

Australia’s Accompanied Irregular Child Migrants

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Introduction

The United Nations Committee on the Rights of the Child identified a range of issues to be considered at the 2012 Day of General Discussion regarding ‘The Rights of All Children in the Context of International Migration’.³ One of those issues concerned the role of guardians in safeguarding ‘unaccompanied irregular child migrants’:

*How can States parties guarantee in law and in practice that migrant children, including in relation to rescue at sea, have effective access to key procedural safeguards including free legal aid, and in the case they are unaccompanied, to a guardian in migration procedures, and also ensure the rights of children due to process and to be heard in all migration procedures.*⁴

All irregular child migrants, referred to in Australia as ‘unlawful non-citizen children’ are deemed to be under the guardianship of the Australian Minister for Immigration,⁵ unless they are found to be under the care of a parent or relative or an intended adoptive parent.⁶ While there is currently a heightened and warranted level of concern and interest regarding the care and protection of unaccompanied irregular child migrants,⁷ the plight of the ‘accompanied irregular child migrant’, those under the care of a parent or relative, is often overlooked.

This paper: (1) Focuses on a range of issues that arise for accompanied irregular child migrants in Australia who are in the care of an adult, usually their parents, and who, as a result of being under the care and protection of their parents, are oftentimes denied their basic human rights; and (2) proposes a number of steps that can be taken to protect accompanied irregular child migrants from being unnecessarily exposed to the risk of significant harm.

Risk of Significant Harm

The 2004 High Court of Australia case of *B & B*⁸ effectively relegated ‘child rights’ to a secondary position in terms of how decisions are to be made with respect to the treatment of accompanied and unaccompanied child migrants in Australia. The Bakhtiyari family of two parents and five children were held in immigration detention under section 189 of the Commonwealth of Australia Migration Act 1958 (‘Migration Act’). The parents asked the Family Court of Australia to grant an injunction for the release of the children under section 67ZC of the Family Law Act 1975 on grounds concerning the welfare of the children. They also argued that immigration detention of children was contrary to articles 9 and 24.1 of the International Covenant on Civil and Political Rights and article 37 of the United Nations Convention on the Rights of the Child.⁹ While the parents were successful in their appeal to the Full Court of the Family Court, the Minister successfully applied for special leave to appeal to the High Court of Australia.

The High Court of Australia unanimously decided that the Family Court did not have the authority to order the Australian Minister for Immigration to release the children from immigration detention. Section 189 of the Migration Act was clear and unambiguous and provided for the detention of all unlawful non-citizens both adults and children. The High Court of Australia held that the jurisdiction of the Family Court of Australia was confined to the Family Law Act and was concerned with proceedings between parents and children and not with the Australian Minister for Immigration. Kirby J held:

The language of the Migration Act is intractable. It cannot be read down to avoid any problems created by obligations derived from international law. The effect of sections 189¹⁰ and 196¹¹ is that no decision under the Migration Act is required as a precondition to the existence of the power and duty of officers to detain an unlawful non-citizen, child or adult. Detention depends solely upon the status of that person as an unlawful non-citizen... The provisions of the Migration Act are susceptible to no other construction [16].

Since no international agreement entered into by the Australian government could legally bind the Australian government with respect to the detention of irregular migrants, the Bakhtiyari family was deported to Pakistan on 30 December 2004.

Three Case Studies

Three case studies have been selected to highlight just some of the issues that face accompanied irregular child migrants in Australia today. Each case was the subject of an inquiry by the Australian Human Rights Commission.

Cathy:¹² Cathy’s parents came to Australia in 2000 from Fiji. Her parents made an unsuccessful temporary employment visa application and by the end of 2001 they had become unlawful non-citizens. At the beginning of 2002 and in the eighth month of her pregnancy with Cathy, Cathy’s mother was located by Immigration Department officers working illegally and arrested and detained. Cathy’s father remained as an unlawful non-citizen in the community.

On 2 February 2002 Cathy was born at Liverpool Hospital in New South Wales and was detained with her mother at an immigration detention facility. Despite having been born in Australia Cathy still retained the citizenship of her parents.¹³

Cathy's mother made an application for a protection visa and applied for bridging visas to be released from detention. However, the Immigration Department refused to grant bridging visas and continued to detain both Cathy and her mother. The Refugee Review Tribunal affirmed this decision. The Federal Magistrates Court and then the High Court dismissed the appeal and also Cathy's application to be recognized as an Australian citizen by birth.

The Minister for Immigration declined to intervene under the Migration Act (to release Cathy and her mother from detention) and on 4 July 2004 Cathy and her mother were transferred to the Baxter Immigration Detention Centre in the state of South Australia and then just three days later they were transferred to the Port Augusta Residential Housing Project in South Australia. At the end of May 2005 the Minister for Immigration once again declined to intervene and in July 2005 also declined to make an alternative residence determination. This was despite the fact that psychiatrists, both independent and departmental, had assessed, and provided reports to the effect, that Cathy's mental and physical development had been adversely affected by the detention environment in which she was being held. At the end of July 2005 Cathy and her mother were transferred to community detention in Sydney, in the state of New South Wales.

Cathy had been detained for the first three years and eight months of her life, the most important period in a child's formative development. According to the Australian Human Rights Commission decision, the Immigration Department violated articles 3 and 37 of the Convention on the Rights of the Child¹⁴ and also article 10 of the International Covenant on Civil and Political Rights.¹⁵ These systemic violations of Cathy's basic human rights occurred because the Australian Immigration Department failed to act in the best interests of Cathy, as she was not detained as 'the last resort' and 'for the shortest period of time' in accordance with Australia's international obligations.

During Cathy's detention, 'alternative home detention' and 'removal pending visas', while options available to the Immigration Department, were not utilized. Cathy was, therefore, not treated with a basic degree of human dignity, integrity or kindness. Because Cathy was arbitrarily detained, she could not experience normal childhood development, having been deprived of her liberty for approximately 1,340 days. Cathy was, therefore, denied her internationally recognized rights as both a child and human being.

During her detention the Immigration Department had removed Cathy with her family from Villawood Immigration Detention Centre in the state of New South Wales to Baxter Residential Housing Project in the state of South Australia and the Immigration Department often threatened to remove both Cathy and her mother from Australia to Fiji. Also, during her detention Cathy

was exposed to and witnessed acts of violence and serious human dysfunction associated with the incarceration of large populations of stressed and often disturbed adults.

Throughout her time in custody Cathy was not afforded either the means or opportunity to challenge her detention in a court of law, as required by article 37(d) of the Convention on the Rights of the Child.¹⁶ Unfortunately, such a right is not available under Australian law.

April: April's parents came to Australia from China on 10 October 2000 and April was born one year later. On 11 March 2002 April's father applied for a protection visa. On 24 March 2003 the protection visa application was refused. On 9 April 2003, her father applied for review to the Refugee Review Tribunal. On 19 February 2004 the Refugee Review Tribunal affirmed the decision not to grant protection visas. On 21 May 2004 April's father was located at work by the Immigration Department and the family's bridging visas were cancelled and they were all detained at Villawood Immigration Detention Centre in New South Wales; April was then 2 years and 6 months old.

On 8 June 2004 April's father lodged an appeal against the Refugee Review Tribunal decision to the Federal Magistrates Court. The appeal was dismissed on 23 May 2005. He then appealed to the Federal Court on 12 June 2005.

On 25 June 2005, April and her mother attended an interview with a Chinese delegation of three officers from the Chinese Ministry of Public Security and a translator who the Australian Consulate-General in Shanghai had seconded from the Chinese Diplomatic Service. Not one of the Chinese officers could speak English. The Immigration Department did not supervise the interviews nor did it implement any protocols; a security guard stood outside the door of the interview room.

The Chinese delegation recorded the interviews without the permission either of the Immigration Department or April's mother. The Chinese delegation asked April's mother about the family's refugee and court applications and the reason why she did not want to return to China. She told them that as April was a 'black child' (born in violation of China's 'One Child Policy') the family wanted to stay in Australia. April's mother became distressed, since the family had an outstanding application before the Federal Court, and did not want to continue with the interview. April was released from immigration detention into community detention with her parents on 20 July 2005.

The Australian Human Rights Commission found that the Immigration Department had violated article 16 of the Convention on the Rights of the Child¹⁷ and article 17 of the International Covenant on Civil and Political Rights¹⁸ in permitting Chinese Public Security officers from the People's Republic of China's Ministry of Public Security to interview April and her mother without proper Immigration Department supervision. The Chinese Ministry of Public Security Officers were granted access to information that was not related to the purpose of their visit i.e. the application and grant of travel documents.

The Immigration Department failed to protect April's right to privacy of information by requiring her to attend an unsupervised interview with Chinese Ministry of Public Security Officers in which her mother disclosed April's information in relation to her protection visa application, court action, and her status as a 'black child'.

The Australian Human Rights Commission found that the Immigration Department breached the human rights of April and her mother in terms of the manner in which the interviews were conducted. Whilst it was found that the action of the Immigration Department in arranging the interviews was not in itself objectionable, what was objectionable and what gave rise to the breaches in this case was the fact that Immigration Department did this without taking adequate precautions to protect the rights and interests of either April or her mother. The manner in which the interviews were conducted breached both the right of the complainants to be treated with humanity and dignity and their right to privacy.¹⁹

In relation to April and her mother, who had made protection visa applications prior to the interviews, the Australian Human Rights Commission found that the Immigration Department had breached their right under article 10(1) of the International Covenant on Civil and Political Rights to be treated with humanity and dignity. It was also found that the Immigration Department had failed to take adequate steps to prevent or at least minimize the risk of the complainants disclosing or being asked questions about their protection visa applications which in itself amounted to a failure to treat them with humanity and respect in relation to their inherent dignity as human beings. This failure arose because the Immigration Department knew there was a risk of such a disclosure and should have known that if such information was disclosed that both April and her mother may be placed at risk of persecution if they were returned to the People's Republic of China. To proceed with the interviews in those circumstances, without taking adequate steps to prevent or minimize that risk, showed a disregard for the rights and interests of April and her mother that amounted to a failure to treat them with a basic degree of humanity and dignity.

With respect to the right to privacy,²⁰ the conduct of the interviews also breached the rights of April and her mother not to have their privacy arbitrarily interfered with. The breach arose because April's mother divulged personal information during the interviews, such as information about protection visa applications that was unrelated to the purpose for which the interviews were being conducted. This disclosure by April's mother of information about April in relation to her protection visa application, court action, and her status as a 'black child' was deemed by the Australian Human Rights Commission to have placed April at risk of persecution if returned to China.

The Immigration Department breached April's human rights in terms of how it permitted the Chinese officials to interview April and her mother. The fact of April's young age or that the interview was conducted with her mother present was irrelevant. The Immigration Department and therefore the Commonwealth of Australia failed to ensure that April's mother was not asked

questions about her claim for protection. As a result April was placed at a very real risk of significant harm, if returned to China.

Joyce: Joyce was 9 years old when she was detained with her mother and three younger siblings at Villawood Immigration Detention Centre. Joyce was born in Australia and she spent her tenth birthday in detention and became an Australian citizen retrospectively by the operation of section 12(2)(b) of the Australian Citizenship Act 2007.

Prior to her tenth birthday Joyce was effectively an accompanied irregular child migrant. However, upon Joyce's tenth birthday it was illegal for her to be detained in immigration detention. On the day prior to her tenth birthday (when Joyce was still an accompanied irregular child migrant) her mother was invited by the Immigration Department to sign a written undertaking that had been drafted for her by the Immigration Department so that Joyce could remain as a 'visitor' in the care of her mother. Joyce's mother signed the undertaking without the benefit of any independent legal advice. The purpose of inviting Joyce's mother to sign the undertaking was to justify the continued detention of Joyce with her mother and for the Immigration Department to discharge its responsibility to uphold articles 3 and 37 of the Convention on the Rights of the Child and article 9(1) of International Covenant on Civil and Political Rights.

The Human Rights Commission found that:

“... the invitation by the Department for the mother to sign the undertaking requesting that her daughter remain at VIDC [Villawood Immigration Detention Centre] under her care with the intention of relying on the undertaking to, in effect, continue to detain the daughter in VIDC amounted to a continued arbitrary detention of the daughter. Such an act ran counter to the Department's guidelines about visitors, it was apparently done without consideration of less restrictive forms of detention that could accommodate the whole family, and no such alternatives were discussed...”

Clearly the mother was not in a position to uphold her own rights, let alone the rights of her daughter Joyce. In such a situation the appointment of a 'guardian ad litem'²¹ on behalf of Joyce, someone who could act in the best interests of Joyce and be in a position to understand and obtain relevant information to make an informed decision in the situation in which Joyce now found herself, would have been the appropriate step to take. Unfortunately there is no provision in either the Migration Act or Guardianship Act for the appointment of guardians ad litem to act on behalf of children or vulnerable adults.

Steps to Reduce Risk of Harm

New Directions Policy: In the twenty-first century, Australia's mandatory detention policy continues to be in breach of Australia's international human rights obligations. Section 4AA of the Migration Act, which incorporates article 37(b) of the Convention on the Rights of the Child, provides that children are to be held in immigration detention only as the last resort for the shortest period of time. The Immigration Department's own *2008 New Directions Policy*

provides that asylum seekers need only be held in immigration detention while their health, identity and security checks are conducted. The Immigration Department's arrest, detention and removal powers in sections 189 and 198 of the Migration Act need to be amended to, firstly, prohibit the detention of children (whether accompanied or unaccompanied) and, secondly, comply with the established range of sound child protection practices currently incorporated in state law throughout Australia.

After the initial period of detention of about one week in which identity and health checks are undertaken, a range of alternatives to immigration detention already exist: (1) Section 5 of the Migration Act provides that detention does not need to occur in an immigration detention facility. The Minister for Immigration can declare a place for the purpose of immigration detention; (2) Grant a Removal Pending Bridging Visa, an option particularly suitable for children 16 years and older; and (3) Community Detention, for families with its broad range of possible options.

Other changes that can be immediately implemented to ensure that Australia no longer breaches international human rights obligations to irregular child migrants include:

Prohibit Suspension of Claims by Irregular Child Migrants: The Migration Act needs to be amended to prohibit the suspension of processing claims lodged by children. For example, in 2010 the Immigration Department suspended the processing of applications of Sri Lankans and Afghans.²² Such discrimination is in clear contravention of articles 2 & 22 of the Convention on the Rights of the Child.²³

Immediate Judicial Review of Detention: A decision by the Immigration Department to detain an irregular child migrant, whether unaccompanied or accompanied, or a decision to continue to detain an irregular child migrant, needs to be subject to immediate judicial review in accordance with article 9(1) and (4) of the Convention on the Rights of the Child.

Prohibit Remote Location: There needs to be a firm prohibition on detaining irregular child migrants in remote locations and also in close confinement. Australia is a vast continent and to move children across state borders subjects irregular child migrant children not only to the stresses associated with travel but also relocation and adjustment to new surroundings.

Safe to Return to Country of Origin: An assessment of the country of origin by the Immigration Department should be undertaken on the basis of whether it is safe to return an irregular child migrant to that country and not whether the child was personally subjected to persecution. This assessment needs to be undertaken by an independent assessor such as a Federal Magistrate in the Family Law jurisdiction or an Office of the Commission for Children adopting Australian national child welfare standards.

Universal Child Protection: The recognition in federal law that all children in Australia regardless of their political status - whether citizen, permanent resident, accompanied or

unaccompanied irregular migrant, or visitor - are accorded the same child protection rights. This can be achieved through the ratification by the commonwealth, state, and territory governments of a National Child Protection Code - a set of principles, practices and procedures by which all states and the commonwealth will abide in relation to the care and protection of all children in Australia, whether or not they are irregular child migrants.

Convention on the Rights of the Child: The incorporation in all state and commonwealth child protection law of the United Nations Convention on the Rights of the Child, with particular reference to article 19.²⁴

National Guardian ad litem Program: The commitment of the Australian federal, state and territory governments to the creation of a national guardian ad litem scheme that will provide vulnerable children, such as accompanied irregular child migrants, with a basic level of protection of their fundamental human rights.²⁵

Accompanied irregular child migrants often find themselves in the care of parents or caregivers who are not in a position to provide their child with an adequate level of protection within what is a new and alien environment. Governments need to recognize this fact and to implement programs that will ensure that children caught between the interests of their parents and the state, have their own best interests - their safety, welfare, and wellbeing - protected and promoted, independently of either the interests of their parents or of the state.

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³ Committee on the Rights of the Child 2012 Day of General Discussion “The Rights of All Children in the Context of International Migration” <http://www2.ohchr.org/english/bodies/crc/discussion2012.htm>

⁴ Committee on the Rights of the Child 2012 Day of General Discussion “The Rights of All Children in the Context of International Migration” <http://www2.ohchr.org/english/bodies/crc/discussion2012.htm>

⁵ Section 4AAA(1) of the Immigration (Guardianship of Children) Act 1946 (‘Guardianship Act’) provides: ‘a person (the child) is a non-citizen child if the child: (a) Has not turned 18; and (b) Enters Australia as a non-citizen; and (c) Intends, or is intended, to become a permanent resident of Australia.’

⁶ Section 4AAA(3) of the Immigration (Guardianship of Children) Act 1946 (‘Guardianship Act’) provides: (Subsection (1) does not apply if: (a) the child enters Australia in the charge of, or for the purposes of living in Australia under the care of, a person who is not less than 21 years of age (the adult); and (b) a prescribed adoption class visa is in force in relation to the child when the child enters Australia; and (c) the adult intends to reside with the child in a declared State or Territory.’

⁷ Taylor, Julie “Guardianship of Child Asylum-Seekers” (34(1) Federal Law Review 2006 185 <http://www.austlii.edu.au/au/journals/FedLRev/2006/7.html>

⁸ Minister for Immigration and Multicultural and Indigenous Affairs v B [2004] HCA 20; 219 CLR 365; 206ALr 130; 78 ALJR 737.

⁹ Article 37(d) of Convention on the Rights of the Child: ‘Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority and to a prompt decision on any such action.’

¹⁰ Section 189 provides that: (1) [I]f an officer knows or reasonably suspects that a person in the migration zone (other than offshore place) is an unlawful non-citizen, the officer must detain the person.

¹¹ Section 196 provides that: ‘(1) [A]n unlawful non-citizen detained under section 189 must be kept in immigration detention until he or she is: (a) Removed from Australia under section 198 or 199; or (b) Deported under section 200; or (c) Granted a visa.

¹² Notice under section 29(2)(a) of the Australian Human Rights Commission Act, 1986 (Cth) dated 20 June 2012

¹³ Section 12 (1) of the Australian Citizenship Act 2007 (Cth): (a) a parent of the person is an Australian citizen, or permanent resident, at the time the person is born; or (b) the person is ordinarily resident in Australia throughout the period of 10 years beginning on the day the person is born.

¹⁴ Convention on the Rights of the Child Article 3.1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. Article 37 State Parties shall ensure that: (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment... (b) No

child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time. (c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age... (d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

¹⁵ International Covenant on Civil and Political Rights: Article 10 1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person

¹⁶ Article 37(d) of Convention on the Rights of the Child: 'Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority and to a prompt decision on any such action.'

¹⁷ Convention on the Rights of the Child; Article 16.1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, or correspondence, not to unlawful attacks on his or her honour and reputation. 2. The child has the right to the protection of the law against such interference or attacks

¹⁸ Article 17.1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honor and reputation. 2. Everyone has the right to the protection of the law against such interference or attacks.

¹⁹ Articles 10 and 17(1) of the International Covenant on Civil and Political Rights.

²⁰ Article 17(1) International Covenant on Civil and Political Rights.

²¹ For example, guardians ad litem are utilized in some state child protection jurisdictions: section 100 Children and Young Persons (Care and Protection) Act 1998 (NSW) provides for the appointment of a guardian ad litem for children or young people – section 100(3) The functions of a guardian ad litem of a child or young person are: (a) to safeguard and represent the interests of the child or young person, and (b) to instruct the legal representative of the child or young person'.

²² Safeguards needed as Australia's suspension of asylum claims by Sri Lankans and Afghans comes into force, 16 April 2010, <http://unhcr.org.au/unhcr/index.php?view=article&catid=35%3Anews-a-media&id=17>

²³ **Article 2.1.** States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status. 2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members. **Article 22.1.** States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties. 2. For this purpose, States Parties shall provide, as they consider appropriate, co-operation in any efforts by the United Nations and other competent intergovernmental organizations or non-governmental organizations co-operating with the United Nations to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family. In cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason , as set forth in the present Convention.

²⁴ 19.1 States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child. 2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

²⁵ The current state based Guardians ad litem programs can easily be expanded with the assistance of federal funding.