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HUMAN RIGHTS COMMITTEE
Eighty-fifth session
17 October – 3 November 2005

DECISION

Communication No. 1012/2001

Submitted by:	Mr. Brian John Lawrence Burgess (represented by Mauro Gagliardi and Fred John Ambrose of the International Federation of Human Rights)
Alleged victim:	The author and his wife, Mrs. Jennefer Anne Burgess, and their children, Dustin, Luke and Malia Burgess.
State party:	Australia
Date of communication:	13 July 2001 (initial submission)
Document references:	Special Rapporteur's rule 97 decision, transmitted to the State party on 11 September 2001 (not issued in document form)
Date of adoption of decision:	21 October 2005

* Made public by decision of the Human Rights Committee.

Subject matter: Deportation; family separation

Procedural issues: admissibility *ratione personae*, exhaustion of domestic remedies

Substantive issues: Psychological torture, unlawful and arbitrary interference with the family unit, protection of the family, equal protection of the law

Articles of the Covenant: 2, 3, 5, 7, 9, 10, 12, 13, 14, 16, 17, 23, 24 and 26

Articles of the Optional Protocol: 1 and 5, paragraph 2 (b)

[ANNEX]

ANNEX

DECISION OF THE HUMAN RIGHTS COMMITTEE UNDER
THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT
ON CIVIL AND POLITICAL RIGHTS

Eighty-fifth session

concerning

Communication No. 1012/2001**

Submitted by:	Mr. Brian John Lawrence Burgess (represented by Mauro Gagliardi and Fred John Ambrose of the International Federation of Human Rights)
Alleged victim:	The author and his wife, Mrs. Jennefer Anne Burgess, and their children, Dustin, Luke and Malia Burgess.
State party:	Australia
Date of communication:	13 July 2001 (initial submission)

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

Meeting on 21 October 2005,

Adopts the following:

DECISION ON ADMISSIBILITY

1.1 The author of the communication is Brian John Lawrence Burgess, a British citizen born in England in 1952, residing in Australia from 1969 to 10 July 2000, date of his deportation from Australia to the United Kingdom. The author is represented by counsel Mauro Gagliardi and Fred John Ambrose of the International Federation of Human Rights, who submitted an authorisation from the author to act on his behalf.

1.2 By letter of 17 July 2001, the author submitted a request for interim measures to allow him to return to the State party and to avoid irreparable damage to him and his family. The request was denied by the Committee's Special Rapporteur on New Communications on 18 July

** The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Hipólito Solari-Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

Pursuant to rule 90 of the Committee's rules of procedure, Committee member Mr. Ivan Shearer did not participate in the adoption of the present decision.

2001.

1.3 On 17 August 2001, counsel included also the author's wife, Jennefer Anne Burgess, an Australian citizen born in 1949, and their children Dustin, born in Australia on 29 March 1983, Luke and Malia, twins born in Australia on 27 April 1985, all still residing in Australia. However, counsel did not submit an authorisation neither from the author nor from the author's wife and children to act on behalf of them.

1.4 Counsel claim that the members of the family are victims of violations by Australia[1] of articles 2, 3, 5, 7, 9, 10, 12, 13, 14, 16, 17, 23, 24 and 26 of the International Covenant on Civil and Political Rights (the Covenant).

Factual background

2.1 On 2 September 1969, at age 17, the author migrated to Australia under the British Boy's Movement for Australia, and was granted a permanent resident's visa. In the early 1970's, he married Jennefer Anne Burgess and they had three children.

2.2 In the beginning of July 1996, the author was arrested. On 24 October 1996, he was convicted of two charges of "import of trafficable quantity of prohibited drug (cocaine)", and sentenced to imprisonment for a term of seven years with a non parole period of four years, on each charge, to be served concurrently. While in prison, the author participated in a work release program in preparation for his release.

2.3 On 27 March 1998, Mr. Burgess was sent a Notice of intention to cancel his visa by the Department of Immigration. On 16 March 2000, after an interview in relation to this notice, Mr. Burgess' visa was cancelled by the Minister under section 501(2) of the Migration Act 1958[2] (the Act), on the grounds that he had a "substantial criminal record" under section 501(6)(a)[3] of the Act, and consequently failed to pass the character test. If a person is deemed to fail the character test, discretion must be exercised by the Minister, who must evaluate primary and other considerations such as the protection of the Australian community, the best interests of the child etc. The Minister's decision was based on a report prepared by the case officer in accordance with the Act. This report listed the principal factors to be taken into account by the Minister while deciding on the author's case, and concluded that the only factor in favour of cancellation of the author's visa was the serious nature of his offence. Factors against cancellation were the assessment of the risk of recidivism as low and the considerable hardship that the children, his

[1] The International Covenant on Civil and Political Rights and its Optional Protocol entered into force for the State party respectively on 13 November 1980 and 25 December 1991.

[2] Section 501 (2) of the Act stipulates that "The Minister may cancel a visa that has been granted to a person if:

a) the Minister reasonably suspects that the person does not pass the character test; and

b) the person does not satisfy the Minister that the person passes the character test."

[3] Section 501(6)(a) stipulates that "a person does not pass the character test (*inter alia*)if:

a) the person has a substantial criminal record (as defined by subsection (7))".

According to subsection 7, "a person has a substantial criminal record (*inter alia*)if:

c) the person has been sentenced to a term of imprisonment of 12 months or more, or

d) the person has been sentenced to 2 or more terms of imprisonment (whether on one or more occasions) where the total of those terms is 2 years or more".

wife and the author would suffer if Mr. Burgess' visa was cancelled and he was removed to the United Kingdom.

2.4 On 14 April 2000, the author was notified of the cancellation of his visa by the Department of Immigration and Multicultural Affairs. The notice indicated that "because the Minister decided your case personally, you are excluded from appealing this decision to the Administrative Appeals Tribunal. However, you may wish to seek further legal advice as to other avenues of legal review which may be available to you."

2.5 On 27 April 2000, the Minister declined to reconsider his decision of 16 March on the basis that section 501(2) does not incorporate a power to revisit decisions made under it. On 5 July, the author applied to the Federal Court for review of the Minister's "decision" of 27 April. The application was dismissed on 10 July on the grounds that it was not a "decision", as the Minister has no power to review a decision made pursuant to section 501(2) of the Act.

2.6 On 10 July 2000, Mr. Burgess was released on parole, and on the same day, was removed to the United Kingdom, after living more than thirty years in the State party. On 23 August 2001, he lodged, through his wife, an application for a spouse-sponsored visa, which was denied.

2.7 With regard to the requirement of exhaustion of domestic remedies, the author contends that he has exhausted available remedies.

2.8 The author states that he has submitted a complaint to the European Court of Human Rights, but the complaint before that Court is directed against the United Kingdom only.

The complaint

3.1 The author claims that his deportation to the United Kingdom deprives him of living in the country that has been his home for all his adult life. In addition, he contends that the family unit has been divided as his deportation results in a permanent separation from his wife and children, who have stayed in Australia and cannot visit him due to financial reasons.

3.2 The author further alleges a violation of his Covenant rights because he considers that the decision of the Minister was arbitrary and an abuse of his discretion, as it was taken in disregard of the recommendations of the case officer who prepared the report on his case.

3.3 He claims that his deportation amounts to psychological torture, both for him, his wife and children. He argues that during the period of his sentence, he was provided with day release and week-end release, time which he spent solely with his family. During this period, his children were led to believe that this was a process of reconciliation with the family, but it was not. He also points out that he was not permitted to say a farewell to his family before his removal.

3.4 The author claims to be the victim of inequality, as expulsion orders which are not signed directly by the Minister can be appealed to the Administrative Appeals Tribunal, while he was denied such opportunity, as the Act provides that deportation orders signed by the Minister are "non-appealable". In addition, the author claims that as a British citizen who arrived in 1969, he falls into a category, defined by the High Court in its *Patterson* ruling[4], of individuals

[4] Counsel refers to the ruling of the High Court of Australia of 6 September 2001 (Re: Patterson; Ex parte Taylor S165/2000).

who cannot be deported because they cannot be considered as "aliens" for the purposes of the Australian constitution and are therefore not subject to the Migration Act. The author considers that he was treated unequally compared to other individuals who arrived prior to 1973, and whose deportation orders were cancelled by the High Court for this reason.

3.5 Finally the author contends that he has been punished twice for the same offence.

The State party's submission on the admissibility and merits of the communication and author's comments

4.1 On 11 March 2002, the State party commented on the admissibility and merits of the communication. It submits that the entire communication is inadmissible *ratione personae* in so far as it purports to be lodged on behalf of Mrs. Burgess and the Burgess children, as they have not given their authority to act on their behalf. It points out that "there is no evidence that either Mrs. Burgess or any of the Burgess children have expressly authorised counsel to act on their behalf. In relation to the Burgess children, there is no evidence that either Mr. or Mrs. Burgess authorised the representatives to act on behalf of any of the Burgess children who do not have the capacity to provide such authorisation themselves (although on this point Australia notes that the age of the three children means that they are likely to be able to provide consent on their own behalf, should they wish to). It underlines that for the communication to be admissible in relation to Mrs. Burgess and the three children, counsel should have provided evidence:

- that Mrs. Burgess and either Mr. or Mrs. Burgess on behalf of the children or any of the children personally has authorised counsel to act on their behalf; or

- that counsel have a sufficient close relationship with Mrs. Burgess and the children to justify them acting without express authorisation, and that the circumstances of the case require this.

The State party contends that counsel provided no such evidence, although they were fully aware of this requirement, as they did submit such an authorisation on behalf of Mr. Burgess.

4.2 The State party further considers that the communication is inadmissible for failure to exhaust domestic remedies in relation to the decision to cancel the author's visa and his removal to the United Kingdom. It argues that the author incorrectly asserts that the decision of the Minister to cancel the author's visa and to remove him was "non-appealable", and that although the decision could not have been reviewed by the Administrative Appeals Tribunal, its legality could have been challenged in the Federal Court or the High Court of Australia. These remedies were available, known to the author and his advisers and would have provided an effective remedy to any defects in the decision made by the Minister. However, the author failed to pursue these appeals within the statutory time lines set out in the Migration Act.

4.3 In addition, the author could have availed himself of constitutional remedies such as seeking the judicial review of the Minister's decision by the High Court in its original jurisdiction, seeking leave to commence an action in the High Court challenging the decision to cancel his visa and his removal from Australia, and bringing an action for *habeas corpus* against Australia in the High Court. It has not been demonstrated that these remedies were not available or would have been ineffective.

4.4 The State party submits that, with the exception of the allegation of a violation of article 9, paragraph 1, in relation to Mr. Burgess, all of the allegations contained in the communication are inadmissible under article 3 of the Optional Protocol in that they are incompatible with the provisions of the Covenant. A number of the allegations are inadmissible under article 1 of the Optional Protocol in relation to certain members of the family as they cannot be considered victims of the alleged violations. Finally, the State party submits that the entire communication is inadmissible under article 2 of the Optional Protocol for failure to substantiate any of the allegations.

4.5 On the merits, the State party argues that the allegations are without merit as the evidence provided is not specific, pertinent and sufficient to permit the examination of the merits of the alleged violations. As to a possible violation of article 7 and the allegations of "psychological torture", the State party submits that the author was informed that he would be removed from Australia upon his release from prison approximately three months before the release, and that he had visitation rights during this period. Furthermore, he was aware that he would not be in the public contact area of the airport prior to departure. He therefore had the opportunity to say farewell to his family in prison well before his release. With regard to the claim that the author's deportation constitutes "psychological torture", the State party argues that its treatment of the Burgess family did not include any of the elements of torture, i.e. the intent, fulfilment of a certain purpose and/or the intensity or severe pain, and that the treatment was reasonable and in accordance with the State party's immigration laws. On the issue of removing the author from Australia, after permitting him to have day and week-end access visits with his family, the State party submits that all of the author's rights as a prisoner were respected; this does not amount to a violation of article 7.

4.6 On the alleged violation of article 9, the State party submits that the author's treatment was in accordance with procedures established by law (the Migration Act), and that his removal resulted directly from his status as an unlawful non-citizen pursuant to article 189 of the Act. The policy of detaining unlawful non-citizens pending removal is reasonable, necessary and proportionate to the ends sought, and the author was not subject to arbitrary detention. The Minister's decision was not contrary to the recommendation of department officials, as the briefing to the Minister referred to by the author did not contain any recommendation. Finally, it submits that its migrations laws are not arbitrary per se, and that they were not enforced in an arbitrary manner in the case of the author.

4.7 On article 10, the State party indicates that the communication does not assert that the author has been detained. It underlines that he was detained for approximately one hour at the airport prior to boarding his flight, and that he was treated humanely during this period.

4.8 In relation to article 12, paragraph 1, the State party notes that the author was not lawfully in Australia at the time of his removal, as he had become an unlawful non-citizen due to the lawful cancellation of his visa. The operation of article 12, paragraph 3, which establishes a number of exceptions to the rights established by article 12, paragraph 1, including restrictions "which are provided by law", means that the author's detention and removal fall within the scope of this provision. With regard to article 12, paragraph 4, the State party considers that the author's link with Australia does not possess the characteristics required for him to be able to assert that this is *his* country for the purposes of this provision. In particular, his situation does not give rise to the special ties and claims as described in the case of *Stewart against Canada*[5].

4.9 On article 13, the State party submits that the author was not lawfully in Australia at the time of his removal to the United Kingdom, that the decision to expel him was made in accordance with Australian law and that he had the opportunity to have this decision reviewed.

4.10 With regard to article 14, the State party notes that the author does not assert that his arrest or imprisonment in relation to importing drugs amounted to a violation of any of the rights guaranteed by the Covenant. It further emphasises that a decision relating to the right of an alien to remain in the territory of a State party does not fall within the ambit of article 14, paragraph 1, as such proceedings involve neither the determination of a criminal charge nor the determination of "rights and obligations in a suit of law". The author was afforded due process in relation to the decision to cancel his visa and points out that the allegation that the Minister's decision was not subject to appeal is incorrect, as he was able to seek review of the legality of this decision in either the Federal Court or the High Court.

4.11 On the alleged violation of article 17, the State party submits that requiring one member of a family to leave Australia while the other members are permitted to remain, does not necessarily involve an "interference" with the family life or either of the person removed or those who remain. It submits that article 17 is aimed at protecting individual privacy and the interpersonal relationships within a family. The author's removal was not aimed at affecting the relationships between members of the family. The fact that the family cannot be together in Australia at this point of time does not in itself amount to an interference, and decisions about whether the other family members will continue their lives in Australia or travel elsewhere to be with the author are for them to make. The State party argues that if the author's removal is found by the Committee to amount to interference, such interference would be neither "unlawful" nor "arbitrary". The removal was made in accordance with domestic law. The State party refers to its submissions on article 9 and provides detailed explanations in support of its submission that the Burgess family was not subject to arbitrary interference, but rather was subject to treatment that is reasonable, necessary, appropriate, predictable and proportional to the ends sought, given the circumstances.

4.12 The State party argues that article 23, paragraph 1, does not prevent the detention and removal of an illegal alien in accordance with Australian domestic laws. Australia's obligations in relation to protecting the family do not mean that it is unable to remove an illegal alien from Australia just because that person has established a family with Australian nationals. Article 23 must be read in light of the State party's right, under international law, to control the entry, residence and expulsion of aliens. The State party adds that the author's removal came about because of the seriousness of his criminal conduct in Australia, and that its

[5] The State party refers to Communication No. 538/1993, *Charles Stewart v. Canada*, Views adopted on 1 November 1996

actions constitute reasonable steps to ensure the integrity of its immigration program and to protect Australian society from the effects of prohibited drugs. The situation arose because of the author's own conduct, rather than a failure by Australian authorities to protect the family unit.

4.13 In relation to article 26, the State party indicates that it assumes that the alleged violation of article 26 is an alleged violation of the guarantee of equality before the law in relation to the decision to cancel the author's visa. The State party refers to its submissions on article 9 and argues that the decision to cancel the author's visa was not arbitrary, but reasonable and necessary, appropriate, predictable and proportional to the ends sought, which is demonstrated by the following factors:

- the author's treatment was in accordance with procedures established by domestic law;

- the clear failure of the character test, required under section 501 of the Migration Act due to the nature of his criminal record, meant that it was reasonable and predictable that his visa would be cancelled notwithstanding that he had established a family in Australia;

- the decision was based on a full consideration of all relevant issues, including the author's criminal record, his conduct since arriving in Australia, the interests of protecting Australian community from prohibited drugs, the expectations of the Australian community, the deterrent effect of a decision to cancel the author's visa for other non-citizens who may engage in criminal conduct, the interests of Mrs. Burgess and the Burgess children and Australia's international obligations.

4.14 As to violations of articles 2, 3, 5, 14, paragraphs 2 to 7, 16, 23, paragraphs 2 to 4, and 24, the State party provides detailed arguments dismissing these claims as either inadmissible or unmeritorious.

5. On 8 June 2004, counsel informed the Committee that they had no comments on the State party's observations.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for purposes of article 5, paragraph 2 (a), of the Optional Protocol.

6.3 On the question of standing, the Committee notes the State party's contention that the communication should be declared inadmissible ratione personae with respect to Mrs. Burgess

and the three children. It appears from a reading of the file that after receiving the initial submission, the Secretariat asked counsel, on 19 July 2001, in the following terms, "to provide (…) written authorisation from Mr. Burgess himself and from his family members if you also wish them to appear as victims". On 26 July, counsel submitted an authorisation to act on behalf of Mr. Burgess only[6]. The Committee notes that the authors' representatives have submitted an authorisation to act on behalf of Mr. Burgess only, but that in August 2001 they included Ms. Burgess and the children in the communication without any authorisation. It further notes that counsel did not wish to comment on the State party's observation that they had no standing to represent Mrs. Burgess and the children. There is nothing in the file before the Committee in respect of the claims brought on behalf of Mrs. Burgess and the children to show that Mrs. Burgess either authorised counsel to represent her, or that Mr. or Mrs. Burgess or their children have authorised counsel to represent the children. The Committee considers that counsel has no standing before the Committee with respect to Mrs. Burgess and Dustin, Luke and Malia Burgess and consequently declares the part of the communication alleging violations of their rights inadmissible under article 1 of the Optional Protocol.

6.4 With regard to the State party's observation that the author has failed to exhaust domestic remedies, because the author failed to appeal the decision of the Minister to cancel his visa to the Federal Court or the High Court of Australia within the statutory time lines set out in the Migration Act, and in the absence of any comments by the author on availability and the effectiveness of these remedies in this particular case, the Committee considers that the author has not exhausted these domestic remedies invoked by the State party and that the communication is accordingly inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

7. The Committee therefore decides:

(a) that the communication is inadmissible under articles 1 and 5, paragraph 2 (b), of the Optional Protocol;

(b) that this decision will be communicated to the author and to the State party.

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

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[6] The authorisation, dated 1 February 2001, reads as follows: "I, Brian John Lawrence Burgess, (…) do hereby appoint and authorise Mauro Gagliardi and Fred John Ambrose, of the International Federation of Human Rights, (…) to represent and undertake on my behalf any and all claims and assertions of violations of the rights secured to me under and pursuant to the various United Nations Covenants and Articles (…) with respect to actions taken against me by the government of Australia (…)."