded that, although it may be in the best interest of the author’s extended family that the cancellation of his visa was revoked, he nevertheless found that the extent of any harm to their best interest was likely to be limited, as there was no indication that any minor children were parented or in the care of the author. The Minister also took into account that the author had resided in Australia since childhood and had contributed to society through employment. He also noted that the author’s brother and sister lived in Australia and that the author was engaged to an Australian citizen, whose three adult children considered him as a stepfather. He also acknowledged that the author may not have personal support in the United Kingdom, having not lived there since he was a child. The Minister considered the extent of the health impediments if the author were to be removed and noted that he had indicated that his family had a history of heart disease, but that the author would have access to medical treatment in the United Kingdom under its national health system. He found that any practical hardship suffered by the author in establishing himself in the United Kingdom would not be excessive. In his decision, the Minister gave significant weight to the serious nature of the author’s conviction and found that the Australian community could be exposed to significant harm should he reoffend.

2.6 The author applied for judicial review of the decision of the Minister for Immigration and Border Protection to the Federal Court of Australia. On 1 May 2018, the Federal Court dismissed his application for review, finding that the Minister’s non-revocation decision was lawful.

Complaint

3.1 The author claims that his removal from Australia to the United Kingdom would disrupt his family life in violation of his rights under articles 17 and 23 of the Covenant. He notes that the deportation would separate him from his fiancée, with whom he has been for 17 years. It would also separate him from his fiancée’s children and from his siblings and extended family in Australia. As his parents are buried in Australia, it would be distressing for him not to be able to visit their gravesites. The author claims to have no ties to the United Kingdom and that the country is unfamiliar to him. He also claims that he would not be able to support himself in the United Kingdom as he does not have a trade or any savings. He claims that the Minister’s decision not to revoke his visa cancellation is manifestly unreasonable and has not given enough weight in all the good that he has achieved. The author claims that he is classified as a model prisoner and has excellent prison case manager reports. He further adds that he was assessed by a senior Clinical Forensic Psychologist Doctor as “Low Risk” to the community. He believes that the Minister had already made up his mind concerning his case before viewing it.

3.2 The author claims that he and his fiancée will lose their home, as they re-mortgaged it to pay his lawyers and his fiancée is no longer able to make the payments. He claims that his savings are depleted and that his fiancée cannot work due to sickness.

3.3 The author submits that if a delegate of the Minister for Immigration and Border Protection, and not the Minister himself, denies an application for reinstating a visa, this decision can be appealed to the Administrative Appeals Tribunal for a merits review. However, if the Minister takes the decision, it can only be appealed through an application for judicial review to the Federal Court. The author claims that the chances for a successful outcome are much higher in the Administrative Appeals Tribunal than the Federal Court. He claims that the fact he was not able to appeal the decision to the Administrative Appeals Tribunal therefore amounted to a violation of his rights under article 14 of the Covenant.

State party’s observations on admissibility and the merits

4.1 In a note verbale dated 28 August 2019, the State party submitted its observations on the admissibility and the merits of the communication.

4.2 The State party submits that further avenues of appeal were available to the author, including before the Federal Court of Australia and the High Court of Australia. It, nonetheless, does not argue that the communication should be declared inadmissible for lack of exhaustion of domestic remedies.

4.3 The State party submits that the author’s claim under article 14 (1) should be declared inadmissible *ratione materiae*. It argues that the decision-making proceedings relating to the author’s visa cancellation and deportation are administrative in nature and do not involve the “determination of any criminal charge” or “rights and obligations in a suit at law” within the meaning of article 14 (1). These proceedings are in the nature of public law and their fairness are rather guaranteed by article 13 of the Covenant. The State party argues that the Committee’s jurisprudence has consistently held that proceedings relating to the expulsion of aliens are governed by article 13 of the Covenant and do not fall under article 14.[[5]](#footnote-5)

4.4 If the Committee were to consider the author’s claims under article 14 (1) admissible, the State party submits that these are without merit. The proceedings to which the author was subject satisfied the general guarantee of equal access, equality of arms and ensuring that parties to the proceedings were treated without any discrimination. The State party argues that the author had the opportunity to make representations in support of his application for revocation of the decision to cancel his visa. In making its non-revocation decision, the Minister took into consideration a range of factors, which included the author’s health, behaviour in prison, his relationships with his family, the nature of his ties to Australia, and the extent of the impediments he would face upon return to the United Kingdom. Furthermore, the State party also submits that the author had access to judicial review by the Federal Court of Australia of the non-revocation decision and was represented by counsel during these proceedings. It holds that the Committee has found that a legal system which offers the possibility to appeal to a federal court of appeal for judicial review provides adequate remedy within the meaning of article 14 of the Covenant.[[6]](#footnote-6) The State party rejects the author’s allegation that, the fact he was not able to appeal to the Administrative Appeals Tribunal for a merits review because his decision was not taken by a delegate of the Minister is a denial of equality before courts and tribunals under article 14 (1). The State party argues that the absence of a merits review in these circumstances is in recognition of the fact that the government is ultimately responsible for ensuring that decisions reflect community standards and expectations. Whether the decision is made by the Minister or a delegate, the State party submits that each decision is made on the same basis and the applicant is entitled to recourse to the Federal Court for judicial review of the decision.

4.5 With regard to the author’s claims under articles 17 (1) and 23, the State party submits that the decision to cancel the author’s visa did not constitute an arbitrary interference with his family. It submits that Australian law provides for the revocation of the permanent residency status of a non-national and the removal of the person from Australia if convicted of serious offences or sexually based offences involving a child. The State party recognizes that, in the author’s case, his removal may involve interference with his family ties. However, it argues that this interference resulting from his removal was not arbitrary, as it was reasonable, necessary, and proportionate to the legitimate objective of protecting the Australia community from harm. In particular, the State party submits that this would protect vulnerable children from the risk of future serious harm by an individual who had committed sexually based offences involving a child.

4.6 The State party reiterates that the Migration Act ensures individuals with an opportunity to seek revocation of the mandatory cancellation of their visa and provide submissions to satisfy the Minister that they pass the character test or that there are other reasons that would justify revoking the cancellation of their visa. In the author’s case, the Minister gave full and careful consideration to the evidence presented by the author and to the effect of his removal on him and his family. The State party submits that the Federal Court of Australia found the Minister’s decision to be lawful and dismissed the author’s argument that the Minister had not considered the hardship of the non-revocation on him, his fiancée, extended family, and friends. The State party adds that the Federal Court also duly considered the strength, nature and duration of the author’s ties to Australia, the extent of impediments if removed, the potential risk the author poses to the Australian community and the best interests of any minor children. On this latter point, the State party submits that the author did not challenge before the Federal Court the Minister’s finding that there was no indication that any minor children were parented by or in the care of the author. It submits that, in sum, the Minister concluded that the seriousness of the nature of the crimes committed by the author and the possibility of reoffending posed an unacceptable risk to the Australian community, outweighing the impact of the author’s removal on him and his family.

4.7 The State party submits that the author’s circumstances fall within the test set out by the Committee’s majority Views in *Stewart v. Canada* with respect to articles 17 and 23. It acknowledges the Committee’s subsequent jurisprudence which has departed from the reasoning in this case, but it submits that each subsequent decision was based on the very specific or extraordinary circumstances of the cases.[[7]](#footnote-7) The State party argues that such circumstances justifying the departure from the Committee’s decision in the *Stewart v. Canada*  case are not present in this case.

Author’s comments on the State party’s observations on admissibility and merits

5.1 On 1 December 2021, the author submitted comments on the State party’s observations. With regard to the remedies sought by the author in Australia, he reiterates that he applied for the revocation of the cancellation of his visa, which was dismissed by the Minister for Immigration and Border Control. He then unsuccessfully appealed the decision to the Federal Court. He sought legal advice at the time about the likelihood of success of further appealing before the Full Court of the Federal Court and decided to cease the appeal process given that it would yield the same result and that he and his fiancé had accumulated significant debt. He submits that there is no automatic right to appeal to the High Court from the Federal Court and a party must apply for special leave. As no question of law arose following the Federal Court’s decision, any application for special leave would have therefore been futile. He also applied for a permanent Protection Visa with the Department of Home Affairs, which was refused on 31 July 2019. He appealed before the Administrative Appeals Tribunal, which confirmed the original decision to refuse his visa application. The author’s subsequent appeal to the Federal Circuit Court of Australia was withdrawn as no error of law could be established and that non-refoulement obligations did not arise in his case. A further request to the Minister for Home Affairs would have been futile. The author submits that the final avenue open to him was an appeal to the High Court of Australia, which he submitted on 12 March 2021, and which was dismissed on 4 August 2021.

5.2 The author reiterates that he has provided extensive evidence and information to the State party regarding the presence of his family in Australia, the nature and significance of his ties to the country and his health conditions. He claims that his forcible deportation from Australia would amount to an arbitrary interference with his family, in violation of article 17, read in conjunction with article 23 (1). The removal of one family member while the others remain in Australia amounts to an interference with the family. He submits that his bond with his fiancée and his *de facto* children is strong and that each family member would be affected by his removal. He has been together with his fiancée for 18 years during which they have experienced much hardship as a result of his criminal offending. During the author’s incarceration, his fiancée visited him in prison every weekend for eight years and spoke with him twice daily on the phone for the last years, which leaves no doubt as to the strength of his family unit.

5.3 The author rejects the argument that his family could accompany him to the United Kingdom. He refers to the Committee’s jurisprudence which supports his claim that the decision to deport one family member whilst allowing other members of the family unit to remain is an interference in respect to article 17 of the Covenant. The author submits that his family has had no choice but to re-mortgage their home to cover the legal costs of his criminal proceedings. He adds that his fiancée is also facing severe emotional hardship following her sister’s recent diagnosis with breast cancer. Due to this situation, his fiancée has been unable to work and is now facing homelessness due to the mounting debt. It would therefore be emotionally and financially unrealistic to suggest that the author’s fiancée could migrate and leave behind her two adult daughters.

5.4 The author submits that, in the Minister’s reasons for cancelling his visa, it gave significant weight to the expectations of and risks to the Australian community but gave little weight to the impact on the family unit or the protections in place in Australia. He further alleges that significant weight was also given to the general nature of the crimes and not so much to their specific nature and to the author’s limited criminal history. The victim of the offense is now an adult, and the author has not sought to have any contact with her. Furthermore, the author submits that he has served his sentence including his probation period in state detention, and that upon release he would be placed on a sex offender registry and his activity online would be strictly monitored. He would have reporting obligations and guidelines as to how and where he could live and would not be in the presence of children whilst living with his fiancé. The author also submits that he has engaged in the rehabilitation programs offered to him during his time in prison. In light of the specific nature of the crimes, which are isolated, the author argues that he poses little risk to the Australian community, especially when considering the impact to his family. He reiterates that it would constitute an arbitrary interference with his family and breach of articles 17 (1) and 23 of the Covenant.

5.5 The author rejects the assumption he poses an ongoing and undisputable risk to the Australian community. He argues that this is unwarranted based on the evidence of his results in different medical and non-medical assessments with low-risk findings. His deportation from Australia, where his life in community would be heavily regulated, would not be proportionate. He submits that deporting him would not increase the Australian community’s safety, as protections are already in place. This would only destabilize his family.

5.6 In response to the State party’s reference to the *Stewart v. Canada* case to suggest that the interference with the author’s family is not arbitrary, he submits that his circumstances also fall within the scope of the Committee’s decision in the *Nystrom v. Australia* case, which found a violation of articles 17 (1) and 23 of the Covenant. The author reiterates that his removal would be unreasonable, unnecessary and disproportionate to the detrimental impact it would cause on the author and his family.

**State party’s additional observations on admissibility and merits**

6.1 In a note verbale dated 17 February 2022, the State party informed the Committee that, on 8 February 2022, the author had been removed to the United Kingdom, consistent with Australian law.

6.2 In a note verbale dated 2 November 2022, the State party submitted additional observations on the admissibility and merits of the communication. Although the State party does not challenge the admissibility of the communication on the grounds of non-exhaustion of domestic remedies, it nonetheless clarifies that further avenues of appeal were available to the author. With regard to the proceedings relating to the mandatory cancellation of the author’s visa under section 501(3A) of the Migration Act, the author could have appealed to the full bench of the Federal Court and the High Court. On the proceedings relating to the refusal of the author’s application for permanent Protection Visa, the State party considers that the independent decision of the Administrative Appeal Tribunal was correct.

6.3 The State party maintains that the author’s claims under article 14(1) are incompatible with the provisions of the Covenant and should be declared inadmissible *ratione materiae*.

6.4 The State party reiterates that it acknowledges that the author’s removal to the United Kingdom may involve interference with his family ties. However, it submits that any interference with his family ties as a consequence of his removal would not be unlawful or arbitrary, which is the standard to which the Committee should have regard in assessing a State party’s obligations under articles 17 and 23 (1) of the Covenant. The State party submits that separating a family member from the family unit is not in and of itself arbitrary interference. Arbitrariness is to be assessed on a case-by-case basis. In the author’s case, the State party reiterates that the impact on the family, the nature of the crimes and the author’s criminal history were thoroughly considered as part of the Minister’s decision to cancel the author’s visa and subsequently to not revoke the decision. The State party further argues that this is supported by the findings of the Federal Court of Australia, which dismissed the author’s arguments and found that the Minister had given attention to: i) the strength, nature and duration of the author’s ties to Australia; ii) the extent of the impediments to the author in case he were to be removed; iii) the potential risk the author poses to the Australian community, and; iv) the best interests of any minor children. The State party also rejects the author’s allegation that the Minister gave disproportionate weight to the protection of the Australian community and to the assumption that he poses an ongoing and undisputable risk. The State party reiterates that the Federal Court found the Minister’s decision as lawful and that it duly considered the risk the author would pose to the Australian community. After giving full and careful consideration to the author’s claims, the Minister found that there was an ongoing likelihood that he would reoffend and that this could result in harm to a minor member of the Australian community. The State party also points to the evidence considered by the Minister, such as references from family, friends and work associates, prison reports as to the author’s behaviour and medical reports.

6.5 With regard to the author’s reference to the Committee’s findings in the *Nystrom v. Australia*, the State party submits that it respectfully disagrees with these Views. It submits that the removal of the author in the *Nystrom v. Australia* case was consistent with its obligations under articles 17 and 23 (1) of the Covenant and in accordance with its legitimate interest of protecting the Australian community. This was recognized by two members of the Committee in their Individual Opinion and the same reasoning should be followed by the Committee in this case. While recognizing that that the author’s record is not extensive, the State party reiterates that the Minister’s decision was proportionate to the legitimate aim of preventing the commission of further crimes, especially in light of the serious nature of the offences and of the Minister’s finding that there is an ongoing likelihood of reoffending, which could cause harm to minors.

6.6 The State party maintains that any interference caused by the author’s removal is in accordance with the Covenant and reasonable in the particular circumstances. It submits that the author’s removal would not be arbitrary because it would be reasonable, necessary and proportionate to the legitimate objective of protecting the Australian community from harm. Therefore, the State party argues that the author has not sufficiently substantiated his claims under articles 17 (1) and 23, as he has not provided evidence that the interference with his family was unlawful or arbitrary. It submits that these claims should be declared inadmissible for lack of substantiation, in accordance with article 2 of the Optional Protocol.

Issues and proceedings before the Committee

Consideration of admissibility

7.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 97 of its rules of procedure, whether the communication is admissible under the Optional Protocol.

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

7.3 The Committee notes the author’s claim that he has exhausted all effective domestic remedies available to him. The Committee notes the State party’s submission that, although it does not challenge the admissibility of the communication on the grounds of non-exhaustion of domestic remedies, further avenues of appeal were available to the author, including before the Federal Court of Australia and the High Court of Australia. Therefore, in the absence of any objection by the State party in that connection, the Committee considers that it is not precluded from examining the communication under article 5 (2) (b) of the Optional Protocol.

7.4 The Committee notes the State party’s arguments that the author’s claim under 14 (1) should be declared inadmissible *ratione materiae*, as the proceedings relating to the author’s visa cancellation and deportation are administrative in nature and are rather covered by the guarantees under article 13 of the Covenant. In that regard, the Committee refers to its jurisprudence in which it states that proceedings relating to the extradition, expulsion and deportation of aliens do not fall within the ambit of a determination of “rights and obligations in a suit at law” within the meaning of article 14, but are governed by article 13 of the Covenant.[[8]](#footnote-8) The Committee notes, however, that the author did not invoke article 13 of the Covenant in his communication. The Committee considers, therefore, that this part of the communication is incompatible *ratione materiae* with the Covenant and declares it inadmissible under article 3 of the Optional Protocol.

7.5 The Committee notes the State party arguments that the author’s claims under articles 17 (1) and 23 should be declared inadmissible for lack of substantiation, as he has not provided evidence that the interference with his family was unlawful or arbitrary. The Committee, however, considers that the author has sufficiently substantiated, for the purposes of admissibility, his claims under articles 17 (1) and 23 (1) of the Covenant. The Committee thus declares these claims admissible and proceeds with its consideration of the merits.

*Consideration of the merits*

8.1 The Committee has considered the communication in the light of all the information submitted to it by the parties, in accordance with article 5 (1) of the Optional Protocol.

8.2 The Committee notes the author’s claim under articles 17 (1) and 23 (1) of the Covenant, that the decision to cancel his visa was manifestly unreasonable and that his removal from Australia to the United Kingdom would disrupt his family life. 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. [[9]](#footnote-9) 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.[[10]](#footnote-10) 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.[[11]](#footnote-11)

8.3 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 family and his fiancée with whom he has been in a relationship for 18 years, 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 for Immigration and Border Protection may cancel a visa, if a person has been sentenced to a term of imprisonment of 12 months or more, is convicted of one or more sexually based offences involving a child and is serving a sentence of imprisonment.[[12]](#footnote-12) In the present case, the author was serving a sentence of imprisonment on a full-time basis after being convicted for serious criminal offences and sentenced to 8 years and six months in prison.

8.4 The Committee recalls that the notion of arbitrariness includes elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality. The Committee also recalls that the relevant criteria for assessing whether or not the specific interference with family life can be objectively justified must be considered in the light, on the one hand, of the significance of the State party’s reasons for the removal of the person concerned and, on the other hand, of the degree of hardship the family and its members would encounter as a consequence of such removal.[[13]](#footnote-13). 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.

8.5 The Committee acknowledges the significance of the author’s criminal record. On the other hand, it notes the author’s claim that he maintained a strong relationship with his fiancée and family despite the time he spent in prison; that he is classified as a model prisoner and has excellent prison case manager reports; that he has engaged in rehabilitation programs; that he was assessed by a senior Clinical Forensic Psychologist Doctor as “Low Risk” to the community; that he does not have any family ties or contact with anyone living in the United Kingdom; that his deportation would lead to a complete disruption of his family ties, as his parents are buried in Australia, and his fiancée cannot travel to the United Kingdom for financial and emotional reasons, following her sister’s recent breast cancer diagnosis. The Committee further notes the author’s argument pointing to his limited criminal history and the isolated nature of his offences and that, upon his release, his life would be heavily regulated and monitored. It notes the author’s argument that deporting him would not increase the Australian community’s safety as protections would be in place.

8.6 The Committee notes that, in its decision, the Minister for Immigration and Border Control concluded that the seriousness of the nature of the crimes committed by the author and the possibility of reoffending posed an unacceptable risk to the Australian community, outweighing the impact of the author’s removal on him and his family. In light of the information made available before it, the Committee considers that the author’s deportation is of a definite nature and has had serious consequences for the author and his family. It concludes that the deportation was disproportionate, to the legitimate aim of preventing the commission of further crimes, especially given the important lapse of time, between the commission of the offences considered by the Minister and the deportation, the absence of any re-offense during this period in particular between his release on bail in 2008 and trial in 2011.[[14]](#footnote-14), the recognition by the Minister of his “good behaviour since his offending conduct”, the author’s efforts to engage in rehabilitation programs, and his placement on a register of sex offenders and resulting monitoring of his conduct The Committee also considers, in this regard, that the State party failed to examine whether it could have taken other measures less restrictive and less detrimental to the family life of the author, and therefore has not demonstrated that deporting the author was a reasonable measure in the particular circumstances.. The Committee therefore 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.

9. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that by deporting the author to the United Kingdom, the State party has violated his rights under articles 17 and 23, paragraph 1 of the Covenant.

10. Pursuant to article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the author with an effective remedy. This requires it to make full reparation to individuals whose Covenant rights have been violated. Accordingly, the State party is obligated, , to take appropriate steps to provide the author with adequate compensation. The State party is also under an obligation to take all steps necessary to prevent similar violations from occurring in the future.

11. 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 and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and 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 present Views. The State party is also requested to publish the present Views and to have them widely disseminated in the official languages of the State party.

Annex

Joint opinion by Committee Members Carlos Gomez Martinez, Marcia V. J. Kran and Koji Teraya (dissenting)

**1.** We have come to a conclusion that differs from the majority of the Committee that the author’s deportation to the United Kingdom would violate his rights under articles 17 and 23, paragraph 1 of the Covenant. At issue in the present case is whether the author has demonstrated the assessment made by the State party of his situation was clearly arbitrary, or amounted to a manifest error or a denial of justice. We are of the view that the majority’s decision departs from the Committee’s established jurisprudence, which gives due weight to the assessments of the facts and evidence in deportation proceedings by the State party.

**2.** The State party’s legislation, namely section 501 (3A) and 501 (6)(e) of the Migration Act, stipulate that the Minister for Immigration and Border Protection (the “Minister”) has the authority to revoke a permanent residency status of a non-national and remove that person from Australia under certain circumstances. Such circumstances include when a person has been convicted of serious offences or sexually based offences involving a child, and as a result, does not pass the character test. In this assessment, decision-makers must consider the risk of future serious harm to the Australian community and protect vulnerable children (para. 4.5).

**3.** The author was convicted of “incest by step parent” and “indecent act with child under 16”, committed between 1 June 2003, and 30 June 2004, and he pleaded guilty to “make/produce child pornography”, which occurred on 7 September 2006. He was sentenced to a cumulative term of eight years and six months imprisonment, with a non-parole period of five years and eight months. The author’s conviction was upheld on appeal by the Melbourne Supreme Court on 18 December 2012 (para 2.2). The author’s entire family reside in Australia and have citizenship, however the author did not seek to become a national of Australia despite being eligible to do so (para 2.1). His visa was cancelled on 12 October 2015 pursuant to 501 (3A) of the Migration Act, and the author was subsequently subject to immigration detention and removal. The author then applied to the Minister to have his visa cancellation revoked pursuant to section 501CA(4) of the Migration Act (para 2.3). The Minister denied the author’s application based on Section 501(6)(e) of the Migration Act, which states that a person does not pass the character test for holding a visa if they have been convicted of one or more sexually based offences involving a child (para 2.5). The author subsequently appealed through an application for a judicial review by the Federal Court of Australia, which found the Minister’s assessment to be full and in careful consideration of the evidence presented by the author and therefore rejected the appeal (para 4.6).

**4.** In its assessment of the author’s claims, the State party concluded that the information at its disposal was serious enough to justify the author’s removal. This conclusion was reached by a competent national authority, namely the Minister for Immigration and Border Protection, after a thorough and individualized assessment of the author’s case. By the author’s own submission, the Minister considered the extent of the harm to the best interests of the author’s family, including his engagement to an Australian citizen, the fiancée’s three adult children who considered the author as a stepfather, and other family ties. The Minister also considered the author’s lack of personal support in the United Kingdom, and his claims regarding his health concerns. However, the Minister found that any harm was likely to be limited as the author did not have any minor children, that any practical hardship suffered by the author in establishing in the United Kingdom would not be excessive, and the author would have access to medical treatment in United Kingdom under its national health system. Finally, the Minister gave due weight to the serious nature of the author's conviction and found that the Australian community would be exposed to significant harm should he reoffend (para 2.5).

The Minister’s considerations and final decision were also subject to a judicial review by the Federal Court of Australia upon the author’s request. The Federal Court of Australia found the Minister’s decision to be lawful and dismissed the author’s argument that the Minister had not considered the hardship of the non-revocation on him, his fiancée, extended family, and friends (para 4.6). Instead, the Court found that the Minister had given attention to: i) the strength, nature and duration of the author’s ties to Australia; ii) the extent of the impediments to the author in case he were to be removed; iii) the potential risk the author poses to the Australian community, and; iv) the best interests of any minor children (para 6.4).[[15]](#footnote-15)

**5.** The Committee’s jurisprudence is well established that considerable weight should be given to the assessment conducted by the State party and that it is generally for the organs of the State parties to the Covenant to review and evaluate facts and evidence unless it is found that the evaluation was clearly arbitrary or amounted to a denial of justice.[[16]](#footnote-16) This deferential approach takes into account the Committee’s general practice of considering communications solely on the basis of the written information provided by the author and the State party.[[17]](#footnote-17) The high threshold reinforces the long-held position that the Committee is not a fourth instance review mechanism that re-evaluates findings of fact or the application of domestic legislation.[[18]](#footnote-18) If the deportation order was made under law in furtherance of a legitimate state interest and due consideration was given in the deportation proceedings to the deportee's family connections, the deportation decision is considered not to be unlawful or arbitrary.[[19]](#footnote-19) It is incumbent upon the author to identify specific circumstances demonstrating that the proceedings in the State party, or the removal decision itself, were arbitrary, manifestly erroneous, or amounted to a denial of justice.[[20]](#footnote-20)

The Committee’s previous jurisprudence has established that it is neither arbitrary nor unreasonable to deny nationality to individuals who have criminal records in situations where that “disability was of [their] own making”.[[21]](#footnote-21) Given that the Migration Act expressly provides that permanent residency status can be revoked if an individual has been convicted of a serious offence or sexually based offence involving a child, the State party’s deportation order was made in pursuit of a legitimate interest with due consideration given to the author’s circumstances.[[22]](#footnote-22)

**6.** Based on the facts of this case, we do not find the decision by the State party to revoke the author’s visa was arbitrary or amounted to a manifest error or denial of justice. As such, we conclude that there has not been a violation of articles 17 and 23(1) of the Covenant.

1. \* Adopted by the Committee at its 138th session (26 June-26 July 2023). [↑](#footnote-ref-1)
2. \*\* The following members of the Committee participated in the examination of the communication: Tania Abdo Rocholl, Wafaa Ashraf Moharram Bassim, Farid Ahmadov, Rodrigo A. Carazo, Yvonne Donders, Mahjoub El Haiba, Laurence R. Helfer, Carlos Gómez Martínez, Bacre Waly Ndiaye, Marcia V.J. Kran, Hernán Quezada Cabrera, José Manuel Santos Pais, Changrok Soh, Tijana Surlan, Kobauyah Kpatcha Tchamdja, Koji Teraya, Hélène Tigroudja and Imeru Tamerat Yigezu. [↑](#footnote-ref-2)
3. \*\*\* Joint opinion by Committee members Carlos Gomez Martinez, Marcia V. J. Kran and Koji Teraya (dissenting) is annexed to the present Views. [↑](#footnote-ref-3)
4. The factual background has been reconstructed using the decision to cancel his permanent visa of October 2015, the decision not to revoke the cancellation of 11 October 2017 and the factual background submitted by the State party in its observations. [↑](#footnote-ref-4)
5. General Comment No. 32; *Zundel v. Canada,* Communication No. 1341/2005. [↑](#footnote-ref-5)
6. Communication No. 1121/1981, *Y.L. v. Canada*. [↑](#footnote-ref-6)
7. Madafferi v. Australia 1011/2001; Winata v. Australia 930/2000; Nystrom et al. v. Australia 1557/2007. [↑](#footnote-ref-7)
8. The Committee’s general comment No. 32 (2007), para. 17; X v. Denmark ([CCPR/C/110/D/2007/2010](http://undocs.org/en/CCPR/C/110/D/2007/2010)), para. 8.5; and Everett v. Spain ([CCPR/C/81/D/961/2000](http://undocs.org/en/CCPR/C/81/D/961/2000)), para. 6.4. [↑](#footnote-ref-8)
9. 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. [↑](#footnote-ref-9)
10. 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. [↑](#footnote-ref-10)
11. See communication No. 558/1993, *Canepa* v. *Canada*, para. 11.4; communication 1557/2007, *Nystrom et al. v. Australia*, para. 7.7. [↑](#footnote-ref-11)
12. Migration Act (1958), Section 501(3A). [↑](#footnote-ref-12)
13. See *A.B. v. Canada*, para. 8.7; communication No. 1011/2001, *Madafferi* v. *Australia*, *op. cit.*, para. 9.8 [↑](#footnote-ref-13)
14. See, communication 1557/2007, *Nystrom et al. v. Australia*, para. 7.11. [↑](#footnote-ref-14)
15. *Isley v Minister for Immigration and Border Protection* [2018] FCA 632 (1 May 2018), paras 134-136 &158-162. The Court found that the Minister had regard to all relevant representations and documents submitted by the author on the effect of non-revocation on Mr. Isley’s family and hardship upon himself. [↑](#footnote-ref-15)
16. *C.C.N. v. Sweden* (CCPR/C/136/D/3701/2020), para 6.7; *J.S. v. Australia* (CCPR/C/135/D/2804/2016), para. 7.5; *Z.H. v. Denmark* (CCPR/C/119/D/2602/2015), para. 7.4; *A.S.M and R.A.H v. Denmark* (CCPR/C/117/D/2378/2014), para. 8.3; *M.M v. Denmark* (CCPR/C/125/D/2345/2014), para. 8.4; *K v. Denmark* (CCPR/C/114/D/2393/2014), para. 7.4. *E. V. Denmark* (CCPR/137/D/2858/2016) Joint opinion of Committee Members Yvonne Donders, Laurence R. Helfer, Marcia V. J. Kran, Carlos Goméz Martinéz and Imeru Tamerat Yigezu (dissenting), para 5; *Z. v. Denmark* (CCPR/C/137/D/2795/2016), para 6.8; *Murne v. Sweden* (CCPR/C/137/D/2813/2016), para 10.5, and Joint opinion of Committee members Farid Ahmadov, Carlos Gómez Martínez, Laurence R. Helfer, Marcia V. J. Kran, José Manuel Santos Pais, Kobauyah Tchamdja Kpatcha and Koji Teraya (dissenting), paras 15-16; *S v. Australia* (CCPR/C/137/D/2999/2017) Joint opinion of Committee members Farid Ahmadov, Carlos Goméz Martinéz, Laurence R. Helfer, Marcia V. J. Kran, Kobauyah Tchamdja Kpatcha and Teraya Koji (dissenting), para 4; *Rudurura v. Sweden* (CCPR/C/136/D/3706/2020), paras 8.2 and 8.7; *O, P, Q, R and S v. Sweden* (CCPR/C/134/D/2632/2015) Joint opinion of Committee members Marcia V. J. Kran, Photini Pazartzis, Vasilka Sancin and Imeru Tamerat Yigezu (dissenting), para 3. [↑](#footnote-ref-16)
17. Office of the United Nations High Commissioner for Human Rights, *Individual Complaint Procedures under the United Nations Human Rights Treaties,* Fact Sheet No. 7, Rev. 2, (New York and Geneva, 2013), p. 10; See also *J.I. v. Sweden* (CCPR/C/128/D/3032/2017), para. 4.15; *Z.H, v. Australia*, (CCPR/C/107/D/1957/2010), para. 9.3; *Pillai v. Canada*, (CCPR/C/101/D/1763/2008) para. 11.2. [↑](#footnote-ref-17)
18. *A.G. v. Netherlands* (CCPR/C/130/D/3052/2017), para. 10.4, para. 8.6; *F and G v Denmark*, CCPR/C/119/D/2530/2015, annex, at para. 2; *Arenz et al. v. Germany* (CCPR/C/80/D/1138/2002) para. 8.6. [↑](#footnote-ref-18)
19. See *Gnaneswaran v. Australia* (CCPR/C/133/D/3212/2018), para 9.3*;* *Stewart v. Canada* (CCPR/C/58/D/538/1993), para 12.10; *Canepa v Canada* (CCPR/C/59/D/558/1993), para 11.4; *Budlakoti v Canada* (CCPR/C/122/D/2264/2013), para 9.6.s [↑](#footnote-ref-19)
20. *J.I. v. Sweden* (CCPR/C/128/D/3032/2017), para. 7.7; *M.R. v. Denmark* (CCPR/C/133/D/2510/2014), para. 7.9. [↑](#footnote-ref-20)
21. *Stewart v. Canada* (CCPR/C/58/D/538/1993), para. 12.6. [↑](#footnote-ref-21)
22. *Stewart v. Canada* (CCPR/C/58/D/538/1993), para. 12.10. [↑](#footnote-ref-22)