

Written evidence for the Women and Equality Committee - Inquiry into equality and the UK asylum process.

1. This evidence is submitted by Dr Rossella Pulvirenti, Senior Lecturer in Law and Manchester Metropolitan University¹

Summary:

2. My evidence discusses the reasons why in order to guarantee equality within the UK asylum process there is a need to fully respect international and national human rights legislative framework especially within the context of the Nationality and Borders Bill (the Bill) and the reform of the Human Rights Act (HRA).
3. The Parliament should ensure that any discriminatory impacts of the existing asylum system have been identified and properly addressed. Thus, the Government must further review and scrutiny the current system to fill the current gaps to ensure that inclusive real-world data is available to Parliament when it scrutinises the current asylum system (Sections 7-9).
4. The same Equality Impact Assessment admits that the proposed Bill creates more inequality rather than increasing the fairness of the asylum procedure. The submitted evidence clarifies that it is not possible to define those disadvantages either justified or proportionate on the basis of a deterrent effect for the following reasons (Sections 10-15). Also, with specific reference to the victims of modern slavery, the Government should establish a more supportive environment to encourage them to come forward as witnesses and break the chain of exploitation (Section 16-18).
5. The reform of the HRA will indirectly discriminate asylum seekers with protected characteristics with regards to the rights contained in Article 8 of the ECHR (right to enjoy family life) and Article 14 ECHR (prohibition from discrimination) (Sections 19 -24). Finally, with regards to “push back” boats at sea and offshore asylum processing, the interaction between the Human Rights Act and the new Bill would diminish the safeguards of asylum seekers with protected characteristics (Sections 25-26).
6. In order to assist Women and Equalities Committee’s scrutiny of its inquiry into equality and the UK asylum process and following the formal meeting (oral evidence session) on 26th of January 2022, I have outlined the following key points to be considered:
 - a) Has the Government provided Parliament with sufficient evidence to enable proper scrutiny of the fairness of the asylum process in the UK for individuals with protected categories? And considering the available evidence, how far is the Government able to address discrimination or specific dangers within the existing system?
 - b) What are the potential discriminatory impacts of the Nationality and Border Bills on asylum seekers with protected categories and how can these be addressed?
 - c) What are the potential discriminatory impacts of the Nationality and Border Bills on (protected categories of) victims of modern slavery and how will these be addressed?
 - d) What are the potential discriminatory impacts of the reform of the Human Rights Act and how will these be addressed?

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- e) Possible Interactions between the Bill and HRA Reform.
- a) Has the Government provided Parliament with sufficient evidence to enable proper scrutiny of the fairness of the asylum process in the UK for individuals with protected categories? And considering the available evidence, how far is the Government able to address discrimination or specific dangers within the existing system?
7. According to the Equality Act 2010 and the Public Sector Equality Duty, public authorities, including the Government, have a specific duty to monitor and publish information about how people are affected by policies and practices. This duty also extends to immigration cases and, more specifically, to the decision under the Immigration Acts relating to the entitlement of a person to enter or remain in the United Kingdom and to their appeal under the immigration provisions.²
8. In September 2021, the Commons Library published a document containing the asylum statistics for the UK, ³ based on Government's immigration statistics quarterly release.⁴ However, those official statistics did not include any data on how many asylum seekers fall within the categorisation of individuals with protected characteristics as defined by the Equality Act 2010. In addition to this, in April 2020 in a Policy Equality Statement (PES) which analysed 240 case files randomly selected from change of conditions applications made during the 2018/19 financial year.⁵ The PES circulated some fragmented statistics on age and sex of asylum seekers but no further data on disability, gender reassignment, pregnancy and maternity, race, religion or belief and sexual orientation. Thus, the Government has not been sufficiently transparent in publishing relevant data to determine whether asylum seekers and refugees with protected characteristics have been discriminated in the initial assessment stage and/or in the appeal phase.
9. As discussed, the Government will unlikely be able to address discrimination or specific dangers for those with protected characteristics within the existing system given the absence of an adequate monitoring system. In order to scrutinise the UK existing asylum system and Government's proposals to reform it, the Parliament will need to be provided with the relevant statistics, information and the evidence upon which the system works, and upon which the new reforms have been based. In that regard, the Government must collect comprehensive data on how the asylum system in the UK affects asylum seekers and refugees with protected categories and consider ways in which to mitigate adverse impacts on those groups.

² Legislation.gov.uk. 2010. Equality Act 2010, Section 115.

³ House of Commons Library, 'Asylum Statistics' (13 September 2021) <<https://researchbriefings.files.parliament.uk/documents/SN01403/SN01403.pdf>>.

⁴ Home Office, 'Immigration statistics quarterly release' <[Immigration statistics quarterly release - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/statistics/immigration-statistics-quarterly-release)>.

⁵ Home Office, Policy Equality Statement, Section 4 (21 April 2020) <[Policy Equality Statement PES 21 April 2020.pdf \(publishing.service.gov.uk\)](https://www.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/86444/pes_21_april_2020.pdf)>.

b) What are the potential discriminatory impacts of the Nationality and Border Bills on asylum seekers with protected categories and how can these be addressed?

10. The Nationality and Borders Bill creates indirect discrimination against asylum seekers and refugees with protected characteristics because it has disproportionately prejudicial effects on these groups. The Equality Impact Assessment of the Bill acknowledges it stating that “both the measures to strengthen border controls and the differentiated approach to asylum claims are more likely to disadvantage this group [of protected individuals]”.⁶ In making it harder for asylum seekers to access routes into the UK, some more vulnerable categories (such as women, children, LGBT individuals and those who have experienced trauma, including where there are mental health issues) might choose to board unsafe and dangerous journeys.⁷
11. The Equality Impact Assessment further clarifies that “such disadvantages would be justified and proportionate, in order to support the overarching policy objectives of the Plan, in particular to deter illegal entry into the UK. There would therefore not be any unlawful discrimination”.⁸ The UK has binding obligations towards asylum seekers and refugees under its jurisdiction according to the Refugee Convention, and it is not possible to define those disadvantages either justified or proportionate on the basis of a deterrent effect for the following reasons.
12. First, they are not justified (or justifiable) under both international and national law. The envisaged limitations curtail the right to seek asylum in contrast with Article 31 of the Refugee Convention, which must be reflected into domestic law. Similarly, they would infringe Articles 2 and 3 of the UN Convention on the Rights of the Child, which prohibits discrimination and requires public authorities to take into account the best interests of the child as a primary consideration. From a national point of view, they would violate the obligations imposed by the Equality Act 2010.
13. Second, even if the Government aims to find some mitigations, it has been vague on the practicalities surrounding this issue. How can it guarantee that those limitations are going to be proportionate? In the Consultation on the New Plan for Immigration: Government Response, those mitigating actions will include “appropriate training of relevant staff, including first responders, and in particular social workers and carers, who will assist in the identification of protected individuals, clear guidance to operational teams on areas such as interviewing and ensuring someone will be able to choose the gender of their interpreter and interviewer”.⁹ Those mitigations assumes that the British authorities will be able to access all the proposed claims. However, a two-tiered system (clause 11) suggests that the British authorities will not assess all the claims. Thus, in order to verify whether those individuals belong to a protected category to apply those mitigation and minimise the adverse impact against them, it would be necessary to create an additional point of

⁶ Home Office, ‘New Plan for Immigration Overarching Equality Impact Assessment of policies being delivered through the Nationality and Borders Bill’, para. 19 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1018188/Nationality_and_Borders_Bill_-_EIA.pdf>.

⁷ UK Government, ‘New Plan for Immigration- Consultation on the New plan for Immigration: Government Response’ (July 2021, para. 19 <[NEW PLAN FOR IMMIGRATION - Consultation on the New Plan for Immigration: Government Response \(publishing.service.gov.uk\)](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1018188/NEW_PLAN_FOR_IMMIGRATION_-_Consultation_on_the_New_Plan_for_Immigration:_Government_Response_(publishing.service.gov.uk))>.

⁸ Ibid.

⁹ Ibid., 17.

evaluation at an earlier stage. This would add further complexity to asylum casework because the competent authorities need to verify the existence of a protected individual before assessing their actual asylum claim. This would not increase the fairness of the system, as advanced by the Bill.

14. Third, deterrent effect cannot be used to justify any limitation to the right to seek asylum because it would assume people are rational calculators who logically weight costs and benefits of their actions. Conversely, the United Nations High Commissioner for Human Rights conducted research into the reasons unaccompanied children came to the UK and concluded that many of the children did not set out with an idea of coming specifically to the UK, but rather of escaping their existing situation.¹⁰
15. The Government must conduct further Equality Impact Assessment and ensure that this Assessment is made available to Parliament when it scrutinises the Government's proposals.

c) What are the potential discriminatory impacts of the Nationality and Border Bills on (protected categories of) victims of modern slavery and how will these be addressed?

16. On 15th December 2021, the Joint Committee on Human Rights released a report on how the Nationality and Borders Bill might affect victims of Modern Slavery.¹¹ Among its findings, this report concluded that Clauses 57 and 58 (deadlines on the ability of victims to disclose exploitation) has a potential discriminatory effect for certain categories of victims with protected characteristics. For instance, some individuals, like women, children, victims of abuses, might find more difficult to disclose what happened to them, to recognise themselves as victims to understand the consequences of non-compliance with legal requirements.¹² It creates extra barriers to the identification of victims and will exclude significant numbers of victims, including those with protected characteristics, from receiving protection and support. Thus, in line with the Joint Committee on Human Rights, the Government should amend Clause 58 to exclude protected categories from its scope of application.
17. Similarly, it focuses on the adverse impact on child victims of modern slavery since it does not distinguish between adult and child victims of trafficking. It suggests the UK cannot ensure that the best interest of the child is taken in full consideration when planning, implementing, and assessing asylum policies and deciding on individual cases). This is in contrast with several international and national instruments, such as the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children ("the Palermo Protocol") ratified on 9 February 2006, the Convention on the Rights of the Child, ratified on 16 December 1991 and the Equality Act 2010. The Parliament should ensure to amend the relevant provisions to ensure that all decisions are made in the child's best interest offering a protection against discrimination on the basis of their immigration status and criminalisation when they commit offences as a result of the exploitation should not be criminalised and that responses are trauma informed.

¹⁰ UNHCR, 'Destination Anywhere' (June 2019), p. 31, para. 3.6 <<https://www.unhcr.org/uk/5daf2cef4>>.

¹¹ Joint Committee on Human Rights, 'Legislative Scrutiny: Nationality and Borders Bill (Part 5)—Modern Slavery' (15 December 2021) <<https://committees.parliament.uk/publications/8328/documents/84688/default/>>.

¹² Ibidem, para. 8. See also the Nationality and Borders Bill Equality Impact Assessment, *supra* note 6, para. 19(b).

18. A less explored effect of the Bill on individuals who are both victims of modern slavery and asylum seekers is that the narrow support and protection victims will receive and the criminalisation of certain behaviours risk damaging prosecutions by allowing dangerous criminals to evade justice. Indeed, modern slavery is a “complex and largely hidden crime whose victims are often too traumatised to report their exploitation or may not self-identify as victims”.¹³ Thus, if those vulnerable individuals do not act as witnesses because intimidated by the hostile environment that the Bill creates, there will be little evidence to prosecute criminals. Thus, the Government needs to create a more supportive environment for victims of modern slavery to encourage them to trust the competent authorities and break the chain of exploitation.

d) What are the potential discriminatory impacts of the reform of the Human Rights Act and how will these be addressed?

19. It is difficult to assess the potential discriminatory impact of the human rights reform on asylum seekers with protected characteristics because the same Government Consultation clarifies there are currently no centrally collated statistics about those who bring human rights cases and on how human rights legislation affects people with protected characteristics under the Equality Act 2010.¹⁴

20. Despite this, it is very likely that the changes in the legislation will indirectly discriminate asylum seekers with protected characteristics with regards to the rights enshrined in Article 8 of the ECHR (right to enjoy family life) and Article 14 ECHR (prohibition from discrimination).

21. The UK guarantees family reunion (under Part 11 of the Immigration Rules) for close family members of both refugees and beneficiaries of humanitarian protection. Article 8 of the ECHR does not automatically guarantee a right to family reunification¹⁵ but provides a broader protection of the right to a family life when the Court considers whether the refusal to admit family members into the State territory (country B) constitutes a justifiable interference with the right to respect for family life.¹⁶ More specifically, the Court evaluates whether the separation from family members was voluntary, and whether it is possible to develop family life in a different country according to the “elsewhere test”. For refugees, who cannot return safely to their country of origin (country A) and thus cannot enjoy their family life ‘elsewhere’, this test creates a presumption in favour of country B, like the UK, destination of some refugees in the first instance.¹⁷ Thus, if country B would refuse the entry

¹³ UK Government, ‘2020 UK Annual Report on modern slavery’ (October 2020) <[2020 UK annual report on modern slavery \(publishing.service.gov.uk\)](https://www.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/92112/2020-uk-annual-report-on-modern-slavery.pdf)>.

¹⁴ Ministry of Justice, ‘Human Rights Act Reform: A Modern Bill of Rights: A consultation to reform the Human Rights Act 1998’ (14 December 2021), pp. 104-105 <<https://www.gov.uk/government/consultations/human-rights-act-reform-a-modern-bill-of-rights>>.

¹⁵ C. Costello, *The Human Rights of Migrants and Refugees in European Law* (Oxford University Press, 2015), pp. 127-130.

¹⁶ *Abdulaziz, Cabales and Balkandali v United Kingdom* (App. No. 9474/81), ECtHR, 28 May 1985, paras 67-68.

¹⁷ *Sen v the Netherlands* (App. No. 31465/96), ECtHR, 21 December 2001, para. 40; *Tuquabo-Tekle et al v the Netherlands* (App. No. 60665/00), ECtHR, 1 December 2005, paras 47-48.

for the purpose of family reunification, this would amount to an unlawful interference with the right to family life.

22. For children, the Court assesses whether family reunification constitutes the “most adequate” – rather than the only – way to develop family life.¹⁸ This creates a more robust protection to children’s right to enjoy family life because it allows family members who had already fled their countries of origin and currently live in a third country (country C) to move to country B, where the individual has been granted asylum, as long as they demonstrate that protection accorded to the refugee in country C is less favourable to the full enjoyment of the right to family life, although it does not necessarily mean that they would be at risk in country C to the same extent as they would be in country A. This would be the “most adequate” way to ensure the child’s enjoyment of family life.¹⁹
23. With this background in mind, the removal of the protection granted by Article 8 with a less effective family reunion mechanism will potentially encourage vulnerable family members, including women and children, to make dangerous journeys to the UK themselves, rather than waiting for family reunion through regular routes.²⁰
24. Regarding the removal of the clause of non-discrimination (Article 14 ECHR), the consultation suggests that the UK should rely on the Equality Act 2010 and the equality duty under section 149 of the Equality Act 2010 to eliminate unlawful discrimination, advance equality of opportunity and foster good relations.²¹ However, the non-discrimination clause with the ECHR (and international human rights law – both treaty law and customary law, more in general)²² impose positive obligations upon public authorities to address unlawful discrimination in protecting and fulfilling individuals’ human rights. The Government needs to assess the scope of obligations stemming from national law (Equality Act 2010 and the equality duty under section 149 of the Equality Act 2010) in comparison with the reach of Article 14 ECHR. In other words, what type of obligations the Equality Act 2010 and the equality duty under section 149 impose upon the stake holders? Do they ensure equal legal protection to individuals with protected characteristics? Or do they correspond to a diminished safeguard?

e) Possible Interactions between the Bill and HRA Reform

25. Finally, the erosion of the system created by the Human Rights Act would diminish the safeguards of asylum seekers with protected characteristics against the new Bill. For instance, the principle of *non-refoulement* (Articles 2 and 3 of the ECHR) prohibits to “push back” boats at sea (clause 44 and schedule 6 of the Bill). A change in the interpretation of the absolute prohibition of collective expulsion would indirectly discriminate certain categories, including children, women, people with disabilities or members of the LGBTIQ community, whose claim would not even taken into consideration by the British authorities.

¹⁸ *Sen v. the Netherlands*, supra note 17, para.40

¹⁹ *Sen v. the Netherlands*, supra note 17, para. 40; *Tuquabo-Tekle et al v the Netherlands*, supra note 17, para. 48-50; *Tanda-Muzinga v France* (App. No. 2260/10), ECtHR, 10 July 2014, para 75.

²⁰ UNHCR Updated Observations on the Nationality and Borders Bill, (January 2022, para. 48 <[UNHCR - UNHCR Updated Observations on the Nationality and Borders Bill, as amended](#)>.

²¹ UK Government, ‘Human Rights Act Reform: A Modern Bill of Rights: A consultation to reform the Human Rights Act 1998’ supra note 14, paras. 10 and 320.

²² *Ibid.*, 151-152.

26. Similarly, the Bill empowers the UK Government to send asylum seekers to a safe third country for offshore asylum processing (clause 28 and schedule 3 of the Bill). This system, modelled after Australia's scheme, is likely to undermine the fundamental rights of asylum seekers, as clarified by the UNHCR.²³ However, according to the current regime of extraterritorial application of human rights under the ECHR, the UK would be obliged respect, protect and fulfil asylum seekers' human rights in these offshore facilities. Thus, modifying the scope of the application of human rights protection, would diminish the ongoing legal responsibilities of the UK towards such individuals and limit their rights.

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²³ Human Rights Watch, 'Australia: Appalling Abuse, Neglect of Refugees on Nauru' (2 August 2016) <[Australia: Appalling Abuse, Neglect of Refugees on Nauru | Human Rights Watch \(hrw.org\)](#)>.