Externalization of Migration and the Impact on the Human Rights of Migrants

Call for inputs written by Dr Rossella Pulvirenti[1] Dr Kay Lalor[2]

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Drs Pulvirenti and Lalor's work together has focused upon the rights of vulnerable people seeking asylum in the UK, the European Convention on Human Rights and asylum protections and on the impact of recent British immigration legislation upon people seeking asylum in Manchester and beyond. Between 2022 and 2025, they submitted evidence to several Parliamentary Committee, including the International Agreement Committee (House of Lords), the Women and Equalities Committee (House of Commons) and the Joint Committee on Human Rights. A summary of this work can be found in the Project Report *The Rwanda Policy and the European Convention on Human Rights: An Analysis of UK Legal and Policy* Duties.

Our input focuses on

- Examples of externalisation measures
- Transparency and monitoring
- Human Rights Implications
- Responsibility and Jurisdiction

Examples of externalisation measures

a) What is the (legal) basis for these measures, specifically, are they based on formal or informal agreements?

The concept 'safe third country' presumes that individuals could be returned to any other country where, in the view of the competent authorities, people seeking asylum have a connection and are not subjected to direct or indirect *refoulement* (safe third country). However, since 2022, the UK Government created a new category of 'safe third country' which does not require any links between that specific state and the individuals claiming asylum. This new safe third country classification enables the UK to transfer of individuals seeking asylum in the UK to any other country. While this practice aligns with the UK's objectives to exercise strong control over its borders, it does not provide sufficient guarantees to people seeking asylum under the Refugee Convention, thereby compromising two key principles underpinning international refugee law: the principles of fairness and individual assessment.[3]

The legal basis for removal of people seeking asylum to Rwanda was initially found within the Illegal Migration Act (IMA) 2023, which created a duty under s1 of the Act upon the Home Secretary to make arrangements for removal of certain categories of people seeking asylum in the UK. The IMA 2023 was accompanied by a Memorandum of Understanding (MoU) with Rwanda facilitating the removal of people seeking asylum to Rwanda for consideration of their claims.[4] Even if successful those granted refugee status would have been required to remain to live in Rwanda. In the AAA

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[3] Rossella Pulvirenti, 'From Solidarity to Exclusion: The 'Safe Country' Concept in UK Asylum Law and the Irony of Borders', *LAWS* 2025 (forthcoming).
[4] Home Office 'Memorandum of Understanding between the government of the United Kingdom of Great Britain and Northern Ireland and the government of the Republic of Rwanda for the provision of an asylum partnership arrangement' (Updated April 6 2023) https://www.gov.uk/government/publications/memorandum-of-understanding-mou-between-the-uk-and-rwanda/memorandum-of-understanding-between-the-government-of-the-united-kingdom-of-great-britain-and-northern-ireland-and-the-government-of-the-republic-of-r (accessed 9 June 2025).

case, the Supreme Court's found that those removed to Rwanda were at risk of *refoulement*.[5] This decision was followed by a treaty with Rwanda, formalising the provisions of the MoU, and by the Safety of Rwanda Act 2024, which mandated that Rwanda must be treated by decision makers as a 'safe third country'.

Following the victory of the Labour Party at the 2024 UK general elections, attempts to remove people to Rwanda were halted. However, the IMA 2023 and the Rwanda Act 2024 remain in force. The Border Security, Asylum and Immigration Bill (BSAI) 2025 proposes the repeal of the Rwanda Act 2024 and sections of the IMA 2023. However, three significant concerns remain. First, British government seems to disregard international and national human rights standards and, second, it frames the asylum legal and policy framework around securitisation and criminalisation. Both increase the government's executive power to the detriment of key Constitutional principles, like the separation of powers and the rule of law.

The BSAI Bill 2025 does not repeal the entirety of the IMA 2023, and in so doing, reduces safeguards for people seeking asylum. In particular,

a. The retention of IMA s12, which allows British authorities to detain people seeking asylum, will reduce judicial scrutiny of migration detention while simultaneously increasing the power and discretion of the Secretary of State.
b. The retention of IMA s19 on the public order disqualification is in violation of Article 4 of the European Convention on Human Rights (ECHR) and Articles 12-15 of the European Convention Against Torture (ECAT).
c. We are concerned that the retention of Section 59 IMA on the inadmissibility of certain asylum and human rights claims violates the letter and the spirit of the Refugee Convention because it creates a new category of inadmissible asylum claims. According to the Refugee Convention, people seeking asylum are excluded from the possibility of obtaining the refugees' status, if the asylum applicants had already been recognised as refugees in the first safe country (Article 1(E)) and if they have committed certain crimes such as crimes against peace, war crimes, or a crimes against humanity; serious non-political crime outside the country of refuge prior to their admission to that country as a refugee and, finally, acts contrary to the purposes and principles of the United Nations (Article 1(F)). Section 59 IMA does not fall in any of these categories and hinders the right to seek asylum in the UK.
d. The retention of s62 on the credibility of the claimant is neither necessary nor proportionate. On the contrary, it misunderstands the extent to which the sharing of information with those in authority may be initially very difficult for those who have experienced, hardship, trauma or mistreatment by state and non-state authorities.[6]

Additionally, and more broadly, the Bill continues a long tradition of the UK approaching migration from a securitisation and criminal perspective, as its predecessors had done before. Although no evidence exists that this approach has any deterrent effect on smugglers, our research shows that it contributes to the stigmatisation and discrimination of migrants.[7] This hostile environment fuels harmful rhetoric against people seeking asylum and contributes to the dehumanisation of those who come to the UK seeking safety, rather than for a consideration of the totality, the complexity and often the trauma of their experiences.

[5] *R (on the application of AAA and others) (Respondents/Cross Appellants) v Secretary of State for the Home Department* [2023] UKSC 42. See also *AAA and others v Secretary of State for the Home Department* [2022] EWHC 3230 (Admin). For the appeal *AAA and others v. The Secretary of State for the Home Department* [2023] EWCA Civ 745.
[6] We expand on these points in our evidence to the Joint Committee on Human Rights: Rossella Pulvirenti and Kay Lalor, Written Evidence FLS0016/BSAI0016, 15 May 2025 available at < committees.parliament.uk/writtenevidence/141355/html/> (accessed 10 June 2023).
[7] Rossella Pulvirenti, Kay Lalor and Catherine Jaquiss, *The Rwanda Policy and the European Convention on Human Rights: An analysis of UK legal and policy duties* (2023), p. 13, available at < The Rwanda Policy and the European Convention on Human Rights > accessed on 9 June 2025.

These three underlying systemic issues (criminalisation, stigmatisation and trauma) remain unaddressed. People seeing asylum and migrants remain at significant risk of being exposed to human rights abuses inherent to the Rwanda Policy. To prevent future the creation of similar policies, the UK government must demonstrate stronger political leadership and commit to reframing its migration policy through a human rights-based lens.

b) Which entities are responsible for negotiating, concluding and implementing these arrangements (executives/parliaments/agencies e.g. border agencies, police forces or equivalent)?

In the UK, negotiating international agreements is a prerogative power reserved to the Government ministers. Parliament has limited oversight and scrutiny over it. We have extensively critiqued this lack of oversight by arguing that the steps taken by the British government during the attempt to implement removals to Rwanda demonstrated disregard for key constitutional principles like the rule of law and parliamentary sovereignty and sets a dangerous precedent.[8] Even more worrying, no steps have been taken to correct the possibility for the misuse of executive power with respect to migration. Indeed, as we note above, there is a consistent trend towards increased discretion and power afforded to the Secretary of State with respect to migration decisions, with a subsequent diminution of judicial or parliamentary oversight.[9] Our research concluded that significant steps are needed to increase judicial and parliamentary involvement in migration oversight, as well as greater engagement with the protection of the fundamental human rights of people crossing borders.[10]

Transparency and monitoring

a) Is the legal basis for externalisation measures (such as Memoranda of Understanding) publicly available?

The MoU with Rwanda, as well as the subsequent Rwanda Treaty were available online and were subject to exhaustive critiques by legal, scholarly and migration rights actors.[11] Unfortunately, these critiques, along with a number of highly critical parliamentary reports did little to slow the previous government's enthusiasm for removals. This reinforces our argument above, that executive power, directed towards a view of migration focused on criminalisation and securitisation is very difficult to oppose. We ourselves attended numerous meetings and committees on the Rwanda removals, and, like many others, published extensively on the problems with the policy, but our input appeared to fall on deaf ears.

We would highlight again that there have been no changes to either the executive-led approach to international agreements and removals, or the securitisation framework through which migration is approached. As such, even with the repeal of the Rwanda Act 2024 and parts of the IMA 2023, the possibility of abuse and human rights violations remains. We believe that a much more expansive and human rights focused approach to migration is needed to resolve these issues.

d) Are human rights impact assessments carried out, especially prior to agreement, and if so, what are their modalities, including findings being public?

Under the Equality Act 2010, the Home Office was required to carry out an Equality Impact Assessment of the Memorandum of Understanding with Rwanda. However, upon close scrutiny, we

[8] Rossella Pulvirenti and Kay Lalor, Written Evidence URA0003, 20 December 2023 available at <https://committees.parliament.uk/writtenevidence/127208/html/> (accessed on 9 June 2025); Rossella Pulvirenti and Kay Lalor, Written Evidence RWA0012, August 2022 available at < committees.parliament.uk/writtenevidence/110576/pdf/> (accessed on 9 June 2025).
[9] Zainab Batul Naqvi, 'Coloniality, Belonging and Citizenship Deprivation in the UK: Exploring Judicial Responses (2022) 31(4) Social & Legal Studies 515.
[10] See above fn 8.
[11] See eg, the submissions to the House of Lords International Agreements Committee at < https://committees.parliament.uk/work/6766/ukrwanda-memorandum-of-understanding/publications/> and < https://committees.parliament.uk/work/8091/ukrwanda-asylum-agreement/publications/> (accessed 10 June 2025).

found that this EIA to be overly focused upon legislative conditions in Rwanda, at times omitting criticism of this legislation by UN bodies.[12]

We argued that the approach to equality and to the wider protection of human rights did not engage with the current realities of asylum seekers with protected characteristics in the UK asylum and immigration system and how these realities would translate to the treatment of asylum seekers facing removal to Rwanda.[13]

This argument is closely linked to the points raised about securitisation and disengagement with rule of law principles above: the perspective taken seemed to aim for the bare minimum legal standards, exploiting legal loopholes or ignoring important constitutional principles in order to force through a policy that was disconnected from living conditions faced by those seeking asylum, and uninterested in the harm that the policy would cause.

Human rights implications

a) What is the (practical and/or legal) situation of individuals once they are transferred or taken to the cooperating States, irrespective of their nationality and migration status?

Our report '*The Rwanda Policy and the European Convention on Human Rights: An analysis of UK legal and policy duties*' highlights the significant potential violations of the ECHR within European removals policies.[14] Despite this, the Supreme Court itself has maintained a conservative approach when it comes to border control policy, as illustrated in the *AAA* case. On 15 November 2023, the Supreme Court declined to address the broader implications of externalisation practices. Instead, it focused on the specific context of Rwanda and concluded that Rwanda could not be considered a safe country because individuals removed to Rwanda would face a real risk of ill treatment in violation of the principle of *non-refoulement* not only under Article 3 of the ECHR but also under customary international law.[15] As a result, the Supreme Court ruled the Rwanda policy must be declared unlawful.[16]

Additionally, our report highlighted the fear and panic experienced by individuals facing removal, as well as the wider reputational damage to the UK's international status as a country committed to upholding human rights.[17]

Thus, we recommend that the UK should commit to the full realisation of the rights protected under the ECHR for all the individuals crossing its borders.

Responsibility and jurisdiction

a) How can the responsibility of the externalising State be established in cases of human rights violations?
b) What jurisdictional approaches may be invoked to assess the extraterritorial application of human rights obligations in the context of externalisation practices involving migrants?;
c) Please provide examples of rulings by international or national courts related to externalisation measures, including addressing migrants who have not yet reached the territory of destination countries.

Our research has extensively investigated the scope of the ECHR for protecting the rights of people seeking asylum. In evidence submitted to parliamentary enquiries, we emphasised that the principle

[12] Rossella Pulvirenti and Kay Lalor, Evidence RWA0012, Supra fn 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', *Journal of Immigration, Asylum & Nationality Law* (2024) 38.1, p. 16-31.
[13] Ibid.
[14] See Pulvirenti, Lalor, Jaquiss, Report 2023, Supra fn 7.
[15] AAA case (SC), Supra fn 5 para 26.
[16] Ibid, para 303.
[17] See Pulvirenti, Lalor, Jaquiss, Report 2023, Supra fn 7, pp. 14 and 21.

of non-refoulement is enshrined in the ECHR.[18] State responsibility is engaged "where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country. In these circumstances, Article 3 implies the obligation not to expel the person in question to that country".'[19]

The European Court of Human Rights (ECtHR) has confirmed that this includes indirect removal to an intermediate country, which "does not affect the responsibility of the United Kingdom to ensure that the applicant is not, as a result of its decision to expel, exposed to treatment contrary to Article 3 of the Convention".[20] The same decision confirmed that multilateral agreements do not absolve the UK from its responsibilities under the ECHR.[21]

However, in domestic UK courts and at the ECtHR, the approach to protecting the rights of people seeking asylum appears to have been relatively conservative. As already mentioned above, for example, in *AAA v UK* the court did not consider a number of issues, particularly relating to Article 5 ECHR on the right to liberty and security that - we believe - to be an important part of guaranteeing rights to people seeking asylum. Similarly, from the most recent European case law in the *WS v Frontex* case (EU)[22] and the *A.R.E v Greece*[23] and *G.R.J v Greece* cases (ECtHR)[24] it seems that the burden of proof required by the court is "unreasonably and unnecessarily high".[25] The EU's ruling precludes any meaningful accountability for Frontex, leaving the agency (and the EU) immune to breaches of its obligations. Similarly, the ECHR's rulings impose an almost impossibly high burden of proof upon the applicant rendering it extremely difficult to find states accountable for egregious practices of 'push back' and other violations of fundamental human rights.

[18] Rossella Pulvirenti and Kay Lalor, Written Evidence URA0003, 20 December 2023, para. 18 available at <https://committees.parliament.uk/writtenevidence/127208/html/> (accessed on 9 June 2025); Rossella Pulvirenti and Kay Lalor, Written Evidence RWA0012 available at < committees.parliament.uk/writtenevidence/110576/pdf/> (accessed on 9 June 2025).
[19] *Soering v UK* App No 14038/88 (7 July 1989), § 91.
[20] *T.I. v. United Kingdom*, Admissibility Decision of 7 March 2000, Appl. No. 43844/98, § 15.
[21] Ibid.
[22] *WS and Others v Frontex* [2023] EU:T:2023:450.
[23] App no. 15783/21 (ECtHR, 7 January 2025).
[24] App no. 15067/21 (ECtHR, 3 December 2024) .
[25] M Fink and JJ Rijpma, 'Responsibility in Joint Returns after WS and Others v Frontex: Letting the Active By-Stander Off the Hook' (22 September 2023) EU Law Analysis, available at <EU Law Analysis: Responsibility in Joint Returns after WS and Others v Frontex: Letting the Active By-Stander Off the Hook> (accessed online 9 June 2025). See also I Kienzle and M Riemer, 'Feeble Recognition of a Systematic Pushback Practice.
The latest ECtHR rulings on Greek pushback cases' (Verfassungsblog, 20 January 2025) available at https://verfassungsblog.de/pushbacks-echr-greece-turkiye/ accessed 10 June 2025.