Minister Dutton's Children: Guardianship of Unaccompanied Minors in Immigration Detention

32

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I INTRODUCTION

Currently, under the *Immigration (Guardianship of Children) Act 1946* (Cth) (‘*IGOC Act*’), the Minister for Immigration and Border Protection (‘the Minister’) is the legal guardian of all unaccompanied minors in immigration detention.[1] The Minister is also responsible for the administration of Australia’s detention scheme and detention centres. This presents an irreconcilable conflict of duties between acting in the best interests of unaccompanied minors, as their guardian, and making decisions relating to the detention of the same minors under the *Migration Act 1958* (Cth) (‘*Migration Act*’). As a result of this fundamental conflict of duties, the Minister *simultaneously* acts as guardian and detainer, carer and imprisoner, of unaccompanied minors in immigration detention. The legal guardianship of unaccompanied minors extends to minors living in community detention and held detention in Australia and Nauru.

More specifically, the status of the Minister as legal guardian creates a significant challenge for unaccompanied minors wishing to bring legal proceedings, such as applying for a visa or partaking in proceedings at the Refugee Review Tribunal (‘the Tribunal’). This is because a legal guardian is expected to provide independent legal advice for the minor.[2] However, review proceedings are often brought against the decisions of the Minister and his department. The inadequacy of legal advice and resources that the Minister provides effectively silences unaccompanied minors wishing to bring proceedings against their guardian and his delegates. It is therefore pertinent to ask how we can best give voice to unaccompanied minors in legal proceedings under the current model of legal guardianship.

This article seeks to henceforth answer that question. Part II will set out the current legal obligations of the Minister as guardian of unaccompanied minors in immigration detention. Part III will examine the rights and access to legal recourse that unaccompanied minors are currently provided, as well as challenges that arise. Finally, Part IV will seek to explore what can be done to remedy this legislative failure.

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1. *IGOC Act* s 6.
2. *Bennett v Minister for Community Welfare* (1992) 176 CLR 408.

II OBLIGATIONS OF THE MINISTER AS GUARDIAN

The duty of a guardian encompasses a non-delegable duty to act with loyalty and good faith, and to pursue the best interests of the minor at all times.[3] This best interest duty is enshrined in the *United Nations Convention on the Rights of the Child*.[4] The High Court has held that stemming from the Minister's general duty to care for the welfare of the unaccompanied minor, there also exists a duty to take steps to obtain independent legal advice for the minor.[5] Additional guardianship duties include the duty to protect the child from harm, provide education and offer emotional support.[6] However, under the *Migration Act* the Minister is required to make decisions regarding the detention of unaccompanied minors. The tension between these two duties is illustrated in the process of an unaccompanied minor asking for an internal review of a visa refusal decision. While the Minister, as guardian, has an obligation to act in the interests of the minor by reconsidering the application, the Minister as *Migration Act* administrator has an interest in resisting challenges to his previous decision.[7]

It is worth noting that this conflict in duties arises somewhat unintentionally. The *IGOC Act* originally assigned legal guardianship to the Minister for administrative purposes in the process of adoption of overseas children. No conflict of duties arises in this process.[8] As such, the *IGOC Act* did not assign legal guardianship with a view to changing politico-legal conditions in Australia, nor did it envisage situations where a conflict may arise.[9]

3. *Beach Petroleum NL v Kennedy* (1999) 48 NSWLR 1, 33 [124]; *The Bell Group Ltd (in liq) v Westpac Banking Corporation (No 9)* (2008) 39 WAR 1. See also National Children's and Youth Law Centre, 'Guardianship and Independent Legal Representation for Unaccompanied Minors Seeking Asylum in Australia - Avoiding a Conflict of Interests' (Draft Discussion Paper, National Children's and Youth Law Centre, November 2012) 1.
4. Opened for signature 20 November 1989, 1557 UNTS 3 (entered into force 2 September 1990) art 3.
5. *Bennett v Minister for Community Welfare* (1992) 176 CLR 408.
6. Julie Taylor, 'Guardianship of Child Asylum-Seekers' (2006) 34 *Federal Law Review* 185, 190.
7. *Odhiambo v Minister for Immigration and Multicultural Affairs* (2002) 122 FCR 29, 47 [90]–[91] (The Court) ('*Odhiambo*').
8. Mary Crock and Mary Anne Kenny, 'Rethinking the Guardianship of Refugee Children after the Malaysian Solution' (2012) 34 *Sydney Law Review* 437, 447.
9. Ibid 448.

III UNACCOMPANIED MINORS AND LEGAL PROCESSES

This Part will explore the legal processes involved in applying for a visa and partaking in a tribunal review. It will seek to establish the challenges faced by an unaccompanied minor as a result of the Minister's position as his or her guardian.

Section 5AAA(4) of the *Migration Act* explicitly sets out that the Minister is not obliged to specify or establish a non-citizen's protection claim in Australia.[10] While it is unclear whether this provision applies equally to minors, the section cannot allow the Minister to 'legislate out' of his guardianship duty to provide independent legal assistance to unaccompanied minors.

A *Applying for a Visa*

In order for a child to apply for a visa independently, without a guardian, the child must be considered competent in the *Gillick* sense. This involves weighing up factors of capacity, age, maturity and understanding.[11] However, the *Migration Regulations 1994* (Cth) requires a guardian to sign the visa application form on behalf of an applicant if they are under 18 years old.[12] The question of whether a minor can sign the form without a guardian was considered in *Minister for Immigration and Multicultural and Indigenous Affairs v WAIK*.[13] However, the question was left unresolved except to comment that even if it was an invalid application because it was signed by a minor, this did not mean the decision of the Tribunal to undertake review was a jurisdictional error.[14] As Taylor argues, a visa application is an important and complex legal document.[15] A minor in this situation should be allowed to receive independent as-

10. *Migration Act* s 5AAA(4).
11. *Gillick v West Norfolk & Wisbech Area Health Authority* [1986] AC 112. Gillick competency was incorporated into Australian law in *Secretary, Department of Health and Community Services (NT) v JWB* (1992) 175 CLR 218 ('*Marion's Case*').
12. *Migration Regulations 1994* (Cth) reg 2.07(3) requires an applicant to complete an 'approved form' in compliance with directions on it. Form 688, the 'approved form' to apply for protection (class XA) visas, requires a guardian to sign if the applicant is under 18. See *Minister for Immigration and Multicultural and Indigenous Affairs v WAIK* [2003] FCAFC 307, 6–8 [20]–[25] (The Court).
13. [2003] FCAFC 307.
14. *Minister for Immigration and Multicultural and Indigenous Affairs v WAIK* [2003] FCAFC 307, 6–9 [19]–[31] (The Court).
15. Taylor, above n 6.

Minister Dutton's Children

Natasha Naidu

sistance from someone appointed by the Minister regarding the application.[16] Accordingly, there is great need for clear and consistent statutory regulation of the processes involved in an unaccompanied minor applying for a protection visa independently.

B *Partaking in a Review*

The *Migration Act* does not require a next friend, tutor or guardian to assist in a review hearing.[17] The Federal Court decisions of *X v Minister for Immigration and Multicultural Affairs*[18] and *Odhiambo*[19] have reinforced this, creating a situation whereby an unaccompanied minor can be alone in navigating the review system. In *X*, North J expressly stated that the Minister was responsible for ensuring that minors are given a direct voice to put forward their claims against the denial of rights in administrative and legal proceedings.[20] However, North J concluded that this responsibility did not enliven any specific obligation to be proactive in legal representation, such as providing a tutor.[21]

The *Odhiambo* decision confirmed that merely being a child does not entitle an unaccompanied minor to the presence of a guardian at the hearing. However, the Court indicated that if the minor was 'so disadvantaged, by tender years or mental disability'[22] the hearing may be adjourned or postponed until legal assistance is available. In this particular case, the Court did not deem assistance necessary because it was found that the applicants were able to have proper regard for their own best interests.[23] The Court attributed this ability to the applicants because, although they were under 18 years of age, they had lived independently for a number of years and had been provided a translator for the hearing.[24]

16. Ibid 196.
17. *Migration Act* s 425(1) only requires the Tribunal to 'invite the applicant to appear before the Tribunal to give evidence and present arguments.' In *Odhiambo* (2002) 122 FCR 29, 49 [101], the Federal Court construed this provision as referring only to the applicant themselves.
18. (1999) 92 FCR 524 ('*X*').
19. (2002) 122 FCR 29.
20. *X* (1999) 92 FCR 524, 537–8 [41], [43].
21. Ibid 537–8 [43].
22. *Odhiambo* (2002) 122 FCR 29, 48 [94].
23. Ibid.
24. Ibid.

In these cases and the cases that followed,[25] the courts have confirmed that the *IGOC Act* does not enliven a duty of the Minister to inform unaccompanied minors of their legal entitlements. The detrimental impact of this was illustrated in *Jaffari v Minister for Immigration and Multicultural Affairs*.[26] Jaffari was either not informed, or did not understand, that he had 28 days to seek judicial review after being refused a protection visa in the Tribunal. That Jaffari had lost his right to judicial review due to not being informed, or not understanding, was viewed by French J to be 'of concern' and 'a pressing, current issue'.[27] The cases reveal a lack of consistency and support for unaccompanied minors, which could be remedied by appointment of a guardian that is not restrained by a conflict of duties.

IV REMEDYING THE CURRENT POSITION

A *Legal Representation*

In order to address the specific challenges of legal representation facing unaccompanied minors due to the current guardianship arrangement, the author recommends the introduction of a policy requiring independent legal advisors for all unaccompanied minors wishing to apply for protection visas or engage in review proceedings. The assistance should be independent, in order to avoid a conflict of duties with the Minister. In line with French J's suggestion in *Jaffari*, assistance should be provided up to, and throughout the process of, judicial review.[28] In arranging independent legal advisors, the author suggests utilising pro-bono legal networks such as the Unaccompanied Humanitarian Minor Consortium ('the Consortium'). The Consortium is a network of non-government organisations, community legal centres, JusticeConnect and private law firms which work in collaboration to run High Court challenges for the family reunification rights of Afghan child refugees.[29] The Consortium is successful because it engages diverse pro bono programs, allowing for increased resources and innovative ideas.

25. See, eg, *WACA v Minister for Immigration and Multicultural Affairs* (2002) 121 FCR 463.
26. (2001) 113 FCR 524 ('*Jaffari*').
27. Ibid 539 [44]. See also Crock and Kenny, above n 8, 437.
28. *Jaffari* (2001) 113 FCR 524, 539 [44].
29. JusticeConnect, *Unaccompanied Humanitarian Minor Consortium wins Children's Law Award* (9 September 2014) <https://www.justiceconnect.org.au/unaccompanied-humanitarian-minor-consortium-wins-childrens-law-award>.

Utilising similar networks would be of great assistance in providing independent legal advisors for unaccompanied minors.

B *Removing the Minister as Guardian*

Of course, the issue of legal representation of unaccompanied minors speaks to the wider problematic framework of legal guardianship of minors in immigration detention. In order to adequately address the root of the problem, it is pressing that the Minister be removed as guardian and replaced by an Independent Legal Guardian. This was proposed in the Guardian for Unaccompanied Children Bill[30] that was introduced to the Senate by Senator Sarah Hanson-Young. The Bill was subsequently referred to the Senate Legal and Constitutional Affairs Legislation Committee for inquiry. However, the Committee's February 2015 report concluded that any conflict between the Minister's duties was merely 'perceived' and not an actual conflict.[31] No subsequent action has been taken.

V CONCLUSION

As has been illustrated above, the position of the Minister as guardian and detainer, carer and imprisoner, under the *IGOC Act* fundamentally fails to meet guardianship requirements to care for the welfare and best interests of unaccompanied minors in immigration detention. This is especially problematic in regards to legal proceedings brought by unaccompanied minors, where the lack of legal representation provided by the Minister fails to give minors a voice. In particular, minors may be prevented from applying for visas, or be forced to navigate the tribunal system independently. It is therefore clear that the provision of independent legal advisors is essential in order to empower unaccompanied minors in the legal process. Above all, however, it is highly desirable that the Minister be removed as the guardian of unaccompanied minors in immigration detention and replaced by an Independent Legal Guardian.

30. Guardian for Unaccompanied Children Bill 2014 (Cth).
31. Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Guardian for Unaccompanied Children Bill 2014* (2015).