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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. 2999/2017*, **, ***

Communication submitted by:	S (represented by counsel, Stephen Tully)
Alleged victim:	B
State party:	Australia
Date of communication:	21 June 2017 (initial submission)
Document references:	Decisions taken pursuant to rules 92 and 94 of the Committee's rules of procedure, transmitted to the State party on 23 June 2017 and 20 September 2018 (not issued in document form)
Date of adoption of Views:	21 March 2023
Subject matter:	Deportation to North Macedonia of a long-time non-citizen resident owing to criminal activity
Procedural issue:	Abuse of the right of submission
Substantive issues:	Arbitrary or unlawful interference with family life; freedom of movement; non-refoulement
Articles of the Covenant:	12 (4), 17 and 23
Article of the Optional Protocol:	3

1.1 The author of the communication is S, a national of Australia born in 1974. She is submitting the communication on behalf of her husband, B, a national of North Macedonia born in 1964.[1] At the time of submission, B was detained at the Yongah Hill Immigration Detention Centre, in Australia, following his release from prison and faced removal to North Macedonia. The author claims that, by removing B, the State party would violate his rights

* Adopted by the Committee at its 137th session (27 February–24 March 2023).

** The following members of the Committee participated in the examination of the communication: Farid Ahmadov, Wafaa Ashraf Moharram Bassim, Rodrigo A. Carazo, Yvonne Donders, Mahjoub El Haiba, Carlos Gómez Martínez, Laurence R. Helfer, Marcia V.J. Kran, Bacre Waly Ndiaye, Hernán Quezada Cabrera, José Manuel Santos Pais, Tijana Šurlan, Kobauyah Tchamdja Kpatcha, Teraya Koji, Hélène Tigroudja and Imeru Tamerat Yigezu.

*** A joint opinion by Committee members Farid Ahmadov, Carlos Goméz Martinéz, Laurence R. Helfer, Marcia V.J. Kran, Kobauyah Tchamdja Kpatcha and Teraya Koji (dissenting) is annexed to the present Views.

[1] B was unable to submit the communication himself owing to his detention. When submitting the communication, S provided a signed and dated written statement to counsel indicating that she had obtained oral consent and authorization from her husband to act on his behalf.

under articles 12 (4), 17 and 23 of the Covenant. The Optional Protocol entered into force for the State party on 25 December 1991. The author is represented by counsel.

1.2 On 23 June 2017, pursuant to rule 94 of its rules of procedure, the Committee, acting through its Special Rapporteurs on new communications and interim measures, requested the State party to refrain from deporting B to North Macedonia while the communication was being examined.

1.3 On 12 September 2018, the State party requested that the interim measures with regard to B be lifted. On 17 September 2018, the author submitted comments on the State party's request. On 20 September 2018, the Committee, acting through its Special Rapporteurs on new communications and interim measures, acceded to the State party's request to lift interim measures. Later that month, the State party removed B to North Macedonia.

Facts as submitted by the author

2.1 In 1968, when he was 3 years old, B arrived in Australia with his mother and was granted permanent resident status upon arrival. He never acquired Australian nationality and remains a national of the country now known as North Macedonia. At the time of submission, B had not left Australia since his arrival in 1968. He is married and has two sons, who were born in Australia in 1992 and 1997, respectively. He enjoys a close relationship with other relatives in Australia. At the time of the submission of the communication, he had no connection to North Macedonia apart from his nationality and suffered from various health problems.

2.2 On 7 August 2015, the Assistant Minister for Immigration and Border Protection cancelled B's permanent visa under section 501 of the Migration Act 1958, owing to his substantial criminal record. At the time, B was serving a prison sentence and had previously been convicted, in 2012, of offences relating to weapons and supplying drugs. He had also pled guilty to a domestic violence offence in 2014. However, his wife (the author) later sought to retract her statement against him.

2.3 On 7 August 2015, B filed a request for revocation of the visa cancellation with the Minister for Immigration and Border Protection. On the same date, B was invited to substantiate the latter request. On 7 November 2016, the Assistant Minister for Immigration and Border Protection rejected the request. He reasoned that B had not passed the character test and that the strength, nature and duration of his ties to Australia, along with the various forms of hardship that he would face in North Macedonia, were outweighed by the risk of harm that he posed to the Australian community.

2.4 On 15 December 2016, B applied to the Federal Circuit Court for judicial review of the negative decision of the Assistant Minister for Immigration and Border Protection. On 25 January 2016, the request was transferred to the Federal Court.

2.5 On 31 May 2017, the Federal Court rejected B's application for judicial review. The Court considered that article 12 (4) of the Covenant did not in and of itself confer any rights to B.[2]

[2] In its decision, the Federal Court discussed the applicable standards, citing the relevant provisions of section 501 and 501CA of the Migration Act. It cited domestic jurisprudence which stated, in part, that it did not follow that, in all cases, the Minister would accord procedural fairness simply by complying with the requirements of 501CA (3). Once the invitation to make representations was extended to a visa holder, it fell to the visa holder, if he or she wished to do so, to provide information and submissions to the Minister in an effort to persuade the Minister that a revocation decision should be made. If, in making representations, the applicant provided information to the Minister relating to his or her personal circumstances and that information was critical and relevant to the applicant's case, the Minister was bound to consider it. It would be a matter for the Minister to weigh such matters against other relevant considerations, including those mentioned in Direction No. 65. The Federal Court then analysed the seriousness of B's crimes. The Court noted, inter alia, that B had been convicted of various offences, including possessing and supplying prohibited drugs, assault and violation of an apprehended violence order, stalking/intimidation and common assault. The Court noted that, when B had been convicted of domestic violence, in March 2015, the Magistrate who had sentenced B to prison had observed that, in the presence of his children, B had put his hands around

2.6 The author maintains that B has exhausted available and effective domestic remedies, and that the same matter is not being examined under another procedure of international investigation or settlement.

his wife's throat after wrongly accusing her of infidelity. The Court concluded that, notwithstanding the length of time that B had spent in Australia, none of the eight grounds of review that he had claimed in his appeal had merit for the following reasons: Regarding B's argument that the Assistant Minister had failed to assess the likelihood that he would reoffend, the Court noted that the Assistant Minister, in his decision, had stated, "I have noted [B's] remorse for his offending and the steps that he has taken towards rehabilitation, including stopping his illicit drug use. I have given weight to the support he has from his family and the availability of employment should he return to the community. Notwithstanding those factors, I have noted that past sentences of imprisonment and two warnings have failed to curb his offending. Given his history of substance abuse and his repeat violent offending, I find there remains a likelihood that he may re-offend. If [B] did reoffend in a similar manner, it could result in conduct that could cause harm to a member or members of the Australian community, given the widespread harm drugs cause to individuals, as well as the potential flow-on costs to the community in terms of any required involvement of law enforcement, public health and judicial services. I consider that further offending of a violent nature by [B] could result in physical harm to members of the Australian community … Further, I find that the Australian community could be exposed to harm should [B] reoffend in a similar fashion. I could not rule out the possibility of further offending by [B]." In response to B's argument that the Assistant Minister had failed to consider the nature of the harm to the community, the Federal Court cited the decision of the Assistant Minister, which referred to the widespread harm drugs caused to individuals as well as the potential flow-on costs to the community. The Federal Court rejected B's argument that the reasoning of the Assistant Minister was too speculative and generalized on that issue; the Court cited domestic jurisprudence stating that no greater specification of the risk being assessed was required to be provided. The Federal Court rejected B's argument that the Assistant Minister had impermissibly acted with unfettered discretion, noting that the argument was elusive and that the Assistant Minister had discretion under the law. The Court also rejected B's argument that the Assistant Minister had failed to consider the fact that the cancellation of B's visa had been considered on two prior occasions, in 2007 and 2014, but had not taken place. The Court reasoned that the Assistant Minister had adequately set forth in his assessment that the two prior warnings had failed to curb B's offending. The Court rejected B's argument that the Assistant Minister had not considered the non-refoulement obligations of Australia. The Court reasoned that B's claims, which had been considered by the Assistant Minister, had not effectively raised for consideration any non-refoulement obligation that could have been owed to him. The Court further reasoned that even if B had raised such obligations, the Assistant Minister had considered, in paragraphs 62 and 64 of his statement of reasons, B's health condition. The Court also reasoned that the Assistant Minister could not have considered, in his decision of 2015, B's email of 2016 relating to an alleged heart attack. The Court further reasoned that it was difficult to see how the facts of B's case could fall within the scope of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment or the Covenant itself, both of which B had invoked in his appeal, considering the content of article 7 of the Covenant. The Court also stated that B's health and the language and cultural difficulties that he would confront if he were removed to North Macedonia had been considered by the Assistant Minister and that B had not raised any further specific concerns to the Assistant Minister. The Court rejected B's argument that the Assistant Minister had failed to take into account B's right to enter his own country under article 12 (4) of the Covenant. The Court reasoned that the Covenant had not been incorporated into domestic law, according to domestic jurisprudence. The Court concluded that article 12 (4) of the Covenant did not confer any rights upon B, nor was the Assistant Minister required to take it into account. Moreover, B had not shown that he would be unable to re-enter Australia to visit his family in the future. In fact, he had not raised that argument before the Assistant Minister. His claims to the Assistant Minister were that Australia was his only home, that his mother was unable to travel due to ill-health and age and that the country of his birth was completely unfamiliar to him because he remembered nothing of it. The Court rejected B's argument that the Assistant Minister had failed to consider all of the consequences when taking his decision. The Court reasoned that the Assistant Minister had, in fact, considered the consequences for B's family life and whether the interference complied with the requirements of the Covenant. The Court rejected B's argument that the Assistant Minister had acted without procedural fairness. The Court noted that the letter of the Assistant Minister of 7 August 2015 had put B on notice of the issues to be addressed and afforded him an opportunity to be heard and to advance submissions as he saw fit. The Court elaborated further on its reasoning on that issue.

Complaint

3.1 At the time of submission, the author claimed that the State party would violate B's rights under article 12 (4) of the Covenant by removing him to North Macedonia.[3] The right to enter one's own country under article 12 (4) of the Covenant implies the right to remain there and to return there after having left. Australia is B's own country. As a concept, an individual's own country is not limited to that person's country of nationality. B has not left Australia since he arrived at the age of 3 years. He was granted permanent resident status upon arrival in Australia. He received all of his education and training in Australia. His mother, sister, nephews, wife and sons live in Australia. He does not speak Macedonian or Albanian and has no family in North Macedonia.

3.2 The decision to remove B to North Macedonia was unreasonable and arbitrary. The Assistant Minister for Immigration and Border Protection failed to consider B's right to enter Australia in view of the strength and duration of his ties to Australia and in view of the hardship that he claimed he would face in North Macedonia, including a lack of access to health care. The Assistant Minister considered North Macedonia to be B's own country without having identified any evidence supporting that conclusion. The decision of removal was issued five years after B's latest conviction, in 2012, and was thus arbitrary with respect to its timing. Owing to his criminal record, B is unlikely to be able to return to Australia.

Additional submission

From the author

3.3 In a further submission, dated 23 August 2017, the author claims that the decision to remove B to North Macedonia also violated his rights under articles 17 and 23 of the Covenant because it represented a disproportionate and arbitrary interference in his family life. The character references and other documents that B provided to the Department of Immigration and Border Protection during the visa cancellation procedure demonstrated that he maintained close relationships with family members who were well settled in Australia, that his mother was in poor health and that he would experience impediments upon removal.

State party's observations on the merits[4]

4.1 In its submissions dated 26 March 2018 and 12 September 2018, the State party considers that the communication is without merit.[5] B, who was granted a permanent resident visa upon arrival in Australia in 1968 at the age of 3 years, has a significant criminal history. Between 1981 and March 2015, he committed crimes consisting of drug, assault and property offences and serious traffic offences. The penalties imposed for those offences ranged from fines to terms of imprisonment from one month to four years. On 18 October 2006, B was convicted of the offence of malicious wounding and was sentenced to 18 months of imprisonment. On 11 December 2012, he was convicted of drug offences committed between January and May 2011 and a weapons offence arising from the execution of a search warrant on B's premises, on 2 May 2011. B was sentenced to a total term of four years and three months of imprisonment, with a non-parole period of two years and nine months. Shortly after his release from prison on parole, in October 2014, B was arrested, in November 2014, for assaulting his wife (the author). On 2 March 2015, B was convicted of several domestic violence offences and was sentenced to four months of imprisonment. On 7 August 2015, his

[3] The author cites jurisprudence of the Committee, including *Nystrom v. Australia* (CCPR/C/102/D/1557/2007), *Stewart v. Canada* (CCPR/C/58/D/538/1993), *Canepa v. Canada* (CCPR/C/52/D/558/1993) and *Madafferi et al. v. Australia* (CCPR/C/81/D/1011/2001).

[4] The State party does not contest the admissibility of the communication. The State party maintains that, although further avenues of appeal were available to the author (including appeals to the full bench of the Federal Court of Australia and the High Court of Australia), it does not dispute the author's view concerning the prospects of such appeals. For that reason, the State party states that it does not assert that the communication should be declared inadmissible on the basis of non-exhaustion of domestic remedies.

[5] The State party provided its initial observations on 26 March 2018 and submitted additional information, with its request to lift interim measures, on 12 September 2018.

permanent residence visa was mandatorily cancelled under section 501 (3A) of the Migration Act and he was placed in immigration detention.

4.2 B was notified in advance of the possibility that his visa would be cancelled. On two occasions, based on the information that B had provided, decisions were made not to cancel his visa. Specifically, after his conviction and sentencing in 2006, he received, on 25 May 2007, a notice of intention to consider visa cancellation. He was given an opportunity to comment on the notice. On 3 July 2007, B responded that he had not received prior notices about the risk of cancellation of his visa and that, if he had received such a warning, it would have been an absolute deterrent to committing any further offences. On 15 July 2007, B was notified of the decision not to cancel his visa and was warned that further offending might cause the reconsideration of that decision. In response, B sent a signed acknowledgement of receipt in which he confirmed that he had received the warning. That written confirmation included an acknowledgement that disregarding the warning could weigh heavily against him if the Minister for Immigration and Border Protection considered his case in the future. Following B's conviction and sentence in 2012 for drug and weapons offences, a second notice of intention to consider visa cancellation was issued to him, on 22 April 2013. It was stated in that notice that B had an opportunity to submit comments. The author submitted comments on B's behalf and, in August 2014, B was notified again of the decision not to cancel his visa and was issued a second warning that further offending might cause the reconsideration of the matter. Despite those warnings, shortly after B's release from prison, in October 2014, and while he was still on parole, he was arrested for assaulting his wife (the author). In 2015, B was convicted of several domestic violence offences and was sentenced to four months of imprisonment.

4.3 Under section 501 (3A) of the Migration Act, the Minister for Immigration and Border Protection must cancel a visa if, inter alia, a person has a substantial criminal record and therefore does not pass the character test. A "substantial criminal record" is defined as including circumstances in which a person has been sentenced to a term of imprisonment of 12 months or more. The Minister must invite the individual concerned to submit comments and may revoke the cancellation if the Minister is satisfied that the individual passes the character test or if there is another reason the cancellation. In revoking mandatory visa cancellations, decision makers must consider the protection of the Australian community from criminal or other serious conduct, the best interests of minor children in Australia and the expectations of the Australian community.

4.4 The communication is without merit. Australia is not B's own country such that he would have a right of entry under article 12 (4) of the Covenant. Although the Committee considers that close and enduring connections may mean that non-citizens can consider a country to be their own, this would require, inter alia, a complete absence of ties with the country of nationality. In the present case, B has not demonstrated an allegiance to Australia, as he has never sought to become a national of Australia despite being eligible to do so and even though his immediate family members became nationals of Australia by naturalization. B was aware that he was not a national of Australia and received warnings in 2007 and 2014 concerning the possible revocation of his visa. Moreover, the frequency with which B has violated Australian law demonstrates a lack of allegiance to Australia and undermines the author's claim that B has strong ties to Australia.

4.5 Even if Australia could be considered B's own country, his removal would not be arbitrary, as it would be lawful, in accordance with the provisions, aims and objectives of the Covenant and reasonable in the particular circumstances. B was given two visa cancellation warnings, in 2007 and 2014, but continued to engage in criminal offending. His removal would be reasonable and proportionate, given the risk of harm to the Australian community (his most recent convictions relate to domestic violence and are part of a history of violent offending) and given the thorough consideration of his claims during domestic processes.

4.6 B's situation differs significantly from the circumstances of *Nystrom v. Australia*. In the latter case, the Committee emphasized the significant length of time between the commission of the author's offences and the cancellation of his visa. In contrast, and contrary to the author's assertion, B's visa was mandatorily cancelled within six months of his most recent conviction.

4.7 Although B would face language and cultural difficulties and would not have access to an equivalent level of health care in North Macedonia, the health-care system and public health services network in that country are financially accessible and well established, with a good geographical distribution of resources and provision of care. The health, language and cultural difficulties that B might face were considered in full by the Assistant Minister for Immigration and Border Protection but were outweighed by the likely danger that he presented to the community in Australia. B reoffended one month after his release from prison in October 2014 and after having completed several rehabilitation processes. The fact that B has taken steps towards rehabilitation does not render his removal disproportionate to the legitimate aim of protecting the Australian community. Moreover, B's most recent convictions were for violent offences and part of a history of violent offending.

4.8 All removals from Australia comply with article 13 of the Covenant. Cancellation of the visa of an alien under section 501 of the Migration Act may only occur pursuant to a lawful decision and through a process that enables the alien to submit reasons to counter the decision and to have it reviewed, both by the Minister for Immigration and Border Protection, and through judicial review. Policies such as Direction No. 65 of the Migration Act, which guides visa cancellation and revocation decisions, require the decision maker to consider the strength, nature and duration of a person's ties to Australia, in conformity with the Covenant.

4.9 With respect to articles 17 and 23 of the Covenant, for the reasons mentioned above, the interference in the present case was provided for by law and was reasonable, necessary, and proportionate to the legitimate objective of protecting the Australian community from harm.

4.10 The State party describes in detail the differences between the facts of the present case and the cases cited by the author in support of her arguments, including *Stewart v. Canada*, *Canepa v. Canada* and *Madafferi et al. v. Australia*.

Author's comments on the State party's observations on the merits

5.1 In her comments of 24 September 2018, the author maintains that B's circumstances have not been independently reviewed on the merits at the domestic level. The Federal Court did not and is unable to review the merits of the decision to cancel B's visa. It considered that there was no error of jurisdiction and upheld the decision of the Assistant Minister for Immigration and Border Protection on that narrow basis.

5.2 Australia is the only country to which B has ties, including through employment and the payment of taxes. B has embraced the way of life, language and culture of Australia and has no real connection to North Macedonia. The seriousness of his crimes is irrelevant to the assessment of whether Australia is his own country. Crimes committed by aliens who have strong ties to their country of residence should be sanctioned in the same manner as the crimes of nationals of that country.

5.3 At some point, B attempted to become a national of Australia but was informed by the immigration authorities that he would not be eligible for nationality owing to his criminal record.

5.4 B's removal was unreasonable and contrary to the provisions, aims and objectives of the Covenant. The State party did not attempt to quantify the likelihood that B would reoffend, nor did it explain the basis for its determination that B posed a risk of danger to the Australian community. There is extensive evidence of B's rehabilitation regarding drug and alcohol-related issues. He has also expressed remorse. Those factors must be assessed in evaluating the risk of any further offending by him.

State party's additional observations

6.1 In its further observations, dated 30 September 2019, the State party clarifies that it does not seek to rely on the seriousness of B's offending as an indication of his lack of allegiance to Australia. Rather, the State party's position is that B's decision not to apply for Australian nationality, combined with his frequent disregard for Australian law in spite of the knowledge that such disregard could result in the cancellation of his visa, does not support his claim that strong ties connect him to Australia.

6.2 In contrast with the circumstances in *Nystrom v. Australia*, B's visa was cancelled after the issuance of two warnings regarding his conduct and the consequence for his visa as a non-national. There is no basis for the suggestion that B did not apply for Australian nationality because of a misapprehension about his status.

6.3 On two occasions before cancelling B's visa, the domestic authorities considered cancelling it but opted not to do so. The two warnings that the authorities issued failed to curb B's offending. Thus, the cancellation of B's visa was not arbitrary or unreasonable. Rather, it resulted from B's own actions, namely, his continued criminal offending.

6.4 The State party has no record of any inquiry regarding B's alleged attempt to obtain Australian nationality. If such an inquiry had been made, it is very unlikely that definitive advice regarding B's eligibility for Australian nationality would have been provided without a prior full assessment. The State party has no record of any attempt by B to apply for Australian nationality nor of any assessment by the State party's authorities regarding his eligibility for nationality. Had B applied for Australian nationality, his application could have been rejected under either the good character provisions or the offences prohibitions under domestic law, depending upon the date of application. It is entirely reasonable and not arbitrary for the State party to place such requirements on the granting of nationality, and to ensure that applicants for Australian nationality are of good character and are not involved in significant criminal offending.

6.5 With respect to the author's argument that the domestic authorities neither quantified the likelihood that B would reoffend nor balanced the risks that he posed to the community with the harm that his removal would cause him, the State party notes that the Assistant Minister for Immigration and Border Protection did, in fact, consider all of those factors. An inability to obtain health care of the level available in Australia does not constitute cruel, inhuman or degrading treatment or punishment. Furthermore, the individual communications procedure does not involve an appellate review of the merits of domestic decisions but is instead intended to assess compliance with obligations under the Covenant.

6.6 Finally, while article 197C of the Migration Act provides that non-refoulement obligations are not relevant in the decision of an official to remove an alien under section 198 of the Migration Act, other mechanisms set forth under the Migration Act enable the State party to assess its non-refoulement obligations before consideration of removal. Those mechanisms include the protection visa application process and the use of the public interest powers of the Minister for Immigration and Border Protection.

Author's further comments

7.1 In a further submission, dated 9 December 2019, the author maintains that, before removing B to North Macedonia, in September 2018, the State party provided him with five nights of accommodation, 500 Australian dollars and an emergency passport valid for five days. The author considers that such treatment was inhumane. As of February 2019, she was unable to determine B's whereabouts. When the author last spoke to B, he stated that he could not cope with his situation and would prefer to be dead. As remedies, the author requests that the State party return B to Australia immediately, issue an apology, and provide appropriate compensation.

7.2 The State party has not successfully distinguished the present case from the circumstances in *Nystrom v. Australia*. The mere fact that B received warnings before the cancellation of his visa does not mean that it was reasonable to deprive him of the right to enter his own country.

7.3 While State parties are entitled to establish criteria for the acquisition of nationality, requirements that applicants have good character and an absence of significant criminal offending unacceptably afford States parties the opportunity to act arbitrarily or unreasonably in the granting of nationality.

7.4 There is no evidence that the State party assessed its non-refoulement obligations with respect to B before his removal. He was effectively deprived of the opportunity to apply for a protection visa because, in certain circumstances, an individual whose visa has been cancelled is ineligible to apply for a protection visa while within the territory of Australia.

7.5 On 18 October 2022, the author informed the Committee that B contacted his family in Australia from time to time by data messaging.

Issues and proceedings before the Committee

Consideration of admissibility

8.1 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.

8.2 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.

8.3 The Committee observes that the State party does not contest the admissibility of the communication or the author's argument that B has exhausted all available domestic remedies, as required under article 5 (2) (b) of the Optional Protocol. The Committee notes that the State party does not maintain that further effective avenues of appeal were available to B at the domestic level. Accordingly, the Committee considers that article 5 (2) (b) of the Optional Protocol does not constitute an obstacle to the admissibility of the communication.

8.4 With respect to the author's claims on behalf of B under articles 17 and 23 of the Covenant, the Committee recalls its jurisprudence in which it stated that authors must raise all of their claims in their initial submission, before the State party is asked to provide its observations on admissibility and the merits of the communication, unless the authors can demonstrate why they were unable to raise all of their claims at the same time.[6] In the present case, the author has not explained why she invoked only article 12 (4) of the Covenant in her communication and did not raise claims under articles 17 and 23 of the Covenant until after the State party had been invited to submit its observations on the case. Accordingly, the Committee considers that those claims are inadmissible as an abuse of the right of submission under article 3 of the Optional Protocol.

8.5 In the Committee's view, the author has sufficiently substantiated for the purpose of admissibility her claim under article 12 (4) of the Covenant. The Committee thus declares that claim admissible and proceeds to examine it on the merits.

Consideration of the merits

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

9.2 In assessing the author's claim that the State party violated B's right to enter his own country by removing him to North Macedonia, the Committee must first determine whether Australia is B's own country for the purpose of article 12 (4) of the Covenant. Recalling paragraph 20 of its general comment No. 27 (1999) on freedom of movement, the Committee notes that the concept of an individual's own country is not limited to nationality in a formal sense, that is, nationality acquired at birth or by conferral; it embraces, at the very least, individuals who, because of their special ties to or claims in relation to a given country, cannot be considered to be mere aliens.[7] In this regard, the Committee also recalls its jurisprudence according to which factors other than nationality may establish close and enduring connections between an individual and a country – connections that may be stronger than those of nationality.[8] The notion of an individual's own country invites consideration of such matters as long-standing residence, close personal and family ties and intentions to remain, as well as the absence of such ties elsewhere.[9]

[6] *D.Č. v. Lithuania* (CCPR/C/134/D/3327/2019), para. 8.4; and *S.R. v. Lithuania* (CCPR/C/132/D/3313/2019), para. 8.8.

[7] See also *Stewart v. Canada*, para. 12.4.

[8] *Elmi v. Canada* (CCPR/C/136/D/3649/2019), para. 8.2; *Warsame v. Canada* (CCPR/C/102/D/1959/2010), para. 8.4; and *Nystrom v. Australia*, para. 7.4.

[9] Ibid.

9.3 In the present case, the Committee notes the State party's position that Australia is not B's own country because he has never demonstrated allegiance to Australia as he never applied for Australian nationality despite being eligible to do so and despite the fact that his immediate family members have acquired Australian nationality through naturalization.

9.4 Nevertheless, the Committee considers that, apart from his nationality, B had no meaningful connections with North Macedonia at the time of his removal. In that regard, the Committee observes that B arrived in Australia at the age of 3 years in the custody of his mother, was granted permanent resident status upon arrival and did not leave Australia until he was removed at the approximate age of 54 years. Thus, he lived in Australia for over half a century and never indicated an intention to reside elsewhere. The Committee notes B's statement to the Assistant Minister for Immigration and Border Protection (as quoted in the decision of the Federal Court of 31 May 2017) that, before his removal, he did not remember having lived in North Macedonia. The Committee also notes that B completed all of his education in Australia, married there and raised two children there to adulthood, completed all of his employment there and paid taxes there. The Committee further notes that B does not have family members in North Macedonia and does not speak its languages. The Committee also notes the State party's observation that, had B applied for Australian nationality, his application could have been rejected under either the good character provisions or the offences prohibitions under domestic law, depending upon the date of application. Given the aforementioned circumstances, the Committee considers that, despite the fact that B did not apply for Australian nationality, he has demonstrated that he has close and enduring connections with Australia, connections that are stronger for him than those of nationality. Accordingly, the Committee concludes that Australia is B's own country within the meaning of article 12 (4) of the Covenant.

9.5 The Committee must next examine whether, by removing B, the State party arbitrarily deprived him of the right to enter Australia, in violation of article 12 (4) of the Covenant. The Committee recalls that a State party must not, by depriving individuals of their nationality or expelling them to other countries, arbitrarily prevent those individuals from returning to their own countries.[10] Recalling paragraph 21 of its general comment No. 27 (1999), the Committee notes that even interference with the right to enter one's own country that is provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances.[11] The Committee recalls that there are few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable.[12]

9.6 In assessing whether the decisions that resulted in B's removal were in accordance with the provisions, aims and objectives of the Covenant and were reasonable under the circumstances, the Committee notes that the State party has not responded in its observations to B's argument that he would be unable to re-enter Australia after his removal owing to his criminal record. The Committee notes that the Assistant Minister for Immigration and Border Protection did not, in his decision, assess whether B would be able to re-enter Australia after his removal. The Committee also notes the statement of the Federal Court that B did not raise that issue with the Assistant Minister. However, the Committee also notes the position of the Federal Court that article 12 (4) did not create justiciable rights for B owing to the status of the Covenant under domestic law. Thus, the Committee considers that B would have been unlikely to prevail had he expressly claimed to the Assistant Minister that he would be unable to re-enter Australia after his removal.

9.7 The Committee also notes that the State party has not explained whether, before deciding to remove B, it had considered less drastic measures to achieve its stated aim of protecting the Australian community from harm, given that, for practical purposes, Australia was the only country that B had known and that B had no ties in North Macedonia and no knowledge of the local languages. The Committee considers that, given B's criminal record in Australia, it is unlikely that he is presently able to re-enter Australia. Accordingly, the

[10] *Nystrom v. Australia*, para. 7.6.

[11] See also *Elmi v. Canada*, para. 8.4; *Warsame v. Canada*, para. 8.6; and *Nystrom v. Australia*, para. 7.6.

[12] Ibid.

Committee considers that B's removal to North Macedonia was unreasonable under the circumstances, as it has hampered his return to Australia and was disproportionate to the legitimate aim pursued, which was to protect the Australian community from harm. The Committee thus concludes that the decision not to revoke the cancellation of B's visa, which resulted in his removal to North Macedonia, was arbitrary and constituted a violation of his rights under article 12 (4) of the Covenant.

10. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the facts before it disclose a violation by the State party of article 12 (4) of the Covenant.

11. 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, inter alia, to ensure that B has the opportunity to re-enter Australia and to provide him 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.

12. 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 Committee's Views. The State party is also requested to publish the present Views and to have them widely disseminated in the language of the State party.

Annex

Joint opinion of Committee members Farid Ahmadov, Carlos Goméz Martinéz, Laurence R. Helfer, Marcia V. J. Kran, Kobauyah Tchamdja Kpatcha and Teraya Koji (dissenting)

1. We have come to a different conclusion than the majority of the Committee on whether, by removing the author's husband, B, from Australia to North Macedonia, the State party arbitrarily deprived B of the right to enter Australia, thus violating his rights under article 12 (4) of the Covenant. In particular, we conclude that the State party's decision to remove B, who had committed numerous criminal offences and had been repeatedly warned about the consequences of reoffending, was not clearly arbitrary nor a manifest error or a denial of justice. The majority's decision is inconsistent with the Committee's established jurisprudence on article 12 (4), which gives due weight to the assessments by a State party's officials of the facts and evidence in deportation proceedings.

2. The State party's legislation, namely, section 501 (3A) of the Migration Act, stipulates that the Minister for Immigration and Border Protection has the authority to cancel a visa if a person has a substantial criminal record and therefore does not pass the character test. In that assessment, decision makers must consider the protection of the Australian community from criminal or other serious conduct (see para. 4.3 above).

3. B has an extensive criminal history, with offences relating to drugs, assault, weapons, property crimes and serious traffic offences and penalties ranging from fines to imprisonment for four years, recorded as early as 1981 (see para. 4.1 above). B did not seek to become a national of Australia despite being eligible to do so. He was notified of the possibility that his visa could be cancelled on the basis of his criminal record on two separate occasions (see para. 4.4 above). In both instances, after receiving B's comments, the Minister decided not to cancel his visa and instead warned B that further criminal offences could lead to a reconsideration of those decisions and his deportation (see para. 4.2 above). Shortly thereafter, B was released from prison and, while on parole, was convicted of several domestic violence offences against his wife. Although 20 years elapsed between B's first criminal offence and his deportation, the multiple warnings that he received from the State party precluded B from having any legitimate expectation that he would not be deported. In fact, B was aware of the consequences that reoffending might have on his permanent residency status, even stating that a risk to his visa would be "an absolute deterrent to committing any further offences" (see para. 4.2 above). However, B continued to reoffend despite having been warned and given multiple opportunities to maintain his visa status. This led to the State party's ultimate decision to remove B from the country, in accordance with section 501 (3A) of the Migration Act (see para. 4.1 above).[1]

4. According to the Committee's jurisprudence, it is generally for the State party to analyse the facts and evidence in deportation cases to determine the risks of deportation for an individual. The Committee does not conduct its own independent evaluation of the facts and gives due weight to the State party's assessment, unless the assessment was clearly arbitrary or amounted to a manifest error or a denial of justice.[2] 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.[3] The high threshold reinforces the long-held position that the Committee is not a fourth-instance review

[1] The Minister did not specifically make any decision regarding B's ability to re-enter the country.

[2] *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; and *K v. Denmark* (CCPR/C/114/D/2393/2014), para. 7.4.

[3] 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; and *Pillai v. Canada* (CCPR/C/101/D/1763/2008), para. 11.2.

mechanism that re-evaluates findings of fact or the application of domestic legislation.[4] 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.[5]

5. In its assessment of the author's claims, the State party concluded that the information at its disposal was serious enough to justify B's removal. That conclusion was reached by a competent national authority, namely, the Assistant Minister for Immigration and Border Protection, after a thorough and individualized assessment of the author's case. The Minister considered multiple factors. For example, the Minister concluded that an inability to obtain health care in North Macedonia at the level that B received in Australia did not constitute inhuman or degrading treatment or punishment (see para. 6.5 above). The Minister also found that the steps that B had taken towards rehabilitation did not render his removal disproportionate to the legitimate aims of the State party, such as the protection of the Australian community from criminal or other serious conduct (see para. 4.7 above).

6. The Migration Act expressly provides that permanent residency status can be revoked if an individual has a substantial criminal record. Australia issued the deportation order under that law in pursuit of a legitimate interest, and due consideration was given to the author's circumstances.[6] B's lack of connection with North Macedonia, which was a factor emphasized by the majority, cannot result in the de facto recognition of Australian nationality without any application for such nationality. Moreover, the Committee's previous jurisprudence has established that it is neither arbitrary nor unreasonable to deny nationality to individuals who have criminal records, especially when that "disability was of [their] own making".[7]

7. For the reasons set out above, we conclude that the State party provided an adequate assessment of the facts and circumstances and acted reasonably in deciding to remove B. We therefore do not find that the decision to revoke B's visa, which has the effect of preventing his re-entry into the country, was arbitrary. As such, we conclude that there has not been a violation of article 12 (4) of the Covenant.

[4] *A.G. v. Netherlands* (CCPR/C/130/D/3052/2017), para. 10.4; *F and G v. Denmark* (CCPR/C/119/D/2530/2015), annex, para. 2; and *Arenz et al. v. Germany* (CCPR/C/80/D/1138/2002), para. 8.6.

[5] *J.I. v. Sweden* (CCPR/C/128/D/3032/2017), para. 7.7; and *M.R. v. Denmark* (CCPR/C/133/D/2510/2014), para. 7.9.

[6] *Stewart v. Canada* (CCPR/C/58/D/538/1993), para. 12.10.

[7] Ibid., para. 12.6.