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HUMAN RIGHTS COMMITTEE
Fifty-eighth session
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VIEWS

Communication No. 538/1993

Submitted by:	Charles E. Stewart [represented by counsel]
Victim:	The author
State party:	Canada
Date of communication:	18 February 1993 (initial submission)
Date of adoption of Views:	1 November 1996

On 1 November 1996, the Human Rights Committee adopted its Views under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 538/1993. The text of the Views is appended to the present document.

[ANNEX]

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* Made public by decision of the Human Rights Committee.

ANNEX

Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights
- Fifty-eighth session -

concerning

Communication No. 538/1993*

Submitted by:	Charles E. Stewart [represented by counsel]
Victim:	The author
State party:	Canada
Date of communication:	18 February 1993 (initial submission)
Date of decision on admissibility:	18 March 1994

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 1 November 1996,

Having concluded its consideration of communication No. 538/1993 submitted to the Human Rights Committee on behalf of Mr. Charles E. Stewart under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Charles Edward Stewart, a British citizen born in 1960. He has resided in Ontario, Canada, since the age of seven, and currently faces deportation from Canada. He claims to be a victim of violations by Canada of articles 7, 9, 12, 13, 17 and 23 of the International Covenant on Civil and Political Rights. He is represented by counsel.

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* The text of five individual opinions, signed by eight Committee members, is appended to the present document.

The facts as submitted by the author

2.1 The author was born in Scotland in December 1960. At the age of seven, he emigrated to Canada with his mother; his father and older brother were already, at the time, living in Canada. The author's parents have since separated, and the author lives together with his mother and with his younger brother. His mother is in poor health, and his brother is mentally disabled and suffers from chronic epilepsy. His older brother was deported to the United Kingdom in 1992, because of a previous criminal record. This brother apart, all of the author's relatives reside in Canada; the author himself has two young twin children, who live with their mother, from whom the author divorced in 1989.

2.2 The author claims that for most of his life, he considered himself to be a Canadian citizen. He claims that it was only when he was contacted by immigration officials because of a criminal conviction that he realized that, legally, he was only a permanent resident, as his parents had never requested Canadian citizenship for him during his youth. It is stated that between September 1978 and May 1991, the author was convicted on 42 occasions, mostly for petty offences and traffic offences. Two convictions were for possession of marijuana seeds and of a prohibited martial arts weapon. One conviction was for assault with bodily harm, committed in September 1984, on the author's former girlfriend. Counsel indicates that most of her client's convictions are attributable to her client's substance abuse problems, in particular alcoholism. Since his release on mandatory supervision in September 1990, the author has participated in several drug and alcohol rehabilitation programmes. He has further received medical advice to control his alcohol abuse and, with the exception of one relapse, has remained alcohol-free.

2.3 It is stated that although the author cannot contribute much financially to the subsistence of his family, he does so whenever he is able to and helps his ailing mother and retarded brother around the home.

2.4 In 1990, an immigration enquiry was initiated against the author pursuant to Section 27, paragraph 1, of the Immigration Act. Under this provision, a permanent resident in Canada must be ordered deported from Canada if an adjudicator in an immigration enquiry is satisfied that the defendant has been convicted of certain specified offences under the Immigration Act. On 20 August 1990, the author was ordered deported on account of his criminal convictions. He appealed the order to the Immigration Appeal Division. The Board of the Appeal Division heard the appeal on 15 May 1992, dismissing it by judgment of 21 August 1992, which was communicated to the author on 1 September 1992.

2.5 On 30 October 1992, the author complained to the Federal Court of Appeal for an extension of the time limit for applying for leave to appeal. The Court first granted the request but subsequently dismissed the application for leave to appeal. There is no further appeal or application for leave to appeal from the Federal Court of Appeal to the Supreme Court of Canada, or to any other domestic tribunal. Thus, no further effective domestic remedy is said to be available.

2.6 If the author is deported, he would not be able to return to Canada without the express consent of the Canadian Minister of Employment and Immigration, under the terms of Sections 19(1)(i) and 55 of the Immigration Act. A re-application for emigration to Canada would not only require ministerial consent but also that the author fulfil all the other statutory admissibility criteria for immigrants. Furthermore, because of his convictions, the author would be barred from readmission to Canada under Section 19(2)(a) of the Act.

2.7 As the deportation order against the author could now be enforced at any point in time, counsel requests the Committee to seek from the State party interim measures of protection, pursuant to rule 86 of the rules of procedure.

The complaint

3.1 The author claims that the above facts reveal violations of articles 7, 9, 12, 13, 17 and 23 of the Covenant. He claims that in respect of article 23, the State party has failed to provide for clear legislative recognition of the protection of the family. In the absence of such legislation which ensures that family interests would be given due weight in administrative proceedings such as, for example, those before the Immigration and Refugee Board, he claims, there is a prima facie issue as to whether Canadian law is compatible with the requirement of protection of the family.

3.2 The author also refers to the Committee's General Comment on article 17, according to which “interference [with home and privacy] can only take place on the basis of law, which itself must be compatible with the provisions, aims and objectives of the Covenant”. He asserts that there is no law which ensures that his legitimate family interests or those of the members of his family would be addressed in deciding on his deportation from Canada; there is only the vague and general discretion given to the Immigration Appeal Division to consider all the circumstances of the case, which is said to be insufficient to ensure a balancing of his family interests and other legitimate State aims. In its decision, the Immigration Appeal Division allegedly did not give any weight to the disabilities of the author's mother and brother; instead, it ruled that “taking into account that the appellant does not have anyone depending on him and there being no real attachment to and no real support from anyone, the Appeal Division sees insufficient circumstances to justify the appellant's presence in this country”.

3.3 According to the author, the term “home” should be interpreted broadly, encompassing the (entire) community of which an individual is a part. In this sense, his “home” is said to be Canada. It is further submitted that the author's privacy must include the fact of being able to live within this community without arbitrary or unlawful interference. To the extent that Canadian law does not protect aliens against such interference, the author claims a violation of article 17.

3.4 The author submits that article 12, paragraph 4, is applicable to his situation since, for all practical purposes, Canada is his own country. His deportation from Canada would result in an absolute statutory bar from reentering Canada. It is noted in this context that article 12(4) does not indicate that everyone has the right to enter his country of nationality or of

birth but only “his own country”. Counsel argues that the U.K. is no longer the author's “own country”, since he left it at the age of seven and his entire life is now centred upon his family in Canada - thus, although not Canadian in a formal sense, he must be considered de facto a Canadian citizen.

3.5 The author affirms that his allegations under articles 17 and 23 should also be examined in the light of other provisions, especially articles 9 and 12. While article 9 addresses deprivation of liberty, there is no indication that the only concept of liberty is one of physical freedom. Article 12 recognizes liberty in a broader sense: the author believes that his deportation from Canada would violate “his liberty of movement within Canada and within his community”, and that it would not be necessary for one of the legitimate objectives enumerated in article 12, paragraph 3.

3.6 The author contends that the enforcement of the deportation order would amount to cruel, inhuman and degrading treatment within the meaning of article 7 of the Covenant. He concedes that the Committee has not yet decided whether the permanent separation of an individual from his/her family and/or close relatives and the effective banishment of a person from the only country he ever knew and in which he grew up may amount to cruel, inhuman and degrading treatment; he submits that this is an issue to be determined on its merits.

3.7 In this connection, the author recalls that (a) he has resided in Canada since the age of seven; (b) at the time of issue of the deportation order all members of his immediate family resided in Canada; (c) while his criminal record is extensive, it does by no means reveal that he is a danger to public safety; (d) he has taken voluntary steps to control his substance-abuse problems; (e) deportation from Canada would effectively and permanently sever all his ties in Canada; and (f) the prison terms served for various convictions already constitute adequate punishment and the reasoning of the Immigration Appeal Division, by emphasizing his criminal record, amounts to the imposition of additional punishment.

The Special Rapporteur's request for interim measures of protection and State party's reaction

4.1 On 26 April 1993, the Special Rapporteur on New Communications transmitted the communication to the State party, requesting it, under rule 91 of the rules of procedure, to provide information and observations on the admissibility of the communication. Under rule 86 of the rules of procedure, the State party was requested not to deport the author to the United Kingdom while his communication was under consideration by the Committee.

4.2 In a submission dated 9 July 1993 in reply to the request for interim measures of protection, the State party indicates that although the author would undoubtedly suffer personal inconvenience should he be deported to the United Kingdom, there are no special or compelling circumstances in the case that would appear to cause irreparable harm. In this context, the State party notes that the author is not being returned to a country where his safety or life would be in jeopardy; furthermore, he would not be barred once and for all from readmission to Canada. Secondly, the State party notes that although the author's social ties with his family may be affected, his complaint makes

it clear that his family has no financial or other objective dependence on him: the author does not contribute financially to his brother, has not maintained contact with his father for seven or eight years and, after the divorce from his wife in 1989, apparently has not maintained any contact with his wife or children.

4.3 The State party submits that the application of rule 86 should not impose a general rule on States parties to suspend measures or decisions at a domestic level unless there are special circumstances where such a measure or decision might conflict with the effective exercise of the author's right of petition. The fact that a complaint has been filed with the Committee should not automatically imply that the State party is restricted in its power to implement a deportation decision. The State party argues that considerations of state security and public policy must be considered prior to imposing restraints on a State party to implement a decision lawfully taken. It therefore requests the Committee to clarify the criteria at the basis of the Special Rapporteur's decision to call for interim measures of protection and to consider withdrawing the request for interim protection under rule 86.

4.4 In her comments, dated 15 September 1993, counsel challenges the State party's arguments related to the application of rule 86. She contends that deportation would indeed bar the author's readmission to Canada forever. Furthermore, the test of what may constitute “irreparable harm” to the petitioner should not be considered by reference to the criteria developed by the Canadian courts where, it is submitted, the test for irreparable harm in relation to family has become one of almost exclusive financial dependency, but by reference to the Committee's own criteria.

4.5 Counsel submits that the communication was filed precisely because Canadian courts, including the Immigration Appeal Division, do not recognize family interests beyond financial dependency of family members. She adds that it is the very test applied by the Immigration Appeal Division and the Federal Court which is at issue before the Human Rights Committee: it would defeat the effectiveness of any order the Committee might make in the author's favour in the future if the rule 86 request were to be cancelled now. Finally, counsel contends that it would be unjustified to apply a “balance of convenience” test in determining whether or not to invoke rule 86, as this test is inappropriate where fundamental human rights are at issue.

State party's admissibility observations and counsel's comments

5.1 In its submission under rule 91, dated 14 December 1993, the State party contends that the author has failed to substantiate his allegations of violations of articles 7, 9, 12 and 13 of the Covenant. It recalls that international and domestic human rights law clearly states that the right to remain in a country and not to be expelled from it is confined to nationals of that state. These laws recognize that any such rights possessed by non-nationals are available only in certain circumstances and are more limited than those possessed by nationals. Article 13 of the Covenant “delineates the scope of that instrument's application in regard to the right of an alien to remain in the territory of a State party.... Article 13 directly regulates only the procedure and not the substantive grounds for expulsion. Its purpose is clearly to prevent arbitrary expulsions. [The provision] aims to ensure

that the process of expelling such a person complies with what is laid down in the State's domestic law and that it is not tainted by bad faith or the abuse of power". Reference is made to the Committee's Views in case No. 58/1979, Maroufidou v. Sweden.

5.2 The State party submits that the application of the Immigration Act in the instant case satisfied the requirements of article 13. In particular, the author was represented by counsel during the inquiry before the immigration adjudicator, was given the opportunity to present evidence as to whether he should be permitted to remain in Canada, and to cross-examine witnesses. Based on evidence adduced during the inquiry, the adjudicator issued a deportation order against the author. The State party explains that the Immigration Appeal Board to which the author complained is an independent and impartial tribunal with jurisdiction to consider any ground of appeal that involved a question of law or fact, or mixed law and fact. It also has jurisdiction to consider an appeal on humanitarian grounds that an individual should not be removed from Canada. The Board is said to have carefully considered and weighed all the evidence presented to it, as well as the circumstances of the author's case.

5.3 While the State party concedes that the right to remain in a country might exceptionally fall within the scope of application of the Covenant, it is submitted that there are no such circumstances in the case: the decision to deport Mr. Stewart is said to be "justified by the facts of the case and by Canada's duty to enforce public interest statutes and protect society. Canadian courts have held that the most important objective for a government is to protect the security of its nationals. This is consistent with the view expressed by the Supreme Court of Canada that the executive arm of government is pre-eminent in matters concerning the security of its citizens ... and that the most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in the country".

5.4 The State party argues that both the decision to deport Mr. Stewart and to uphold the deportation order met with the requirements of the Immigration Act, and that these decisions were in accordance with international standards; there are no special circumstances which would "trigger the application of the Covenant to justify the complainant's stay in Canada". Furthermore, there is no evidence of abuse of power by Canadian authorities and in the absence of such an abuse, "it is inappropriate for the Committee to evaluate the interpretation and application by those authorities of Canadian law".

5.5 As to the alleged violation of articles 17 and 23 of the Covenant, the State party argues that its immigration laws, regulations and policies are compatible with the requirements of these provisions. In particular, Section 114(2) of the Immigration Act allows for the exemption of persons from any regulations made under the Act or the admission into Canada of persons where there exist compassionate or humanitarian considerations. Such considerations include the existence of family in Canada and the potential harm that would result if a member of the family were removed from Canada.

5.6 A general principle of Canadian immigration programs and policies is that dependants of immigrants into Canada are eligible to be granted permanent residence at the same time as the principal applicant. Furthermore, where

family members remain outside Canada, the Immigration Act and ancillary regulations facilitate reunification through family class and assisted relative sponsorships: "[r]eunification in fact occurs as a result of such sponsorships in almost all cases".

5.7 In the light of the above, the State party submits that any effects which a deportation may have on the author's family in Canada would occur further to the application of legislation that is compatible with the provisions, aims and objectives of the Covenant: "In the case at hand, humanitarian and compassionate grounds, which included family considerations, were taken into account during the proceedings before the immigration authorities and were balanced against Canada's duty and responsibility to protect society and to properly enforce public interest statutes".

5.8 In conclusion, the State party affirms that Mr. Stewart has failed to substantiate violations of rights protected under the Covenant and is in fact claiming a right to remain in Canada. He is said to be in fact seeking to establish an avenue under the Covenant to claim the right not to be deported from Canada: this claim is incompatible ratione materiae with the provisions of the Covenant and inadmissible under article 3 of the Optional Protocol.

6.1 In her comments, counsel notes that the State party wrongly conveys the impression that the author had two full hearings before the immigration authorities, which took into account all the specific factors in his case. She observes that the immigration adjudicator conducting the inquiry "has no equitable jurisdiction". Once he is satisfied that the person is the one described in the initial report, that this person is a permanent resident of Canada, and that he has been convicted of a criminal offence, a removal order is mandatory. Counsel contends that the adjudicator "may not take into account any other factors and has no statutory power of discretion to relieve against any hardship caused by the issuance of the removal order".

6.2 As to the discretionary power, under Section 114(2) of the Immigration Act, to exempt persons from regulatory requirements and to facilitate admission on humanitarian grounds, counsel notes that this power is not used to relieve the hardship of a person and his/her family caused by the removal of a permanent resident from Canada: "[T]he Immigration Appeal Division exercises a quasi-judicial statutory power of discretion after a full hearing, and it has been seen as inappropriate for the Minister or his officials to in fact 'overturn' a negative decision ... by this body".

6.3 Counsel affirms that the humanitarian and compassionate discretion delegated to the Minister by the Immigration Regulations can in any event hardly be said to provide an effective mechanism to ensure that family interests are balanced against other interests. In recent years, Canada is said to have routinely separated families or attempted to separate families where the interests of young children were at stake: thus, "the best interests of children are not taken into account in this administrative process".

6.4 Counsel submits that Canada ambiguously conveys the impression that family class and assisted relative sponsorships are almost always successful. This, according to her, may be true of family class sponsorships, but it is

clearly not the case for assisted relative sponsorships, since assisted relative applicants must meet all the selection criteria for independent applicants. Counsel further dismisses as "patently wrong" the State party's argument that the Court, upon application for judicial review of a deportation order, may balance the hardship caused by removal against the public interest. The Court, as it has articulated repeatedly, cannot balance these interests, is limited to strict judicial review, and cannot substitute its own decision for that of the decision maker(s), even if it would have reached a different conclusion on the facts: it is limited to quashing a decision because of jurisdictional error, a breach of natural justice or fairness, an error of law, or an erroneous finding of fact made in a perverse or in a capricious manner (Sec. 18(1) Federal Court Act).

6.5 As to the compatibility of the author's claims with the Covenant, counsel notes that Mr. Stewart is not claiming an absolute right to remain in Canada. She concedes that the Covenant does not per se recognize a right of non-nationals to enter or remain in a state. Nonetheless, it is submitted that the Covenant's provisions cannot be read in isolation but are inter-related: accordingly, article 13 must be read in the light of other provisions.

6.6 Counsel acknowledges that the Committee has held that article 13 provides for procedural and not for substantive protection; however, procedural protection cannot be interpreted in isolation from the protection provided under other provisions of the Covenant. Thus, legislation governing expulsion cannot discriminate on any of the grounds listed in article 26; nor can it arbitrarily or unlawfully interfere with family, privacy and home (article 17).

6.7 As to the claim under article 17, counsel notes that the State party has only set out the provisions of the Immigration Act which provide for family reunification - provisions which she considers inapplicable to the author's case. She adds that article 17 imposes positive duties upon States parties, and that there is no law in Canada which would recognize family, privacy, or home interests in the context raised in the author's case. Furthermore, while she recognizes that there is a process provided by law which grants to the Immigration Appeal Division a general discretion to consider the personal circumstances of a permanent resident under order of deportation, this discretion does not recognize or encompass consideration of fundamental interests such as integrity of the family. Counsel refers to the case of Sutherland as an other example of the failure to recognize that integrity of the family is an important and protected interest. For counsel, there "can be no balancing of interests if ... family ... interests are not recognized as fundamental interests for the purpose of balancing. The primary interest in Canadian law and jurisprudence is the protection of the public...".

6.8 Concerning the State party's contention that a "right to remain" may only come within the scope of application of the Covenant under exceptional circumstances, counsel claims that the process whereby the author's deportation was decided and confirmed proceeded without recognition or cognizance of the author's rights under articles 7, 9, 12, 13, 17 or 23. While

it is true that Canada has a duty to ensure that society is protected, this legitimate interest must be balanced against other protected individual rights.

6.9 Counsel concedes that Mr. Stewart was given an opportunity, before the Immigration Appeal Division, to present all the circumstances of his case. She concludes, however, that domestic legislation and jurisprudence do not recognize that her client will be subjected to a breach of his fundamental rights if he were deported. This is because such rights are not and need not be considered given the way immigration legislation is drafted. Concepts such as home, privacy, family or residence in one's own country, which are protected under the Covenant, are foreign to Canadian law in the immigration context. The overriding concern in view of removal of a permanent resident, without distinguishing long-term residents from recently arrived immigrants, is national security.

The Committee's admissibility decision

7.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

7.2 The Committee noted that it was uncontested that there were no further domestic remedies for the author to exhaust, and that the requirements of article 5, paragraph 2(b), of the Optional Protocol had been met.

7.3 In as much as the author's claims under articles 7 and 9 of the Covenant are concerned, the Committee examined whether the conditions of articles 2 and 3 of the Optional Protocol were met. In respect of articles 7 and 9, the Committee did not find, on the basis of the material before it, that the author had substantiated, for purposes of admissibility, his claim that deportation to the United Kingdom and separation from his family would amount to cruel or inhuman treatment within the meaning of article 7, or that it would violate his right to liberty and security of person within the meaning of article 9, paragraph 1. In this respect, therefore, the Committee decided that the author had no claim under the Covenant, within the meaning of article 2 of the Optional Protocol.

7.4 As to article 13, the Committee noted that the author's deportation was ordered pursuant to a decision adopted in accordance with the law, and that the State party had invoked arguments of protection of society and national security. It was not apparent that this assessment was reached arbitrarily. In this respect, the Committee found that the author had failed to substantiate his claim, for purposes of admissibility, and that this part of the communication was inadmissible under article 2 of the Optional Protocol.

7.5 Concerning the claim under article 12, the Committee noted the State party's contention that no substantiation in support of this claim had been adduced, as well as counsel's contention that article 12, paragraph 4, was applicable to Mr. Stewart's case. The Committee noted that the determination of whether article 12, paragraph 4, was applicable to the author's situation required a careful analysis of whether Canada could be regarded as the

author's country" within the meaning of article 12, and, if so, whether the author's deportation to the United Kingdom would bar him from reentering "his own country", and, in the affirmative, whether this would be done arbitrarily. The Committee considered that there was no a priori indication that the author's situation could not be subsumed under article 12, paragraph 4, and therefore concluded that this issue should be considered on its merits.

7.6 As to the claims under articles 17 and 23 of the Covenant, the Committee observed that the issue whether a State was precluded, by reference to articles 17 and 23, from exercising a right to deport an alien otherwise consistent with article 13 of the Covenant, should be examined on the merits.

7.7 The Committee noted the State party's request for clarifications of the criteria that formed the basis of the Special Rapporteur's request for interim protection under rule 86 of the Committee's rules of procedure, as well as the State party's request that the Committee withdraw its request under rule 86. The Committee observed that what may constitute "irreparable damage" to the victim within the meaning of rule 86 cannot be determined generally. The essential criterion is indeed the irreversibility of the consequences, in the sense of the inability of the author to secure his rights, should there later be a finding of a violation of the Covenant on the merits. The Committee may decide, in any given case, not to issue a request under rule 86 where it believes that compensation would be an adequate remedy. Applying these criteria to deportation cases, the Committee would require to know that an author would be able to return, should there be a finding in his favour on the merits.

8. On 18 March 1994 the Committee declared the communication admissible in so far as it might raise issues under articles 12, paragraph 4, 17, and 23 of the Covenant.

State party's observations and author's comments

9.1 In its submission of 24 February 1995, the State party argues that Mr. Stewart has never acquired an unconditional right to remain in Canada as his country". Moreover, his deportation will not operate as an absolute bar to his reentry to Canada. A humanitarian review in the context of a future application to reenter Canada as an immigrant is a viable administrative procedure that does not entail a reconsideration of the judicial decision of the Immigration Appeal Board.

9.2 Articles 17 and 23 of the Covenant cannot be interpreted as being incompatible with a State party's right to deport an alien, provided that the conditions of article 13 of the Covenant are observed. Under Canadian law everyone is protected against arbitrary or unlawful interference with privacy, family and home as required by article 17. The State party submits that when a decision to deport an alien is taken after a full and fair procedure in accordance with law and policy, which are not themselves inconsistent with the Covenant, and in which the demonstrably important and valid interests of the State are balanced with the Covenant rights of the individual, such a decision cannot be found to be arbitrary. In this context the State party submits that the conditions established by law on the continued residency of non-citizens

in Canada are reasonable and objective and the application of the law by Canadian authorities is consistent with the provisions of the Covenant, read as a whole.

9.3 The State party points out that the proposed deportation of Mr. Stewart is not the result of a summary decision by Canadian authorities, but rather of careful deliberation of all factors concerned, pursuant to full and fair procedures compatible with article 13 of the Covenant, in which Mr. Stewart was represented by counsel and submitted extensive argument in support of his claim that deportation would unduly interfere with his privacy and family life. The competent Canadian tribunals considered Mr. Stewart's interests and weighed them against the State's interest in protecting the public. In this context the State party refers to the Convention relating to the Status of Refugees, which gives explicit recognition to the protection of the public against criminals and those who are security risks; it is submitted that these considerations are equally relevant in interpreting the Covenant. Moreover, Canada refers to the Committee's General Comment No. 15 on "The position of aliens under the Covenant", which provides that "It is for the competent authorities of the State party, in good faith and in the exercise of their powers, to apply and interpret the domestic law, observing, however, such requirements under the Covenant as equality before the law". It also refers to the Committee's Views in communication No. 58/1979, Maroufidou v. Sweden, in which the Committee held that the deportation of Ms Maroufidou did not entail a violation of the Covenant, because she was expelled in accordance with the procedure laid down by the State's domestic law and there had been no evidence of bad faith or abuse of power. The Committee held that in such circumstances, it was not within its competence to reevaluate the evidence or to examine whether the competent authorities of the State had correctly interpreted and applied its law, unless it was manifest that they had acted in bad faith or had abused their power. In this communication there has been no suggestion of bad faith or abuse of power. It is therefore submitted that the Committee should not substitute its own findings without some objective reason to think that the findings of fact and credibility by Canadian decision-makers were flawed by bias, bad faith or other factors which might justify the Committee's intervention in matters that are within the purview of domestic tribunals.

9.4 As to Canada's obligation under article 23 of the Covenant to protect the family, reference is made to relevant legislation and practice, including the Canadian Constitution and the Canadian Charter on Human Rights. Canadian law provides protection for the family which is compatible with the requirements of article 23. The protection required by article 23, paragraph 1, however, is not absolute. In considering his removal, the competent Canadian courts gave appropriate weight to the impact of deportation on his family in balancing these against the legitimate State interests to protect society and to regulate immigration. In this context the State party submits that the specific facts particular to his case, including his age and lack of dependents, suggest that the nature and quality of his family relationships could be adequately maintained through correspondence, telephone calls and visits to Canada, which he would be at liberty to make pursuant to Canadian immigration laws.

9.5 The State party concludes that deportation would not entail a violation by Canada of any of Mr. Stewart's rights under the Covenant.

10.1 In her submission dated 16 June 1995, counsel for Mr. Stewart argues that by virtue of his long residence in Canada, Mr. Stewart is entitled to consider Canada to be "his own country" for purposes of article 12, paragraph 4, of the Covenant. It is argued that this provision should not be subject to any restrictions and that the denial of entry to a person in Mr. Stewart's case would be tantamount to exile. Counsel reviews and criticizes relevant Canadian case law, including the 1992 judgment in Chiarelli v M.E.I, in which the loss of permanent residence was likened to a breach of contract; once the contract is breached, removal can be effected. Counsel maintains that permanent residence in a country and family ties should not be dealt with as in the context of commercial law.

10.2 As to Mr. Stewart's ability to return to Canada following deportation, author's counsel points out that because of his criminal record, he would face serious obstacles in gaining readmission to Canada as a permanent resident and would have to meet the selection standards for admission to qualify as an independent immigrant, taking into account his occupational skills, education and experience. As to the immigration regulations, he would require a pardon from his prior criminal convictions, otherwise he would be barred from readmission as a permanent resident.

10.3 With regard to persons seeking permanent resident status in Canada, counsel refers to decisions of the Canadian immigration authorities that have allegedly not given sufficient weight to extenuating circumstances. Counsel further complains that the exercise of discretion by judges is not subject to review on appeal.

10.4 As to a violation of articles 17 and 23 of the Covenant, author's counsel points out that family, privacy and home are not concepts incorporated into the provisions of the Immigration Act. Therefore, although the immigration authorities can take into account family and other factors, they are not obliged by law to do so. Moreover, considerations of dependency have been limited to the aspect of financial dependency, as illustrated in decisions in the Langner v. M.E.I., Toth v. M.E.I. and Robinson v. M.E.I. cases.

10.5 It is argued that the Canadian authorities did not sufficiently take into account Mr. Stewart's family situation in their decisions. In particular, counsel objects to the evaluation by Canadian courts that Mr. Stewart's family bonds were tenuous, and refers to the unofficial transcript of the deportation hearings, in which Mr. Stewart stressed the emotionally supportive relationship that he had with his mother and brother. Mr. Stewart's mother confirmed that he helped her in caring for her youngest son. Counsel further criticizes the reasoning of the Immigration Appeal Division in the Stewart decision, which allegedly put too much emphasis on financial dependency: "The appellant has a good relationship with his mother who has written in support of him. But the appellant's mother has always lived independently of him and has never been supported by him. The appellant's younger brother is in a program for the disabled and is therefore taken care of by social services. As a matter of fact, there is no one

depending on the appellant for sustenance and support...". Counsel argues that emphasis on the financial aspect of the relationship does not take into account the emotional family bond and submits in support of her argument the report of Dr. Irwin Silverman, a psychologist, summarizing the complexity of human relationships. Moreover counsel cites from a book by Johathan Bloom-Fesbach, *The Psychology of Separation and Loss*, outlining the long-term effects of breaking the family bond.

10.6 Counsel rejects the State party's argument that proper balancing has taken place between State interests and individual human rights.

Issues and proceedings before the Committee

11.1 This communication was declared admissible in so far as it might raise issues under articles 12, paragraph 4, 17 and 23 of the Covenant.

11.2 The Committee has considered the communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

12.1 The question to be decided in this case is whether the expulsion of Mr. Stewart violates the obligations Canada has assumed under articles 12, paragraph 4, 17 and 23 of the Covenant.

12.2 Article 12, paragraph 4, of the Covenant provides: "No one shall be arbitrarily deprived of the right to enter his own country". This article does not refer directly to expulsion or deportation of a person. It may, of course, be argued that the duty of a State party to refrain from deporting persons is a direct function of this provision and that a State party that is under an obligation to allow entry of a person is also prohibited from deporting that person. Given its conclusion regarding article 12, paragraph 4, that will be explained below, the Committee does not have to rule on that argument in the present case. It will merely assume that if article 12, paragraph 4, were to apply to the author, the State party would be precluded from deporting him.

12.3 It must now be asked whether Canada qualifies as being Mr. Stewart's country". In interpreting article 12, paragraph 4, it is important to note that the scope of the phrase "his own country" is broader than the concept "country of his nationality", which it embraces and which some regional human rights treaties use in guaranteeing the right to enter a country. Moreover, 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. That provision speaks of "an alien lawfully in the territory of a State party" in limiting the rights of States to expel an individual categorized as an "alien". It would thus appear 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.

12.4 What is less clear is who, in addition to nationals, is protected by the provisions of article 12, paragraph 4. Since the concept "his own country" is not limited to nationality in a formal sense, that is, nationality acquired on

birth or by conferral, it embraces, at the very least, an individual who, because of his special ties to or claims in relation to a given country cannot there be considered to be a mere alien. This would be the case, for example, of nationals of a country who have there been stripped of their nationality in violation of international law and of individuals whose country of nationality has been incorporated into or transferred to another national entity whose nationality is being denied them. In short, while these individuals may not be nationals in the formal sense, neither are they aliens within the meaning of article 13. The language of article 12, paragraph 4, permits a broader interpretation, moreover, that might embrace other categories of long-term residents, particularly stateless persons arbitrarily deprived of the right to acquire the nationality of the country of such residence.

12.5 The question in the present case is whether a person who enters a given State under that State's immigration laws, and subject to the conditions of those laws, can regard that State as his own country when he has not acquired its nationality and continues to retain the nationality of his country of origin. The answer could possibly be positive were the country of immigration to place unreasonable impediments on the acquiring of nationality by new immigrants. But when, as in the present case, the country of immigration facilitates acquiring its nationality, and the immigrant refrains from doing so, either by choice or by committing acts that will disqualify him from acquiring that nationality, the country of immigration does not become “his own country” within the meaning of article 12, paragraph 4, of the Covenant. In this regard it is to be noted that while in the drafting of article 12, paragraph 4, of the Covenant the term “country of nationality” was rejected, so was the suggestion to refer to the country of one's permanent home.

12.6 Mr. Stewart is a British national both by birth and by virtue of the nationality of his parents. While he has lived in Canada for most of his life he never applied for Canadian nationality. It is true that his criminal record might have kept him from acquiring Canadian nationality by the time he was old enough to do so on his own. The fact is, however, that he never attempted to acquire such nationality. Furthermore, even had he applied and been denied nationality because of his criminal record, this disability was of his own making. It cannot be said that Canada's immigration legislation is arbitrary or unreasonable in denying Canadian nationality to individuals who have criminal records.

12.7 This case would not raise the obvious human problems Mr. Stewart's deportation from Canada presents were it not for the fact that he was not deported much earlier. Were the Committee to rely on this argument to prevent Canada from now deporting him, it would establish a principle that might adversely affect immigrants all over the world whose first brush with the law would trigger their deportation lest their continued residence in the country convert them into individuals entitled to the protection of article 12, paragraph 4.

12.8 Countries like Canada, which enable immigrants to become nationals after a reasonable period of residence, have a right to expect that such immigrants will in due course acquire all the rights and assume all the obligations that nationality entails. Individuals who do not take advantage of this opportunity and thus escape the obligations nationality imposes can be deemed

to have opted to remain aliens in Canada. They have every right to do so, but must also bear the consequences. The fact that Mr. Stewart's criminal record disqualified him from becoming a Canadian national cannot confer on him greater rights than would be enjoyed by any other alien who, for whatever reasons, opted not to become a Canadian national. Individuals in these situations must be distinguished from the categories of persons described in paragraph 12.4 above.

12.9 The Committee concludes that as Canada cannot be regarded as Mr. Stewart's country", for the purposes of article 12, paragraph 4, of the Covenant, there could not have been a violation of that article by the State party.

12.10 The deportation of Mr. Stewart will undoubtedly interfere with his family relations in Canada. The question is, however, whether the said interference can be considered either unlawful or arbitrary. Canada's Immigration Law expressly provides that the permanent residency status of a non-national may be revoked and that that person may then be expelled from Canada if he or she is convicted of serious offences. In the appeal process the Immigration Appeal Division is empowered to revoke the deportation order "having regard to all the circumstances of the case". In the deportation proceedings in the present case, Mr. Stewart was given ample opportunity to present evidence of his family connections to the Immigration Appeal Division. In its reasoned decision the Immigration Appeal Division considered the evidence presented but it came to the conclusion that Mr. Stewart's family connections in Canada did not justify revoking the deportation order. The Committee is of the opinion that the interference with Mr. Stewart's family relations that will be the inevitable outcome of his deportation cannot be regarded as either unlawful or arbitrary when 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. There is therefore no violation of articles 17 and 23 of the Covenant.

13. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before the Committee do not disclose a violation of any of the provisions of the International Covenant on Civil and Political Rights.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

A. Individual opinion by Eckart Klein *(concurring)*

Being in full agreement with the finding of the Committee that the facts of the case disclose neither a violation of article 12, paragraph 4, nor of articles 17 and 23 of the Covenant, for the reasons given in the view, I cannot accept the way how the relationship between article 12, paragraph 4, and article 13 has been determined. Although this issue is not decisive for the outcome of the present case, it could become relevant for the consideration of other communications, and I therefore feel obliged to clarify this point.

The view suggests that there is a category of persons who are not “nationals in the formal sense”, but are also not “aliens within the meaning of article 13" (paragraph 12.4). While I clearly accept that the scope of article 12, paragraph 4, is not entirely restricted to nationals but may embrace other persons as pointed out in the view, I nevertheless think that this category of persons - not being nationals, but still covered by article 12, paragraph 4 - may be deemed to be “aliens” in the sense of article 13. I do not believe that article 13 deals only with some aliens. The wording of the article is clear and provides for no exceptions, and aliens are all non-nationals. The relationship between article 12, paragraph 4, and article 13 is not exclusive. Both provisions may come into play together.

I therefore hold that article 13 applies in all cases where an alien is to be expelled. Article 13 deals with the procedure of expelling aliens, while article 12, paragraph 4, and, under certain circumstances, also other provisions of the Covenant may bar deportation for substantive reasons. Thus, article 12, paragraph 4, may apply even though it concerns a person who is an “alien”.

Eckart Klein [signed]
[Original: English]

B. Individual opinion by Laurel B. Francis *(concurring)*

This opinion is given against the background of my recorded views during the Committee's preliminary consideration of this case quite early in the session when I stated inter alia that (a) Mr. Stewart was an “own country” resident under article 12 of the Covenant and (b) his expulsion under article 13 was not in violation of article 12, paragraph 4.

I will as far as possible avoid a discursive format in relation to the Committee's decision adopted on November 1 with respect to the question whether the expulsion of Mr. Stewart from Canada (under article 13 of the Covenant) violates the State party's obligation under articles 12, paragraph 4, 17 and 23 of the Covenant.

I should like to submit that:

1. Firstly, I concur with the reasons given by the Committee at paragraph 12.10 and the decision taken that there was no violation of articles 17 and 23 of the Covenant.

2. But, secondly, I do not agree with the Committee's restricted application of his “own country” concept at the fourth sentence of paragraph 12.3 of the Committee's decision under reference (“That provision speaks of an 'alien lawfully in the territory of a State party' in limiting the rights of States to expel an individual categorized as an 'alien'.”) Does it preclude the expulsion of unlawful aliens? Of course not -falling as they do under another legal regime. I have made this point in order to suggest that the legal significance in relation to “an alien lawfully in the territory of a State party” as appears in the first line of article 13 of the Covenant, is related to the first line of article 12: “everyone lawfully in the territory of a State”, which includes aliens but, it may be borne in mind that in respect of a compatriot of Mr. Stewart lawfully in Canada on a visitor's visa (not being a permanent resident of Canada) he would not normally have acquired “own country” status as Mr. Stewart had, and would be indifferent to the application of article 12, paragraph 4. But Mr. Stewart would certainly be concerned as indeed he has been.

3. Thirdly, were it intended to restrict the application of article 13 to exclude aliens lawfully in the territory of a State party who had acquired “own country” status, such exclusion would have been specifically provided in article 13 itself and not left to the interpretation of the scope of article 12, paragraph 4, which incontestably applies to nationals and other persons contemplated in the Committee's text.

4. In regard to “own country” status in its submission of 24 February 1995 the State party argues that “Mr. Stewart has never acquired an unconditional [1] right to remain in Canada as his 'own country'. Moreover his deportation will not operate as an absolute bar to his re-entry to Canada. A humanitarian review in the context of the future application to re-enter Canada as an immigrant is a viable administrative procedure that does not entail reconsideration of the judicial decision of the Immigration Appeal Board” (see 9.1) [2].

Implicit in the foregoing is the admission that the State party recognizes Mr. Stewart's status as a permanent resident in Canada as his “own country”. It is that qualified right applicable to such status which facilitated the decision to expel Mr. Stewart.

But for the foregoing statement attributable to the State party we could have concluded that the decision taken to expel Mr. Stewart terminated his “own country” status in regard to Canada but in light of such statement the “own country” status remains only suspended at the pleasure of the State party.

On the basis of the foregoing analysis, I am unable to support the decision of the Committee that Mr. Stewart had at no time acquired “own country” status in Canada.

Laurel B. Francis [signed]
[Original: English]

C. Individual opinion by Elizabeth Evatt and Cecilia Medina Quiroga, co-signed by Francisco José Aguilar Urbina *(dissenting)*

1. We are unable to agree with the Committee's conclusion that the author cannot claim the protection of article 12, paragraph 4.

2. A preliminary issue is whether the arbitrary deportation of a person from his/her own country should be equated with arbitrary deprivation of the right to enter that country, in circumstances where there has as yet been no attempt to enter or re-enter the country. The Committee does not reach a conclusion on this issue; it merely assumes that if article 12, paragraph 4, were to apply to the author, the State would be precluded from deporting him (paragraph 12.2). The effect of the various proceedings taken by Canada, and the orders made, is that the author's right of residence has been taken away and his deportation ordered. He can no longer enter Canada as of right, and the prospects of his ever being able to secure permission to enter for more than a short period, if at all, seem remote. In our view, the right to enter a country is as much a prospective as a present right, and the deprivation of that right can occur, as in the circumstances of this case, whether or not there has been any actual refusal of entry. If a State party is under an obligation to allow entry of a person it is prohibited from deporting that person. In our opinion the author has been deprived of the right to enter Canada, whether he remains in Canada awaiting deportation or whether he has already been deported.

3. The author's communication under article 13 was found inadmissible, and no issue arises for consideration under that provision. The Committee's view is, however, that article 12, paragraph 4 applies only to persons who are nationals, or who, while not nationals in a formal sense are also not aliens within the meaning of article 13 (paragraph 12.3). Two consequences appear to follow from this view. The first one is that the relationship between an individual and a State may be not only that of national or alien (including stateless) but may also fall into a further, undefined, category. We do not think this is supported either by article 12 of the Covenant or by general international law. As a consequence of the Committee's view it would also appear to follow that a person could not claim the protection of both article 13 and 12, paragraph 4. We do not agree. In our view article 13 provides a minimum level of protection in respect of expulsion for any alien, that is any non-national, lawfully in a State. Furthermore, there is nothing in the language of article 13 which suggests that it is intended to be the exclusive source of rights for aliens, or that an alien who is lawfully within the territory of a State may not also claim the protection of article 12, paragraph 4, if he or she can establish that it is his/her own country. Each provision should be given its full meaning.

4. The Committee attempts to identify the further category of individuals who could make use of article 12, paragraph 4, by stating that a person cannot claim that a State is his or her own country, within the meaning of article 12, paragraph 4, unless that person is a national of that State, or has been stripped of his or her nationality, or denied nationality by that State in the circumstances described (paragraph 12.4). The Committee is also of the view that unless unreasonable impediments have been placed in the way of an immigrant acquiring nationality, a person who enters a given State under

its immigration laws, and who had the opportunity to acquire its nationality, cannot regard that State as his own country when he has failed to acquire its nationality (paragraph 12.5).

5. In our opinion, the Committee has taken too narrow a view of article 12, paragraph 4, and has not considered the raison d'être of its formulation. Individuals cannot be deprived of the right to enter “their own country” because it is deemed unacceptable to deprive any person of close contact with his family, or his friends or, put in general terms, with the web of relationships that form his or her social environment. This is the reason why this right is set forth in article 12, which addresses individuals lawfully within the territory of a State, not those who have formal links to that State. For the rights set forth in article 12, the existence of a formal link to the State is irrelevant; the Covenant is here concerned with the strong personal and emotional links an individual may have with the territory where he lives and with the social circumstances obtaining in it. This is what article 12, paragraph 4, protects.

6. The object and purpose of the right set forth in article 12, paragraph 4, are reaffirmed by its wording. Nothing in it or in article 12 generally suggests that its application should be restricted in the manner suggested by the Committee. While a person's 'own country' would certainly include the country of nationality, there are factors other than nationality which may establish close and enduring connections between a person and a country, connections which may be stronger than those of nationality. After all, a person may have several nationalities, and yet have only the slightest or no actual connections of home and family with one or more of the States in question. The words 'his own country' on the face of it invite consideration of such matters as long standing residence, close personal and family ties and intentions to remain (as well as to the absence of such ties elsewhere). Where a person is not a citizen of the country in question, the connections would need to be strong to support a finding that it is his “own country”. Nevertheless our view is that it is open to an alien to show that there are such well established links with a State that he or she is entitled to claim the protection of article 12, paragraph 4.

7. The circumstances relied on by the author to establish that Canada is his own country are that he had lived in Canada for over thirty years, was brought up in Canada from the age of seven, had married and divorced there. His children, mother, handicapped brother continue to reside there. He had no ties with any other country, other than that he was a citizen of the UK; his elder brother had been deported to the UK some years before. The circumstances of his offences are set out in paragraph 2.2; as a result of these offences it is not clear if the author was ever entitled to apply for citizenship. Underlying the connections mentioned is the fact that the author and his family were accepted by Canada as immigrants when he was a child and that he became in practical terms a member of the Canadian community. He knows no other country. In all the circumstances, our view is that the author has established that Canada is his own country.

8. Was the deprivation of the author's right to enter Canada arbitrary? In another context, the Committee has taken the view that “arbitrary” means unreasonable in the particular circumstances, or contrary to the aims and

objectives of the Covenant (General Comment on article 17). That approach also appears to be appropriate in the context of article 12, paragraph 4. In the case of citizens, there are likely to be few if any situations when deportation would not be considered arbitrary in the sense outlined. In the case of an alien such as the author, deportation could be considered arbitrary if the grounds relied on to deprive him of his right to enter and remain in the country were, in the circumstances, unreasonable, when weighed against the circumstances which make that country his "own country".

9. The grounds relied on by the State party to justify the expulsion of the author are his criminal activities. It must be doubted whether the commission of criminal offences alone could justify the expulsion of a person from his own country, unless the State could show that there are compelling reasons of national security or public order which require such a course. The nature of the offences committed by the author do not lead readily to that conclusion. In any event, Canada can hardly claim that these grounds were compelling in the case of the author when it has in another context argued that the author might well be granted an entry visa for a short period to enable him to visit his family. Furthermore, while the deportation proceedings were not unfair in procedural terms, the issue which arose for determination in those proceedings was whether the author could show reasons against his deportation, not whether there were grounds for taking away his right to enter "his own country". The onus was put on the author rather than on the State. In these circumstances, we conclude that the decision to deport the author was arbitrary, and thus a violation of his rights under article 12, paragraph 4.

10. We agree with the Committee that the deportation of the author will undoubtedly interfere with his family relations in Canada (paragraph 12.10), but we cannot agree that this interference is not arbitrary, since we have come to the conclusion that the decision to deport the author - which is the cause of the interference with the family - was arbitrary. We have to conclude, therefore, that Canada has also violated the author's rights under articles 17 and 23.

Elizabeth Evatt [signed]
Cecilia Medina Quiroga [signed]
Francisco José Aguilar Urbina [signed]
[Original: English]

D. Individual opinion by Christine Chanet, co-signed by Julio Prado Vallejo (*dissenting*)

I do not share the Committee's position with regard to the Stewart case, in which it concludes that, "as Canada cannot be regarded as Mr. Stewart's 'own country'", there has been no violation by Canada of article 12, paragraph 4, of the Covenant.

My criticism concerns the approach taken to the case on this point:

- assuming that wrongful acts disqualified the author from acquiring nationality and that, as a consequence, Canada may consider that it is not his own country, that conclusion should have led the Committee to

reject the communication at the admissibility stage, since its awareness of that impediment should have precluded any application of article 12, paragraph 4, of the Covenant.

- there is nothing either in the Covenant itself or in the travaux préparatoires about the "own country" concept; the Committee must, therefore, either decide the question on a case-by-case basis or establish criteria and make them known to States and authors, thus avoiding any contradition with admissibility decisions; if a person is unable to acquire the nationality of a country owing to legal impediments, then regardless of any other criteria or factual circumstances, the communication should not be declared admissible under article 12, paragraph 4, of the Covenant.

I agree with the substance of the individual opinion formulated by Ms. Evatt and Ms. Medina Quiroga.

Christine Chanet [signed]
Julio Prado Vallejo [signed]
[Original: French]

E. Individual opinion by Prafullachandra Bhagwati *(dissenting)*

I entirely agree with the separate opinion prepared by Mrs. Elizabeth Evatt and Mrs. Cecilia Medina Quiroga, but having regard to the importance of the issues involved in the case, I am writing a separate opinion. This separate opinion may be read as supplementary to the opinion of Mrs. Evatt and Mrs. Medina Quiroga with which I find myself wholly in agreement.

This is not a case of one single individual. Its decision will have an impact on the lives of tens of thousands of immigrants and refugees. This case has therefore caused me immense anxiety. If the view taken by the majority of the Committee is right, people who have forged close links with a country not only through long residence but having regard to various other factors, who have adopted a country as their own, who have come to regard a country as their home country, would be left without any protection. The question is: are we going to read human rights in a generous and purposive manner or in a narrow and constricted manner? Let us not forget that basically, human rights in the International Covenant are rights of the individual against the State; they are protections against the State and they must therefore be construed broadly and liberally. This backdrop must be kept in mind when we are interpreting article 12, paragraph 4.

First let me dispose of the argument with regard to article 13. The Committee has declared the communication under article 13 inadmissible and therefore it does not call for consideration. Coming to article 12, paragraph 4, it raises three issues. The first is whether article 12, paragraph 4, covers a case of deportation or is it confined only to right of entry; the second is as to what is the meaning and connotation of the words "his own country" and whether Canada could be said to be the author's own country; and the third is what are the criteria for determining whether an action alleged to be violative of article 12, paragraph 4, is arbitrary and

whether the action of Canada in deporting the author was arbitrary. I may point out at the outset that if the action of Canada was, on the facts, not arbitrary, there would be no violation of article 12, paragraph 4, even if the other two elements were satisfied, namely, that article 12, paragraph 4, covers deportation and Canada was the author's own country within the meaning of article 12, paragraph 4, and it would in that event not be necessary to consider whether or not these two elements were satisfied. But since the majority of the members of the Committee have rested their opinion on the interpretation of the words "his own country" and taken the view, in my opinion wrongly, that Canada could not be said to be the author's own country, I think it necessary to consider all the three elements of article 12, paragraph 4.

I am of the view that on a proper interpretation, article 12, paragraph 4, protects everyone against arbitrary deportation from his own country. There are two reasons in support of this view. In the first place, unless article 12, paragraph 4, is read as covering a case of deportation, a national of a State would have no protection against expulsion or deportation under the Covenant. Suppose the domestic law of a State empowers the State to expel or deport a national for certain specific reasons which may be totally irrelevant, fanciful or whimsical. Can it be suggested for a moment that the Covenant does not provide protection to a national against expulsion or deportation under such domestic law? The only article of the Covenant in which this protection can be found is article 12, paragraph 4. It may be that under international law, a national cannot be expelled from his country of nationality. I am not familiar with all aspects of international law and I am therefore not in a position to affirm or disaffirm this proposition. But, be as it may, a law can be made by a State providing for expulsion of a national. It may conflict with a principle of international law, but that would not invalidate the domestic law. The principle of international law would not afford protection to the person concerned against domestic law. The only protection such a person would have is under article 12, paragraph 4. We should not read article 12, paragraph 4, in a manner which would leave a national unprotected against expulsion under domestic law. In fact, there are countries where there is domestic law providing for expulsion even of nationals and article 12, paragraph 4, properly read, provides protection against arbitrary expulsion of a national. The same reasoning would apply also in a case where a non-national is involved. Article 12, paragraph 4, must therefore be read as covering expulsion or deportation.

Moreover, it is obvious that if a person has a right to enter his own country and he/she cannot be <u>arbitrarily</u> prevented from entering his/her own country, but he/she can be arbitrarily expelled, it would make non-sense of article 12, paragraph 4. Suppose a person is expelled from his own country arbitrarily because he/she has no protection under article 12, paragraph 4, and immediately after expulsion, he/she seeks to enter the country. Obviously he/she cannot be prevented because article 12, paragraph 4, protects his/her entry. Then what is the sense of expelling him? We must therefore read article 12, paragraph 4, as embodying, by necessary implication, protection against arbitrary expulsion from one's own country.

That takes me to the second issue. What is the scope and ambit of "his own country"? There is a general acceptance that "his own country" cannot be

equated with “country of nationality” and I will not therefore spend any time on it. It is obvious that the expression “his own country” is wider than “country of nationality” and that is conceded by the majority view. “His own country” includes “country of nationality and something more”. What is that “something more”? The majority view accepts that the concept “his own country” embraces, at the very least, “an individual who, because of his special ties to or claims in relation to a given country cannot there be considered to be a mere alien”. I am in full agreement with this view. But then, the majority proceeds to delimit this concept by confining it to the following three illustrative cases:

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

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

(3) stateless persons arbitrarily deprived of their right to acquire the nationality of the country of their residence.

It is the view of the majority that “while these individuals may not be nationals in the formal sense, neither are they aliens within the meaning of article 13” and they fall within article 12, paragraph 4.

There are two observations I would like to make in connection with this view of the majority. The majority view argues that article 12, paragraph 4, and 13 are mutually exclusive. It is observed by the majority in the view of the Committee 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, though they may be considered as aliens for other purposes”. Thus, according to the majority view, an individual falling within article 12, paragraph 4, would not be an “alien” within the meaning of article 13. I too subscribe to the same view. But there my agreement with the view of the majority ends. The question is: who is protected by article 12, paragraph 4? Who falls within its protective wing? I may again repeat, in agreement with the majority view, that article 12, paragraph 4, embraces, at the very least, an individual who, because of his special ties to or claims in relation to a given country cannot there be considered to be an alien. This is a correct test but I fail to understand why its application should be limited to the three kinds of cases referred to by the majority. These three kinds of cases would certainly be covered by this test but there may be many more which would also answer this test. I do not see any valid reason why they should be excluded except a predetermination by the majority that they should not be regarded as fulfilling this test, because that would affect the immigration policies of the developed countries. Take for example, a large number of Africans or Latin Americans or Indians who are settled in U.K., but who have not acquired U.K. citizenship. Their children, born and brought up in U.K. would not have even visited their country of nationality. If you ask them: “which is your own country?”, they would unhesitatingly say: “U.K.”. Can you say that only India or some country in Africa of Latin America which they have never visited and with which they have no links at all is the only country

which they can call their own country? I agree that mere length of residence would not be a determinative test but length of residence may be a factor coupled with other factors. The totality of factors would have to be taken into account for the purpose of determining whether the country in question is a country which the person concerned has adopted as his own country or is a country with which he has special ties or the most intimate connection or link in order to be regarded as "his own country" within the meaning of article 12, paragraph 4.

Before I part with the discussion of this point, I must refer to one other illogicality in which the majority appears to have fallen. The majority seems to suggest that where the country of immigration places unreasonable impediments on the acquiring of nationality by a new immigrant, it might be possible to say that for the new immigrant who has not acquired the nationality of the country of immigration and continues to retain the nationality of his country of origin, the country of immigration may be regarded as "his own country". There are at least two objections against the validity of this view. In the first place, it is the sovereign right of a State to determine under what conditions it will grant nationality to a non-national. It is not for the Committee to pass judgment whether the conditions are reasonable or not and whether the conditions are such as to impose unreasonable impediments on the acquisition of nationality by a new immigrant nor is the Committee competent to enquire whether the action of the State in rejecting the application of a new immigrant for nationality is reasonable or not. Secondly, I fail to see what is the difference between the two situations: one, where an application for nationality is made and is unreasonably refused and the other, where an application for nationality is not made at all. In both cases, the new immigrant would continue to be a non-national and if in one case, special ties or intimate connection or link with the country of immigration would render such country "his own country", there is no logical or relevant reason why it should not have the same consequence or effect in the other case.

I fail to understand what is the basis on which the majority states that countries like Canada have a <u>right</u> to expect that immigrants within due course acquire all the rights and assume all the obligations that nationality entails. I agree that individuals who do not take advantage of the opportunity to apply for nationality, must bear the consequences of not being nationals. But the question is: what are these consequences? Do they entail exclusion from the benefit of article 12, paragraph 4? That is the question which has to be answered and it cannot be <u>assumed</u>, as the majority seems to have done, that the consequence is exclusion from the benefit of article 12, paragraph 4. Throughout the decision of the Committee, I find that the majority starts with the predetermination that in the case of the author, Canada cannot be regarded as "his own country" even though he has special ties and most intimate connection and link with Canada and he has always regarded Canada as his own country, and then tries to justify this conclusion by holding that there were no unreasonable impediments in the way of the author acquiring Canadian nationality but the author did not take advantage of the opportunity to apply for Canadian nationality and must therefore bear the consequence of Canada not being regarded as his own country and therefore of being deprived of the benefit of article 12, paragraph 4. If I may repeat, the fact that the author did not apply for Canadian nationality in a situation

where there were no unreasonable impediments in such acquisition, cannot have any bearing on the question whether Canada could or could not be regarded as "his own country". It is because the author is not a Canadian national that the question has arisen and it is begging the question to say that Canada could not be regarded as "his own country" because he did not or could not acquire Canadian nationality.

It is undoubtedly true that on this view, both U.K. and Canada would be "his own country" for the author. One would be the country of nationality while the other would be, what I may call, the country of adoption. It is quite conceivable that an individual may have two countries which he can call his own: one may be a country of his nationality and the other, a country adopted by him as his own country. I am therefore inclined to take the view, on the facts as set out in the communication, that Canada was the author's own country within the meaning of article 12, paragraph 4, and he could not be arbitrarily expelled or deported from Canada by the Government of Canada.

That leaves the question whether the expulsion or deportation of the author could be said to be arbitrary. On this question, I recall the Committee's jurisprudence that the concept of arbitrariness must not be confined to procedural arbitrariness but must include substantive arbitrariness as well and it must not be equated with "against the law" but must be interpreted broadly to include such elements as inappropriateness or excessiveness or disproportionateness. Where an action taken by the State party against a person is excessive or disproportionate to the harm sought to be prevented, it would be unreasonable and arbitrary. Here, in the present case, the author is sought to be expelled on account of his recidivist tendency. He has committed around 40 offences including theft and robbery for which he has been punished. The question is whether it is <u>necessary</u>, in all the circumstances of the case, to expel or deport him in order to protect the society from his criminal propensity or whether this object can be achieved by taking a lesser action than expulsion or deportation. The element of proportionality must be taken into account. I think that if this test is applied, the action of Canada in seeking to expel or deport the author would appear to be arbitrary, particularly in the light of the fact that the author has succeeded in controlling alcohol abuse and no offence appears to have been committed by him since May 1991. If the author commits any more offences, he can be adequately punished and imprisoned and if, having regard to his past criminal record, a sufficiently heavy sentence of imprisonment is passed against him, it would act as a deterrent against any further criminal activity on his part and in any event, he would be put out of action during the time that he is in prison. This is the kind of action which would be taken against a national in order to protect the society and <u>qua</u> a national, it would be regarded as adequate. I do not see why it should not be regarded as adequate <u>qua</u> a person who is not a national but who has adopted Canada as his own country or come to regard Canada as his own country. I am of the view that the action of expulsion or deportation of the author from Canada resulting in completely uprooting him from his home, family and moorings, would be excessive and disproportionate to the harm sought to be prevented and hence must be regarded as arbitrary.

I would therefore hold that in the present case, there is violation of article 12, paragraph 4, of the Covenant. On this view, it becomes unnecessary to consider whether there is also violation of articles 17 and 23 of the Covenant.

Prafullachandra Bhagwati: [signed]
[Original: English]

Notes

1.Emphasis mine (see 9.1).

2.See also paragraph 4.2 statements attributable to the State party, including the following “... furthermore, he would not be barred once and for all from re-admission to Canada”.
