

UNACCOMPANIED & DENIED: REGIONAL LEGAL FRAMEWORK FOR UNACCOMPANIED MINORS ASYLUM SEEKERS (UMAS) *

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Abstract

Unaccompanied minor asylum seekers are vulnerable and thus, provided special international law protections. However, in reality, they are being mistreated as illegal immigrants and on the receiving end of ethnic violence, discrimination, restrictions in enjoyment of their rights duly recognised by international human rights law. This article identifies legislative, policy and support mechanisms which encompass the minimum UMAS guardianship standards at international law and which are evidence-based from best practice models for the provision of guardians for UMAS internationally. It presents situation of UMAS in relation to human rights violations with emphasis on the legal framework and practices in Australia and five ASEAN State Members. This article also highlights the various stands taken by various countries providing better legal framework and practices regarding the terms for protection and enforcement of human rights for UMAS. Finally, this article provides recommendations for Australia and ASEAN Member States to adopt in order to realise the international human rights of UMAS with respect to guardianship.

Keywords: human rights, asylum seekers, unaccompanied minor asylum seekers, Australia, ASEAN

Abstrak

Pencari suaka di bawah umur (Unaccompanied Minor Asylum Seekers (UMAS)) berada dalam keadaan rentan dan karenanya mendapat perlindungan hukum internasional khusus. Namun demikian, atas dasar ras, mereka seringkali diperlakukan sebagai imigran ilegal di banyak dan menjadi korban tindak kekerasan, diskriminasi dan hambatan menerima hak-hak mereka sebagaimana yang telah dijamin dalam hukum hak asasi manusia internasional. Artikel ini mengidentifikasi peraturan legislatif, mekanisme kebijakan dan dukungan, yang memenuhi standar minimum perwalian dalam hukum internasional dan yang terbukti menjadi model praktik terbaik terkait peraturan perwalian UMAS secara internasional. Artikel ini juga menjelaskan situasi yang dialami UMAS dalam kaitannya dengan pelanggaran hak asasi manusia dengan penekanan pada kerangka hukum dan praktik di Australia dan lima negara ASEAN. Selain itu, artikel ini juga menyoroti pandangan negara-negara dalam menyediakan kerangka hukum dan pelaksanaan yang lebih baik terkait persyaratan perlindungan dan penegakan hukum hak asasi manusia bagi UMAS. Pada bagian akhir, artikel ini memberikan rekomendasi bagi Australia dan negara anggota ASEAN untuk mengakui hak asasi manusia internasional UMAS terkait perwalian.

Kata Kunci: hak asasi manusia, pencari suaka, pencari suaka di bawah umur, Australia, ASEAN

I. Introduction

The international community has long recognised the particular vulnerability of UMAS and the consequent imperative for States to provide UMAS with special protection and assistance. Internationally, UNHCR and NGO resources exist which focus on the assistance required by UMAS in relation to identification, age assessment, registration and documentation, family tracing and reunification, access to refugee status determination procedures and complementary protection. However, far fewer resources exist which focus solely on guardianship issues for UMAS. Accordingly, guardianship of UMAS is the sole focus of this article. The appointment of an independent guardian for UMAS serves as the key procedural safeguard to ensure respect for the child's best interests,¹ and is often the gateway for UMAS to access the assistance in the fields noted above. Further, without effective guardianship arrangements, UMAS are particularly vulnerable to physical and psychological harm and legal disadvantage.

The lack of effective guardianship arrangements for UMAS is a key protection gap in Australia and South East Asia. However, there is growing momentum for a regional framework to enhance the realisation of the guardianship rights of UMAS as evidenced by the recent unanimous adoption of the ASEAN Human Rights Declaration,² the stated focus of the Regional Support Office for the Bali Process in Bangkok to develop a more harmonised, protection sensitive model to safeguard the rights of UMAS in South East Asia,³ and the recent appointment of an Australian National Children's Commissioner, whose mandate includes monitoring both the Australian government's legislation, policies and programs which affect children⁴ and Australia's level of compliance with its international obligations under the United Nations Convention On the Rights Of the Child (CRC).⁵

This article identifies legislative, policy and support mechanisms which both encompass the minimum UMAS guardianship standards at International law,⁶ and which are evidence-based from best practice models for the provision of guardians for UMAS internationally.⁷

¹ General Comment No. 6, paragraph 21.

² ASEAN Human Rights Declaration was adopted by ASEAN Member States at Phnom Penh, Cambodia (18 November 2012), <http://www.asean.org/news/asean-statement-communiques/item/asean-human-rights-declaration>, accessed 10 April 2013. In particular, see General Principle 4 on the rights of children, and Principle 39 which points to a shared interest and commitment among ASEAN Member States to cooperate for the purposes of promoting and protecting human rights and fundamental freedoms.

³ Regional Support Office The Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime, "Mapping and Analyzing the Protection Situation of Unaccompanied and Separated children in South East Asia," Project (2012), http://www.baliprocess.net/files/RSO/RSO_UASC%20Project_Final_060912.pdf, accessed 15 November 2015. The RSO's mapping exercise on UMAS includes the collection and review of statistical data on the number of UMAS who enter Indonesia, Malaysia and Thailand. Following the finalisation of the mapping exercise, the findings will be publicly disseminated.

⁴ Parliament of Australia, "Budget Review 2012-13: National Children's Commissioner" (May 2012), http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/BudgetReview201213/ChildrensCommissioner, accessed 17 November 2015.

⁵ *Ibid.*

⁶ The CRC has been ratified by Australia and all ASEAN Member States. See Annexure A of this Report for a comprehensive list of the international human rights of UMAS.

⁷ See Section 4 of this article for best practice models for the guardianship of UMAS.

II. International Human Rights of UMAS⁸

Australia and all ASEAN Member States have ratified the CRC and are therefore bound by its provisions in relation to UMAS. Article 3(1) of the CRC determines that in all actions concerning children, the best interests of the child must be the primary consideration. The following provisions of the CRC are also relevant to the rights of UMAS with respect to guardianship:

- a. Article 2(1): States must apply the CRC to all children within their jurisdiction without discrimination.
- b. Article 3(2): States must take appropriate legislative and administrative measures to provide the child with the care necessary for their wellbeing, taking into account the rights and duties of the child's guardian.
- c. Article 18(1): Legal guardians have the primary responsibility for the upbringing and development of the child, and the best interests of the child will be their basic concern.
- d. Article 18(2): States shall assist guardians in undertaking their child-rearing responsibilities and ensure the development of institutions, facilities and services for the care of children.
- e. Article 20(1)-20(3): A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State. This includes being placed in suitable alternative care with due regard being paid to the desirability of placing children in an environment consistent with his or her ethnic, religious, cultural and linguistic background.
- f. Article 22(1): States shall ensure that children seeking refugee status receive appropriate protection and humanitarian assistance in the enjoyment of their rights under the CRC and in other international human rights treaties or instruments to which the State is a party.
- g. Article 37(b): No child shall be unlawfully or arbitrarily deprived of his or her liberty.

The UNHCR has issued specific guidelines relating to UMAS. In relation to the issue of guardianship, the 1997 UNHCR Guidelines state that: It is suggested that an independent and formally accredited organization be identified/established in each country, which will appoint a guardian or adviser as soon as the unaccompanied child is identified. The guardian or adviser should have the necessary expertise in the field of child caring, so as to ensure that the interests of the child are safeguarded, and that the child's legal, social, medical and psychological needs are appropriately covered during the refugee status determination procedures and until a durable solution for the child has been identified and implemented. To this end, the guardian or adviser would act as a link between the child and existing specialist agencies/individuals who would provide the continuum of care required by the child.⁹

The provisions relating to guardianship in the CRC and the 1997 UNHCR Guidelines require States to:

⁸ See Annexure A of this article for a comprehensive list of the international human rights and best practice guidelines for the guardianship of UMAS.

⁹ UNHCR, "Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum," (February 1997), article 5.7.

- a. facilitate the provision of an independent and appropriately qualified guardian to all UMAS in their jurisdiction as soon as the UMAS is identified;
- b. ensure any decisions made thereafter in relation to the guardianship of UMAS are in their best interests;
- c. ensure the UMAS' views and opinions are considered in all decisions that affect them;
- d. provide a continuum of care which ensures effective cooperation between the various organisations charged with care of UMAS to meet their legal, social, medical and psychological needs until the refugee status determination procedures have been concluded and a durable solution for the UMAS has been implemented;
- e. ensure UMAS are placed in environment that is suited to their cultural and ethnic background, and maturity; and guarantee that under no circumstances will the UMAS be detained.

The international human rights of UMAS with respect to guardianship as outlined above require States to have robust systems in place to ensure the proper maintenance of guardianship arrangements for UMAS. This will necessarily involve the mobilisation of relevant aspects of the receiving State's executive, administrative, judicial and civil society apparatus. Without adopting this holistic approach to the guardianship of UMAS, States will be unable to, even minimally, realise the rights of UMAS to protection.

III. Current Gap in Guardianship Protection

A. Australia

UMAS who arrive by boat and are taken into immigration detention¹⁰

UMAS arrivals by gender	2010-11	2011-12
UMAS – male	387	1297
UMAS – female	24	99
TOTAL	411	1396

1. The Minister for Immigration's Role as Guardian

Under Australian law, the Minister for Immigration ('the Minister') is the legal guardian of all UMAS in Australia.¹¹ While the appointment of a guardian for unaccompanied children is a key procedural safeguard to ensure respect for the child's best interests,¹² guardianship arrangements in Australia currently provide inadequate protection for UMAS. In particular:

- a. The Minister is not an independent guardian. There is an inherent conflict between the Minister's role as guardian of UMAS and the Minister's functions as executor

¹⁰ Department of Immigration and Citizenship, "Annual Report 2011-2012: Offshore asylum seeker management," http://www.immi.gov.au/about/reports/annual/2011-12/html/performance/outline_4/program_4.3/offshore_asylum_seeker_management.htm, accessed 2 May 2013.

¹¹ Immigration (Guardianship of Children) Act 1946 (Cth), section 6.

¹² General Comment No. 6, paragraph 21.

- of Australia's immigration policy.¹³The United Nations Committee on the Rights of the Child has specifically stated that 'agencies or individuals whose interests could potentially be in conflict with those of the child's should not be eligible for guardianship.'¹⁴ Despite repeated recommendations by the Australian Human Rights Commission that Australian law should be amended so that the Minister is replaced with an independent legal guardian for UMAS¹⁵ and acknowledgement by the Department of Immigration and Citizenship (DIAC) of this 'perceived conflict of interest'¹⁶and an indication that 'policy work is being progressed to improve the guardianship regime',¹⁷ the issue remains unsatisfactorily addressed.
- b. The Minister is not formally accredited as a guardian and has no relevant expertise in the field of child caring. Moreover the content of the Minister's rights, duties and obligations are not prescribed by legislation.¹⁸ Further still, rather than having a legislatively entrenched duty to act in the best interests of the child in relation to guardianship decisions, Australian law explicitly stipulates that the Minister's duties as guardian are subordinate to the powers vested in the Minister under migration law.¹⁹
 - c. There is no consistent procedure by which guardians are appointed. In practice the Minister delegates his or her function as guardian to immigration officers, or relevant State or Territory child welfare authorities.²⁰ DIAC also contracts NGOs including the Australian Red Cross and Life Without Barriers to assist in meeting the educational, financial, health, housing and legal needs of UMAS.²¹ In a 2011 visit to an immigration detention facility in Sydney, the Australian Human Rights Commission noted that there was an ad hoc approach to the care and supervision of UMAS.²² Further, there was absence of clear written policy identifying the name and responsibilities of the immigration officer that had been delegated

¹³ See Human Rights and Equal Opportunity Commission, *A last resort? National Inquiry into Children in Immigration Detention*, (South Granville, NSW: J S McMillan Printing Group, 2004), pp. 18-19, http://www.humanrights.gov.au/human_rights/children_detention_report/report/index.htm, accessed 17 November 2015. The Human Rights and Equal Opportunity Commission has since been renamed the Australian Human Rights Commission.

¹⁴ General Comment No. 6, paragraph 33.

¹⁵ This recommendation has been repeatedly made by the Australian Human Rights Commission. See for example: Human Rights and Equal Opportunity Commission, *loc.cit.*; Australian Human Rights Commission, "Submission to the Joint Select Committee on Australia's Immigration Detention Network," (August 2011), https://www.humanrights.gov.au/sites/default/files/content/legal/submissions/2011/201108_immigration.pdf, 17 November 2015.

¹⁶ Department of Immigration and Citizenship, "Response to the 2011 Australian Human Rights Commission Statement on Immigration Detention in Villawood," p. 2, http://www.humanrights.gov.au/human_rights/immigration/idc2011_villawood_response.pdf, accessed 17 November 2015.

¹⁷ *Ibid.*

¹⁸ Mary Crock and Mary Anne Kenny, "Rethinking the Guardianship of Refugee Children after the Malaysian Solution," *Sydney Law Review* Vol. 34 (2012): 451.

¹⁹ Immigration (Guardianship of Children) Act 1946 (Cth), sections 8(2), (3).

²⁰ Department of Immigration and Citizenship, "Australian Immigration Fact Sheet 69. Caring for Unaccompanied Minors," <http://www.immi.gov.au/media/fact-sheets/69unaccompanied.htm>, accessed 22 November 2015. See also Immigration (Guardianship of Children) Act 1946 (Cth), section 5.

²¹ Australian Red Cross, "Asylum Seeker Assistance Scheme," <http://www.redcross.org.au/asylum-seeker-assistance-scheme.aspx>, accessed 22 November 2015; Chris Bowen MP, "Moving asylum seeker children into the community," (1 March 2011), <http://www.minister.immi.gov.au/media/cb/2011/cb159599.htm>, accessed 22 November 2015; Life Without Barriers, "Refugees and Asylum Seekers," <http://www.lwb.org.au/Services/Refugees/Pages/default.aspx>, accessed 22 November 2015.

²² Australian Human Rights Commission, *2011 Immigration Detention at Villawood: Summary of Observations from Visit to Immigration Detention Facilities at Villawood*, (2011), p. 25.

the Minister's powers of legal guardianship in relation to the UMAS held at the facility.²³ This lack of effective coordination between the bodies tasked with guardianship functions and day-to-day care of UMAS has the effect of undermining a framework that should otherwise operate to protect the specific vulnerabilities of UMAS and denies UMAS the continuum of care necessary to ensure that their individual legal, social, medical and psychological needs are appropriately met.

2. The Regional Processing Scheme

Following the introduction of the regional processing system in 2012,²⁴ any asylum seeker who arrives in Australia by boat without a valid visa may be transferred from Australia to a third country, such as Nauru or Papua New Guinea, for the processing of their claims for refugee protection under the laws of those countries.²⁵ The Minister ceases to be the guardian of UMAS who are sent to a regional processing country.²⁶ However, Australian law does not designate anyone to assume a guardianship role for UMAS in the place of the Minister. It is unclear what, if any, guardianship arrangements exist to oversee the welfare of UMAS who are sent to regional processing countries.²⁷ In relation to this, the Australian Human Rights Commission has stated that 'despite the fact that the transfer of unaccompanied children seeking asylum to a third country is lawful under Australian law, it may breach Australia's international human rights obligations under the CRC'.²⁸ In particular, the Commission notes that the current arrangements mean the Australian government is unlikely to be fulfilling its obligations to provide special protection and assistance to UMAS, nor its duty to treat their best interests as a primary concern.²⁹

B. Indonesia

The Indonesian government is not party to the 1951 Refugee Convention nor the 1967 Optional Protocol. Because there is no legal framework in Indonesia to protect asylum seekers, pursuant to Article 83(1) of the Indonesian Immigration Law, any alien in Indonesia who does not have a valid visa may be subject to detention at the discretion of immigration officers.³⁰ The effect of this provision is that all asylum seekers in Indonesia are vulnerable to detention or deportation.³¹ Indonesian law does not require a guardian to be appointed in respect of UMAS, and there are no specific policies or guidelines in place for the protection of UMAS. However, in response to concern about the increasing number of people seeking asylum in

²³ *Ibid.*

²⁴ Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012 (Cth).

²⁵ Migration Act 1958 (Cth) sections 198AB, 198AD: the Minister is able to designate a country as a 'Regional Processing Country' if the Minister thinks it is 'in the national interest' to do so.

²⁶ Immigration (Guardianship of Children) Act 1946 (Cth), sections 6(1), 6(2)(b).

²⁷ Australian Human Rights Commission, "Human rights issues raised by the transfer of asylum seekers to third countries," (November 2012), p. 17.

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ Indonesia. Undang-Undang tentang Keimigrasian (Law regarding Immigration), UU No. 6 Tahun 2011, LN No. 52 Year 2011 (Law Number 6 Year 2011, SG No. 52 Year 2011).

³¹ JRS Asia Pacific, *The Search: Protection Space in Malaysia, Thailand, Indonesia, Cambodia and the Philippines* (Bangkok: JRS Asia Pacific, 2012), pp. 17-19, https://jrsap.org/Assets/Publications/File/The_Search.pdf, accessed 20 November 2015); UNHCR, "2013 UNHCR Regional Operations Profile - South-East Asia," (2013), <http://www.unhcr.org/pages/49e488116.html>, accessed 5 November 2015.

Indonesia, the Directorate General of Immigration issued a Directive in September 2002.³² The effect of the Directive is that, while asylum seekers are initially registered as illegal immigrants upon their arrival in Indonesia, they are subsequently entitled to apply for asylum and must coordinate this process with the UNHCR and its partner organisations.³³ It is difficult to access data on the number of UMAS in Indonesia. In late 2011, more than 1,800 asylum seekers and refugees were recorded as being held in one of Indonesia's fourteen detention facilities.³⁴ In 2012, the Jesuit Refugee Service identified 109 UMAS being held in detention in Indonesia while they waited to be transferred to shelters in urban areas.³⁵

UMAS do not have access to the formal economy, education or health services other than what they can access through programs implemented by international organisations like the International Organization for Migration (IOM) and UNHCR and their local partners, which do provide temporary shelters, access to study in local schools and some vocational training albeit on a limited and ad hoc basis.³⁶ In 2012 there were 60 unaccompanied minors living in shelters operated by the Church World Service (CWS) in cooperation with the UNHCR.³⁷ Children living in CWS shelters are also provided with a monetary allowance and some basic educational services.³⁸ However it appears that such services are only available to unaccompanied minors who have obtained recognition as refugees from the UNHCR.³⁹ Those asylum seekers who are not registered with UNHCR and are not in detention generally live in urban slums or on the borders of major cities.⁴⁰

Thus while the 2002 Directive indicates that Indonesia is taking steps to improve the protections for asylum seekers who come into contact with its jurisdiction, the country is yet to introduce a holistic framework that provides for the guardianship of UMAS at all, or that protects them from potential physical and psychological harm.⁴¹

C. Malaysia

Malaysia is not a signatory to the Refugee Convention nor the 1967 Optional Protocol and all asylum seekers, including UMAS, are treated as illegal immigrants pursuant to the Immigration Act 1959/1963.⁴² The number of UMAS in Malaysia is

³² Directorate General of Immigration Ministry of Justice and Human Rights, Peraturan Direktur Jenderal Imigrasi tentang Penanganan Imigran Ilegal (Regulation of Director General of Immigration regarding Handling of Irregular Migrants), No. IM.1489.UM.08.05 Year 2010. This 2010 Directive replaces Directive from the Director General of Immigration No. F-IL.01.10-1297 on Procedures Regarding Aliens Expressing Their Desire to Seek Asylum or Refugee Status (Indonesia), No.F-IL.01.10-1297, <http://www.refworld.org/docid/3ed8eb5d4.html>, accessed 6 November 2015.

³³ JRS Asia Pacific, *loc.cit.*

³⁴ Antje Missbach and Frieda Sinanu, "The Scum of the Earth? Foreign People Smugglers and Their Local Counterparts in Indonesia," *Journal of Current Southeast Asian Affairs* Vol. 30 No. 4(2011): 67.

³⁵ JRS Asia Pacific, *loc.cit.*

³⁶ *Ibid.*, p. 60; Missbach and Sinanu, *op.cit.*:70.

³⁷ JRS Asia Pacific, *loc.cit.*

³⁸ *Ibid.*

³⁹ Missbach and Sinanu, *loc.cit.*

⁴⁰ *Ibid.*, p.68.

⁴¹ *Ibid.*, p.74, implies that UMAS in Indonesia may be spared detention due to their status as minors, and can instead be released into the care of an international organisation while they apply for asylum through UNHCR. This suggests that Indonesia may have special procedures in place for UMAS, however it may be that such special arrangements are ad hoc and discretionary.

⁴² Under the Immigration Act 1959/1963, section 55, the Minister for Immigration has the capacity to

not publicly available, however, in January 2013 approximately 21 930 children were registered with the UNHCR in Peninsular Malaysia.⁴³ The number of unregistered asylum seeking children in Malaysia is unknown, but believed to be significant.⁴⁴

Malaysian law does not require a guardian to be appointed in respect of UMAS,⁴⁵ and there are no specific policies or guidelines in place for the protection of UMAS.⁴⁶ UMAS are vulnerable to arrest, detention, corporal punishment and deportation⁴⁷ by both immigration authorities and the police and civilian group known as the People's Volunteer Corps (RELA).⁴⁸ The conditions in immigration detention facilities are poor, and UMAS are especially vulnerable to abuse as they are housed with adults, often without adequate access to food and water.⁴⁹ UMAS who are registered with the UNHCR are still in danger of being arrested,⁵⁰ however registration can improve the stability and safety of UMAS. The Office of Protection and Intervention (a division of UNHCR) monitor reports of arrests and detention, and visits detention centres to secure the release of asylum seekers that are registered with the UNHCR⁵¹, however, it can take several months for registered UMAS to be released back into the community.⁵²

Along with other children in Malaysia that are deemed to be illegal immigrants, UMAS do not have access to formal education or healthcare. In an attempt to address this, the UNHCR Community Development Unit has partnered with various NGOs to assist in providing health and education services, as well as access to social workers, and temporary shelters for vulnerable persons such as UMAS.⁵³ However, this informal network of services is often difficult to access, and favours those with community linkages.⁵⁴ It is therefore altogether insufficient to even minimally meet the international human rights of UMAS, let alone their right to the appointment of a guardian.

D. The Philippines

In 1981 the Philippines acceded to the Refugee Convention and the 1967 Optional

regularise the status of a refugee or asylum seeker by granting an IMM13 permit, which generally serves as a temporary residence permit. However, these permits are very rarely granted. See Jera Beah H. Lego (1), "Protecting and Assisting Refugees and Asylum-Seekers in Malaysia: The Role of the UNHCR, Informal Mechanisms, and the 'Humanitarian Exception'" *Journal of Political Sociology* Vol. 17 (2012): 84.

⁴³ Child Rights Coalition Malaysia, "Report for the Universal Periodic Review," (2013), p.8, <http://voc.org.my/blog/wp-content/uploads/2013/03/CRCoalition-UPR-report-Final.pdf>, accessed 6 November 2015.

⁴⁴ *Ibid.*

⁴⁵ The Guardianship of Infants Act 1961 does not set out any specific procedures for the protection and care of UMAS. Further, the Child Act 2001 permits the appointment of guardians (as defined in section 2 of the Act) in respect of children, but does not specifically require a guardian to be appointed for UMAS.

⁴⁶ Child Rights Coalition Malaysia, *loc.cit.*

⁴⁷ See Immigration Act of 1959/1963, section 6(3), which makes it a criminal offence to enter Malaysia illegally, punishable with a fine not exceeding 10,000 ringgit (approximately US\$2,800), and/or imprisonment not exceeding 5 years, and whipping of up to six strokes.

⁴⁸ Jera Beah H. Lego (2), "Frameworks for the Protection of Refugees and Asylum-Seekers in Malaysia and Thailand: Implications and Prospects," (2012), p. 2, <http://www.icird.org/2012/files/papers/Jera%20Beah%20H%20Lego.pdf>, accessed 6 June 2013.

⁴⁹ *Ibid.*

⁵⁰ Jera Beah H. Lego (1), *op.cit.*, p. 88 citing Human Rights Commission of Malaysia (Suhakam), "Annual Report 2009," p. 35.

⁵¹ *Ibid.*

⁵² Child Rights Coalition Malaysia, *loc.cit.*

⁵³ Jera Beah H. Lego (1), *op.cit.*, p.89.

⁵⁴ *Ibid.*, p.90.

Protocol, and became the first country in South East Asia to establish a procedure to protect UMAS as part of the broader protection afforded to refugees.⁵⁵ Unlike Indonesia and Malaysia, the Philippines Government (Refugee Processing Unit in the Department of Justice per Department Order 94),⁵⁶ rather than UNHCR, determines the refugee status applications of UMAS residing in the country. Department Order 94 reflects the basic principles of the Refugees Convention including non-refoulement, family unity, and the preclusion of punishment for illegal entry or stay, and also sets out the eligibility requirements for a grant of refugee status.⁵⁷ Further, the Department Order 94 provides the right for an applicant, including UMAS, to an interpreter, to be legally represented, and to access UNHCR should they request it.⁵⁸

Relevantly, it appears that the Department of Social Welfare and Development is the delegated guardian of all UMAS in the Philippines.⁵⁹ The Department of Social Welfare and Development provides social work, housing and healthcare services to UMAS.⁶⁰ Guardianship arrangements generally come into effect when the Department of Justice refers the case of an undocumented child located at the border to the Department of Social Welfare and Development.⁶¹ UMAS located at the border are usually not detained; if detained, the child will be released following this process of referral.⁶²

However, the current framework for guardianship of UMAS in the Philippines does not adequately protect the international human rights of UMAS, in particular the right to special protection and assistance under the CRC. The United Nations Committee on the Rights of the Child (the Committee) has repeatedly voiced concern over the absence of domestic legislation and policies in the Philippines that addresses the particular vulnerabilities of UMAS.⁶³ In this regard, the Committee has recommended that the Philippines:

*...introduce specific laws and administrative regulations that address the needs of asylum-seeking and refugee children and provide unaccompanied and separated asylum-seeking and refugee children with special procedures.*⁶⁴

E. Thailand

The Thai government is not a signatory to the Refugee Convention nor the 1967 Optional Protocol. In Thailand there is no refugee law or functioning asylum procedures; refugees living outside of designated refugee camps are regarded as living in the country illegally and 'the authorities can either try to resettle refugees or

⁵⁵ Philippine Immigration Act No. 613 of 1940 (as amended), section 47(B); Philippines Department of Justice, Department Order No. 94/1998: Establishing a Procedure for Processing Applications for the Grant of Refugee Status (4 March 1998), www.unhcr.org/refworld/docid/3ede2d914.html, accessed 24 November 2015.

⁵⁶ Philippines Department of Justice, *loc.cit.*

⁵⁷ JRS Asia Pacific, *op.cit.*, p. 26.

⁵⁸ Philippines Department of Justice, *op.cit.*, section 14.

⁵⁹ International Detention Coalition, *There are Alternatives: A Handbook for Preventing Unnecessary Detention* (2011), p. 25, www.idcoalition.org, accessed 24 November 2015.

⁶⁰ *Ibid.*

⁶¹ *Ibid.* See also Department of Justice, *loc.cit.*

⁶² International Detention Coalition, *loc.cit.*

⁶³ UN Committee on the Rights of the Child, *Consideration of Reports Submitted by State Parties under Article 44 of the Convention, Concluding observations: The Philippines*, 22 October 2009, CRC/C/PHL/CO/3-4, paragraphs 67 and 68.

⁶⁴ *Ibid.*

keep them in detention'.⁶⁵ Although Thailand has no national legislative framework or formalised asylum procedures for processing asylum seekers or, specifically, UMAS, the Thai government has provided long-standing temporary protection to refugees and displaced persons in refugee camps along the Myanmar border. However, the in-camp registration system for refugees is ad hoc⁶⁶ and the lack of a legal asylum processing and UMAS guardianship framework leaves UMAS in Thailand particularly vulnerable.⁶⁷

Although Section 1585 of the Civil Code (Thailand) provides that "A person who is not *sui juris* and has no parents, or whose parents are deprived of their parental power, may be provided with a guardian during minority",⁶⁸ there appears to be no formal scheme for the appointment of guardians for UMAS in the camps and care and protection arrangements for UMAS are uneven and ad hoc: some camps have group homes or boarding houses where UMAS are housed (with or without informal guardians)⁶⁹ and in most camps UMAS may also be housed in informal foster family arrangements.⁷⁰ It is difficult to obtain accurate data regarding the number of UMAS (disaggregated from the total number of asylum seekers and displaced persons in Thailand) although in a 2006 Report, the Lutheran Immigration and Refugee Service estimated that over 8,000 refugee minors were living in the border camps, in a variety of arrangements including in boarding houses, with blood relatives, with non-relative foster families or on their own.⁷¹

The care of UMAS in camps falls to UNHCR in partnership with the Catholic Office for Emergency Relief and Refugees (COERR) and other NGOs to provide UMAS with food, shelter, health care and access to education. However, significant economic activity is prohibited, and the refugees have no legal right to integrate formally into Thai society. In relation to UMAS there is no formal or holistic care structure and the level of care and supervision for UMAS depends on the efforts of NGO's and camp personnel and necessarily varies from camp to camp.

IV. An Holistic Approach to the Guardianship of UMAS

A. The holistic model

The adoption of a holistic approach by both the Australian government and ASEAN Member States would realise the rights of UMAS with respect to the provision of a guardian. In particular, a framework comprising:

⁶⁵ Danish Immigration Service, Rohingya refugees in Bangladesh and Thailand: Fact finding mission Bangladesh and Thailand (May 2011), p. 46, <http://www.nyidanmark.dk/NR/rdonlyres/B08D8B44-5322-4C2F-9604-44F6C340167A/0/FactfindingrapportRohingya180411.pdf>, accessed 6 November 2015.

⁶⁶ Leaving those who are not registered unable to apply to UNHCR for refugee determination. See Human Rights Watch, "Ad Hoc and Inadequate: Thailand's Treatment of Refugees and Asylum Seekers," <http://www.hrw.org/node/110100>, accessed 6 November 2015.

⁶⁷ *Ibid.*

⁶⁸ See Thai Civil Law, <http://www.thailandlawonline.com/table-of-contents/thai-private-law-the-civil-and-commercial-code#5>, accessed 6 November 2015.

⁶⁹ Human Rights Watch, *op.cit.*, p. 44: "In 2012, Human Rights Watch visited one of the boarding houses in Nu Po camp and observed children staying in narrow and overcrowded rooms. There were two caretakers for the 80 students living there."

⁷⁰ LIRS and Migration and Refugee Services United States Conference of Catholic Bishops, *A Shady Tree: Hope for Vulnerable Refugees in Malaysia and Thailand* (2006), p. 11, <http://lirs.org/wp-content/uploads/2012/05/MALASIA-THAILAND-REPORT-WITH-COVER.pdf>, accessed 6 November 2015.

⁷¹ *Ibid.*

1. **legislation** that embodies the international human rights of UMAS with respect to guardianship; and
 2. **policies** that support the legislation; and
 3. **support mechanisms** that realise the legislation and policies
- will provide a comprehensive and robust guardianship model that accords with international law and international best practice.

B. Best practice model: The Netherlands

The model adopted by The Netherlands with respect to the guardianship of UMAS provides an illustration of the holistic approach to the guardianship of UMAS. The Dutch Civil Code stipulates that minors, including UMAS, must be under the authority of a parent or legal guardian at all times. In cases where a child is without a parent or legal guardian, the law confers power on the Juvenile Court to appoint a representative to assume legal guardianship of the child.⁷² In order to qualify for the guardianship of unaccompanied minors in The Netherlands, organisations must meet the requirements set out in the 2005 *Youth Care Act*.⁷³ The Act also establishes the obligations of guardians, the recruitment guidelines that guardianship organisations must adhere to, as well as a complaints process.⁷⁴ Guardianship institutions in The Netherlands are directly accountable to the Dutch government, which ensures the relevant organisation is conforming to the provisions of the *Youth Care Act* and the Dutch Civil Code.⁷⁵

Responsibility for the guardianship of UMAS in The Netherlands rests with the Nidos Foundation ('Nidos'), an independent organisation that is subsidised by the Ministry in charge of asylum seeker policy.⁷⁶ Once the UMAS has been interviewed by Dutch authorities, Nidos will submit an application with the Juvenile Dutch Court to assume guardianship of the minor.⁷⁷ If the Court grants the application, Nidos becomes the legal guardian of the child until a durable solution is reached.⁷⁸ If it is determined by Nidos that it is not possible for the UMAS to return safely to his or her country of origin, the UMAS is deemed to require permanent guardianship and total integration into Dutch society.⁷⁹

Nidos appoints trained 'juvenile protectors' to tend to the needs of UMAS, with the overriding objective of realising the best interests of the child.⁸⁰ In order to qualify as a juvenile protector, guardians must have a bachelors degree in social work from

⁷² Dutch Civil Code, Book 1: Law of Persons and Family Law, article 245.

⁷³ European Network of Guardianship Institutions (ENGI), *Towards a European Network of Guardianship Institutions* (February 2010), p. 47, <http://www.epim.info/wp-content/uploads/2011/02/ENGI-Report-Towards-a-European-Network-of-Guardianship-Institutions.pdf>, 30 November 2015.

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

⁷⁶ Immigration and Naturalisation Service (IND), Staff Directorate for Implementation and Policy (SUB), Section Information and Analysis Centre (INDIAC), Dutch National Contact Point for the European Migration Network (EMN), *EMN-Study: Unaccompanied Minors in the Netherlands* (February 2010), pp.34 & 43, emn.intrasoft-intl.com/Downloads/download.do?fileID=932, accessed 28 November 2015.

⁷⁷ *Ibid.*, p. 31.

⁷⁸ *Ibid.*, p. 40.

⁷⁹ *Ibid.*, p. 35.

⁸⁰ Nidos, "Annual Report" (2007), www.nidos.nl/~media/annual%20report%202007.ashx, accessed 2 May 2013.

the Dutch social academy.⁸¹ Before they can be assigned to a ward, Nidos requires its guardians to undergo training in the form of workshops and company courses.⁸² Specifically, Nidos guardians are charged with overseeing:

1. the UMAS's asylum application;⁸³
2. the placement of UMAS in a suitable housing arrangement;⁸⁴
3. the enrolment of the UMAS in school;⁸⁵ and
4. anything else relevant to emotional and physical needs of the UMAS.⁸⁶

UMAS under the age of 12 are placed in foster families. Where possible, the family to which the UMAS is assigned will be from the same cultural background as the child seeking asylum.⁸⁷ UMAS over the age of 12 are placed with the Central Agency for the Reception of Asylum Seekers (COA).⁸⁸ The COA undertakes an assessment of the UMAS's developmental status and level of independence, and, based on this assessment, assigns them to a Child Residence Group (CRG), a Small Residential Unit (SRU) or a Campus.⁸⁹ CRGs accommodate anywhere from 4 to 12 minors who are placed under 24-hour supervision. SRUs house a maximum of 4 UMAS who receive 28 hours of supervision per week. Campuses are larger residences for UMAS that can contain up to a maximum of 100 UMAS between the age of 15 and 18.⁹⁰

While noting that the Campuses operated by the COA have been criticised for being harmful to the mental health and well being of UMAS who are housed in them,⁹¹ the broader system of guardianship whereby independent guardians are empowered to make informed decisions relating to the day to day care of the child, with the primary objective of realising his or her best interests is the system most likely to realise the UMAS' best interests.

This utilisation of legislation, policy and support mechanisms for the guardianship of UMAS in The Netherlands represents a model that has the potential to realise the best interests of the child as codified in the CRC and UN best practice guidelines.

C. Other Best Practice Models

In order to achieve the holistic model, guardianship institutions must be sufficiently resourced, independent of immigration authorities, and accountable. Furthermore, guardianship arrangements embody best practice when they are tailored to the special cultural, legal, health and educational needs of UMAS. While the involvement of civil society, specifically the Nidos Foundation, is central to the guardianship framework in

⁸¹ European Network of Guardianship Institutions (ENGI), *op.cit.*, p. 48.

⁸² Defence for Children International-ECPAT the Netherlands, Closing a Protection Gap (December 2010), p.34, <http://www.defenceforchildren.nl/images/20/1275.pdf>, accessed 17 November 2015.

⁸³ Immigration and Naturalisation Service (IND), Staff Directorate for Implementation and Policy (SUB), Section Information and Analysis Centre (INDIAC), Dutch National Contact Point for the European Migration Network (EMN), *op.cit.*, p.6

⁸⁴ *Ibid.*, pp. 34-35.

⁸⁵ *Ibid.*, p. 40.

⁸⁶ *Ibid.*, pp. 1-62.

⁸⁷ *Ibid.*, pp. 34-35.

⁸⁸ *Ibid.*, p.7.

⁸⁹ Carla Buil, "A Rights-Based Approach to Afghan Unaccompanied Minors in The Netherlands," (2012), p. 2, <http://mgsog.merit.unu.edu/ISAcademie/docs/PB8.pdf>, accessed 2 November 2015.

⁹⁰ Immigration and Naturalisation Service (IND), Staff Directorate for Implementation and Policy (SUB), Section Information and Analysis Centre (INDIAC), Dutch National Contact Point for the European Migration Network (EMN), *op.cit.*, p.35.

⁹¹ Carla Buil, *op.cit.*, p.37.

the Netherlands, guardianship institutions that are embedded within State apparatus also have the capacity to be robust and effective.⁹² For example, Hungary mobilises the State's child protection system to attend to the guardianship needs of UMAS.

Children residing in Hungary have equal access to the child protection system, regardless of whether they are citizens or non-citizens.⁹³ UMAS are entitled to a guardian by virtue of the Family Code,⁹⁴ and guardianship arrangements are regulated by the Child Protection Act and its implementation Decrees.⁹⁵ Following their arrival, UMAS are appointed a case guardian by the Guardianship Office, which is independent of the Office of Immigration and Nationality and funded by the Ministry of National Resources.⁹⁶

The case guardian is a child protection practitioner, with legal training, and so is qualified to care for UMAS during the asylum application process.⁹⁷ The professional qualifications and responsibilities of case guardians and carers are mandated by law.⁹⁸ However, it is noted that guardians do not necessarily have expertise, or experience to attend to the specific cultural needs of the child⁹⁹ and they may have a high case load of up to 40 UMAS at the same time.¹⁰⁰

During the asylum application process, UMAS reside in child protection residential care units ('care units') of 10-12 people,¹⁰¹ which are administered under the supervision of the Regional Child Protection Service. The key accountability mechanism for these care units is an operating permit system. In order to qualify for an operating permit, the care unit must meet standards in relation to organisational structure, principles and methodologies of care, and tasks and responsibilities of staff.¹⁰²

V. Conclusions and Recommendations

It is recommended that Australia and ASEAN Member States to adopt the following recommendations in order to realise the international human rights of UMAS with respect to guardianship:

⁹² Sweden's model for the guardianship of UMAS is another example of the holistic model. See European Migration Network, "Policies on Reception, Return and Integration arrangements for, and numbers of, Unaccompanied Minors- an EU comparative study," (2009); Anna Lundberg and Lisa Dahlquist, "Unaccompanied Children Seeking Asylum in Sweden: Living Conditions from a Child-Centred Perspective," *Refugee Survey Quarterly* Vol. 31 No. 2 (2012): 54.

⁹³ International Organisation for Migration (IOM), "Overview of Guardianship Systems for Unaccompanied Minor Asylum-Seekers in Central Europe- Synthesis Report," (2012), p.14, http://publications.iom.int/bookstore/free/UAMAS_Synthesis_Report2012.pdf, accessed 6 November 2015. See for example, Child Protection Act (1997) on child protection and guardianship administration.

⁹⁴ Act IV of 1952 on marriage, family and guardianship, § 70.

⁹⁵ See the XXXI Act on child protection and public guardianship administration (1997) and the 149/1997 (IX. 10) Government Decree on the guardianship authority, and on child protection and guardianship proceedings, cited by International Organisation for Migration (IOM), '*op.cit.*', p. 39.

⁹⁶ *Ibid.*, p. 40.

⁹⁷ *Ibid.*, p. 14.

⁹⁸ See in particular the 15/1998 (IV, 30) Welfare Ministry's Regulation on the professional responsibilities and operations of child welfare or child protection institutions and staff providing personal care: cited International Organisation for Migration (IOM), "Overview of guardianship systems for unaccompanied minor asylum-seekers in Central Europe- Synthesis report," (2012), p.24.

⁹⁹ International Organisation for Migration (IOM), "Overview of guardianship systems for unaccompanied minor asylum-seekers in Central Europe- Synthesis report," (2012), p.41.

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*, p. 14.

¹⁰² *Ibid.*, p. 41.

A. Legislation

Introduce a legislative framework for guardianship of UMAS that:

1. appoints an independent legal guardian for UMAS to safeguard his/her interests. Guardianship arrangements should be maintained until the child turns 18 or a durable solution is arrived at, such as return to country of origin, local integration or resettlement depending on what is in the best interests of the child;
2. delegates responsibility for guardianship arrangements to an independent and formally accredited guardianship institution;
3. requires the guardian to act in the 'best interests' of the child, including ensuring access to legal assistance, health, education, food and housing; and
4. ensures legislation dealing with guardianship of UMAS is not subordinate to existing or subsequent immigration legislation.

B. Policies

Create policies that:

1. facilitate effective cooperation between migration authorities and guardianship institutions, including clear demarcation of the responsibilities of migration authorities and guardianship institutions with respect to the guardianship of UMAS;
2. establish effective independent monitoring and accountability mechanisms to ensure that delegated guardianship arrangements are meeting the following minimum standards:
 - a. guardians are appointed as soon as possible after a UMAS arrives and an expert assessment that identifies the child's psychological, emotional and physical needs is conducted;
 - b. guardians have relevant childcare expertise, receive training and professional support, and undergo police checks;
 - c. guardians are of a similar cultural and linguistic background to the child, or trained to take care of the child's special cultural needs; and
 - d. guardian arrangements allow the voice of the child to be heard in all decisions that affect them.
3. improve data collection systems relating to UMAS and ensure this information is publicly available¹⁰³

C. Support Mechanisms

Ensure that the institution or institutions responsible for guardianship have: a government mandate to be present, and active in all planning and decision making processes regarding the child, including immigration hearings, day-to-day care arrangements and all efforts to search for a durable solution; sufficient funding and resources; and regular consultations with UMAS, Government and civil society actors.

¹⁰³ As recommended by the Special Rapporteur on the Human Rights of Migrants. See the Committee on the Rights of the Child, "2012 Day of General Discussion: the Rights of All Children in the Context of International Migration," p. 3.

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Annexure

International Human Rights of UMAS

International Treaties

Instrument	Rights Contained in Instrument
CRC	<ul style="list-style-type: none"> • Article 1: “Children” means all those below 18yrs • 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...’ • Article 3(1): ‘In all actions concerning children... the best interests of the child shall be a primary consideration.’ • Article 3(2): ‘States... undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.’ • Article 18(1): ‘States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.’ • Article 18(2): ‘... States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.’ • Article 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.’ • Article 20(1): ‘A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.’ • Article 20(2): ‘States Parties shall in accordance with their national laws ensure alternative care for such a child.’ • Article 20(3): ‘Such care could include, <i>inter alia</i>, foster placement, <i>kafalah</i> of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child’s upbringing and to the child’s ethnic, religious, cultural and linguistic background.’

	<ul style="list-style-type: none"> • Article 22(1): ‘States Parties shall take appropriate measures to ensure that a child who is seeking refugee status... 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.’ • Article 37(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.’
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<p>General Comments and Guidelines Source</p>	<p>Guideline contained in source</p>
<p>1997 UNHCR Guidelines on Policies and Procedures in dealing with Unaccompanied Children seeking asylum</p>	<ul style="list-style-type: none"> • Paragraph 5.7: ‘It is suggested that an independent and formally accredited organization is identified/established in each country, which will appoint a guardian or adviser as soon as the unaccompanied child is identified. The guardian or adviser should have the necessary expertise in the field of child caring, so as to ensure that the interests of the child are safeguarded, and that then child’s legal, social, medical and psychological needs are appropriately covered during the refugee status determination procedures until a durable solution for the child has been identified and implemented. To this end, the guardian or adviser would act as a link between the child and existing specialist agencies/individuals who would provide the continuum of care required by the child.’
<p>General Comment No. 6</p>	<ul style="list-style-type: none"> • Paragraph 21: The appointment of a guardian ‘...serves as a key procedural safeguard to ensure respect for the best interests of an unaccompanied or separated child.’ • Paragraph 33: ‘...States should appoint a guardian or adviser as soon as the unaccompanied or separated child is identified and maintain such guardianship arrangements until the child has either reached the age of majority or has permanently left the territory and/or jurisdiction of the State, in compliance with the Convention and other international obligations.’ • Paragraph 33: ‘The guardian or adviser should have the necessary expertise in the field of childcare, so as to ensure that the interests of the child are safeguarded and that the child’s legal, social, health, psychological, material and educational needs are appropriately covered by, inter alia, the guardian acting as a link between the child and existing specialist agencies/individuals who provide the continuum of care required by the child.’ • Paragraph 33: ‘Agencies or individuals whose interests could potentially be in conflict with those of the child’s should not be eligible for guardianship.’