WRITTEN EVIDENCE FROM DR ROSSELLA PULVIRENTI[1] DR KAY LALOR[2] (RWA0012)

Summary

1. Our evidence addresses Points 1, 2, 3, 4, 5, 6 and 7 of the Call for Evidence. We conclude that:
    - The Bill exposes people seeking asylum to the risk of being *refouled* (Sections 2-3 of this evidence) or being re-trafficked (Section 6).
    - The Bill does not offer sufficiently robust protections to those subject to relocation. The new enforcement mechanisms in the UK-Rwanda Treaty are insufficient to protect the rights of people seeking asylum (Sections 4-5).
    - The Bill violates Article 13 of the ECHR because it removes a key fact-finding function of the courts and denies those facing relocation the right to access a national court (Sections 7-9).
    - Allowing for some claims based on compelling evidence relating to particular individual circumstances negatively affects the rights of people seeking asylum (Sections 10-13). First, empirical evidence shows that vulnerable individuals are often too traumatised to reveal their personal circumstances at the screening interview (Section 14). Second, the Bill does not clarify who is considered a vulnerable individual (Section 15) and, third, it creates a legal limbo for those people who are returned to the UK from Rwanda but who are unable to apply for asylum according to Illegal Migration Act 2023 (Section 16).
    - The Bill violates the effectiveness of the right to be heard under Article 34 of the ECHR when a) a member of the Executive a Minister of the Crown can decide whether the UK will comply with the interim measure and b) when a court or tribunal should regard the application of interim measure (Sections 17-20).
    - The Bill uses the Parliamentary Sovereignty to sidestep the principles of rule of law and separation of powers and to unduly limit the powers the Judiciary (Sections 21-22).
    - The Bill damages the UK's reputation in upholding international law's obligations (Section 23-24) and could expose the UK Government to responsibility for the violation of international human rights obligations before the European Court of Human Rights (Sections 25) and international criminal responsibility for the members of the Government before any domestic court (Section 26).

2. **Question 1 - Does the requirement to conclusively treat Rwanda as a safe country comply with the UK's human rights obligations, including in particular the prohibition of refoulement and the prohibition of inhuman or degrading treatment under Article 3 ECHR?**

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3. The Safety of Rwanda (Asylum & Immigration) Bill 2023 (hereinafter, Bill) exposes individual seeking asylum to the risk of being subject to direct *refoulement* against the right not to be subject to torture and inhuman and degrading treatment (Article 3 ECHR, customary law and *jus cogens*[3]) and flagrant denial of liberty or justice (Articles 5 and 6 of the ECHR). The Bill, together with the UK-Rwanda Treaty, attempts to shift the burden of responsibility for protecting the rights of people seeking asylum to Rwanda, but it does not absolve the UK from its human rights obligations.

4. The Supreme Court's judgment highlighted structural issues with the Rwandan Asylum System[4] based upon Rwanda's non-compliance with its agreement with Israel. [5] The Bill and the Treaty cannot guarantee that Rwandan Asylum System will instantly improve. Those structural changes (such as attitudes, and effective training and monitoring) require time. In the meantime, risk of rights violations will remain. Additionally, Rwanda is a sovereign state and the UK has no right to interfere with Rwanda's domestic legal and political processes. Thus, the enforcement system created by the UK-Rwanda Treaty, namely the Monitoring Committee, the Joint Committee and Article 22 of the UK-Rwanda Treaty, will necessarily be weaker than the protections afforded by the UK to people seeking asylum within UK territory.

5. The different legal basis of the agreement (a treaty rather than a Memorandum of Understanding) does change the effectiveness of the safeguards in place and does not counterbalance past evidence of non-compliance with asylum partnership agreements.

6. Finally, the Bill places some individuals seeking asylum at risk of being re-trafficked considering that the US Department of State 2023 Trafficking in Persons Report reads that the Rwandan Government "does not fully meet the minimum standards for the elimination of trafficking".[6]

7. **Question 2 - Does legislating, in clause 2, to prevent the courts considering any claim that Rwanda is not safe comply with the UK's human rights obligations, including in particular Article 13 ECHR?**

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[3] Cathryn Costello and Michelle Foster, 'Non-refoulement as Custom and Jus Cogens? Putting the Prohibition to the Test' (2016) in Heijer, M., van der Wilt, H. (eds) Netherlands Yearbook of International Law (T.M.C. Asser Press 2015) vol 46 M. Shaw, *International Law* (Cambridge: Cambridge University Press (2014), p.88; D. Moeckli, S. Shaw, S. Sivakumaran, International Human Rights Law (Oxford: Oxford University Press, 2017), p. 73; *Belgium v Senegal*, Judgments. Judgment of 20 July 2012, ICJ Reports 2012, 68-70; ICTR, *Furundžija*, Case No. IT-95-17/1T, Trial Judgment, 121 ILR 218, 260).

[4] *R (on the application of AAA and others) v Secretary of State for the Home Department* [2023] UKSC 42 [104].

[5] Ibid [95]-[100].

[6] US Department of State, *2023 Trafficking in Persons Report: Rwanda* (Office to Monitor Trafficking in Persons, 2023) https://www.state.gov/reports/2023-trafficking-in-persons-report/rwanda/

8. S. 2 of the Bill hinders Article 13 ECHR because it creates an *ad hoc* legal fiction on the safety of Rwanda. Indeed, the statement that Rwanda must be treated as safe does not render Rwanda safe for relocated people.

9. In imposing a statutory obligation upon the Home Secretary, immigration officers, courts, and tribunals to consider Rwanda as a safe country, the Bill removes a key fact-finding function of the courts and denies those facing relocation the right to access a court, which is an integral part of the right to an effective remedy before national authorities (Article 13 ECHR).[7] The Bill, thus, significantly weakens available protections for persons relocated to Rwanda by removing an essential safeguard prior to relocation. There is no mechanism in the Bill and in the UK-Rwanda Treaty that directly replaces this essential safeguard.

10. **Question 3- Does allowing for some claims based on compelling evidence relating to particular individual circumstances affect the Bill's compliance with human rights?**

11. S. 4(1)(a) establishes that S. 2 does not prevent decision makers and courts from assessing whether Rwanda is safe for particular individuals "based on compelling evidence relating specifically to the person's particular circumstances".

12. On paper, this might allow enhanced protections for vulnerable individuals or for individuals who would be rendered vulnerable in Rwanda as a result of particular characteristics – such as sexual orientation, gender identity, disability or age – to argue against their refusal to Rwanda.[8]

13. However, this negatively affects the rights of people seeking asylum for at least three reasons.

14. First, this would likely require that those individuals should disclose their particular circumstances, including their vulnerability, in their screening interview. Our own research with organisations supporting people seeking asylum demonstrates that individuals who have been traumatised need a significant period of time to talk about their trauma, with some taking years to disclose the full extent of what they have experienced.[9] This raises a real risk of a vulnerable, traumatised person or a person who is rendered vulnerable because of particular characteristics being removed to Rwanda without consideration of individual circumstances, and without a clear avenue for redress once removed to Rwanda.

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[7] Rhona K. M. Smith, *International Human Rights Law* (Oxford: OUP) 2018, 275-276.

[8] Rossella Pulvirenti, Catherine Jaquiss and Kay Lalor, 'The 'Asylum Partnership' Memorandum of Understanding with Rwanda and LGBTQI+ Asylum Seekers: an analysis of vulnerability in the Equality Impact Assessment and the European Convention on Human Rights' forthcoming in Journal of Immigration, Asylum and Nationality Law, 38.1 (2024).

[9] Rossella Pulvirenti, Catherine Jaquiss and Kay Lalor *The Rwanda Policy and the European Convention on Human Rights: An analysis of UK legal and policy duties* (2023) https://mcrmetropolis.uk/wp-content/uploads/2023/12/Report-Rwanda-Policy-and-the-ECHR.pdf

15. Second, Article 19 of the UK-Rwanda Treaty resettles a portion of Rwanda's most vulnerable refugees in the UK. However, there is no definition of what constitutes vulnerability, or of the intersectional and situational nature of vulnerability. Moreover, in the previous agreement with Rwanda, the government seemed unwilling to outline how it would identify individuals as particularly vulnerable and therefore not a suitable candidate for relocation.[10]

16. Third, the Bill exposes people seeking asylum to indirect *refoulement* when in S. (1)(3)(a) states that that "any person removed to the Republic of Rwanda under the 15 provisions of the Treaty (a "relocated individual") will not be removed from Rwanda except to the United Kingdom". This provision is not workable and will create a legal *limbo* for people seeking asylum because those returned to the UK from Rwanda would not be able to have their claims for refugee status considered in the UK (Illegal Migration Act 2023). Thus, having been returned from Rwanda, if there was no "safe third country" for this person to be relocated to, a situation appears to arise in which a person could not be removed, could not be returned, and could not have their claim considered.

17. Question 4 and - Does the way in which the Bill deals with applications for interim remedies from domestic courts, including by allowing them only in narrow circumstances, comply with the UK's human rights obligations?

And

Question 5 - Is expressly stating that it is for Ministers to decide whether to comply with interim measures issued by the European Court of Human Rights, and prohibiting courts or tribunals from having regard to them, consistent with the UK's obligations under the ECHR? Would deciding not to comply with interim measures put the UK in breach of the ECHR?

18. With regards to the interim measures, the Bill is in violation of the obligations contracted under the ECHR. Under Rule 39 of the Rules of European Court of Human Rights (ECtHR), interim measures are applied in exceptional circumstances in cases where there is an imminent risk of irreparable harm. They make the protection afforded by the ECHR effective.

19. With regards to Q. 5 of the call for evidence, the failure by the UK to comply with interim measures because it is for a Minister of the Crown to decide whether the United Kingdom will comply with the interim measure (S. 5(2) of the Bill) frustrates the effectiveness of right to be heard, as enshrined in Article 34 of the ECHR. The interpretation of this latter provision is within the jurisdiction of the ECtHR (Article 32 of ECHR) and cannot be reviewed unilaterally by any member state.

[10] Rossella Pulvirenti, Catherine Jaquiss and Kay Lalor, 'The 'Asylum Partnership' Memorandum of Understanding with Rwanda and LGBTQI+ Asylum Seekers (n 8); Rossella Pulvirenti, Catherine Jaquiss and Kay Lalor, *The Rwanda Policy and the European Convention on Human Rights* (n 9).

20. The same reasoning could be applied with regards to Q. 4 of the call of evidence. S. 5(3) of the Bill imposes a statutory obligation upon domestic judges to violate the ECHR. Thus, the UK would be in flagrant violation of its human rights obligation when a court or tribunal must not have regard to the interim measure when considering any application or appeal which relates to a decision to remove the person to the Republic of Rwanda under a provision of, or made under, the Immigration Acts. Additionally, this has negative implications for the separation of powers.[11]

21. **Question 6 - Does the Bill have any significant implications for constitutional principles, such as the sovereignty of Parliament, the separation of powers between the courts and Parliament and the rule of law, and the way in which they affect the protection of human rights in the UK?**

22. The Bill uses the Parliamentary Sovereignty to sidestep the principles of rule of law and separation of powers and to unduly limit the powers the Judiciary. First, S. 1(4) of the Bill employs principle of Parliamentary Sovereignty to circumvent any pre-existing international rules and to give effect to Government policy, when it says that the validity of an Act is unaffected by international law. Second, the Bill precludes judges from assessing the lawfulness of the action of the executive because judges must consider Rwanda to be a safe country (s.2 of the Bill), disapply the HRA (s. 3 of the Bill) and exclude the application of interim measures under s. 5 of the Bill. Finally, the disapplying of the HRA sets a dangerous precedent and weakens the framework and culture of human rights protections in the UK.

23. Question 7 - Does the Bill give rise to any other significant human rights concerns?

24. The Bill damages the UK's reputation when it rejects well-established principles of international law and the right any individual to claim asylum, prohibition of non-refoulement, prohibition from torture and freedom from slavery. Our empirical research with people seeking asylum shows that they envisioned the UK as a place where rights were respected and protected and they were horrified to find that the UK did not live up to its international reputation.[12]

25. The Bill could expose the UK Government to responsibility for the violation of international human rights obligations since it does not stop individuals from bringing a case to the ECtHR. Our research demonstrates that the UK does not meet the extensive obligations under the ECHR that are required in relation to the protection of people seeking asylum.[13]

26. Finally, the prohibition of torture (in the form of *non-refoulement*) and prohibition from slavery are considered crimes of universal jurisdiction, which could be prosecuted in any

[11] Sections 21-22 of this evidence.

[12] Rossella Pulvirenti, Catherine Jaquiss and Kay Lalor, *The Rwanda Policy and the European Convention on Human Rights* (n 9).

[13] Rossella Pulvirenti, Catherine Jaquiss and Kay Lalor, 'The 'Asylum Partnership' Memorandum of Understanding with Rwanda and LGBTQI+ Asylum Seekers (n 8); Rossella Pulvirenti, Catherine Jaquiss and Kay Lalor *The Rwanda Policy and the European Convention on Human Rights* (n 9).

national court.[14] Although a rare possibility, the Bill could arguably expose the leaders of the Home Office, who proposed the Bill; the Prime Minister, who is the Head of the Government; and the Cabinet Secretary, who is the head of the Civil Service, to international criminal charges in any country around the world.

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[14] Re *Pinochet* [1999] UKHL 1; *R. v. Bow Street Metropolitan Stipendiary Magistrate and others, Ex Parte Pinochet Ugarte* (No.3) [2000] 1 AC pp. 147 – 292.