International Covenant on Civil and Political Rights

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Human Rights Committee

Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2981/2017*, **, ***

Communication submitted by:	Graham Cayzer (represented by Nigel Davidson)
Alleged victims:	The author
State party:	Australia
Date of communication:	13 July 2016 (initial submission)
Document references:	Decision taken pursuant to rule 92 of the Committee's rules of procedure, transmitted to the State party on 24 May 2017 (not issued in document form)
Date of adoption of Views:	25 July 2022
Subject matter:	Deportation to the United Kingdom of Great Britain and Northern Ireland
Procedural issues:	*Ratione personae*, *ratione materiae*, victim status, lack of substantiation
Substantive issues:	Freedom of movement; arbitrary arrest; detention; right to vote; right to enter own country; fair trial; family life; double jeopardy; deportation as a citizen
Articles of the Covenant:	9 (1), 12 (1), 12 (4), 14, 14 (7), 15 (1), 24 (1) and 25 (b)
Articles of the Optional Protocol:	2 and 3

1.1 The author of the communication, dated 13 July 2016, is Graham Cayzer, born in 1960 in Scotland, United Kingdom of Great Britain and Northern Ireland. He moved with his family to Australia at age 5. The author states that, by cancelling his visa, arresting him, holding him in immigration detention and deporting him to the United Kingdom, Australia

* Adopted by the Committee at its 135th session (27 June–27 July 2022).

** The following members of the Committee participated in the examination of the communication: Tania Maria Abdo Rocholl, Wafaa Ashraf Moharram Bassim, Yadh Ben Achour, Arif Bulkan, Mahjoub El Haiba, Furuya Shuichi, Carlos Gómez Martínez, Marcia V.J. Kran, Duncan Laki Muhumuza, Photini Pazartzis, Hernán Quezada Cabrera, Vasilka Sancin, José Manuel Santos Pais, Soh Changrok, Kobauyah Tchamdja Kpatcha, Hélène Tigroudja, Imeru Tamerat Yigezu and Gentian Zyberi.

*** The texts of a joint opinion by Committee members Arif Bulkan, Duncan Laki Muhumuza, Hernán Quezada Cabrera and José Manuel Santos Pais (dissenting) and an individual opinion by Arif Bulkan (dissenting) are annexed to the present Views. The annexes are circulated in the language of submission only.

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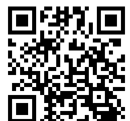

(the State party) has violated his rights under articles 9 (1), 12 (1), 12 (4), 14, 15 (1), 24 (1) and 25 (b). The author is represented by counsel.

1.2 The complaint was registered on 24 May 2017. The Committee, acting through its Special Rapporteur on new communications and interim measures, decided not to grant the author's request for interim measures. On 10 December 2017, the author was removed from Australia to the United Kingdom.

Facts as presented by the author

2.1 The author was born in the United Kingdom on 1 August 1960 to British parents, neither of whom were Australian citizens. The family migrated to Australia on 5 October 1965. The author was immediately granted a visa of permanent residence and lived in Australia until his removal to the United Kingdom in December 2017. He claims to hold dual Australian/British nationality, having become an Australian citizen in 1981 in a ceremony at which he swore an oath of allegiance.[1] He also voted in, and stood for, elections in the State party. He did not renounce his United Kingdom citizenship.

2.2 On 11 November 2011, the Supreme Court of Tasmania convicted the author of maintaining sexual relations with a person under 17 years of age. He was sentenced to four years of imprisonment and on 7 May 2014 was released on parole.

2.3 On 27 October 2014, the Minister for Immigration decided to cancel the author's Transitional (Permanent) Visa, under section 501 (2) of the Migration Act (1958),[2] as he was found to have failed the "character test".[3] On 29 October 2014, the author was informed by the immigration authorities that he must report to their offices by 9 a.m. on 31 October 2014. He was also told that if he failed to report by the deadline, the authorities would seek the assistance of the police in locating and detaining him.

2.4 On 30 October 2014, the author made an urgent, ex parte (without notice) application for an injunction to prevent the State party from placing him in immigration detention while his citizenship status was being determined. The Federal Administrative Court granted the author's injunction.[4] Under the decision, it was considered that, as the author was on parole at the time, as part of his original sentence, until November 2015, any failure to meet reporting conditions would lead to his arrest and imprisonment. It was therefore held that the risk of flight, while impossible to discount entirely, was slight and not sufficient to alter the balance of convenience favouring the status quo, under which the author was not detained at that time. However, in its decision taken on 31 October 2014, the Federal Administrative Court granted leave to the State party to appeal to have the injunction set aside. On 12 November 2014, the Minister applied to have the injunction preventing the author's detention set aside. The Minister's application to have the injunction set aside was granted by the Federal Administrative Court on 21 November 2014.[5]

2.5 Meanwhile, on 13 November 2014, the author also filed an application with the Federal Administrative Court, in which he requested a judicial review of the Minister's decision to cancel his residence visa on the grounds that he had claimed to have been granted citizenship, in 1981 and therefore did not meet the definition of an alien against whom the visa cancellation power, under section 501 (2) of the Migration Act, was applicable. He

[1] No further information on the ceremony is provided.

[2] According to section 501 (2) of the Migration Act: " (2) The Minister may cancel a visa that has been granted to a person if:

"(a) the Minister reasonably suspects that the person does not pass the character test; and

"(b) the person does not satisfy the Minister that the person passes the character test."

[3] According to section 501 (6) (a) of the Migration Act: "(6) For the purposes of this section, a person does not pass the character test if:

"(a) the person has a substantial criminal record (as defined by subsection (7))."

According to section 501 (7) (c): "(7): "For the purposes of the character test, a person has a substantial criminal record if:

" (c) the person has been sentenced to a term of imprisonment of 12 months or more."

[4] *Cayzer v. Minister for Immigration and Border Protection* [2014] FCA 1166.

[5] *Cayzer v. Minister for Immigration and Border Protection* (No. 3) [2016] FCA 806.

contested his detention on the same basis. In his application he contended that he was not an alien at the time of his entry into Australia because he was a British subject and therefore a "person of the Commonwealth". He also submitted that, since his arrival in the State party and by virtue of his entitlement to vote (having also stood for election), he had become one of the people of the Commonwealth benefiting from protected status under section 41 of the Constitution of Australia.[6]

2.6 On 23 November 2014, four police officers arrived at the author's home. Receiving no reply after knocking at the door, they proceeded to break a window and force entry into the home. On searching the premises and finding the author to be absent, the officers proceeded to question the author's six-year-old son regarding his father's location. The police eventually found the author travelling in a car with his other children, whereupon officers stopped the vehicle, forcibly removed the author from the car, arrested him, took him into custody and detained him at the Maribyrnong Detention Centre in Melbourne.

2.7 On 13 April 2015, the author amended his substantive appeal application on the visa cancellation. The amended appeal, which in addition to reiterating the grounds in his original appeal application, challenged the lawfulness of his detention. He also sought a writ of habeas corpus requiring that he be released from immigration detention. On 8 December 2015, the author filed an interlocutory application in which an order was sought that he be released from immigration detention. On 18 December 2015, in an Order of the Federal Administrative Court, the author's interlocutory application in relation to home detention was dismissed.

2.8 On 13 July 2016,[7] the Federal Administrative Court reviewed the Minister's decision to cancel the author's visa, finding that, on the balance of probabilities, the author had not demonstrated that he had obtained Australian citizenship in 1981 nor did he meet the definition of a person of the Commonwealth, and was therefore an alien, to whom section 502 of the Migration Act applied. This being the case, the author did not possess any right to vote but rather had benefited from a legislative privilege afforded to certain permanent residents. It therefore found no violation of the author's rights. The author appealed this decision to the Full Federal Court of Australia. On 18 August 2016, he was transferred to Christmas Island.

2.9 On 14 December 2016, the Full Federal Court denied the author's appeal,[8] upholding the decision of the Federal Administrative Court. The author filed an application for special leave to appeal the decision of the Full Federal Court to the High Court of Australia. The request for leave to appeal was denied by the High Court of Australia on 11 May 2017 on the grounds that the appeal did not enjoy a reasonable prospect of success, inasmuch as the grounds advanced by the author were contrary to binding precedent.[9]

2.10 The author refers to the Committee's jurisprudence,[10] in which it affirmed that "transportation", that is to say, the forcible removal of a person from one country to another, constitutes a violation of the right to liberty and security and that his arrest, detention and removal cumulatively constitute a "single transaction", akin to abduction from one country and removal to another.

2.11 The author also refers to the Committee's decision in the case of *Tillman v. Australia*[11] in which the further detention of a person who had already served out the entirety of his criminal sentence amounted to arbitrary detention, within the meaning of article 9 of the

[6] No adult person who has or acquires a right to vote at elections for the more numerous House of the Parliament of a State shall, while the right continues, be prevented by any law of the Commonwealth from voting at elections for either House of the Parliament of the Commonwealth. See https://www.ausconstitution.org/home/chapter-1-the-parliament/part-iv-both-houses-of-the-parliament/section-41.

[7] *Cayzer v. Minister for Immigration and Border Protection* (No 3) [2016] FCA 806.

[8] *Cayzer v. Minister for Immigration and Border Protection* [2016] FCAFC 176.

[9] Central to the appeal was the willingness of the High Court to reconsider the precedent-setting Sipka case, as well as the related case of *Shaw v. Minister for Immigration and Multicultural Affairs* [2003] HCA 72; 218 CLR 28.

[10] See *Burgos v. Uruguay* (CCPR/C/13/D/52/1979).

[11] *Tillman v. Australia* (CCPR/C/98/D/1635/2007).

Covenant. The author notes that the Committee in its Views confirmed that, to avoid a characterization of arbitrariness, the detention must be shown to be reasonable, necessary in all the circumstances of the case and proportionate to achieve the legitimate aims of the State party. If those legitimate ends can be achieved by less invasive means, then such detention will be rendered arbitrary. The author claims that his "prognosis for full rehabilitation is very good" and that he "is currently assessed as being at minimal risk of reoffending".[12] The author also claims that he completed all required rehabilitation courses during his time in prison.

2.12 As for the proportionality of detention, to achieve the legitimate aim of protecting the public, the author argues that there are many less onerous options, including ongoing community-based psychosocial support, which are available to the State party in pursuit of its aim.

2.13 The author refers to the Committee's jurisprudence in *A. v Australia*[13] and in other Views,[14] in which it confirmed that prolonged and indefinite detention, as provided for and as permissible under section 189 of the Migration Act, constituted arbitrary detention. The author also cites European Court of Human Rights jurisprudence, in which the European Court affirmed the principle that retroactive preventive detention is incompatible with article 7 (1) of the European Convention on Human Rights regarding arbitrary detention.[15]

2.14 The author claims that his deportation had the collateral effect of cutting him off from his mother, wife, and children, all of whom reside in Australia, and disconnected him from his long-standing social and professional networks. He also claims that it effectively severed his connection to the country in which he had grown up.

2.15 The author reaffirms that having participated in a citizenship ceremony in 1981 when joining the armed forces, he considers himself an Australian citizen. However, even if this is not accepted, he was lawfully residing in the State party as a permanent resident and this being the case, the decision to cancel his visa and arrest, detain and deport him violated his rights under the Covenant to move freely and choose his residence under its article 12.

2.16 The author submits that he considers the State party his "own country" for the purposes of article 12 (4) of the Covenant, as, whether or not his formal citizenship status is accepted by the State party, the Committee's jurisprudence has established that the rights to freedom of movement and choice of residence extend to persons who reside permanently in a country, even where they remain nationals of a different country. The author, distinguishing the Committee's Views in *Stewart v. Canada*,[16] claims that he had demonstrated his intention to reside permanently in the State party through having applied for citizenship, even if a certificate was never issued.

2.17 The author claims that, in addition to the other issues raised, the State party's representatives had taken actions from which his son should have been protected and he refers in this regard to the report of a doctor, who states that the author's children and his mother had started to be affected by the author's departure.[17]

[12] The author refers to a report by a psychologist, Dr Northey.

[13] *A. v. Australia* (CCPR/C/59/D/560/1993).

[14] The author cites *D and E, and their two* children *v. Australia* (CCPR/C/87/D/1050/2002); and *Baktiyari v. Australia* (CCPR/C/79/D/1069/2002).

[15] In the case of *M. v. Germany*, of 17 December 2009, the European Court of Human Rights found that the retroactive extension under a German law of a period of preventive detention was a breach of articles 5 (1) (a) and 7 (1) of the European Convention. Three judgments, delivered on 13 January 2011, affirmed the principle in *M. v. Germany*. These were the cases of *Kallweit, Mautes and Schummer*. Essentially, the right to liberty and security of person requires that, for imprisonment to be legitimate, it must involve "the lawful detention of a person after conviction by a competent court". The initial period of 10 years of preventive detention was thus acceptable, as it had been ordered by a court.

[16] *Stewart v. Canada* (CCPR/C/58/D/538/1993).

[17] The author refers to a report submitted in domestic proceedings by Dr Hilary Bower, in which it is stated that "[the author's son] has been seeing a psychologist for trauma after the police broke into his house looking for his father". Furthermore, the author asserts that his deportation means that his children will effectively grow up without a father. In the report it is also stated that, according to the author, the separation is particularly difficult for his son because of the events leading up to and

Complaint

3.1 The author claims a violation of his rights under article 9 (1) of the Covenant to liberty and security of person and freedom from arbitrary arrest and detention.

3.2 The author claims a violation of his rights under article 12 (1) and (4) of the Covenant since, as the cancellation of his visa was not reasonable, necessary or proportionate to the State party's legitimate aim of protecting the public, it did not meet the requirements under article 12 (3) for permissible restrictions of his rights under article 12 (1) and (4) of the Covenant to enjoy freedom of movement and to choose his residence in "his own country".

3.3 The author claims a violation by the State party of his rights under article 14 (7), as the cancellation of his visa and consequent arrest, detention and deportation amount to his being punished again for an offence. The author notes in reference to the character test,[18] that the State party used "civil proceedings" under the Migration Act to subsequently impose an additional term of imprisonment on him for the same crime, which he claims amounts to double jeopardy, in violation of article 15 of the Covenant.[19]

3.4 The author therefore claims that the cancellation of his visa and subsequent arrest, detention and deportation based on his previous conviction amount to the imposition of a heavier penalty than was applicable at the time when the criminal offence was committed and is therefore a retroactive punishment, in violation of article 15 of the Covenant.

3.5 The author claims that the State party violated his son's rights under article 24 (1) of the Covenant by failing to adequately protect him from the actions of the police at the time that the author was arrested and placed in immigration detention. He also claims that his daughter is medically vulnerable.[20] The author avers that in separating him from two such vulnerable children, the State party is in breach of its obligation to take such special measures as are required to protect children. He also indicates that the deportation continues to cause significant distress to his mother, who remains in the State party, and therefore that his mother's rights have been similarly violated.

3.6 The author claims that his right to vote, as evidenced by the fact that his name appeared on the electoral roll and because of which he had voted in many elections and had even stood for public office himself while residing in the State party, was denied him through his deportation. The author therefore claims that his right to vote under article 25 (1) of the Covenant has been infringed.

State party's observations on admissibility and the merits

4.1 On 23 August 2018, the State party provided its observations on the admissibility and merits of the author's communication.

4.2 The State party challenges the admissibility of the author's claims on the following bases: (a) with respect to article 14 of the Covenant, the author's claims are not sufficiently substantiated; (b) further and additional to being inadmissible as insufficiently substantiated, the author's claims under articles 14 (7), 15 (1) and 24 (1) of the Covenant (the last-mentioned with respect to the author's mother) are incompatible with the provisions of the Covenant and therefore should be found inadmissible, *ratione materiae*, in accordance with article 3 of the Optional Protocol and rule 96 (d) of the Committee's rules of procedure; and (c) the author's claim under article 24 (1) of the Covenant is wholly inadmissible, as the author lacks authority to bring the claim on behalf of his children, having made no submissions with

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including his arrest. Furthermore, he submits that, as his daughter has only one kidney, he has been deprived of the opportunity to donate his kidney to her should she need it.

[18] As applied under section 501 of the Migration Act (1958) read in conjunction with section 189 thereof.

[19] The author notes the Committee's jurisprudence in *Tillman v. Australia* (CCPR/C/98/D/1635/2007), which confirmed that preventive detention imposed as part of the original sentencing scheme may be permissible in some cases.

[20] Referencing the medical report of Dr. Northey.

regard to his authority or standing, and should therefore be dismissed, *ratione personae*, in accordance with the Committee's jurisprudence.[21]

4.3 With regard to article 14 of the Covenant, the State party submits that the author has not made clear which of the specific provisions of the article are alleged to have been breached during his criminal proceedings, which are the only proceedings to which article 14 of the Covenant could have been applied.

4.4 Furthermore, the author's claims under article 14 of the Covenant, with regard to his immigration status, fall outside the scope of the Covenant and should be dismissed, *ratione materiae*. The State party notes that the cancellation of the visa was based on an administrative process. The State party also notes the Committee's general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, in which it clarified that a suit of law "does not apply to extradition, expulsion and deportation procedures".[22]

4.5 In relation to article 9 (1) of the Covenant and referring to the *travaux préparatoires* of the Covenant, the State party contends that there is no rule that detention for a particular length of time will necessarily be considered arbitrary: the determining factor is whether the grounds for detention are justifiable. Whether detention of an individual is arbitrary thus falls to be determined on a case-by-case basis, having regard to the purpose served by detention and the circumstances of the individual.

4.6 With regard to the author's immigration detention, the State party claims that the author was detained following the lawful cancellation of his visa on character grounds, under section 501 (2) of the Migration Act, which obliges immigration officers to detain individuals who are without valid visas.[23] Section 196 of the same Act provides that an unlawful non-citizen shall be detained until "he or she is removed from Australia" under section 198 or 199. It is therefore asserted that the immigration detention of the author was lawful and in accordance with domestic law. Noting that the Committee has found that detention of non-citizens who do not hold a valid visa, including asylum-seekers, is not arbitrary per se,[24] the State party submits that the rationale for its immigration laws must be considered to assess arbitrariness in order to demonstrate that such detention does not breach article 9 (1) of the Covenant.

4.7 In the author's case, the detention was necessary to ensure that removal could be carried out as soon as was reasonably practicable. The State party notes that this approach is consistent with the fundamental principle of sovereignty in international law, which includes the right of a State to control the entry and stay of non-citizens in its territory. Contrary to the author's claims, immigration detention is distinct from imprisonment, as persons in immigration detention are not in prison, are not considered to be prisoners and are not held for punitive reasons but rather are detained administratively.

4.8 The author was detained since he had failed the character test, established by section 501 of the Migration Act, owing to his substantial criminal record. He was given the opportunity to make representations on his own behalf and upon their being found not to outweigh concerns, his detention was the predictable result.

4.9 The State party clarifies that prior to the Minister's decision to cancel his visa, the author had been provided with a Notice of Intention to Consider Cancellation, which allowed him to provide evidence regarding why his visa should not be cancelled. The Minister considered all the factors presented by the author, as can be seen from the Statement of Reasons by the Minister,[25] but decided that as "there remains a risk, albeit a low one, that [the author] will re-offend", the physical and psychological harm which would result to

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[21] *Fei v. Colombia* (CCPR/C/53/D/514/1992).

[22] The State party refers to *Zundel v. Canada* (CCPR/C/89/D/1341/2005), where the Committee confirmed that "proceedings relating to an alien's expulsion" do not fall under article 14 (1) of the Covenant.

[23] Section 189 of the Migration Act.

[24] *A v. Australia* (CCPR/C/59/D/560/1993), para. 9.3.

[25] Statement of Reasons for Cancellation of Visa under Subsection 501 (2) of the Migration Act 1958, the Hon Scott Morrison MP, Minister for Immigration and Border Protection, 27 October 2014, 7.

vulnerable members of the Australian community if the author were to reoffend justified the cancellation. As a result, the author was no longer in possession of a valid visa and was therefore no longer lawfully within the State party's territory. He was therefore administratively detained, pending removal. This decision was upheld by the Federal Court of Australia and the Full Court of the Federal Court of Australia upon judicial review. Special leave to appeal to the High Court was denied. The author's detention was thus reasonable and necessary in all the circumstances and proportionate to the legitimate aim.

4.10 The State Party notes that the author's detention was prolonged only for the length of time required to resolve his domestic proceedings to affect his removal. He was removed from Australia on 10 December 2017 after he had exhausted all domestic remedies in relation to his visa cancellation. While detention in a place outside an immigration detention centre is, in some cases,[26] available, this was not considered appropriate owing to the risk to the community.

4.11 As to the context of detention within the Covenant, article 12 of the Covenant concerns freedom of movement more broadly; and in article 13 of the Covenant a State's sovereignty to regulate the entry and expulsion of aliens from its territory is specifically recognized. The specific context and surrounding provisions of article 9 (1) of the Covenant indicate that "exile" was not intended to be read into the text. Therefore, the issue of the exile or transportation of non-nationals was explicitly not intended to be included.

4.12 The State party submits that, even if the author's broad interpretation of article 9 of the Covenant (which the State party disputes) is adopted, the author's removal was not arbitrary. It was lawful; in accordance with the provisions, aims and objectives of the Covenant; and reasonable in the circumstances. The State party distinguishes the *Burgos*,[27] case, which concerned the unlawful and clandestine abduction of Mr. Burgos from Argentina and his removal to Uruguay, where he was detained incommunicado and subjected to torture, from the author's case, which relates to an administrative procedure to remove an unlawful non-citizen in accordance with both domestic law and international obligations.

4.13 As to the author's claim under article 12 of the Covenant, the State party quotes the Committee's general comment No. 27 (1999) on freedom of movement, in which it is stated that "the question whether an alien is 'lawfully' within the territory of a State is a matter governed by domestic law, which may subject the entry of an alien to the territory of a State to restrictions, provided they are in compliance with the State's international obligations". The State party argues that it does not accept that the author was an Australian citizen, as confirmed by the Federal Circuit Court. In relation to the author's claim under article 12, the State party notes that in *Stewart v. Canada*,[28] *Canepa v. Canada*[29] and *Madafferi v. Australia*,[30] the Committee held that a person who enters a State under a State's immigration laws cannot regard the State as his own country when he has not acquired the nationality of that country and continues to retain the nationality of his country of origin. The State party also notes the Committee's finding that the denial of nationality based on a criminal record is not an unreasonable impediment to acquiring citizenship.[31]

4.14 The State party notes that the Committee has interpreted this provision more broadly, specifically with reference to *Nystrom v. Australia*,[32] in which it held that a State could be a person's "own country" for the purposes of article 12 (4) of the Covenant in circumstances where he or she was not a national but could nonetheless establish "close and enduring connections" with that State. In the Committee's view, relevant factors to be considered included long-standing residence, close family ties and the lack of a connection with any

[26] Public interest test under section 197AB (1) of the Migration Act.
[27] *Sergio Euben Lopez Burgos v. Uruguay* (CCPR/C/13/D/52/1979).
[28] *Stewart v. Canada* (CCPR/C/58/D/538/1993).
[29] *Canepa v. Canada* (CCPR/C/52/D/558/1993).
[30] *Madafferi v. Australia* (CCPR/C/81/D/1011/2001).
[31] In *Stewart v. Australia* (CCPR/C/58/D/538/1993), it was held that "[e]ven had he [Mr. Stewart] applied and been denied nationality because of his criminal record, this disability was of his own making. It cannot be said that Canada's immigration legislation is arbitrary or unreasonable in denying Canadian nationality to individuals who have criminal records.
[32] *Nystrom v. Australia* (CCPR/C/102/D/1557/2007).

other State. However, in dissenting opinions, two Committee members disagreed with this overly broad approach, stating that only in limited and exceptional circumstances can an alien establish close and enduring connections to a State, such that it can be that person's own country for the purposes of article 12 (4) of the Covenant.

4.15 The State party's interpretation of "own country" under article 12 (4) of the Covenant is consistent with article 13 of the Covenant, which clearly contemplates the expulsion of aliens, that is to say, non-nationals. In article 13 of the Covenant, a State's sovereignty to regulate the entry and expulsion of aliens from its territory and decide who should be able to stay within its borders is recognized as well as the setting of minimum procedural standards that must be complied with when that sovereignty is being exercised.

4.16 The author seeks to support his claim of citizenship by stating that the Australian courts had accepted that he "had, in fact, applied for Australian citizenship, even though no certificate was issued". The Federal Court of Australia found, however, that "there is no evidence of any record held by the Department of Immigration of any application for Australian citizenship by the author". "Although the author may have filled in a form, no application for citizenship was ever progressed, as the author did not proceed to enlist." In addition, the Federal Court of Australia held that at the ceremony attended by the author in 1981, citizenship could not have been conferred, given that such conferral was beyond the powers of the Defence officials who conducted the ceremony. The author has produced no evidence to support his claim that he was granted citizenship or that he was successful in becoming an Australian citizen.

4.17 Furthermore, the State party distinguishes the author's circumstances from those associated with the *Nystrom* case, in that his ties do not exclusively connect him to Australia, that is to say, he has family elsewhere (a brother in Canada), and while he asserts that he has no other ties with Scotland, this has not been substantiated. Further, in contrast to the situation in the *Nystrom* case, the author speaks the language of the United Kingdom. In addition, there are no material cultural barriers that would impact the author's ability to reintegrate himself into society in Scotland or find employment or housing there. The State party notes that family members who are capable of travel can visit him in the United Kingdom.

4.18 The State party submits that the author's allegations under articles 14 and 14 (7) of the Covenant are without merit, as the decision to cancel the visa and remove the author were purely administrative and therefore do not trigger the applicability of article 14 and the author's subsequent detention and removal do not constitute a criminal penalty.

4.19 As for article 14 (7) of the Covenant, it applies to criminal offences only and not to disciplinary measures that do not amount to a sanction for a criminal offence within the meaning of article 14 of the Covenant.[33] In *J.G. v. New Zealand*,[34] the Committee found the decision to remove the author to be administrative and not a double punishment for a prior drug conviction.

4.20 In *Uner v. Netherlands*,[35] the European Court of Human Rights decided that "an expulsion ordered in administrative proceedings following a criminal conviction did not constitute a double punishment, either for the purposes of article 4 of Protocol No. 7 or in the humane sense of the term". The author's period of immigration detention and his subsequent removal did not represent a criminal penalty nor did it constitute double punishment within the meaning of article 14 (7) of the Covenant.

4.21 As to the claim of retroactivity prohibited under article 15 (1) of the Covenant, the State party asserts that this provision is limited to laws imposing criminal liability or punishment for criminal offences. In contrast, there was no retrospective application of legislation in the present case, as the provisions on visa cancellation on character grounds had been introduced in 1999 and were available to all.

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33 The State party refers to the Committee's general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial.

34 *J.G. v. New Zealand* (CCPR/C/115/D/2631/2015).

35 European Court of Human Rights, *Uner v. Netherlands*, Application No. 46410/99 (16 June 2005).

4.22 As to article 24 (1) of the Covenant, the State party submits that the article itself does not set out the rights of children but rather guarantees that all children subject to each State party's jurisdictional authority are afforded protection. Australia has a wide range of legislative and other measures in place to ensure that children are protected by their families, the wider society and the State. The author has not provided any evidence that the system in Australia failed to provide the requisite measures of protection to minors.

4.23 Regarding the right to vote under article 25 (b) of the Covenant, the State party submits that these provisions apply only to citizens. However, there is an exception whereby certain permanent residents who were enrolled prior to the 25 January 1984 cut-off date have been given the right to vote at federal elections and referendums and the author was subject to this exception. Under article 25 (b) of the Covenant, States parties are not required to provide permanent residents with the right to vote nor is the State party prevented from withdrawing an alien's right to reside permanently in Australia or required to maintain the eligibility to vote under domestic law of a person who has ceased to be a permanent resident. The author's claims under article 25 (b) of the Covenant are accordingly without merit.

Author's response to the State party's observations on admissibility and the merits

5.1 In a response dated 15 July 2019, the author states that the Minister's decision to cancel his visa was "clearly arbitrary" and "amounted to a denial of justice". In particular, he claims that the Minister failed to give adequate weight to the assessment that there was a "low risk" of further offending, his long-standing connections to Australia, the "best interests" of the author's children and the impact of cancellation and its consequences on the health and well-being of the author. The author asserts that any reasonable decision maker would have found that these considerations were sufficient to prevent cancellation of the visa.

5.2 The assessment that the original visa cancellation decision was a denial of justice is supported through reference to a recent mental health report, dated 1 May 2019.[36] Most relevant are conclusions derived from this report that there were "no safeguarding concerns" or "no risk of harm to others" identified. The report does, however, set out the mental health challenges that the author is confronting, which have been exacerbated by his stay in immigration detention and his deportation. Those challenges would be mitigated by allowing him to repatriate to Australia. The report details abuse suffered by the author[37] while in the detention centre and his current struggles with low mood and anxiety, with some reported biological features of depression.

State party's additional observations

6. On 11 November 2019, the State party responded to the author's comments, noting that the author had not identified any irregularity in the decision of the Minister, which was subject to five separate instances of judicial review. It refers to the Minister's Statement of Reasons where all the factors mentioned are considered but not found to outweigh the risk of harm to the public. With reference to the doctor's report,[38] the State party notes that as it was produced in the context not of reoffending but rather of an assessment for depression, the report is therefore of limited relevance. The State party submits, however, that a psychological report was part of the evidence considered by the Minister.

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.

[36] The author refers to and provides a copy of the report of Hartlepool Integrated Mental Health Services.

[37] No further information is provided by the author.

[38] The State party refers to the report in para. 2.17 and footnote 19.

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. In the absence of any objection by the State party in that regard, 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 submission that the author's claim under article 14 (7) of the Covenant, characterizing his arrest, detention and deportation as a new punishment for served convictions, is insufficiently substantiated. The Committee also notes the author's claims that the State party's actions were criminal penalties imposed for crimes for which he had already served his sentence and that since no new proceedings had been instituted, there was no justification for new criminal sanctions. He therefore claims that his treatment during removal proceedings, being penal in nature, fall under and violate articles 14 and 15 of the Covenant, which prevent double jeopardy and retroactive punishment. The Committee further notes the State party's argument that the removal proceedings were purely administrative and although the character test under the Migration Act takes past convictions into account, the aim is not to repunish the individual but to ensure public safety. The Committee recalls its jurisprudence in which it was confirmed that article 14 of the Covenant is applicable to criminal matters and not to proceedings in relation to deportation and removal[39] and that administrative proceedings, consequent to a criminal conviction, do not equate to double punishment under article 14 (7) of the Covenant.[40] Accordingly, the Committee concludes that the author's claims under articles 14 and 15 are inadmissible, *ratione materiae*, under article 3 of the Optional Protocol.

7.5 The Committee notes that the State party challenges the admissibility of the author's claims under article 14 for lack of substantiation, contrary to article 2 of the Optional Protocol and rule 96 (b) of the rules of procedure, as he has not clearly set out which provisions of article 14, apart from paragraph 7 (see para. 7.4), are alleged to have been violated, nor has he identified any procedural irregularity in criminal proceedings, that is to say, those to which article 14 applies. The Committee therefore finds the author's remaining claims under article 14 of the Covenant to be inadmissible as insufficiently substantiated, in accordance with article 2 of the Optional Protocol.

7.6 The Committee notes the State party's assertion that all claims pertaining to members of the author's family should be found inadmissible, *ratione personae*, as no claims were submitted on behalf of any of the other members of the author's family nor were they joined as victims in the author's communication. The State party therefore argues that the author does not have standing to claim a violation of any other individual's rights, since this is contrary to requirements under articles 1 and 2 of the Optional Protocol. The Committee notes that nothing in the author's communication indicated that it was being submitted on behalf of other members of the family or that anyone else should be joined as a victim. Further, the author neither provided any evidence of consent given by another individual conferring authority on the author to act on that individual's behalf in the proceedings before the Committee nor advanced any arguments in his communication in which he alleged that he had been instructed to do so or believed consent to have been implied in that regard. The Committee therefore finds the author's claims regarding his children and mother under article 24 of the Covenant to be inadmissible, *ratione personae*, in accordance with rule 91 of the Committee's rules of procedure and article 2 of the Optional Protocol.

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[39] *J.G. v. New Zealand* (CCPR/C/115/D/2631/2015). The Committee notes, first, that the *ne bis in idem* principle as protected by article 14 (7) of the Covenant prohibits States from trying someone for the same offence for which that person has already been tried and sentenced. The Committee observes that, in the circumstances of the present case, the decision to proceed with the deportation of the author is a measure of administrative nature that is independent of his conviction and sentence under criminal law for drug-related crimes. It therefore cannot be seen as constituting an additional punishment for the criminal offences committed by the author. Accordingly, the Committee considers that the author's claims do not raise any issues under article 14 (7) of the Covenant.

[40] *J.G. v. New Zealand* (CCPR/C/115/D/2631/2015).

7.7 The Committee notes the author's claims under article 25 of the Covenant that he was entitled to vote in the State party, as evidenced by his registration on the electoral roll, and that in detaining and removing him, the State party had therefore violated that right by preventing his exercise of it. The State party claims, on the other hand, that in fact the author had historically benefited from a legislative privilege conferred upon a particular group of permanent residents at a particular time. It therefore states that, as a non-citizen, he cannot be deprived of a right that he does not in fact hold. In the absence of further explanations, however, the Committee considers that the author has not sufficiently substantiated these claims for the purposes of admissibility and therefore finds that these claims are inadmissible under article 2 of the Optional Protocol.

7.8 The Committee considers that the author's remaining claims, raising issues under articles 9 and 12 of the Covenant, have been sufficiently substantiated for the purposes of admissibility and proceeds to their examination on the merits.

Consideration of the merits

8.1 The Committee has considered the communication in the light of all the information made available to it by the parties, as provided for under article 5 (1) of the Optional Protocol.

8.2 In relation to the author's claims under article 12 of the Covenant, the Committee first notes his claims that he took part in an Australian citizenship ceremony in 1981, as part of the admission process for the armed forces, that he had voted and stood for election in the State party and that he was a citizen of the State party as a member of the Commonwealth. It also notes the State party's argument that the power to grant citizenship is not conferred on recruiting officers of the armed forces, that the conferring of voting rights upon the author was due to a legislative privilege given to a particular class of previously enfranchised permanent residents and that the author had not at any time applied for citizenship. It further states that its judicial authorities had carefully considered all of these factors and had concluded that none of them taken individually or together conferred a right of citizenship on the author.

8.3 The Committee notes that limitations on the right to liberty of movement and choice of residence, protected by article 12 (1) and (2) of the Covenant, are relative to the author's status, either as a citizen or as a lawfully present alien, and the right mentioned in article 12 (4) of the Covenant applies to those individuals whose connections to the State party are such that it could be considered "their own country".[41] The Committee also notes that the issue of the author's citizenship was heard before all available domestic instances and that the author raises no question of procedural irregularity. The Committee therefore does not find it necessary to interfere with the State party's determination that the author was not, in fact, its citizen.

8.4 The Committee recalls its jurisprudence,[42] on the question of whether a person who enters a given State, under and subject to the conditions of its immigration law, 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 in a case where the country of immigration places unreasonable impediments on the acquiring of nationality by new immigrants; when, however, as in the present case, 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 (4) of the Covenant. It is to be noted in this regard that, while in the drafting of article 12 (4) of the Covenant the term "country of nationality" was rejected, the suggestion to refer to the country of one's permanent home was rejected as well. The Committee also recalls its jurisprudence

[41] See paragraph 20 of general comment No. 27 (1999) on freedom of movement, in which it is stated that: "[t]he wording of article 12, paragraph 4, does not distinguish between nationals and aliens ('no one'). The scope of 'his own country' is broader than the concept of '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."

[42] *Stewart v. Canada* (CCPR/C/58/D/538/1993).

in *Nystrom*[43] and *Warsame*[44] in which the failure to acquire citizenship, in the absence of unreasonable impediments imposed by the State party, was not determinative of the application of article 12 (4) where individual and highly specific circumstances made such an interpretation too restrictive.

8.5 The Committee finds that, while the author has made submissions that he subjectively considers the State party to be his own country, nothing before it indicates a flaw in the State party's examination of the author's status, which included examination of his intention to permanently remain in the State party, his failure to apply for citizenship and renounce his nationality by birth, his social connections to the State party, including involvement in public life, the lack of connections in Scotland and the impact on his family life, which were all duly weighed by domestic decision makers.

8.6 The Committee does not find any circumstances arising in the present case that are sufficient to trigger the exceptions mentioned above under article 12 (4) of the Covenant. In the circumstances, the Committee concludes that the author cannot claim that Australia is "his own country", for purposes of article 12 (4) and therefore cannot conclude that the author's rights under article 12 of the Covenant were violated.

8.7 Considering the above, the Committee turns to the author's claims that, being always lawfully present on the State party's territory, by reason of his actual or implied citizenship, his arrest, detention and deportation were, in and of themselves, arbitrary and thus contrary to article 9 of the Covenant. The Committee, not finding any basis on which to question the State party's determination that the author was not an Australian citizen, proceeds to consider the factors taken into account in the decision to cancel the visa and whether that decision was taken arbitrarily and therefore whether his consequent arrest and detention were arbitrary.

8.8 The Committee notes that on 26 October 2014, the author was informed of the decision on visa cancellation and on 29 October 2014, he was informed by immigration authorities that he must report to their offices by 31 October 2014, whereupon he would be detained pending removal. He was also told that if he failed to report by the deadline, authorities would seek the assistance of the police to locate and detain him. The Committee also notes that the author filed a challenge to the decision, including an injunction to halt his detention. The Committee further notes that the injunction was overturned on the application of the Minister, after which the author was arrested and detained.

8.9 The Committee notes the author's claims that, regardless of his immigration status, the prolonged and indeterminate detention to which he was subjected, underpinned by domestic legislation, is by its very nature arbitrary and contrary to the Covenant. It also notes the State party's submission that the detention was justified for the purposes of removal and was reasonable having regard to the risk he posed to the community and for that reason detention other than in an immigration detention centre was not considered appropriate owing to the risk to the community. The State party claims that the detention continued only up until the author had exhausted all available remedies effective to challenge the removal decision and that he was removed as soon as practicable thereafter.

8.10 The Committee recalls that the Covenant in its article 9 (1) recognizes that everyone has the right to liberty and security of person and that no one may be subjected to arbitrary arrest or detention. In that article, the Committee does provide, however, for certain permissible limitations on this right, by way of detention, where the grounds and the procedures in that regard are established by law. Such limitations are indeed permissible and exist in most countries, being incorporated in laws which have as their object, for example, immigration control or other purposes related to conditions under which individuals are deemed harmful to themselves or society. The Committee recalls its jurisprudence,[45] in which it is stated that the right to liberty of person is not absolute. While it is recognized in article 9 of the Covenant that deprivation of liberty is sometimes justified, for example, in the enforcement of criminal laws, arrest or detention may be authorized by domestic law and nonetheless be arbitrary. The notion of "arbitrariness" is not to be equated with being "against

[43] *Nystrom v. Australia* (CCPR/C/102/D/1557/2007).
[44] *Warsame v. Canada* (CCPR/C/102/D/1959/2010).
[45] See general comment No. 35 (2014) on liberty and security of person.

the law" but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law,[46] as well as elements of reasonableness, necessity and proportionality. The grounds and procedures prescribed by law must not be destructive of the right to liberty of person[47] nor can the regime of detention amount to an evasion of the limits imposed on the criminal justice system by providing the equivalent of criminal punishment without the applicable protections.[48]

8.11 The Committee recalls its jurisprudence in which it confirmed that detention in the course of proceedings for the control of immigration is not arbitrary per se but stated that the detention must be justified as reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time.[49] States parties should also prevent and redress unjustifiable use of force in law enforcement.[50] In relation to continued detention after the completion of a criminal sentence for the purpose of protecting the community or "preventive detention" which, although not directly applicable in the author's case, is perhaps analogous to detention prior to removal where protection of the public is at issue, the Committee has confirmed in previous Views that such detention must be justified by compelling reasons arising from the gravity of the crimes committed and the likelihood of the detainee committing similar crimes in the future. Furthermore, States should use such detention only as a last resort and regular periodic reviews by an independent body to decide whether continued detention is justified must be assured. States parties must exercise caution and provide appropriate guarantees in evaluating future dangers posed by the individual.[51] If a prisoner has fully served the sentence imposed at the time of conviction, under articles 9 and 15 of the Covenant a retroactive increase in the sentence is prohibited and a State party may not circumvent that prohibition by imposing a detention that is equivalent to penal imprisonment under the label of civil detention.[52] To avoid arbitrariness, in these circumstances, the State party must demonstrate that the legitimate aim of protecting the public could not be achieved through any other, less intrusive, means than arrest and indeterminate detention until all domestic remedies had been exhausted.[53]

8.12 In relation to the author's claim that the decision to cancel his visa was taken arbitrarily, the Committee notes that visa applications in the State party are judged against a statutory standard of "public interest". In this assessment, both the past criminal and general conduct of the individual may be considered to be evidence of a lack of "good character". Any visa decision can be reviewed by an administrative appeals tribunal of the Department of Immigration and Multicultural Affairs. The Minister of Immigration retains independent statutory authority to set aside the decision of the tribunal. The Minister may do so when he "reasonably suspects that the person does not pass the character test", based on the objective criteria of the person's "substantial criminal record" defined by legislation as any "term of imprisonment of 12 months or more". However, the Minister's discretion allows for the individual to submit evidence of his good character, thereby enabling the Minister to decide whether to intervene in the visa decision on the basis of public interest. The Committee also notes that the author's substantive application for judicial review was heard by the Federal Administrative Court before which he made detailed submissions and which he does not question in terms of procedural fairness. In light of the foregoing, the Committee concludes that the facts presented to it do not indicate that the visa cancellation was arbitrary, as all of the individual factors presented to the Minister by the author were comprehensively assessed and the Minister's decision that detention was necessary and proportionate in light of the risk of recidivism, which, although acknowledged by authorities to be statistically minimal, was

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[46] *Gorji-Dinka v. Cameroon* (CCPR/C/83/D/1134/2002), para. 5.1; and 305/1988, *Van Alphen v. Netherlands* (CCPR/C/39/D/305/1988), para. 5.8.

[47] *Fardon v. Australia* (CCPR/C/98/D/1629/2007), para. 7.3.

[48] Ibid., para. 7.4 (a)–7.4 (c). See concluding observations: United States of America (CCPR/C/USA/CO/3/Rev.1, 2006), para. 19; and general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, paras. 15 and 18.

[49] *Shafiq v. Australia* (CCPR/C/88/D/1324/2004), para. 7.2.

[50] *Leehong v. Jamaica* (CCPR/C/66/D/613/1995), para. 9.3; see also Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990).

[51] See concluding observations: Germany (CCPR/C/DEU/CO/6, 2012), para. 14.

[52] *Fardon v. Australia* (CCPR/C/98/D/1629/2007), para. 7.4.

[53] *Danyal Shafiq v. Australia* (CCPR/C/88/D/1324/2004).

deemed too great in terms of the potential harm to vulnerable victims, was subject to judicial review. Therefore, the resulting arrest and detention were prima facie carried out in pursuit of the legitimate aim of administrative removal and were therefore not arbitrary per se. The Committee does not find that the information before it reveals a violation of article 9 of the Covenant insofar as the decisions regarding visa cancellation and removal are concerned.

8.13 As to the author's claims regarding the manner of his arrest, the Committee does not have any detailed submissions before it regarding interactions between the author and the immigration authorities, except that it does note that the pleadings for the 30 October 2014 ex parte injunction application state the fact that the author was informed that his failure to appear voluntarily by the set deadline, originally 31 October 2014, would trigger an arrest by the police. The Committee notes that he did not appear voluntarily but rather filed an injunction to suspend his arrest and detention while the substantive appeal against the visa decision was pending before the Federal Administrative Court. The Committee also notes that he was not consequently arrested on the day in question and was afforded the opportunity to have his ex parte injunction application heard and to submit further pleadings in response to the Minister's set aside application regarding the injunction to suspend detention which, although initially granted, was lifted. He was arrested on 23 November 2014. The Committee therefore concludes that it does not have sufficient information before it to conclude that his arrest was arbitrary, having regard to his failure to appear before authorities as instructed once the injunction application had been concluded. It therefore does not find that the author's arrest constitutes a violation of article 9.

8.14 As to the author's detention, the Committee notes that it does not have the benefit of detailed submissions from either party specifically concerning review of the necessity of the author's detention, having before it the records of only certain of the proceedings.[54] Having regard to the fact that the Committee does not have the transcript of proceedings of 18 December 2015 on the Order to dismiss the author's interlocutory application in relation to home detention, the Committee, while noting that the Order was made by consent and that no further application to restrain detention was made by the author, finds that there is not sufficient information before it to indicate that the decision to impose detention was taken arbitrarily.

8.15 As to the author's claims regarding the indeterminate and unnecessarily prolonged nature of his detention, the Committee notes that, while the author's detention was not of determined length at the outset, the information before it indicates that the detention was considered by the Federal Administrative Court on 30 and 31 October 2014, 21 November 2014, 18 December 2015 and 13 July 2016 and by the Full Federal Court on 14 December 2016. The author was therefore given an opportunity to challenge his detention in several judicial forums and the consequences for the author and his family were duly weighed against the risk he was deemed to present to the community. The Committee also notes the State party's conclusion that detention was necessary and proportionate in light of the risk of recidivism, which, although acknowledged by authorities to be statistically minimal, was deemed too great in terms of the potential harm to vulnerable victims. The Committee therefore finds that the detention was imposed for the clear purpose of removal, in accordance with domestic law, which was affected as soon as domestic remedies, which were not unduly prolonged, had been exhausted. The Committee therefore concludes that the facts as presented do not establish a violation of the author's rights under article 9 of the Covenant in relation to his detention.

[54] Including the visa cancellation decision; the author's application for an urgent ex parte injunction to suspend his detention, heard on 30 and 31 October 2014; the hearing on the Minister's application to set aside the injunction, which was granted on 21 November 2014; the hearing on the author's application for declaratory relief regarding his visa cancellation, which was rejected on 13 July 2016; his application to remove his appeal to the High Court, which was rejected on 13 November 2015; the substantive appeal hearing, which was rejected by the Full Federal Court on 14 December 2016; and the hearing by the High Court on the author's application for special leave to appeal the decision of the Full Federal Court.

9. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the information before it does not reveal a violation by the State party of either article 9 or 12, of the Covenant.

Annex I

Joint opinion of Committee members Duncan Laki Muhumuza, Hernán Quezada Cabrera and José Manuel Santos Pais (dissenting)

1. We regret not being able to concur with the majority of the Committee in the present communication. In our view, there is a violation by the State party of the author's rights under article 9 of the Covenant.

2. The author, born in Scotland in 1960, moved with his family to Australia at age 5 and lived there until his removal to the United Kingdom of Great Britain and Northern Ireland in December 2017 (paras. 1.1 and 2.1).

3. On 11 November 2011, the Supreme Court of Tasmania convicted the author of maintaining sexual relations with a person under 17 years of age and sentenced him to four years of imprisonment. The facts, however, date back to 1996, when the author was 36 years of age and commenced a relationship with one of his employees, then 12 years of age, which lasted for five years. The author served part of his sentence and was released on parole on 7 May 2014 (para. 2.2).

4. On 27 October 2014, the Minister for Immigration decided to cancel the author's Transitional (Permanent) Visa, based on his having failed the "character test". The author was informed by the immigration authorities that he must report to their offices; otherwise, authorities would seek the assistance of the police in locating and detaining him (para. 2.3).

5. He made an application for an injunction to prevent the State party from placing him in immigration detention while his citizenship status was being determined. The Federal Administrative Court, on 31 October 2014, granted the author's injunction, considering the risk of flight to be slight. The Court, however, also granted leave to the State party to appeal and, on 21 November 2014, granted the Minister's application to set aside the author's injunction (para. 2.4).

6. Meanwhile, on 13 November 2014, the author filed another application, in which he requested a judicial review of the Minister's decision to cancel his residence visa (para. 2.5). On 23 November 2014 while its consideration was pending, the author was forcibly removed from his car by four police officers, taken into custody and detained at the Maribyrnong Detention Centre in Melbourne (para. 2.6). He had never absconded, however, and had simply been exercising his right to guarantee his liberty through judicial means.

7. On 18 August 2016, he was transferred to Christmas Island (para. 2.8) and detained there until his removal to the United Kingdom. He was administratively detained for more than three years, pending such removal.

8. Domestic courts dealt mainly with the issue of whether the author had acquired Australian citizenship which prevented him from being deported (paras. 2.5–2.9). His applications to be released from immigration detention were always dismissed and the need for the extended period of his detention was not reassessed, the courts not having found any violation of the author's rights, as regards his visa cancellation.

9. The question therefore remains whether, to avoid arbitrariness, the immigration detention, albeit lawful, was necessary, reasonable and proportionate in the circumstances; and whether there were sufficient reasons to consider that the author had failed the character test, which led to his visa's being cancelled.

10. The author claims, in this regard, that his "prognosis for full rehabilitation is very good" and that he "is currently assessed as being at minimal risk of reoffending", joining in support a report by a psychologist. He had completed all required rehabilitation courses during his time in prison (para. 2.11) and, indeed, he was released on parole, which attests to his claims.

11. As for the proportionality of the detention, to achieve the legitimate aim of protecting the public, the author argues that there were many less onerous options available to the State

party, including ongoing community-based psychosocial support (para. 2.12), an argument that the State party simply rebuts by saying the detention was appropriate owing to the risk to the community (para. 4.10), which was minimal, however.

12. The author claims that his deportation had the collateral effect of separating him from his mother, wife and children, all of whom reside in Australia, and disconnected him from his long-standing social and professional networks, severing his connection to the country in which he had grown up (paras. 2.14 and 2.17). The Minister for Immigration acknowledges all of these impacts.

13. Domestic courts, however, do not seem to have addressed these decisive questions, critical to an assessment of the arbitrariness of the author's prolonged and indefinite detention, which ultimately extended for more than three years.

14. We dispute the State party's claim that detention was necessary to ensure removal and "that this approach is consistent with the fundamental principle of sovereignty in international law, which includes the right of a State to control the entry and stay of non-citizens in its territory", as well as the State party's claim that "immigration detention is distinct from imprisonment, as persons in immigration detention are not in prison, are not considered to be prisoners and are not held for punitive reasons and rather, they are detained administratively" (para 4.7). In fact, the author was doubtlessly deprived of his liberty and prevented from leaving the detention premises during the whole of his "immigration detention", which seriously impacted his mental health (para. 5.2).

15. Unlike the State party and the majority of the Committee (para 8.13), we consider, based on the very same reasons expressed in the Views (para 8.11), that the author's detention was neither necessary nor reasonable or proportionate, particularly in view of the manner in which it was enforced, and was therefore arbitrary. Moreover, such detention was not reassessed as it extended in time, contrary to the reasoning adopted by the majority (para. 8.15).

16. We dispute the legitimacy of the aim of the author's removal. The Statement of Reasons by the Minister (who belongs to the Liberal-National Coalition, responsible for implementing Operation Sovereign Borders) (para 4.9) does not justify, in our view, the ultimate visa cancellation decision.

17. The Minister agreed with the sentencing judge's decision and considered the author's "sexual offending as very serious" and "repugnant". He also acknowledged, however, the author's "addictions and psychological problems" at the time of the offence, his willingness to undergo treatment and to participate in rehabilitation programmes for sex offenders and persons with addictive behaviours, positive work reports regarding his general behaviour in prison and opportunities taken advantage of by the author to undergo psychological counselling so as to reduce the risk of reoffending and to continue such treatment following his release from prison. He also noted good progress achieved in the re-forming of bonds between the author, his partner and their children; the strong ongoing support provided by his family, mostly Australian citizens resident in Australia; his expression of remorse and existing support networks, including employment opportunities; and his deep and long sustained ties to Australia. The Minister acknowledged that it was in the best interests of the author's four children and two step grandsons not to cancel the author's visa, as this would cause them substantial hardship and deprive them of the opportunity to maintain close and direct personal contact with him. He also recognized the substantial hardship that the author's family, with whom he maintained a close relationship, would endure as a result of his removal. While noting that the author had no relatives, no contacts and no ties in Scotland and that he would experience significant difficulties in establishing himself owing to his extended absence and to a lack of family support there, the Minister still decided to exercise his discretion to order the removal, concluding that "there remains a risk, albeit even if a low one, that Mr. Cayzer will reoffend".

18. We cannot therefore endorse the majority's conclusion (para 8.12), that "all of the individual factors presented to the Minister by the author were comprehensively assessed". They were referred to but not duly assessed. In fact, by adhering to the sentencing court's reasoning, the Minister simply disregarded all subsequent efforts made by the author to rehabilitate himself while serving his sentence, attested by his release on parole, as well as

the several significant individual and family circumstances that would justify his stay. Rigid security reasons prevailed, notwithstanding the risk of reoffending being minimal, and the issue of the rehabilitation of the author was never seriously considered.

19. We would therefore have concluded for a violation of the author's rights under article 9 of the Covenant, since his immigration detention, for more than three years, was neither necessary nor reasonable or proportionate and was therefore arbitrary. Moreover, the Statement of Reasons by the Minister does not justify, in our view, the author's visa cancellation.

Annex II

Individual opinion of Committee member Arif Bulkan (dissenting)

1. In the present communication, the majority finds that the State party did not violate the author's rights under article 12 (4) of the Covenant by deporting him from Australia, even though this meant his effective banishment from the only country he has ever known. In so deciding, the majority does not grapple meaningfully with the Committee's evolving jurisprudence on article 12, nor does it accord the specific facts of the author's case anything beyond cursory mention. For this reason, I cannot join in this decision to reject the author's claims under both articles 12 and 9 of the Covenant.

2. The text of article 12 (4), which provides that "[n]o one shall be arbitrarily deprived of the right to enter his own country", conspicuously eschews the language of citizenship or nationality. The ineluctable conclusion is that this was done to confer protection on a wider category of persons, capturing those who do not qualify under narrow, traditional criteria but nonetheless possess some deep and enduring connection to the country in question. This separate category is distinct from that of aliens, who are dealt with in article 13, reinforcing the conclusion that the categorization of "own country" is a unique one to be interpreted more flexibly.

3. Despite some initial resistance, this broader interpretation is now firmly incorporated in the meaning of article 12 (4). In its general comment 27 (1999) on freedom of movement, the Human Rights Committee affirms that the scope of this provision extends beyond the formal category of nationality. In a passage worth quoting in full, the Committee notes that article 12 (4) is capable of a "broader interpretation that might embrace other categories of long-term residents", since "[i]t 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".[1]

4. This broader approach has been embraced in several recent cases. In *Nystrom v. Australia*, for example, this Committee found 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. 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".[2] Applying that test, the Committee concluded that Australia was the author's own country, notwithstanding his lack of citizenship, since he was taken there from Sweden by his mother when he was only 27 days old and lived there all his life; further, the author had no ties to Sweden, did not speak the language and had always considered Australia to be his home. A similar approach was taken in *Warsame v. Canada*, where the Committee echoed that there may be "close and enduring connections between a person and a country" which may be stronger than nationality, thereby attracting the protection of article 12 (4). In the case of *Warsame*, the author had arrived in Canada at age 4, lived there continuously thereafter with his nuclear family and received his entire education in that country. Before that, he had resided in Saudi Arabia and had never lived in Somalia nor could he speak the language properly. Given these factors, which the Committee described as indicating "strong ties" connecting him to Canada, it concluded that the author had established that Canada was the author's "own country" for the purposes of article 12 (4).[3]

5. Critiques of this approach have never satisfactorily explained the reason for a more restrictive interpretation. In *Nystrom*, for example, Committee members Gerald L. Neuman and Yuji Iwasawa asserted in a dissenting opinion that the primary purpose of article 12 (4) of the Covenant is to protect the rights of citizens, a frankly unconvincing position given that

[1] General comment No. 27 1999) on freedom of movement.

[2] Communication No. 1557/2007, *Nystrom v. Australia*, adopted on 18 July 2011, para. 7.4.

[3] Communication No. 1959/2010, *Warsame v. Canada*, adopted on 21 July 2011, paras. 8.4–8.5.

the language of this specific subparagraph studiously avoids any reference to nationality or citizenship. The obvious flaw in that argument is that if such had been the primary purpose of article 12 (4), it would have been the easiest thing for the drafters to adhere to traditional language which, significantly, is used in other subparagraphs of article 12. However, they chose instead to construct a category of "own country", thereby clearly signalling the intent to offer protection to persons beyond the narrow category of citizenship.

6. Of considerable relevance is that the provision being interpreted forms part of a human rights treaty, not a deed or some other commercial transaction, which necessarily requires greater flexibility in the quest to discern meaning. Nowhere has this been more commandingly explained than in *Minister of Home Affairs v. Fisher*,[4] a case involving the Privy Council of the United Kingdom, where the word "child" in section 11 (5) (d) of the Constitution of Bermuda was under consideration. Coincidentally, *Fisher* was also a case concerned with citizenship and the right of remaining in a country and equally in respect of conferring protection, the term used in the provision under consideration was the wider one of "belonging", not citizenship or nationality. In seeking to deny the children of a Jamaican woman the right to remain in Bermuda, the Government argued, however, that they were illegitimate (*sic*) and thus could not qualify as "children" according to the traditional interpretation of the term. Rejecting this crabbed interpretation, the Privy Council traced the origins of the Constitution of Bermuda to both the Convention for the Protection of Human Rights and Fundamental Freedoms and the Universal Declaration of Human Rights, magisterially asserting that such antecedents "call for a generous interpretation avoiding …'the austerity of tabulated legalism', suitable to give to individuals the full measure of the fundamental rights and freedoms referred to".[5] On this note, I should hasten to add that calling for a generous interpretation of human rights provisions is not to privilege a particular ideological bent at all costs; rather, it simply reflects a recognition that where the language of a human rights document permits, the more generous interpretation should be adopted. Nowhere would that be more possible than in this case, where the language of the provision is not one of "citizenship" or "nationality", but rather of "own country".

7. Against this background, the approach of the majority in finding no violation of article 12 (4) is a classic example of "tabulated legalism". The majority focuses on the author's lack of citizenship (see para. 8.2), an approach that is completely blind to the wider language used in the text. Compounding this misstep, the majority adds (in para. 8.3) that the author's failure to demonstrate any procedural irregularity in domestic proceedings on the issue of his citizenship precludes any interference with the State party's determination, which is again oblivious to the fact that the right in question under the Covenant is not confined to citizens but rather encompasses the conferring of protection on a wider class by the use of the term "own country". At the domestic level, the focus was on citizenship; at the Committee level – where the text of the Covenant applies – the issue is a much broader one and the majority misdirected itself with its preoccupation with citizenship.

8. Applying the factors identified in paragraph 20 of general comment No. 27 (1999) on freedom of movement and reiterated in the Committee's above-mentioned jurisprudence would produce the opposite conclusion to that reached by the majority. The author was involuntarily taken to Australia at age 5 by his parents and lived there for the rest of his life – some 52 years – before being deported to the United Kingdom in 2017. All of the members of his immediate family live in Australia, namely, his mother, his wife and his children, included among whom are a son who was only 6 years of age at the time and a daughter with a health condition rendering her extremely vulnerable. The author's intention to remain in Australia has never been in question and was objectively established by his participation in a citizenship ceremony when he attained the age of majority in 1981 as well as by his involvement in the civic affairs of his community and the country at large by voting and even standing for elections. Any one of these factors would be sufficient to indicate the depth of the author's attachment to Australia; combined, they leave no doubt that the State party qualifies as "his own country". Indeed, if more than five decades of uninterrupted residence

4 [1979] 3 All ER 21.

5 Ibid. p. 5.

in a country are not sufficient to demonstrate “special ties” thereto, then it is unclear what could qualify.

9. Once it is accepted that for the purposes of article 12 (4) of the Covenant, Australia does qualify as the author’s own country, then it is at the same time difficult to resist the conclusion that the State party arbitrarily deprived him of the right to enter, which necessarily includes the right to remain therein.[6] As pointed out by this Committee, there are “few, if any, circumstances in which deprivation of the right to enter one’s own country could be reasonable”.[7] In this case, the factors that would strictly engage migration rules fall far short of contributing to a compelling case for deporting the author when measured against not only his lifelong attachment to the country, as discussed, but also the specific circumstances of the case. No evidence was presented portraying the author as a recidivist; rather, a psychologist’s report described the prognosis for his full rehabilitation as being very good (see para. 2.11); further, any risk that the author would reoffend was conceded by the Minister to be a low one (para. 4.9). In such circumstances, deportation constituted a nuclear option, completely at odds with the author’s lifelong attachment and profound familial ties to the country.

10. Given my views on the applicability of article 12 (4) of the Covenant, I find that the author’s pre-removal detention, which lasted for more than three years, was arbitrary and thus a violation of article 9 of the Covenant. Whatever the strict legality of the process, it was clearly unreasonable to keep him in such extended detention, especially when he could hardly pose any flight risk (he was, ironically, fighting to remain in the country!) and this incarceration served only to separate him from his family. That having been said, his detention was temporary. However disproportionate and ultimately wrong, it pales beside the drastic decision adopted by the State party, which was to banish the author permanently from the only home he has ever known. Considering that the author was severed from his closest relatives, including a son who was a minor and daughter who was ill, and sent to a country where he is a complete stranger, the State party’s response was not just disproportionate and arbitrary, it was callous and inhumane. For these reasons, I find that by deporting the author to the United Kingdom – a country from which he was removed at age 5 – the State party violated his rights under article 12 (4) of the Covenant and, through subjecting him to the processes leading thereto, his rights under article 9 as well.

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[6] General comment No. 27 (1999) on freedom of movement, para. 19.

[7] *Warsame v. Canada* (CCPR/C/102/D/1959/2010), adopted 21 July 2011, at paragraph 8.6.