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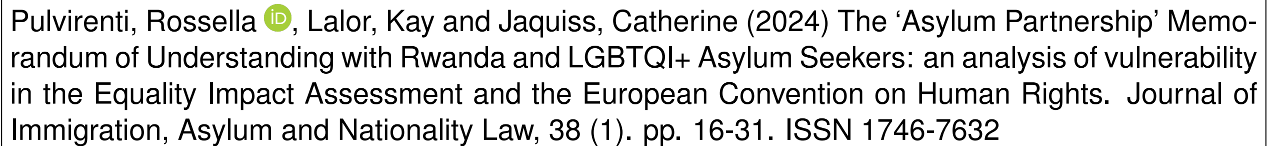

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# The 'Asylum Partnership' Memorandum of Understanding with Rwanda and LGBTQI+ Asylum Seekers: an analysis of the Equality Impact Assessment and international human rights obligations

## 1. Introduction

In April 2022, the former UK Home Secretary, Priti Patel, and Rwandan Minister for Foreign Affairs and International Co-Operation, Vincent Burata, signed a 'Migration and Economic Development Partnership'. This agreement includes a Memorandum of Understanding (MoU) between the two Governments through which asylum seekers whose claims are not being considered by the United Kingdom will be relocated to Rwanda.[1] This mechanism (hereinafter, 'Rwanda Policy') was applied to all individuals arriving 'illegally' in the UK but posed a particular risk lesbian, gay, bisexual, transgender, and intersex (LGBTQI+) asylum seekers, who are likely to face discrimination or ill treatment in Rwanda.[2]

Even before the risk of removal to Rwanda, the situation of LGBTQI+ asylum seekers in the UK was precarious. Those seeking asylum on the basis of sexual orientation or gender identity[3] (SOGI) face disbelief or suspicion that they are not 'genuinely' LGBTQI+[4], struggle to evidence their claims for

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[1] 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 6 April 2023) Available at http://www.gov.uk/government/publications/memorandum-of-understanding-mou-between-the-uk-and-rwanda Accessed 15 August 2023.

[2] Equaldex 'LGBT Rights in Rwanda' (*Equaldex)* https://www.equaldex.com/region/rwanda Accessed 15 August 2023; Rainbow Migration 'Rwanda is not safe for LGBTQI+ people' *(Rainbow Migration 13 April 2022)* https://www.rainbowmigration.org.uk/news/rwanda-is-not-safe-for-lgbtqi-people/ Accessed 15 August 2023; Emmy Kageha Igonya 'Rwanda: LGBT rights are protected on paper, but discrimination and homophobia persist' *(The Conversation, 16 May 2022)* https://theconversation.com/rwanda-lgbt-rights-are-protected-on-paper-but-discrimination-and-homophobia-persist-182949 Accessed 15 August 2023.

[3] For a critique that the idea of sexual orientation is itself overly implicated in a logic of identity that corresponds to high Anglocentric ways of conceptualising sexual difference, see Alex Powell, '"Sexuality" through the Kaleidoscope: Sexual Orientation, Identity, and Behaviour in Asylum Claims in the United Kingdom' (2021) 10(4) Laws 90.

[4] Calogero Giametta, 'New asylum protection categories and elusive filtering devices: the case of 'Queer asylum' in France and the UK' (2020) 46 Journal of Ethnic and Migration Studies 142, 156-157; Nuno Ferreira, 'Utterly Unbelievable: The Discourse of 'Fake' SOGI Asylum Claims as a Form of Epistemic Injustice' (2022) 34 IJRL 303; Danielle Cohen, 'Why Gay Asylum Seekers Aren't Believed' (2017) 161(15) Solicitors Journal 20.

asylum[5], and continue to experience homophobia and transphobia in the UK.[6] In June 2023 the Women and Equalities Committee highlighted the prejudice that LGBTQI+ asylum seekers experience in the UK,[7] as well as '"constant fear" of homophobic abuse and violence at the hands of both accommodation staff and fellow asylum seekers'.[8] However, how the Rwanda Policy and, more broadly, the Nationality and Borders Act 2022 and Illegal Migration Act 2023 affect LGBTQI+ asylum seekers has not yet been given full consideration.

Drawing upon refugee and equality law scholarship on how identity and vulnerability is deployed in asylum claims[9] and upon a close reading of the protections afforded to vulnerable groups and LGBTQI+ individuals found within the European Convention on Human Rights (ECHR), this paper seeks to fill this gap. In Nov 2023, the Supreme Court found the Rwanda Policy to be unlawful.[10] This means that, at time of writing, no person seeking asylum in the UK faces an imminent risk of removal to Rwanda. However, this judgment has not removed the government's commitment to removals to 'safe third countries' as found in the Illegal Migration Act 2023, or indeed, to continuing to pursue removals to Rwanda. As such the Rwanda Policy provides an important lens for examining the way in which vulnerability is deployed, ignored and understood in the context of asylum policy in the UK. The paper exposes and examines the limited understandings of LGBTQI+ identity and vulnerability found within the Rwanda Policy. It holds in tension both the emancipatory potential offered by the recognition of the vulnerable subject[11] and the possibility of negative, disempowering or stigmatising consequences of labelling a group as vulnerable.[12] Vulnerability here is most effective not as a stigmatising label but as a layered concept to which positive obligations attach.[13] In the paper, we focus in particular on how such obligations are expressed by the European Court of Human Rights (ECtHR).

In approaching LGBTQI+ asylum through vulnerability, identity and the ECHR, we argue that that ECtHR case law constitutes a significant and underexplored avenue for assessing the MoU and the obligations of the UK towards LGBTQI+ asylum seekers for several reasons. First, as a party to the Convention, the

[5] Moira Dustin, 'Many Rivers to Cross: The Recognition of LGBTQI Asylum in the UK' (2018) 30 IJRL 104.
[6] Nina Held, 'As queer refugees, we are out of category, we do not belong to one, or the other': LGBTIQ+ refugees' experiences in "ambivalent" queer spaces' (2023) 46 Ethnic and Racial Studies 1898.
[7] Women and Equalities Committee *Equality and the UK asylum process Fourth Report of Session 2022–23* (HC 93, 27 June 2023), 25-29.
[8] Ibid [41-42].
[9] Oddny Mjöll Anardóttir, 'Vulnerability under Article 14 of the European Convention on Human Rights: Innovation or Business as Usual?' (2017) 4 Oslo Law Review 4.
[10] R (on the application of AAA and others) (Respondents/Cross Appellants) v Secretary of State for the Home Department (Appellant/Cross Respondent) [2023] UKSC 42.
[11] See particularly Martha A. Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition (2008) 20 (1) Yale J.L. & Feminism, 9; Lourdes Peroni and Alexandra Timmer, 'Vulnerable groups: The promise of an emerging concept in European Human Rights Convention law' (2013) 11 ICON 1056.
[12] Ekaterina Yahyaoui Krivenko, 'Reassessing the Relationship between Equality and Vulnerability in relation to Refugees and Asylum Seekers in the ECtHR: The MSS Case 10 Years On' (2022) 34 IJRL 192–214.
[13] Ibid [213-4].

UK is bound to respect the positive obligations established by the ECHR system. Secondly, the ECHR has a stronger enforcement system than the Refugee Convention.[14] Third, although the ECHR does not explicitly recognise the right to asylum, its character of living instrument[15] helps in framing the rights of asylum seekers and, for this reason, Daniel Thym argued the ECtHR caselaw establishes 'a *de facto* right to asylum 'through the backdoor' via enhanced procedural assurances'.[16] The paper shows how a consideration of identity, vulnerability and Article 14 taken with Articles 3, 5 and 6 of the ECHR significantly expand the scope of substantive and procedural safeguards required when considering the removal of LGBTQI+ asylum seekers in a way that has not yet been accounted for in the Rwanda Policy, the Illegal Migration Act 2023 or the legal challenges to the practice of offshoring asylum. We conclude that complex individual circumstances of the asylum seekers and their experiences of vulnerability should not just be seen as an empty label, but can be understood as situated, contingent and contextual, imposing heightened procedural and safeguarding obligations upon states.

Our analysis in this paper is primarily doctrinal. It begins by offering an overview of the Rwanda Policy and the Illegal Migration Act 2023 (Section 2). It then draws upon the Equality Impact Assessment of the MoU to demonstrate the government's poor understanding of the complex issues that structure the experiences of SOGI minorities seeking asylum and call instead for a more intersectional understanding of refugee identity as it relates to vulnerability (Sections 3 and 4). The paper then turns to an analysis of the *AAA* case, where the lawfulness of the MoU and decisions to remove ten asylum seekers from the UK to Rwanda are assessed against the ECHR, demonstrating the limited judicial consideration of vulnerability within the Rwanda Policy (Section 5). Finally, the paper draws upon ECtHR case law a basis for showing the developing jurisprudence around the more complex and intersectional idea of identity with more specific obligations stemming from jurisprudence on Articles 3, 5, 6 and 14 (Section 6). We conclude that the ECHR offers an initial, albeit imperfect, route for thinking about more enforceable ways of introducing more complex intersectional considerations of identity into the Rwanda Policy specifically, and to LGBTQI+ asylum generally.

## 2. The Rwanda Policy and the Illegal Migration Act 2023

The MoU between the UK and Rwanda aimed to create:

[14] Article 46 ECHR of the Convention relating to the Status of Refugees (Geneva, 28 July 1951). Nuno Ferreira, 'An exercise in detachment: the Council of Europe and sexual minority asylum claims' in Richard C Mole (eds) Queer Migration and Asylum in Europe (UCL Press 2021).

[15] *Tyrer v United Kingdom* App No 5856/72 (ECtHR, 25 April 1978) [31].

[16] Daniel Thym, 'The End of Human Rights Dynamism? Judgments of the ECtHR on 'Hot Returns' and Humanitarian Visas as a Focal Point of Contemporary European Asylum Law and Policy' (2020) 32 IJRL 569, 573.

> a mechanism for the relocation of asylum seekers whose claims are not being considered by the United Kingdom, to Rwanda, which will process their claims and settle or remove (as appropriate) individuals after their claim is decided, in accordance with Rwanda domestic law, the Refugee Convention, current international standards, including in accordance with international human rights law and including the assurances given under this Arrangement (Section 2.1.).

It is notable within the agreement that the MoU places a much greater burden upon Rwanda who must receive, house, provide for and consider the claims of those people removed under the agreement, while the UK was required only to carry out initial screenings, provide transport to Rwanda and share documents as required. The policy of removing anyone who enters the UK 'illegally' from British territory became law under the Illegal Migration Act 2023. It crystalises the intent to prevent and deter unlawful migration[17] and establishes that the Secretary of State has a duty to make arrangements for the removal if a person meets four conditions: 1) the person does not have any entitlement to enter the UK; 2) the person entered or arrived in the UK on or after the day on which Illegal Migration Act 2023 is passed; 3) in entering or arriving, the person did not come directly to the UK from a country in which the person's life and liberty were threatened by reason of their race, religion, nationality, membership of a particular social group or political opinion; and 4) the person requires leave to enter or remain in the UK but does not have it.[18] If an immigration officer suspects that the four conditions relating to removal from the UK are met, they might detain the asylum seeker while their status is determined.[19] The UK has an international obligation to consider asylum claims according to the Refugee Convention 1951, as modified by the 1967 Protocol relating to the status of refugees,[20] and the ECHR. However, the fact that MoU shifts asylum responsibilities to Rwanda allowing the UK to evade its international obligations sparked international criticism.[21]

Concerns about the impact of the Rwanda Policy upon LGBTQI+ asylum seekers were raised during Parliamentary debates.[22] Mindful that the MoU will deeply affect LGBTQI+ asylum seekers Lord Etherton requested the inclusion of an amendment, which would prevent LGBTQI+ asylum seekers from being moved to countries where they have a well-founded fear of persecution; or to a country which is subject to proceedings under Article 7(1) of the Treaty on European Union during the Report

[17] Illegal Migration Act 2023, s 1(1).
[18] Ibid.
[19] Ibid, s 11.
[20] Article 1 of the Protocol relating to the Status of Refugees (Geneva, 16 December 1967).
[21] See eg UNHCR 'UNHCR 'firmly' opposing UK-Rwanda offshore migration processing deal' *(United Nations, 14 April 2022)* https://news.un.org/en/story/2022/04/1116342 Accessed 15 August 2023.
[22] HC Deb 28 June 2023, vol 831, cols 761-762; see also UK Parliament, 'Lord Etherton's amendment, After Clause 6' https://bills.parliament.uk/bills/3429/stages/17763/amendments/10007841 Accessed 15 August 2023.

Stage of the Illegal Immigration Bill within the House of Lords,.[23] However, this clause was, then, removed by the House of Commons leaving LGBTQI+ asylum seekers without any specific protection.[24]

## 3. The Equality Impact Assessment of the MoU

Although the Illegal Migration Act 2023 grants no special protections, the government has not entirely ignored the situation of SOGI minorities seeking asylum. As per the requirements of s149 of the Equality Act 2010, an Equality Impact Assessment (EIA) was published alongside the MoU. The EIA drew upon the reporting of the Country Policy and Information Team (CPIT), who conducted a 'safety assessment' of Rwanda based upon a written evidence, country visits and interviews with Rwandan government officials and NGOs.[25] With respect to LGBTQI+ asylum seekers, the report concluded that removal to Rwanda would not be *prima facie* discriminatory. This finding was despite recognition of ongoing ill treatment of LGBTQ+ populations in Rwanda, which was viewed as treatment that was 'more than one off' but not 'systematic'.[26] The risk of ill treatment with respect to 'individual vulnerabilities' resulting from SOGI identified the EIA was to be managed through two mechanisms: case-by-case assessment of individual eligibility for removal and ongoing monitoring of those who have been relocated.[27]

Notable here is the fact that that while the EIA does explicitly state that it will undertake individualised assessment – as is legally required – the standards of this assessment are unclear. Indeed, the EIA notes that '[s]uitability for relocation will be kept under constant review however we are keen not to divulge the exact criteria.'[28] This opacity makes it difficult to assess the scope and standard of these individual assessments of vulnerabilities. As we discuss below, vulnerability must be understood as situated, intersectional and multifaceted. Moreover, within the framework of the ECHR, discrimination and vulnerability are closely linked. This more complex understanding of vulnerability does not appear to be present in the EIA or the MoU.

Beyond the limitations of the EIA's approach to vulnerability, further issues can be raised about the assessment of the safety of LGBTQI+ asylum seekers. A 2023 Women and Equalities Committee report has noted the variable and occasionally 'gravely inadequate' standards of Country Policy and Information Notes (CPINs).[29] In this case proper assessment of the underlying research for the EIA is

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[23] Section 6(5)(b) of the Illegal Migration Act 2023 s 6(5)(b) .https://bills.parliament.uk/bills/3429/stages/17763/amendments/10007841.
[24] Ibid.
[25] Home Office *Migration and Economic Development Partnership with Rwanda: equality impact assessment* (4 July 2022) Available at https://www.gov.uk/government/publications/migration-and-economic-development-partnership-with-rwanda Accessed 15 August 2023.
[26] Ibid.
[27] Ibid.
[28] Ibid.
[29] Women and Equalities Committee *Equality and the UK asylum process* (n 7) para 64-70.

hindered by a lack of methodological clarity on the part of the CPIT about the criteria for identifying relevant documents or interviewees during the country visit to Rwanda .These issues with CPINs were also commented upon by the Supreme Court, in its consideration of the reliability of the government's conclusion that Rwanda would be safe.[30]

The limitations of the CPIN research leads to their conflicting with the findings of other sources and authorities. One clear example of such a conflict can be found in the assessment of the situation of LGBTQI+ people in Rwanda. In *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department,* the Supreme Court abolished the 'discretion test' that allowed for LGB people to be returned and told to live discreetly.[31] The EIA does not maintain this emphasis on the right of queer people to live openly and freely. It instead emphasises the lack of criminalisation of homosexuality in Rwanda and de-emphasises the lack of specific guarantees of protection and non-discrimination central to ensuring that LGBTQI+ people can live safely.

The departure of the EIA from the standards of *HJ (Iran) and HT (Cameroon)* is even more evident in its finding that '[t]he visibility of gender as opposed to sexuality issues places transgender women at greater risk of ill-treatment'.[32] Implicit in this comment is a kind of discretion test of the type that had been firmly rejected by the Supreme Court. Trans women are more likely to be subject to harm because they may be more visible and thus less able to be discreet. However, in *HJ and HT,* the Supreme Court concluded that the safety of LGBT persons should not depend on their capacity to appear heterosexual and cisgender in public places. Moreover, this sentence in the EIA alone recognises that those who are open in their sexuality are, in fact, potentially at risk. The EIA thus raises significant concerns both in terms of how the assessment of Rwanda was undertaken, but also in terms of what criteria were used to set the standard for what a safe situation for LGBTQI+ people might be. The following section shows how limited consideration of the intersection of identity and vulnerability contributes to a poor understanding of the situation of LGBTQI+ asylum seekers.

## 4. Intersectionality, Identity and Vulnerability

It is unsurprising given the EA 2010's focus upon singular protected characteristics, rather than intersectional or 'dual discrimination', that identity is treated in the EIA as a series of discreet internal categories, rather than something that is complex structural or fluid. Wider literatures of refugee law and equality law have highlighted the limitations of this approach, with calls for more intersectional

[30] Ibid., para 53-55.
[31] [2010] UKSC 31 [2011] 1 AC 596.
[32] Home Office. *Migration and Economic Development Partnership with Rwanda: equality impact assessment* (n 25).

approaches to refugee decision making.[33] Intersectionality emerged in the work of Kimberlé Crenshaw as a critique of the way in which categories of identity were treated, particularly in the courts, as mutually exclusive. Crenshaw insisted upon the consideration of how the intersection of race, gender and class shaped operated as interacting, structural factors that positioned Black women disadvantageously.[34] For the purposes of this paper, intersectional analysis allows a critique of the consideration of risk and vulnerability along a single axis of identity. As Nina Held and Moira Dustin note in relation to SOGI asylum seekers:

> Their legal and social experiences (including experiences of persecution) are not only shaped by sexual orientation and gender identity but also by their intersections with sex, 'race', social class, religion, and other social identifiers; however these intersections are often not considered by decision-makers…The one-dimensional approach to SOGI asylum mitigates against a full understanding of LGBTQI+ asylum-seekers' experiences and therefore against fair treatment of these claims.[35]

This limited understanding of how identity and identity categories fails to capture the refugee experience raises further issues, when considered in relation to the EIA's statement that:

> there will be a case-by-case risk assessment when determining suitability for relocation and *individual vulnerabilities* will be taken into consideration and assessed against our knowledge of the conditions in Rwanda [italics added].[36]

This approach means that, in a very limited period of time, a person must prove both that they can fit within an identity category recognisable as an EA 2010 protected characteristic and that this renders them vulnerable. This replicates the already existing issues that plague LGBTIQA+ asylum claims because it places a significant practical burden upon LGBTQI+ asylum seekers with respect to 'proving'

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[33] For an overview of refugee law scholarship see generally Dina Taha 'Intersectionality and Other Critical Approaches in Refugee Research: An Annotated Bibliography' (Local Engagement Refugee Research Network Paper No. 3 – December 2019). See also Kate Malleson, 'Equality Law and the Protected Characteristics' (2018) MLR, 598. See also Rand Shahin, ''Intersectionality': A Blind-Spot Missed in the British Equality Framework?' (2020) 6 LSE LR 32; Sylvia Walby, Jo Armstrong and Sofia Strid. 'Intersectionality and the Quality of the Gender Equality Architecture' (2012) 19 Social Politics 446; Olena Hankivsky, Diego de Merich and Ashlee Christoffersen, 'Equalities devolved: experiences in mainstreaming across the UK devolved powers post-Equality Act 2010' (2019) 14 Br Polit 141; Iyiola Solanke ' Infusing the Silos in the Equality Act 2010 with Synergy' (2011) 40 Industrial Law Journal 336.

[34] Kimberlé W. Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) 1 U. Chi. Legal F. 139; Kimberlé W. Crenshaw (1991). 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color' (1991) 43 Stan.L.Rev 12419.

[35] Moira Dustin and Nina Held 'In or out? A Queer intersectional approach to 'Particular Social Group' membership and credibility in SOGI asylum claims in Germany and the UK' (2018) University of Sussex. https://hdl.handle.net/10779/uos.23463953.v2, 75; Eoin Jackson, 'Reforming the "credibility test" to better recognise LGBTQ+ asylum seekers' (2022) 40(16) Irish Law Time, 235; Toni A.M. Johnson, 'On silence, sexuality and skeletons: reconceptualizing narrative in asylum hearings' (2011) 20(1), Social & Legal Studies, 57; Cillian Bracken, 'Unreasonable intolerance: Article 14 as the basis for sexual orientation and gender identity refugee claims under the European Convention on Human Rights' (2017) 5 European Human Rights Law Review, 455.

[36] Home Office *Migration and Economic Development Partnership with Rwanda: equality impact assessment* (n 25).

their sexuality to often suspicious decisionmakers in an even shorter period of time.[37] These practical issues sit alongside the fact that here, vulnerability is used as a tool of governance and control, that reimpose already existing power dynamics that are rarely sensitive to changing and structural determinants of vulnerability as it intersects with identity[38] and that rarely allows those who are vulnerable to express how exactly their vulnerability is experienced.[39]

Within the Rwanda Policy therefore, identity and vulnerability are articulated primarily through categories and conceptual frameworks over which those seeking asylum have very little control. Government imposed understandings of identity that exist only upon a single axis create hierarchies of vulnerability into which asylum seekers must situate themselves to benefit from even the possibility of a case-by-case consideration of whether they are vulnerable enough to merit exclusion from the possibility of removal. After first outlining the domestic consideration of the Rwanda Policy in *AAA v SSHD* we then turn to ECHR caselaw to argue that while Convention jurisprudence continues to use the language of vulnerability in a top-down manner that gives relatively little agency to those who are vulnerable, the way in which vulnerability is conceptualised with respect to LGBTQI+ identities and experiences can be used to set out a more robust and expansive framework of state responsibilities to those who are deemed vulnerable within the asylum system.

## 5. The AAA case through the lens of Intersectionality, Identity and Vulnerability

In *AAA*, the High Court found that the Secretary of State for the Home Department ('SSHD') had lawfully decided that Rwanda is a safe third country after a 'thorough examination of all relevant generally available information',[40] as required by *Ilias*.[41] The latter case dealt with the asylum applications of two Bangladeshi nationals who passed through Greece, the former Yugoslav Republic of Macedonia and Serbia before entering Hungary. The ECtHR concluded that Hungary had violated Article 3 for failing to assess both the merits of applicants' asylum request based on a safe third country clause and the alleged risk of being subjected to treatment contrary to Article 3.[42]

[37] Ferreira, 'Utterly Unbelievable: The Discourse of 'Fake' SOGI Asylum Claims as a Form of Epistemic Injustice' (n 4).
[38] Amalia Gilodi, Isabelle Albert and Birte Nienaber, 'Vulnerability in the Context of Migration: a Critical Overview and a New Conceptual Model' (2022) Human Areas.
[39] Ibid; Daria Mendola and Alessandra 'Vulnerability of refugees: Some reflections on definitions and measurement practices' (2022) 60 International Migration 108; Simona Zavratnik and Sanja Cukut Krilić 'Addressing intersectional vulnerabilities in contemporary refugee movements in Europe' (2018) Druzboslovne Razprave, XXXIV, 85; Krivenko, 'Reassessing the Relationship between Equality and Vulnerability in relation to Refugees and Asylum Seekers in the ECtHR' (n 12); Peroni and Timmer, 'Vulnerable groups: The promise of an emerging concept in European Human Rights Convention law' (n 11).
[40] *R (on the application of AAA and others) v Secretary of State for the Home Department* [2022] EWHC 3230 (Admin) [2022] 12 WLUK 280 [59].
[41] *Ilias v. Hungary* (2020) 71 EHRR 6. See also *MA v Bulgaria* (2020) 71 EHRR 20; *MA v Lithuania* (2020) 70 EHRR 11; *Babajanov v Turkey* (2018) 67 EHRR 32.
[42] Ibid [151-164].

In the *AAA* case, because removals had not yet taken place, available information was limited. According to the High Court, a reliance on past evidence by the claimants was 'speculative'.[43] In relation to *non-refoulement*, it was also on this basis that the High Court found that there was no breach of Article 33 and the principle of *non-refoulement*. The High Court further held that Article 31 of the Refugee Convention did not in principle prevent the SSHD from removing people seeking asylum to safe third countries, the policy was not discriminatory and the claimants had been given sufficient opportunity to explain why they had not claimed asylum in the other countries they had passed through.[44] However, the High Court ruled that the individual decisions were inadequately reasoned and were therefore unlawful.[45]

The claimants subsequently appealed to the Court of Appeal, which allowed the appeals by a majority of 3 to 1 on the ground of 'the safety of Rwanda issues'.[46] On "this point, the majority held that there was a real risk that persons sent to Rwanda for their claims to be processed would be returned to their home countries where they might face a risk of persecution or inhumane treatment, notwithstanding the fact they might have a good claim for asylum.[47] This conclusion was based on the evidence of inadequacies in Rwanda's system for deciding asylum claims .[48] On this basis, the Court of Appeal held that sending anyone to Rwanda for their claims to be processed would be a breach of Article 3. However, the Court of Appeal otherwise unanimously dismissed the appeals on the other issues under consideration, including on the issue of whether Article 31 in principle prevents removal to safe third countries; and on whether the procedures on which basis the SSHD decided to send people to Rwanda were unfair.[49] In relation to the latter, however, the Court of Appeal did find that some of the High Court's reasoning was insupportable, emphasising that caseworkers need to be given guidance on the importance of flexibility when deciding whether to grant extensions to time limits.[50]

When considering the evidence on asylum processes in Rwanda, the Master of the Rolls (MoR) nodded to the importance of considering vulnerability of asylum seekers arguing that '[i]t is also important to bear in mind that many [relocated individuals] are likely to be especially vulnerable as a result of their experiences, which may include a history of torture'.[51] The MoR correctly applied ECtHR caselaw that

[43] Ibid [77].
[44] Ibid [125].
[45] Ibid [438].
[46] *R (on the application of AAA and others)* v Secretary of State for the Home Department [2023] EWCA Civ 745, [2023] 6 WLUK 395 [57-67].
[47] Ibid [92] and [119] (Sir Geoffry Vos, Master of the Rolls) [293-294] (Underhill LJ). For a dissenting point of view, see Lord Burnett of Maldon [525].
[48] *Soering v United Kingdom* (1989) 11 EHRR 439.
[49] *R (on the application of AAA and others)* (n 46) [304- 330].
[50] Ibid [375], [434-443].
[51] Ibid [189].

portrays asylum seekers as vulnerable because of the circumstances that they had experienced.[52] However, apart from this quote, there is otherwise no substantive reference to vulnerability in the judgment. Both scholarship[53] and ECtHR caselaw[54] agree that the characterisation of a group as vulnerable obliges states to provide a more responsive and tailored level of protection to respond to specific needs and concerns. The Rwanda Policy does not meet this signposted threshold because the UK is only in charge of the initial screening of asylum seekers, while the Rwandan authorities oversee the actual assessment of the asylum claims. In this sense, the conclusion that there is a real risk of an Article 3 breach in *AAA* is blind or indifferent to intersecting aspects of identity and difference that might result in an increased risk of an Article 3 breach. Indeed, within the case, treatment of vulnerability, identity and difference drifts towards a kind of essentialism, reifying one experience as paradigmatic, at the expense of other experiences.[55]We agree with the Court of Appeal that the Rwanda Policy is unlawful and that those removed to Rwanda face a real risk of ill treatment regardless of particular protected characteristics. However, we also see the Rwanda Policy, and the case as a missed opportunity to consider how identity, vulnerability and harm interact in the context of asylum.[56]

The lack of additional positive obligations stemming from the vulnerability of asylum seekers is also clear in the assessment of 'all generally available information' upon which the High Court concluded that Rwanda is a safe third country. The Court of Appeal implicitly criticised the High Court's focus on the procedural rather than substantive aspects of *Ilias*, itself finding that there was a substantive risk of breach of Article 3 and *non-refoulement*; and declining, thereafter, to decide whether the SSHD had met her procedural duty in undertaking a thorough examination of the relevant generally available information.[57] Their reasoning was based on a key finding in *Ilias*,[58] that 'if the asylum-seeker does not have access to such a procedure there will *prima facie* be a real risk of being refouled, either because their claim is not entertained at all or because it is not determined properly and fairly'.[59] The Court of Appeal considered the evidence in relation to asylum procedures in Rwanda and found the procedure was so flawed as to create the risk of *any* asylum seeker being refouled, notwithstanding assurances made in good faith by the Rwandan authorities.

[52] *MSS v Belgium and Greece* (2011) 53 EHRR 2.
[53] Peroni and Timmer 'Vulnerable groups: The promise of an emerging concept in European Human Rights' (n 11), fn 140.
[54] *Chapman v. United Kingdom* (2001) 33 EHRR 18, [96] *MSS. v. Belgium and Greece* (n 52), [251] Yordanova v. Bulgaria, App. No. 25446/06 (ECtHR 24 April 2012) [128-129].
[55] Peroni and Timmer 'Vulnerable groups: The promise of an emerging concept in European Human Rights' (n 11); See also Vanessa E. Munro, 'Resemblances of Identity: Ludwig Wittgenstein and Contemporary Feminist Legal Theory' (2006) Res Publica 137, 138.
[56] Jan Helge Solbakk, 'Vulnerability: A Futile or Useful Principle in Healthcare Ethics?' in Ruth Chadwick, Henk ten Have & Eric M. Meslin eds. *The SAGE Handbook of Health Care Ethics* (Sage, 2011), 232.
[57] *R (on the application of AAA and others)* (n 46).
[58] *Ilias v. Hungary* (n 41), [131].
[59] Ibid [123].

At time of writing , the Supreme Court has upheld the unlawfulness of the Rwanda Policy and no asylum seekers face imminent removal. In confirming the decision of the Court of Appeal, the Supreme Court did not rely solely upon the protections against *refoulement* afforded by Article 3 ECHR, instead finding that 'The principle of non-refoulement is […] given effect n by other international conventions to which the [UK] is party' and further that the UK had acknowledged *non-refoulment* to be a principle of customary international law and thus binding upon states regardless of other treaty obligations'.[60] In considering the risk of *refoulement* posed by the Rwanda Policy, the Supreme Court argued that the ECtHR requires an assessment of how the practical operation of asylum system in the receiving state[61] and the diplomatic assurances received by the UK[62]. However, it concluded that 'the past and the present cannot be effectively ignored or side-lined as the Secretary of State suggests [...] risk is judged in the light of what has happened in the past, and in the light of the situation as it currently exists, as well as in the light of what may be promised for the future.' Drawing upon evidence presented by UNHCR and upon the results of a previous agreement between Rwanda and Israel in which Rwanda accepted people seeking asylum from Eritrea and Sudan, the Supreme Court concluded that 'As matters stand, the evidence establishes substantial grounds for believing that there is a real risk that asylum claims will not be determined properly, and that asylum seekers will in consequence be at risk of being returned directly or indirectly to their country of origin' where they would face ill treatment.[63] While we welcome, the Supreme Court's finding, we argue that the limited consideration of identity and vulnerability in the MoU is repeated by the courts. Indeed, the Supreme Court concluded that, in light of their findings on non-refoulement, it was unnecessary to discuss both the specific grounds according to which people seeking asylum were at risk of ill-treatment in Rwanda and the fact that the Secretary of State had failed to consider the risk of refoulement with the degree of care required either under the common law or under article 3 of the ECHR.[64] We suggest below that the ECtHR offers an initial point of departure for using a lens of vulnerability to frame a much wider scope of substantive and positive obligations afforded to LGBTQI+ asylum seekers than has been found domestically.

## 6. The ECHR and the MoU

The Illegal Migration Act 2023 contains a clause that disapplies Section 3 of the Human Rights Act[65] preventing the interpretation of any provision of the Illegal Migration Act 2023, which could *prima*

[60] SC, R (on the application of AAA and others) (n 10) [26].
[61] Ibid [45].
[62] Ibid [47-57]. *Othman v United Kingdom* (2012) 55 EHRR 1 and Zabolotnyi v Mateszalka District Court, Hungary [2021] UKSC 14; [2021] 1 WLR 2569.
[63] SC, R (on the application of AAA and others) (n 10) [105].
[64] Ibid [106].
[65] Illegal Migration Act 2023 s 1(5).

*facie* violate the ECHR in a way which is compatible with the Convention.[66] This unprecedented provision dangerously curtails judges' powers to protect asylum seekers' human rights.[67] We argue however, that the ECHR remains a valid lens to assess the complexity of identity as it intersects with vulnerability, and that the possibility of a declaration of incompatibility under Section 4 of the HRA, and the possibility of taking a claim to the Strasbourg court mean that the framework of the ECHR remains relevant to the consideration of the rights of people seeking asylum. The following sections consider how ECHR jurisprudence engages issues of vulnerability and identity and how this might be applied to the situation of LGBTQI+ asylum seekers facing removal to Rwanda.

### 6.1. Article 14 of the ECHR – LGBTQI+ asylum seekers identity and vulnerability

The application of Rwanda Policy to LGBTQI+ asylum seekers engages Article 14 of ECHR, which prohibits any form of discrimination in the enjoyment of ECHR rights, under two different aspects. ECtHR caselaw recognises that the residual umbrella term 'other status' covers the asylum seekers' status,[68] as well as individuals' sexual orientation.[69] Thus, the immediate consequence of that is that ECtHR jurisprudence in relation to Article 14, together with Articles 3 (prohibition of non-refoulement), 5 (right to liberty) and 6 (right to a fair trial), offers a privileged way of looking at the application of the Rwanda Policy to LGBTQI+ asylum seekers under a double lens.

Second, the ECtHR caselaw on Article 14 is more attuned to the complex understanding of intersectionality and associated forms of vulnerability, as already discussed above. Indeed, ECtHR judges often use this argumentative tool when they need to afford enhanced protection in difficult circumstances, where more than one factor contributes to unique protection needs.[70] The third consequence of that is linked to the type of obligations the UK is expected to respect to safeguard LGBTQI+ asylum seekers under Article 14. The legal doctrine of margin of appreciation grants Member States some discretion in deciding over controversial matters.[71] Recent scholarship suggests that that the introduction of 'vulnerable group' has created an asymmetrical interpretation of the ECHR, by restricting the margin of appreciation in Article 14 cases and imposing positive obligations upon States

[66] See also *Ghaidan v Godin-Mendoza* [2004] UKHL 30.
[67] Joint Committee on Human Rights Legislative Scrutiny: Illegal Migration Bill Twelfth Report of Session 2022–23 (HC 1241, HL Paper 208, 11 June 2023), 9, 33.
[68] *Hode and Abdi v. the United Kingdom* (2013) 56 EHRR 27, [47].
[69] *X and Others v Austria* (2013) 57 EHRR 14, [99]; *Christine Goodwin v United Kingdom* (2002) 35 EHRR 18.
[70] Anardóttir, 'Vulnerability under Article 14 of the European Convention on Human Rights: Innovation or Business as Usual?' (n 9).
[71] Protocol 15 to ECHR (2013, CETS 213; not yet in force); Steven Greer, *The Margin of Appreciation: Interpretation and Discretion Under the European Convention on Human Rights* (Human Rights Files, 2000).

to protect victims of human rights violations.[72] This means that, while the ECtHR generally provides a generous space for *manoeuvre* to national authorities to fulfil their ECHR obligations, this does not apply to cases that ascertain a violation of Article 14. In those cases, the ECtHR does not only impose upon national authorities a duty to refrain from discrimination, but it also requires that the state must adopt specific positive steps to guarantee substantive equality.

Agreeing with the previous scholarship, we argue that the reference to Article 14 creates support for the proposition that asylum processes and procedures must be inclusive and sensitive to particular and intersecting characteristics in order for those processes and procedures to be effective and accessible. However, considering that Article 14 ECHR is an accessory right, it must be linked to other human rights obligations. The sections below consider broad state responsibilities towards asylum seekers with respect to Article 3 and then consider in more detail how Article 14, taken with Articles 3 (prohibition of non-refoulement), 5 (right to liberty) and 6 (right to a fair trial) impose obligations upon states with respect to the treatment of LGBTQ+ asylum seekers.

### 1.2. Safe Third Country and of Vulnerable Asylum Seekers: Article 3 of the ECHR and the Dignity and Identity

We agree with the Supreme Court's decision, which concluded that the UK is in breach of its a procedural obligation to assess a risk of an Article 3 breach upon removal to third countries, which includes an obligation to assess whether an asylum procedure proposed in the third country would be adequate or provide sufficient safeguards; and the obligation to conduct an adequate assessment of risk to individual claimants.[73] This principle is clearly expressed in *Ilias,* where the ECtHR held that judges should conduct a rigorous assessment of the effective guarantees protecting the applicant against arbitrary direct or indirect refoulement.[74] The obligation to undertake a proper assessment of risk is more important where the receiving third country is not a state party to the ECHR, like in the case of Rwanda.[75] In our view, the issue here is twofold. First despite the explicit claim in the EIA and implicit assumption in the MoU that 'Rwanda has been assessed as a safe third country in terms of its commitment to non-refoulement and its treatment of asylum seekers and refugees'[76], we agree with the Supreme Court that there is a real risk that this is not the case. Second however, we would also

[72] Peroni and Timmer 'Vulnerable groups: The promise of an emerging concept in European Human Rights' (n 11); Anardóttir, 'Vulnerability under Article 14 of the European Convention on Human Rights' (n 9); Krivenko, 'Reassessing the Relationship between Equality and Vulnerability in relation to Refugees and Asylum Seekers in the ECtHR' (n 12).
[73] *MA v Bulgaria* (n 41); *Ilias v Hungary* (n 41); *MA v Lithuania* (2020) 70 EHRR 11 (n 41); *Babajanov v Turkey* (n 41).
[74] SC, R (on the application of AAA and others) (n 10) [63]; *Ilias v Hungary* (n 41), [113] .
[75] *Hirsi Jamaa v Italy* (2012) 55 EHRR 21.
[76] Home Office *Migration and Economic Development Partnership with Rwanda: equality impact assessment* (n 25).

dispute that the case-by-case assessments of those considered for relocation is sufficiently rigorous. In the context of LGBTQ+ asylum discussed in this paper, there is no demonstration in the MoU, the EIA or associated documents of an appreciation the scope of intersectional vulnerabilities of SOGI minorities. Furthermore, as we show below, there are significant positive obligations to protect the rights of vulnerable groups. Given that the government is 'keen not to divulge the exact criteria' through which suitability for removal is assessed, it is unclear as to whether these obligations could be met as part of the case-by-case assessments and ongoing monitoring.

With specific reference to Article 3 and 14 of the ECHR, ECtHR jurisprudence offers the perspective that a breach of Article 3 may occur on removal *to* Rwanda in relation to those persons who might be considered vulnerable. In other words, not only are such persons at risk of *refoulement* to their countries of nationality, there may also be a real risk of an Article 3 breach in Rwanda both during asylum processing and thereafter. The jurisprudence considered in this section suggests this may be the case where a breach of Article 3 is directed at a person's identity and is a breach of dignity, notwithstanding the fact that the treatment in and of itself (without the discriminatory aspect), might not otherwise reach the Article 3 threshold.

It is well-established that whether ill-treatment attains the minimum level of severity for Article 3 is a matter to be decided 'on all the circumstances of the case, such as the nature and context of the treatment, its duration, its physical and mental effects and, in some instances, the sex, age and state of health of the victim'.[77] This principle has led the ECtHR to consider that Article 3 may be breached in relation to relatively vulnerable persons in the context of a relationship of power and control. Indeed, asylum seekers who arrive to the UK shores are within the power and control of the UK authorities because, unlike economic migrants, they do not choose their 'refugee status' but this status is conferred by the UK authorities according to British asylum legislation.[78]

In relation to dignity, the ECtHR has held that treatment directed at identity (such as homophobia or racism), might render otherwise minor treatment a breach of Article 3. Indeed, the substantive Article 3 threshold has been interpreted to encompass elements of degradation and humiliation.[79] This threshold can be reached where the degradation or humiliation is a result of homophobia or transphobia, or discrimination on the basis of other (perceived or actual) characteristics.[80] This principle is explained in *Identoba and others v Georgia,* where the claimants, protesting in support of LGBT rights,

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[77] *MC and another v Romania*, App no. 12060/12 (ECtHR 12 July 2016).
[78] *Hode and Abdi v. the United Kingdom* (n 68), [47].
[79] *MC and another v Romania*, App no: 12060/12 (ECtHR 23 January 2014).
[80] Ibid; *Balazs v Hungary*, App no. 15529/12 (ECtHR 14 March 2016).

were attacked by counter-demonstrators.[81] The ECtHR found that the attack reached the minimum level of severity under Article 3 taken in conjunction with Article 14; the authorities failed to provide adequate protection; and no effective investigation was taken into the incident. Key to the reasoning in finding a breach of Article 3 was the 'homophobic bias'[82] of the verbal and physical assaults on the claimants. This was considered to be an 'aggravating factor',[83] which meant that 'the treatment of the applicants must necessarily have aroused in them feelings of fear, anguish and insecurity… which were not compatible with respect for their human dignity and reached the threshold of severity within the meaning of Article 3 taken in conjunction with Article 14 of the Convention'.[84] Similarly, in *MC and another v Romania*, treatment 'directed at [the claimants'] identity', that is, *homophobic* violence, 'must necessarily have aroused in them feelings of fear, anguish and insecurity… [which] was not compatible with their human dignity' and therefore reached the Article 3 threshold in conjunction with Article 14.[85]

This line of cases suggests that when states are considering whether to remove persons to safe third countries, key to their assessment of safety must be a consideration of not only whether there is an explicit risk of serious harm, but also whether and to what extent less harmful treatment might reach the Article 3 threshold as a result of discriminatory attitudes directed at a person's identity (and therefore impinging upon their dignity). For LGBTQI+ asylum seekers who might face removal to Rwanda or another third country therefore, the ECHR offers a way of articulating their heightened vulnerabilities in a way that goes far beyond what has so far been considered in either the EIA or in domestic jurisprudence.

### 6.3. Processing of claims in detention: Articles 5 and 6 and Vulnerability

Broadly speaking, Article 5 in conjunction with Article 14 protects persons from being arbitrarily detained on a discriminatory basis. The ECtHR has found breaches of Article 5 in conjunction with Article 14 where difference in treatment has related to place of residence;[86] foreign nationality;[87] and length of custodial sentence.[88] In *Clift*, for instance, the applicant was sentenced to 18 years' imprisonment for murder. When he became eligible for release, the parole board recommended release on the basis that his risk of offending had significantly reduced. The SSHD rejected that

[81] *Identoba and others v Georgia (2018)* 66 EHRR 17.
[82] Ibid [70].
[83] See *Abdu v Bulgaria* App no. 26827/08 (ECtHR 11 March 2014) [121], [23]; *Begheluri and Others v Georgia* App no. 28490/02 (ECtHR 07 January 2015), [107], [117].
[84] *Identoba and others v Georgia* (n 81) [71].
[85] *MC and another v Romania* (n 79), [119].
[86] *Aleksandr Aleksandrov v Russia* App no. 14431/06 (ECtHR 10 September 2018).
[87] *Rangelov v Germany* App. No. 5123/07 (ECtHR 22 March 2012).
[88] *Clift v United Kingdom* App no. 7205/07 (ECtHR 13 July 2010).

recommendation on the basis he would pose an unacceptable risk to the public and the applicant remained in prison. He argued that there had been a breach of Article 5 in conjunction with Article 14, challenging the SSHD's power to decide whether to release only one group of prisoners on licence (that is, those who were serving determinate terms of imprisonment of 15 years or more). The ECtHR accepted that Article 14 extends to those 'other statuses' which are not inherent or innate. The ECtHR also considered that the question of whether there is a difference in treatment based on a personal or identifiable characteristic is one that must give effect to the ECtHR in a practical and effective, rather than theoretical and illusory way.[89] In the circumstances, the difference in treatment lacked objective justification.[90]

The ECtHR has found breaches of Article 5 where persons are considered vulnerable due to their mental health and have been treated inappropriately. In *HL v the United Kingdom*, the applicant was found to have been detained in breach of Article 5(1) and 5(4) of the Convention where he had been admitted informally to a psychiatric ward. In relation to 5(1), he was incapable of consent and was under continuous supervision and control (and it was therefore not determinative that the ward was unlocked).[91] In relation to 5(4), there was a complete absence of procedural regulations and limits. The case gave rise to no separate issue under Article 14. Similarly, in *Strazimiri v Albania*,[92] the applicant, who was exempted from criminal responsibility for attempted murder on the basis of his mental health condition, was detained at a Prison Hospital. This was not an appropriate institution for the detention of mentally ill persons exempted from criminal responsibility. Accordingly, there was a breach of Article 5. Although the court declined to make separate findings under Article 14, key to the ECtHR's reasoning was consideration of the appropriateness of the environment of detention in relation to a person with particular needs and/or vulnerabilities.

ECtHR caselaw on Article 5 also suggests that individualised assessments of suitability of detention are required where proposed detainees are vulnerable. Should no individualised assessment be made, detention may be unlawful and/or discriminatory. In *OM v Hungary*,[93] detention was found to be unlawful because the Hungarian authorities had failed to undertake an individualised assessment of the detainee's vulnerability, which included considering the extent to which his sexuality impacted upon his vulnerability. Specific reference was made to the necessity of considering whether persons are safe

[89] Ibid [62].
[90] Ibid [77].
[91] [2004] All ER (D) 39 (Oct).
[92] (2020) 71 EHRR 8.
[93] App No. 9912/15 (ECtHR 5 October 2016).

or unsafe in custody amongst those who 'had come from countries with widespread cultural or religious prejudice against such persons'.[94]

In relation to cases concerning Article 6 in conjunction with Article 14, where discriminatory differential treatment occurs in relation to access to justice, there will be a breach of Article 6 in conjunction with Article 14. The ECtHR has found this to be the case in relation to differences in access to justice on the grounds of sex;[95] ethnicity;[96] paternity,[97] ethnic origin;[98] immigration status;[99] and religion.[100]

With specific reference to the Rwanda Policy, in relation to detention, removal and asylum procedure, risk must be assessed, including a consideration of particular vulnerabilities, history and identity. Where there is risk to vulnerable persons, procedures may be deemed to be unfair; and removal or detention unlawful. The the Supreme Court in *AAA* did not consider removal, detention procedural fairness in relation to vulnerability specifically; but in light of the reviewed ECtHR jurisprudence, from the perspective of the ECHR, policies which in their application result in state failure to take sufficient account of vulnerabilities may be in breach of Articles 5 and 6.

## 7. Conclusion

This paper suggests that part of the justification for the conclusion by the UK government that LGBTQI+ persons could be removed to Rwanda was based upon a flawed consideration of how identity, as an intersectional and structural aspect of a person's being, and vulnerability, as a nuanced and layered concept, operate in the context of LGBTQI+ asylum.

We argue that absent from the EIA and from *AAA*'s assessment is any nuanced discussion of the ways in which the implementation of the MoU might impinge upon the dignity of those removed to Rwanda, with reference to specific characteristics or identities which might render them vulnerable in the context of removal. This absence has the potential to particularly impact LGBTQI+ asylum seekers. We contend that while ECHR conceptualisations of vulnerability still rest upon a top-down, court defined understanding of what constitutes a vulnerable person, within the jurisprudence of the ECtHR, there is scope for considering identity and vulnerability in a way that has not, thus far, been found in domestic legal and political considerations of the Rwanda Policy. In particular, for LGBTQI+ asylum seekers, the existence of discriminatory attitudes directed at identity can reach the threshold of Article 3 taken with

[94] Ibid [53].
[95] *Schuler-Zgraggen v Switzerland* (1993) 16 EHRR 405.
[96] *Moldovan and Others v. Romania* (no. 2) (2007) 44 EHRR 16.
[97] *Mizzi v Malta* (2008) 46 EHRR 27.
[98] Paraskeva Todorova v Bulgaria App No. 37193/07 (ECtHR 25 June 2010).
[99] Anakomba Yula v Belgium App. No 45413/07 (EctHR 10 March 2009).
[100] *Sâmbata Bihor Greek Catholic Parish v. Romania* App no. 48107/99 (12 January 2010).

Article 14. Thus, the vulnerabilities of LGBTQI+ asylum seekers impose a different calculus of risk and vulnerability when considering both the substantive and procedural dimensions of removal and refoulement.

As such, we conclude that ECHR jurisprudence offers an important counter to the limited treatment of identity and vulnerability found in the Rwanda Policy and associated legislation. The decisions of the ECtHR offer one mechanism for countering the limited consideration of the situation of LGBTQI+ asylum seekers who could face removal under the Rwanda Policy. A greater consideration of Article 14 taken with Articles 3, 5 and 6 of the ECHR might be used to demand a more structured and nuanced approach to the positive obligations owed by the UK government to SOGI individuals seeking asylum.