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# Nystrom, Nystrom & Turner vs. Australia

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Communication No. 1557/2007  
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## Facts

The author was 25 days old when he travelled from Sweden to Australia, where his parents, Swedish and Finnish respectively, were permanent residents and where his elder sister had been born. The author remained in Australia all his life, where he kept close ties with his mother, sister and nephews. The author committed several offences for which he was punished and committed to the care of the Australian State when he was 13.

In August 2004, due to his criminal record, his permanent visa was cancelled and he was detained in a prison for 8 months. In June 2005, as a consequence of his successful appeal to the Full Federal Court, which considered him as 'an absorbed member of the Australian community with no relevant ties elsewhere', the author was released and started working. However, the Minister's successful appeal to the High Court in November 2006 ruled that his visa should be cancelled and he should be deported. The author was imprisoned again in solitary confinement and deported to Sweden in December 2006.

Neither the author nor his mother thought he was not an Australian citizen or that he had a visa, since his visas were conferred to him automatically.

The author arrived in Sweden entirely unprepared for the culture, language and climate, leading him to return to alcohol abuse. His mother and sister are unable to visit him due to a lack of financial means.

## Consideration of admissibility

**Art. 2 Optional Protocol (OP).** Regarding the author's claim under Art. 14 §7 that, by having his visa cancelled and being deported, he was punished again for offences he had already served a term for, the Committee found it not to be substantiated since proceedings for the expulsion of a person not holding the nationality of the State are ordinarily outside this article (e.x. No. 1494/2006, *Chadzjian v. The Netherlands*, inadmissibility decision, § 8.4). The authors claim of discrimination with regard to Art. 2 §1 and Art. 26, in conjunction with Art. 14 §7, is inadmissible for the same reasons.

## Consideration of merits

**Art. 9 §1:** The Committee recalled its jurisprudence that remand in custody of unlawful residents could be considered arbitrary if it is not necessary or proportional (No. 1011/2001, *Madafferi v. Australia*, §9.2). However, bearing in mind: (i) that the author was lawfully detained in connection with his visa cancellation and pending his deportation; (ii) that the author's detention in a prison was necessary due to his substantial criminal record, risk of recidivism, risk of flight and the concern that he could harm the detention centre personnel and inmates, the Committee considered

## Key words

- Arbitrary detention
- Freedom of movement
- Privacy
- Protection of family
- No double trial

## Relevant Provisions

- Article 9 §1
- Article 12 §4
- Article 17 and 23 §1
- Article 14 §7 and Article 2 OP

## Violated Provisions

- Article 12 §4
- Article 17 and 23 §1

the author's detention to be proportionate. Thus, no violation of this Art. was found.

**Art. 12 §4:** On the question of whether Australia is indeed the author's 'own country' for the purposes of deciding whether his deprivation of the right to enter that country would be arbitrary, the Committee took into account that the term is not limited to nationality but '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' ([General Comment No. 27](#)). Bearing this, the Committee found it established that Australia was the author's own country in the light of the strong ties connecting him to Australia, the presence of his family in Australia, the language he speaks, the duration of his stay in the country and the lack of any other ties than nationality with Sweden. The Committee also considered that there are few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable (General Comment No. 27). Therefore, bearing that the decision to deport the author occurred many years after his release from prison on various charges and at a time where he was in rehabilitation, the Committee found the deportation arbitrary and contrary to this Art.

**Art. 17 and 23 §1.** The Committee recalled that 'the separation of a person from his family by means of expulsion could be regarded as an arbitrary interference with the family (...) if, in the circumstances of the case, the separation of the author from his family and its effects on him were disproportionate to the objectives of the removal (No. 558/1993, [Canepa v. Canada](#), 1997, § 11.4). In this case, the Committee considered the decision to deport the author disproportionate to the legitimate aim of preventing the commission of further crimes, especially given (i) the lapse of time between the commission of offences and the deportation and (ii) that the author's deportation is of a definite nature and that the author's family has limited financial means to visit him or reunite with him in Sweden. Therefore, it found a violation of the above-mentioned articles.

Regarding the author's claim that his mother's and sister's rights have been directly violated under these articles, the Committee noted that all the arguments invoked relate to the consequences of the disruption for him and that his mother and sister were not uprooted from their family life environment in Australia. Therefore, there has not been a separate and distinct violation related to his family.

The Committee found it unnecessary to address the author's claims under Art. 2 §1 and 26.

## Conclusions

The Committee found that the author's deportation to Sweden arbitrarily deprived him of his right to enter his own country (Art. 12 §4) and constituted an arbitrary interference with his family life (Art. 17 and Art.23 §1). Therefore, it requested the State party to provide the author with an effective remedy, including materially facilitating his return to Australia, and avoid exposing others to similar risks of a violation in the future. It should moreover, within 180 days, give the Committee information about the measures taken to give effect to its views, as well as publishing the Committee's Views.

## Dissent/Concurrence

**Dissenting opinion of Prof. Neuman and Prof. Iwasawa.** The dissenting members departed from the majority's view regarding their assessment of Art. 17 and 23 §1. According to these members, neither the Committee's prior Views nor the jurisprudence of the regional human rights courts would support the conclusion that deportation of an adult in this family situation (i.e. young, no spouse or children, with some family contacts in Sweden and with possibility of technological communication) and with this criminal record represented a disproportionate interference with his family life.

In addition, they departed from the majority's views regarding their assessment of Art. 12 §4. The dissenting members referred to the Committee's views in No. 538/1993, *Steward v Canada*, 1996, § 12.5, where it preserved a relationship between the right and the concept of nationality. In the present case, however, the majority abandons any link to nationality and suggests that long standing residence and subjective ties are sufficient for non-nationals to claim a state as their 'own country'. This expansion has as a consequence an increased number of non-nationals whom a State cannot send back to their country of nationality, despite strong reasons of public interest, and a dilution of the protection this Art. traditionally afforded to nationals or quasi-nationals.

**Dissenting opinion of Sir Rodley, Ms Keller and Prof O'Flaherty.** The dissenting members agree with the opinion of Prof. Neuman and Iwasawa regarding Art. 12 § 4. They believe General Comment 27, relied upon by the majority to support their view, expanded the scope of the expression "his own country" to include individuals deprived of any effective nationality, which is not the case of the author. They considered the case borderline, though, because the author did not know he was not an Australian citizen, taking into account that the State of Australia assumed his guardianship for a substantive period of his life. Thus, they did not conclude that Art. 12 §4 could not have been violated.