

Asylum seeking children and the Australian protection visa process

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Participation

Convention on the Rights of the Child Article 12

“1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.”

Per UNCRC, *General Comment No. 12 on The Right of the Child to be Heard*, UN Doc. CRC/C/GC/12 (20 July 2009)

- Children are capable of forming their own views even before they are able to communicate verbally (para 21)
- The clause at the end of paragraph 2 should not be interpreted as permitting national law to derogate from the fundamental right (para 38).

Participation

Department of Home Affairs (DHA), LEGENDcom >All stacks > 5 May 2019 > Policy -Refugee and Humanitarian > The Protection Visa Processing Guidelines > 2.23.1

“Where an application can be decided on the information available to the Department, including information provided in the application and country information, the decision may be made without interviewing the applicant. However, as a matter of policy, decision makers should conduct an interview in the following circumstances:

- cases where there are concerns about the credibility of the applicant's claims that may affect the decision (for example, cases where a decision maker needs to explore the veracity of protection claims that are based on an applicant's innate characteristics, such as religious beliefs and sexual identity)
- complex and sensitive cases, such as cases involving multiple complex claims needing further investigation with the applicant
- before making a decision to refuse an application made by a fast track applicant
- before making a decision to refuse a TPV/SHEV application of an applicant who was previously found to engage Australia's protection obligations, unless the refusal is based on improvements in the country of reference.
- before granting a permanent PV.”

Participation

Administrative Appeals Tribunal Migration and Refugee Division (AAT) must invite an applicant to appear before it to give evidence and present arguments relating to the issues arising at review, unless

- it is able to make a decision favourable to the applicant on the papers, or
- the applicant consents to review on the papers, or
- the applicant is uncooperative.

Participation

Child should be heard directly wherever possible

DHA and AAT both have good policy guidance on giving children an effective hearing.

Whether practice conforms to policy is a different matter. See eg *AZAEF (by her litigation guardian Charman) v. Minister for Immigration and Border Protection* [2016] FCAFC 3

Hearing through a representative

Usual rule is that applicant's representative at a DHA interview/AAT hearing must be a registered migration agent. However, a child can be represented by a parent or guardian instead.

Appropriateness of representation by parent has been considered in:

WZAOT v. Minister for Immigration and Citizenship [2013] FCA 136

MZAHU v. Minister for Immigration and Border Protection [2016] FCA 537

Appropriate Measures to Protect Child Asylum Seekers

Convention on the Rights of the Child 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.”

Appropriate Measures to Protect Child Asylum Seekers

DHA, *Getting help from the Immigration Advice and Application Assistance Scheme (IAAAS)*

“IAAAS provides:

- Immigration advice and application assistance (decision made by the Department only, not including review of that decision) to individuals:
 - seeking a Protection visa in Australia (excluding any person who arrived illegally in Australia)
 - who meet the eligibility criteria [no previous PV application and financial hardship and exceptional vulnerability]
- Immigration advice and application assistance in relation to any visa in Australia (including review of a decision of the Department) to minors for whom the Minister is guardian under the *Immigration (Guardianship of Children) Act 1946* (IGOC minors).”

Best Interests of the Child

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.”

Australia’s processing of protection visa applications involving children does not include, or draw upon, an individualized and formal best interests determination which meets the standards specified by the UNCRRC.

No requirement to take best interests of the child into account in making a protection visa decision: see *AXL 17 v Minister for Immigration and Border Protection (No 2)* [2019] FCA 778 (30 May 2019)

Conclusion



References

Articles/Books/Reports

Carr, 'Incorporating a "Best Interests of the Child" Approach into Immigration Law and Procedure' (2009) 12 *Yale Human Rights and Development Law Journal* 120

Evenhuis, 'Child-Proofing Asylum: Separated Children and Refugee Decision Making in Australia' (2013) 25(3) *International Journal of Refugee Law* 535

Lundberg, 'The Best Interests of the Child Principle in Swedish Asylum Cases: The Marginalization of Children's Rights' (2011) 3(1) *Journal of Human Rights Practice* 49

Ottosson and Lundberg, "'People Out of Place"? Advocates' Negotiations on Children's Participation in the Asylum Application Process in Sweden' (2013) 27(2) *International Journal of Law, Policy and the Family* 266

Cases

AXL17 v Minister for Immigration and Border Protection (No 2) [2019] FCA 778 (30 May 2019)

AZAEF (by her litigation guardian Charman) v. Minister for Immigration and Border Protection [2016] FCAFC 3

References

MZAHU v. Minister for Immigration and Border Protection [2016] FCA 537

WZAOT v. Minister for Immigration and Citizenship [2013] FCA 136

Legislation

Migration Act 1958 (Cth)

Treaties

Convention on the Rights of the Child, 20 November 1989, 1577 UNTS 3

Australian Government Material

AAT, *President's Direction: Conducting Migration and Refugee Reviews* (1 August 2018)

AAT, *Migration and Refugee Division Guidelines on Vulnerable Persons* (November 2018)

Australian Government, *Explanatory Memorandum, Migration Legislation Amendment Bill (No. 1) 2014*

References

Australian Government, Combined fifth and sixth periodic reports submitted under article 44 of the Convention, UN Doc. CRC/C/AUS/5-6 (22 November 2018)

DHA, *Getting help from the Immigration Advice and Application Assistance Scheme (IAAAS)* <https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/protection-866/iaaas>

DHA, LEGENDcom>All stacks>5/5/2019>Policy - Refugee and Humanitarian>Protection Visa Processing Guidelines

PJCHR, *Seventh Report of the 44th Parliament* (18 June 2014)

International Material

UNCRC, *Concluding Observations on Australia*, UN Doc. CRC/C/AUS/CO/4 (28 August 2012)

UNCRC, *General Comment No. 5 on General Measures of Implementation of the Convention on the Rights of the Child*, UN Doc. CRC/GC/2003/5 (27 November 2003)

References

UNCRC, *General Comment No. 6 on Treatment of Unaccompanied and Separated Children Outside Their Country of Origin*, UN Doc. CRC/GC/2005/6 (1 September 2005)

UNCRC, *General Comment No. 12 on The Right of the Child to be Heard*, UN Doc. CRC/C/GC/12 (20 July 2009)

UNCRC, *General Comment No. 22 on the General Principles Regarding the Human Rights of Children in the Context of International Migration*, UN Doc. CMW/C/GC/3-CRC/C/GC/22 (16 November 2017)

UNCRC, *General Comment No. 23 on State Obligations Regarding the Human Rights of Children in the Context of International Migration in Countries of Origin, Transit, Destination and Return*, UN Doc. CMW/C/GC/4-CRC/C/GC/23 (16 November 2017)

Thank you