Supreme Judgecraft

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In *R (on the application of AAA (Syria) and others)* the UK Supreme Court held that the Secretary of State's policy to remove protection seekers to Rwanda was unlawful. Rwanda is not, at present, a safe third country ('STC'). There are, the Supreme Court found, "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." Should this occur "refugees will face a real risk of ill-treatment in circumstances where they should not have been returned at all" (para 105).

We argue that the Supreme Court's legal reasoning and evidential assessment are both impeccable, applying legal principles that are well-embedded in international and domestic law to very clear evidence. However, the UK government's responses are deeply troubling, from the perspectives of refugee protection, international legality, and the rule of law in the UK.

Background

In April 2022, the UK Government and Rwanda entered into a Migration and Economic Development Partnership (MEDP) through a Memorandum of Understanding (MoU). This political, not legal, agreement sought to enable the 'transfer' of asylum-seekers from the UK to Rwanda to have their claims for protection determined there. Following the granting of urgent interim measures by the European Court of Human Rights (ECtHR), no removals to Rwanda have taken place.

AAA and others concerns claims brought by asylum seekers ("the claimants") variously from Iran, Iraq, Sudan, Syria, and Vietnam, who travelled to the UK irregularly in small boats or, in one case, by lorry. The Home Secretary declared the claimants' applications for asylum inadmissible. Under the Immigration Rules, a person with an inadmissible claim may be removed to a Safe Third Country (STC). The relevant definition refers to a place that the claimant was previously present, to which they have a connection, or any other STC which may agree to their entry (para 123).

Pursuant to the MEDP, the Secretary of State sought to have the claimants removed to Rwanda. The claimants challenged both the lawfulness of the Rwanda policy in general, and the inadmissibility and removal decisions made in each individual case. UNHCR was given permission to intervene, and as will be seen, its evidence and argumentation in the case were impactful.

In December 2022, the UK's Divisional Court upheld the legality of the Rwanda scheme but quashed the individual inadmissibility and removal decisions. In contrast,

in June 2023, the Court of Appeal held that the policy was unlawful. On 15th of November, the Supreme Court upheld the Court of Appeal's findings.

The UK's Externalisation Game

This case has to be considered alongside the UK's broader attempts at 'externalisation'. These include (but are alas, not limited to) the Illegal Migration Act 2023. This legislation, the key provisions of which are not in force, create a group of people who cannot have their claims for protection determined in the UK and who are instead subject to a duty to deport and a power to detain. As UNHCR has explained when the Bill was being debated:

> The legislation, if passed, would amount to an asylum ban – extinguishing the right to seek refugee protection in the United Kingdom for those who arrive irregularly, no matter how genuine and compelling their claim may be, and with no consideration of their individual circumstances.

The use of STC practices to send asylum seekers elsewhere is, of course, well-established. STC agreements were invented in Europe in the 1990s. Often justified as a means to share responsibility for refugee protection, their legality depends at a minimum on the inclusion of procedural safeguards to ensure the safety of the third country both as a general matter and for the individual protection seeker. In EU law, further safeguards apply, with the Dublin Regulation including a connection requirement, a personal interview, and procedures to ensure the "best interests" of children are respected.

The UK was bound by the Dublin Regulation until 31 December 2020. When the Brexit transition period ended, the Government sought to enter into alternative bilateral returns arrangements with other European states. However, it has been reported that France, Germany, the Netherlands, Belgium and Sweden refused to enter into any such agreements. This left the UK with no legal arrangements in place for STC returns to any of its neighbours.

Against this backdrop, the UK looked to Rwanda, the only African state to have previously engaged in these practices. This included briefly accepting asylum seekers from Israel, and reaching, but not implementing, an agreement with Denmark.

UNHCR has consistently maintained that "primary responsibility" for assessing protection needs rests with the state in which an asylum-seeker arrives, or with whose jurisdiction it engages. STC agreements should guarantee minimum rights, and "contribute to the enhancement of the overall protection space." Deporting asylum seekers to Rwanda distorts the notion that STC arrangements involve sharing responsibility, including by returning someone to a country that they could have sought protection in on their journey. This notion forms the basis of the Dublin Regulation and the US-Canada agreement. Instead, the UK's approach seeks to shift responsibility to a country already hosting many refugees, compounding

racialised inequalities within refugee law and the refugee regime. Notably, no other African state plays this externalisation game.

STC arrangements rarely deter arrivals, as UK research and decades of European experience testifies. Nevertheless, in the UK's current political climate, where "stopping the boats" has become highly politicised, the portrayal of the 'Rwanda deal' as the only way to address irregular migration has somehow taken hold. Influential, in this regard, have been think tank reports which fail to engage with either empirical evidence on the dynamics of irregular arrivals or legal scholarship. The Government's apparent engagement with such work belies the fact that is has no serious policy on this or other pressing issues, including the asylum backlog, the quality of decision making or the availability of legal advice.

The Supreme Court Ruling

The Court's unanimous judgment is a model of judicial economy and clarity. It states at the outset that it is

> … not concerned with the political debate surrounding the policy, and nothing in this judgment should be regarded as supporting or opposing any political view of the issues [2].

Instead, the Court's starting point is the UK's obligations under the Refugee Convention and international human rights law and the many UK statutes giving effect to the principle of *non-refoulement*.

The Supreme Court affirms that the UK's right to control the entry and residence of migrants is limited by international law, in particular by the prohibition on *refoulement* (para 19). This prohibition is found in a range of treaties to which the UK is party, including the Refugee Convention, CAT, ICCPR and ECHR. In the case of each key Treaty, the Court mentions not only the UK's ratification, but also the considerable number of other state parties. It also cites the Human Rights Committee's General Recommendation 31 and offers a succinct distillation of key aspects of the ECtHR's *non-refoulement* jurisprudence, including *Soering* (1989), *MSS* (2011) and *Ilias v Hungary* (2019). This emphasis on the principle's place in the system of international legality is also evident in the fact that the Court goes out of its way to acknowledge the likely customary character of *non-refoulement* (para 25). It concludes that the prohibition on *refoulement* is:

> a core principle of international law, to which the United Kingdom government has repeatedly committed itself on the international stage, consistently with this country's reputation for developing and upholding the rule of law [26].

The Court then emphasises that this principle is part of domestic law by virtue of a range of statutory provisions, concluding that:

> Asylum seekers are thus protected against refoulement not only by the Human Rights Act but also by provisions in the [three other statutes], under

> which Parliament has given effect to the Refugee Convention as well as the ECHR [33].

Adjudicating Non-refoulement

One of the central questions in the litigation concerned the approach, and test, to be applied in *non-refoulement* cases. One of the Supreme Court's strongest rebukes was of the Divisional Court on this point. "[S]everal passages" of the Divisional Court's decision suggested that they had "misunderstood their function" by limiting themselves to *reviewing* decisions made by the Secretary of State and deciding whether or not they were "tenable" (para 39). Indeed, it is interesting how clear the Supreme Court is on the constitutional role of courts, vis-à-vis that of the executive. When assurances are given by other governments, even in cases concerning national security, it is for courts to determine whether an individual's rights have been breached (para 56). The question that should be addressed in all such cases is whether there are "substantial grounds for thinking that there is a real risk of refoulement" (paras 39 and 57). The Supreme Court thereby both affirms a standard well-established across human rights courts and bodies and defends the role of the judiciary in applying it.

Another question, crucial to the application of this test, was the weight to be accorded to evidence provided by UNHCR. The Court of Appeal had been correct to interfere with the decision of the Divisional Court, not only because of the above, but also because of its failure to appreciate the status, role, and expertise of UNHCR (para 42).

Having identified, and corrected, the errors of the Divisional Court, the Supreme Court then applied the correct test to the evidence it had on the general human rights situation in Rwanda, and the adequacy of its asylum system. In doing so, it drew extensively on the UNHCR's evidence and the "impressive" judgement of Underhill LJ in the Court of Appeal (para 74).

Of note in this part of the judgment is the Supreme Court's concern about an overall lack of independence, in relation to the legal profession, judiciary, and court system in Rwanda (paras 82-3). Familiar to those who have followed the case through the domestic courts is evidence concerning the quality of decisions themselves:

> UNHCR's evidence shows 100% rejection rates at RSDC level during 2020-2022 for nationals of Afghanistan, Syria and Yemen, from which asylum seekers removed from the United Kingdom may well emanate. This is a surprisingly high rejection rate for claimants from known conflict zones. By comparison, Home Office statistics for the same period show that asylum claims in the United Kingdom were granted in 74% of cases from Afghanistan, 98% of cases from Syria, and 40% of cases from Yemen. UNHCR attributes the refusal of such claims by the Rwandan authorities to a view that persons from the Middle East and Afghanistan should claim asylum in their own region [85].

Significantly, the Supreme Court identifies a “practice of refoulement” (para 87) and a failure to understand the substantive legal content of its prohibition (para 91). Finally, the Court finds it relevant that Rwanda had failed to meet obligations it had assumed in other, similar, agreements, notably with Israel (para 100).

As the Court concludes in a one of the simplest, but most compelling of sentences:

> But 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 [103].

The Court of Appeal was correct, the Secretary of State’s policy unlawful (para 149).

Anticipating Objections

Despite the Court’s attempt to distance itself from the broader political context, certain elements of the judgment nonetheless speak to it.

To those who might assert that domestic law should be determinative, the Court engages with a raft of provisions in primary legislation that give effect to the Refugee Convention. It also refers to section 6 of the Human Rights Act 1998, which makes it unlawful for a public authority to act in a way which is incompatible with an ECHR right.

To those who, like the Prime Minister or Suella Braverman, think that the ECHR stands in the way of the Rwanda policy, the Court explains that the prohibition of *refoulement* is “given effect not only by the ECHR but also by other international conventions to which the United Kingdom is party” (para 26). As mentioned, the Supreme Court emphasises on place of *non-refoulement* in the wider system of international legality, including its likely customary character (para 25). We could also mention that the principle is “ripe for recognition” as a norm of *jus cogens*.

Strategic Silences

Judges under pressure often adopt minimalist judgments, focusing on the legal principles that are most clear and well-established. Breaking new legal ground or advancing new points of law is often for cases less in the spotlight. Perhaps understandably then, the Supreme Court limits its legal analysis to *non-refoulement*. To those concerned with legality of different kinds of arrangements for responsibility sharing or shifting, the judgement offers a silence that neither precludes nor permits.

On STC practices, the Supreme Court did not consider whether or not there is an implied obligation in the Refugee Convention on states to process the claims made by those within their jurisdiction. It did not explore the relevance of the principles of non-penalisation (article 31 of the Refugee Convention) and non-discrimination (article 3 of the Refugee Convention, article 14 ECHR). Nor did it rule on the question of whether or not the motivations of states in entering into STC agreements matter. This is potentially salient, because when the Supreme Court

of Canada reviewed the legality of Canada's agreement with the US, it took into account the role of that agreement in *sharing* responsibility for claims in accordance with international law (paras 39, 128). In contrast, the explicit purpose of the UK's scheme is to *evade* responsibility, potentially contrary to the object and purpose of the Refugee Convention.

Finally, the court did not rule on whether or not STC agreements should contain a 'connection requirement', some link between the protection-seeker and the jurisdiction they are returned to. The attempt to rely on the connection requirement in the EU Asylum Procedures Directive as 'retained EU law' failed. The Supreme Court did, however, point out that:

> No question has been raised in these proceedings as to whether the removal of asylum seekers to a state with which they have no connection is compatible with the ECHR [16].

Ditto, we would add, the Refugee Convention.

Leaving these judicial markers is perhaps significant, admitting the narrow scope of the ruling and that there are legal issues to explore on another day. Notably, the Supreme Court's aside on the likely customary status of *non-refoulement* is also suggestive in that respect.

The Fragility of (International) Legality

R (on the application of AAA (Syria) and others) was decided on narrowest and most solid of grounds. It is a judgment to be welcomed. No one will, for the time being at least, be removed to a country to which they have no connection and in which their rights are at risk. As we know, asylum seekers have been "highly distressed, anxious, and traumatised about the prospect of being shipped as though they are human cargo to Rwanda." We hope that those living in fear of such removal are now released from it.

Worryingly, however, the Supreme Court's careful reasoning and legal precision and clarity was met with immediate, direct and obfuscatory challenges to its legal authority from the highest political level.

Rishi Sunak, the British Prime Minister, announced that he would seek to pass "emergency legislation" that would pronounce Rwanda safe. He also fired a warning shot at the ECtHR: "I will not allow a foreign court to block these flights." This was not enough for those on the right of the Conservative party. Suella Braverman MP, the former Home Secretary sacked days before by Sunak, called for legislation to "block off" challenges under the ECHR and the Human Rights Act. Miriam Cates MP and Danny Kruger MP, co-chairs of the New Conservatives, said Sunak's emergency law should disapply the UK Human Rights Act and "give effect to the policy *notwithstanding* the ECHR and [UN] Refugee Convention". The Deputy Chair of the Conservative Party, Lee Anderson MP, said Sunak should ignore the

Supreme Court ruling, telling reporters "I think we should just get the planes in the air now and send them to Rwanda."

These responses render international legality's fragility all too apparent. Here, we have the apex court of an established constitutional democracy deciding a question, the safety of a country for refugees, on the clearest of legal points, a principle of international law that is well-established, widely accepted, and judicialised. It did so on the basis of a wealth of evidence from an expert source: UNHCR, the guardian of the Refugee Convention.

That this ruling has been met with immediate, political rejection should also prompt concern for the rule of law in the UK and for the values that underpin its "collaborative constitution". It forms part of the increasingly populist turn in British conservative politics which has included frequent attacks on the judiciary. The current political posturing contributes to this trend, even if it ultimately leads to nothing. It is doubtful that the "emergency legislation" being proposed could become law before the next election. It is likely to encounter significant opposition in the House of Lords, the UK's unelected upper house, which has the power to both revise and to delay. Those proposing and supporting this legislation are likely to know this. Indeed, they may cynically hope to make securing legislative change the central plank of their election (or leadership) campaign. Yet, these moves may also lack their imagined popular appeal. As Alison Young has noted on this blog, the British public is largely supportive of the judicial protection of rights. It also shows "notably higher support for judicial interventions than is often supposed." Trust in judges is "much higher" than that in politicians.

The Costs of Overriding the Law

If, conversely, overriding legislation is passed, a range of significant international legal and constitutional issues arise. From an international perspective, direct legislative change in the face of customary international law (perhaps even *jus cogens*) and a raft of treaty obligations, would put the UK out of step with its European neighbours and all the other states with whom it would seek to cooperate. It would also place it on a collision course with the ECtHR and a range of UN Treaty Bodies.

Legislation may be passed that, for example, seeks to disapply key provisions in the Human Rights Act or other legislation. Section 1(5) of the Illegal Migration Act is illustrative in this regard. It seeks to do just that in relation to section 3 of the Human Rights Act (on the interpretation of legislation). This provision, if brought into force, will be the subject of highly contentious legal challenge. Domestically, direct legislative overruling of factual finding by the Supreme Court would, however, be constitutionally unprecedented. As Nick Vineall KC, Chair of Bar Council explains, the Supreme Court decision turned on the safety of Rwanda:

> If parliament were to pass legislation the effect of which was to reverse a finding of fact made by a court of competent jurisdiction, that would raise

profound and important questions about the respective role of the courts and parliament in countries that subscribe to the Rule of Law.

The UK constitution rests on parliamentary legislative supremacy. The judiciary have, however, always asserted common law and constitutional principles of legality. Such principles notionally protect liberties and judicial independence. Politicians have, wisely, not sought to flout these constitutional principles so egregiously before. One could look again at the Supreme Court's comments on the relationship between it and the executive in cases involving human rights (para 56, discussed above) and draw a range of conclusions as to its likely response if required to adjudicate on any such legislation. One might also want to reflect on the relationship between the common law and customary international law: the Supreme Court's comments on the prohibition of *refoulement* being part of the latter, *potentially* make it part of the former. Litigation on any of these points would be of historical constitutional significance.

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