Ministry of Justice

The Right Honourable
**Alex Chalk KC MP**
Lord Chancellor & Secretary of State for Justice

Rt Hon Harriet Harman KC MP
Joint Committee on Human Rights
Committee Office
House of Commons
London
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MoJ ref: 111578

11 January 2023

Dear Harriet,

**JCHR EVIDENCE SESSION REMAINING QUESTIONS**

Thank you for your letter of 13 December following my attendance at your evidence session on the same day. I welcome the Committee's thorough scrutiny of the Government's record on human rights.

I have dealt in turn with the questions raised in your letter, as well as two additional points about which I undertook to write to the Committee during the evidence session.

**Questions 1 & 2 - Safety of Rwanda (Asylum and Immigration) Bill**

In relation to the s.19(1)(b) statement made on the face of the Safety of Rwanda (Asylum and Immigration) Bill, this statement is not specific to one provision. It applies to the Bill as a whole. A statement under s.19(1)(b) makes clear, in this instance, that although the Home Secretary cannot state that the Bill is compatible with Convention rights with more than 50% certainty, the Government nevertheless is satisfied that there are respectable legal arguments for compatibility and wishes to proceed with it. All such a statement means is that the Home Secretary is not able to state now that the Bill's provisions are more likely than not compatible with Convention rights.

There is nothing improper or unprecedented about pursuing bills with a s.19(1)(b) statement. It does not mean the Bill is unlawful or that the Government will necessarily lose any legal challenges on human rights grounds. Parliament clearly intended s.19(1)(b) to be used as it is included in the Human Rights Act 1998.

The use in this case recognises the novel and ambitious approach taken by this Bill, and the fact there is room for argument both ways. Legislation and policy nearly always engage human rights and there are very often arguments on both sides of the equation on compatibility.

On your second question regarding the safety of Rwanda, the Supreme Court deemed Rwanda to be unsafe based on information provided to the Divisional Court on Rwanda up until summer 2022, prior to its hearing in September 2022. The Supreme Court recognised that changes could be delivered which could address the issues they raised. The treaty, which addresses the findings of the Court, alongside the evidence of changes in Rwanda since summer 2022, will enable Parliament to conclude that Rwanda is safe, and the Bill provides Parliament with the opportunity to do so.

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The treaty contains three main elements. It ensures individuals relocated to Rwanda under the Migration and Economic Development Partnership are not at risk of being returned to a country where their life or freedom would be threatened – known as 'refoulement'; it strengthens Rwanda's asylum system; and it establishes a new Appeal Body within Rwanda's court system. The functions of the independent Monitoring Committee have also been enhanced to ensure that obligations under the treaty are adhered to in practice. At the same time, the Bill allows decision makers (the Secretary of State, immigration officers, courts and tribunals) to consider claims on the ground that Rwanda is unsafe for an individual person due to their particular circumstances, despite the safeguards in the treaty, if there is compelling evidence to that effect. However, such an individualised claim cannot be considered if it is on the ground that Rwanda will or may remove or send the person in question to another State in contravention of any of its international obligations (including in particular its obligations under the Refugee Convention).

In light of this, upon operationalisation of the Bill and treaty, it is the Government's view that Rwanda will be a safe country to remove people for asylum processing.

**Question 3 – Support for asylum seekers**

In terms of question 3 on the provision of accommodation and financial support for asylum seekers, section 9 of the Illegal Migration Act 2023 (IMA) provides that individuals whose asylum claims are declared inadmissible under section 5 can obtain support under section 4(2) of the Immigration and Asylum Act 1999. The exception to this is families: where an asylum-seeker's household includes a child dependant under the age of 18, they will remain eligible for support under section 95 of the 1999 Act after their asylum claim is declared inadmissible.

Furthermore, on the availability of legal aid, as set out in paragraphs 25 up to 32 of Schedule 1 to the Legal Aid Sentencing and Punishment of Offenders Act 2012, legal aid is available ("in scope") for asylum cases, for victims of domestic abuse and modern slavery, for separated migrant children and for immigration cases where someone is challenging a detention decision. For immigration matters which are not in scope, individuals can apply for Exceptional Case Funding, which can be granted if they can show that without legal aid, there is a risk that their human rights may be breached. Through the IMA, all individuals who receive a removal notice under the IMA will have access to free legal advice in relation to the removal notice including any appeal seeking to suspend their removal.

We are consequently aiming to ramp up market capacity on immigration and asylum legal aid and, to that effect, we have increased fees for IMA work by 15% above the usual hourly rate. We are also implementing other measures including paying for the time it takes providers to travel to Immigration Removal Centres for Detained Duty Advice Scheme (DDAS) surgeries and allowing advice to be provided remotely for DDAS surgeries, at the discretion of providers and subject to their professional judgement and their obligations towards vulnerable persons.

Lastly, the IMA creates a duty on the Secretary of State to make arrangements for the removal from the UK of persons who meet the four conditions set out in section 2 of the Act. There is no discretion, and that duty applies regardless of any asylum or human rights or modern slavery claim a person may make, subject to the power by regulations to create exceptions from the duty.

From a modern slavery perspective, if a person subject to the above duty is referred into the National Referral Mechanism, they will receive a reasonable grounds decision (RG decision). If they get a positive RG decision, however, they are disqualified by sections 22 to 25 of the IMA from the protection on removal conferred on such a person by Nationality and Borders Act 2022, from any requirement to grant leave under section 65 of that Act, and from an obligation to provide modern slavery support. There are limited exceptions to these disqualifications. If a potential victim falls within an exception, notably the

cooperation with an investigation exception, they will cease to be subject to the disqualifications whilst the exception continues to apply to them.

Sections 22 to 25 of the IMA do not apply to an unaccompanied child within the meaning of section 4 of that Act (until they reach the age of 18). The provisions will also be suspended two years after they commence, unless their operation is extended by regulations subject to the affirmative procedure. It is possible for the Secretary of State to suspend the provisions earlier than they would otherwise suspend, by regulations subject to the negative procedure. If the provisions suspend, they can be revived by regulations subject to the affirmative procedure, or the made affirmative procedure in cases of urgency.

The position taken in the IMA is consistent with the UK's international obligations, including under both the European Convention on Human Rights (ECHR) and the Council of Europe Convention on Action against Trafficking in Human Beings (ECAT). In particular:

1. the position is consistent with Article 13(3) of ECAT, which provides for the public order disqualification; and
2. there are safeguards to protect rights under Article 4 ECHR:
    a. the disqualifications will not apply during the period the Secretary of State is satisfied that a person is cooperating with an investigation by a public authority into their alleged slavery or trafficking, if the Secretary of State considers it necessary for the person to be present in the United Kingdom to provide that cooperation, and if the Secretary of State does not consider that the public interest in the person providing that cooperation is outweighed by any significant risk of serious harm to members of the public which is posed by the person; and
    b. the potential for the person to make a suspensive claim if they can provide compelling evidence that removal to the safe country in question would give rise to a real risk of serious and irreversible harm.

**Question 4 - UK-Rwanda Asylum Partnership Treaty**

On your questions regarding the Monitoring Committee of the UK-Rwanda Asylum Partnership Treaty, the Committee was appointed following a thorough selection process with approval by the Joint Committee co-chairs, Clementine Mukeka who is Permanent Secretary at the Rwandan Ministry of Foreign Affairs and International Cooperation and Dan Hobbs, now Director General in the UK Home Office. The Committee is made up of people with different backgrounds and expertise who have a wealth of experience across sectors including migration, international law, asylum and assurance. The co-chairs were satisfied that the objective of experience in the areas of immigration, law, human rights, monitoring and audit was met across the Committee prior to approving appointments. As set out in Article 15(2) of the Treaty, the members of the Monitoring Committee are independent of both the UK and Rwandan Governments.

Further details on the Monitoring Committee members, including current details about its membership and meetings are set out here: https://www.gov.uk/government/publications/monitoring-committee-migration-and-economic-development-partnership.

The Monitoring Committee will provide an independent quality control assessment of conditions against the assurances set out in the Treaty between the UK government and Rwandan government independent of, but reporting and making recommendations to, the Joint Committee.

The Treaty provides for an enhanced system of monitoring, including daily monitoring during the first three months of operation of the Treaty. The key function of the Monitoring Committee (to advise on all steps to

be taken to ensure the Treaty is adhered to in practice) is set out on the face of the Treaty (Article 15(3)). The Joint Committee may add to this function, but only with the agreement of the Monitoring Committee (Article 15(3)). The Monitoring Committee sets its own terms of reference which will be published (Article 15(4) and (5)). The co-chairs of the Joint Committee can set additional terms of reference for the Monitoring Committee but not contrary to those set out in Article 15 of the Treaty (see Article 16(5)). The Monitoring Committee will have its own independent support team (Article 15(8)).

As set out in Article 14 of the Treaty, the Monitoring Committee has unfettered access for the purposes of completing their assessments and reports. This includes the ability to make unannounced visits to accommodation, asylum processing centres and any other locations where documents relating to relocated individuals or their claims and appeals is held.

The combination of the experience and expertise of the Monitoring Committee membership and the structural safeguards identified above means the UK Government is fully satisfied of the independence and effectiveness of the Monitoring Committee.

**Question 5 – Employment Tribunals**

Regarding your questions on outstanding Employment Tribunal cases, on 31 October 2023, which are the latest published data we have, outstanding caseload in the Employment Tribunals was 37,527.[1] This includes both single claims and lead multiple claim cases. It does not include a small number of claims being pursued through the new digital reform service which is being developed and tested in four early adopter sites.

These data are taken from management information collected by HMCTS and may be subject to some subsequent revision. You will note, for example, that the outstanding caseload for 30 September 2023 has been revised slightly upwards from 37,924 reported in the September 2023 statistics to 38,846 in the latest publication.

The Employment Tribunals (ETs) responded impressively to the pandemic and the outstanding caseload for claims bought by a single claimant remains significantly below its peak of over 51,700 in February 2021. This reduction in outstanding caseload is thanks in part to the steps we have taken to increase capacity through:

- the recruitment of additional judges: in 2022/23 we recruited an additional 19 salaried judges and 150 fee-paid judges, a further campaign is underway, and I expect to make further salaried appointments in March 2024;
- the deployment of legal caseworkers; and
- the implementation of a new electronic case management system.

In addition, the judiciary have established a virtual region of fee-paid judges able to hear cases remotely from any region. Between April and September 2023, the virtual region sat over 840 days, and heard nearly 1,200 cases that would have otherwise been postponed.

We continue to work closely with the Department for Business and Trade on further measures to support the ETs as they recover from the pandemic. We are, for example, planning to lay regulations in the Spring making amendments to the ETs' rules of procedure to support the implementation of the reform programme. Later in the year we intend to bring into effect the provisions in the Judicial Review and Courts Act 2022, which will transfer responsibility for ET procedure rules to the Tribunal Procedure Committee.

[1] https://www.gov.uk/government/statistical-data-sets/hmcts-management-information-october-2023

**Question 6 – Sentencing Bill and Whole Life Orders**

On Whole Life Orders (WLO), the change is designed to ensure that those who commit the very worst murders face the most severe punishment available. The imposition of a WLO would still be subject to judicial discretion, but, following our amendments, the court will be under a new duty to impose a WLO for all the categories of case currently listed within the WLO starting point in paragraph 2(2) of Schedule 21 (to the Sentencing Act 2020), unless there are exceptional circumstances. This includes cases such as the murder of two or more persons, where each murder involves a substantial degree of premeditation or planning, or a murder committed for the purpose of advancing a political, religious, racial or ideological cause.

We do not envisage that the proposals to create a duty for the court to impose a WLO will significantly affect the number of WLOs that are imposed given the rarity of these appalling crimes. What these proposals will do is to create a new duty so that the very worst cases of murder must be given a WLO unless there are exceptional circumstances. We envisage that establishing 'exceptional circumstances' should be a higher bar than the mitigating circumstances currently required to reduce a sentence from a WLO starting point to a minimum term order under Schedule 21 to the Sentencing Act.

We have also added the murder of a single victim involving sexual or sadistic conduct to the list of those offences that will become subject to the new duty to impose a WLO (unless there are exceptional circumstances). The public has been rightly shocked by a number of high-profile cases such as Sarah Everard, Zara Aleena and Sabina Nessa. In the cases of Ms Aleena and Ms Nessa, their murderers received 38 (reduced on appeal to 33 years) and 36 years respectively. While all murders are abhorrent crimes, the imposition of a WLO is the most severe form of punishment that the courts can impose and should be reserved for the most heinous cases. This Government believes that the murder of a single victim which involves sexual or sadistic conduct is exceptionally serious enough to warrant a WLO.

The European Court of Human Rights (ECtHR) has confirmed that section 30 of the Crime (Sentences) Act 1997 provides the necessary prospect of release and possibility of review to ensure the regime for imposing WLOs in England and Wales is compatible with Article 3 ECHR. The section 30 power allows the Secretary of State to release a WLO offender if he is satisfied that exceptional circumstances exist which justify the prisoner's release on compassionate grounds and is subject to the additional check of judicial review.

Those who receive a WLO under the new provisions will continue to be eligible for release by the Secretary of State pursuant to the section 30 power. Accordingly, we are confident that the new measures comply with Article 3 ECHR (see *Vinter v UK*,[2] *Hutchinson v UK*,[3] and *R v McLoughlin*[4]).

**Question 7 – Family Visas and Minimum Income Requirements**

As the Committee is aware, Article 8 ECHR (the right to respect for private and family life) is a qualified right. This means that its scope is qualified by the effect its protection has on the rights of others. Any interference with a qualified Convention right must be prescribed by law and necessary to achieve one of the listed aims. These include the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

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[2] *Vinter and others v United Kingdom*, Applications no. 66069/09, 130/10 and 3896/10, Grand Chamber judgment of 9 July 2013

[3] *Hutchinson v United Kingdom*, Application no. 57592/08, Grand Chamber judgment of 17 January 2017

[4] [2014] EWCA Crim 188

Primarily the interference with Article 8 as a result of the Minimum Income Requirement is necessary to protect the economic well-being of the country. This principle was found to be lawful by the Supreme Court in *MM (Lebanon) v SSHD*.[5]

Additionally the family Immigration Rules contain a provision for exceptional circumstances which would render a refusal decision to be a breach of Article 8, because such refusal would result in unjustifiably harsh consequences for the applicant, their partner, a relevant child or another family member whose Article 8 rights it is evident from that information would be affected by a decision to refuse the application. Where an individual is assessed as having exceptional circumstance this would result in leave being granted on a ten-year instead of a five-year route to settlement. This will not change under the revised Minimum Income Requirement when it is introduced in Spring 2024.

Whilst the interference with Article 8 is broadly similar for British citizens and non-British citizens who are settled in the UK, a person's individual circumstances may differ when considering exceptional circumstances.

**Daesh inquiry**

During our session I undertook to write with additional information with respect to questions on the repatriation of British citizens from north-east Syria. We are aware that there are British nationals, including women and unaccompanied children, located in displaced persons camps in north-east Syria. As you may know, the UK Government has advised against all travel to Syria since 2011. The UK has no consular presence within Syria from which to provide assistance. This makes it difficult to provide direct help to British nationals located there, but we carefully consider how we can support every British national that asks for our help.

We are committed to considering every request for consular assistance on a case-by-case basis, taking into account all relevant circumstances, including, but not limited to, national security. Where British unaccompanied minors and orphans are brought to our attention, we will seek to facilitate their return to the UK where feasible, and subject to national security concerns.

With regards to our policy in comparison with those of other likeminded States, the UK government is of the view that repatriating citizens and the management of risks posed by returnees from Syria is ultimately a matter for individual countries. Our priority remains ensuring the safety and security of the UK.
For those who remain in north-east Syria, the UK is supporting vulnerable populations there with vital, lifesaving assistance, including in camps for internally displaced persons, settlements and communities. We are working with international partners, including the UN, on opportunities to improve programme coverage, access, and coordination in north-east Syria.

On accountability, we continue to support the United Nations Investigative Team to Promote Accountability for Crimes Committed by Daesh/ISIL (UNITAD) to gather evidence of Daesh crimes in Iraq, and the work of the International, Impartial and Independent mechanism (IIIM) for their assistance on the investigation of the most serious crimes under international law committed in Syria. Simultaneously, the UK will continue to pursue all available avenues with international partners in seeking justice and accountability for those who have fought alongside Daesh.

The British Government is clear that those individuals who have fought for, or supported Daesh, whatever their nationality, should face justice through a fair trial in the most appropriate jurisdiction. Everyone who

[5] *R (MM (Lebanon) v Secretary of State for the Home Department* [2017] UKSC 10

returns to the UK from Syria, or certain parts of Iraq, including some children, should expect to be investigated by the police to determine whether they have committed criminal offences, to assess any safeguarding concerns, and to ensure that they do not pose a threat to our national security. Where there is evidence that a crime has been committed, individuals should expect to be prosecuted. However, decisions on prosecutions are taken independently by the police and Crown Prosecution Service on a case-by-case basis.

**Universality of human rights**

I also undertook to write to the Committee in response to Ms Cherry KC's question about the universality of human rights. As Ms Cherry KC rightly said to me, it is a fundamental tenet of modern human rights that they are universal and indivisible: this is reflected in, amongst many other things, Article 2 of the Universal Declaration of Human Rights, Article 2 of the International Covenant on Civil and Political Rights, and Articles 1 and 14 of the ECHR.

But it is legitimate to treat people differently in different circumstances: to take just two examples, a citizen may legitimately be treated differently, and have different legal rights, from a non-national; and a person in detention may have certain rights restricted when compared to a person at liberty. The ECHR, as interpreted by the case law of the ECtHR, fully recognises this principle. Rights are therefore universal, but what rights may mean for different people may legitimately differ depending on the circumstances, so long as any difference in treatment is justifiable within the framework of the relevant right. Therefore, everybody holds their rights without distinction on any ground; but the extent to which those rights may be limited, restricted, interfered with, or indeed vindicated, depends on each individual's circumstances, and the legitimacy of the limitation, restriction, interference, etc.

To be clear, there is nothing in the Safety of Rwanda (Asylum and Immigration) Bill that deprives any person of any of their human rights: in accordance with Article 1 of the ECHR, we shall continue to secure to everyone within our jurisdiction the rights and freedoms defined in the Convention. What we can legitimately do, and what we are doing, is to draw legal distinctions between those with a legitimate right to be in this country, and those who have come to this country illegally.

I hope that this additional information is helpful to the Committee in its ongoing work.

Yours sincerely,

**RT HON ALEX CHALK KC MP**

**LORD CHANCELLOR AND SECRETARY OF STATE FOR JUSTICE**