Mandates of the Special Rapporteur on the independence of judges and lawyers; the Special Rapporteur on the human rights of migrants and the Special Rapporteur on trafficking in persons, especially women and children

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(Please use this reference in your reply)

21 February 2024

Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the independence of judges and lawyers; Special Rapporteur on the human rights of migrants and Special Rapporteur on trafficking in persons, especially women and children, pursuant to Human Rights Council resolutions 53/12, 52/20 and 53/9.

We would like to bring to the attention of your Excellency's Government provisions of the proposed legislation known as Safety of Rwanda (Immigration and Asylum) Bill ("the Rwanda Bill"), published by the Government on 6 December 2023 and currently being deliberated by Parliament which could impact the independence of the judiciary in the United Kingdom.

According to the information received, many of the provisions in the Rwanda Bill are at odds with the United Kingdom's international human rights obligations, in particular as set out in the International Covenant on Civil and Political Rights (ICCPR), the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (CAT), the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol, the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children (the Palermo Protocol), the Convention on the Rights of the Child (CRC), the European Convention on Human Rights (ECHR), and the Council of Europe Convention on Action against Trafficking in Human Beings (ECAT).

For example, clause 2 of the Rwanda Bill requires that "Every decision-maker must conclusively treat the Republic of Rwanda as a safe country."[1] In particular, "…a court or tribunal must not consider a review of, or an appeal against, a decision of the Secretary of State or an immigration officer relating to the removal of a person to the Republic of Rwanda to the extent that the review or appeal is brought on the grounds that the Republic of Rwanda is not a safe country."[2]

Moreover, clause 2(5) of the Rwanda Bill provides that the prohibition against judicial review or appeal on the grounds that Rwanda is not a safe country applies "notwithstanding" provisions of UK human rights law (the Human Rights Act 1998), any other provision or rule of domestic law (including any common law), and any interpretation of international law by the court or tribunal, which the Bill broadly defines non-exhaustively to include "any other international law, or convention or rule of international law, whatsoever […]". Clause 3 of the Rwanda Bill also explicitly disapplies various provisions of the Human Rights Act 1998.

Clause 4(1) of the Rwanda Bill permits a decision-maker, including a court or tribunal, to find that Rwanda is unsafe for a specific person, based on "compelling

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1 Safety of Rwanda (Immigration and Asylum) Bill, Clause 2(1)
2 Ibid. Clause 2(3)

evidence relating specifically to the person's particular individual circumstances." However, the decision-maker is prohibited from considering the principle of non-refoulement in these cases[3].

Finally, clause 5 of the Rwanda Bill prohibits courts or tribunals from considering interim measures issued by the European Court of Human Rights in proceedings relating to the intended removal of an asylum seeker to Rwanda from the UK, providing that "[i]t is for a Minister of the Crown (and only a Minister of the Crown) to decide whether the United Kingdom will comply with the interim measure."[4]

On 15 November 2023, the UK Supreme Court—the highest court in the United Kingdom—held that the UK Government's policy of sending certain asylum seekers to Rwanda for processing of their asylum claims, pursuant to an April 2022 Memorandum of Understanding between the two countries, was unlawful.[5] The Court held that the Court of Appeal was entitled to find there were substantial grounds for believing asylum seekers would face a real risk of ill-treatment by reason of refoulement to their country of origin if they were removed to Rwanda. In concluding that there was a real risk of ill-treatment by reason of refoulement, the information suggests that Supreme Court had regard to factual evidence, including evidence provided by UNHCR, that (1) Rwanda has a poor human rights record, including serious and systematic defects in its procedures and institutions for processing asylum claims; (2) Rwanda had previously engaged in refoulement by sending asylum-seekers to other countries, including after entering into the April 2022 Memorandum of Understanding with the UK Government; and (3) Rwanda had failed to honour its explicit undertaking to comply with the principle of non-refoulement provided to Israel in a similar agreement for the removal of asylum seekers.

On 5 December 2023, the United Kingdom entered into a treaty with Rwanda ("the Rwanda Treaty"), which provides, among other things, that no person who has been relocated from the United Kingdom to Rwanda pursuant to the Rwanda Treaty shall be removed from Rwanda except to the United Kingdom, at its request, and that Rwanda shall create a new system for processing asylum claims.[6] The Special Rapporteur on trafficking in persons, especially women and children, has previously raised concerns in relation to the compatibility of the Treaty with the United Kingdom's obligations under international human rights and refugee law (OL GBR 1/2024).

That same month, the Home Secretary was unable to make the statement required under the section 19(1)(b) of the Human Rights Act 1998 that the provisions of the Bill would be compatible with the European Convention on Human Rights, adding that the Government nevertheless wished the House to proceed with the Bill.

Without prejudging the accuracy of these allegations, we wish to express our concern that provisions of the Rwanda Bill could undermine the independence of the judiciary in the United Kingdom.

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3 Ibid. Clause 4(2)
4 Clause 5(3)
5 *R (on the application of AAA (Syria) and others) v Secretary of State for the Home Department* [2023] UKSC 42
6 Agreement 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 Agreement to Strengthen Shared International Commitments on the Protection of Refugees and Migrants.

For example, clause 2 of the Rwanda Bill, as set out above, would unduly limit the independence of the judiciary, as it would require judges to treat Rwanda as a safe third country, now and in the future. The provisions would also prohibit general legal challenges before courts or tribunals in the United Kingdom on the grounds that Rwanda will or may violate the principle of non-refoulement, will not provide a fair and proper consideration of asylum claims, and/or will not act in accordance with the terms of the new Rwanda Treaty, which has yet to be ratified.

Further impinging on the capacity of judges to form an independent assessment of the cases before them would take place if courts were prevented from applying interim measures issued by the European Court of Human Rights. This provision will represent yet another incursion into their independence, as well as a violation of international law. Interim measures are vital to protecting human rights in urgent cases where there is a real risk of irreparable harm.

We are also concerned that by purporting to displace a finding of fact made by the UK Supreme Court, the Rwanda Bill as currently drafted invalidates the judiciary's power to rule on the facts in cases before them and to apply the law to those facts.

These provisions appear to have the effect of further infringing judicial independence by preventing judges from considering, in this context, the United Kingdom's international human rights obligations and facts presented before them. Additionally, prohibiting courts and tribunals in the UK from applying and interpreting principles of domestic human rights law and international law would undermine the capacity of courts to protect all those under the jurisdiction of the UK against violations of their human rights, as protected under international law.

We would like to draw the attention of your Excellency's Government to the ICCPR, ratified by the United Kingdom in 1976. We wish to recall that article 14(1) of the ICCPR sets out a general guarantee of equality before courts and tribunals and the right of every person to a fair and public hearing by a competent, independent and impartial tribunal established by law. Additionally, we would like to refer your Excellency's Government to the Basic Principles on the Independence of the Judiciary[7], which establish that all governmental and other institutions must respect and conform to the independence of the judiciary and that judges will decide cases impartially, on the basis of the facts and in accordance with the law, "without any restriction and without undue influence, incitement, pressure, threat or interference, direct or indirect, from any sector or for any reason".

We would like to recall that international standards on the independence of the judiciary are closely linked to the rule of law and the separation of powers. In a 2009 report to the United Nations Human Rights Council, the mandate on Independence of Judges and Lawyers recalled that "[t]he principle of the separation of powers, together with the rule of law, are key to the administration of justice with a guarantee of independence, impartiality and transparency[8]". Furthermore, in a 2017 report to the

[7] adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

[8] A/HRC/11/41, para. 18

Human Rights Council, the Special Rapporteur on that mandate highlighted that "respecting the rule of law and fostering the separation of powers and the independence of justice are prerequisites for the protection of human rights and democracy[9]". Provisions of the Rwanda Bill could undermine the principles of the separation of powers and the rule of law in the United Kingdom.

We would also like to re recall that the principle of non-refoulement is codified in articles 3 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, to which the UK is a party since 1988. Article 3 of the Convention provides that no State shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds to believe that he would be in danger of being subjected to torture, ill-treatment or other irreparable harm. As an inherent element of the prohibition of torture and other forms of ill-treatment, the prohibition of refoulement under international human rights law is also more expansive than the protections afforded under refugee law insofar as it applies to any form of removal or transfer of persons, regardless of their status or grounds for seeking protection, and is characterised by its absolute nature without any exception.

Specific concerns arising in relation to the compatibility of the Bill with the United Kingdom's international law obligations in the following areas affecting trafficked persons and persons at risk of trafficking: positive obligations of identification, assistance and protection of potential victims of trafficking; the obligation of non-refoulement and its application to potential victims of trafficking without discrimination; and the principle of non-punishment.

Further concerns arise in relation to the failure to ensure the primary of the best interests of the child (article 3 CRC), and non-discrimination (article 2 CRC). The possible relocation of a child, with their family or guardian, continues to be permitted, contrary to the recommendation of the UN Committee on the Rights of the Child, urging the United Kingdom "to ensure that children and age-disputed children are not removed to a third country."

The obligation of non-refoulement in relation to potential victims of trafficking is stated the Palermo Protocol, article 14(1) of which provides for the continuing application of the "rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein."

We are concerned that there continues to be a real risk of refoulement arising from the planned relocation of asylum seekers, including potential victims of trafficking to Rwanda. The concerns noted by the Supreme Court of the United Kingdom remain relevant. The Court highlighted the significant changes required, which they noted "may not be straightforward, as they require an appreciation that the current approach is inadequate, a change of attitudes, and effective training and monitoring." (Para. 104) As the Supreme Court stated, "intentions and aspirations do not necessarily correspond to reality: the question is whether they are achievable in practice." (Para. 102)

[9] A/HRC/35/31, para. 1

As previously highlighted by the UN Special Rapporteur on trafficking in persons, especially women and children, we recall the non-penalisation clause of the 1951 Convention (article 31), which seeks to ensure that refugees can gain access to asylum without being penalized for breaches of immigration and other laws, and further highlight its centrality to the object and purpose of the 1951 Convention. (A/HRC/53/28 paras. 41-42).

Of particular concern is the impact of the Bill on the rights of individual asylum seekers, including potential victims of trafficking, to an effective remedy, as recognized under article 13 of ECHR, and other provisions of international human rights law, including through effective access to the courts to challenge the finding of safety of the third country, Rwanda and to ensure protection against *refoulement*.

We recommend review and reconsideration of the Safety of Rwanda (Immigration and Asylum) Bill to ensure that the law is in compliance with the UK's international human rights obligations. We stand ready to engage in dialogue with Your Excellency's government on this very important matter.

As it is our responsibility, under the mandate provided to us by the Human Rights Council, to seek to clarify cases brought to our attention, we would be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned assessment of the Safety of Rwanda (Immigration and Asylum) Bill.

2. Please explain how the independence of the judiciary will be safeguarded within the amendments to immigration law proposed by the Safety of Rwanda (Immigration and Asylum) Bill.

3. Please explain how the Safety of Rwanda (Immigration and Asylum) Bill is compatible with the international human rights obligations under ICCPR and CAT.

4. Please provide detailed information on the measures taken to ensure judicial oversight of asylum cases, including claims of violations of human rights law and the principle of non-refoulement.

We would appreciate receiving a response within 60 days. Past this period, this communication and any response received from your Excellency's Government will be made public via the communications reporting website. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

We would ask that a copy of this letter be shared with the House of Commons and the House of Lords, in order to inform their deliberations.

We may publicly express our concerns in the near future as, in our view, the information upon which the press release will be based is sufficiently reliable to indicate a matter warranting immediate attention. We also believe that the wider public should be alerted to the potential implications of the above-mentioned allegations. The press release will indicate that we have been in contact with your

Excellency's Government's to clarify the issue/s in question.

Please accept, Excellency, the assurances of our highest consideration.

Margaret Satterthwaite
Special Rapporteur on the independence of judges and lawyers

Gehad Madi
Special Rapporteur on the human rights of migrants

Siobhán Mullally
Special Rapporteur on trafficking in persons, especially women and children

Annex

Reference to international human rights law

In connection with above alleged facts and concerns, we would like to draw the attention of your Excellency's Government to the international norms and standards applicable to the present case.

We would like to refer you to article 14 of the International Covenant on Civil and Political Rights (ICCPR), ratified by the United Kingdom in 1976. Paragraph 1 of article 14 enshrines the requirements of independence and impartiality of the judiciary. As the Human Rights Committee has stated, these are absolute rights that do not allow any limitations, see general comment no. 32, para. 19. As also highlighted by the Human Rights Committee, article 14 guarantees the right to a public and fair hearing before a competent, independent, and impartial tribunal established by law.

We would also like to refer you to the Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985. These establish that all governmental and other institutions must respect and conform to the independence of the judiciary (principle 1) and that judges will decide cases impartially, on the basis of the facts and in accordance with the law, "without any restriction and without undue influence, incitement, pressure, threat or interference, direct or indirect, from any sector or for any reason" (principle 2).

In 2009 report to the United Nations Human Rights Council, the mandate on Independence of Judges and Lawyers recalled that "[t]he principle of the separation of powers, together with the rule of law, are key to the administration of justice with a guarantee of independence, impartiality and transparency" (A/HRC/11/41, para. 18).

Furthermore, in the 2017 report to the Human Rights Council, the Special Rapporteur on that mandate highlighted that "respecting the rule of law and fostering the separation of powers and the independence of justice are prerequisites for the protection of human rights and democracy" (A/HRC/35/31, para. 16).

We would also like to draw the attention of your Excellency's Government to article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, ratified by the United Kingdom in 1988. Article 3 paragraph 1 provides that "(n)o State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." Paragraph 2 of the same article provides that "(f)or the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights."