Individual Communication

under the

Optional Protocol to the International Covenant on Civil and Political Rights

Original Communication

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Submitted by the Authors' legal representatives

acting through and on referral from the

Human Rights Law Resource Centre,

Victoria, Australia

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2. Background and Preliminary Comments

2.1 Chronology of Legal Proceedings and Applications

1. The following table sets out a chronology of the Authors' court actions and other applications in relation to the cancellation of Mr Nystrom's visa which have led to this Communication:

Table 1: Key dates

Date	Action
21 August 2003	Mr Nystrom is interviewed by the Department of Immigration and Multicultural Affairs regarding its intention to consider the cancellation of his visa.
12 August 2004	The Hon Senator Amanda Vanstone, the State party's Minister for Immigration and Multicultural Affairs ("**Minister**"), signs a deportation order in respect of Mr Nystrom.
11 November 2004	Mr Nystrom is notified of the Minister's decision and arrested by four armed officers of the Australian Federal Police. Mr Nystrom is taken into Port Phillip Prison.
4 February 2005	Mr Nystrom applies for judicial review of the Minister's decision in the Federal Magistrates' Court of Australia ("**Federal Magistrates' Court**").
16 March 2005	Hartnett FM of the Federal Magistrates' Court hands down a judgment dismissing Mr Nystrom's application and upholding the Minister's decision.
24 March 2005	Mr Nystrom submits a Notice of Appeal of the Federal Magistrates' Court of Australia decision to the Federal Court of Australia.
1 July 2005	The Full Court of the Federal Court of Australia ("**Full Federal Court**") hands down its judgment upholding Mr Nystrom's appeal and quashing the decision of the Federal Magistrates' Court. Mr Nystrom is released from Port Phillip Prison.
29 July 2005	The Minister lodges an application for Special Leave to appeal the decision of the Full Federal Court to the High Court of Australia ("**High Court**").
16 December 2005	Justices Hayne and Heydon of the High Court grant the Minister Special Leave to appeal the decision of the Full Federal Court.
8 November 2006	The High Court hands down its judgment allowing the Minister's appeal and setting aside the orders of the Full Federal Court.

Date	Action
10 November 2006	Mr Nystrom is arrested in Swan Hill and taken into the Maribyrnong Immigration Detention Centre.
13 November 2006	Mr Nystrom is relocated to the Melbourne Custody Centre.
8 December 2006	Mr Nystrom is returned to the Maribyrnong Immigration Detention Centre.
22 December 2006	The Authors' legal advisors submit a preliminary Communication to the Human Rights Committee ("**Committee**") seeking interim measures ("**Interim Measures Request**").
23 December 2006	The Special Rapporteur on New Communications and Interim Measures declines the Authors' request for interim measures.
29 December 2006	Mr Nystrom is deported to Sweden.
31 December 2006	Mr Nystrom arrives in Sweden.

2.2 Details relating to the Authors, Legal Advisers and State Party

2.2.1 Information on the Authors

2. The Authors' details are:

Name:	Stefan Lars Nystrom
Current address:	Rosenlunds Stigen 2A 59634 Skanninge SWEDEN
Date and place of birth:	31 December 1973, Sodertalje, Sweden
Occupation:	Unemployed
Nationality:	Mr Nystrom is a Swedish citizen but permanently resident in Australia and an 'absorbed member' of the Australian community
Name:	Britt Marita Nystrom
Current address:	31 Lindrum Road Frankston VIC 3199 AUSTRALIA
Date and place of birth:	27 March 1942, Vasa, Finland
Occupation:	Retired
Nationality:	Mrs Nystrom has held Finnish citizenship and is a Swedish citizen but permanently resident in Australia

Name:	Annette Christine Turner
Current address:	7 Leichardt Street McCrae VIC 3938 AUSTRALIA
Date and place of birth:	12 October 1969, Melbourne, Australia
Occupation:	School teacher
Nationality:	Mrs Turner is an Australian citizen

3. The relationship between the Authors is that of mother (Mrs Nystrom), son (Mr Nystrom), and daughter (Mrs Turner). Mr Nystrom and Mrs Turner are brother and sister.

4. The Authors note that in General Comment 15 the Committee stated that the rights and obligations recognised under the Covenant apply to all persons within the territory of the State party and subject to its jurisdiction, irrespective of their nationality or statelessness.[1] Mrs Nystrom and Mr Nystrom are therefore protected by the provisions of the Covenant, regardless of their status as non-citizens of Australia.

2.2.2 Information on Counsel

5. The Authors have engaged the following qualified legal practitioners to assist in the preparation of this Communication:

Name:	Philip Lynch
Address:	Human Rights Law Resource Centre Level 1, 550 Lonsdale Street Melbourne VIC 3000 AUSTRALIA
Name:	Ben Schokman
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1 UN HRC, *General Comment 15: The position of aliens under the Covenant* (Twenty-seventh session, 11 April 1986), [1].

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6. Powers of attorney (valid under Australian law) authorising the Human Rights Law Resource Centre (among others) to submit this Communication, and otherwise to act on behalf of the Authors, are attached to this Communication in an Annexure.

2.2.3 Address for Correspondence

7. Please address all correspondence to:

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2.2.4 The name of the State party against which the Communication is directed

8. The complaint is made against the Commonwealth of Australia ("**State party**").

9. The State party ratified the Optional Protocol on 25 September 1991.

2.3 Summary of Comments and Submissions

10. The Authors respectfully submit that the State party's actions in:

    (a) cancelling Mr Nystrom's transitional (permanent) visa; and

    (b) deporting him to Sweden,

    have constituted and continue to constitute multiple violations of the Covenant.

11. The following table sets out the Articles of the Covenant that the each Author submits has been breached in respect of him or herself:

Table 2: Summary of Covenant violations alleged and remedies sought

Author	Article of the Covenant	Remedy sought
Mr Nystrom	Article 9	Compensation
	Article 12(4)	Reinstatement of Mr Nystrom's visa Compensation
	Article 14(7)	Reinstatement of Mr Nystrom's visa Compensation
	Article 17	Reinstatement of Mr Nystrom's visa Compensation
	Article 23(1)	Reinstatement of Mr Nystrom's visa Compensation
	Article 26	Reinstatement of Mr Nystrom's visa Compensation
Mrs Nystrom	Article 17	Reinstatement of Mr Nystrom's visa Compensation
	Article 23(1)	Reinstatement of Mr Nystrom's visa Compensation
Mrs Turner	Article 17	Reinstatement of Mr Nystrom's visa Compensation
	Article 23(1)	Reinstatement of Mr Nystrom's visa Compensation

12. These submissions are set out in greater detail in Parts 3, 4 and 5, below.

13. Mr Nystrom is not pursuing a complaint concerning the violation of Articles 7 and 13 of the Covenant referred to in the Interim Measures Request.

3. The Authors' Story

3.1 The Authors' Background

14. Britt Marita Nystrom ("**Mrs Nystrom**"), was born in Finland in 1942 and migrated to Sweden in 1950, where she met and married Mr Nystrom's father, who is a Swedish citizen. Mrs Nystrom gained Swedish nationality in 1950. In 1966, the couple permanently migrated to Australia. Mrs Nystrom subsequently acquired Australian permanent resident status. Annette Christine Turner (née Nystrom) ("**Mrs Turner**"), who was born to Mrs Nystrom and her then husband in Australia in 1969, is an Australian citizen.

15. In 1973, while pregnant a second time, Mrs Nystrom returned to Sweden with her daughter to visit family members. While she was there, it became apparent that due to her advanced state of pregnancy it would not be safe for her to make the return journey to Australia. Accordingly, for medical reasons, she stayed in Sweden to give birth to a son, Stefan Lars Nystrom ("**Mr Nystrom**"). Mr Nystrom was born on 31 December 1973 in Sweden and is a Swedish citizen because his father is a Swedish citizen and was married to Mrs Nystrom at the time of Mr Nystrom's birth. This Swedish rule would have granted Mr Nystrom Swedish citizenship even had he been born in Australia, provided that the same circumstances as to his parenthood applied.

16. Following the birth, Mrs Nystrom departed for Australia on 25 January 1974, accompanied by Mr Nystrom, who was 25 days old at the time, and Mrs Turner. Three days before the family were to depart for Australia, Mrs Nystrom telephoned the Australian Embassy in Sweden and was told at that point that Mr Nystrom would need a Swedish passport. Mrs Nystrom was instructed to take Mr Nystrom to a police station, where a passport might be obtained quickly. The passport was produced without a photograph on it, so Mr Nystrom could not have used it to travel in future, but it was stamped with 'permanent entry' and 'permanent visa' for Australia. Mrs Nystrom did not even consider that Mr Nystrom might not be an Australian citizen. Mr Nystrom travelled on the Swedish passport. The family arrived in Australia on 27 January 1974, and after that date Mr Nystrom did not leave Australia until he was deported by the Department of Immigration and Multicultural Affairs (subsequently renamed the Department of Immigration and Citizenship ("**Department**").

17. Mrs Nystrom and her husband separated when Mr Nystrom was about five years old and are now divorced. There has been little contact between Mr Nystrom and his father since that time. Mrs Nystrom, Mr Nystrom's father and Mrs Turner have all continued to live in Australia. Mr Nystrom has had a close relationship with his mother, his sister and his sister's two young sons. During Mr Nystrom's imprisonment between the ages of 16 and 21, his mother visited him every week, even though she was working full time, did not have a car and had to make a round trip of over 130 kilometres to do so. Mrs Turner, her husband and their two sons have also visited Mr Nystrom when he has been in prison. When not imprisoned or in foster care, Mr Nystrom has generally lived with his mother and has had regular contact with his sister and nephews. For example, when Mrs Turner was studying for a diploma in 2004, Mr Nystrom would mind her sons during the day.

18. Mr Nystrom has been entirely brought up in Australia and knows no country but Australia. Mr Nystrom has held an Australian Medicare (government health care) card and an Australian driver's licence. He has received Centrelink unemployment benefits from the Australian government at several points in his life. He has an Australian Tax File Number, and has paid tax on the wages he has earnt as a car detailer and fruit picker. He retains a bank account in Australia. Moreover, State authorities in Australia took a direct role in Mr Nystrom's upbringing, as will be explained further in paragraphs 22 to 25 below.

19. Conversely, Mr Nystrom has few, if any, ties with Sweden. There has been little contact between the Authors and Mrs Nystrom's family in Sweden. Prior to his deportation, Mr Nystrom did not know the names of his cousins or aunts and uncles, where they lived or what they did. He has never learnt the Swedish language. He has never received Swedish social security or other government benefits, never voted in a Swedish election, and never paid or been asked to pay any Swedish tax. He has also never been called for mandatory national service in Sweden. Until his removal from Australia, Mr Nystrom had not received any communication from the government of Sweden. Prior to Mr Nystrom's deportation the Swedish Government asked the Australian authorities on humanitarian grounds not to deport Mr Nystrom.

20. Up until the cancellation of his visa by the Minister and his subsequent deportation, Mr Nystrom lived all but the first 27 days of his life in Australia as a permanent resident, at first by virtue of the grant of a permanent entry permit which allowed him to remain in Australia indefinitely, and later (following changes to the *Migration Act* 1958 (Cth) ("**Act**")) by virtue of holding an absorbed person visa and a transitional (permanent) visa.

21. Mr Nystrom only realised he was not an Australian citizen when the Government raised the possibility of cancelling his visa in August 2003. He was not aware that he held a visa. (The visas held by Mr Nystrom were conferred on him automatically by Australian legislation; they were not something for which application was made or which were stamped in a passport.) Mr Nystrom did not make any conscious decision not to acquire Australian citizenship. Mrs Nystrom had also always thought that her son was an Australian citizen. In the early part of their stay in Australia (including for two to three years after the birth of Mr Nystrom), Mrs Nystrom and her husband received letters from the Australian Government inviting the two of them to become citizens. However, these letters never referred to their children, which reinforced the impression that the children were, in fact, Australian citizens.

3.2 Mr Nystrom's Criminal Convictions

22. Since the age of 10 years, Mr Nystrom has been convicted of a large number of offences. He appeared in the Children's Courts on six separate occasions between 6 April 1984 and 5 June 1987 (between the ages of 10 and 13) on charges including theft and burglary. During this period he was placed on periods of probation and supervision orders.

23. Mr Nystrom was, by order of the Children's Court, admitted to the care of the Department of Community Welfare Services (a department of the government of the Australian State of Victoria) on 5 June 1987 (at the age of 13) and was then placed by the State in a series of foster homes. At the time that Mr Nystrom was admitted to the care of the Department of Community Welfare Services, section 36(1) of the *Community Welfare Services Act 1970* (Vic) provided that the Director-General of Community Welfare Services would, to the exclusion of the father, mother and every other guardian become and be the guardian of the person and estate of any child admitted to the care of the Department of Community Welfare Services. Section 36(3) of the *Community Welfare Services Act 1970* (Vic) provided that, subject to other provisions of the legislation, the Director-General had as guardian the same rights, powers, duties, obligations and liabilities as a natural guardian of the child would have. The Director-General was permitted to deal with a child admitted to the care of the Department of Community Welfare Services in various ways, including the placement of the child with suitable foster parents. Section 41 of the *Community Welfare Services Act 1970* (Vic) stated that, in placing a child, the welfare of the child was the first and paramount consideration and any provision for the child's physical, intellectual and spiritual development should be such as a good parent would make for his child.

24. Whilst committed to the care of the State, Mr Nystrom appeared in the Children's Court on five occasions on an aggregate of 29 counts, including theft, burglary and criminal damage. During this period of care under the auspices of the State, Mr Nystrom would visit his mother and sister on weekends.

25. On 14 December 1990, at the age of 16 and whilst committed to the care of the State, Mr Nystrom was convicted of aggravated rape and intentionally causing serious injury, for which he was sentenced to nine years imprisonment, with a minimum term of seven years. This conviction related to an incident at a bowling alley where Mr Nystrom attacked a ten-year-old child. He has subsequently been convicted of a large number of other offences, including arson and various offences relating to property damage; armed robbery, burglary and theft; various driving offences, including reckless conduct endangering life; and offences relating to the possession and use of drugs.

26. Mr Nystrom has a criminal record of a considerable number of offences and he has served eight prison terms. Mr Nystrom has a 'substantial criminal record' within the meaning of section 501(7) of the Act.

27. The Authors submit that Mr Nystrom's offences have occurred in greater part due to his alcoholism. Mr Nystrom has been addicted to alcohol since his early teens and committed many of his offences under the influence of alcohol. However, Mr Nystrom recognises that he has an addiction and has undertaken periods of rehabilitation both in and out of prison. Some of the sentences imposed upon Mr Nystrom required that he undertake assessment or treatment for alcohol abuse, which Mr Nystrom has done. Aside from a period of nine months in which he was detained in Port Phillip Prison after his visa was originally cancelled, Mr Nystrom has been employed since December 2002 as a car detailer and as a fruit picker, continuing through the course of the Minister's High Court appeal. The Authors submit that during 2006, prior to his deportation, Mr Nystrom had learnt to control his drinking problem.

3.3 Deportation Order

28. On 12 August 2004, the Minister cancelled the transitional (permanent) visa that was held by Mr Nystrom. The Minister's exercise of this power was based on the view that the Minister's power to cancel that visa had been enlivened by Mr Nystrom's failure to pass the 'character test' specified in section 501(6) of the Act because of his abovementioned 'substantial criminal record'.

29. Mr Nystrom was informed of the Minister's cancellation of his visa in November 2004. At that time he was taken into custody by four armed officers of the Australian Federal Police. Mr Nystrom was taken to Frankston police station, where he was held without charge until late in the evening, and was then taken directly to Port Phillip Prison. The Authors note that Port Phillip Prison is a maximum-security, privately-operated prison that is neither an approved immigration detention facility of the Department nor required to operate in accordance with the Immigration Detention Standards[2] that have been developed by the Department, the Commonwealth Ombudsman's Office, and the Human Rights and Equal Opportunity Commission. Mr Nystrom was kept in Port Phillip Prison for the next nine months.

3.4 Federal Magistrates' Court Proceeding

30. Following the Minister's decision, Mr Nystrom brought proceedings in the Federal Magistrates' Court to challenge the Minister's decision to cancel his visa. Demonstrating jurisdictional error on the part of the Minister was the only basis upon which the decision could be set aside; a merits review was not available. In particular, Mr Nystrom could not argue on general principle that the Minister ought not cancel his visa. Mr Nystrom did not challenge the Minister's conclusion that he did not pass the character test. The essence of Mr Nystrom's case, on the limited review that was available at that level, was that he did not hold a transitional (permanent) visa but rather was the holder of an 'absorbed person visa' pursuant to section 34 of the Act. There is no difference in the substantive rights conferred by the two visas.

31. Mr Nystrom argued before the Federal Magistrate that because he had been a permanent resident for 10 years before the commission of his crimes he was an 'absorbed person' and held an absorbed person visa. Mr Nystrom argued that:

    (a) the Minister had purported to cancel the wrong visa (a transitional (permanent) visa) and, as a consequence, jurisdictional error had occurred; or, alternatively

    (b) if the applicant held both an absorbed person visa and a transitional (permanent) visa, then the Minister had failed to take his absorbed person visa into account in making her decision.

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2 Department of Immigration and Multicultural Affairs, *Managing Australia's Borders: Immigration Detention Standards* <http://www.immi.gov.au/managing-australias-borders/detention/standards_index.htm>.

32. Hartnett FM dismissed Mr Nystrom's claim for judicial review. The Federal Magistrate found that Mr Nystrom held a transitional (permanent) visa and that even if he had succeeded in establishing that he held an absorbed person visa, the Minister's cancellation of the transitional (permanent) visa also cancelled any other visa held by Mr Nystrom (see *Nystrom v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FMCA 305 (16 March 2005)). The Minister's deportation order was accordingly upheld, and Mr Nystrom continued to be held in Port Phillip Prison.

3.5 Full Federal Court Proceeding

33. Mr Nystrom appealed to the Full Federal Court. The majority of the Full Federal Court (Moore and Gyles JJ) ruled that the Minister had committed an error because Mr Nystrom held an absorbed person visa, which was a different class of visa from the one that the Minister had decided to cancel (see *Nystrom v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 121 (1 July 2005)). The Minister contended that the correct and only visa held by Mr Nystrom had been cancelled, but alternatively argued that if Mr Nystrom had held an absorbed person visa as well as a transitional (permanent) visa, the absorbed person visa had been validly cancelled by operation of section 501F(3) of the Act.

34. Moore and Gyles JJ's judgment was highly critical of the Minister and immigration officials. Their Honours showed great unease about the move to cancel Mr Nystrom's right to be in Australia and deport him to Sweden:

> [Mr Nystrom] is only an 'alien' by the barest of threads. However, if the decision under challenge here stands he will be deported to Sweden and permanently banished from Australia. That result causes us a … sense of disquiet …It suggests that administration of this aspect of the Act may have lost its way.[3]
>
> [Mr Nystrom] has indeed behaved badly, but no worse than many of his age who have also lived as members of the Australian community all their lives but who happen to be citizens. The difference is the barest of technicalities. It is the chance result of an accident of birth, the inaction of the appellant's parents and some contestable High Court decisions. Apart from the dire punishment of the individual involved, it presumes that Australia can export its problems elsewhere.[4]

35. Their Honours found it difficult 'to envisage the bona fide use of s 501 [bad character grounds] to cancel the permanent absorbed person visa of a person of over 30 years of age who has spent all of his life in Australia, has all of his relevant family in Australia by reason of criminal conduct in Australia so leading to his deportation to Sweden and permanent banishment from Australia.'[5]

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3 *Nystrom v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 143 FCR 420; [2005] FCAFC 121 (1 July 2005), [1] (Moore and Gyles JJ).

4 Ibid [29].

5 Ibid [26].

36. As a result of his successful appeal to the Full Federal Court, Mr Nystrom was released from Port Phillip Prison in July 2005. Following his release, Mr Nystrom took a job fruit picking in the Swan Hill region in northern Victoria. He was very happy and satisfied in this employment and began a period of stability in his life, in which he minimised his drinking, worked hard and reliably, and paid all his bills.

3.6 High Court of Australia Proceeding

37. The Minister appealed to the High Court, which unanimously allowed the appeal (see *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 230 ALR 370; [2006] HCA 50 (8 November 2006)). The High Court held that Mr Nystrom had qualified for and acquired simultaneously both an absorbed person visa and a transitional (permanent) visa. The visas conferred the same substantive rights and so the same considerations applied whichever visa was cancelled. Consequently, in deciding to cancel Mr Nystrom's transitional (permanent) visa (which had the incidental effect under section 501F(3) of the Act of cancelling Mr Nystrom's absorbed person visa), the Minister was not bound to take into account the nature of the absorbed person visa and there had been no failure by the Minister to take into account relevant considerations.

38. The Court also held that the power to cancel a visa under section 501 of the Act (and thereby remove a person from Australia) is not restricted by the deportation power in sections 200 and 201 of the Act, which enables the deportation of non-citizens convicted of an offence attracting at least one year's jail who at the time of the offence had been in Australia for less than 10 years. It held that the provisions were distinct and cumulative and the deportation provisions did not restrict the power under section 501 to cancel Mr Nystrom's visa and consequently remove him from Australia.

3.7 Mr Nystrom's Deportation and its Consequences

39. Following the High Court decision, Mr Nystrom was arrested by immigration officials and taken into Maribyrnong Immigration Detention Centre on 10 November 2006. He was detained there for three days before being relocated to the Melbourne Custody Centre. Mr Nystrom was relocated in order to attend a preliminary hearing in the Melbourne Magistrates' Court in respect of several minor charges arising from two incidents that occurred two weeks before the High Court handed down its judgment. The incidents occurred on a weekend when Mr Nystrom had travelled to Melbourne from Swan Hill (a country town in Victoria where he was working) to visit Mrs Nystrom. While at the train station waiting to return to Swan Hill, Mr Nystrom was arrested and charged with possession of cannabis and possession of some kitchen knives and other utensils he was carrying home in his bag. Mrs Nystrom says that she had given the cooking utensils to Mr Nystrom to take back to Swan Hill. Later the same day, on a second attempt to return to Swan Hill, Mr Nystrom was involved in a minor and unrelated altercation at a different train station and was charged with false imprisonment.

40. Mr Nystrom remained at the Melbourne Custody Centre for four weeks until 8 December 2006 when the charges against him were heard, at which point he pleaded guilty on legal advice and the Melbourne Magistrates' Court sentenced him to the time that he had already served. Mr Nystrom was returned to Maribyrnong on 8 December 2006, and remained in immigration detention until his deportation.

41. Mr Nystrom was informed by officials at the Maribyrnong Immigration Detention Centre that he was classified as a 'high risk' detainee and he was accordingly subjected to solitary confinement through the entire course of his detention. He was kept in a single room with a guard posted outside and a light kept permanently on. These onerous conditions caused Mr Nystrom to suffer emotional distress.

42. The Authors were informed approximately one week earlier that Mr Nystrom's deportation was scheduled for 29 December 2006. Despite their requests, the Department did not permit Mrs Nystrom or Mrs Turner and her family to see Mr Nystrom off at the airport. Instead, the family was obliged to say their farewells at Maribyrnong Immigration Detention Centre on 28 December 2006.

43. Mr Nystrom was deported on 29 December 2006 to Sweden. On the day of his deportation, Department officials held an interview with Mr Nystrom, at which they told him that he must either accept the deportation, or be detained in immigration detention pending the Australian Government's decision in relation to any findings by the Committee based on the current Communication. Further, he was told that if he accepted the second option, he would not remain at the Maribyrnong Immigration Detention Centre, which is in a suburb of Melbourne, the city where his mother and sister live. Instead, he would be relocated to either Villawood Immigration Detention Centre, in New South Wales, or Baxter Immigration Detention Facility, at the El Alamein army camp in South Australia. Both of these facilities are outside Victoria and Mr Nystrom's relocation would in each case prevent Mrs Turner and Mrs Nystrom from visiting Mr Nystrom with any frequency.

44. When Mr Nystrom accepted the deportation option, the Department officials then required him to execute a statutory declaration which they had already prepared stating that he 'wish[ed] to depart Australia today, 29 December 2006, as arranged' and further stating that when he executed the power of attorney dated 22 December 2006 permitting the Human Rights Law Resource Centre to act for him he 'was not aware that it would be used to prevent his return [presumably meaning 'return' to Sweden] or to engage the UNHRC' by preparing and submitting this Communication to the Committee.

45. Misleadingly, the statutory declaration makes no mention of the options presented to Mr Nystrom of either being deported or facing indefinite detention in a location remote from his family. Further, contrary to what was said in the declaration, it was made clear to Mr Nystrom from the point at which he first engaged the Human Rights Law Resource Centre that its principal role would be to forward a Communication to the Committee, as Mr Nystrom had by then exhausted his limited domestic legal remedies.

46. Mr Nystrom was given no opportunity to obtain legal advice either when he 'chose' to be deported rather than be placed in indefinite immigration detention, or when he executed the statutory declaration. At this point, the Australian Government was well aware that Mr Nystrom was represented by the Human Rights Law Resource Centre, as it had received a copy of the request for urgent interim measures sent on behalf of Mr Nystrom to the Committee on 22 December 2006. Philip Lynch of the Centre spoke to Mr Nystrom by telephone after he had signed the Government's statutory declaration and shortly before his departure for Sweden. Mr Nystrom was by that time at the airport awaiting his departure to Sweden. Mr Nystrom then signed a second statutory declaration, in which he affirmed that he only signed the first statutory declaration accepting deportation because he 'was informed by officials of DIMA that if [he] did not accept deportation that [he] would be held in indefinite immigration detention' and that he 'in no way intend[ed] for [his] deportation to constitute a waiver of any rights that [he has], including in relation to … [his] complaint to the UN Human Rights Committee'. A copy of each statutory declaration is enclosed with this Communication.

47. The Commonwealth has published a model litigant policy which is expressed to apply to litigation before tribunals and inquiries and in arbitrations and other alternative dispute resolution processes. Accordingly, it applied to Mr Nystrom's communication to the Committee which had been initiated on 22 December 2006. The policy requires the Commonwealth to act with complete propriety, fairly and in accordance with the highest professional standards.[6] The conduct of the Commonwealth, in presenting a misleading declaration for Mr Nystrom to sign without the benefit of legal advice, was in clear breach of the Commonwealth's own model litigant policy and the general expectation that the Crown act and be seen to act as a model litigant.[7] The requirement by Departmental officials that Mr Nystrom sign the first statutory declaration was a grave impropriety, and it would seem was deliberately engaged in for the purpose of frustrating Mr Nystrom's exercise of his rights, and in violation of his rights to legal representation.

48. After being deported, Mr Nystrom arrived at Arlanda airport, Stockholm, on 31 December 2006 (incidentally, his 33rd birthday). Mr Nystrom was not met at the airport by Swedish authorities, despite claims by the Australian Government that it had arranged with Swedish authorities for community service representatives to meet Mr Nystrom. The Swedish Justice Department has claimed in the press that there was limited telephone contact only at the time of the deportation order, and that it received no request of any kind from the Australian Government for transitional assistance to be provided to Mr Nystrom.[8] As he has not been deported to Sweden to serve any type of prison sentence, Mr Nystrom has received no government support, other than unemployment benefits, since his arrival. For the first two months after his arrival, Mr Nystrom was temporarily housed with Mrs Nystrom's brother-in-law, Mr Torsten Nystrom, and his family.

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6 Legal Services Directions 2005, made under s 55ZF of the *Judiciary Act* 1903 (Cth), Appendix B, [2], notes 1 and 2.

7 *Melbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333, 342.

8 Paul O'Mahony, 'Aussie ex-crim dumped on Sweden', *The Local: Sweden's News in English* (Sweden), 2 January 2007.

Had this accommodation not been arranged by Mrs Nystrom, Mr Nystrom would have been entirely alone on his arrival in Stockholm. None of the people with whom Mr Nystrom was living speak English, although one cousin who is resident in Sweden does speak English. The Australian Government has subsequently admitted to Mrs Turner that it was 'a poorly-handled deportation' due to a 'breakdown in communication'.[9]

49. Mr Nystrom is currently renting a one-room apartment in Skanninge. About half of the amount of his unemployment benefit is spent on his accommodation.

50. The Authors have suffered significant emotional distress as a result of the cancellation of Mr Nystrom's visa and his subsequent deportation.

51. Mr Nystrom arrived in Sweden entirely unprepared for the culture, language and climate of Sweden, and has suffered considerable confusion, exhaustion, anger and unhappiness as a result of the process to which he has been subjected. Apart from the provision of social benefits referred to above, he has been provided with no government or community assistance in organising or managing food, money, language training or other necessities of life, and has been reliant on Mrs Nystrom's relatives for everything as a result. He is also very distressed by the separation from his immediate family. This distress has precipitated a return by Mr Nystrom to alcohol abuse. Mr Nystrom is subject to fluctuating moods and is now drinking both during the day and at night as a way of 'dealing with it all'. He has expressed his upset and frustration over the telephone to Mrs Turner, who continues to speak with Mr Nystrom almost every day. He has told her that he would 'rather be in immigration detention' than in his present situation.[10]

52. Mrs Nystrom and Mrs Turner have similarly suffered a significant emotional impact after being indefinitely separated from their son and brother. Mrs Nystrom, an unmarried retiree of 64 years, relies emotionally on her two children, her only immediate family members, and is extremely upset in the wake of her son's deportation. She is emotionally distraught and unable to stop dwelling on the fact of Mr Nystrom's deportation. She has described herself as 'falling in a heap'. Neither Mrs Nystrom nor Mrs Turner presently possess the financial means to be able to visit Stefan in Sweden. In particular, Mrs Nystrom does not have the funds to ever visit Sweden again, meaning that the family is at present irreparably and indefinitely separated. Further information in relation to the family relationships and the effect of Mr Nystrom's banishment is set out in the enclosed statutory declarations of Mrs Nystrom and Mrs Turner.

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[9] See the statutory declaration of Mrs Annette Turner at Annexure 5.

[10] Ibid.

4. Admissibility

4.1 Requirements

53. In relation to any Communication made by an individual regarding a State party to the Covenant in accordance with Article 1 of the Optional Protocol, the Committee must determine the admissibility of that Communication under:

    (a) Articles 2, 3 and 5(2) of the Optional Protocol; and

    (b) Rules 93 and 96 of the Rules of Procedure of the Human Rights Committee ("**Rules of Procedure**").

54. For the reasons set out below, the Authors respectfully request that the Committee determine that their claims in relation to Articles 7, 9, 12(4), 14(7), 17, 23(1) and 26 are admissible.

55. In relation to Article 1 of the Optional Protocol, it is submitted that each of the Authors is subject to the jurisdiction of Australia. Mrs Nystrom is a permanent resident of Australia. Mrs Turner is a citizen and resident of Australia. Mr Nystrom was a permanent resident of Australia until his deportation; his deportation was obviously carried out under the jurisdiction of Australia and any prospect of being permitted to return to Australia is a matter within the jurisdiction of Australia. This point is dealt with more fully in part 4.5.1 below in relation to the Committee's Rules of Procedure.

4.2 Article 2

56. The Authors respectfully submit in relation to Article 2 of the Optional Protocol that they have exhausted all effective remedies available to them in Australia.

4.2.1 Domestic Legal Proceedings

57. As is detailed further in Part 3.4 to 3.6 above, Mr Nystrom sought relief against the cancellation of his transitional (permanent) visa and the issuing of a deportation order against him by the Minister via the following domestic proceedings:

    (a) Federal Magistrates' Court – 16 March 2005

    Unsuccessfully challenged the decision and sought judicial review.

    (b) Full Federal Court – 1 July 2005

    Successfully appealed the decision of the Federal Magistrates' Court. Obtained orders declaring that Mr Nystrom holds a (permanent) absorbed person visa and requiring that:

    (i) the decision cancelling his visa be quashed;

    (ii) the matter be remitted for determination according to law;

    (iii) Mr Nystrom be released from immigration detention; and

    (iv) the Minister pay Mr Nystrom's costs.

(c) High Court – 8 November 2006

Successful appeal by the Minister of the decision of the Full Federal Court. Obtained orders that:

(i) allowed the appeal;

(ii) set aside the orders of the Full Federal Court and in their place ordered that the appeal be dismissed; and

(iii) required Mr Nystrom to pay the Minister's costs.

58. The case has accordingly been finally resolved by the High Court, the highest judicial body in Australia, and no further legal appeal is possible.

4.2.2 Lack of Available Domestic Remedies for Persons in Immigration Detention

59. Mr Nystrom was held in immigration detention for over nine months. The Authors note that very limited remedies are available to persons detained by the State party under the Act. This is the direct result of a consistent and sustained policy by the State party over a number of years to drastically scale back the remedies available to detained persons and to minimise the scope of judicial and other review available in relation to administrative decisions made under the Act.

60. This intention was manifest at the time of the passage of the relevant legislation. In the second reading speech before the Senate in relation to the Migration Legislation Amendment (Judicial Review) Bill 1998 (Cth), the Parliamentary Secretary for the Minister noted that the purpose of the bill was 'to give legislative effect to the government's election commitment to reintroduce legislation that in migration matters will restrict access to judicial review in all but exceptional circumstances.'[11]

61. The Committee has similarly confirmed that there is no substantive judicial review of the lawfulness of immigration detention in Australia. In the *C v Australia* Communication, the Committee recognised that the writ of habeus corpus is not available in respect of immigration detention as the High Court has affirmed the constitutionality of the mandatory detention regime.[12] This has been subsequently accepted in the Federal Court.[13]

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[11] Commonwealth of Australia, *Parliamentary Debates*, Senate, 2 December 1998, 1025 (Senator Kay Paterson).

[12] *Mr C v Australia*, Communication No 900/1999 (13 November 2002), [7.4]; referring to *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1.

[13] See, eg, *Te, in the matter of an application for writs of Habeas Corpus, Prohibition and Mandamus against Ruddock* [2003] FCA 661; affirmed on appeal in *Te v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 204 ALR 497.

4.2.3 Remedies Post-Deportation

62. Finally, given that Mr Nystrom has now been deported from Australia, the Authors note that there is similarly no avenue or remedy that would permit Mr Nystrom to pursue re-entry from outside Australia.

63. Mr Nystrom would not be able to return to Australia in future without the express consent of the Department. Such a reapplication for immigration to Australia under any form of visa would also require that Mr Nystrom meet all other criteria for immigration. Mr Nystrom would be highly unlikely to meet these requirements. Section 501 of the Act (the section under which the Minister cancelled Mr Nystrom's visa by reference to the character test) also allows the Minister to refuse to grant a visa to a person if the person does not satisfy the Minister that he passes the character test.

64. In relation to Mrs Nystrom and Mrs Turner, it is relevant to note that under Australian municipal law, provisions of the Covenant cannot operate as a direct source of individual rights and obligations unless they have been incorporated into domestic law by statute.[14] The provisions of the Covenant on which Mrs Nystrom and Mrs Turner rely have not been incorporated in any complete or comprehensive way into Australian municipal law and such incorporation as has occurred does not give rise in these circumstances to any domestic legal recourse. Further, no domestic legal remedy based on Australian common law or legislation was available to Mrs Nystrom or Mrs Turner.

65. Accordingly, the Authors respectfully confirm that they have exhausted all available and effective domestic remedies.

4.3 Article 3

66. The Authors respectfully submit that in relation to Article 3 of the Optional Protocol that this Communication is not anonymous, and is not an abuse of the right of submission or incompatible with the provisions of the Optional Protocol.

4.4 Article 5(2)

67. The Authors respectfully confirm in relation to Article 5(2) of the Optional Protocol that this matter is not being considered by any other procedure of international investigation or settlement and that, as discussed above, they have exhausted all available domestic remedies.

4.5 Rule 96

68. In light of the above discussion, the Authors make the following submissions as to admissibility under the Rules of Procedure.

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[14] *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 286–7.

4.5.1 Rule 96(a)

69. In relation to Rule 96(a), the Authors warrant that their identities have been disclosed to the Committee.

70. The Authors also warrant that both Mrs Nystrom and Mrs Turner are within the territory of the State party and are subject to its jurisdiction by reason of territoriality. Similarly, while Mr Nystrom has now been deported, the Authors submit that he remains subject to the jurisdiction of the State party, as required by Rule 96(a), because Mr Nystrom was within the territorial jurisdiction of the State party at the time of all relevant conduct on the part of the State party and at the time of Mr Nystrom's initial Communication to the Committee, which was submitted by the Authors' legal advisors on 22 December 2006, seven days prior to Mr Nystrom's deportation. The Authors rely in this submission on the Committee's decision in *Viana v Uruguay*, in which it was held that 'Article 1 of the Optional Protocol was clearly intended to apply to individuals subject to the jurisdiction of the State party concerned at the time of the alleged violation of the Covenant. This was manifestly the object and purpose of Article 1.'[15]

71. Further, as a separate submission, the Authors submit that as the remedies sought by Mr Nystrom for the State party's violations of his Covenant rights are subject to an exercise of power by the State party, Mr Nystrom is presently subject to Australian jurisdiction. In making this submission, the Authors refer to the Committee's decision in *Montero v Uruguay*, which held that the refusal of the Uruguayan authorities to renew a Uruguayan passport, notwithstanding that the holder was outside Uruguay's territorial jurisdiction, was 'clearly a matter within the jurisdiction of the Uruguayan authorities', and the complainant was accordingly 'subject to the jurisdiction of Uruguay for that purpose'[16]. The Authors submit that the cancellation or renewing of a visa is a clearly analogous power to that of cancelling or renewing a passport, at least in circumstances where the visa holder or visa applicant has been a long term resident of the country concerned.

4.5.2 Rule 96(e)

72. The Authors confirm in relation to Rule 96(e) that the matter is not being examined under another procedure of international investigation or settlement and has never been so examined.

4.5.3 Rule 96(f)

73. In relation to Rule 96(f), the Authors refer to the discussion in part 4.2, above, and reiterate that they have exhausted all available domestic remedies.

4.5.4 Rule 96(b)

74. The Authors respectfully submit that in relation to Rule 96(b), for the reasons set out in part 5 below, the claims of alleged violations of the Covenant have been sufficiently substantiated.

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[15] *Viana v Uruguay*, Communication No 110/1981 (29 March 1984), [6].

[16] *Montero v Uruguay*, Communication No 106/1981 (31 March 1983), [5].

4.5.5 Rule 96(c)

75. The Authors respectfully submit in relation to Rule 96(c) that this Communication does not constitute an abuse of the right of submission.

4.5.6 Rule 96(d)

76. In relation to Rule 96(d), the Authors respectfully submit that this Communication is not incompatible with the provisions of the Covenant.

5. Merits

5.1 ARTICLE 12(4) – RIGHT TO ENTER ONE'S OWN COUNTRY

77. The obligation assumed by the State party under Article 12(4) is to recognise the right of a person to enter his or her own country. All individuals within Australia's territory and subject to its jurisdiction must be protected from Article 12(4) violations, including aliens.

5.1.1 Is Australia Mr Nystrom's 'Own Country'?

78. The Authors submit that Australia is Mr Nystrom's 'own country'. In its General Comment 27, the Committee explained that the wording of Article 12(4)

> does not distinguish between nationals and aliens ('no one'). Thus, the persons entitled to exercise this right can be identified only by interpreting the meaning of the phrase 'his own country'. The scope of 'his own country' is broader than the concept 'country of his nationality'. It is not limited to nationality in a formal sense, that is, nationality acquired at birth or by conferral; it embraces, at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien.[17]

79. In *Stewart v Canada* ("**Stewart**"), the Committee held:

> Since the concept 'his own country' is not limited to nationality in a formal sense, that is, nationality acquired on birth or by conferral, it embraces, at the very least, an individual who, because of his special ties to or claims in relation to a given country cannot there be considered to be a mere alien.[18]

80. The Committee then listed three examples where an applicant's 'own country' would not be dependent on the applicant's nationality:

    (a) where nationals of a country have been stripped of their nationality in violation of international law;

    (b) where the country of nationality of individuals has been incorporated into or transferred to another national entity whose nationality is being denied to them; and

    (c) possibly, long term residents who are stateless persons arbitrarily deprived of their right to acquire the nationality of the country of their residence.

81. Although the concept of nationality as understood in international law is narrower in scope than the concept of one's 'own country', the meaning of nationality in international law, and in particular the idea of an effective link with a country, is capable of providing some guidance in determining the application of Article 12(4) of the Covenant. According to Weis, in international law nationality

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[17] UN HRC, *General Comment 27: Freedom of Movement (Article 12)*, UN Doc CCPR/C/21/Rev.1/Add.9 (1999), [20].

[18] *Charles E Stewart v Canada*, Communication No 538/1993 (16 December 1996), [12.4].

is a term denoting the allocation of individuals to a specific State which confers on the State the right to exercise protection of the national in relation to other States and the duty vis a vis other States to allow the national to reside in its territory.[19] The International Court of Justice has said that:

> nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State.[20]

82. The domestic rules of a State principally govern the acquisition of the nationality of that State. However, a State cannot claim that its own nationality rules are entitled to recognition by other States unless it has acted in conformity with the general aim of making the legal bond of nationality accord with the individual's genuine connection with the State.[21] In *Nottebohm*, the International Court of Justice had to decide whether the nationality which Liechtenstein had conferred on Mr Nottebohm by way of naturalization (under its domestic law) permitted Liechtenstein to exercise protection in respect of Mr Nottebohm (under international law) as against Guatemala. The Court considered whether it was possible to regard the nationality conferred by Liechtenstein as real and effective, as the exact juridical expression of a social fact of a connection which existed previously or came into existence thereafter. The Court asked: 'At the time of his naturalization does Nottebohm appear to have been more closely attached by his tradition, his establishment, his interests, his activities, his family ties, his intentions for the near future to Liechtenstein than to any other State?'[22] Similar tests have been used in international arbitrations dealing with the exercise of protection and dual nationality.[23]

83. Brownlie observes that before the existence of domestic statutory definitions, nationality was related to domicile and to some extent still is. Where a State has no nationality legislation, international law has rested on principles of residence, domicile, immigration with an intent to remain permanently and membership of ethnic groups associated with the State territory. Brownlie adds that the expulsion of persons who by long residence have acquired prima facie the effective nationality of the host State is not a matter of discretion, since the issue of nationality places the right to expel in question.[24]

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[19] P Weis, *Nationality and Statelessness in International Law* (2nd ed, 1979) 59.

[20] *Nottebohm (Liechtenstein v Guatemala) (Second Phase)* [1955] ICJ Rep 4, 23.

[21] Ibid 23.

[22] Ibid 24.

[23] Ibid 22.

[24] Ian Brownlie, *Principles of Public International Law* (6th ed, 2003) 385–386, 396, 499.

84. It is submitted that the concepts of real and effective nationality and genuine connection resorted to by international law in dealing with questions of nationality assist in giving meaning to the phrase ‘own country’ in Article 12(4) of the Covenant. Those concepts are consistent with the reference by the Committee to close and enduring connections between a person and a country in paragraph 20 of its General Comment 27. They are also consistent with the separate opinion of Members Evatt, Quiroga and Urbina in *Stewart*, in which long-standing residence, close personal and family ties and intentions to remain are emphasised at the expense of merely formal links to a State:

> For the rights set forth in Article 12 the existence of a formal link to the State is irrelevant; the Covenant is here concerned with the strong personal and emotional links an individual may have with the territory where he lives and with the social circumstances obtaining in it. This is what Article 12, paragraph 4, protects.[25]

85. The *travaux preparatoires* of the Covenant also strongly support a broad interpretation of the reference to one’s own country. Early drafts of Article 12(4) dealt only with the right of nationals to enter their country. This was not satisfactory for States in which the right of return to one’s country was not governed by rules of nationality or citizenship, but by the idea of a permanent home. In the drafting process of the Commission on Human Rights the words ‘country of which he is a national’ were replaced by the words ‘his own country’.[26]

86. Article 3(2) of Protocol No 4 to the *European Convention for the Protection of Human Rights and Fundamental Freedoms*[27] provides that no one shall be deprived of the right to enter the territory of the state of which he is a national. The use of the term ‘national’ rather than ‘own country’ marks a clear difference between the Covenant and Protocol No 4,[28] and some Judges of the Court have referred to this difference. Judge Martens has said that the wording in Article 12(4) of the Covenant implies a ban on the expulsion not only of nationals but also of integrated aliens,

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25 *Charles E Stewart v Canada*, Communication No 538/1993 (16 December 1996), [5]–[6] (Members Evatt, Quiroga and Urbina). Committee Members Chanet, Vallejo and Bhagwati agreed with the separate opinion of Members Evatt, Quiroga and Urbina.

26 Marc Bossuyt, *Guide to the* Travaux Preparatoires *of the International Covenant on Civil and Political Rights* (1987) 260–1. During the 14th session of the Third Committee, a question was raised regarding the meaning of ‘his own country’. The view was expressed by Italy, Japan and Saudi Arabia that it should be taken to mean the country of which the individual was a national or citizen. However, in earlier consideration of the article the Commission on Human Rights had considered and not adopted proposals to employ references to nationals and to citizens or nationals having a permanent home in the country. Further, the drafters had shown themselves capable of using the expressions citizen or national when that was what they intended: see Articles 25, 29 and 31.

27 16 September 1963, ETS No 46.

28 The European Court of Human Rights has held that for the purpose of Article 3 of Protocol No 4, a person’s nationality must be determined, in principle, by reference to national law: *Slivenko v Latvia* [2003] ECHR 498, [77].

such as second generation immigrants.[29] Judge Morinella has noted the use of the words 'own country' in Article 12(4) and, in respect of immigrants integrated in the community in which they work, regarded it as referring to the place in which they were born or in which they grew up and which is theirs despite difficulties of integration.[30]

87. Although Mr Nystrom's relationship with Australia does not fall within one of the three examples previously listed by the Committee and referred to in paragraph 77, it does constitute another category of long-term residence which is embraced by the meaning of Article 12(4). The three examples noted above from the Committee's decision in *Stewart* are not exclusive, in that

> [t]he language of Article 12, paragraph 4, permits a broader interpretation, moreover, that might embrace other categories of long-term residence, particularly stateless persons arbitrarily deprived of the right to acquire the nationality of the country of such residence.[31]

88. It is respectfully submitted that, in light of the concepts of real and effective nationality and genuine connection and the decision of the drafters of the Covenant to eschew the use of the term nationality in Article 12(4), the Committee should not narrowly confine the meaning of 'own country' to cases which are closely related to the categories of long-term residence already recognised as potentially giving rise to protection under Article 12(4). The term 'own country' warrants a broader interpretation of the type recognised by the separate opinion of Members Evatt, Quiroga and Urbina in *Stewart* and by Judges of the European Court of Human Rights as outlined in paragraph 83.

89. The Authors note that the author in *Stewart* was unsuccessful in relation to his submissions regarding Article 12(4). However, the Authors submit that Mr Nystrom's life-long and exclusive connection with Australia is significantly closer than was Mr Stewart's connection with Canada.

90. The author in *Stewart* resided in Britain until he was seven years old, when he immigrated to Canada. In other words, Mr Stewart had a life that preceded his residence in Canada. Mr Stewart spoke the language of the country to which he was being sent and had a brother who lived in that country. Similarly, in *Canepa v Canada*,[32] Mr Canepa had also had a life that preceded his residence in Canada and knew some of the language of the country to which he was to be deported. By contrast, Mr Nystrom has never had a life in Sweden, or for that matter, outside of Australia. It was merely an accident of birth that caused Mr Nystrom not to be born in Australia. Mr Nystrom's parents permanently migrated to Australia in 1966. When Mr Nystrom arrived in Australia on 25 January 1974, he arrived in his 'own country', where he developed

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[29] *Beldjoudi v France* [1992] ECHR 42, concurring opinion of Judge Martens at [2] and footnote 3 and see the separate opinion of Judge de Meyer who noted that Mr Beldjoudi was facing eviction from a country which had always been his since birth, even though he did not possess its nationality.

[30] *Nasri v France* [1995] ECHR 24, [4] of Judge Morenilla's separate opinion.

[31] *Charles E Stewart v Canada*, Communication No 538/1993 (16 December 1996), [12.4].

[32] Communication No 558/1993 (20 June 1997).

'strong personal and emotional links'. Apart from his deportation to Sweden on 29 December 2006, Mr Nystrom has never left his 'own country'.

91. The Authors submit that the following facts indicate that Mr Nystrom has created links to Australia that possess the characteristics necessary to call Australia his 'own country' within the meaning of Article 12(4):

(a) Australia is the only country he has ever known;

(b) both of his parents reside in Australia;

(c) his sister, having been born in Australia, is an Australian citizen and continues to reside in Australia;

(d) he holds an Australian driver's licence, a taxation file number, and a Commonwealth Medicare health card, has received government unemployment benefits. has a bank account and has been employed in various positions in Australia, including as a fruit picker and car detailer, and paid tax on his wages from such employment;

(e) Government authorities in Australia were his guardian during a significant part of his childhood (to the exclusion of his parents) and owed him the duties and obligations of a natural guardian;

(f) he has never left Australia since arriving at the age of 27 days;

(g) he does not speak the Swedish language;

(h) he has tenuous, or arguably non-existent, links with Sweden and his distant family that reside there; and

(i) he has had no connection with Sweden since his birth and he:

  (i) has not served in the Swedish military;

  (ii) has no relevant tax or health connections;

  (iii) has never voted in Swedish elections or had any other form of political, economic or social involvement with Swedish society, such that he has no personal or emotional links whatsoever with Sweden; and

  (iv) has no friends or close family in Sweden.

92. The Australian Government has accepted that before 2 April 1984 (a date relevant in relation to certain legislative changes) Mr Nystrom had ceased to be an immigrant by reason of his absorption into the Australian community.[33] In an Australian legal context, ceasing to be an immigrant by reason of absorption occurs when a person becomes a member of the Australian community[34] or is absorbed into the community of the country.[35]

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[33] *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 230 ALR 370, 391–2; [2006] HCA 50, [83].

[34] *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36, 62–5 (Knox CJ).

[35] *O'Keefe v Calwell* (1948) 77 CLR 261, 277 (Latham CJ).

93. The Committee has referred to immigrants in due course acquiring the rights and assuming the obligations that nationality entails.[36] As mentioned in paragraph 91, Mr Nystrom was eligible for government health benefits. He also received a substantially free education at government schools. A broad range of other rights in Australia are similarly not confined to those who are formally labelled as citizens; for example:

(a) the *Social Security Act 1991* (Cth), under which a range of government benefits are payable, does not generally confine eligibility to citizens, although a period of residence may be required;

(b) rehabilitation programs under the *Disability Services Act 1986* (Cth) are available to citizens and permanent residents;[37]

(c) to be authorised to solemnise marriage in Australia, a minister of religion must be ordinarily resident in Australia (but need not be a citizen);[38]

(d) to be registered as a migration agent (a person authorised to provide immigration assistance) a person must be a permanent resident or an Australian citizen;[39]

(e) voting and eligibility for office in local government in Victoria (the state in Australia in which Mr Nystrom resided) is not confined to citizens;[40] and

(f) eligibility to serve in the Australian Defence Force is not confined to citizens.[41]

94. In relation to obligations, Mr Nystrom was, of course, obliged to obey the laws of Australia and was also subject to the Australian taxation regime, which distinguishes between residents and non-residents for tax purposes (and not between citizens and non-citizens). As Mr Nystrom was a permanent resident, it would have been acceptable under international law for Australia to compel him, under the same conditions as a citizen, to serve in the police and similar public services for the purpose of maintaining public order and safety.[42] After Mr Nystrom attained the age of 18 years he was also liable under the *Defence Act 1903* (Cth) to be called upon in time of war to serve in the Australian Defence Force, even though he was not formally a citizen.[43] (Australia has a history of conscripting residents who are not citizens and in 1967 the

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36 *Charles E Stewart v Canada*, Communication No 538/1993 (16 December 1996), [12.8]. Weis refers to nationality connoting the relationship between a State and its nationals, consisting of material rights and obligations: see Weis, above n 19, 29–30.

37 *Disability Services Act 1986* (Cth) s 21.

38 *Marriage Act 1961* (Cth) s 29.

39 *Migration Act 1958* (Cth) s 294.

40 See *Local Government Act 1989* (Vic) Part 3, Divisions 1 and 3.

41 A member's service may be terminated if the member becomes a permanent resident of another country or, in the case of an enlisted member, has not been granted or does not accept Australian citizenship: *Defence (Personnel) Regulations 2002* (Cth).

42 Robert Jennings and Arthur Watts, *Oppenheim's International Law* (9th ed, 1992) vol 1, 906–7.

43 *Defence Act 1903* (Cth) ss 59, 60.

Government justified its policy by saying that because it only applied to those choosing to make Australia their home it was entirely reasonable from the international standpoint.[44]) Australian laws in respect of treachery and treason do not distinguish between citizens and non-citizens.[45] In these circumstances it cannot be said that Mr Nystrom was not subject to material obligations of Australian nationality.

5.1.2 Has Mr Nystrom been Deprived of his Right to Enter his 'Own Country'?

95. The State party has cancelled Mr Nystrom's transitional (permanent) visa, which lead to Mr Nystrom's subsequent deportation to Sweden. Due to Mr Nystrom's criminal record, it is highly unlikely that he will be granted a visa to enter Australia in the future. As concluded in the above section, Australia is Mr Nystrom's 'own country.' Therefore, the cancellation of Mr Nystrom's transitional (permanent) visa and his subsequent deportation to Sweden has deprived Mr Nystrom of his right to enter his 'own country'. In any event, if a State is under an obligation to allow entry of a person, it is prohibited from deporting that person.[46] The act of deportation is inconsistent with, and serves to defeat, the right to enter.

5.1.3 Was the Deprivation of Mr Nystrom's Right to Enter his 'Own Country' Arbitrary?

96. In its General Comment 27, the Committee stated:

> In no case may a person be arbitrarily deprived of the right to enter his or her own country. The reference to the concept of arbitrariness in this context is intended to emphasize that it applies to all State action, legislative, administrative and judicial; it guarantees that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances. The Committee considers that there are few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable. A State party must not, by stripping a person of nationality or by expelling an individual to a third country, arbitrarily prevent this person from returning to his or her own country.[47]

97. The Committee's jurisprudence on the concept of arbitrariness contemplates that it must not simply be equated with 'against the law' but must be interpreted broadly to include such elements as inappropriateness, excessiveness or lack of proportionality.[48] Where an action taken by the

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44 [1967] *Australian Year Book of International Law*, 249–258.

45 *Crimes Act 1914* (Cth) s 24AA; Commonwealth Criminal Code, s 80.1.

46 *Charles E Stewart v Canada*, Communication No 538/1993 (16 December 1996), [2] (Members Evatt, Quiroga and Urbina).

47 UN HRC, *General Comment 27: Freedom of Movement (Article 12)*, UN Doc CCPR/C/21/Rev.1/Add.9 (1999), [21].

48 See *A v Australia*, Communication No 560/1993 (30 April 1997); *Mr C v Australia*, Communication No 900/1999 (13 November 2002).

State party against a person is excessive or disproportionate to the harm sought to be prevented, it would be unreasonable and arbitrary.[49]

98. In Mr Nystrom's case, the question is whether it is reasonable, necessary, proportionate, appropriate and justifiable[50] in all the circumstances of the case to deport him, having regard to whether the objectives of deportation identified by the Australian government are legitimate and, to the extent the objectives are legitimate, to whether they can be achieved by taking a lesser action than deportation. The Minister relied on Mr Nystrom's past criminality and her perception of the expectations of the Australian community to justify his expulsion. The Minister placed only moderate weight on the risk of recidivism on the part of Mr Nystrom and little weight on his visa cancellation serving as a general deterrent.[51] The Authors submit that the commission of criminal offences alone does not justify the expulsion of a person from his own country, unless the State could show that there are compelling and immediate reasons of necessity, such as national security or public order, which require such a course. In particular, the Minister's conception of the expectations of the Australian community, a matter to which she gave primary consideration, does not provide any compelling justification for the banishment of Mr Nystrom from his own country. Both the delay in taking action after Mr Nystrom's most serious offences and the fact that only moderate weight was given to the risk of recidivism (as discussed further at paragraphs 141 and 142) suggest that protection of the Australian community from future conduct on the part of Mr Nystrom was not a major factor for the Minister in reaching her decision.

99. As grievous as they may be, the nature of the offences committed by Mr Nystrom do not lead readily to the conclusion that he should be deported and taken into custody by armed Australian Federal Police officers. Both the cancellation of Mr Nystrom's transitional (permanent) visa and the circumstances in which he was taken into immigration detention were unreasonable, unnecessary, disproportionate, inappropriate and unjustified. Ordinary Australian citizens prosecuted for crimes, having completed formal detention sentences, are then permitted to live in freedom. It is grossly unfair and unjustified that Mr Nystrom, having duly served his criminal sentences, is not being extended the same rights as other Australians. As stated by the Full Federal Court of Australia in its decision in *Nystrom v Minister for Immigration*, Mr Nystrom

> has behaved badly, but no worse than many of his age who have also lived as members of the Australian community all their lives but who happen to be citizens. The difference is the barest of technicalities.[52]

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49 *Charles E Stewart v Canada*, Communication No 538/1993 (16 December 1996) (Member Bhagwati in dissent).

50 See the State Party's submissions at [4.2] in *D & E v Australia*, Communication No 1050/2002 (9 August 2006). See also *A v Australia*, Communication No 560/1993 (30 April 1997), [9.2 and 9.3] and *Van Alphen v Netherlands*, Communication No 305/1988 (23 July 1990), [5.8].

51 See the Statement of Reasons of the Minister dated 12 August 2004, included as Annexure 8 with this communication.

52 *Nystrom v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 121 (1 July 2005), [29] (Moore and Gyles JJ).

100. The action of the State party in seeking to deport Mr Nystrom is arbitrary. The effect of the actions of the State party is to unnecessarily preclude Mr Nystrom's right of residence and ability to enter Australia as of right. His future prospects of ever being permitted to enter Australia for more than a short period, if at all, are remote. Furthermore, his deportation is disproportionate because it has lifelong consequences, chief among which are separation from his family and enforced uprooting from his environment. Deportation from Australia means that he has been torn from his normal living environment and banished for life to a country where he has few, if any, contacts. Deportation has severed irrevocably all social ties between Mr Nystrom and the community he was living in.

101. The actions of Australia are especially difficult to justify in the case of Mr Nystrom because of the role of the State as Mr Nystrom's guardian (to the exclusion of his actual parents) between the ages of 13 and 16. The offences of rape and intentionally causing serious injury to which the Minister gave the greatest weight in reaching her decision to expel Mr Nystrom were committed during the period that the State was acting *in loco parentis*. Having chosen to assume parental responsibility and authority in respect of Mr Nystrom and to play a significant role in his upbringing, the State (after punishing Mr Nystrom for his crimes) now seeks to wash its hands of Mr Nystrom and of any further responsibility for his rehabilitation.

102. In assessing whether the expulsion of Mr Nystrom is arbitrary, it is obviously permissible to have regard to the position and legitimate objectives of Australia and of the Australian community. However, the reasonableness and appropriateness of the position and objectives of Australia cannot be judged in isolation from their effect on other members of the international community. One of the principal grounds for the Minister's decision to cancel Mr Nystrom's visa was said to be a desire to protect the Australian community. The Minister apparently decided that the desired protection would be best achieved by exposing Sweden and its community to whatever risk Mr Nystrom was seen as posing to Australia, despite the fact that Mr Nystrom's tenuous connection with Sweden ended when he left that country 25 days after his birth. It is submitted that the effect on Sweden of Australia's conduct also calls into question the reasonableness and appropriateness of the deportation of Mr Nystrom.

103. In *Nasri v France*, Judge Morenilla of the European Court of Human Rights wrote, in a partly dissenting opinion dealing with a proposed deportation:

> A State which, for reasons of convenience, accepts immigrant workers and authorizes their residence becomes responsible for the education and social integration of the children of such immigrants as it is of the children of its 'citizens'. Where such social integration fails, and the result is antisocial or criminal behaviour, the State is also under a duty to make provision for their social rehabilitation instead of sending them back to their country of origin, which has no responsibility for the behaviour in question and where the possibilities of rehabilitation in a foreign social environment are virtually non-existent.'[53]

[53] *Nasri v France* [1995] ECHR 24, [3] of Judge Morenilla's separate opinion.

5.2 ARTICLE 14(7) – RIGHT NOT TO BE TRIED OR PUNISHED AGAIN FOR AN OFFENCE FOR WHICH ONE HAS ALREADY BEEN FINALLY CONVICTED

104. The obligation assumed by the State party under Article 14(7) is to ensure that no one shall be liable to be tried or punished again for an offence for which he has already been convicted. The Authors submit that Mr Nystrom's visa cancellation and consequential deportation constitutes another punishment for offences in respect of which he has already served his time in accordance with Australian criminal law.

105. The Authors note the use of the phrase ’tried *or* punished’ in Article 14(7). In this sense, the Authors acknowledge that Mr Nystrom has not been tried again for his crimes. However, the Authors submit that Mr Nystrom has been punished again for his criminal actions.

5.2.1 Has the State party Punished Mr Nystrom?

106. Mr Nystrom was tried, convicted, and imprisoned several times in accordance with Australian criminal law as punishment for the offences that the Minister has determined constitute his ‘serious criminal record’ for the purposes of cancelling his visa. The Authors therefore submit that it is clear that Mr Nystrom was punished for each of his crimes, in accordance with Australian law.

5.2.2 Has the State party Punished Mr Nystrom again?

107. The Authors submit that:

   (a) the cancellation of Mr Nystrom’s transitional (permanent) visa;

   (b) his consequential detention (in both immigration and regular detention facilities); and

   (c) his deportation to Sweden,

   each constitutes a second instance of punishment for the crimes for which Mr Nystrom has already been punished in accordance with Australian law.

108. By cancelling Mr Nystrom’s transitional (permanent) visa, the State party took away rights and liberties that Mr Nystrom had enjoyed prior to that action by the State party. The State party has effectively banished Mr Nystrom from Australia, uprooted him from his home, family and employment, and essentially denied him any future ability to maintain meaningful contact with his family and friends, all of whom reside in Australia.

109. Furthermore, the Authors point to the fact that, as the result of the cancellation of his transitional (permanent) visa, Mr Nystrom was detained at Port Philip Prison for eight months, beginning in November 2004. As noted in paragraph 29, Port Philip Prison is not an approved immigration detention facility, but rather a maximum-security regular prison, where convicted and remand prisoners are held in relation to indictable offences. Mr Nystrom’s detention at Port Philip Prison essentially amounts to extra-judicial imprisonment for a reason other than criminal conviction. In addition, whilst being detained at Maribyrnong Immigration Detention Centre, Mr Nystrom was categorised as ‘high risk’. As a result, Mr Nystrom was:

   (a) not allowed to mingle with any other detainees;

   (b) given a single room with a guard permanently stationed outside it;

(c) held in a room with a light that was kept on 24 hours a day; and

(d) escorted by three guards when visited by his family.

Mr Nystrom's detention as a consequence of the cancellations of his transitional (permanent) visa, in particular his detention at Port Philip Prison, is strong evidence that the State party's actions against Mr Nystrom amount to 'punishment'.

110. The State party based its decision to cancel Mr Nystrom's transition (permanent) visa on Mr Nystrom's convictions. Therefore, the second punishment the State party inflicted on Mr Nystrom is directly referable to his crimes. In other words, the State party, in cancelling Mr Nystrom's transition (permanent) visa and consequential deportation, punished Mr Nystrom again.

5.2.3 Was this Treatment Discriminatory under Articles 2(1) and 26 of the Covenant?

111. The Authors submit that the denial of Mr Nystrom's right to be free from double punishment by the State party amounts to a breach of Articles 2(1) and 26. In this context, the Authors submit that the State party has unreasonably discriminated again Mr Nystrom based on nationality.

112. The State party relied on Mr Nystrom's status as a long-term resident with a criminal history, as opposed to a citizen, to cancel his transitional (permanent) visa. As stated above, the cancellation of Mr Nystrom's transitional (permanent) visa and his subsequent deportation amount to a second form of punishment for Mr Nystrom's crimes. A citizen would not be 'doubly punished' in this way. A person's long term residency, as opposed to citizenship, is not a reasonable and objective criterion to form the basis of a decision to infringe this right. Articles 2(1) and 26, when read together with Article 14(7), mean that, as a permanent resident, Mr Nystrom should not have been treated by the State party in a manner that was different from the manner in which a citizen would have been treated.

5.3 ARTICLES 17 AND 23(1) – RIGHT NOT TO BE SUBJECTED TO ARBITRARY INTERFERENCE WITH PRIVACY, FAMILY OR HOME; AND RIGHT TO PROTECTION OF THE FAMILY UNIT

113. The obligation assumed by the State party under Article 17 is to protect every individual against arbitrary or unlawful interference with his or her privacy, family and home.

114. The obligation assumed by the State party under Article 23 is to protect the family as the natural and fundamental group unit of society.

115. The Authors submit that the deportation of Mr Nystrom amounted to:

(a) an interference with the Authors' family;

(b) which was arbitrary,

amounting to a violation of Article 17 in conjunction with Article 23(1), for the reasons set out below.

116. The Authors further submit that the deportation of Mr Nystrom amounted to:

(a) an interference with Mr Nystrom's home;

(b) which is arbitrary,

amounting to a violation of Article 17 for the reasons set out below.

5.3.1 'Interference' with the Family

5.3.1.1 Definition of Family

117. In General Comment 16, the Committee stated:

> Regarding the term 'family', the objectives of the Covenant require that for purposes of Article 17 this term be given a broad interpretation to include all those comprising the family as understood in the society of the State party concerned.[54]

118. In General Comment 19, the Committee stated:

> The Committee notes that the concept of the family may differ in some respects from State to State, and even from region to region within a State, and that it is therefore not possible to give the concept a standard definition. However, the Committee emphasizes that, when a group of persons is regarded as a family under the legislation and practice of a State, it must be given the protection referred to in Article 23.[55]

119. The Authors submit that the bonds between mother and son, and sister and brother, clearly constitute family for the purposes of both Article 17 and Article 23(1). Being a 'nuclear family', this relationship satisfies even the most restrictive interpretation of family as understood in the society of the State party, and is clearly regarded as a family under the legislation and practice of the State party. This conclusion is supported by the decision of the Committee in *Winata v Australia*.[56] It is also consistent with the decision of the European Court of Human Rights in *Al-Nashif v Bulgaria*.[57]

5.3.1.2 Interference

120. The Authors submit that requiring one member of a family to leave Australia, while the other members of the family remain in Australia, amounts to an 'interference' with the family life of the Authors.

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[54] UNHRC, *General Comment 16: 'The right to respect of privacy, family, home and correspondence, and protection of honour and reputation (Article 17)*, (Thirty-second session, 8 April 1988), [5].

[55] UNHRC, *General Comment 19: Protection of the family, the right to marriage and equality of the spouses (Article 23)*, (Thirty-ninth session, 27 July 1990), [2].

[56] *Winata v Australia*, Communication No 930/2000 (26 July 2001).

[57] *Al-Nashif v Bulgaria* (2003) 36 EHRR 31.

121. Further, there is considerable evidence demonstrating that the family bond among the Authors is strong, and that each of the Authors would be deeply affected and mentally distressed by separation. When not imprisoned or in foster care, Mr Nystrom has generally lived with his mother, including during his adult life.

122. Mrs Turner, Mr Nystrom's sister, submitted a letter to the Department in support of her brother dated 3 September 2003. In the letter, a copy of which is attached to this Communication, Mrs Turner stated the following:

> [Stefan] left Sweden when he was 24 days old and has never returned…He has absolutely no knowledge of the Swedish language, of the culture or of any relatives that we have there. To imagine that he may be sent to a country that he has really never been to, to live out the rest of his days fills me and the rest of our family with absolute horror, dread and overwhelming sadness. I cannot foresee that he would survive very well at all…He would fall apart without us and us without him…To think that after 30 years of having a brother, it is up to complete strangers to decide whether I will ever see him again is incomprehensible. I feel as though I am fighting for his life.
>
> …
>
> I am filled with great sadness to think that I may be the only child [her mother] has in her life during her retirement and her old age. I am also not looking forward to the possibility that I may be the only one she can rely upon for help etc, as she grows older. Before all this drama started she was, for once in a long time, happy with how things were going. She had retired, was looking forward to doing more of what she wanted, spending time with her grandchildren, gardening etc. Now she is once again stressed, upset and quite depressed at the prospect of what may happen to our family. She is horrified that her son may be taken away from his family, because she knows, as I do that he would not survive.
>
> …
>
> For the past twenty years we have had many challenges with Stefan, lots of trouble and stress and tears. We know better than anyone that he was no angel and yet we have stood by him through it all, supporting him in whatever way we could…We have been to court with him most times, have visited him in jail, and have offered any help we could. Despite everything he has done he is still my brother, he is still our family, and we will always be there for him.
>
> …
>
> We all love him very much and cannot even begin to comprehend the prospect of him being torn from his family. Not only would we have to cope with the grief of never seeing him again, but also with the constant stress and worry for the rest of our lives about his survival in a foreign country surrounded by strangers whom he wouldn't understand.

123. Mrs Turner also has two young children, who are very close to Mr Nystrom. In her letter to DIMA she stated:

> I don't even think how I would go about explaining to my sons that they wouldn't be seeing their Uncle Stefan again. They are 6 and 4 and would never understand. He is the only Uncle they have and they love him dearly and do not judge him. As mum and dad decided to come to Australia to live, we are still only a very small family in the way of aunts and uncles and such. We need all of our family around us, Stefan needs all of us around him.

124. Further evidence demonstrating that the family bond is strong is set out in the statutory declarations of Mrs Nystrom and Mrs Turner, and has been referred to in paragraphs 17 and 52.

125. The Authors distinguish this situation from those where an individual seeks entry into a State for the purpose of 'family creation'. Although recognising that the Committee has previously had a restrictive approach towards such instances, the Authors submit that both the Committee and the European Court of Human Rights have adopted a more liberal approach to existing families already residing in a State.

126. It may be argued that the there is no 'interference', as the decision of whether the other members of the Nystrom family will accompany Mr Nystrom to Sweden or remain in Australia, is an issue for the family and is not influenced by the State party's actions. In this respect, the Authors refer the Committee to its previous decisions (and to decisions of the European Court of Human Rights is a similar context) that state that a State party's refusal to allow one member of a family to remain in its territory, while the other members of the family unit are allowed to remain in its territory, can still amount to an interference with that person's family life.[58] The Authors submit that in the present case, a decision by the State party to deport Mr Nystrom and to compel his immediate family to choose whether they should accompany him or stay in the State party would result in 'substantial changes to long-settled family life'[59] in either case, in a manner which is inconsistent with the Covenant.

127. Mrs Nystrom is 64 and no longer working. She has made her home in Australia for the last 40 years and her only other child (Mrs Turner) is a resident and citizen of Australia. Any migration by Mrs Nystrom to Sweden would involve expense which she cannot afford, as well as severe dislocation and distress. In the case of Mrs Turner, her husband and her husband's family are resident in Australia and her two children, aged four and six, were born and have been brought up in Australia. Mrs Turner holds Australian qualifications which enable her employment

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58 See *Madafferi v Australia*, Communication No 1011/2001 (26 August 2004), [9.7]; *Winata v Australia*, Communication No 930/2000 (26 July 2001), [7.1]; and *Canepa v Canada*, Communication No 558/1993 (20 June 1997), [11.4]. The European Court of Human Rights has accepted that the deportation of one member of a family because of criminal behaviour by that member can constitute interference with family life; see, for example, *Moustaquim v Belgium* [1991] ECHR 3, [36] and *Nasri v France* [1995] ECHR 24, [34].

59 See *Madaferri v Australia*, Communication No 1011/2001 (26 August 2004) and *Winata v Australia*, Communication No 930/2000 (26 July 2001).

in Australia as a secondary school teacher. It is unrealistic to suggest that Mrs Turner migrate to Sweden and it would involve even further significant disruption to her family life.

128. Accordingly, the Authors submit that the deportation of Mr Nystrom has undoubtedly amounted to 'interference' with the family life of the Authors.

129. The issue thus arises whether or not such interference with family life would be unlawful or arbitrary, and therefore contrary to Article 17, in conjunction with Article 23(1). This is dealt with in part 5.3.4.

5.3.2 'Interference' with the Home

5.3.2.1 Definition of Home

130. In General Comment 16 the Committee stated:

> The term 'home' in English…as used in Article 17 of the Covenant, is to be understood to indicate the place where a person resides or carries out his usual occupation.[60]

131. The Authors submit that the term 'home' as adopted in Article 17 must be interpreted broadly to include the community in which a person resides and of which he is a member. The fact that Mr Nystrom is not technically an Australian citizen is not relevant in any consideration of whether Australia is Mr Nystrom's home for the purposes of the Covenant. That this must logically be the case was recognised by the Full Federal Court of Australia when it noted that 'the appellant has indeed behaved badly, but no worse than many of his age who have also lived as members of the Australian community all their lives but who happen to be citizens. The difference is the barest of technicalities'.[61] The Federal Court of Australia has expressed similar concerns in cases concerning comparable factual scenarios.[62]

132. In light of the circumstances set out above, the Authors submit that the State party should be viewed as Mr Nystrom's home for the purposes of Article 17.

5.3.2.2 Interference

133. The Authors submit that by uprooting Mr Nystrom from the only country he has ever known, severing his contact with family, friends and regular employment, and deporting him to an alien environment such as Sweden, without any support networks, settlement initiatives, or genuine prospects of meaningful integration, except at the lowest imaginable level, the State party has indeed 'interfered' with the home life of Mr Nystrom.

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60 UNHRC, *General Comment 16: 'The right to respect of privacy, family, home and correspondence, and protection of honour and reputation (Article 17)*, (Thirty-second session, 8 April 1988), [5].

61 *Nystrom v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 121, [29].

62 See *Shaw v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 142 FCR 402 and *Ayan v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 196 ALR 332.

134. As outlined above, in an interview with a departmental officer from the Department on 21 August 2003, Mr Nystrom stated that he would not survive removal from Australia. He stated that all of his family and friends and parents' friends are Australian. Mr Nystrom stated that it would be very difficult for him to learn a new language as an adult. Further, Mr Nystrom stated that he was not very educated or skilled, and that it would be incredibly difficult for him to find a job in Sweden.

135. The Authors submit that the deportation of Mr Nystrom has undoubtedly amounted to 'interference' with the home life of Mr Nystrom.

136. The issue thus arises whether or not such interference with home life would be unlawful or arbitrary, and therefore contrary to Article 17.

5.3.3 That is Unlawful or Arbitrary

137. The Authors submit that the interference with the Authors' family and home is arbitrary for the reasons set out below.

138. The Committee has said that the introduction of the concept of arbitrariness into Article 17 was intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances.[63] The Committee has previously observed that in cases where one member of a family must leave the territory of a State party, while the other members of a family are entitled to remain, the relevant criteria for assessing whether or not the specific interference with family life can be objectively justified must be considered 'on the one hand, in light of the significance of the State party's reasons for the removal of the person concerned and, on the other, the degree of hardship the family and its members would encounter as a consequence of such removal.'[64] The Authors submit that the Committee should adopt the same approach to the assessment of arbitrariness as it related to an interference with Mr Nystrom's home.

139. In *Madafferi v Australia*, the State party justified the deportation of the author on the bases of:

    (a) Mr Madafferi's unlawful presence in Australia;

    (b) alleged dishonestly towards immigration officials; and

    (c) bad character based on offences the author had committed in Italy.[65]

140. The Committee ruled that in making its decision to deport Mr Madafferi, the State party did not afford enough due consideration to the significant hardship Mr Madafferi's deportation imposed on his family (including two children) that had been in existence for 14 years. The Committee noted the serious negative effect Mr Madafferi's family would endure if they were to immigrate to Mr Madafferi's new country of residence. Due to the imbalance of weight afforded to relevant

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63 UNHRC, *General Comment 16: 'The right to respect of privacy, family, home and correspondence, and protection of honour and reputation (Article 17)*, (Thirty-second session, 8 April 1988), [4]; *Canepa v Canada*, Communication No 558/1993 (20 June 1997), [11.4].

64 See *Madaferri v Australia*, Communication No 1011/2001 (26 August 2004), [9.8].

65 Ibid.

factors in the State party's decision to deport Mr Madafferi, the Committee found in *Madafferi v Australia* that the deportation decision was arbitrary.[66]

141. In the present case, the State party has justified the deportation of Mr Nystrom on the basis that Mr Nystrom has a substantial criminal record and is therefore deemed to be of 'bad character' for the purposes of the criteria set out under the *Act*. In her Statement of Reasons, the Minister gave primary consideration to:

(a) the protection of the Australian community, taking into account the seriousness and nature of Mr Nystrom's conduct (to which she gave great weight), the risk of recidivism (to which she gave moderate weight) and the deterrent to others (to which she gave little weight); and

(b) the expectations of the Australian community (to which she gave great weight), specifically the fact that the Australian community expects non-citizens to obey Australian laws while in Australia.

142. In commenting on the seriousness and nature of Mr Nystrom's conduct, the Minister placed the greatest emphasis on the convictions for rape and intentionally causing serious injury which occurred in December 1990 and then on two armed robbery convictions in February 1997. The Minister's decision to deport Mr Nystrom was made almost 14 years after the conviction for rape and intentionally causing serious injury, over nine years after Mr Nystrom's release from prison on those charges, seven years after the armed robbery convictions and a number of years after Mr Nystrom's release from prison on the armed robbery charges. The timing of the Minister's decision does not demonstrate any sense of an urgent need to protect the Australian community over and above the protection which applies in respect of all crimes committed in Australia: the prospect of punishment, deterrence and rehabilitation.

143. Further, by placing great weight on the seriousness and nature of Mr Nystrom's conduct to date, only moderate weight on the risk of recidivism and little weight on general deterrence, the Minister's decision does not seem to have been principally motivated by the future protection of the Australian community, but rather by a view that further punishment (in addition to that administered by the Australian criminal justice system) was required in respect of Mr Nystrom's past behaviour.

144. The other matter to which the Minister gave primary consideration was the Minister's belief that the Australian community would expect Mr Nystrom to be removed from Australia. It is not clear from the decision how the Minister divined what the Australian community would have expected. Nor is it clear that the Minister asked herself what the Australian community would have expected had they known that the government had acted *in loco parentis* during a significant part of Mr Nystrom's childhood.

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66 Ibid.

145. It is submitted that the Minister's perception of something as difficult to measure as the expectations of the Australian community should not be accorded great weight in balancing the significance of the State party's reasons for deporting Mr Nystrom against the hardship suffered by the Nystrom family. Similarly, a wish to inflict a punishment on Mr Nystrom beyond that provided for by the Australian criminal justice system should not be afforded material weight in the balancing exercise.

146. The Authors submit that the considerations which caused the government to deport Mr Nystrom should be weighed against the following:

(a) Mr Nystrom has resided in Australia since the age of 27 days and is, by all accounts, an absorbed member of the Australian community, and has known no home other than Australia.

(b) At all times, until the cancellation of his transitional (permanent) visa, Mr Nystrom has been a lawful permanent resident of Australia.[67]

(c) Mr Nystrom has no relevant ties to any other jurisdiction (although he is, by reason of both his place of birth and his father's status as a Swedish citizen, a citizen of Sweden). He has not travelled out of Australia since his arrival in 1974.

(d) Mr Nystrom has no knowledge of the Swedish language.

(e) Mr Nystrom has never known any person residing in Sweden.

(f) Despite statements to the contrary by the State party, Mr Nystrom received no warning of the potential cancellation of his visa until 12 November.

(g) Mr Nystrom's criminal conduct, although serious, is largely a product of family problems which commenced when he was seven years old, alcoholism, and his social environment. The State appears to have given no consideration to the fact that it elected to become Mr Nystrom's guardian (to the exclusion of his parents) when Mr Nystrom was 13 and continued in that role until Mr Nystrom was sentenced to prison when he was 16. On any view, his offences are the product of his upbringing within the State party. The most serious of Mr Nystrom's criminal offences occurred when he was 16 years old.

(h) Since being released from prison, and prior to deportation, Mr Nystrom had made positive steps towards reform, including towards overcoming his alcohol dependence.

(i) Mr Nystrom has minimal education, skills or work experience. These factors, combined with the significant language barriers, mean that it would be extremely difficult for Mr Nystrom to find employment in Sweden. Accordingly, Mr Nystrom has no real prospect of meaningful integration within Sweden, except at the lowest imaginable level.

(j) Mr Nystrom's entire immediate family reside within Australia. This includes his mother, his father, his sister and his two nephews aged six and four years old.

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[67] This contrasts to the position in *Winata v Australia*, Communication No 930/2000 (26 July 2001) and *Madaferri v Australia*, Communication No 1011/2001 (26 August 2004) where, although successful in relation to their communications, the complainants were residing in Australia unlawfully.

(k) There is considerable evidence demonstrating that the family bond among the Authors is strong, and that each of the Authors would be deeply affected and mentally distressed by separation.

(l) Mrs Nystrom's financial situation prevents her from ever travelling to Sweden again to visit her son and Mrs Turner's family and financial responsibilities will prevent her from travelling to Sweden to visit Mr Nystrom in the short to medium term.

(m) Based on current Australian law and practice, there is little chance that Mr Nystrom will ever be able to obtain any form of visa to return to Australia, on account of his criminal record. The deportation of Mr Nystrom therefore amounts to a permanent separation of Mr Nystrom from his home and entire immediate family.

147. The above makes clear the gravity of the consequences of the decision to deport Mr Nystrom. Not only does it involve the hardship in being permanently banished to a country which Mr Nystrom is entirely unfamiliar with, it also results in the permanent removal of Mr Nystrom from his family.

148. Given the gravity of the consequences flowing from the decision, the Authors submit that the decision to deport Mr Nystrom was, to adopt the wording of the Federal Court of Australia in a similar factual situation, not made 'conformably with a careful and humane balancing of the effects of the decision with other relevant matters.'[68]

149. Accordingly, the Authors submit that:

(a) the significance of the reasons advanced by the State party for the decision of the Minister to deport Mr Nystrom from the State party do not outweigh the hardship which has been, and will continue to be, suffered by the Nystrom family as a result of:

(i) the deportation of Mr Nystrom; and

(ii) the permanent separation of the members of the Nystrom family; and

(b) as a result, the actions of the State party are arbitrary.

150. Accordingly, the Authors submit that the deportation by the State party therefore constitutes arbitrary interference with the family and home of Mr Nystrom, in breach of Articles 17 and 23(1).[69]

151. The manifest inconsistency of the visa cancellation and deportation with the object and purpose of the Covenant, including Articles 7, 9, 12(4) and 14(7), also go to establishing that the conduct of the State party is arbitrary within the meaning of Articles 17 and 23(1).

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68 *Ayan v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 196 ALR 332, 346-7.

69 In *Moustaquim v Belgium* [1991] ECHR 3, a case whose facts bear some similarity to those in this communication, the European Court of Human Rights found a violation of the right to respect for Mr Moustaquim's family life.

5.3.4 Was this Treatment Discriminatory under Articles 2(1) and 26 of the Covenant?

152. The Authors submit that the denial of Mr Nystrom's right to be free from interference with his family and home, and the denial of his right to the protection of his family, amounts to a breach of Articles 2(1) and 26. In this context, the Authors submit that the State party has unreasonably discriminated again Mr Nystrom based on nationality.

153. The State party relied on Mr Nystrom's status as a long-term resident with a criminal history, as opposed to a citizen, to cancel his transitional (permanent) visa. As stated above, the cancellation of Mr Nystrom's transitional (permanent) visa and subsequent deportation amount to a second form of punishment in this context for Mr Nystrom's crimes. A citizen would not be denied their right to freedom of interference with their family and home, or denied their right to the protection of their family in this way. A person's long term residency, as opposed to citizenship, is not a reasonable and objective criterion to form the basis of a decision to deny these rights. Articles 2(1) and 26, when read together with Article 17 and Article 23(1), means that, as a permanent resident, Mr Nystrom should not have been treated by the State party in a manner which was different from the manner in which a citizen would have been treated.

5.4 ARTICLE 9 – RIGHT NOT TO BE SUBJECTED TO ARBITRARY ARREST OR DETENTION

154. The Authors respectfully submit that the State party has breached Mr Nystrom's right under Article 9(1) of the Covenant not to be subjected to arbitrary arrest or detention.

5.4.1 Scope of Obligation and Acceptable Limitations

155. The obligation assumed by the State party under Article 9(1) of the Covenant is to protect the liberty and security of persons under its jurisdiction by preventing arbitrary arrest or detention. The scope of the obligation extends to the all forms of deprivation of liberty, including detention for the purposes of immigration control.[70]

156. Article 9(1) designates that the only permissible limitations of the right to protection from deprivation of liberty are where the detention:[71]

(a) is 'on such grounds and in accordance with such procedures as are established by law'; and

(b) is not arbitrary.

157. In respect of the latter requirement, for the State party to be able to conform with its Article 9(1) obligations, neither the law under which an individual is detained, or the application of the law in the particular circumstances of that individual's case, may be arbitrary. How to determine whether the detention of an individual is 'arbitrary' has been considered by the Committee on several occasions. Arbitrariness may be identified by assessing whether the detention is

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70 UNHRC, *General Comment 8: Right to liberty and security of persons (Article 9)*, (Sixteenth session, 30 June 1982), [1].

71 S Joseph, J Schultz and M Castan (eds), *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (2nd ed, 2004) 11.10.

reasonable, necessary, proportionate, appropriate and justifiable in all of the circumstances.[72] Committee jurisprudence states further that 'arbitrariness' must not be equated with 'against the law' but be interpreted more broadly to include such elements as inappropriateness and injustice'.[73]

5.4.2 Detention in the Present Facts

158. Mr Nystrom was detained in Port Phillip Prison for nine months between November 2004, when his visa was first cancelled by the Minister, and July 2005, when the Full Federal Court handed down its judgment quashing the cancellation. Mr Nystrom's detention at this time was for reason of him being an 'unlawful non-citizen', but he was detained in a mainstream, maximum-security prison.

159. Mr Nystrom was further detained after the Minister's successful High Court appeal. He was held at the Maribyrnong Immigration Detention Centre between 10 November and 14 November 2006 and 8 December and 29 December 2006 in anticipation of his deportation to Sweden, as required by the State party's mandatory immigration detention policy in respect of 'unlawful non-citizens'. Mr Nystrom was in immigration detention up until his deportation on 29 December 2006, which prevented him from spending Christmas with his family and friends.

5.4.3 Arbitrariness of Mr Nystrom's Detention

160. While the law under which Mr Nystrom was detained has previously been found to be constitutionally valid under Australian law,[74] the Authors submit that Mr Nystrom's detention was not 'reasonable, necessary, proportionate, appropriate and justifiable in all of the circumstances' and is thus arbitrary in the sense precluded by Article 9(1) of the Covenant.

161. The Authors note the established views of the Committee regarding the mandatory detention policy under which Mr Nystrom was detained. The Committee has in numerous communications found that the State party's policy regarding mandatory detention of unlawful non-citizens has contravened Article 9(1).[75] While in certain circumstances 'the fact of illegal entry may indicate a need for investigation and there may be other factors particular to the individual … which may justify detention for a period',[76] the Committee has recognised that mandating detention for longer than what is strictly justified by the individual circumstances of each detainee is neither necessary

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[72] See above n 50 and accompanying text.

[73] *Shafiq v Australia*, Communication No 1324/2004 (13 November 2006), [7.2]; citing *A v Australia*, Communication No 560/1993 [9.2].

[74] *Al-Kateb v Godwin* (2004) 219 CLR 562.

[75] See, eg, *A v Australia*, Communication No 560/1993 (30 April 1997); *Mr C v Australia*, Communication No 900/1999 (13 November 2002); *Baban v Australia*, Communication No 1014/2001 (18 September 2003); *Bakhtiyari v Australia*, Communication No 1069/2002 (6 November 2003); *D and E v Australia*, Communication No 1050/2002 (9 August 2006); *Shafiq v Australia*, Communication No 1324/2004 (13 November 2006).

[76] *A v Australia*, Communication No 560/1993 (30 April 1997) at [9.4]

nor reasonable.[77] The Committee also expressed its concerns about the State party's mandatory immigration detention policy in its Concluding Observations to Australia's Periodic Report in 2000, stating that alternatives to mandatory detention should be instituted in order to achieve the competing aims of compliance with the State party's Covenant obligation under Article 9(1), and maintenance of a systematic and orderly immigration process.[78]

162. The Authors submit that the detention of Mr Nystrom in the present case was arbitrary within the meaning of Article 9(1). In assessing the arbitrariness of Mr Nystrom's detention, guidance can be drawn from the considerable amount of Committee jurisprudence on this point. In *C v Australia*, the Committee formed the view that 'detention should not continue beyond the period for which the State party can provide appropriate justification' in the circumstances of the individual detainee.[79] This was later endorsed in the subsequent *Baban* and *Bakhtiyari* cases.[80] On the present facts, Australian immigration officials at no point made an assessment of factors specific to Mr Nystrom that might justify the restriction of his liberty that occurred when he was placed in immigration detention, particularly during the nine months that he spent at Port Phillip Prison. The Australian Government has provided no reasoning or justification for Mr Nystrom's detention during the course of his legal appeals or in preparation for deportation that takes into account the nature of his individual circumstances. Mr Nystrom has not entered Australia illegally or purported fraudulently or dishonestly to have any visa or citizenship status he does not possess, and the State party has not at any time alleged that he has done so.

163. The Authors submit that there are similarly no factors particular to Mr Nystrom as an individual that would render his detention necessary or reasonable. The Authors submit that his 'substantial criminal record' (within the meaning of the Act) does not provide such a factor, as Mr Nystrom has already served his lawfully-determined sentences of penal detention for his crimes and, but for the deportation order, would not otherwise be restrained because of his past criminal activities from going about his ordinary activities in the community. His detention on such grounds, therefore, was both unnecessary and unreasonable.

164. Further, Mr Nystrom's detention for almost ten months, eight months of which was spent in a maximum-security prison, was disproportionate, inappropriate and unjustified in the circumstances of his case. The Authors submit that depriving Mr Nystrom of his liberty was a disproportionate means to bring about the ends, if any indeed exist, that Mr Nystrom's period of detention was designed to achieve. The Authors note the Committee's statement that '[w]ithout such factors [such as, in the case of a particular individual, the likelihood of absconding and lack

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77 *Mr C v Australia*, Communication No 900/1999 (13 November 2002), [8.2]; *Baban v Australia*, Communication No 1014/2001 (18 September 2003), [7.2]; *Bakhtiyari v Australia*, Communication No 1069/2002 (29 October 2003), [9.3].

78 UNHRC, *Concluding Observations to Australia's Periodic Report*, UN Doc A/55/40 (2000), [526]-[527].

79 *Mr C v Australia*, Communication No 900/1999 (13 November 2002), [8.2].

80 *Baban v Australia*, Communication No 1014/2001 [7.2]; *Bakhtiyari v Australia*, Communication No 1069/2002 [9.3].

of co-operation] detention may be considered arbitrary, even if entry was illegal'[81] and, presumably, even if the individual concerned is an 'unlawful non-citizen'. As Mr Nystrom is not an asylum seeker, and is unlawful by reason only of the Minister's action in cancelling his visa, there can be no deterrent effect resulting from Mr Nystrom's detention.

165. Further, if the purported object of detaining Mr Nystrom was because he was perceived to be an increased 'flight risk', or in order to facilitate administrative convenience for his deportation, it was an equally disproportionate measure. The Committee has stated that 'remand in custody could be considered arbitrary if it is not necessary in all the circumstances of the case, for example to prevent flight or interference with evidence: the element of proportionality becomes relevant in this context'[82]. It has further stated that 'the likelihood of absconding and lack of cooperation [of the detainee] … may justify detention for a period'.[83] The Authors submit that Mr Nystrom did not represent such a significant flight risk so as to render incarceration in immigration detention a proportionate response. Mr Nystrom was in steady employment in November 2004. At that point, he had a clear avenue of judicial review available to him, and therefore had the prospect of potentially regaining his visa. There would be no value or advantage to Mr Nystrom in absconding and jeopardising the success of his application for judicial review.

166. Furthermore, the fact that Mr Nystrom remained present and working in Swan Hill through the course of the government's High Court appeal ought to have strengthened the suggestion that he posed little risk of imminent flight at the point when he was taken to Maribyrnong Immigration Detention Centre. Indeed, in her letter to the Department dated 3 September 2003, Mrs Turner notes that the prospect of Mr Nystrom's deportation and separation from his family 'fills me and the rest of our family with absolute horror, dread and overwhelming sadness. I cannot foresee that he would survive very well at all…He would fall apart without us and us without him'. The Authors submit that as the time of Mr Nystrom's deportation approached, Mr Nystrom represented significantly less of a flight risk than ever before, as he would wish to spend his remaining time in Australia with his family and friends. The Authors therefore refer to the Committee's findings in *Baban v Australia*, where the Committee found that the author's detention by the State party was arbitrary because, inter alia, the 'State party [did] not demonstrat[e] that, in the light of the author's particular circumstances, there were not less invasive means of achieving the same ends, that is to say, compliance with the State party's immigration policies, by, for example, the imposition of reporting obligations, sureties or other conditions'.[84] Here, the Authors submit that an effective alternative was open to the State party to prevent Mr Nystrom from absconding without infringing his Article 9(1) right.

167. Finally, as Mr Nystrom became an 'unlawful non-citizen' only as a result of positive actions on the part of the Minister, it is both inappropriate and unjustified for Mr Nystrom to be punished by being placed in immigration detention.

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81 *A v Australia*, Communication No 560/1993 (30 April 1997), [9.4].

82 Ibid [9.2].

83 Ibid [9.4].

84 *Baban v Australia*, Communication No 1014/2001 (18 September 2003), [7.2].

5.4.4 Conclusion

168. Mr Nystrom's detention in Port Phillip Prison and Maribyrnong Immigration Detention Centre under the State party's mandatory detention policy was arbitrary so as to constitute a violation of Article 9(1) of the Covenant. The Authors submit that it was carried out by the State party with no consideration of Mr Nystrom's individual circumstances, which further, if considered, disclose that in the context Mr Nystrom's detention was unreasonable, disproportionate, unnecessary and inappropriate.

6. Findings and Remedies

6.1 Findings

169. Based on the submissions in Parts 4 and 5 above, the Authors respectfully request the Committee to act under Article 5(4) of the Optional Protocol to make a finding that the State party has violated each of Articles 7, 9, 12(4), 14(7), 17, 23(1) and 26 of the Covenant.

6.2 Remedies

170. The Authors note that Australia is required under Article 2(3)(a) of the Covenant to provide the Authors with an effective remedy in relation to these violations, including compensation. The Authors submit that the following remedies would be effective:

(a) Mr Nystrom's permanent residency status be reinstated; and

(b) the Authors be awarded compensation, assessed according to the standards applicable under Australian domestic law, for the following heads of damage:

(i) pain and suffering;

(ii) in respect of Mr Nystrom, loss of liberty;

(iii) in respect of Mr Nystrom, loss of income for the period spent in detention;

(iv) in respect of Mr Nystrom, personal injury, whether physical or psychological, contracted by reason of detention and deportation;

(v) in respect of Mr Nystrom, future economic loss caused or sustained by reason of his detention and deportation; and

(vi) in respect of Mr Nystrom, the costs of any medical treatment required by the Author for any conditions, whether physical or psychological, contracted while in detention or during or after being deported.

171. The Authors further respectfully request that the Committee require the State party to inform the Committee of the measures it has taken to give effect to the Committee's views within 90 days.

6.3 Interim Measures

172. In the Authors' preliminary Communication, which was submitted to the Committee on their behalf on 22 December 2006, interim measures were requested.

173. The Authors submitted that it would be desirable for the Committee to request that the State party, acting through any of its relevant Ministers or Departments, comply with the following undertakings:

   (a) that Mr Nystrom not be removed from Australia pending the determination of this Communication; and

   (b) further, that Mr Nystrom not be detained as an unlawful non-citizen or in any other form of immigration detention under the Act while in Australia pending the determination of this Communication; or

   (c) in the event that Mr Nystrom is removed from Australia, he be granted the right to temporarily re-enter Australia on a reasonably regular basis (and at least for a period of not less than three weeks on at least two separate occasions in a calendar year), for the purpose of family reunification, pending the determination of this Communication.

174. The Authors note that the Special Rapporteur on New Communications and Interim Measures declined the Authors' Interim Measures Request on 23 December 2006.

7. Schedule

Glossary

Act means the Australian *Migration Act 1958* (Cth).

Australian Government or **Australia** means the State party.

Authors means the alleged victims, Mr Stefan Lars Nystrom, Mrs Britt Marita Nystrom and Mrs Annette Christine Turner.

Committee means the Human Rights Committee established under part IV of the Covenant.

Communication means this Individual Communication to the Human Rights Committee.

Covenant means the *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976); GA Res 2200A (XXI), 21 UN GAOR Supp (No 16) 52; UN Doc A/6316 (1966).

Department means the Australian Department of Immigration and Multicultural and Indigenous Affairs (recently renamed the Department of Immigration and Citizenship).

Federal Court means the Federal Court of Australia.

Federal Magistrates' Court means the Federal Magistrates' Court of Australia.

FM means Federal Magistrate.

Full Federal Court means the Full Court of the Federal Court of Australia.

High Court means the High Court of Australia.

J means Justice.

JJ means Justices.

Minister means the then Australian Minister for Immigration and Multicultural and Indigenous Affairs, The Hon Senator Amanda Vanstone.

Mr Nystrom means Mr Stefan Lars Nystrom, one of the three Authors.

Mrs Nystrom means Mrs Britt Marita Nystrom, one of the three Authors.

Mrs Turner means Mrs Annette Christine Turner, one of the three Authors.

Optional Protocol means the *Optional Protocol to the International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 302 (entered into force 23 March 1976); GA Res 2200A (XXI), 21 UN GAOR Supp (No 16) 59; UN Doc A/6316 (1966).

Rules of Procedure means revision 8 of the *Rules of Procedure of the Human Rights Committee*, UN Doc CCPR/C/3/Rev.8 (22 September 2005).

State party means the Commonwealth of Australia.

8. Annexures

Attached are the following annexures:

1. Power of Attorney executed by Stefan Lars Nystrom;
2. Power of Attorney executed by Britt Marita Nystrom;
3. Power of Attorney executed by Annette Christine Turner;
4. Statutory Declaration of Britt Marita Nystrom;
5. Statutory Declaration of Annette Christine Turner;
6. Statutory Declaration of Stefan Nystrom dated 29 December 2006 (I);
7. Statutory Declaration of Stefan Nystrom dated 29 December 2006 (II);
8. Issues for consideration of possible cancellation of a visa under section 501(2) of the *Migration Act 1958* (Cth), including:

    Annex A Movement Records;

    Annex B Applicant's Criminal History;

    Annex C Notice of Intention to Consider Cancelling a Visa;

    Annex D Transcript of Judges' Remarks;

    Annex E Record of Interview with Applicant;

    Annex F Letter of Support from the Applicant's Family;

    Annex G Letter of Support from the Applicant's Employer;

9. Affidavit of Britt Nystrom dated 4 February 2005;
10. *Nystrom v Minister for Immigration* [2005] FMCA 305;
11. *Nystrom v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 121;
12. *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* [2006] HCA 50.