



Human Rights Law Resource Centre Ltd
Level 1, 550 Lonsdale Street
Melbourne VIC 3000
AUSTRALIA
P: + 61 3 9225 6695
F: + 61 3 9225 6686
hrlrc@vicbar.com.au
www.hrlrc.org.au

22 December 2006

Petitions Team
Office of the United Nations High Commissioner for Human Rights
UNOG-OHCHR
1211 Geneva 10
SWITZERLAND
Fax: + 41 22 917 9022
Email: tb-petitions@ohchr.org

Copy to

The Hon Philip Ruddock MP
Attorney-General
Parliament House
Canberra ACT 2600
Fax: + 61 2 6273 4102

The Hon Amanda Vanstone MP
Minister for Immigration and Multicultural Affairs
Department of Immigration and Multicultural Affairs
Belconnen ACT 2617
Fax + 61 2 6225 6970

Principal Legal Officer, Human Rights
International Law Office
Attorney-General's Department
Central Office, Robert Garran Offices
National Circuit
Barton ACT 2600
Fax: + 61 2 6250 5900

Duty Officer
c/- Maribyrnong Immigration Detention Centre
53 Hampstead Road
Maidstone VIC 3012
Fax: + 61 3 9317 7390

Dear Sir or Madam

New Individual Communication under the First Optional Protocol to the International Covenant on Civil and Political Rights — STEFAN LARS NYSTROM — Request for Urgent Interim Measures

1 The Author fears his immediate deportation

- 1.1 We write to you in relation to the pending deportation of Mr Stefan Lars Nystrom (“**the Author**”) from Australia. We understand that the Author will be deported on 29 December 2006. We and the Author are of the view that this will result in the permanent banishment of the Author from Australia, and cause irreparable harm to him.
- 1.2 The Author was born in Sweden on 31 December 1973. His mother, a permanent resident of Australia, was temporarily visiting Sweden when he was born. The Author moved to Australia when he was 27 days old. He has not left Australia since that time. The Author is not an Australian citizen; he has resided in Australia on the basis of a Transitional (Permanent) Visa. On 12 August 2004, the Minister for Immigration and Multicultural Affairs and Indigenous Affairs (**the “Minister”**) cancelled the Author’s visa because of the Author’s failure to pass the “character test” specified in section 501(6) of the *Migration Act 1958* (Cth) due to his “substantial criminal record”. Following the conclusion of ultimately unsuccessful court proceedings seeking judicial review of the Minister’s decision to cancel the Author’s visa, the Australian Government now intends to deport the Author on the basis of his criminal convictions. This is despite the fact that:
- (a) the Author is, by all accounts, an absorbed member of the Australian community, and has known no home other than Australia;
 - (b) the Author has no relevant ties to any other jurisdiction (although he is, by reason of his place of birth, a citizen of Sweden) ;
 - (c) the Author has no knowledge of Sweden or of the Swedish language; and
 - (d) the Author’s entire immediate family reside within Australia.
- 1.3 The above points were forcefully made by the Full Federal Court of Australia in its consideration of the cancellation of the Author’s transitional (permanent) visa and the issuing of a deportation order against him by the Minister:
- “It is one thing to say that the responsibility to determine who should be allowed to enter or to remain in Australia in the interests of the Australian community ultimately lies with the discretion of the responsible minister. That has little to do with the permanent banishment of an absorbed member of the Australian community with no relevant ties elsewhere. [The applicant] 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...Apart from the dire punishment of the individual involved, it presumes that Australia can export its problems elsewhere.”¹*
- 1.4 The Author is currently detained at Maribyrnong Immigration Detention Centre, a detention centre for “unlawful non-citizens” in Victoria, Australia. He is awaiting immediate deportation,

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

which we understand to be subject only to securing an available flight to Sweden and likely to be as soon as 29 December 2006.

1.5 On behalf of the Author, we intend to submit a more detailed form of individual communication for the consideration of the Human Rights Committee (“**the Committee**”) pursuant to the *Optional Protocol to the International Covenant on Civil and Political Rights* (“**ICCPR**”) (“**Optional Protocol**”). However, given the imminent timeframes, we and the Author have at this stage only been able to prepare a more abbreviated form of individual communication. As described in section 3 of this letter, to assist the Committee in making a determination in relation to the necessity of interim measures, we have prepared a summary of our submissions which is set out in the Schedule.

1.6 For the purposes of rule 84(2) of the Rules of Procedure of the Human Rights Committee [(CCPR/C/3/Rev.8 22 September 2005)] (“**Rules of Procedure**”), we confirm that we have been engaged to make this communication as a representative of the Author. A power of attorney (valid under Australian law) authorising us to submit this communication, and otherwise to act on behalf of the Author, is attached to this communication as an Annexure.

2 Request for interim measures

2.1 On behalf of the Author we respectfully ask the Committee to request the Commonwealth of Australia (“**State party**”) to take interim measures to avoid irreparable damage to the Author, in accordance with Rule 92 of the Rules of Procedure.

Interim measures required

(a) We respectfully submit that it would be desirable for the Committee to request that the State party, acting through any of its relevant Ministers, Departments or agencies, comply with the following undertakings:

- (i) that the Author not be removed from Australia pending the determination of this communication; and
- (ii) further, that the Author will not be detained as an unlawful non-citizen or in any other form of immigration detention under the *Migration Act 1958* (Cth) while in Australia pending the determination of this communication;

or, alternatively, in the event that the Author is removed from Australia contrary to undertakings 2.1(a)(i) and (ii) above:

- (iii) the Author will 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.

2.2 We respectfully submit that the Committee request that the State party agree to these proposed undertakings in the precise form set out above. The State party has, in relation to previous requests for interim measures made by the Committee regarding individual communications, merely undertaken not to take action which might cause irreparable damage to the relevant Author while considering the Committee’s request to provide interim measures of relief. Such an ambiguous undertaking leaves considerable scope for the State party, acting through any of its relevant Ministers or Departments, to import its subjective view as to what constitutes irreparable damage, as occurred in Communication No. 1243/2004.

Reasons for interim measures

- 2.3 We respectfully submit that the Author would suffer irreparable damage unless preferably the first (paragraphs 2.1(a)(i) and (ii)), or alternatively the second (paragraphs 2.1(a)(iii)), form of interim measure is afforded to him.
- 2.4 As outlined above, the Author is currently being held in detention, pending immediate deportation to Sweden. Based on current Australian law and practice, if the Author were to be deported today there is little chance that he would ever be in a position to return to Australia, on account of his criminal record. As stipulated by the Federal Court, this amounts to the permanent banishment of an individual who has known no other home. Further, it results in the permanent separation of the Author from his family.
- 2.5 It is highly likely that deportation would result in irreparable mental harm to the Author, attributed to the separation from his home, his family, and the effective loss of an identity.
- 2.6 On this basis, the deportation of the Author will result in the ongoing violation of each of the following articles of the ICCPR:
- (a) Article 7;
 - (b) Article 9;
 - (c) Article 12(4);
 - (d) Article 13;
 - (e) Article 17;
 - (f) Article 23; and
 - (g) Article 26.
- 2.6 Australia has a duty to perform its obligations under the ICCPR and the Optional Protocol in good faith.² It would be contrary to that duty for Australia to pre-empt or undermine the Committee's consideration of this communication by deporting the Author before the determination of the communication.

3 Individual Communication to the Committee to follow

- 3.1 The Author intends to provide a more detailed communication to the Committee, on the basis of the matters set out and identified in the Schedule, on or before Friday, 20 January 2007.
- 3.2 In the interim, please contact me on the details listed below should you have any questions concerning, or require any additional information in relation to, this request:

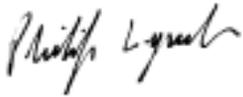
Philip Lynch
Director and Principal Solicitor
Human Rights Law Resource Centre Ltd
Level 1, 550 Lonsdale Street
Melbourne VIC 3000
AUSTRALIA

² Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331, article 26

P: + 61 3 9225 6695
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E: hrlrc@vicbar.com.au

- 3.3 We note that we have also sent a copy of this letter to the Commonwealth Attorney-General, the Minister for Immigration and Multicultural Affairs, the Principal Legal Officer, Human Rights within the International Law Office of the Commonwealth Attorney-General's Department, Canberra and the Duty Officer of the Maribyrnong Immigration Detention Centre.

Yours sincerely

A handwritten signature in black ink, appearing to read "Philip Lynch". The signature is written in a cursive style with a prominent initial "P".

Philip Lynch
Director and Principal Solicitor

on behalf of Mr Stefan Nystrom

SCHEDULE

SUMMARY of INDIVIDUAL COMMUNICATION

22 December 2006

The following is a summary of the individual communication that the Author submits for the consideration of the Human Rights Committee (**“the Committee”**) pursuant to the *Optional Protocol to the International Covenant on Civil and Political Rights* (**“ICCPR”**) (**“Optional Protocol”**).

The Author intends to provide a more fulsome communication to the Committee on or before Friday 20 January 2007.

1 Information on the Author

1.1 The Authors details are:

Name:	Stefan Lars Nystrom
Current address:	Maribyrnong Immigration Detention Centre 53 Hampstead Road Maidstone VICTORIA 3012 AUSTRALIA
Date and place of birth:	31 December 1973, Sodertalje, Sweden
Occupation:	Unemployed
Nationality:	The Author is a Swedish citizen but permanently resident in Australia and an absorbed member of the Australian community

1.2 The Author notes that in General Comment 15, the Committee stated that the rights and obligations recognised under the ICCPR apply to all persons within the territory of the State party and subject to its jurisdiction, irrespective of their nationality or statelessness. The Author is protected by the provisions of the ICCPR, regardless of his status as a non-citizen of Australia.

2 Information on the complainants

2.1 The Author has 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 VICTORIA 3000

Name: Ben Schokman
Address: Human Rights Law Resource Centre
Level 1, 550 Lonsdale Street
Melbourne VICTORIA 3000

- 2.2 A power 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 Author, is attached to this communication as an Annexure.

3 Address for correspondence

- 3.1 Please address all correspondence to:

Mr Philip Lynch
Human Rights Law Resource Centre
Level 1, 550 Lonsdale Street
Melbourne VICTORIA 3000

P: + 61 3 9225 6695

F: + 61 3 9225 6686

E: hrlrc@vicbar.com.au

4 The name of the State party against which the communication is directed

- 4.1 The complaint is made against the Commonwealth of Australia (“**State party**”).
4.2 The State party ratified the Optional Protocol on 25 September 1991.

5 The object of the communication

- 5.1 The Author respectfully requests 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), 13, 17, 23 and 26 of the ICCPR.
- 5.2 The Author notes that the State party is required, under article 2(3)(a) of the ICCPR to provide the Author with an effective remedy in relation to these violations. The Author submits that the following remedies would be effective:
- (a) the Author’s permanent Australian residency status be reinstated; and
 - (b) the Author be awarded compensation according to the standards applicable under Australian domestic law for his pain and suffering.
- 5.3 The Author requests that the Committee require the State party to inform the Committee of the measures it has taken to give effect to the Committee’s findings within 90 days.

6 The provisions of the Covenant alleged to have been violated

6.1 The Author respectfully submits that the State party, in cancelling his Transitional (Permanent) Visa pursuant to s 501(6) of the *Migration Act 1958* (Cth), has or will violate the following rights protected under the ICCPR:

(a) *Article 17 - Right to Protection from interference with family and home*

- (i) The Author respectfully submits that the State party has failed to provide clear legislative protection from arbitrary interference with privacy, family or home of persons in the Author's position.

Although the Minister for Immigration and Multicultural and Indigenous Affairs ("**the Minister**") may consider other factors when making decisions under the *Migration Act*, the *Migration Act* does not provide that the Minister must have regard to a person's privacy, family or home when making decisions under the *Migration Act*. Therefore, when acting pursuant to the *Migration Act*, the Minister is not obliged by law to have regard to the rights enshrined in article 17 of the ICCPR. This is inconsistent with article 2(3) of the ICCPR.³

- (ii) In addition, the Author respectfully submits that Australia has arbitrarily and/or unlawfully interfered with the Author's rights to privacy, family and home.

- (A) The term 'home' as it is adopted in article 17 of the ICCPR must be interpreted broadly to include the community in which a person resides and of which he or she is a part. As clearly articulated in the judgment of the Full Federal Court, the Author is an absorbed member of the Australian community, and has no ties whatsoever to Sweden. Further, due to the Author's criminal record, if deported, it is unlikely that he will ever be in a position to return to Australia.
- (B) The Author has lived in Australia for all but the first 27 days of his life and has developed deeply-rooted ties. The deportation of the Author to a county where he does not speak the local language and has little connections would have serious implications for the Author's ability to enjoy his rights to privacy, family and home.
- (C) The prohibition against 'arbitrariness' within the context of article 17 of the ICCPR is violated where a limitation, restriction or violation of the right is unreasonable, unnecessary, disproportionate or patently incompatible with the provisions, objects and purposes of the ICCPR. The severe consequences of deportation and the fact that the Author's criminal offending has already been dealt with and punished in the normal way under the domestic criminal justice system indicate that the banishing of the Author is, at least, unreasonable, unnecessary and disproportionate.

³ *Danyal Shafiq v Australia*, CCPR/C/88/D/1324/2004 (13 November 2006), para 6.4.

(b) *Article 23 - Right to Protection of the Family*

- (i) The Author respectfully submits that the State party has failed to provide clear legislative protection of the family for persons in the Author's position.

Although the Minister may consider other factors when making decisions under the *Migration Act*, the Act does not provide that the Minister must have regard to a person's right to family. Furthermore, the *Migration Act* does not recognise the importance of family as the "natural and fundamental unit in society." Therefore, when acting pursuant to the *Migration Act*, the Minister is not obliged by law to have regard to the right enshrined in article 23 of the ICCPR. This is inconsistent with article 2(3) of the ICCPR.⁴

- (ii) In addition, the Author respectfully submits that the State party has arbitrarily interfered with the Author's right to protection of his family.

(A) The cancelling of the Author's Transitional (Permanent) Visa and resulting imminent deportation separates him from his nuclear family consisting of his father, mother and sister, all of whom reside in Australia.

(B) Furthermore, due to the Author's criminal record, if deported, he is unlikely to be able to obtain a visa to re-enter Australia and visit his family.

(C) The prohibition against 'arbitrariness' within the context of article 23 of the ICCPR is violated where a limitation, restriction or violation of the right is unreasonable, unnecessary, disproportionate or patently incompatible with the provisions, objects and purposes of the ICCPR.

(c) *Article 12(4) - Right to enter ones own country*

The Author respectfully submits that in cancelling his Transitional (Permanent) Visa, leading to his imminent deportation, Australia has breached his right to enter his own country.

- (i) As clearly spelt out in the judgment of the Full Federal Court, the Author is an absorbed member of the Australian community, and has no ties whatsoever to Sweden.

- (ii) Further, due to the Author's criminal record, if deported, it is unlikely that he will ever be in a position to return to Australia. The actions of the Australian government will prevent the Author from entering the only country in the world which could sensibly be considered his own.

(d) *Article 9 - Right to be free from arbitrary detention*

The Author respectfully submits that Australia has breached the Author's right to be free from arbitrary detention.

⁴ *Danyal Shafiq v Australia*, CCPR/C/88/D/1324/2004 (13 November 2006), para 6.4.

The Author is currently held in immigration detention. If the Committee finds that Australia should not have cancelled the Author's Transitional (Permanent) Visa, it is submitted that it necessarily follows that the detention of the Author is arbitrary.

In addition to the above violations, the Author further submits that the following articles of the ICCPR have been violated by the State party:

- (e) Article 13 - Procedural Rights against Expulsion;
- (f) Article 7 - Right to Protection from Cruel, Inhuman or Degrading Treatment or Punishment; and
- (g) Article 26 - Right to Non-Discrimination.

Together, the claims set out in sections 6.1(a)–(g) are “**the Claims**”.

- 6.2 The Author submits that each of the Claims should be read in conjunction with Article 2(1) of the ICCPR which provides that each of the rights recognised under the ICCPR should be respected and ensured without distinction of any kind.

7 Admissibility of the Author's claim

- 7.1 The Author submits that the Claims are admissible, and as such may be received and considered by the Committee, because:

- (a) in relation to Rule 96(a) of the Rules of Procedure of the Human Rights Committee [(CCPR/C/3/Rev.8 22 September 2005)] (“**Rules of Procedure**”) his identity has been disclosed to the Committee, and he is still within the territory and subject to the jurisdiction of the State party;
- (b) in relation to Rule 96(e) of the Rules of Procedure, this matter is not being considered by any other procedure of international investigation or settlement; and
- (c) the Author has exhausted all available and effective remedies in Australia.

The Author further respectfully submits that:

- (d) in relation to Rule 96(b) of the Rules of Procedure, the communication is submitted by an authorised representative of the Author and, for the reasons set out herein, the claims of alleged violations of the ICCPR have been sufficiently substantiated;
- (e) in relation to Rule 96(c) of the Rules of Procedure, the communication is not an abuse of the right of submission; and
- (f) in relation to Rule 96(d) of the Rules of Procedure, the communication is not inconsistent with the provisions of the Covenant.

8 Steps taken by the Author to exhaust domestic remedies

- 8.1 The Author has 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 of Australia - 16 March 2005*
 - (i) Unsuccessfully challenged the decision and sought judicial review.

- (ii) The judgment may be found at <http://www.austlii.edu.au/au/cases/cth/FMCA/2005/305.html>.
- (b) *Full Court of the Federal Court of Australia - 1 July 2005*
 - (i) Successfully appealed the decision of the Federal Magistrates' Court. Obtained orders declaring that the Author holds a (permanent) absorbed person visa and requiring that:
 - (A) the decision cancelling his visa be quashed;
 - (B) the matter be remitted for determination according to law;
 - (C) the Author be released from immigration detention; and
 - (D) the Minister pay the Author's costs.
 - (ii) The judgment may be found at <http://www.austlii.edu.au/au/cases/cth/FCAFC/2005/121.html>.
- (c) *High Court of Australia - 8 November 2006*
 - (i) The Minister successfully appealed the decision of the Full Federal Court to the High Court and obtained orders that:
 - (A) allowed the appeal;
 - (B) set aside the orders of the Full Federal Court and in their place ordered that the appeal be dismissed; and
 - (C) required the Author to pay the Minister's costs.The High Court is the final court of appeal in Australia.
 - (ii) The judgment may be found at http://www.austlii.edu.au/au/cases/cth/high_ct/2006/50.html.

Accordingly, the Author is presently an unlawful non-citizen under an Order of Deportation. He is in immigration detention pending immediate departure.

8.2 These actions are set out in fuller detail in the facts of the Author's claim, below.

9 The facts of the claim

- 9.1 The Author's mother was born in Finland and migrated to Sweden in 1950 where she met and married his father. In 1966 the couple migrated to Australia. Their first child, a daughter, was born in Australia. In 1973, while pregnant a second time, the Author's mother traveled back to Sweden with her daughter to visit family members. She stayed in Sweden for his birth when it became clear that it would be difficult to travel because of her advanced state of pregnancy.
- 9.2 Accordingly, the Author was born in Sweden on 31 December 1973. When he was 25 days old he traveled to Australia on a Swedish passport with his mother and sister. He entered Australia two days later, on 27 January 1974.
- 9.3 The Author's parents separated when he was about five years old and are now divorced. His mother, father and sister continue to live in Australia. His mother is a permanent resident and his sister was born here and is an Australian citizen. The Author has remained in Australia since his arrival when he was 27 days old as a lawful non-citizen holding a Transitional (Permanent) Visa up until the Minister's cancellation of his visa.

- 9.4 The Author has few ties with Sweden. The Author has never left Australia. He has some distant cousins in Sweden, but does not know their names, where they live or what they do. Furthermore, he has never learnt the Swedish language.
- 9.5 The Author has a 'substantial criminal record' within the meaning of s 501(7) of the *Migration Act*. He has been convicted of a large number of offences, including aggravated rape; arson and various offences relating to property damage; armed robbery, burglary and theft; various driving offences; and offences relating to the possession and use of drugs. In relation to all of these offences he has been dealt with, and where so ordered, punished, under the domestic criminal justice system. The Author is not subject to any outstanding or incomplete sentences or other punishments.
- 9.6 On 12 August 2004, the Minister cancelled the Author's Transitional (Permanent) Visa. The Minister's power to cancel that visa had been enlivened by Mr Nystrom's failure to pass the 'character test' specified in s 501(6) of the Act by reference to his 'substantial criminal record'.
- 9.7 The Author's application for judicial review of the decision to cancel his visa was dismissed by a federal magistrate but subsequently allowed by the Full Court of the Federal Court (see *Nystrom v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 121 (1 July 2005)). In their joint judgment, Moore and Gyles JJ described the case as causing 'a sense of disquiet' which 'suggests that the administration of this aspect of the Act may have lost its way'. At para 29, they stated:
- 'It is one thing to say that the responsibility to determine who should be allowed to enter or to remain in Australia in the interests of the Australian community ultimately lies with the discretion of the responsible minister. That has little to do with the permanent banishment of an absorbed member of the Australian community with no relevant ties elsewhere. 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. 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.'*
- 9.8 The Minister subsequently successfully appealed to the High Court (see *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* [2006] HCA 50 (8 November 2006)), with the effect that the Author is now an 'unlawful non-citizen'.
- 9.9 The Author is currently being held at the Maribyrnong Immigration Detention Centre pending imminent deportation, which is likely to occur as soon as 29 December 2006.

ANNEXURE

A copy of the Power of Attorney signed, sealed and delivered by the author accompanies this letter as a separate document.