



2 April 2008

The Lord Adonis  
Parliamentary Under Secretary of State for Schools and Learners  
Department for Children, Schools and Families  
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Hard copy follows by post.

Dear Minister

**Debate on Guardianship for Unaccompanied Asylum-Seeking Children during Report Stage of the Children and Young Persons Bill on 17 March**

I am writing as Chair of the Immigration Law Practitioners' Association further to your response during the conjoined debate on Amendment Nos. 7 and 8 (17 March 2008, Column 35 et seq).

Our primary concern is to clarify the role of a legal representative of a separated child (unaccompanied asylum-seeking child), which was not accurately described in the debate.

You stated (17 March 2008 : Column 38) that:

*'...mention has been made of the difficulty that children have in giving clear instructions to solicitors. Obtaining relevant information from children can, of course, present difficulties, but it is the responsibility of solicitors who have a recognised specialism in asylum and immigration practice to ensure that relevant information is obtained to represent their client effectively.'*

Of course, it is correct that it is the responsibility of a legal representative to provide every opportunity for their clients, of whatever age, to be able to give clear instructions. However, what is missing from the analysis cited is a recognition of the limitation placed upon the legal representative by reason of their duty to act on instructions. A legal representative is not free to act on an appreciation of the child's best interests irrespective of the particular instructions the child may have given. The indication given to the contrary by including legal representatives among a list of persons and agencies said to be *'directly and specifically concerned with [children's] welfare'*, previous to the passage cited above is not accurate.

Significantly, it is well-established in our common law tradition that the responsibilities and expectations that are placed upon adults in respect of their personal and legal affairs are not simply transposed to children. This is specifically recognised in the Solicitors' Code of Conduct, the guidance to which provides at paragraph 6(a)(iii):

*'6 Subrule 2.01 sets out situations in which you must refuse instructions or, where appropriate, cease acting. These might include the following :*

*(a)*

**Breach of the law or rules**

- (iii) where the client is a child or a patient (within the meaning of the Mental Health Act 1983), special circumstances apply. You cannot enter into a contract with such a person... However, it is important that the client, who is in a very vulnerable situation, is not left without legal representation. Consequently, you should notify an appropriate person (e.g. the Court of Protection), or you may look for someone legally entitled to provide you with instructions...'*

This reflects a general recognition in law that it is not appropriate to require or expect of a child the same degree of competence to take such responsibility as may be expected of an adult.

Of course, there are circumstances in which adults may lack sufficient competence to provide instructions due to their particular mental health. In these circumstances, legal representatives are similarly not entitled by the nature of their duty to act on instructions to simply transplant their appreciation of what may be in their client's best interests for the instructions they would ordinarily have expected to receive from the client.

The misapprehension in your response during the debate is to assume that by the child's giving clear instructions to his or her legal representative, the role of that representative in securing the welfare of the child is adequately protected. The problem, however, is not about clarity of instructions; but rather about the competence of a particular child to give adequate or appropriate (as opposed to clear) instructions.

This is especially problematic in a process that may have profound implications for the child's future wellbeing and safety. If the child's instructions are not in his or her best interests (and there are many circumstances in which this may be the case – the situation of trafficked children provides some of the more pressing examples of this), there is an urgent need for an independent and legally competent person to provide instructions to the legal representative on the child's behalf. This is a role that can be fulfilled by the Official Solicitor and his representatives, but not before the Asylum and Immigration Tribunal or indeed the Border and Immigration Agency at the initial stages of the case.

It is instructive to consider the role played by the children's guardian in the Children and Family Court Advisory and Support Service (CAFCASS) scheme; and contrast this with the

role, experience, training and legal competence that can be expected from a legal representative.

We also note your statement (17 March 2008 : Column 39) that:

*‘...the Asylum and Immigration Tribunal has issued guidance to immigration judges... as well as making it a requirement that the child is represented by an appropriate adult at all hearings.’*

The guidance, to which we understand you to refer, is the guidance note of the then Chief Adjudicator of the Immigration Appellate Authority of April 2004 on ‘Unaccompanied Children’. It is available on the Tribunal’s website at:

<http://www.ait.gov.uk/Documents/CaseLaw/PracticeDirections/GuideNoteNo8.pdf>

That guidance continues to apply to hearings of the Asylum and Immigration Tribunal. It provides that a separated child should be legally represented and should have an ‘appropriate adult’ present at all hearings. It also indicates the option for the immigration judge of adjourning a hearing for the purpose of the child obtaining a legal representative; including the possibility of the Tribunal contacting the Refugee Council’s Children’s Panel, Refugee Legal Centre or Immigration Advisory Service.

However, it is reported to us that significant numbers of children appear before the Tribunal without representation. There may be various causes; but we note that current legal aid provisions do not allow for representation of separated children regardless of a merits assessment. If there is no legal representative, whereas a social worker may well be in attendance – or indeed some other person who can undertake the role of an appropriate adult – this person is not competent to provide representation at that hearing.

ILPA, as you will no doubt be aware, shares the opinion of fellow members of the Refugee Children’s Consortium that there ought to be established an independent guardianship role for separated children. We should be very pleased to discuss this further with you or with your officials.

Legal representatives cannot substitute for a guardian; and the expectations voiced during the debate on 17 March, which we share, as to the fulfilment by legal representatives of their particular role in a child-sensitive manner do not provide the answer to what continues to be a serious lacuna in the protection available to children passing through the UK’s asylum process. That lacuna is the absence of an independent guardian who is competent to instruct the legal representative in circumstances where the child is not able or willing to provide instructions consistent with his or her best interests.

Yours sincerely,

Sophie Barrett Brown  
Chair