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Human Rights Committee

Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3646/2019**, ***, ****

Communication submitted by:	John Falzon (represented by counsel, Nikol Caruana and Andre Borg)
Alleged victim:	The author
State party:	Australia
Date of communication:	28 November 2018 (initial submission)
Document reference:	Decision taken pursuant to rule 92 of the Committee's rules of procedure, transmitted to the State party on 15 August 2019 (not issued in document form)
Date of adoption of Views:	14 March 2024
Subject matter:	Deportation to Malta of a long-term foreign resident
Procedural issues:	Incompatibility; *ratione materiae*
Substantive issues:	Accused or convicted persons; administrative arrest or detention; aliens' rights; arbitrary arrest or detention; arbitrary or unlawful interference; family rights; freedom of movement; freedom of movement-own country; nationality; *ne bis in idem*; parole or release on parole
Articles of the Covenant:	2 (2), 9 (1), 12 (4), 14 (7), 17 and 23 (1)
Article of the Optional Protocol:	3

1. The author of the communication is John Falzon, a national of Malta born in 1952. He submits that, by deporting him to Malta, the State party violated his rights under

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** Adopted by the Committee at its 140th session (4–28 March 2024).

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

**** A joint opinion by Committee members Carlos Goméz Martínez, Marcia V.J. Kran, Kobauyah Tchamdja Kpatcha and Teraya Koji (dissenting) and individual opinions by Committee members Hernán Quezada Cabrera (concurring) and Rodrigo A. Carazo (concurring) are annexed to the present Views.

articles 9 (1) and 12 (4), article 14 (7), read in conjunction with articles 9, 12 (4) and 17, and article 17, read in conjunction with articles 2 (2) and 23 (1), of the Covenant. The Optional Protocol entered into force for the State party on 25 December 1991. The author is represented by counsel.

Facts as presented by the author

2.1 In 1956, when the author was 3 years old, he emigrated from Malta to Australia with his parents, who were nationals of Malta. The author grew up, studied and started a family in Australia. However, he never applied for Australian nationality, even though he was entitled to it. While he acknowledges that ignorance of the law is no excuse for his failure to apply for nationality, he believed that he was Australian and never had any reason to doubt his status. He is not highly educated and was not familiar with laws relating to immigration or citizenship.

2.2 In 1972, the author married a national of Australia. They remained married for 32 years. The author's three living children, 10 grandchildren, five brothers, two sisters, 13 nieces and nephews and 20 great-nieces and great-nephews are also nationals of Australia. The author has always been present in the lives of his grandchildren and has always contributed to his family's welfare. He helped one of his daughters to raise her two children, who are now adults. He also took care of another daughter for some time when she suffered from chronic depression and anxiety.

2.3 The author always paid taxes and made social contributions in Australia. He had a driver's license in Australia and a health card. Those were his main identification documents. He was entitled to vote in local elections and to serve in the public sector.

2.4 Between 1971 and 1994, the author was convicted of several unspecified petty crimes.

2.5 In 1994, by operation of law, the author was granted an Absorbed Person Visa and a Class BF Transitional (Permanent) Visa. As an absorbed person of the Australian community, he had a legitimate expectation that he would be treated as a member of that community.

2.6 In 1995, the author was convicted of drug trafficking. On 26 June 2008, he was again convicted of drug trafficking and was sentenced to 11 years in prison with the possibility of parole after eight years.

2.7 On 10 March 2016, after almost eight years in prison and shortly before he was scheduled to become eligible for parole, the author was notified that he was subject to deportation following the cancellation of his visa[1] by a delegate of the Minister for Immigration and Border Protection. The notice was issued pursuant to section 501 (3A) of the Migration Act, which permitted the Minister to cancel the author's visa following a determination that he had failed the statutory character test owing to a substantial criminal record. The author was invited to submit a request to revoke the decision of the Minister; he did so on 15 March 2016. He submitted letters of support from family and friends and a psychological report in which the expected impact of his deportation on him was described.[2] The previous day, on 14 March 2016, the author had been transferred from a penitentiary facility to a centre for administrative detention. He spent six weeks in pre-removal detention in Melbourne and was then transferred to a detention centre on Christmas Island.

2.8 On 10 January 2017, the Assistant Minister for Immigration and Border Protection rejected the author's request to revoke the cancellation of his visas. The Assistant Minister considered the author's representations regarding his family life and acknowledged that he and his family would have to endure hardship if he were to be deported. However, the Assistant Minister concluded that the author posed an unacceptable risk to the Australian

[1] While the author had two visas, the parties both refer to the cancellation of a visa (singular). In the High Court decision of 7 February 2018, it is explained that, owing to the cancellation of the author's Absorbed Person Visa, the Minister of Immigration and Border Protection decided to cancel the author's other visa, by judgment of 7 February 2018.

[2] The author provided to the Committee undated statements from his three children, who expressed concern about the author's imprisonment and his potential deportation.

community which outweighed all other considerations owing to the nature of the crimes and the likelihood to re-offend.

2.9 On an unspecified date, the author filed an application for revocation of the cancellation of his visa with the High Court. He claimed that his deportation would violate the principle of double jeopardy. On 7 February 2018, the High Court dismissed the application. It found that section 501 (3A) of the Migration Act required the cancellation of the visa granted to the author as a non-citizen, owing to his criminal history and imprisonment. The High Court indicated that, when the author's legal status changed to that of an unlawful non-citizen, he could be detained to facilitate his removal.

2.10 Nearly four months later, on 1 June 2018, the author was deported to Malta, where he currently resides. During those four months, the author was not released from detention and therefore could not spend time with his family or pay his respects to family members who had passed away during his imprisonment. At the time of his deportation, his only connection to Malta was his birth in the country. He knew no one there and could not find work owing to his age, medical condition and history of detention. He was unfamiliar with the country's culture, traditions, language and basic institutional infrastructure, including the health and social welfare systems. The State party's authorities paid for two weeks of accommodation for him in a hotel in Malta. They did not provide any other monetary support. They assured him that he would begin receiving his pension benefits soon after his arrival in Malta. However, at the time the communication was submitted, the author had not received those benefits. The author maintains that he has exhausted domestic remedies.

Complaint

3.1 The author submits that, by deporting him to Malta, the State party violated his rights under articles 9 (1) and 12 (4), article 14 (7), read in conjunction with articles 9, 12 (4) and 17, and article 17, read in conjunction with articles 2 (2) and 23 (1), of the Covenant.

3.2 In violation of article 12 (4) of the Covenant, the State party arbitrarily deprived the author of the right to enter his own country. When he was deported in 2018, Australia was essentially the only country that he had known. He had lived in Australia for over 60 years, since the age of 3. He had never left the country before his deportation. He has only one distant relative in Malta, with whom he had no personal ties at the time of his deportation.

3.3 The author's deportation was arbitrary because the State party's legislation did not provide for due consideration of his status as a long-term resident of Australia. Under section 501 of the Migration Act, a person's visa must be cancelled if the person has been imprisoned for 12 months or more. The cancellation of the visa may be revoked if certain criteria are met. However, in the author's case, the migration authorities did not consider the expected psychological impact of his deportation, his ties with Australia, his lack of ties with Malta, his age or his good conduct during his term of imprisonment. His human rights were not duly considered.

3.4 In violation of article 17 (1), read in conjunction with articles 2 (2) and 23 (1), of the Covenant, the State party accorded insufficient weight to the author's family life when deciding to cancel his visas and deport him. The author was the pillar of his family. He took care of his eldest daughter and her children after her partner died by suicide. He also cared for his other daughter, who was a single mother affected by depression and anxiety. The author had a very close relationship with his grandchildren. The decision maker acknowledged the negative impact of the deportation on the author's family life, but the legal framework only allowed for the decision maker to consider that impact as a secondary matter. The only instance where the adverse effect of the deportation on the author's family was a primary consideration was with respect to the best interests of the author's minor grandchildren.[3]

3.5 In violation of article 9 (1) of the Covenant, the author was arbitrarily held in administrative detention for almost two years and was only notified of the decision to cancel

[3] The author provides statements in which his three children describe the predicted impact of his deportation on his family and him.

his visas and deport him a few days before he became eligible for release on parole. During his administrative detention, his right to communicate with and receive visits from his attorney and family was restricted. While the author's challenges to his deportation prolonged his administrative detention, he could not apply for conditional release. The State party's authorities did not assess whether the author posed a risk to society or a risk of absconding. They also disregarded his good conduct in prison, the length of his residence in Australia and the lawfulness of his entry into Australia. The author's administrative detention was also disproportionate because the authorities did not consider other measures that would have been less intrusive than detention.

3.6 In violation of article 14 (7), read in conjunction with articles 9, 12 (4) and 17, of the Covenant, the author's imprisonment following a criminal conviction and the subsequent cancellation of his visas resulted in double jeopardy. The High Court rejected the author's argument on that issue, reasoning that the intent behind a deportation order was not punitive; rather, deportation was required to remove non-nationals from Australia. The author maintains that, according to that reasoning, his personal circumstances were necessarily going to be disregarded, notwithstanding any human rights violations at stake. The sole trigger for the automatic cancellation of the author's visas was his criminal conviction. The author's crime and his deportation were directly related. His detention in an administrative facility, his deportation and the prohibition on his return to Australia constitute punishment, in the light of his ties to Australia, his lack of ties to Malta, the completion of his sentence of imprisonment and his good conduct while in prison.

3.7 As remedies, the author requests the ability to return to Australia, the material facilitation of his return to Australia, a permanent residence permit for Australia, the consideration of monetary compensation and legislative reform of the character test under section 501 of the Migration Act.

State party's observations on admissibility and the merits

4.1 In its observations of 17 July 2020, the State party made the following factual assertions. The author was eligible for Australian nationality but never applied for it. His legal status as the holder of the Absorbed Person Visa and a Class BF Transitional (Permanent) Visa was that of a lawful non-citizen. The author has a significant history of criminal offending, spanning 37 years. The penalties imposed included fines and, for his serious drug-related offences, terms of imprisonment of two years, five years and 11 years. His criminal offending is serious in the light of its scale, repetition and the sentences imposed. Between 1971 and 1984, he was convicted of five offences, including assault occasioning actual bodily harm, theft (two counts), the handling, receiving and retention of stolen goods and cruelty to animals, for which he received fines and one sentence of six weeks' imprisonment. In 1995, he was convicted of five counts of drug trafficking. For those offences, he was sentenced to terms of imprisonment of two years on each of the first four counts and five years for the last count, to be served concurrently. In 2008, the author was convicted of trafficking a large commercial quantity of cannabis and was sentenced to 11 years' imprisonment with the possibility of parole after eight years.

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

4.3 Section 501 of the Migration Act was amended on 11 December 2014 to strengthen the character test, to ensure that non-citizens who committed crimes in Australia or who posed a risk to the Australian community could be considered for visa refusal or cancellation. The amendment also introduced mandatory visa cancellation grounds under section 501 (3A) for non-citizens serving a full-time sentence of imprisonment in a custodial institution who

did not pass the character test. That and other amendments arose from a parliamentary recommendation to strengthen the integrity of the migration programme, including by better considering certain kinds of criminal activity and migration fraud. The recommendation followed an observation that the character provisions of the Migration Act had been in place since 1999 and that, since that time, the number of temporary visa holders entering Australia had greatly increased. In the parliamentary memorandum explaining the rationale for the amendment to section 501 of the Migration Act, it was noted that the amendment would ensure that issues relating to a non-citizen's entitlement to retain a visa and the risk posed to the Australian community could be assessed before the release of the non-citizen from criminal custody into the community.

4.4 Cancellation of the visa of a non-citizen under section 501 of the Migration Act may only occur pursuant to a lawful decision. The process enables the non-citizen to submit reasons to contest the decision and to have those reasons reviewed, both by the Minister for Immigration and Border Protection and by a court through judicial review. Policies such as Direction No. 65 of the Migration Act, which guided visa cancellation and revocation decisions at the relevant time, require the decision maker to consider the strength, nature and duration of a person's ties to Australia, non-refoulement obligations, the extent of any impediments that the person may face if deported in maintaining basic living standards, taking into account the person's age and health, language or cultural barriers and the social, medical and/or economic support available to the person.

4.5 The State party considers that the communication is without merit.[4] Australia is not the author's own country within the meaning of article 12 (4) of the Covenant. The Committee's jurisprudence on that issue has expanded over the decades. The State party agrees with the Committee's position on that issue in its Views in *Stewart v. Canada*, *Canepa v. Canada* and *Madafferi et al. v. Australia*.[5] Even if the Committee takes the more expansive interpretation that it adopted in *Nystrom et al. v. Australia*,[6] a State may be an alien's own country only in the limited and specific circumstances equivalent to Mr. Nystrom's case. Those circumstances are not present in the author's case. Only in limited and exceptional circumstances may a non-citizen establish close and enduring connections to a State such that it can represent that person's own country for the purpose of article 12 (4) of the Covenant. That position is supported by the travaux préparatoires for the development of the Covenant,[7] and by article 13 of the Covenant, which clearly contemplates the expulsion of non-nationals and recognizes the right of States to regulate the entry and expulsion of aliens from its territory.

4.6 The author has not demonstrated an allegiance to Australia, given that he never sought to become a national of Australia, despite being eligible to do so, and given the frequency with which he violated Australian law. His criminal offending dates to 1971, since which time he has continued to act in contravention of Australian law (see para. 4.1). Despite spending eight years in prison after a conviction in 1995 on several counts of drug trafficking, he continued to reoffend and was again charged with drug trafficking in 2008. In view of the nature and increasing severity of the author's offending, which culminated in multiple charges of large-scale trafficking of illicit drugs, he has disregarded law enforcement and the safety of the Australian community.

4.7 Even if Australia were the author's own country, his removal was not arbitrary because it was lawful, reasonable and proportionate to the legitimate interest of protecting the Australian community from harm. The Committee should apply the term "arbitrary" consistently. A deprivation of the right to enter one's own country is not arbitrary where it is appropriate, justifiable, reasonable, necessary and proportionate to the ends sought. The assessment of arbitrariness should take into account injustice, unpredictability, unreasonableness or capriciousness in a State's action and the consistency of the expulsion with article 13 of the Covenant.

[4] The State party did not contest the admissibility of the communication in its initial observations.

[5] *Stewart v. Canada* (CCPR/C/58/D/538/1993), *Canepa v. Canada* (CCPR/C/59/D/558/1993) and *Madafferi et al. v. Australia* (CCPR/C/81/D/1011/2001).

[6] *Nystrom et al. v. Australia* (CCPR/C/102/D/1557/2007).

[7] E/CN.4/SR.315; E/CN.4/SR.316; A/C.3/SR.957, paras. 1, 19 and 25; and A/C.3/SR.958, para. 5.

4.8 The author's removal was reasonable, given that he had an opportunity to apply for Australian nationality over an extended period and it was within his control to obtain Australian nationality and thereby prevent his removal. Moreover, his personal circumstances were comprehensively considered during the domestic process. On 10 January 2017, when deciding not to revoke the cancellation of the author's visa, the Assistant Minister for Immigration and Border Protection took into account comments made by an appellate judge in 2013. The judge noted that the author had shown remorse and good prospects of rehabilitation upon his conviction in 1995 but had nevertheless reoffended after serving that term of imprisonment. The judge commented that, while the author's "remorse now may again be genuine, the prospects of rehabilitation must be guarded". Because the author had previously reoffended, despite having expressed remorse, the Assistant Minister could not be confident that the author would not reoffend again. The Assistant Minister considered the full range of circumstances relevant to the author, including the length of his stay in Australia, his large support network of family and friends in Australia, claims of rehabilitation, job offers upon release, his lack of connection with his birth country, including inability to speak the language and possible difficulty in acquiring access to government services, personal hardship and a diagnosis of emotional trauma with psychological and medical conditions. However, the Assistant Minister considered that the author's history of criminal offending posed an unacceptable risk to the Australian community and that the risk outweighed the impact that removal would have on the author and his family. It is the general practice of the Committee not to substitute the evaluation of evidence by domestic decision makers with its own evaluation.

4.9 The State party did not violate articles 17 or 23 (1) of the Covenant, given the factors previously mentioned.

4.10 In addition, the author's detention was consistent with article 9 (1) of the Covenant, since it was lawful, reasonable and proportionate. After the author completed his prison sentence, his visa was cancelled, on 10 March 2016, and he then became an unauthorized non-citizen. Upon his release from criminal custody, he was placed in immigration detention pending his removal from Australia. He had the option to leave the country voluntarily while his request for revocation or judicial review was pending. However, he chose to remain in Australia. He therefore continued to be detained in an immigration facility while he pursued those remedies. Immigration detention was considered necessary to protect the Australian community and to ensure the author's availability for removal. Had the author applied for and obtained Australian nationality, he would not have been detained.

4.11 The author's situation does not fall within the scope of article 14 (7) of the Covenant. The cancellation of the author's visa and his subsequent removal have a protective and not punitive purpose and were not carried out pursuant to ordinary criminal procedure. The regime is not designed to punish an offender for past conduct but to protect the Australian community. In *Nystrom et al. v. Australia*, the Committee found that the processes for the expulsion of an alien are ordinarily outside the scope of article 14 (7) of the Covenant.

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

5.1 In his comments of 9 May 2021, the author reiterated that Australia is his own country. He cites the dissenting opinions in *Stewart v. Canada*, *Canepa v. Canada* and *Madafferi et al. v. Australia*. In those opinions, certain members interpreted more broadly the concept of one's own country. Moreover, it is clear from the *travaux préparatoires* for the development of the Covenant that the phrase "own country" was deliberately chosen by the drafters of the treaty.

5.2 Individuals who, like the author, migrated to Australia at a very young age may be unaware of their lack of Australian citizenship or its consequences. The author was never formally notified by the authorities that criminal offending might result in the cancellation of his visa. The author left school when he was 14 years old. When he was first questioned by the immigration officials, he was shocked to learn that he was not a national of Australia. The removal of the author reflects a misguided notion that Australia may export its problems elsewhere.

5.3 The author again contests the legal regime that brought about the cancellation of his visa. He maintains that the decision makers' failure to give primary weight to his family life and ties to Australia indicates that the consideration of international obligations was subordinate to considerations of national interest.

5.4 As a consequence of his deportation, the author has suffered substantial confusion, exhaustion, frustration and sadness. His family cannot visit him, owing to a lack of financial means and in view of the long distance between Australia and Malta. The author's removal has caused great emotional distress to his family and has irreparable and indefinitely disrupted his family life.

5.5 With respect to article 9 (1) of the Covenant, the author reiterates his arguments and adds that, before placing him in immigration detention, the authorities did not assess the need for detention or consider his good behaviour while in prison or the non-violent nature of the offence that had resulted in his imprisonment.

5.6 Regarding article 14 (7) of the Covenant, the regime for visa cancellation and deportation was indeed punitive. While the author's detention was lawful, his human rights were violated when he was indefinitely detained and then permanently deported.

Issues and proceedings before the Committee

Consideration of admissibility

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

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

6.3 The Committee takes note of the author's claim that, as required by article 5 (2) (b) of the Optional Protocol, he availed himself of all effective and available domestic remedies before submitting the communication to the Committee.[8] The Committee observes that the High Court rejected the author's application for judicial review of the decision not to revoke the cancellation of his visa. The Committee notes that the State party does not maintain that further effective avenues of appeal were available to the author at the domestic level. Accordingly, the Committee considers that article 5 (2) (b) of the Optional Protocol does not constitute an obstacle to the admissibility of the communication.

6.4 The Committee takes note of the author's claim under article 14 (7), read in conjunction with articles 9, 12 (4) and 17, of the Covenant, to the effect that the State party subjected him to double jeopardy by deciding to deport him after he had become eligible for release from prison on parole, thereby punishing him twice for the same offence. According to the Committee's general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, article 14 (7) of the Covenant prohibits bringing a person, once convicted or acquitted of a certain offence, either before the same court again or before another tribunal again for the same offence. The Committee recalls that proceedings concerning the expulsion of a non-citizen are ordinarily outside the scope of article 14 of the Covenant[9] and that administrative proceedings that are consequent to a criminal conviction do not equate to double punishment in violation of article 14 (7) of the Covenant.[10] Accordingly, the Committee considers that the author's claims do not fall within the scope of article 14 (7) of the Covenant and are therefore inadmissible *ratione materiae* under article 3 of the Optional Protocol.

6.5 The Committee considers that for the purpose of admissibility, the author has sufficiently substantiated his claims under articles 9 (1) and 12 (4) and article 17, read in

[8] See, for example, *Gilberg v. Germany* (CCPR/C/87/D/1403/2005), para. 6.5.
[9] *Nystrom et al. v. Australia*, para. 6.4.
[10] *Cayzer v. Australia* (CCPR/C/135/D/2981/2017), para. 7.4.

conjunction with articles 2 (2) and 23 (1), of the Covenant. The Committee thus declares those claims admissible and proceeds with its examination of the merits.

Consideration of the merits

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

7.2 In assessing the author's claim that the State party violated his right to enter his own country by deporting him to Malta, the Committee must first determine whether Australia is his own country within the meaning of article 12 (4) of the Covenant. Recalling paragraph 20 of its general comment No. 27 (1999) on freedom of movement, the Committee notes that the concept of an individual's own country is not limited to nationality in a formal sense, that is, nationality acquired at birth or by conferral; it embraces, at the very least, individuals who, because of their special ties to or claims in relation to a given country, cannot be considered to be mere aliens.[11] In this regard, the Committee also recalls its jurisprudence according to which factors other than nationality may establish close and enduring connections between an individual and a country – connections that may be stronger than those of nationality. The notion of an individual's own country invites the consideration of such matters as long-standing residence, close personal and family ties and intentions to remain, as well as the absence of such ties elsewhere.[12]

7.3 In the present case, the Committee takes note of the State party's position that Australia is not the author's own country, because he has never demonstrated allegiance to it, since he never applied for Australian nationality, despite being eligible to do so. Nevertheless, the Committee considers that, apart from his nationality, the author had no meaningful connections with Malta at the time of his removal. In that regard, the Committee observes that the author arrived in Australia in 1956 when he was 3 years old, in the custody of his parents. In 1994, he was granted a Class BF Transitional (Permanent) Visa and an Absorbed Person Visa, despite having committed several offences between 1978 and 1994. He did not leave Australia until his deportation in 2018. He therefore lived in Australia for over 60 years, never indicated an intention to reside elsewhere and did not have much conscious recollection, if any, of having lived in Malta. The Committee also notes that, before his deportation, all of the author's schooling was completed in Australia, and he married there and had children and grandchildren there. All of his immediate family members are nationals of Australia, and he states that he always paid taxes and made social contributions there. The Committee further notes that the author did not have close family members in Malta and was unfamiliar with its culture and language. Given the aforementioned circumstances, the Committee considers that, despite the fact that the author did not apply for Australian nationality, he has demonstrated that he has close and enduring connections with Australia, connections that are stronger for him than those of nationality. Accordingly, the Committee concludes that Australia is the author's own country within the meaning of article 12 (4) of the Covenant.

7.4 The Committee must next examine whether, by deporting the author to Malta, the State party arbitrarily deprived him of the right to enter his own country, in violation of article 12 (4) of the Covenant. The Committee recalls that a State party must not, by depriving individuals of their nationality or expelling them to other countries, arbitrarily prevent those individuals from returning to their own countries.[13] Recalling paragraph 21 of its general comment No. 27 (1999), the Committee notes that even interference with the right to enter one's own country that is provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular

[11] See, for example, *B v. Australia* (CCPR/C/137/D/2999/2017), para. 9.2; and *Stewart v. Canada*, para. 12.4.

[12] *B v. Australia*, paras. 9.2–9.4; *Warsame v. Canada* (CCPR/C/102/D/1959/2010), paras. 8.4 and 8.5; and *Nystrom et al. v. Australia*, paras. 7.4 and 7.5.

[13] *Nystrom et al. v. Australia*, para. 7.6.

circumstances. The Committee recalls that there are few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable.[14]

7.5 In assessing whether the decisions that resulted in the author's deportation were in accordance with the provisions, aims and objectives of the Covenant and were reasonable under the circumstances, the Committee notes that the State party has not responded in its observations to the author's assertions that he is currently prohibited from re-entering Australia and that he only learned that criminal reoffending could result in the cancellation of his visa when he was informed that his visa had been cancelled. The Committee also notes that the author's visas were attributed to him by operation of law in 1994. The information before the Committee does not establish that the author was notified of that development or that he received other notifications which clarified to him, when he was of a sufficient age, that he was a visa holder and not a national of Australia. The Committee further notes that the State party has not explained whether, before deciding to remove the author, it had considered less drastic measures to achieve its stated aim of protecting the Australian community from harm, given that, for practical purposes, Australia was the only country that the author had known and that the author had no ties in Malta and no knowledge of the Maltese, the national language. Accordingly, the Committee considers that the author's removal to Malta was unreasonable under the circumstances, given that it has hampered his return to Australia and was disproportionate to the legitimate aim pursued, which was to protect the Australian community from harm.[15] The Committee thus concludes that the decision to deport the author to Malta was arbitrary and constituted a violation of his rights under article 12 (4) of the Covenant.

7.6 The Committee takes note of the author's claim under article 9 (1) of the Covenant that his administrative detention in an immigration facility after the cancellation of his visa was arbitrary. The author was sentenced to a prison term of 11 years on 26 June 2008, was notified of the cancellation of his visa on 10 March 2016 and was released from criminal custody on 14 March 2016, when he was placed in immigration detention. He initiated legal proceedings to challenge the cancellation of his visa on 15 March 2016, received confirmation of the cancellation of his visa on 10 January 2017, continued legal challenges thereafter and was deported on 1 June 2018.

7.7 The Committee recalls its general comment No. 35 (2014) on liberty and security of person, in which it stated that an arrest or detention may be authorized by domestic law and nonetheless be arbitrary. The notion of "arbitrariness" is not to be equated with "against the law" but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability and due process of law.[16] Detention for the purpose of immigration control is not arbitrary per se but must be justified as reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time.

7.8 The Committee notes that, while the author asserts that he should have had an opportunity to be considered for conditional release from immigration detention based on his eligibility for parole as of 26 June 2016, he ceased to be detained for punitive purposes pursuant to his criminal sentence on 14 March 2016. He was instead detained for immigration purposes from 14 March 2016 to 1 June 2018. Accordingly, the Committee considers that the standards relating to parole do not apply to the latter period.

7.9 The Committee refers to its finding above that the State party's decision to deport the author was in violation of article 12 (4) of the Covenant. The Committee notes that the author's deportation stemmed from the cancellation of his visa on 10 March 2016. The Committee therefore considers that the author should not have been placed in immigration detention. The Committee takes note of the State party's information that, after the author's placement in immigration detention, he was given the option to voluntarily leave Australia while he was pursuing his legal actions but chose to remain in immigration detention. With reference to its findings above (para. 7.3), the Committee considers that, because the State party's offer to release the author from immigration detention was conditioned upon his

[14] See also *Elmi v. Canada* (CCPR/C/136/D/3649/2019), para. 8.4; *Warsame v. Canada*, para. 8.6; and *Nystrom et al. v. Australia*, para. 7.6.

[15] See also *B v. Australia*, para. 9.7.

[16] For example, *Kim v. New Zealand* (CCPR/C/139/D/4170/2022), para. 8.17.

departure from his own country, it did not represent a reasonable alternative to detention. Accordingly, the Committee considers that the author's detention from 14 March 2016 to 1 June 2018 was arbitrary, in violation of article 9 (1) of the Covenant.

8. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the facts before it disclose a violation by the State party of article 12 (4) of the Covenant and also disclose a violation by the State party of article 9 (1) of the Covenant for the period from 14 March 2016 to 1 June 2018.

9. In the light of its findings that there has been a violation of articles 9 (1) and 12 (4) of the Covenant, the Committee decides not to examine separately the author's claims under article 17, read in conjunction with articles 2 (2) and 23 (1), of the Covenant.

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

11. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective remedy when it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and to have them widely disseminated in the language of the State party.

Annex I

Joint opinion of Committee members Carlos Goméz Martínez, Marcia V.J. Kran, Kobauyah Tchamdja Kpatcha and Koji Teraya Koji (dissenting)

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

2. The State party's legislation, namely, section 501 (3A) of the Migration Act, stipulates that the Minister for Immigration and Border Protection must cancel a visa if, inter alia, a person has a substantial criminal record and therefore does not pass the character test. In that assessment, decision makers must consider the protection of the Australian community from criminal or other serious conduct, the best interests of minor children in Australia and the expectations of the Australian community (para. 4.2).

3. The author has an extensive criminal history, beginning as early as 1971, with offences relating to drugs, assault occasioning actual bodily harm, theft, cruelty to animals and property crimes. For those offences, the author incurred penalties ranging from fines to imprisonment for 11 years (para. 4.1). The author has been sentenced to a cumulative term of at least 24 years in prison over his lifetime, encompassing periods both served and unserved, with some time spent on parole. In 1994, the author was granted an Absorbed Person Visa and a Class BF Transitional (Permanent) Visa, but he never sought to become a full citizen of Australia, despite being entitled to do so (paras. 2.1 and 2.5).

4. The Committee has well established in its jurisprudence that it is generally for the State party to analyse the facts and evidence in deportation cases to determine the risks of deportation for an individual. The Committee does not conduct its own independent evaluation of the facts and gives due weight to the State party's assessment, unless the assessment was clearly arbitrary or amounted to a manifest error or a denial of justice.[17] This deferential approach takes into account the Committee's general practice of considering communications solely on the basis of the written information provided by the author and the State party.[18] The high threshold reinforces the long-held position that the Committee is not a fourth-instance review mechanism that re-evaluates findings of fact or the application of domestic legislation.[19] It is incumbent upon the author to identify specific circumstances

[17] *C.C.N. v. Sweden* (CCPR/C/136/D/3701/2020), para. 6.7; *J.S. v. Australia* (CCPR/C/135/D/2804/2016), para. 7.5; *Z.H.et al. v. Denmark* (CCPR/C/119/D/2602/2015), para. 7.4; *A.S.M et al. v. Denmark* (CCPR/C/117/D/2378/2014), para. 8.3; *M.M v. Denmark* (CCPR/C/125/D/2345/2014), para. 8.4; *K v. Denmark* (CCPR/C/114/D/2393/2014), para. 7.4; *Elezaj v. Denmark* (CCPR/C/137/D/2858/2016), annex, para. 5; *Z and C v. Denmark* (CCPR/C/137/D/2795/2016), para. 6.8; *Murne et al. v. Sweden* (CCPR/C/137/D/2813/2016), para. 10.5, and annex I, paras. 15 and 16; *B v. Australia* (CCPR/C/137/D/2999/2017), annex, para. 4; *Rudurura v. Sweden* (CCPR/C/136/D/3706/2020), paras. 8.2 and 8.7; *O et al. v. Sweden* (CCPR/C/134/D/2632/2015), annex, para. 3; *Isley v. Australia* (CCPR/C/138/D/3208/2018), annex, para. 5.

[18] See https://www.ohchr.org/sites/default/files/Documents/Publications/FactSheet7Rev.2.pdf. See also *J.I. v. Sweden* (CCPR/C/128/D/3032/2017), para. 4.15; *Z.H. v. Australia* (CCPR/C/107/D/1957/2010), para. 9.3; and *Pillai et al. v. Canada* (CCPR/C/101/D/1763/2008), para. 11.2.

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

demonstrating that the proceedings in the State party or the removal decision itself were arbitrary, manifestly erroneous or amounted to a denial of justice.[20] If the deportation order was made under law in furtherance of a legitimate State interest and due consideration was given in the deportation proceedings to the deportee's family connections, the deportation decision is considered not to be unlawful or arbitrary.[21]

5. In its assessment of the author's claims, the State party concluded that the information at its disposal was serious enough to justify his deportation. That conclusion was reached by a competent national authority, namely, the Assistant Minister for Immigration and Border Protection, after a thorough and individualized assessment of the author's case. The Assistant Minister considered multiple factors. For example, the Assistant Minister considered the author's lack of connection with Malta, his extensive network of family and friends in Australia and a diagnosis of emotional trauma with psychological and medical conditions (para. 4.8). The Assistant Minister also considered comments by an appellate judge that the author had shown remorse and good prospects of rehabilitation upon his conviction in 1995 (ibid). However, the Assistant Minister ultimately found that the author's continued criminal actions thereafter posed an unacceptable risk to the Australian community and that that risk outweighed the impact that removal would have on the author and his family (ibid.).

6. The Migration Act expressly provides that permanent residency status can be revoked if an individual has a substantial criminal record. Australia issued the deportation order under that law in pursuit of a legitimate interest, and due consideration was given to the author's circumstances.[22] The author's lack of connection with Malta, which was a factor emphasized by the majority, cannot result in the de facto recognition of Australian nationality without any application for such nationality. Moreover, the Committee's previous jurisprudence has established that it is neither arbitrary nor unreasonable to deny nationality to individuals who have criminal records, especially when that "disability was of [their] own making".[23]

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

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

[21] *Gnaneswaran v. Australia* (CCPR/C/133/D/3212/2018), para. 9.3; *Stewart v. Canada* (CCPR/C/58/D/538/1993), para. 12.10; *Canepa v. Canada* (CCPR/C/59/D/558/1993), para. 11.4; and *Budlakoti v. Canada* (CCPR/C/122/D/2264/2013), para. 9.6.

[22] *Stewart v. Canada*, para. 12.10; *B v. Australia*, annex, para. 6; and *Isley v. Australia*, annex, para. 5.

[23] Ibid.

Annex II

[Original: Spanish]

Individual opinion of Committee member Hernán Quezada Cabrera (concurring)

1. I fully agree with the Committee's conclusion that the facts examined in the present case disclose a violation by the State party of article 12 (4) of the Covenant, as well as article 9 (1), in relation to, respectively, the author's deportation to Malta and his deprivation of liberty in a migration detention centre from 14 March 2016 to 1 June 2018.

2. However, as pointed out by some members of the Committee during the consideration of the communication, the Committee should have provided adequate reasoning for the decision contained in paragraph 9 of its Views that, in the light of its finding of a violation of the aforementioned articles, it would not examine separately the author's claims under article 17, read in conjunction with articles 2 (2) and 23 (1), of the Covenant.

3. From this decision, it could be understood that the facts amounting to a violation of article 17 of the Covenant, read in conjunction with articles 2 (2) and 23 (1), are subsumed under the violation of articles 12 (4) and 9 (1) – or perhaps article 9 only – or that any of the provisions of which the Committee has found a violation are *lex specialis* compared to the provisions whose possible violation is not being examined. However, the foregoing is nothing but speculation and does not replace the necessary reasoning that the Committee should have provided in deciding not to examine separately the author's claims under the provisions that were disregarded.

4. This lack of reasoning has led me to formulate this individual opinion in the present case, especially given the importance of articles 17 and 23 of the Covenant for protection against certain forms of arbitrary interference with privacy and family and protection of the family.

5. My intention in drafting this opinion is not to question the Committee's decision in paragraph 9 of the Views but to point out that the decision should have been properly reasoned, however succinctly.[24]

[24] Examples of reasoning in decisions similar to the one discussed in this individual opinion include *Benhadj v. Algeria* (CCPR/C/90/D/1173/2003), para. 8.5, and the following judgments of the European Court of Human Rights: *Ezelin v. France*, 26 April 1991, para. 35; *Kudła v. Poland*, 26 October 2000, para. 146; *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania*, 17 July 2014, para. 156; and *Mehmet Hatip Dicle v. Turkey*, 15 October 2013, para. 41.

Annex III

[Original: Spanish]

Individual opinion of Committee member Rodrigo A. Carazo (concurring)

1. It is not sufficient, as decided in these Views, that the State party be obliged to grant the author the opportunity to re-enter Australia. Remedying the expulsion of a "national", which the author effectively is, includes the obligation to reintegrate the injured party in Australia, if he so requests, in ex ante conditions, in other words, the same conditions he enjoyed before experiencing the proven violation.