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Submission of Written Evidence to the United Kingdom (UK) Government Human Rights (Joint Committee), 'Call for Evidence on Human Rights of Asylum Seekers in the UK'

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Written evidence submitted by Professor Ryszard Piotrowicz and Professor Natalia Szablewska (ASU0005)

We are grateful for the opportunity to provide this submission in response to the United Kingdom (UK) Government's Call for Evidence on Human Rights of Asylum Seekers in the UK. We base the submission on the evidence drawn from our own research and combined decades of expertise in human rights, international refugee law and forced migration. Our views and opinions expressed are made in our capacity as academics and should not be associated with any of our current or past affiliate organisations or bodies.

Professor Ryszard Piotrowicz, FLSW has been a professor at Aberystwyth University since 1999, prior to which he was professor and Dean of the Faculty of Law at the University of Tasmania. He was a member of the Council of Europe's Group of Experts on Action against Trafficking in Human Beings (GRETA) from 2013-20 (Vice-President 2017-20) and a member of the European Commission's Group of Experts on Trafficking in Human Beings (2008-15). He is a member of the Wales Anti-Slavery Leadership Group. He has acted as a consultant on legal aspects of human trafficking to UNCHR, Council of Europe, European Commission, IOM, OSCE and ICMPD.

Professor Natalia Szablewska has over 20 years of experience spanning the public sector, governmental and non-governmental organisations and academia in five countries. She is Professor in Law and Society at The Open University (UK) and holds further academic affiliations in Australia, New Zealand and Cambodia. Prof. Szablewska specialises in public international law and human rights law and has conducted multimethod and interdisciplinary research into forced migration and modern slavery. She is Chair of Business and Human Rights Committee for Australian Lawyers for Human Rights ([ALHR](#)) and serves on the Modern Slavery Leadership Advisory Group to the New Zealand Government.

Please see below our responses to the questions.

“Safe and legal routes”

1. Is it compatible with the UK's human rights obligations to deny asylum to those who do not use what the Government calls “safe and legal routes”?

We submit that under the UK's human rights obligations, including those arising under Art 3 of the European Convention on Human Rights (ECHR) (1950),¹ Art 33 of the Refugees Convention (1951) and Art 3(1) of the UN Torture Convention (1984), the UK may not return a person to a territory where they are at real risk of persecution or other breaches of their basic human rights. This duty exists, irrespective of how a person has reached the UK and is unequivocal.

2. What “safe and legal routes” currently exist for asylum seekers in the UK? Should new routes be introduced?

¹ Interpreted as such by the European Court of Human Rights, see *Cruz Varas and Others v. Sweden*, Judgement of 20 March 1991, Appl. No. 15576/89, Series A, No. 201, paras. 69–70; *Vilvarajah and Others v. United Kingdom*, Judgement of 30 October 1991, Applications Nos. 13163/87, 13164/87, 13165/87, 13447/87, 13448/87, Series A, No. 215, paras. 107–8.

There are no safe and legal routes for most asylum seekers to reach the UK, because the UK has not provided any. The UK should accept its fair share of the burden of providing international protection not only to asylum seekers but also those who are fleeing armed conflict.

Relocation of asylum seekers

3. Is the policy of relocating asylum seekers to third countries consistent with the UK's human rights obligations?

We posit that the policy *may* be consistent with the UK's human rights obligations, as international law does not require a State where an asylum application is made to consider it, so long as it will be considered appropriately by another country. However, the UK remains responsible for the safety of any asylum seeker it relocates to another country. Therefore, the UK must be certain that the asylum seeker's basic rights will be respected in the third State, including that they will not be returned to a territory where they may be at risk of persecution.

In case of doubt, the UK should act on the side of caution and not relocate asylum seekers to a third country unless it is reasonably satisfied that their human rights will be upheld there to the same extent as they would have had they been in the UK. The risk is that, once the person is in a third country, the UK may be unable to prevent breaches of the person's rights. In such a case, the UK will have violated its duty towards the asylum seeker.²

4. Are the rules on detention and processing, and the treatment of detained asylum seekers, consistent with the UK's human rights obligations?

Under international law, seeking asylum is not unlawful and, therefore, no person should be detained on the basis of being an asylum seeker. Consequently, detention of asylum seekers needs to be limited only to situations where it is absolutely necessary, including as prescribed by law to verify the identity of the person, to assess their asylum or refugee claims, or to protect national security or public order,³ and be a measure of last resort, and alternatives to detention should be considered.⁴

In the UK, asylum seekers constitute the largest category of immigration detainees (81% in 2021),⁵ and without a time limit on their detention set by law,⁶ the practice of detention does not comply with the aforementioned international standards.

² UNHCR, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol (26 January 2007); Szablewska N and Ly R (2017), Regional collaborative responses to the global migration crisis: refugee law, human rights and shared state responsibility (The Australia-Cambodia resettlement agreement), *Australian Law Journal* 91(3): 186-197.

³ UNHCR (1986) Detention of Refugees and Asylum-Seekers No. 44 (XXXVII), 37th session, A/41/12/Add.1, [d].

⁴ UN High Commissioner for Refugees (UNHCR) (2012), Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention, <https://www.unhcr.org/uk/detention.html>.

⁵ The Migration Observatory, the University of Oxford, <https://migrationobservatory.ox.ac.uk/resources/briefings/immigration-detention-in-the-uk/>.

⁶ With the exception of pregnant women and children.

Electronic tagging

5. Is the electronic tagging of asylum seekers a necessary and proportionate interference with their human rights?

In line with human rights standards, policies such as the use of electronic monitoring of persons need to be reasonable, necessary and proportionate in pursuance of a legitimate objective. The Government has failed to present convincing evidence that asylum seekers tend to abscond in the UK. There has been, however, evidence showing that this type of surveillance practice further marginalises and alienates vulnerable groups.⁷ This is particularly worrying in the context of persons who have experienced torture, discrimination and persecution in their home countries, as it often leads to adverse health impacts, including self-harm and suicide.⁸

Thus, the policy fails to meet the test of reasonableness, necessity and proportionality to the risk posed by the person “vanishing” into the country, and arguably also violates Art 8 (right to respect for private and family life) and Art 14 (on non-discrimination) of the ECHR.

Right to work

7. How do the rules on right to work impact on the human rights of asylum seekers?

The right to work, as enshrined in Art 6 of the International Convent on Economic, Social and Cultural Rights (1966), is central to economic, social and cultural development. Granting the right to work allows asylum seekers to better integrate into the host society, ease their return to the workforce after securing asylum and has a positive effect on their mental health.⁹

The Government’s argument that a ban on working for asylum seekers is to prevent more people from risking their lives crossing the channel is unfounded and contrary to the existing evidence, as often countries with stricter labour access regulations, like the UK, receive more asylum claims than those with more relaxed rules, like Sweden, which allows for nearly immediate access to the labour market for asylum seekers.¹⁰

Modern slavery

8. Is the UK’s legal framework for tackling modern slavery and human trafficking effective, and is it compatible with our human rights obligations? Are there changes that should be made?

The UK anti-modern slavery framework is not sufficient. This is particularly the case in relation to section 54 of the Modern Slavery Act (2015) (transparency in supply chains) requiring commercial organisations to submit modern slavery statements according to

⁷ Bail for Immigration Detainees, Medical Justice and the Public Law Project (2022) *Every move you make: the human impact of GPS tagging in immigration system*, https://medicaljustice.org.uk/wp-content/uploads/2022/10/2022_EveryMoveYouMake_BID_MJ_PLP_Final.pdf.

⁸ Ibid.

⁹ See the Home Office’s Migration Advisory Committee (2021) Annual Report, <https://www.gov.uk/government/publications/migration-advisory-committee-annual-report-2021/migration-advisory-committee-mac-annual-report-2021-accessible-version#asylum-and-integration>.

¹⁰ Asylum Information Database, <https://asylumineurope.org/>.

reporting criteria, but which are not mandatory, and the regime has weak enforcement mechanisms, including lack of penalties for non-compliance.¹¹ There is evidence that many enterprises do not take seriously their duty to provide a statement on their anti-slavery commitments.¹² Consequently, the UK's legal framework for tackling modern slavery and human trafficking should be further strengthened and brought into line with global developments in this space. This includes ensuring that the office of the UK's Independent Anti-Slavery Commissioner is filled, to ensure an independent evaluation of data, drive research and be a voice for the rights of victims of modern slavery.

There needs to be also greater awareness amongst law enforcement of the non-punishment principle – that people should not be penalised for offences they have been compelled to commit in the course, or as a consequence, of being trafficked or other forms of modern slavery.¹³

9. Is there any evidence that modern slavery laws are being abused by people “gaming” the system?

The Government has failed to provide credible evidence that modern slavery laws are being abused by people “gaming” the system, and an increase in modern slavery claims is not evidence thereof. Under the Government's own policy, raising awareness of rights and avenues for victims of modern slavery to bring forward their claims regarding abuse and exploitation is an example of modern slavery becoming better detected and reported. This is further evidenced by the fact that 97% of those who made claims of being trafficked in the second quarter of 2022 had their claims confirmed.¹⁴

Thus, the claim of asylum seekers “gaming” the system is unsubstantiated, is harmful to the estimated 136,000 victims of modern slavery in the UK¹⁵ and further undermines the Government's own policy to root out modern slavery.

Nationality and Borders Act 2022

10. To what extent has the enactment of the Nationality and Borders Act 2022 had an impact on the human rights of asylum seekers?

Under international refugee and human rights laws, non-discrimination is a cross-cutting principle. The changes brought about by the Nationality and Borders Act 2022, in particular, the differential level of support and protection offered to those who arrive via regular vs

¹¹ Home Office, *Independent Review of the Modern Slavery Act. Fourth interim report: Legal application of the Modern Slavery Act 2015: Final Report*, <https://www.gov.uk/government/publications/independent-review-of-the-modern-slavery-act-final-report>

¹² See, e.g., Minderoo Foundation's Walk Free Initiative, Australian National University, WikiRate and Business & Human Rights Resource Centre (2019) *Beyond Compliance in the Hotel Sector: A Review of UK Modern Slavery Act*, <https://www.gov.uk/government/publications/independent-review-of-the-modern-slavery-act-final-report>.

¹³ Piotrowicz R and Sorrentino L (2016) “Human Trafficking and the Emergence of the Non-Punishment Principle”, *Human Rights Law Review* 16(4): 669-699; *VCL and AN v UK*, Application nos 77587/12 and 74603/12 European Court of Human Rights, 16 February 2021.

¹⁴ Helen Bamber Foundation (2022) *Abuse of the System: survivors of trafficking in immigration detention report*, https://medicaljustice.org.uk/wp-content/uploads/2022/10/2022.AbuseByTheSystem.HBF_MJ_Final.pdf.

¹⁵ Walk Free, Global Slavery Index, <https://www.globalslaveryindex.org/2018/findings/country-studies/united-kingdom/>.

irregular means is discriminatory in nature¹⁶ and, as such, in breach of the UK's international obligations in that respect.

Further, the introduction of the two-limb test for satisfying the standard of proof for finding fear of persecution (section 31)—requiring to show on the balance of probabilities that the person has characteristics which could cause them to fear persecution and then to satisfy the test of a reasonable likelihood of being persecuted as a result of such characteristics—puts too high a burden on the applicants, as it is often unrealistic in relation to evidence that an asylum seeker might be able to produce. Arguably, it is also not in line with Art 1A(2) of the Refugee Convention which requires “a *well-founded* fear of being persecuted [due to the specific characteristics]” [emphasis added].

09/12/2022

¹⁶ Szablewska N (2014) Illegal immigrants, asylum seekers and Australia's international obligations: the debate goes on, *Australian Law Journal* 88(10): 707-714.