Nystrom v Australia, UN Doc CCPR/C/102/D/1557/2007 (18 July 2011)

DEVON WHITTLE*

I Introduction

On 18 July 2011, the United Nations Human Rights Committee (the 'Committee') published its views in *Nystrom v Australia*.[1] In *Nystrom*, the Committee expanded the scope of art 12(4) of the *International Covenant on Civil and Political Rights*,[2] finding that it could apply to non-citizens where they had sufficient ties to a country. This significantly weakens the nexus previously required by the Committee between art 12(4) and nationality.[3]

This case note summarises the findings in *Nystrom* in relation to art 12(4) and briefly discusses the Committee's reasoning in light of its past views. While the Committee in *Nystrom* also found violations of arts 17 and 23 of the *ICCPR* and was asked to consider a number of other alleged rights violations, this note does not consider those aspects of the Committee's reasoning.

II Background

Mr Nystrom was born in Sweden in 1973. When he was 25 days old he travelled to Australia, where he has lived ever since, holding a Transitional (Permanent) Visa that has been automatically conferred upon him. Mr Nystrom's family ties are all in Australia and he has no connections with Sweden, nor does he have contact with the members of his extended family members who live there. He does not speak Swedish and was under the misapprehension that he was an Australian citizen.

In 2004, the Australian government cancelled Mr Nystrom's visa on the basis that he failed to satisfy the character test in s 501(6) of the *Migration Act 1958* (Cth) due to his criminal record. Mr Nystrom had previously been convicted of a number of criminal offences, including aggravated rape, arson, armed robbery, burglary and drug offences, and had served time in prison. Mr Nystrom's visa was cancelled a number of years after he had been released from prison, having served time for his most serious offences.

Mr Nystrom applied for judicial review of the cancellation of his visa, but this application was dismissed by a federal magistrate.[4] The federal magistrate's decision was then overturned on appeal to the Full Court of the Federal Court, where Moore and Gyles JJ found that Mr Nystrom was 'an absorbed member of the Australian community

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1 Human Rights Committee, *Views: Communications No 1557/2007*, 102nd sess, UN Doc CCPR/C/102/D/1557/2007 (18 July 2011) ('*Nystrom*'), decided with a majority of 10 members with five in dissent.

2 Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*').

3 *Nystrom*, UN Doc CCPR/C/102/D/1557/2007, 18 [7.4].

4 *Nystrom v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FMCA 305 (16 March 2005).

with no relevant ties elsewhere' (Emmet J in dissent).[5] The government successfully appealed that decision to the High Court[6] and Mr Nystrom was ultimately deported to Sweden on 29 December 2006.

Mr Nystrom submitted a communication to the Committee, arguing that Australia had violated his *ICCPR* rights as follows:

- his right to liberty and security of person (art 9(1));
- his right to enter his own country (art 12(4));
- his right not to be tried or punished for an offence of which he had already been convicted or acquitted (art 14(7));
- his right to protection from arbitrary and unlawful interference with privacy, family and home (art 17);
- his right to protection of his family (art 23(1));
- his right to equality before the law (art 26); and
- his right to non-discrimination (art 2(1)) in relation to the rights contained in arts 14(7), 17 and 23(1).

Mr Nystrom also submitted that his mother's and his sister's rights under arts 17 and 23(1) had been violated by his deportation.

III The Views of the Committee

The Committee found that Mr Nystrom's claim under *ICCPR* art 14(7) was inadmissible, his claim under art 9(1) failed on its merits and that, due to its other findings, it did not need to consider his claims under arts 2(1) or 26. Mr Nystrom's claims on behalf of his mother and sister also failed. The Committee found that Australia had violated arts 12(4), 17 and 23(1).

A *Majority View Regarding Art 12(4)*

Article 12(4) of the *ICCPR* states: 'No one shall be arbitrarily deprived of the right to enter his own country.' Mr Nystrom submitted that the phrase 'his own country' should not be read to mean the country of his nationality, Sweden; rather, it referred to Australia because of his 'special ties [and] claims' to Australia which meant that he 'cannot be considered to be a mere alien'.[7] In relation to the arbitrariness of the deportation, Mr Nystrom submitted that his criminal record did not justify deportation, given that Australia was 'his own country', unless there were 'compelling and immediate reasons of necessity' for the expulsion.[8] He also pointed to Australia's delay in cancelling his visa and that 'only moderate weight was given to the risk of recidivism', which he suggested showed that protection of the community was not a 'major factor' in the decision to deport him.[9]

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5 *Nystrom v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 143 FCR 420, 429.
6 *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566.
7 *Nystrom*, UN Doc CCPR/C/102/D/1557/2007, 6 [3.2].
8 Ibid 7 [3.4].
9 Ibid.

When considering whether Australia was Mr Nystrom's 'own country', the Committee recalled its *General Comment No 27*[10] on the freedom of movement.[11] *General Comment No 27* notes that the phrase 'his own country' in art 12(4) is broader than only the country of a person's 'formal' nationality and could include a country that an individual has 'special ties to or claims in relation to' such that he or she 'cannot be considered to be a mere alien'.[12] The *Nystrom* majority found a number of such factors that could demonstrate 'close and enduring connections between a person and a country', including 'long standing residence, close personal and family ties, intentions to remain' and the absence of similar ties elsewhere.[13] Such connections, the Committee noted, 'may be stronger than those of nationality' and thus could make a country a person's 'own' for the purposes of art 12(4) despite his or her formal nationality being of a different country.[14]

The Committee noted that Mr Nystrom had lived in Australia since he was 27 days old, that his nuclear family lives in Australia, that he has no ties to Sweden and that he does not speak Swedish.[15] It also took into consideration the Federal Court's finding that Mr Nystrom was an 'absorbed member of the Australian community', that he had many of the duties of a citizen and that he was generally treated like a citizen in Australia.[16] Further, it noted Mr Nystrom's submissions that the reason he did not acquire Australian citizenship was that he thought he was an Australian citizen and that, while he was a minor under state guardianship, the Australian authorities did not begin the process of acquiring citizenship for him.[17] Considering these factors, the Committee found that Mr Nystrom had established that Australia was 'his own country' within the meaning of art 12(4) of the *ICCPR*, despite his Swedish citizenship.

The Committee then turned to the arbitrariness of the deportation. It again recalled *General Comment No 27* and found that there would be 'few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable'.[18] The Committee noted that the deportation decision came:

> 14 years after [Mr Nystrom's] conviction for rape and intentionally causing injury and over nine years after his release from prison on those charges, seven years after the armed robbery convictions and a number of years after his release from prison on the latter charges.[19]

Finally, the Committee noted that Australia had provided no justification for the timing of the deportation. The Committee then concluded that the deportation of Mr Nystrom was arbitrary and that Australia had thus violated art 12(4) of the *ICCPR*.

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10 Human Rights Committee, *General Comment No 27: Freedom of Movement (Art 12)*, 67th sess, UN Doc CCPR/C/21/Rev.1/Add.9 (2 November 1999) ('*General Comment No 27*')

11 *Nystrom*, UN Doc CCPR/C/102/D/1557/2007, 18 [7.4].

12 *General Comment No 27*, UN Doc CCPR/C/21/Rev.1/Add.9, [20].

13 *Nystrom*, UN Doc CCPR/C/102/D/1557/2007, 18 [7.4].

14 Ibid 6, citing Human Rights Committee, *Views: Communication No 538/1993*, 58th sess, UN Doc CCPR/C/58/D/538/1993 (1 November 1996) ('*Stewart*') .

15 *Nystrom*, UN Doc CCPR/C/102/D/1557/2007, 18 [7.5].

16 Ibid.

17 Ibid.

18 Ibid 18 [7.6].

19 Ibid 19 [7.6].

B *Dissenting Views Regarding Art 12(4)*

In addition to the majority view, the Committee issued two separate opinions. The first separate opinion was by Committee Members Neuman and Iwasawa; and the second was by Members Rodley, Keller and O'Flaherty.

1 *The Neuman and Iwasawa dissent*

Members Neuman and Iwasawa disagreed with the majority's interpretation of the phrase 'one's own country' in art 12(4) of the *ICCPR*.[20] They characterised the interpretation as an 'overturning of the Committee's established jurisprudence'.[21]

In the two members' view, the 'primary function' of art 12(4) is to 'protect strongly the right of a state's own citizens not to be exiled or blocked from return'.[22] They noted that the structure and *travaux préparatoire* of the *ICCPR* specifically excluded art 12(4) from the exception in art 12(3) to the rights to freedom of movement in arts 12(1) and (2), rights that apply to 'everyone', for laws 'necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others'.[23] They also noted the Committee's views in *Stewart*,[24] which found that art 12(4) had a scope broader than formal nationality, but still 'preserved a relationship between the right and the concept of nationality'.[25] The two members saw the majority's reasoning as abandoning this link to nationality in preference of a 'broader approach' present in past Committee dissenting views, but that was 'not endorsed' in *General Comment No 27* or previous majority views.[26]

The two members viewed the majority's expansion of art 12(4) as allowing for longstanding residence and other ties to 'supply the criteria that determine whether non-nationals can claim a state as their "own country"'.[27] In their view, this gives rise to two potential problems. First, the majority's interpretation could result in a significant increase in the number of non-nationals a state could not deport even in the face of 'strong reasons of public interest and protection of the rights of others'.[28] Second, the majority's interpretation could dilute art 12(4)'s protection of nationals and 'a narrow category of quasi-nationals' due to its 'shift in emphasis from the structure and purpose of [art 12(4)] … to the literal wording of the section', particularly in relation to the question of what is arbitrary.[29]

Members Neuman and Iwasawa also noted that the majority's view regarding the length of time between Mr Nystrom's crimes and his deportation was 'counterproductive to the protection of human rights' as it could 'discourage states from giving deportable residents a

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20 Ibid 22 [1] (Dissenting Opinion of Members Neuman and Iwasawa).

21 Ibid.

22 Ibid 23 [3.1] (Dissenting Opinion of Members Neuman and Iwasawa), citing Human Rights Committee, *Views: Communication No 1011/2001*, 81st sess, UN Doc CCPR/C/81/D/1011/2001 (26 August 2004) ('*Madafferi*') [9.6]; Human Rights Committee, *Views: Communication No 859/1999*, 74th sess, UN Doc CCPR/C/74/D/859/1999 (15 April 2002) ('*Jiménez Vaca*') [7.4]; Human Rights Committee, *Concluding Observations of the Human Rights Committee: Syrian Arab Republic*, 71st sess, UN Doc CCPR/CO/71/SYR (24 April 2001) [21].

23 *Nystrom*, UN Doc CCPR/C/102/D/1557/2007, 23 [3.1] (Dissenting Opinion of Members Neuman and Iwasawa).

24 *Stewart*, UN Doc CCPR/C/58/D/538/1993 (16 December 1996).

25 *Nystrom*, UN Doc CCPR/C/102/D/1557/2007, 22 [3.1] (Dissenting Opinion of Members Neuman and Iwasawa), citing *Stewart*, UN Doc CCPR/C/58/D/538/1993, [12.5].

26 Ibid 23 [3.2] (Dissenting Opinion of Members Neuman and Iwasawa).

27 Ibid 23 [3.2] (Dissenting Opinion of Members Neuman and Iwasawa).

28 Ibid 24 [3.3] (Dissenting Opinion of Members Neuman and Iwasawa).

29 Ibid 24 [3.4] (Dissenting Opinion of Members Neuman and Iwasawa).

chance to demonstrate their rehabilitation, by maintaining that the delay forfeits the option of deportation even if further crimes occur'.[30]

The two members finally noted that they may have been able to conclude that Mr Nystrom should have been treated as an Australian national for the purposes of art 12(4) due to the state authority's failure to apply for citizenship on his behalf when he was under the care of the state.[31] However, as that was not the basis on which the majority decided the matter, the two members respectfully dissented.

2 *The Rodley, Keller and O'Flaherty dissent*

The second dissent was in general agreement with the dissent of Members Neuman and Iwasawa. It also further noted that the broader scope given to the phrase 'his own country' in the examples provided in *General Comment No 27* were all 'ones where the individual is deprived of any effective nationality'.[32] The members noted that Mr Nystrom had a definite, uncontested nationality — that of Sweden.[33] However, they also noted Australia's failure to address Mr Nystrom's ignorance of his lack of citizenship and failure to apply for citizenship on Mr Nystrom's behalf while he was under state guardianship.[34] Thus, they were not willing to conclude definitively that *ICCPR* art 12(4) could not have been violated in this case, but opined that the majority 'could and should have refrained' from taking the approach it did, especially given its findings of violations of arts 17 and 23(1).[35]

IV Discussion

The majority's views in *Nystrom* in relation to *ICCPR* art 12(4) are a clear expansion of the previous position of the Committee as expressed in *General Comment No 27* and *Stewart*.[36] While both *General Comment No 27* and *Stewart* accepted a broader reading of the words 'his own country' in art 12(4), the examples provided in each retained a nexus to nationality and have generally been read as closing off the categories of persons to whom art 12(4) applies.[37] The majority in *Nystrom*, conversely, expanded the application of art 12(4) beyond just nationality issues and looked at other factors to establish sufficient linkage between Australia and Mr Nystrom.

A *The Relevance of Nationality in Prior Committee Decisions Regarding Art 12(4)*

The *Stewart* majority accepted that a person's 'special ties' to a country could make that country his or her 'own' under *ICCPR* art 12(4) despite the person lacking formal nationality. However, their reading of art 12(4) remained limited by a nexus with nationality

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30 Ibid 22 [2.5] (Dissenting Opinion of Members Neuman and Iwasawa).
31 Ibid 24 [3.6] (Dissenting Opinion of Members Neuman and Iwasawa).
32 Ibid 25 (Dissenting Opinion of Members Rodley, Keller and O'Flaherty).
33 Ibid.
34 Ibid.
35 Ibid.
36 *General Comment No 27*, UN Doc CCPR/C/21/Rev.1/Add.9; *Stewart*, UN Doc CCPR/C/58/D/538/1993.
37 *Nystrom*, UN Doc CCPR/C/102/D/1557/2007, 23 [3.2] (Dissenting Opinion of Members Neuman and Iwasawa), 25 (Dissenting Opinion of Members Rodley, Keller and O'Flaherty); Human Rights Committee, *Views: Communication No 1959/2010*, 102nd sess, UN Doc CCPR/C/102/D/1959/2010 (1 September 2011), 22 (Dissenting Opinion of Member Rodley) ('*Warsame*').

that stemmed from that majority's view that 'in seeking to understand the meaning of article 12, paragraph 4, account must also be had of the language of article 13 of the Covenant'.[38]

Article 13 of the *ICCPR* limits the rights of states to expel 'an alien lawfully in the [state's] territory' and the *Stewart* majority opined that:

> 'his own country' as a concept applies to individuals who are nationals and to certain categories of individuals who, while not nationals in a formal sense, are also not 'aliens' within the meaning of article 13, although they may be considered as aliens for other purposes.[39]

The *Stewart* majority appeared to be of the view that to have recourse to art 12(4) a person needed to be more than an alien in a country or else the person would only be covered by art 13. They also considered what could make someone more than an 'alien' and gave examples, such as nationals who have their nationality improperly removed[40] and lawful immigrants who are denied nationality due to 'unreasonable impediments'.[41] In effect, then, the majority in *Stewart* read art 12(4) as applying to nationals and persons who would be nationals but for the illegitimate action of the state.

The reasoning in *Stewart* was accepted by the Committee in *Canepa*[42] and *Madafferi*.[43] Both of these majorities found that a person having the nationality of another country was decisive in relation to which country was that person's 'own country' as long as the country of residence had not put 'unreasonable impediments' in the way of obtaining nationality.[44]

The *Nystrom* majority did not explicitly discuss any 'unreasonable impediments' preventing Mr Nystrom from obtaining Australian citizenship. While they did note Australia's failure to apply for citizenship on Mr Nystrom's behalf while he was under state guardianship,[45] the majority did not explicitly make an 'unreasonable impediments' finding and instead relied on other factors to ground their art 12(4) finding. Their silence on the point may be seen as deliberate.

The *Nystrom* majority was also silent in relation to *ICCPR* art 13. The contrast between arts 12(4) and 13 set up by the *Stewart* majority does not flow naturally from the text. Moreover, as noted in *Stewart*, during the negotiation of the *ICCPR*, the words 'country of nationality' were specifically rejected for art 12(4), as were the words 'country of one's permanent home'.[46] This prima facie indicates an intention not to limit art 12(4)'s interpretation to only issues of nationality. Further it was incongruous for art 12(4) to be read as regarding only issues of nationality (whether in a 'formal' sense or otherwise) when other *ICCPR* articles contain explicit references to nationality or citizenship where such

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38 *Stewart*, UN Doc CCPR/C/58/D/538/1993, [12.3] with dissents on this issue by Member Klein, Member Francis, Members Evatt, Quiroga and Urbina, Members Chanet and Vallejo and Member Bhagwati.

39 Ibid.

40 Ibid [12.4].

41 Ibid [12.5].

42 Human Rights Committee, *Views: Communication No 558/1993*, 59th sess, UN Doc CCPR/C/59/558/1993 (20 June 1997) ('*Canepa*'), decided with a majority of 10 members with four members in dissent.

43 *Madafferi*, UN Doc CCPR/C/81/D/1011/2001, decided with a majority of 14 with two members in dissent.

44 *Canepa*, UN Doc CCPR/C/59/558/1993, [11.3]; *Madafferi*, UN Doc CCPR/C/81/D/1011/2011, [9.6].

45 *Nystrom*, UN Doc CCPR/C/102/D/1557/2007, 18 [7.5].

46 Ibid [12.5].

concepts are relevant. For example, art 24(3) states that '[e]very child has the right to acquire a *nationality*'[47] and art 25 states that:

> Every *citizen* shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:
>
> (a) To take part in the conduct of public affairs, directly or through freely chosen representatives.[48]

These explicit references to citizenship and nationality suggest against reading art 12(4) as relating solely to nationality, or 'non-aliens', when the article itself specifically uses terms other than nationality, alien or citizen.

Conversely, there is nothing incongruous in reading 'own country' in art 12(4) as applying to situations involving aliens where art 13 is not violated. Art 12(4) could be read as an additional hurdle to meet when expelling an alien who has made a country his or her own. This belies the reasoning in *Stewart* that presupposes art 12(4) as being caught up in the bundle of rights and duties that are associated with citizenship.[49] A straightforward reading of art 12(4) does not necessitate such a relationship, as was noted in the *Stewart* dissents[50] and ultimately accepted in *Nystrom*, albeit implicitly.[51]

Further, contrary to the dissenting views of Members Neuman and Iwasawa that the majority's interpretation of art 12(4) 'vastly increases the number of non-nationals whom a state cannot send back to their country of nationality', the finding in *Nystrom* is relatively exceptional given the case's unique factual context.[52] Mr Nystrom had spent virtually his entire life in Australia, had no links to Sweden and the only reason he had not applied for Australian citizenship was that he was unaware that he was not a citizen. Indeed, without the fact of state guardianship for part of his life, the majority may not have reached the decision it did in relation to art 12(4).[53] Given the high standard set by the Committee in *Nystrom*, and also other views such as *Toala et al*,[54] it may not be easy for a non-citizen to utilise art 12(4) without factors rising to a *Nystrom*-like level.

B *Potential Issues With the Majority View*

Despite the coherence of the majority's approach to *ICCPR* art 12(4), their decision is not without issue. First, the majority did not clarify the extent to which they relied upon the

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47 Emphasis added.

48 Emphasis added.

49 *Stewart*, UN Doc CCPR/C/58/D/538/1993, [12.8].

50 Ibid (Dissenting Opinion of Members Evatt, Quiroga and Urbina and the Dissenting Opinion of Member Bhagwati).

51 *Nystrom*, UN Doc CCPR/C/102/D/1557/2007, 18 [7.4].

52 Note that past decisions finding no violation of *ICCPR* art 12(4) remain informative as to what does constitute sufficient evidence of a close and enduring connection to the state. For example, in Human Rights Committee, *Views: Communication No 675/1995*, 70th sess, UN Doc CCPR/C/70/D/675/1995 (2 November 2000) ('*Toala et al*') a stay in New Zealand of between six and seven years was not sufficient to make New Zealand the applicants' 'own country' where they lacked citizenship despite having children who were New Zealand citizens who resided in New Zealand; in *Stewart* the applicants' presence in Canada since he was seven was not determinative; and in *Madaferri* a seven-year presence in Australia, marriage to an Australian citizen, having children with citizenship and running a business in Australia was also not sufficient. It is not clear that any of these decisions would be decided differently in light of the majority's views in *Nystrom*.

53 Cf *Warsame*, UN Doc CCPR/C/102/D/1959/2010.

54 *Toala el al*, UN Doc CCPR/C/70/D/675/1995; see also the discussion above n 52.

failure of Australia to begin the citizenship application process for Mr Nystrom when he was under state guardianship. Thus their views cannot be said, by themselves, to stand for the proposition that nationality may be irrelevant, or a lesser factor, to whether a country is a person's 'own' under art 12(4).[55] While the majority did connect its art 12(4) finding to the 'strong ties' connecting Mr Nystrom to Australia,[56] it is not clear whether the other factors would have been sufficient for their finding without Australia's lack of action while Mr Nystrom was under state guardianship.[57]

Second, the majority did not clarify the interaction between arts 17 and 23 of the *ICCPR* (regarding family life) and art 12(4). Of the factors relied upon to find a breach of art 12(4), close personal and family ties are also taken into account and protected by arts 17 and 23. In this instance the majority found that Australia had violated arts 17 and 23, but the question remains what the case would be if deportation of a person was reasonable under arts 17 and 23: could the person's family life still be a sufficient factor to support an 'own country' claim under art 12(4)?

Finally, in relation to the arbitrariness of the decision to deport Mr Nystrom, the majority's noting of the length of time between Mr Nystrom's criminal acts and his deportation is worrying.[58] As noted by Members Neuman and Iwasawa, this could 'discourage states from giving deportable residents a chance to demonstrate their rehabilitation by maintaining that the delay forfeits the option of deportation'.[59] Similarly, the majority's attention on Australia treating Mr Nystrom like a citizen may discourage such equitable treatment by states of their aliens, if it risks those aliens attracting the protection of art 12(4). A related concern is that broadening the application of art 12(4) could result in a weakening of the standard used to judge what is an 'arbitrary' deportation.[60] At present the standard is a stringent one: 'there are few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable'.[61] However, this standard was formulated in view of its general application to nationals, and thus it remains to be seen how it will be applied to aliens.

V Conclusion

After the *Nystrom* views were published, the Committee affirmed its approach in *Warsame*, which also dealt with a violation of art 12(4).[62] In *Warsame*, the Committee found that

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55 This issue persists despite the decision in *Warsame* (discussed below) confirming the *Nystrom* majority's interpretation of *ICCPR* art 12(4), given that Mr Warsame's ostensible citizenship was that of Somalia and the lack of clarity in relation to the true status of that nationality in Mr Warsame's case.

56 *Nystrom*, UN Doc CCPR/C/102/D/1557/2007, 18 [7.5].

57 Note also that the Committee's concerns in relation to Australia's inaction over Mr Nystrom's citizenship while he was under state guardianship may have been misplaced given art 8(1) of the *Convention on the Rights of the Child*, which requires parties to 'respect the right of the child to preserve his or her identity, including *nationality*, name and family relations as recognized by law without unlawful interference': *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) (emphasis added). This issue was not the subject of submissions or analysis, so it is unclear what the correct course of action would have been for Australia.

58 *Nystrom*, UN Doc CCPR/C/102/D/1557/2007, 19 [7.6].

59 Ibid 22 [2.5] (Dissenting Opinion of Members Neuman and Iwasawa).

60 See also *Stewart*, UN Doc CCPR/C/58/D/538/1993, [12.7].

61 *General Comment No 27*, UN Doc CCPR/C/21/Rev.1/Add.9, [21].

62 *Warsame*, UN Doc CCPR/C/102/D/1959/2010. This decision was subject to a subtle pre-emptive criticism in *Nystrom* in the dissent of Members Rodley, Keller and O'Flaherty, where the decision of the Committee to expand

'close and enduring connections' with a country 'may be stronger than those of nationality'.[63] Note, though, again in *Warsame*, issues regarding the applicant's nationality were not unimportant, as, although Mr Warsame had the formal nationality of Somalia according to his Canadian documents, he contested whether this would be recognised in Somalia given that he lacked documentary evidence of this nationality and had never lived in Somalia.[64]

Thus, the Committee has now issued two views confirming the 'factor-based' approach to art 12(4). While both views have generally been welcomed by human rights organisations, their reasoning should not be exaggerated. In both cases violations of *ICCPR* art 12(4) were found where there were clear, ongoing and longstanding connections to the resident state *and also* no connection between the person and the ostensible state of his nationality. While both views do entail clear developments in the interpretation of art 12(4) (particularly due to the absence of references to art 13 and issues of 'unreasonable impediments'), these decisions are not radical departures from *Stewart*; rather, they are best seen as gradual broadenings of the scope of art 12(4) to cater for the unique factual circumstances of the relevant applicants.

Note that the Australian government has also published its own response to the *Nystrom* decision.[65] In effect, Australia disagrees with the majority view and has indicated it will not be taking action to comply with the Committee's requests.

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the scope of *ICCPR* art 12(4) in *Warsame* was said to be 'far less explicabl[e]' than in *Nystrom*: *Nystrom*, UN Doc CCPR/C/102/D/1557/2007, 25 (Dissenting Opinion of Members Rodley, Keller and O'Flaherty)

63 Ibid 16 [8.4].

64 Ibid 12 [5.11], 17 [8.5].

65 Australian Commonwealth Attorney-General, *Response of the Australian Government to the Views of the Committee in Communication No 1557/2007, Nystrom et al v Australia* (18 July 2011) Australian Government Attorney-General's Department <http://www.ag.gov.au/RightsAndProtections/HumanRights/DisabilityStandards/Documents/NystrometalvAustralia-AustralianGovernmentResponse.pdf>.