

**PROTECTION OF FREEDOMS BILL: HOUSE OF LORDS REPORT
STAGE*****LEGAL GUARDIANS FOR TRAFFICKED CHILDREN*****BRIEFING FROM THE IMMIGRATION LAW PRACTITIONERS'
ASSOCIATION (ILPA) FOR THE AMENDMENT, NEW CLAUSE AFTER
CLAUSE 110, IN THE NAMES OF PROFESSOR THE LORD MCCOLL,
BARONESS BUTLER-SLOSS AND BARONESS ROYALL**

The Immigration Law Practitioners' Association (ILPA) is a professional association with some 900 members (individuals and organisations), the majority of whom are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with an interest in the law are also members. Established over 25 years ago, ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law through an extensive programme of training and disseminating information and by providing evidence-based research and opinion. ILPA is represented on numerous Government and other consultative and advisory groups and participated in the first year of the Anti-Trafficking Monitoring Group.

ILPA has long been concerned that the UK is failing to meet its international obligations in respect of guardians for separated children, including children who have been trafficked.

It is often suggested, wrongly, that legal representatives can play the role of guardians.¹ This is incorrect. A legal representative acts on his/her client's instructions. A legal representative must always endeavour to act in his/her client's best interests, but this does not override the duty to act on instructions. As long as best interests and instructions march hand in hand (and the lawyer can be confident that this is the case) all is well. But what happens when they do not? The problem is raised in all its acuity in the case of children who may have been trafficked.

A real example may assist in illustrating the point. The client, a child of eight. The UK Border Agency case, that the child is trafficked by X. The child's instructions, that X is uncle and carer. Who is to instruct the lawyers? The child, who is only eight years old and may be acting under duress? The uncle/trafficker?

Legal representatives must be careful to ensure that the child understands the issues in the case and gives instructions freely. A child must be made aware of the circumstances in which a solicitor can breach the duty of confidentiality on child protection grounds.

¹ See e.g. Hansard, Lords Report, 17 March Col 38, per the Lord Adonis.

ILPA Lindsey House, 40/42 Charterhouse Street London EC1M 6JN Tel: 020 7251 8383 Fax: 020 7251 8384

email: info@ilpa.org.uk website: www.ilpa.org.uk

A legal representative is not free to act on their own appreciation of the child's best interests (which may in any event be erroneous), irrespective of the particular instructions the child has given.

It is currently the case that the Official Solicitor does not become involved until a case reaches the higher courts, presenting enormous challenges for legal representatives, and enormous risks for children, while the case is before the UK Border Agency and, if refused, the Tribunals. The taking of infinite pains by the legal representative will not necessarily solve this problem.

Under Article 10 of the Council of Europe Convention on Action Against Trafficking in Human Beings,² when a child who is separated has been trafficked, States are obliged to appoint a legal guardian who will act in the best interests of that child, take steps to ascertain his/her identity and nationality, and locate his or her family.

As to separated children subject to immigration control more generally, both the UN Committee on the Rights of the Child and UNHCR recommend that a guardian or adviser should be appointed as soon as a separated child is identified. The guardian or adviser should have the expertise necessary to ensure that the rights and best interests of the child are protected, and that the child's legal, social, medical and psychological needs are appropriately met until a durable solution for the child has been identified and implemented.

The UN Committee on the Rights of the Child and UNHCR recommend that the guardian or adviser should be maintained until the child has either reached the age of majority or has permanently left the UK. The guardian or adviser should be consulted and informed regarding all actions taken in relation to the child. The guardian or adviser should be expected to work in close co-operation with the case owner, care workers, social workers, legal representative and immigration officials.

ILPA wrote to the Minister for Immigration and the Minister for Children and Families on 7 December 2010 following correspondence with the UK Border Agency on the subject of guardianship. The Agency had written to us on 23 August 2010, in the context of a consultation, stating:

Guardianship

Some respondents argued that a guardian should be appointed for each unaccompanied child. As many of you know this is a proposal that the Agency has been asked to consider on several occasions in recent years. The UNHCR made a recommendation for such a system in the "Quality Initiative Project" it published in April 2009

Our position remains that we are not clear what the roles and responsibilities of the proposed guardian are intended to be. There are already many professionals involved with this group of children – for example the social worker, independent reviewing officer, personal advisor and immigration legal representative. The Refugee Council Children's Panel also provides an advice service funded by UKBA. It is not clear how a system of guardianship will fit within the current systems and not duplicate functions already carried out by others.

² CETS No. 197, opened for signature 16 May 2005, into force 1 February 2008.

We have, however, offered (in July 2009) to consider a detailed proposal. ... We will of course consider any detailed proposal that is submitted. We will also carefully consider the results of the small project being conducted by the Scottish Refugee Council to provide an independent guardian in order to support unaccompanied children through the immigration, social, legal and welfare system and promote interagency working.

We reiterate, yet again, that the Refugee Council's Panel of Advisors of Unaccompanied Children do not have the powers or the resources to play this particular role and this is not the role they are set up and trained to play. Similarly with social services staff. They cannot, are under Children Act provisions, be appointed to act as guardians *ad litem*. As explained below, local authorities do not have formal parental responsibility where care and support is provided under sections 17 and 20 of Children Act 1989, without more. In addition, because of conflicts of interest arising from the financial and decision-making relationships social services have with the UK Border Agency, where support is provided whilst the child remains in the UK, they do not have the necessary independence. It is of course the case that Local Authorities caring for children do not play the role of the child's guardian in the family courts or any other proceedings. The Scottish Guardianship Service currently being piloted³ does not address our concern regarding the role of legal representatives. It does not empower the guardian to give instructions to the child's legal representative, as opposed to advising the child on the instructions that he or she can or ought to give.

A child from overseas, alone in the UK, will most likely be accommodated by the local authority under section 20 of the Children Act 1989. But in ILPA's experience such children are rarely taken into care by the local authority. Assuming that, as is usually the case, the child has no contact with his/her parents, if any, then there is no one whatsoever in the UK with parental responsibility for that child. We suggest that it would be unthinkable other than for migrant children that there be a separated child, let alone one at risk and facing complex legal proceedings, for whom no known person has parental responsibility. Why then is it considered acceptable for children under immigration control?

Many children who have been trafficked make a claim for recognition as a refugee, or that return would breach their human rights. Obligations under the EU Directives pertaining to persons who have sought international protection are thus relevant.

The EU Reception Directive by which the UK is bound⁴ provides

"Article 19

Unaccompanied minors

1. Member States shall as soon as possible take measures to ensure the necessary representation of unaccompanied minors by legal guardianship or, where necessary, representation by an organisation

³ See <http://www.aberlour.org.uk/scottishguardianshipservice.aspx>

⁴ 2003/9/EC

which is responsible for the care and well-being of minors, or by any other appropriate representation. Regular assessments shall be made by the appropriate authorities.”

The EU Qualification Directive by which the UK is bound⁵ states that:

“Article 17

Guarantees for unaccompanied minors

1. With respect to all procedures provided for in this Directive and without prejudice to the provisions of Articles 12 and 14, Member States shall:

(a) as soon as possible take measures to ensure that a representative represents and/or assists the unaccompanied minor with respect to the examination of the application. This representative can also be the representative referred to in Article 19 of Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers (1);

(b) ensure that the representative is given the opportunity to inform the unaccompanied minor about the meaning and possible consequences of the personal interview and, where appropriate, how to prepare himself/herself for the personal interview. Member States shall allow the representative to be present at that interview and to ask questions or make comments, within the framework set by the person who conducts the interview. Member States may require the presence of the unaccompanied minor at the personal interview, even if the representative is present.

2. Member States may refrain from appointing a representative where the unaccompanied minor:

(a) will in all likelihood reach the age of maturity before a decision at first instance is taken; or

(b) can avail himself, free of charge, of a legal adviser or other counsellor, admitted as such under national law to fulfil the tasks assigned above to the representative; or

(c) is married or has been married.’

....[the article continues]”

Would a separated child’s being required to bring a case unaided in this manner be tolerated in any other jurisdiction? The proposal that underlies the amendment, that separated children should have the protection and assistance of a guardian, is long overdue.

ILPA

2 February 2012

⁵ 2004/83/EC