
GARDEN COURT
CHAMBERS

# Safety of Rwanda: What next?

Sonali Naik KC, Garden Court Chambers

4 June 2024

# *AAA and others v SSHD* [2023] UKSC 745

- [Judgment of the UKSC 15 November 2023]
- Under the Home Secretary's Rwanda policy, certain people claiming asylum in the UK will be sent to Rwanda where their claims will be decided by the Rwandan authorities. If their claims are successful, they will be granted asylum in Rwanda.
- The Supreme Court held that Rwanda was not a safe third country with UNHCR intervening.
- On the evidence, there was a real risk of an Article 3 ECHR breach for asylum-seekers being sent there by reason of refoulement to their country of origin.

# UKSC reasons

- Rwanda has a poor human rights record. In 2021, the UK government criticised Rwanda for "extrajudicial killings, deaths in custody, enforced disappearances and torture".
- UK Government officials have also raised concerns about constraints on media and political freedom.
- UNHCR's evidence was that there are serious and systematic defects in Rwanda's procedures and institutions for processing asylum claims:
  - (i) concerns about the asylum process itself, such as the lack of legal representation, the risk that judges and lawyers will not act independently of the government in politically sensitive cases, and a completely untested right of appeal to the High Court,
  - (ii) the surprisingly high rate of rejection of asylum claims from certain countries in known conflict zones from which asylum seekers removed from the UK may well emanate,
  - (iii) Rwanda's practice of refoulement, which has continued since the MEDP was concluded, and
  - (iv) the apparent inadequacy of the Rwandan government's understanding of the requirements of the Refugee Convention.

# MEDP

- Nature of the agreement:

- Part of the Court's reasoning was that Rwanda has recently failed to comply with an explicit undertaking to comply with the non-refoulement principle given to Israel in an agreement for the removal of asylum seekers from Israel to Rwanda, which operated between 2013 and 2018.

- 13 April 2022, the UK and Rwandan governments entered into a Migration and Economic Development Partnership ("MEDP"), recorded in a Memorandum of Understanding and two diplomatic "Notes Verbales".

- On the basis of the arrangements made and assurances given in the MEDP, the Home Secretary decided that Rwanda was a safe third country to which asylum seekers could be removed.

# Good Faith Agreement

- The Supreme Court accepted that the Rwandan government had entered into the MEDP in good faith, that it has incentives to ensure that it is adhered to, and that monitoring arrangements provide a further safeguard.

- Nevertheless, the evidence shows that there are substantial grounds for believing that there is a real risk that asylum claims will not be determined properly, and that asylum seekers will therefore be at risk of being returned directly or indirectly to their country of origin.

- The changes and capacity-building needed to eliminate that risk may be delivered in the future, but they were not shown to be in place when the lawfulness of the Rwanda policy had to be considered in these proceedings.

# Treaty with Rwanda 2024 following UKSC judgment

- Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Rwanda for the provision of an asylum partnership to strengthen shared international commitments on the protection of refugees and migrants.

- ARTICLE 2 : Objectives

  - 1. The overarching objective is to deter dangerous and illegal journeys to the United Kingdom, which are putting people's lives at risk, and to disrupt the business model of people smugglers who are exploiting vulnerable people.

  - 2. To that end, the Agreement commits both Parties by the specific, clear and binding obligations assumed by each under this Agreement to the creation, maintenance and enforcement of a partnership for dealing with Relocated Individuals, including in the consideration and determination of claims for refugee status.

# Treaty terms and objectives

A. Creating a mechanism for the relocation to Rwanda of asylum seekers whose claims are not being considered by the United Kingdom, and by providing a mechanism for an asylum seeker's claim for protection to be determined in Rwanda, in accordance with the Refugee Convention and current international standards, including in accordance with international human rights law;
B. Creating a mechanism for the relocation to Rwanda of other individuals arriving illegally in the United Kingdom and providing an option for people who, after removal from the United Kingdom, desire asylum or protection to make such a claim in Rwanda or for alternative settlement in Rwanda for Relocated Individuals whose asylum claim has been refused in Rwanda;
C. Creating a mechanism for the settlement of all Relocated Individuals removed from the United Kingdom to Rwanda and providing them with adequate tools to successfully integrate in Rwandan society;
D. Specifying the detail of those mechanisms in the binding terms and specific obligations set out in this Agreement.

# Thank you

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GARDEN COURT
CHAMBERS

# THE SAFETY OF RWANDA ACT 2024

David Jones, Garden Court Chambers

04 June 2024

# Treaty with Rwanda

- In response to the Supreme Court decision in *RAA* [2023] UKSC 42, the catchily entitled '*Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Rwanda for the provision of an asylum partnership to strengthen shared international commitments on the protection of refugees and migrants*' was published on 5 December 2023.
- Much of the treaty is just an expanded version of the preceding memorandum.
- The key provision is Article 10(3) which purports to avoid refoulement –

> *No Relocated Individual (even if they do not make an application for asylum or humanitarian protection or whatever the outcome of their applications) shall be removed from Rwanda except to the United Kingdom in accordance with Article 11(1)*

# Treaty with Rwanda

- Otherwise, the main new additions are annexes on reception and accommodation conditions, as well as setting out the claims process.
- The claims process will involve a "First Instance Body" that will make decisions and will "*be made up of individuals who are appropriately trained, including in asylum and refugee law, and humanitarian protection law*". For refusals, there will be an "Appeal Body".
- The agreement is also now explicit that the UK intends to send children seeking asylum here with their families.
- A relocatee identified subsequently as a UASC will, under Article 3(4), be returned to the UK.

# The substance of the Act

The Safety of Rwanda Act purports to *give effect to the judgement of Parliament that the Republic of Rwanda is a safe country and* refers to various provisions of the **treaty** and that the Rwandan government has agreed that people will not be removed to anywhere except the UK.
The opening provision of the Act sets things up, Parliament is sovereign, Courts should back off –

- Section 1(1) refers to the purpose of the Act, which is stated to be to *prevent and deter unlawful migration* by sending people to Rwanda.
- Section 1(4) the Act states that the Parliament of the UK is sovereign, and *the validity of an Act is unaffected by international law*.
- The list of international law instruments affected is set down in section 1(6) and is comprehensive –
    - ✓Human Rights Convention
    - ✓The Refugee Convention
    - ✓The International Covenant on Civil and Political Rights
    - ✓The UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
    - ✓The Council of Europe Convention on Action against Trafficking in Human Beings
    - ✓Customary international law and other international law

# Treaty obligations transposed

The Act describes the principle obligations on Rwanda, as outlined in the Treaty at section 1(3) –

(a) that any person removed to the Republic of Rwanda under the provisions of the Treaty will not be removed from Rwanda except to the United Kingdom;

(b) that any relocated individual is to be made available for return to the United Kingdom following a request from the Government of the United Kingdom;

(c) that the system for the processing of protection claims by relocated individuals is to be improved;

(d) that relocated individuals are to be treated equally, irrespective of the status that they are granted in the Republic of Rwanda;

(e) that relocated individuals are to be provided with legal assistance for the purposes of their protection claims and any appeals relating to such claims;

(f) that the obligations mentioned in paragraphs (a) to (e) are to be independently monitored and subject to a form of binding dispute settlement.

# Rwanda is designated to be safe

There's intended to be no room to challenge the safety of Rwanda under the Act -

- Section 2(1) says decision makers (defined as Home Office decision makers as well as courts and tribunals) must conclusively treat Rwanda as a safe country
- Section 2(3) says courts and tribunals cannot consider claims challenging removal to Rwanda on the grounds that it is not safe
- Section 2(4) makes clear in particular that a court or tribunal cannot consider a claim or complaint –
    a) Rwanda will or may remove or send a person to another State in contravention of any of its international obligations.
    b) A returnee will not receive fair and proper consideration of an asylum, or other similar, claim in Rwanda.
    c) Rwanda will not act in accordance with the Rwanda Treaty.
- By operation of s2(5) subsections (3) and (4) apply regardless of any provisions of the Immigration Acts, the HRA (to the extent disapplied by section 3), other domestic/common law, any interpretation of international law by a court or tribunal

# The HRA disapplied

Section 3 expressly disapplies certain sections of the Human Rights Act 1998, namely –

- Section 2 (interpretation of Convention rights) which does not apply where a court of tribunal is determining whether Rwanda is a safe third country for removal.
- Section 3 (Interpretation of legislation) does not apply in relation to the SoRA.
- Sections 6-9 (acts of public authorities) in so far as they relate to –
  - A decision under s2(1) to treat Rwanda as safe.
  - A decision as to whether to grant an interim remedy under s4(4)(interim remedies: serious irreversible harm).
  - A decision under s4(1) on particular individualised circumstances .

# Some room for challenge in individual cases

- Section 4(1) sets out that the position in s2, that Rwanda is in general a safe country, does not prevent either the Home Office or a court or tribunal, on a review or appeal (s4(1)(b)), finding based on *particular individual circumstances*.
- The threshold for such a finding is set down in s4(1)(a) and requires *compelling evidence relating specifically to the person's particular individual circumstances* that *Rwanda is not safe for the person in question*.
- Section 4(1) states again, explicitly, that a decision cannot be made on the basis that Rwanda is a not a safe country generally.
- Section 4(2) again prevents consideration in individual cases of *the issue of whether the Republic of Rwanda will or may remove or send the person in question to another State in contravention of any of its international obligations*.

# Interim measures

- Under Section 4(3) to (4) a court or tribunal can grant interim relief which prevents or delays removal.
- **BUT** only if satisfied that the person would face *a real, imminent and foreseeable risk of serious and irreversible harm* if sent to Rwanda.
- Section 5(1)-(2) states that compliance with interim measures made by the European Court of Human Rights will be a ministerial decision and courts and tribunals cannot have regard to this otherwise.
- Accordingly, a court or tribunal cannot have regard to the interim measure when considering an application or appeal relating to removal to Rwanda (s5(3)).

# Other provisions

- Section 6 requires the SSHD to publish an annual report on modern slavery and human trafficking provisions in A13 of the Treaty.
- Section 9 extends application of the Act to all of the four home nations.
- Controversy has already arisen with regard to application of the Act and aspects of the IMA 2023 in Northern Ireland.

# Thank you

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# JR295; NORTHERN IRELAND HUMAN RIGHTS COMMISSION [2024] NIKB 35; [2024] NIKB 44

Adrian Berry, Garden Court Chambers

4 June 2024

**Questions**:

What are the consequences for the IMA and for immigration control in Great Britain?

What are the consequences for the Safety of Rwanda (Asylum and Immigration) Act 2024?

What are the consequences for the movement of asylum-seekers between Great Britain and Northern Ireland?

## Two discrete bases of challenge:

(i) That the statutory provisions are incompatible with article 2 of the Ireland/Northern Ireland Protocol or Windsor Framework ("WF"), as implemented by section 7A of the European Union (Withdrawal) Act 2018 ("the Withdrawal Act"); and

(ii) That the same provisions are incompatible with articles 3, 4, 5, 6 and/or 8 of the European Convention on Human Rights ("ECHR") and section 4 of the Human Rights Act 1998 ("HRA").

## Windsor Framework: Article 2(1) of the WF provides:

"Right of individuals

(1) The United Kingdom shall ensure that no diminution of rights, safeguards or equality of opportunity, as set out in that part of the 1998 Agreement entitled Rights, Safeguards and Equality of Opportunity results from its withdrawal from the Union, including in the area of protection against discrimination, as enshrined in the provisions of Union law listed in Annex 1 to this Protocol, and shall implement this paragraph through dedicated mechanisms."

The rights protected by article 2(1) WF are those set out in the Rights, Safeguards and Equality of Opportunity ("RSE") part of the Belfast/Good Friday Agreement including those referred to in Annex 1.

The RSE section in the B-GFA recites that the parties affirm:

"...their commitment to the mutual respect, the civil rights and the religious liberties of everyone in the community. Against the background of the recent history of communal conflict, the parties affirm in particular..

## The European Union (Withdrawal) Act 2018

By section 7A of the Withdrawal Act: "(1) Subsection (2) applies to—

(a) all such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the withdrawal agreement, and

(b) all such remedies and procedures from time to time provided for by or under the withdrawal agreement,

as in accordance with the withdrawal agreement are without further enactment to be given legal effect or used in the United Kingdom.

## The Illegal Migration Act 2023

Section 1(1) of the IMA sets out its legislative purpose:

"...to prevent and deter unlawful migration, and in particular migration by unsafe and illegal routes, by requiring the removal from the United Kingdom of certain persons who enter or arrive in the United Kingdom in breach of immigration control."

# JR295 NORTHERN IRELAND HUMAN RIGHTS COMMISSION

The provisions of the IMA challenged in the NIHRC proceedings were as follows:

(i) Section 5(2) relating to admissibility of protection or human rights claims;

(ii) Section 5(2) and section 54 concerning effective remedy;

(iii) Sections 2(1), 5(1) and 6 which require removal from the UK in specified cases;

(iv) Sections 2(1), 5(1) and 6 in relation to the principle of non-refoulement;

(v) Section 13(4) concerning the court's ability to review detention;

(vi) Sections 22(2) and 22(3) which require the removal of victims of slavery and/or trafficking in certain circumstances;

(vii) (vii) Sections 2(1), 5(1) and 6 insofar as they relate to the removal of children and children's claims.

# JR295 NORTHERN IRELAND HUMAN RIGHTS COMMISSION

The JR295 application sought to impugn the following additional provisions:

(viii) Section 4 in relation to unaccompanied children;

(ix) Sections 16-20 relating to accommodation and support for unaccompanied children; and

(x) Section 57 concerning age assessments.

## JR295 NORTHERN IRELAND HUMAN RIGHTS COMMISSION

- Article 2 of the WF is an unusual provision, in that it seeks to incorporate into law a chapter of the B-GFA, which was never intended to create binding legal rights and obligations.

- The starting point of the analysis is that the RSE provisions contain a specific commitment to the "civil rights…of everyone in the community", which must extend to asylum seekers, as well as UK or Irish citizens (see Colton J in *Re Angesom's Application* [2023] NIKB 102 at paras [107] and [108]).

# JR295 NORTHERN IRELAND HUMAN RIGHTS COMMISSION

In this field, the applicants rely on the following as relevant Union law:

(i) Council Directive 2005/85/EC on minimum standards on procedures in member states for granting and withdrawing refugee status ('the Procedures Directive');

(ii) Council Directive 2004/83/EC on the minimum standards for the qualification and status of third country nationals or stateless persons as refugees who otherwise need international protection and the content of the protection granted ('the Qualification Directive');

(iii) Council Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims ('the Trafficking Directive');

(iv) Regulation (EU) 604/2013 establishing the criteria and mechanisms for determining the member state responsible for examining an application for international protection lodged in one of the member states by a third country national or stateless person (recast) ('the Dublin III Regulation'); and

(v) The Charter of Fundamental Rights of the European Union.

# JR295 NORTHERN IRELAND HUMAN RIGHTS COMMISSION

*Re SPUC Pro Life Limited's Application* [2023] NICA 35 concluded that in order to establish a breach of article 2 of the WF, it is necessary to show:

(i) A right (or equality of opportunity protection) included in the relevant part of the Belfast/Good Friday 1998 Agreement is engaged;

(ii) That right was given effect (in whole or in part) in Northern Ireland, on or before 31 December 2020;

(iii) That Northern Ireland law was underpinned by EU law;

(iv) That underpinning has been removed, in whole or in part, following withdrawal from the EU;

(v) This has resulted in a diminution in enjoyment of this right; and

(vi) This diminution would not have occurred had the UK remained in the EU. (para [54])

In relation to each of the nine areas, it was necessary therefore to analyse:

(i) The rights created by and enjoyed under the relevant EU law;

(ii) The statutory provisions of the IMA; and

(iii) Whether the latter has caused (or will cause when commenced) a diminution in the rights enjoyed.

# JR295 NORTHERN IRELAND HUMAN RIGHTS COMMISSION

(1) Effective examination and grant of asylum claims

(2) Lack of effective remedy

(3) Removal

(4) Non-refoulement

(5) Detention

(6) Trafficking

(7) Children

(8) Unaccompanied Children

(9) Age Assessment

# JR295 NORTHERN IRELAND HUMAN RIGHTS COMMISSION

Applying the SPUC criteria:

(i) Each of the rights in question falls within the concept of "the civil rights…of everyone in the community" and these are therefore protected by the RSE provisions of the B-GFA;

(ii) These rights were given effect in Northern Ireland on or before 31 December 2020;

(iii) The Northern Irish law was underpinned by EU law including the Procedures Directive, the Qualification Directive, the Trafficking Directive, the Dublin III Regulation and the CFR;

(iv) The UK's withdrawal from the EU has removed this underpinning – see section 5 of the Withdrawal Act, as amended by the Retained EU Law (Revocation and Reform) Act 2023;

(v) The IMA will cause a diminution in the rights enjoyed by asylum seekers in a variety of significant ways as outlined; and

(vi) This diminution could not have occurred but for the UK's withdrawal since, otherwise, the supremacy principle would have ensured that the corpus of EU law prevailed over inconsistent domestic law.

# JR295 NORTHERN IRELAND HUMAN RIGHTS COMMISSION

The following sections of the IMA are disapplied in Northern Ireland:

(i) Section 2(1);

(ii) Section 5(1);

(iii) Section 5(2);

(iv) Section 6;

(v) Section 13(4);

(vi) Section 22(2);

(vii) Section 22(3); and

(viii) Section 57.

## The Incompatibility Claim

The applicants also contend that elements of the IMA are incompatible with relevant Convention rights and that the court should make a declaration of incompatibility pursuant to section 4 of the HRA.

The SSHD was unable to make a statement of compatibility at the time of the second reading of the proposed legislation under section 19(1)(a) of the HRA.

In *Christian Institute v Lord Advocate* [2016] UKSC 51, the court held, at para [88]:

"an ab ante challenge to the validity of legislation on the basis of a lack of proportionality faces a high hurdle: if a legislative provision is capable of being operated in a manner which is compatible with Convention rights in that *it will not give rise to an unjustified interference with article 8 rights in all or almost all cases, the legislation itself will not be incompatible with Convention rights…The proportionality challenge in this case does not surmount that hurdle…*"

## The Incompatibility Claim

The NIHRC contends that there are two significant differences:

(i) This claim is brought by the NIHRC which has specific powers under the NIA to review the effectiveness of Northern Ireland legislation relating to the protection of human rights and powers to bring compatibility challenges without being a victim or without showing that there is an actual or potential victim, including in cases of potential future breach;

(ii) Secondly, the Supreme Court cases referred to concerned qualified Convention rights and challenges to legislation on the basis of a lack of proportionality. This claim concerns rights which are absolute and unqualified. It does not involve any question of proportionality.

(i.e. the question is whether the legislation is 'in accordance with law')

## The Incompatibility Claim

(1) Removal

(2) Trafficking

(3) Detention

(4) Children

(5) Age Assessment

## The Incompatibility Claim

Remedy

The Court granted the section 4 declarations of incompatibility sought in respect of the IMA:

(1) Sections 2(1), 5(1), 6(3) and 6(7) insofar as they impose a duty to remove;

(2) Sections 2(1), 5, 6 and 22 insofar as they relate to potential victims of modern slavery or human trafficking; and

(3) Sections 2(1), 5(1) and 6 relating to children.

## The Incompatibility Claim

Should relief be stayed?

In *R (Liberty) v SSHD* [2018] EWHC 975 (Admin), Singh LJ emphasised the following important principles:

(i) The disapplication of domestic legislation which is incompatible with EU law is the duty of the national court; and

(ii) The jurisprudence relating to the sections 3 & 4 of the Human Rights Act 1998 is irrelevant and misleading in this context (see paras [63] to [69])

## The Incompatibility Claim

Should relief be stayed?

The respondents contended that, once the IMA is commenced, *the potential arises for dual and inconsistent systems of immigration in the United Kingdom in light of the disapplication of the statutory provisions in Northern Ireland*. It was argued that such is the unusual and novel nature of relief granted in these proceedings, this court should stay the impact of its order until the issues are determined by the Court of Appeal or the Supreme Court.

Application Refused

## Questions

1. What are the consequences for the IMA and for immigration control in Great Britain?

- Look-a-like DOIs under HRA could follow, as well as others.
- WF does not apply.

2. What are the consequences for the Safety of Rwanda (Asylum and Immigration) Act 2024?
- Could be challenged in NI under WF and HRA; in GB under HRA

3. What are the consequences for the movement of asylum-seekers between Great Britain and Northern Ireland?
- Cannot restrict movement.
- S 3 IA 1971 will not stop in practice.
- Renders IMA regime and possibly RW Act regime seriously weakened if not inoperable?

# Thank you

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