



AMICUS CURIAE

**WRITTEN RESPONSE TO QUESTIONS POSED BY THE COURT DURING THE
PUBLIC HEARING CONVENED IN CONNECTION WITH THE
REQUEST FOR ADVISORY OPINION ON MIGRANT CHILDREN BEFORE THE
INTER-AMERICAN COURT OF HUMAN RIGHTS**

Submitted by the Child Law Clinic, University College Cork, Ireland to the
Inter-American Court of Human Rights

15 November 2013

Signed as Director of the Child Law Clinic, Professor Ursula Kilkelly

Ursula Kilkelly

INTRODUCTION

1. The Child Law Clinic of University College Cork, Ireland, respectfully submits this *amicus curiae* brief in response to a question raised by the Inter-American Court of Human Rights during the public hearing on the Request for an Advisory Opinion on Migrant Children. Child Law Clinic member Emily Bartholomew participated in the public hearing on the Clinic's behalf on the 9th and 10th of October, 2013, in Mexico City, Mexico. The Child Law Clinic of University College Cork submitted an *amicus curiae* brief to this Court on February 13th, 2012, which focused on the circumstances of separated children.

2. The Child Law Clinic at University College Cork is an independent research clinic which provides student-led research services to those litigating children's issues. The Clinic is directed by Professor Ursula Kilkelly, and is made up of staff and graduate students of University College Cork. Members of the Clinic are highly skilled legal researchers, with considerable knowledge of child law and children's rights. As an organisation which promotes the use of law to reform the treatment of children, with a particular influence on evidence-based law, the Clinic has a particular interest in the issues raised by the prospective Advisory Opinion. This written response was prepared and written by Clinic member Emily Bartholomew under the supervision of Professor Kilkelly.

3. This written submission will respond to the following question posed by Judge Ferrer Mac-Gregor on the 10th of October 2013:

It is said that boys, girls and adolescents in administrative procedures must be heard and have their opinions taken into account. What mechanisms and system of guarantees can states implement to assure that children are listened to and have their views taken into account? What mechanisms must exist to achieve this?¹

5. In response to this question, having particular regard to the circumstances of separated children, the Child Law Clinic, University College Cork, Ireland, submits that the following mechanisms can be implemented to effectuate the children's right to be heard and to have their views taken into account:

- **The appointment of a guardian *ad litem*, free of conflicts of interest;**
- **The appointment of a legal representative – an individual separate and distinct from the guardian *ad litem*; and**
- **A child-friendly asylum interview that is tailored to the needs of the particular child.**

¹ Judge Ferrer Mac-Gregor, 10 October 2013, available at <http://www.sitios.scjn.gob.mx/videoteca/corteinterhum/?q=video/1488> (113:26 minute mark).

ANALYSIS

6. **Article 12 of the United Nations Convention on the Rights of the Child.** Each MERCOSUR country has signed and ratified the UN Convention on the Rights of the Child, and is thus obligated to protect the child's right to be heard, as codified by Article 12 of this instrument. Article 12 provides that:

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.²

7. **Separated children and the right to be heard.** The United Nations Committee on the Rights of the Child (hereinafter "UN Committee"), in its General Comments, has addressed the application of Article 12 of the UN Convention on the Rights of the Child to the circumstances of separated children.³ In this regard, the UN Committee has noted that immigrant and refugee children "are in a particularly vulnerable situation," and "[f]or this reason it is urgent to fully implement their right to express their views on all aspects of the immigration and asylum proceedings".⁴ Specifically, the Committee has noted that separated children have a right to express their views concerning which of the five durable solution options (including family reunification, return to country of origin, local integration, resettlement, and inter-country adoption) is pursued on their behalf.⁵ The UN Committee has also specified that separated children's views also need to be considered with respect to "guardianship, care and accommodation arrangements, and legal representation".⁶ With regard to the child's right to express their views concerning their representation, General Comment No. 6 likewise identifies the separated child's need to "be informed of arrangements with respect to guardianship and legal representation and [notes that] their opinions should be

² United Nations Convention on the Rights of the Child [hereinafter "UNCRC"], GA Res. 44/25, U.N. GAOR, 44th Sess. Supp. No. 49, at 167 U.N. Docs. A/44/49 (1989), art. 12.

³ See United Nations Committee on the Rights of the Child, *General Comment No. 6 (2005) Treatment of Unaccompanied and Separated Children Outside Their Country of Origin* UN Doc CRC/GC/2005/6, 1 September 2005 and United Nations Committee on the Rights of the Child, *General Comment No. 12: The Right of the Child to be Heard* UN Doc CRC/C/GC/12, 20 July 2009.

⁴ United Nations Committee on the Rights of the Child, *General Comment No. 12: The Right of the Child to be Heard* UN Doc CRC/C/GC/12, 20 July 2009, para. 123.

⁵ United Nations Committee on the Rights of the Child, *General Comment No. 6 (2005) Treatment of Unaccompanied and Separated Children Outside Their Country of Origin* UN Doc CRC/GC/2005/6, 1 September 2005, paras. 25, 81, 84, 90 & 91.

⁶ *Ibid.* at para 25.

taken into consideration".⁷ Likewise, regarding accommodation, the UN Committee advises that separated children "must be kept informed of the care arrangements being made for them, and their opinions must be taken into consideration".⁸ Finally, "the child has to be heard on his or her educational expectations and health conditions in order to integrate him or her into school and health services".⁹

8. Direct and indirect participation. Article 12 of the United Nations Convention on the Rights of the Child articulates that children have the right to participate in all matters affecting them either "directly, or through a representative".¹⁰ As applied to asylum-seeking separated children, this gives them the right to be involved in the asylum procedure (an administrative proceeding for the purposes of Article 12) directly or indirectly.¹¹ Direct participation can be accomplished by giving the child the opportunity to speak directly to the decision-maker in an asylum interview, as is discussed in greater detail in paragraph 11, *infra*. Indirect participation can be accomplished with the assistance of a representative, like a guardian *ad litem* or a lawyer, acting on the child's behalf and communicating the child's wishes. Both the a guardian *ad litem* and lawyer's role in promoting the separated child's right to participation via indirect participation will be addressed in turn below.

9. Indirect participation through the appointment of an independent guardian *ad litem*, free of conflicts of interest. A guardian *ad litem* is an adult - usually professional qualified as a social worker or a psychologist - whose role it is to represent the interests of the child in legal proceedings. More generally, the guardian *ad litem* ensures that the child is protected, participates in decisions affecting her/him, and receives the medical, housing, educational and other services necessary to promote the his or her welfare. Accordingly, the guardian has a very important role in ensuring the separated child's concerns regarding his or her accommodation, education, and healthcare services are voiced to the appropriate professionals so that the child may have his or her housing, education, and medical needs properly addressed. The guardian *ad litem* can also assist in realizing the child's right to express his or her views on which durable solution option is pursued and following up with the child's wishes, as securing a

⁷ *Ibid.* at para 37. See also Separated Children in Europe Programme, *Statement of Good Practice*, 4th rev. ed. (Copenhagen: Separated Children in Europe Programme, 2009) www.separated-children-europe-programme.org (accessed 12 November 2013) at p. 8: "Separated children should always be enabled and encouraged to voice their views, concerns and complaints regarding their care and guardianship, education, health services, legal representation and durable and secure solutions".

⁸ United Nations Committee on the Rights of the Child, *General Comment No. 6 (2005) Treatment of Unaccompanied and Separated Children Outside Their Country of Origin* UN Doc CRC/GC/2005/6, 1 September 2005, para 40.

⁹ United Nations Committee on the Rights of the Child, *General Comment No. 12: The Right of the Child to be Heard* UN Doc CRC/C/GC/12, 20 July 2009, para. 123.

¹⁰ UNCRC, art. 12.2 [emphasis added].

¹¹ According to the UN Committee, "specific examples of administrative proceedings relevant for children include ... asylum requests from unaccompanied children". United Nations Committee on the Rights of the Child, *General Comment No. 12: The Right of the Child to be Heard* UN Doc CRC/C/GC/12, 20 July 2009, para. 67.

durable solution is one of the key duties of the guardian.¹² It is critical that the guardian *ad litem* is an independent individual, free of conflicts of interests, so that the guardian can execute his or her duties effectively. To appoint a government employee to serve as the child's guardian *ad litem* would create potential conflict of interest in circumstances where the guardian may have to lodge a complaint against the government entity providing housing, education, and health services for the separated child, or may have decide to appeal an adverse determination of an asylum claim on the child's behalf. Clearly, it would unduly infringe upon the separated child's right to be heard if his or her guardian *ad litem* were compromised in communicating the child's views/complaints and furthering the child's interests by a lack of independence.

10. Indirect participation through the appointment of legal counsel, a person separate and distinct from the guardian *ad litem*. The role of the guardian *ad litem* is distinct from the role of the child's lawyer: while the lawyer's role is advise the child on her/his legal rights, assist the child in navigating the asylum application process, and represent the child in associated legal proceedings, it is the role of the guardian *ad litem* to secure the child's welfare through access to appropriate services, much like a parent. Best practice dictates that the roles of guardian *ad litem* and legal counsel are best fulfilled by two separate individuals.¹³ Unlike a guardian *ad litem*, a lawyer trained in the asylum

¹² According to the EU Trafficking Directive, "where appropriate, a guardian and/or a representative are appointed in order to safeguard the minor's best interests. A decision on the future of each unaccompanied child victim should be taken within the shortest possible period of time with a view to finding durable solutions based on an individual assessment of the best interests of the child, which should be a primary consideration". Directive of 5 April 2011: Preventing and Combating Trafficking in Human Beings and Protecting Its Victims, and Replacing Council Framework Decision 2002/629/JHA (2011/36/EU), pmb. at recital 23. See also United Nations Committee on the Rights of the Child, *General Comment No. 6 (2005) Treatment of Unaccompanied and Separated Children Outside Their Country of Origin* UN Doc CRC/GC/2005/6, 1 September 2005, para. 33; Defence for Children – ECPAT The Netherlands, *Core Standards for Guardians of Separated Children in Europe: Goals for Guardians and Authorities* (Leiden: Defence for Children – ECPAT The Netherlands, 2011) www.defenceforchildren.nl (accessed 12 November 2013) at pp. 17-19 & 29-32; OHCHR, UNHCR, UNICEF, UNODC, UN Women and ILO, *Joint UN Commentary on the EU Directive – A Human Rights-Based Approach: Prevent, Combat, Prevent Human Trafficking* (OHCHR, UNHCR, UNICEF, UNODC, UN Women & ILO, 2011) <http://www.unicef.gr/pdfs/n120329.pdf> (accessed 12 November 2013) at p. 76.

¹³ The Child-friendly Justice Guidelines and UNHCR suggest there should be two separate individuals. Per the Child-friendly Justice Guidelines, "combining the functions of a lawyer and a guardian *ad litem* in one person should be avoided, because of the potential conflict of interests that may arise...The lawyer does not have to bring forward what he or she considers to be in the best interests of the child...but should determine and defend the child's views and opinions, as in the case of an adult client". Council of Europe, *Guidelines of the Committee of Ministers of the Council of Europe on Child-friendly Justice* (17 November 2010) <http://www.coe.int/t/dghl/standardsetting/childjustice/Guidelines%20on%20child-friendly%20justice%20and%20their%20explanatory%20memorandum%204.pdf> (accessed 12 November 2012) at paras. 104-105. Per the Joint UN Commentary on the EU Trafficking Directive, "[t]he role of the guardian and the legal representative are

process and other areas of law relevant to the child's circumstances possesses the expertise necessary to inform the child about her or his legal options. The UN Committee has explicitly recognized that separated children should be appointed with both a guardian and legal representation, "free of charge".¹⁴ Bhabha posits that where children are seeking asylum, effective legal advocacy is particularly crucial because in light of the difficulty in proving child-specific forms of political persecution. In this regard, the challenge of persuading the decision-maker that "the persecuting regime would take the threat posed by the child seriously enough to give rise to a well-founded fear of persecution" is one of the factors noted.¹⁵ The assistance of a lawyer is thus critical to separated children putting forward the basis for their asylum claim.

11. Direct participation through tailoring the asylum interview to the needs of the particular child and having a child-friendly process. For many separated children, especially those who have been victims of trauma, an adversarial interview can be both traumatic and not conducive to the child telling his or her story.¹⁶ It follows that it best practice is to refrain from interviewing the separated child if to do so would be unduly traumatic, and the relevant information for the purpose of the refugee status determination process can be obtained through alternative methods.¹⁷ Where it is determined that it is appropriate to interview the child, the child should have the option of having both his or her guardian *ad litem* and legal counsel present, as well as an interpreter if necessary.¹⁸ As the UNHCR notes,¹⁹ the interviewer can make the process more

different. If it is appropriate for a child to initiate or take part in legal proceedings, he or she will also need a legal representative in the form of a qualified lawyer". OHCHR, UNHCR, UNICEF, UNODC, UN Women and ILO, *Joint UN Commentary on the EU Directive – A Human Rights-Based Approach: Prevent, Combat, Prevent Human Trafficking* (OHCHR, UNHCR, UNICEF, UNODC, UN Women & ILO, 2011)

<http://www.unicef.gr/pdfs/n120329.pdf> (accessed 12 November 2013) at p. 77.

¹⁴ United Nations Committee on the Rights of the Child, *General Comment No. 6 (2005) Treatment of Unaccompanied and Separated Children Outside Their Country of Origin* UN Doc CRC/GC/2005/6, 1 September 2005, paras. 36 & 69.

¹⁵ J. Bhabha, "Internationalist Gatekeepers?: The Tension Between Asylum Advocacy and Human Rights" (2002) 23 *Immigr. & Nat'lity L. Rev.* 159 at pp. 180-81.

¹⁶ See Amicus Curiae Brief submitted by The Child Law Clinic, Issue 4: Separated children seeking asylum have a right to a specialized asylum procedure that takes into account their particular vulnerabilities, 13 Feb. 2013 (discussing the prevalence of trauma amongst separated children).

¹⁷ H. Crawley, *Working with Children and Young People Subject to Immigration Control: Guidelines for Best Practice* (London: Immigration Law Practitioners' Association, 2d ed. 2012) <http://www.ilpa.org.uk/pages/publications.html> (accessed 12 November 2013) at pp. 42-43. See also Separated Children in Europe Programme, *Statement of Good Practice*, 4th rev. ed. (Copenhagen: Separated Children in Europe Programme, 2009) www.separated-children-europe-programme.org (accessed 12 November 2013) at p. 8 (indicating that interviews of separated children must involve such appropriate safeguards as to insure the interviews does not cause harm to the child.)

¹⁸ United Nations Committee on the Rights of the Child, *General Comment No. 6 (2005) Treatment of Unaccompanied and Separated Children Outside Their Country of Origin* UN Doc CRC/GC/2005/6, 1 September 2005, paras. 71 & 72.

¹⁹ It should be noted that the UNHCR points on interviewing children in the publication *UNHCR Guidelines on Determining the Best Interests of the Child* are made in the context

conducive to the child expressing his or her views by adopting a more informal manner to make the child feel more comfortable, or by breaking up the interview into two or three shorter interviews to make the process easier for the child to endure.²⁰ Likewise, the UNHCR recommends that when interviewing a child who has suffered trauma, the interviewer should employ such methods as "observation, sentence completion, games and drawing, to help the child to express traumatic experiences".²¹ The interviewer should also be mindful that children "may not be able to present information relating to context, timing, importance and details with the same precision as adults".²² Finally, the UN Committee requires that "the child should be given the 'benefit of the doubt', should there be credibility concerns relating to his or her story as well as a possibility to appeal for a formal review of the decision".²³ In sum, there are a number of safeguards a State can employ to facilitate the separated child's ability to express his or her views during the asylum interview.

of interviewing children for Best Interest Determination processes, rather than asylum interviews. See UNHCR, *UNHCR Guidelines on Determining the Best Interests of the Child* (Geneva: UNHCR, 2008) <http://www.unhcr.org/4566b16b2.pdf> (accessed 12 November 2013).

²⁰ A series of shorter interviews instead of one long interview can "reduce the stress of the child". Likewise, multiple interviews with the same interviewer and interpreter has the added benefit of giving the child time to build trust with the adults involved in the interview process. UNHCR, *UNHCR Guidelines on Determining the Best Interests of the Child* (Geneva: UNHCR, 2008) <http://www.unhcr.org/4566b16b2.pdf> (accessed 12 November 2013) at pp. 60-61.

²¹ UN High Commissioner for Refugees, *Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, HCR/GIP/09/08, (2009) <http://www.unhcr.org/refworld/docid/4b2f4f6d2.html> (accessed 12 November 2013) at p. 61.

²² *Ibid.* at p. 60.

²³ United Nations Committee on the Rights of the Child, *General Comment No. 6 (2005) Treatment of Unaccompanied and Separated Children Outside Their Country of Origin* UN Doc CRC/GC/2005/6, 1 September 2005, para. 71.

CONCLUSION

12. In conclusion, with regard to the following question:

It is said that boys, girls and adolescents in administrative procedures must be heard and have their opinions taken into account. What mechanisms and system of guarantees can states implement to assure that children are listened to and have their views taken into account? What mechanisms must exist to achieve this?

-the Child Law Clinic of University College Cork, Ireland, respectfully requests that this honourable Court consider the foregoing response:

The following mechanisms can be implemented to assure that separated children are listened to and have their views taken into account:

1. The appointment of a guardian *ad litem*, free of conflicts of interest;
2. The appointment of a legal representative - an individual separate and distinct from the guardian *ad litem*; and
3. A child-friendly asylum process that is tailored to the needs of the particular child making an asylum claim by:
 - a) Assessing whether there is a need to interview the particular child, taking into account whether doing so would be unduly traumatic, and considering alternative methods of obtaining the information necessary for the refugee status determination;
 - b) giving the separated child the option of having both his or her guardian *ad litem* and legal counsel present for the asylum interview;
 - c) providing an interpreter for the asylum interview if necessary;
 - d) Conducting the asylum interview in an informal manner that makes the child feel more comfortable, which may include i) splitting up the interview into 2 or 3 shorter interviews, or ii) allowing the child to communicate non-verbally through art; and
 - e) giving the child the benefit of the doubt when credibility concerns arise.