WRITTEN EVIDENCE FROM AYESHA RIAZ (SENIOR LECTURER IN LAW AT UNIVERSITY OF GREENWICH) (RWA0012)

Introduction

1. This evidence was prepared by academic staff researching and teaching in the field of immigration and asylum law at Queen Mary University of London and the University of Greenwich. The author previously worked in the field of immigration and asylum law for a substantial number of years also. This evidence highlights the problematic nature of the Bill and argues that it fails to deal with the risk of refoulment.

2. This response to the call for evidence answers question one: 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 refoulment and the prohibition of inhuman or degrading treatment under Article 3 ECHR? It also partially answers questions two that asks whether clause 2 of the Bill complies with the UK's human rights obligations, including in particular Article 13 of the ECHR. The short answer to questions one and two is, ***no***.

3. It is noteworthy that the principle of non-refoulment is not just enshrined in the ECHR, but it can also be found within other international conventions/laws, such as Article 33(1) of the 1951 Refugee Convention. According to case-law, this provision does not only prohibit direct return of refugees/asylum seekers to the country they fear persecution from, but it also covers indirect returns via a third country.[1] There are also other international Conventions and Covenants that deal with refoulment of refugees that the UK has signed up to. For example, to name a few, the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984, the United Nations International Covenant on Civil and Political Rights of 1966, the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW).

4. The principle of non-refoulement can also be found in domestic law. See for example, see section 2 of the Asylum and Immigration Appeals Act 1993, section 94 of the Nationality, Immigration and Asylum Act 2002 Act and paragraph 13 of schedule 3 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004. Asylum seekers are therefore protected against refoulement by these Acts, the ECHR and the Refugee Convention 1951, as well as the Conventions/international laws mentioned above (amongst others).

5. It is noteworthy that the Human Rights Act (hereinafter HRA) 1998 gives domestic effect to the ECHR. According to section 6 of the HRA, it is unlawful for a public authority, including the Secretary of State for the Home Department (hereinafter SSHD) to act in a way that is incompatible with the ECHR, such as Article 3. The Supreme Court in its judgment dated 15 November 2023, held that under section 6 of the HRA, it is unlawful for the SSHD to remove asylum seekers to countries where there are substantial grounds to believe that they would be at risk of refoulment.[2] When asylum seekers/refugees are subjected to removal from

[1] *R v Secretary of State for the Home Department, Ex p Bugdaycay* [1987] AC 514, 532.
[2] *R (on the application of AAA (Syria)) v SSHD* [2023] UKSC 42, para 28.

the UK to other countries, domestic courts have applied the HRA in accordance with the principles laid down by the European Court of Human Rights (hereinafter ECtHR).[3]

Case-law developed by the ECtHR on non-refoulement under Article 3 of the ECHR

6. There are many cases that deal with the issue of non-refoulment that even the Supreme Court discussed.[4] In the case of *Soering v United Kingdom*,[5] it was held that the contracting parties under Article 3 of the ECHR should not subject persons to torture or to inhuman or degrading treatment. Therefore, asylum seekers cannot be removed to other States where there are substantial grounds for believing that they would be at real risk of receiving such ill-treatment.[6]

7. Article 3 confers an absolute right, the breach of which cannot be justified by any interests of the State. The ECtHR confirmed in *Chahal v UK*,[7] that a person who may be a danger to national security cannot be expelled to face torture. This simple assertion, confirmed in *N v Finland*,[8] has become the focal point of an international debate.

8. Similarly, in the case of *Ilias v Hungary*,[9] it was held that a State cannot remove an asylum seeker to a third intermediary country, unless there are adequate procedures in place (within that country) so that the asylum seeker will have access to an adequate asylum system and will not be refouled. Otherwise, there could be a breach of Article 3 of the ECHR.[10] The Court stated:

   '… in all cases of removal of an asylum seeker from a contracting state to a third intermediary country without examination of the asylum requests on the merits … it is the duty of the removing state to examine thoroughly the question whether or not there is a real risk of the asylum-seeker being denied access, in the receiving third country, to an adequate asylum procedure, protecting him or her against refoulement. If it is established that the existing guarantees in this regard are insufficient, article 3 [of the ECHR] implies a duty that the asylum-seekers should not be removed to the third country concerned'.[11]

9. The Court in *Ilias* confirmed that well documented general deficiencies within authoritative reports including the UNHCR 'are considered to have been known'.[12] Thus, the expelling State cannot assume that the asylum seeker will be treated in accordance with Convention standards and therefore, it must verify how the authorities of that country apply their legislation on asylum.[13]

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[3] See for example, *MSS v Belgium and Greece* App No 30699/09 (ECtHR, 21 January 2011).
[4] *R (on the application of AAA (Syria)) v SSHD* [2023] UKSC 42 [2023] UKSC 42.
[5] (1989) 11 EHRR 439.
[6] ibid, para 23.
[7] (1996) 23 EHRR 413
[8] (2005) 43 EHRR 12
[9] Application no 47287/15, Grand Chamber.
[10] ibid, para 134.
[11] ibid.
[12] ibid, para 141.

10. The seminal case of *Othman v UK*,[14] concerned the sufficiency of assurances that were given by Jordan to the UK, as Othman was being deported there. The Court noted that assurances were not in themselves sufficient to ensure adequate protection against the risk of ill-treatment.[15]

11. In the case of *Zabolotnyi v Mateszalka District Court, Hungary*,[16] diplomatic approaches were relied upon. The court examined the sufficiency of assurances that the Hungarian government gave to the UK government regarding Mr Zabolotnyi, who may have been subjected to ill-treatment in Hungary. It was held that the Court was required to examine all the relevant evidence.[17] In doing so, it was noted that *past breaches* of similar assurances by the requesting State were relevant to the question of whether the requesting State could be relied upon to comply with its assurances.[18]

12. In the case of *MSS v Belgium*,[19] it was accepted that the shortcomings in the Greek asylum procedure were such that the applicant faced a risk of refoulement to Afghanistan without any real examination of the merits of his asylum application and without access to an effective remedy, in violation of Articles 13 and 3 of the ECHR.[20] The ECtHR clarified that it must take an urgent decision under rule 39 where the applicant's expulsion was imminent (at the time when the case is brought before a court).[21]

13. The court in the case of *Mohammadi*,[22] stated that the expelling State is required to ensure that the intermediary country's asylum procedure affords sufficient guarantees to avoid an asylum-seeker being removed, directly or indirectly, to his country of origin without a proper evaluation of the risks he faces from the standpoint of Article 13 of the ECHR.

***AAA (Syria) and others) v Secretary of State for the Home Department* on Refoulment**

14. The UK Government has drafted a new agreement with Rwanda dated 12 December 2023 following the Supreme Court's decision.[23] According to paragraph 13 of the Agreement, the UK Government and the Government of Rwanda,

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[13] ibid.
[14] (2012) EHRR 1.
[15] ibid, para 187.
[16] [2021] UKSC 14.
[17] ibid para 50; *R (on the application of AAA (Syria) and others) v SSHD* [2023] UKSC 42, para 49.
[18] ibid paras 46, 49.
[19] [2011] 53 EHRR 2.
[20] ibid, para 321.
[21] ibid, para 355.
[22] *Mohammadi v Austria (71932/12) 3 July 2014* at [60].
[23] UK Government, 'Safety of Rwanda (Asylum and Immigration) Bill: Policy Statement' (12 December 2023), Available at: assets.publishing.service.gov.uk/media/657850ff254aaa000d050b07/Policy_Statement_-_Safety_of_Rwanda__Asylum_and_Immigration__Bill.pdf.

'have agreed and begun to implement assurances and commitments to strengthen Rwanda's asylum system. These assurances and commitments provide clear evidence of GoR's [Government of Rwanda] ability to fulfil its obligations generally and specifically to ensure that Relocated Individuals face no risk of refoulement. These assurances and commitments, together with the treaty and conclusions from Foreign, Commonwealth and Development Office experts which are reflected throughout this Statement, allow HMG [Her Majesty's Government] to state, with confidence, that the Supreme Court's concerns have been addressed and that Rwanda is safe'.[24]

15. The Supreme Court stated that it is *not* required to accept the government's evaluation of assurances unless there is compelling evidence to the contrary,[25] which seems to be the case here given the Rwandan authorities record on failing to abide by the principle of non-refoulment, and its general human rights record (discussed in more detail below). Accordingly, the Supreme Court pointed out that there was a need to carry out a fact-sensitive examination of how the assurances operated in practice.[26] This involved checking the terms of the assurances, the general human rights situation in the receiving State (which were criticised by the UNHCR), its laws (which appear workable) and practices (which are questionable) in abiding by similar assurances, the existence of monitoring mechanisms, and the examination of the reliability of the assurances by the domestic courts of the sending state.[27] The Supreme Court placed significant importance on the UNHCR's evidence regarding the defects within the Rwandan asylum system in reaching this conclusion.[28]

16. The Supreme Court criticised the approach of the Divisional Court, because it had failed to properly consider the evidence that was placed before it and it had failed to ascertain the reliability of assurances that were given by Rwanda, that detailed the serious and systemic defects in Rwanda's procedures and institution for processing asylum claims, its history of breaching the principle of non-refoulment, which continued during the negotiation of the Migration and Economic Partnership,[29] and after its execution, its failure to abide by similar assurances which it had given to another foreign government (Israel).[30]
17. The Supreme Court also noted that according to the evidence that the UNHCR had presented to the Divisional Court, the Rwandan authorities had failed to comply with their obligations under the 1951 Refugee Convention.[31] In particular, the Divisional Court was provided with a table that contained at least 100 allegations of refoulment and threatened refoulment (enclosed within the UNHCR's evidence and within the minutes of meetings with the Home Office officials).[32] The

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[24] ibid.
[25] *R (on the application of AAA (Syria) and others) v SSHD [2023] UKSC 42*, para 52.
[26] ibid, para 48.
[27] ibid.
[28] ibid, para 71.
[29] The UK and Rwanda announced a new Migration and Economic Development Partnership on 14 April 2022 which provides for the relocation of individuals who arrive in the UK illegally (or for those that do not have the right to be in the UK) to Rwanda after 1 January 2022. See, UK Government, 'Policy Paper, Migration and Economic Development Partnership: Factsheet' (15 November 2023) Available at: https://www.gov.uk/government/publications/migration-and-economic-development-partnership-factsheet/migration-and-economic-development-partnership-factsheet
[30] *R (on the application of AAA (Syria) and others) v SSHD* [2023] UKSC 42, paras 50, 60.
[31] ibid, para 62.

Supreme Court noted that the UNHCR possessed 'unique and unrivalled expertise' of asylum and refugee law.[33] It possessed information about the practical realities of the Rwandan asylum system, which the UK Home Office acknowledged.[34] Thus, as a result of the above-mentioned information and case-law, the Supreme Court stated that importance needed to be attached to the evidence of the UNHCR.[35]

Conclusion

18. According to the evidence presented to the Supreme Court, Rwanda had a history of refoulment, and an inadequate asylum system.[36] This was a relevant factor in assessing whether persons that were due to be removed to Rwanda (in order for their claims to asylum to be decided by the Rwandan authorities), were at risk of refoulement.[37]

19. Therefore, if the UK Government does not amend the Bill and conclusively treats Rwanda as a safe country without regard to its human rights obligations, it would not only be contravening the ECHR, HRA, the Refugee Convention and the other conventions/international/domestic laws discussed above, but it would also be acting in contravention of the recent decision of the Supreme Court in which it held that there were substantial grounds for believing that asylum seekers that were removed to Rwanda would be at risk of refoulment.[38]

(12 January 2024)

[32] ibid para 89.
[33] ibid, para 66.
[34] ibid, para 68
[35] ibid.
[36] ibid, para 63.
[37] ibid.
[38] ibid, paras 63, 73.