
GARDEN COURT
CHAMBERS

IMA Part 3 - Rwanda, Third Country Removals & Interim Measures

Garden Court Chambers

29 November 2023

Dealing with Inadmissibility decisions and NOIs post UKSC judgment

Isaac Ricca-Richardson

Contents

1) Outstanding Inadmissibility decisions: the relevance of 345D of the Rules.
2) Notices of Intent but no decision: how to get the claim admitted.
3) How to frame your representations.

Outstanding Inadmissibility decisions and 345D

The first category of persons positively impacted by the UKSC judgment are those with an outstanding decision treating their asylum claim as inadmissible.

Here, the aim will be to have the SSHD withdraw that decision and decide the claim in the UK. In support of that you will want to rely on:

- **Rule 345D**: where SSHD "believes removal to a safe third country within a reasonable period of time is unlikely", the claim **will** be admitted.
- **Inadmissibility guidance:** the version relied upon depends on whether claim made pre or post 28 June 2022 (although differences are minimal).
- **Any compelling personal factors** that mean delay is particularly harmful **or** which mean third country removal is unsuitable (345D(ii) for pre 28 June 2022) / raise exceptional circumstances (s80B(7) of the NIAA 2002 for post 28 June 2022).

NoI but no decision: how to get the claim admitted

This cohort is far bigger than those with decisions: 24,000 recipients of NoIs by March 2023 (Guardian).

Although s.2 IMA not currently in force, the cohort will grow further still if it is introduced, as SSHD will be under a 'duty to remove' anyone arriving after 20 July 2023.

SSHD's position in Rwanda litigation was 345D does not apply until *after* decision made. **So how do we get the claim admitted?**

- The key will be the *Inadmissibility guidance*, plus any specific compelling factors in each claimant's case.
- Begin by making representations against the guidance and, if unsuccessful, PAP on grounds of e.g. irrationality and failure without good reason to apply policy.

Inadmissibility guidance for claims pre 28 June 2022

For this cohort, the relevant iteration is v6. This provides:

- Inadmissibility action may be suitable *"provided there are reasonable prospects they can be removed in a reasonable time to a safe country"* (p.6).

- If it is not possible both to make a decision and effect removal within a reasonable period, *"inadmissibility action must be discontinued, and the person's claim must be admitted to the asylum process for substantive consideration"* (p.18).

Although v6 states there is *"no strict time limit"* for making an inadmissibility decision (p.18), v7 states in respect of pre 28 June 2022 claims that *"where more than six months has passed since the date of the claim, inadmissibility may not be appropriate – this is fact specific"* (p.9).

V6 further states, repeatedly, that the *"particular circumstances"* of the applicant will be relevant (see e.g. p.13, p.18).

Inadmissibility guidance for claims post 28 June 2022

The relevant iteration here is v7. That provides:

- The inadmissibility process *"must not create a lengthy 'limbo' position"*, where the claim is not decided at all (p.27).

- As with v6, if it is not possible to make a decision and effect removal within a reasonable period, the claim *"must"* be considered in the UK (p.27).

Like v6, v7 of the guidance also repeatedly refers to the *"particular circumstances"* of the individual claimant.

How to frame your representations

Whether you have a decision or just an NoI, (1) the key is whether the SSHD can make a decision and remove in a 'reasonable period' (2) there is no strict timeframe but claims in 'limbo' for longer than six months (or likely to be) may be suitable for reps, and (3) individual circumstances are always relevant.

As such, representations for both should begin by setting out the relevant Rule and / or policy and then:

1. Describe both the length of time your client has *already* spent in limbo and the likelihood of a significant further period, by reference to (a) the UKSC's decision, (b) lack of evidence of issues being rectified, and (c) evidence that even if / when operational there will be significant delay (due e.g. to the size of the cohort, evidence that number of transferees will be low (BBC, parliament, Times)).

2. Address any reasons why delay is particularly harmful to your client.

3. Address any reasons why, even if there was no delay, removal would be inappropriate (pre 28 June 2022) / there are exceptional circumstances (post 28 June 2022): mental health, trafficking indicators, family life in the UK.

Thank you

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Illegal Migration Act 2023:

s. 2 Duty to Remove

Eva Doerr, Garden Court Chambers

29 November 2023

Contents

Introduction – duty to remove

- Latest incarnation of UK gov's commitment to stop 'boat crossings' through deterrence
- Provisions are not yet in force (and may well never come into force)
    - Bill first published in March 2023 in wake of Divisional Court judgment in *AAA and Ors v SSHD* [2022] EWHC 3230 (Admin)
    - Since then Court of Appeal ([2023] EWCA Civ 745) and Supreme Court ([2023] UKSC 42) found that Rwanda is not a safe third country ie that removal of asylum seekers there would be unlawful
    - Unless there is/are willing safe third country/ies with sufficient capacity for people to be removed to, the duty to remove is practically unworkable
- UNHCR position: core provisions inconsistent with UK's obligations under international law incl: IMA 2023 extinguishes right to claim asylum in UK and creates real risk of refoulement (see UNHCR opinion on Bill and recommendations for implementation)

When does the duty to remove apply?

- Duty to remove applies where the following four conditions are met:

1. The person entered in breach of immigration provisions;

2. The person entered the UK on or after 20 July 2023 (this date is subject to change);

3. The person travelled through a safe third country (has not *"come directly"* to UK). Note: contrary to international law, this includes persons who have merely *"passed through or stopped"* in another safe country;

4. The person requires leave to enter or remain and does not have it.

Exceptions (1)

- Duty to remove is suspended for:

1. Unaccompanied minors until person turns 18. IMA provides SSHD with power to remove unaccompanied minors in these prescribed circumstances:

    1. Purpose of removal is family reunion;
    2. Removal is to child's country of nationality provided this is EEA member state or Albania;
    3. Removal is to country where child embarked from prior to entry to UK provided child has not made protection or HR claim;
    4. In other circumstances specified by SSHD.

2. Victims of trafficking where person is cooperating with law enforcement agencies in connection with investigation/ prosecution of offence relating to history of trafficking

Exceptions (2)

- Duty to remove permanently disapplied where:

3. ECtHR has issued interim measure preventing removal and Minister of the Crown has personally determined that remeoval duty does not apply in relation to the person. Matters of particular relevance for the decision of the Minister of the Crown include whether the UK government had an opportunity to make representations and the likely duration of the interim measure and the timing of any substantive determination of the matter by the Strasbourg court.

- SSHD may include additional 'exceptions' to the removal duty

Challenging removal to ‘safe third country’ if removal duty applies

- Where duty to remove applies, SSHD has to declare inadmissible any asylum or human rights claims concerning the person’s country of citizenship/ origin. Effect: no substantive consideration of protection claims in UK and no right of appeal to Immigration Tribunals.

- Person can still claim that removal to proposed third country would breach their human rights. Remedy against refusal of such a claim will be judicial review (there is no right of appeal). However, the JR challenge would be non-suspensive.

- New statutory means of challenging removal in narrow circumstances: where this would cause serious irreversible harm. The duty to remove is suspended while these proceedings are ongoing.

Suspensive claims: serious harm (1)

- Brought on basis that, before the time it would take to make a human rights claim, receive a decision, and bring a judicial review, the applicant would face a real, imminent and foreseeable risk of serious and irreversible harm if removed to the third country.

- Time limits are very short:

    - Claim must be brought within 8 days from the day on which removal notice is served (subject to extension). Claims brought late will only be considered if there were "compelling reasons" for delay. Remedy against refusal of accepting claim out of time is declaration from UT (which will be determined on papers).
    - SSHD will make decision within 4 days (subject to extension)

- SSHD obliged to consider 1) assurances given by government of safe third country, 2) any support and services provided in the safe third country, 3) evidence (or lack thereof).

Suspensive claims: serious harm (2)

- If SSHD finds that serious harm condition is not met, SSHD may certify claim as clearly unfounded.
- Decision is subject to very limited appeal to UT.
- In cases where claim has been certified as clearly unfounded, appeal is subject to permission from UT. Where permission is refused, this decision is neither subject to appeal to Court of Appeal nor can it be challenged by judicial review.

Thank you

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Interim Relief in the Domestic Courts

Lessons from Rwanda

Alex Grigg, Garden Court Chambers

29 November 2023

Introduction

- Two essential questions:

    i. Is there a *prima facie* case for judicial review?

    ii. Where does the 'balance of convenience' lie?

- 'Balance of convenience' test comes from *American Cyanamid Co. v Ethicon Ltd.* [1975] AC 396. Applies with some modification in the public law context: *R (Medical Justice) v SSHD* [2010] EWHC 1425 (Admin), paras 6 to 16.

- Fundamental concern is to minimise the risk of injustice to either party. Lord Bridge of Harwich in *ex parte Factortame (No. 2)* [1991] AC 603, 659F:

    "[T]*he court shall choose the course which, in all the circumstances, appears to offer the best prospect that eventual injustice will be avoided or minimised.*"

The Rwanda litigation I

- Four key lessons:

    i. Government's timetable forces actions to be prepared rapidly – consider impact on fairness to the Claimant.

    ii. Instruct counsel, and identify evidential avenues, at earliest stage possible. The later the stage of the case, the harder it may become to introduce new evidence.

    iii. Pair generic points with case-specific representations

    iv. Judicial deference to the government's assessment

The Rwanda litigation II

- *R (AAA & Ors) v SSHD* [2023] UKSC 42:

> "*52.* […] *The FCDO in particular has long experience of diplomatic relations with other countries, and the advice of its officials can assist ministers to reach an informed view as to the likelihood of the country in question complying with assurances. Other departments may also have officials who are well-qualified to give such advice. Ministers do not, however, necessarily act on the advice of their officials.*
>
> *53.* […] *According to the evidence of Home Office officials, the CPINs underpinned the government's decision to enter into the MEDP. However, possibly because of the pressures under which they had to work, the officials who prepared the CPINs relied heavily on assurances by the Rwandan government, without close examination of supporting evidence, or consideration of publicly available material which placed some of those assurances in question.*"

The Illegal Migration Act 2023 – bar on interim relief I

- Section 54 of the Act:

> "**54. Interim remedies**
>
> (1) This section applies to any court proceedings relating to a decision to remove a person from the United Kingdom under this Act (whether the proceedings involve consideration of Convention rights or otherwise).
>
> (2) Any power of the court or tribunal to grant an interim remedy (whether on an application of the person or otherwise) is restricted as follows.
>
> (3) The court or tribunal may not grant an interim remedy that prevents or delays, or that has the effect of preventing or delaying, the removal of the person from the United Kingdom in pursuance of the decision."

The Illegal Migration Act 2023 – bar on interim relief II

- S. 54(4) adds that 'decision' includes "*any purported decision*".
- Designed to avoid the reasoning employed in *R (Privacy International)* [2019] UKSC 22, following *Anisminic* [1969] 2 AC 147 (HL)
- Similar language used in s. 2(1) of the Judicial Review and Courts Act 2022 to abolish *Cart* [2011] UKSC 28 judicial reviews (JRs of unappealable UT refusals of permission to appeal)
- The 2022 Act provisions held to be effective in *R (Oceana)* [2023] EWHC 791 (Admin) and *LA (Albania)* [2023] EWCA Civ 1337

The Illegal Migration Act 2023 – suspensive claims

- The ouster of interim relief does not avoid all judicial scrutiny.
- Sections 42-53 provide for 'suspensive claims'. Two types:

    i. 'Serious harm' suspensive claim (s. 42).
    ii. 'Removal conditions' suspensive claim (s. 43).

- Accelerated appeal to the Upper Tribunal if claim refused: ss. 44, 49.
- SSHD may certify as clearly unfounded. This erects additional permission hurdle – claimant must satisfy the UT that there is 'compelling evidence' that the claim should succeed: s. 45.
- Section 51 limits judicial review of UT decision refusing permission to appeal. Limited to questioning the constitution of the Tribunal, bad faith, or serious procedural irregularity.

Thank you

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Interim measures from the European Court of Human Rights, and the Illegal Migration Act 2023

David Sellwood, Garden Court Chambers

29 November 2023

Introduction

- Three issues to cover:
  - (1) The European Court of Human Rights' interim measures procedure, and its application to date;
  - (2) Proposed reforms; and
  - (3) The Illegal Migration Act 2023

(1) Interim measures in their current form

- Rules of the European Court of Human Rights, Rule 39 [my emphasis]:

> *"1. The Chamber or, where appropriate, the President of the Section or a duty judge appointed pursuant to paragraph 4 of this Rule* ***may****, at the request of a party or of any other person concerned, or of their own motion,* ***indicate to the parties any interim measure which they consider should be adopted in the interests of the parties or of the proper conduct of the proceedings.***
> *2. Where it is considered appropriate, immediate notice of the measure adopted in a particular case may be given to the [Council of Europe] Committee of Ministers.*
> *3. The Chamber or, where appropriate, the President of the Section or a duty judge appointed pursuant to paragraph 4 of the Rules may request information from the parties on any matter connected with the implementation of any interim measure indicated*
> *4. The President of the Court may appoint Vice-Presidents of Sections as duty judges to decide on requests for interim measures."*

(1) Interim measures in their current form

- Seven key principles applicable *in practice:*
  - (1) the need for **imminent risk of irreparable harm**;
  - (2) only granted on an **exceptional** basis;
  - (3) in a majority of cases they are made to suspend expulsion;
  - (4) generally indicated in respect of the member State, but can also apply to the applicant;
  - (5) they are **granted on the papers, no hearing, & no right of appeal**;
  - (6) the measure generally covers the duration of proceedings; and
  - (7) the measure **may be lifted at any time**.

(1) Interim measures in their current form

- Types of cases where interim measures granted include:
  - Risk of torture, inhuman or degrading treatment or punishment;
  - Expulsion cases raising issues relating to ill health:
    - *D v UK* (no. 30240/96); *N v UK* (no 26565/05); and *Paposhvili v* Belgium (no. 41738/10).
  - Potential sentence of death or life imprisonment
    - *Ocalan v Turkey* (no. 46221/99); and *Babar Ahmad & Ors v UK* (no. 24027/07).
  - Flagrant denial of justice:
    - *Soering v UK* (no. 14038/88)*;* and *Othman (Abu Qatada) v UK* (no. 8139/09).
  - 'Exceptionally', in private & family life cases:
    - *Amrollahi v Denmark* (no. 56811/00).

(1) Interim measures in their current form

- Are interim measures legally binding?
  - According to the Court, see *Mamatkulov & Askarov v Turkey* (no. 46827/99):
    - Consider Art 34, ECHR:"*The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right*";
    - And Art 1, ECHR.
  - See subsequent cases, including:
    - *Paladi v Moldova* (no. 39806/05)
    - *Kondrulin v Russia* (no. 12987/15)

(2) Proposed amendments by the Court

- Context: wider reform of the court
- The exponential rise in the number of interim measures
- *Proposed* amendments:
  - Updated Practice Direction to include:
    - Disclosure of the identity of judges who determine interim measures applications
    - Maintaining practice of providing reasons for Rule 39 decisions
    - Issuing formal judicial decisions
    - Maintaining practice of adjourning the examination of requests for interim measures

(2) Proposed amendments by the Court

- Proposed new text for Rule 39 [my emphasis]:

1.Where it is considered appropriate, immediate notice of the measure adopted in a particular case may be given to the Committee of Ministers.
2.The Court may, in ***exceptional circumstances****, whether at the request of a party or of any other person concerned, or of its own motion, indicate to the parties any interim measure which it considers should be adopted. Such measures, applicable in cases of* ***imminent risk of irreparable harm*** *to a Convention right, which, on account of its nature,* ***would not be susceptible to reparation, restoration or adequate compensation****, may be adopted where necessary in the interests of the parties or the proper conduct of the proceedings. The Court's power to decide on requests for interim measures shall be exercised by duty judges appointed pursuant to paragraph 4 of this Rule or, where appropriate, the President of the Section, the Chamber, the President of the Grand Chamber, the Grand Chamber or the President of the Court.*
3.A duty judge appointed pursuant to paragraph 4 of this Rule or, where appropriate, the President of the Section, the Chamber, the President of the Grand Chamber, the Grand Chamber or the President of the Court ***may request information from the parties on any matter connected with the implementation of any interim measure indicated.***
4.The President of the Court shall appoint Vice-Presidents of Sections as duty judges to decide on requests for interim measures

(3) Illegal Migration Act 2023

- Context, Lord Bellamy, Parliamentary Undersecretary of State of Justice (June 2023) [my emphasis]:
  - "*The Government recognise that* ***interim measures can be an important mechanism*** *for securing individuals' convention rights* ***in exceptional circumstances***. *Nevertheless,* ***the Government want the interim measures process to achieve a better balance between transparency, fairness and the proper administration of justice.*** *Ministers, including the Prime Minister, have had constructive discussions with the Strasbourg court about reform. The court's regular internal review of procedures began to look at the interim measures procedures in November 2022*"

(3) Illegal Migration Act 2023

- The response?
  - Section 55 of the IMA 2023, 'Interim measures of the European Court of Human Rights'
    - **Section 55(2)** – Ministerial *discretion* to disapply section 2(1) duty to make arrangements for removal
    - **Section 55(4)** – When determining whether to exercise discretion, the Minister '*may have regard to any matter that the Minister considers relevant*' including the matter in sub-section 5…
    - **Section 55(5)** – where an interim measure has been indicated, consider
      - (a) whether HMG was given an opportunity to present observations & information before the interim measure was indicated;
      - (b) the form of the decision to indicate the interim measure;
      - (c) whether Strasbourg will take account of any representations by HMG seeking reconsideration, without undue delay, of the decision to indicate interim measures;
      - (d) the likely duration of the interim measure and the timing of any substantive determination by Strasbourg

Conclusion

- Lots to consider, including:
  - (1) Will Section 55 IMA 2023 ever come into force?
  - (2) Will it ever be used to override interim measures?
  - (3) Does it comply with the ECHR?

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Non-refoulement and UK third country removal

Adrian Berry, Garden Court Chambers

29 November 2023

Introduction

The position in *R(AAA (Syria) and Others v Secretary of State* [2023] UKSC 42:

- Immigration Rules (Inadmissibility and Removal), 345B:

> A country is safe for a particular applicant if:
> …
> (ii) the principle of non-refoulement will be respected in accordance with the Refugee Convention
> (iii) the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law, is respected in that country

Refugee Convention

Article 33 - Prohibition of expulsion or return ("refoulement")

- 1. No Contracting State shall expel or return (" refouler ") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

- 2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.

This extends to indirect return via a third country, see *R v Secretary of State, ex parte Bugdaycay* [1987] AC 514, 532.

Non-refoulement in other International Treaties

- UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment, Article 3(1)
- UN International Covenant on Civil and Political Rights, Articles 6 and 7, see General Comment 31 (2004), para 12.
- European Convention on Human Rights, Article 3, see *Soering v UK* (1989) 11 EHRR 439; see also *MSS v Greece and Belgium* (2011) 53 EHRR 2

Customary International Law

- The UK has subscribed to the view that non-refoulement forms part of customary international law, see 2001 Declaration of State Parties to the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, fourth recital

- As part of customary international law, all states are bound by it.

- Customary International Law not addressed in *R(AAA (Syria))*

Customary International Law

- See also 2016 New York Declaration For Refugees and Migrants (UNGA):

67. We reaffirm respect for the institution of asylum and the right to seek asylum. We reaffirm also respect for and adherence to the fundamental principle of non-refoulement in accordance with international refugee law.

Customary International Law

- See also Inter-American Court of Human Rights, Advisory Opinion OC 25/18, paras 179-181:

179. The Court has defined as an integral component of the right to seek and receive asylum, the obligation of the State not to return a person to a territory in which they are at risk of persecution. Indeed, the principle of non-refoulement or non-refoulement constitutes the cornerstone of the international protection of refugees and asylum seekers and has been codified in article 33(1) of the 1951 Convention. **The principle of non-refoulement in this area has been recognized as a norm of customary International Law binding on all States**, whether or not they are parties to the 1951 Convention or the 1967 Protocol.

Customary International Law

- See also Inter-American Court of Human Rights, Advisory Opinion OC 25/18, paras 179-181:

180. However, the principle of non-refoulement is not an exclusive component of international refugee protection, since, with the evolution of international human rights law, it has found a solid foundation in the various human rights instruments and interpretations made by control bodies. **Indeed, the principle of non-refoulement is not only fundamental for the right to asylum, but also as a guarantee of various non-derogable human rights, since it is precisely a measure whose purpose is to preserve the life, liberty, or integrity of the protected person**.

Customary International Law

- See also Inter-American Court of Human Rights, Advisory Opinion OC 25/18, paras 179-181:

181. Thus, within the framework of the American Convention, other provisions on human rights such as the prohibition of torture and other cruel, inhuman, or degrading punishment or treatment, recognized in Article 5 of the American Convention, provide a solid base of protection against return. In this regard, this Court has already indicated that, starting from Article 5 of the American Convention, read together with the erga omnes obligations to respect and enforce the norms that protect human rights, reveals the obligation of the State not to deport, return, expel, extradite, or remove in any other way to another State a person who is subject to its jurisdiction, or to a third State that is unsafe, when there are grounds for believing that they would be in danger of being subjected to torture, or cruel, inhuman or degrading treatment….

Customary International Law

…. This principle seeks, above all, to ensure the effectiveness of the prohibition of torture in any circumstance and with regard to any person, without any discrimination. **Since it is an obligation derived from the prohibition of torture, the principle of non-refoulement in this area is absolute and also becomes a peremptory norm of customary international law; in other words, of ius cogens.**

- For a rule of customary international law to have the status of *jus cogens*, it must be based on the consistent practice of states and superior *opinion juris* (opinion as to law or necessity)

UK Legislation

Non-refoulement principle embedded in UK legislation:

- S 2 of the Asylum and Immigration Appeals Act 1993 (viz the Refugee Convention)
- S 6 of the Human Rights Act 1998 (viz the ECHR)
- Ss 82 and 84 of the Nationality, Immigration and Asylum Act 2002, viz appeals
- S 94 of the Nationality, Immigration and Asylum Act 2002, viz 'clearly unfounded' certificates
- Schedule 3 to the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, viz the Refugee Convention

What next? Questions for further consideration

- What Next?

  (i) A new UK-Rwanda Treaty?

  (ii) New legislation declaring Rwanda safe

Questions for further consideration:

(i) To what extent does customary international law regarding non-refoulement form part of domestic law?

(ii) If it does, what is its effect on (1) any primary legislation declaring Rwanda a safe third country, and (2) consideration by a domestic court of the validity and effect of a Treaty?

Thank you

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