11 December 2023

JOINT COMMITTEE ON HUMAN RIGHTS

CHAIR'S BRIEFING PAPER:

SAFETY OF RWANDA (ASYLUM & IMMIGRATION) BILL

SUMMARY:

- **The Government has entered into an agreement with Rwanda under which those who enter the UK without prior authorisation, including those who come to the UK seeking asylum, can be removed from the UK to Rwanda. There they will be entitled to make any asylum claim and have it determined.**
- **On 15 November 2023 the Supreme Court concluded that this policy was unlawful due to the risk of those removed to Rwanda facing onward 'refoulement' – i.e. being returned to a country where they would face persecution or inhuman or degrading treatment. Refoulement is prohibited under both international and domestic law and amounts to a violation of fundamental human rights.**
- **The Government has responded to the Supreme Court's judgment with two measures: a new treaty with Rwanda and the introduction of the Safety of Rwanda (Asylum and Immigration) Bill.**
- **The new treaty makes some substantial changes designed to meet the Supreme Court's concerns regarding refoulement, most significantly a guarantee that those who are sent to Rwanda will be entitled to remain there even if their asylum claims are unsuccessful. Nevertheless, there remain questions over Rwanda's ability to comply with its treaty obligations. In light of the evidence accepted by the Supreme Court of Rwanda's difficulties in practice with maintaining human rights standards and adhering to its international obligations, it is likely that, to be confident in Rwanda's safety, courts would need to be able to consider evidence of the reality on the ground.**
- **The Bill seeks to legislate to establish that Rwanda is a safe country, despite the Supreme Court's conclusion otherwise. It has on its face a statement that the Home Secretary is unable to confirm that in his view the Bill is compatible with Convention rights (i.e. the ECHR rights that form part of the Human Rights Act 1998).**
- **The Bill would require all domestic courts to accept that Rwanda is safe and not to consider any review or appeal brought on the grounds that it is not – even if there is compelling evidence in support. This raises difficult constitutional**

questions about the separation of powers and the rule of law. It would prevent the courts considering arguable claims that removal to Rwanda is unsafe, which would expose individuals to a risk of their fundamental rights not to be subjected to inhuman and degrading treatment being violated, and is inconsistent with the right to an effective remedy guaranteed under Article 13 ECHR.

- **The requirement that all decision-makers conclusively treat Rwanda as safe applies notwithstanding laws including key provisions of the Human Rights Act. This would permit public authorities to act incompatibly with Convention rights, which would be inconsistent with the UK's obligations under the ECHR. Disapplying the HRA in respect of a particular cohort runs contrary to the fundamental principle that human rights are universal.**
- **While the Bill can alter domestic law, Parliament cannot legislate away the UK's obligations in international law including the prohibition on refoulement under the Refugee Convention and the ECHR. Under the ECHR, any individual who is selected for removal to Rwanda is able to make an application to the European Court of Human Rights (ECtHR) and the UK will be bound by that court's judgment.**
- **The ECtHR has the power to issue interim measures, effectively an order requiring states to refrain from taking certain action while a human rights claim is considered. They have done so previously, preventing the initial flights to Rwanda. The Bill would provide that a Minister, and only a Minister, may choose whether or not to comply with interim measures. Since interim measures have been held to be binding under the ECHR, this provision purports to permit a Minister to act in breach of international law.**

Background - the Supreme Court Judgment

1. On 15 November 2023 the Supreme Court of the UK handed down its judgment in the case of ***R (AAA and others) v Secretary of State for the Home Department***. The Supreme Court considered the lawfulness of the Government's policy, under a partnership agreement with Rwanda (the MEDP), of sending to Rwanda individuals who arrive in the UK without authorisation. The Supreme Court concluded that the policy was unlawful, because it found that there were substantial grounds for believing that asylum seekers removed to Rwanda would be at real risk of 'refoulement' (essentially, being returned to a country where they would face persecution or inhuman or degrading treatment).

2. The Supreme Court noted that refoulement is prohibited by a number of international legal instruments by which the UK is bound, including the Refugee Convention and Article 3 of the European Convention on Human Rights (ECHR) (the prohibition on

torture or inhuman or degrading treatment), as well as in a number of domestic statutes.[1] The Court also acknowledged that the principle of non-refoulement may form part of "customary international law" – i.e. international legal rules that are established through general state practice and acceptance of their legally binding status, rather than through any treaty.[2]

3. The Government responded to the Supreme Court's judgment by making clear that it planned to continue to pursue the Rwanda policy. It announced that two steps would be taken:

    a. A new agreement would be reached with Rwanda, in the form of a legally binding treaty rather than the non-legally binding MEDP. This was intended to address the issues that concerned the Supreme Court.

    b. "Extraordinary emergency legislation" would be brought forward in the coming weeks. This would be primary legislation that would make clear that Rwanda is a safe country.

4. Both of these steps have since been carried out.

The Treaty

5. On 5 December 2023 the Home Secretary signed a new treaty with Rwanda in Kigali. It was laid before Parliament on 6 December 2023.

6. A full analysis of the treaty is set out in the annex to this briefing note, but in summary:

    a. Large parts of the treaty mirror the MEDP that was found by the Supreme Court to be insufficient to protect against the risk of refoulement, albeit in a form that is legally binding under international law.

    b. The most significant differences are (i) a guarantee that anyone sent to Rwanda who fails their asylum claim there will still be entitled to permanent residence in Rwanda, and (ii) improvements to the Rwandan asylum system including advice by independent seconded experts, a guarantee of legal advice and representation and a new appeal body made up of international judges.

---

[1] In addition to the ECHR (and the Human Rights Act that applies its rights domestically), the Supreme Court referred to:

a. The Refugee Convention;
b. The UN Convention Against Torture (UNCAT);
c. The International Covenant on Civil and Political Rights (ICCPR);
d. The Asylum and Immigration Appeals Act 1993;
e. The Nationality, Immigration and Asylum Act 2002; and
f. The Asylum and Immigration (Treatment of Claimants etc) Act 2004.

[2] The Supreme Court noted that the UK has previously subscribed to that position, but since it was not relied upon by the parties it did not form part of the Court's reasoning.

c. If the treaty were complied with, these differences could be argued to meet the Supreme Court's concerns about refoulement – particularly the guarantee against being removed from Rwanda to a third country even if an asylum claim is unsuccessful. However, a key part of the evidence that influenced the Supreme Court's conclusions covered Rwanda's previous failure to comply with international agreements and its incapability of guaranteeing future compliance through its systems and officials. The Supreme Court came to this conclusion even though it accepted that Rwanda was acting in good faith.

d. The courts are unlikely to accept that the Supreme Court's concerns have been met without real evidence of both capacity building and attitude change on the ground. Thus, it appears inescapable that a legal question over the safety of Rwanda remains, despite the treaty.

New Legislation

7. On 6 December 2023 the Government made a statement to Parliament and published the Safety of Rwanda (Asylum & Immigration) Bill. It was introduced to the House of Commons the following day and has its second reading on Tuesday 12 December. The Bill is designed to work in tandem with the treaty, effectively writing into statute that the treaty has successfully addressed the reasons for the Supreme Court's conclusion that the Rwanda policy is unlawful.

Summary of Bill - clause by clause

8. On the face of the Bill, the Home Secretary has made a statement under s19(1)(b) of the Human Rights Act 1998 (HRA) that he is unable to say that in his view the provisions of the Bill are compatible with Convention rights, but the Government nevertheless wants Parliament to proceed with the Bill. It is very rare for such a statement to be made – although it was also done in respect of the Illegal Migration Bill.[3]

9. It is notable that the ECHR Memorandum that accompanies the Bill indicates that the Government is satisfied that each clause of the Bill is compatible with the Convention rights it engages.[4] It is hard to reconcile this view with the s19(1)(b) statement.

10. The Bill is said in clause 1 to "give effect to the judgment of Parliament that the Republic of Rwanda is a safe country" which means that it is a country to which persons can be removed "in compliance with all of the United Kingdom's obligations under international law."

---

[3] We are aware of a s19(1)(b) statement having been made in respect of 6 Bills in total – see Legislative Scrutiny: Illegal Migration Act at para 78

[4] Safety of Rwanda (Asylum and Immigration) Bill, ECHR Memorandum

11. Clause 2 is central. It requires any decision-maker, including the courts, to "conclusively treat the Republic of Rwanda as a safe country". Clause 2(3) also operates as an 'ouster clause', stating that no court or tribunal may consider a review or appeal against any removal decision on the grounds that Rwanda is not a safe country. This includes any claim that an individual will not "receive fair and proper consideration" of their asylum claim in Rwanda or that Rwanda will not comply with the new treaty. The clause makes clear that this applies "notwithstanding" any other provision or rule of statute or common law, including the Human Rights Act.

12. Clause 3 is a further 'notwithstanding clause', which expressly disapplies several parts of the HRA in specific ways:
    a. Section 2 HRA (which requires the courts to take into account the case law of the ECtHR when considering any question that arises in connection with a Convention right): This section would not apply to the determination of any question of whether Rwanda is a safe country – including on an individual basis under clause 4;
    b. Section 3 HRA (which requires legislation to be read compatibly with Convention rights (i.e. requires courts to adopt an interpretation that is ECHR compatible, if possible to do so)): Section 3 would not apply to interpretation of the Bill if it became law;
    c. Section 6 HRA (which requires public authorities to act compatibly with Convention rights) and sections 7-9 (which give victims of human rights violations the right to bring legal claims and obtain remedies against public authorities): These sections would not apply to decisions taken on the basis of Rwanda being safe under clause 2 or to decisions on whether or not to grant injunctions preventing removal.

13. Clause 4 makes clear that the requirement to conclude that Rwanda is a safe country does not prevent officials and courts considering whether Rwanda is safe for an individual, "based on compelling evidence relating specifically to the person's particular circumstances."
    a. This does not include any argument that relates to the risk of refoulement, however, which remains off-limits regardless of the individual's circumstances.
    b. This clause would allow, for example, a gay asylum seeker to argue that they personally would be unsafe in Rwanda due to the treatment of gay people in that country.

    Clause 4 would not, however, be of assistance to an individual who is removed to Rwanda but who subsequently becomes at risk due to a change of circumstances in the laws of Rwanda or the factual situation on the ground after their removal. Even if Rwanda breached its own international legal obligations and the international human rights standards required by its treaty with the UK, it would seem that that individual would have no route to retrospectively challenge or undo their removal via UK courts.

14. The Bill does not completely rule out the possibility of an interim remedy in domestic law, i.e. an injunction preventing a person's removal to Rwanda while their challenge

based on individual circumstances is heard, but clause 4 makes clear it would only be permissible if their removal would expose them to "a real, imminent and foreseeable risk of serious and irreversible harm" before their review or appeal is determined.

15. Clause 5 states that if an interim measure (effectively an international law injunction) is issued by the ECtHR in respect of the removal of an individual to Rwanda, only a Minister personally is permitted to decide whether the UK will comply with that interim measure. Courts and tribunals are not permitted to take that interim measure into account.

16. Clause 8 establishes that the Bill applies to England and Wales, Scotland and Northern Ireland.

17. Clause 9 provides that the Bill would come into force on the same day on which the Rwanda Treaty comes into force. The Treaty has been laid before both Houses of Parliament under the Constitutional Reform and Governance Act 2010 (CRaG) process. Unless this changes the Bill cannot become law before the end of January 2024 at the earliest.[5]

Analysis of the Bill and its implications

18. The Bill states that Rwanda is a safe country. By doing so, it seeks to reverse a conclusion of the Supreme Court on the facts; a conclusion that Rwanda is not a safe place for individuals to be removed to because there is a real risk that those sent to Rwanda will have their right not to be subjected to inhuman or degrading treatment, under Article 3 ECHR, violated. This is a human right so fundamental that no exceptions or derogation are permitted under the ECHR – even in times of war or public emergency.[6]

19. The Bill would require all decision-makers, including the courts, to accept that Rwanda is a safe country for removals. It would also prohibit any court or tribunal from considering any claim that Rwanda is *not* a safe country – and would disapply any laws that might allow the courts to say otherwise, including most of the key provisions of the HRA.

20. In practice, this means that even if there was copious available evidence that Rwanda was *not* safe, the domestic courts (a) would not be permitted to review whether it was safe and (b) even if they did review it, would be bound to make a finding that it remained safe regardless of any evidence to the contrary. Plainly such an approach prevents the courts carrying out independent and rigorous scrutiny of any claim that there are substantial grounds for fearing a real risk of refoulement/treatment contrary to Article 3 ECHR. This approach would therefore be incompatible with international obligations including the Refugee Convention and the ECHR. Not only would it expose

[5] https://committees.parliament.uk/committee/448/international-agreements-committee/content/116407/treaty-scrutiny-under-the-constitutional-reform-and-governance-act-2010/

[6] See Article 3 ECHR (the prohibition on torture and inhuman or degrading treatment and punishment) and Article 15 ECHR (derogations)

individuals to a risk of refoulement, in breach of fundamental human rights standards, it would also be inconsistent with the an express right to an effective remedy under Article 13, which would be undermined by blocking access to the courts.[7]

21. Given the Treaty with Rwanda that the Government has entered into, and given the Government's stated view that this Treaty meets the concerns of the Supreme Court that led it to conclude that Rwanda was not safe, it is unclear why the Bill is considered necessary other than in order to speed up the operationalisation of the policy by bypassing review in the courts. The usual and arguably less controversial approach would be to allow the courts to assess the safety of removal to Rwanda in light of the changed circumstances.

Constitutional implications

22. Requiring the courts to conclude that Rwanda is safe, even though the evidence has been assessed by the UK's highest court to establish that it is not, is a remarkable thing for a piece of legislation to do. Many constitutional lawyers would argue that this is, nevertheless, constitutionally sound because Parliamentary sovereignty means that Parliament can do anything it wants and the courts must acquiesce. Others would argue, however, that while Parliamentary sovereignty is a cornerstone of the UK's unwritten constitution, the constitution also depends on the separation of powers and the rule of law. It is the role of the courts to assess evidence and come to a conclusion upon it – and Parliament is not equipped to carry out this function in the same way. More fundamentally, effectively reversing by statute a Supreme Court judgment on the facts, preventing the courts from being able to consider the legality of Government actions and requiring the courts to come to a particular conclusion (regardless of the evidence) undermines the constitutional role of the judiciary, arguably jeopardising both the separation of powers and the rule of law.[8] In the absence of a written constitution there are no definite answers to these questions.

23. It is conceivable, albeit unprecedented, that a claim could be brought before the courts arguing that the Bill, if passed, should not be complied with because it is simply unconstitutional. Such a claim being heard is unlikely, however, and its chances of success less likely. Perhaps more likely is the possibility of the courts, if faced by a stark example of the true situation in Rwanda being inconsistent with the requirement to conclude it is safe, concluding that Parliament could not have intended such a consequence and attempting to read the legislation accordingly (it is a general principle of statutory interpretation that Parliament is presumed to have intended to act compatibly with the UK's international obligations). This would be difficult given the plain language of the Bill.

---

[7] Article 13 ECHR requires independent and rigorous scrutiny of any arguable claim that removal would expose an individual to treatment contrary to Articles 2 or 3 ECHR. See *MSS v Belgium and Greece* at para 293.

[8] Respect for the rule of law is crucial for the protection of human rights, as made clear in the preamble to the Universal Declaration on Human Rights: "[I]t is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law", Universal Declaration of Human Rights, proclaimed by the United Nations General Assembly in Paris on 10 December 1948

Disapplication of the HRA

24. Disapplying the HRA, as the Bill does, is also significant. Human rights are meant to offer a fundamental level of protection for every person on the basis of their humanity alone. As the JCHR has noted in a previous report, if those protections are disapplied when they cause problems for a policy goal they lose the fundamental and universal quality that characterises them.[9] This is arguably particularly the case when they are disapplied in respect of a particular group, in this case migrants who have come to the UK without prior permission.

25. Bills that disapply elements of the HRA are not unprecedented under the current government. Both the Illegal Migration Act and the Victims and Prisoners Bill, as brought from the Commons to the House of Lords, disapply section 3 HRA in respect of certain legislation. However, disapplication of section 6 HRA, the obligation on public authorities to act compatibly with human rights, has never before been attempted and represents a significant inroad into human rights protections. It would mean the Bill effectively authorising public authorities to breach human rights. As a result of Parliamentary sovereignty, such acts would be in accordance with domestic law, but they would still violate the UK's obligations under the ECHR.

Room for legal challenge under the Bill

26. The Bill does not prevent all legal claims from individuals facing removal to Rwanda. An official or a court may consider whether *on the basis of an individual's particular circumstances* it would be unsafe for that individual to be removed to Rwanda. This does not permit any claim based on the risk of refoulement – so it effectively only allows for a claim that there would be a human rights violation in Rwanda itself. This is not consistent with the ECHR, which requires all arguable claims that removal would expose an individual to treatment in breach of Article 2 or 3 – including by way of refoulement - to be subjected to independent and rigorous scrutiny.[10]

27. As set out above, a domestic injunction preventing removal in such a case can only be granted in very narrow circumstances. This appears to be consistent with the approach taken in the Illegal Migration Act and could, in some narrow circumstances, result in individuals being removed despite having a well-founded claim that their Convention rights would be violated in Rwanda.[11] Indeed, the disapplication of sections 6-9 HRA appears to have been extended to cover this eventuality.[12]

28. The Bill does appear to leave open a window for potential challenge to the legislation itself. While much of the HRA is disapplied in respect of decisions made under the Bill, section 4 of the HRA is not. This is the provision under which the courts may grant

[9] See Legislative Scrutiny: Illegal Migration Bill at para 90
[10] Article 13 ECHR. See *MSS v Belgium and Greece* at para 293
[11] See Legislative Scrutiny: Illegal Migration Bill at 333, and generally paras 326-349.
[12] See clause 3(5)(c)

declarations of incompatibility – i.e. a conclusion that primary legislation is not compatible with ECHR rights. It may, therefore, remain possible for a legal challenge to be brought challenging the Bill, once law, on the basis that it is incompatible with human rights. However, such a challenge could result only in a declaration of incompatibility which has no impact on the ongoing legal effect of the incompatible primary legislation in domestic law. Given that the final remedy could not render action taken under the legislation unlawful, it appears that there would be no prospect of securing a domestic injunction to prevent flights in the course of any such litigation.

International law and claims to the ECtHR

29. Crucially, no matter what the legislation says, it can only affect *domestic* law. As the Supreme Court explained, the UK is prohibited from allowing refoulement under the Refugee Convention and the ECHR, as well as under the UN Convention Against Torture and the International Covenant on Civil and Political Rights. All of these obligations are in international law.

30. In respect of the ECHR in particular, the UK remains bound by it as a matter of international law (and, under the terms of the Convention, would remain bound for a further 6 months even if withdrawal did take place). Any individual could still bring a claim to the European Court of Human Rights (ECtHR) in Strasbourg and, while UK courts would not be permitted to do so, that court would assess whether Rwanda was in fact safe, taking into account the new treaty and the evidence presented by the parties and the UNHCR. In accordance with its obligations under the Convention, the UK would be bound by the ECtHR's conclusions.

31. It is likely that an application to the ECtHR for interim measures (i.e. effectively an injunction preventing steps being taken that would undermine a claim to the Court) would be made before any flights take off for Rwanda. Given the conclusions reached by the Supreme Court, which is generally given great respect by the ECtHR, applications for interim measure are also likely to be successful.

32. The Bill provides that only a Minister can decide whether to comply with interim measures issued by the ECtHR, and domestic courts should ignore them. It remains to be seen whether a Minister would choose to comply with interim measures or not, but the Prime Minister's repeated statements that he would not let a foreign court prevent flights taking off indicate that interim measures may well be ignored.

33. Interim measures are made under Rule 39 of the Court's rules of procedure and therefore do not form part of the text of the Convention ratified by the UK. However, the ECtHR, which is the body that determines the meaning of the Convention, has held consistently that failing to comply with interim measures amounts to a breach of Article 34 of the Convention itself (the obligation not to hinder in any way the right to bring claims before the court). [13] Any decision of a Minister not to comply with interim measures would therefore be inconsistent with the UK's obligations under the ECHR.

[13] See Mamatkulov v Turkey

This means that clause 5 of the Bill purports to expressly authorises a Minister to act in breach of international law.

Annex: Rwanda Treaty Analysis

Introduction

34. The intention behind the new treaty entered into by the Government of the UK with the Government of Rwanda is to address the concerns that led the Supreme Court to conclude that the Rwanda policy is unlawful.

Supreme Court's Conclusions

35. The Government's position before the Supreme Court was that Rwanda could be relied upon to treat asylum seekers lawfully, including by not exposing them to the risk of refoulement, because they had committed to do so in the MEDP. The extent to which that agreement could be relied upon was weighed against the evidence presented to the Supreme Court, in particular by the UNHCR, undermining the likelihood of Rwanda complying with it.

36. That evidence came under three headings:

    a. The general human rights situation in Rwanda – including serious concerns raised by previous court judgments and the UN, primarily regarding treatment of those who are critical of the government, which give rise to serious questions over Rwanda's compliance with its international obligations.
    b. Rwanda's failure to meet obligations in a similar 2013 agreement with Israel, resulting in refoulement.
    c. The adequacy of Rwanda's current asylum system, including lack of capability and experience, and evidence of an unwillingness of Rwandan courts to find against the government.

37. Having considered this detailed evidence, the Supreme Court stated that *"[t]he central issue in the present case is…not the good faith of the government of Rwanda at the political level, but its practical ability to fulfil its assurances, at least in the short term, in the light of the present deficiencies of the Rwandan asylum system, the past and continuing practice of refoulement…, and the scale of the changes in procedure, understanding and culture which are required.*"

38. The Supreme Court went on to say: "*The matters which we have discussed are evidence of a culture within Rwanda of, at best, inadequate understanding of Rwanda's obligations under the Refugee Convention. The evidence also goes some way to support the suggestion of a dismissive attitude towards asylum seekers from the Middle East and Afghanistan. It is also apparent from the evidence that significant changes need to be made to Rwanda's asylum procedures... The necessary changes may not be straightforward, as they require an appreciation that the current approach is inadequate, a change of attitudes, and effective training and monitoring.*"

39. The Court concluded: "*The structural changes and capacity-building needed to eliminate that risk [of refoulement] may be delivered in the future, but they were not shown to be in place at the time when the lawfulness of the policy had to be considered in these proceedings.*"

The Treaty

40. On 5 December 2023 the Home Secretary signed a new treaty with Rwanda in Kigali. It was laid before the House of Commons and the House of Lords on 6 December 2023. To a large extent, the new treaty repeats the content of the previous MEDP. However, there are a number of significant differences.

41. Firstly, the treaty is legally binding in international law (with disputes over interpretation or implementation to go to arbitration). This does not in itself, however, resolve any of the issues raised by the Supreme Court:

    a. Making the treaty legally binding creates another incentive to comply, but the Supreme Court accepted that there are already incentives to comply. As apparent from the passaged quoted above, the central issue is Rwanda's practical ability, through systems and officials, to fulfil its assurances.

    b. The Supreme Court decision relied on evidence that Rwanda had previously failed to comply with international human rights treaties. It is hard to see how turning an agreement into a treaty can answer serious underlying concerns about Rwanda's compliance with its international treaty obligations.

42. More importantly, the new treaty now specifies that any person sent to Rwanda under the treaty will be entitled to remain there *even if they are unsuccessful in a claim for refugee status or humanitarian protection*.[14] Those persons will still be entitled to a permanent residence permit (and to accommodation and support until that status is granted). This is of direct relevance to the risk of refoulement, because there can be no risk of being sent on from Rwanda to face persecution or human rights violations if the individual has a legal right to remain in Rwanda.

43. Nevertheless, significant issues remain:

    a. As noted above, the Supreme Court decision relied on evidence that Rwanda had previously failed to comply with its obligations, including by removing individuals from Rwanda when it had committed not to do so. The routine clandestine removal of individuals to Uganda, despite express commitments to Israel to uphold the principle of non-refoulement, is particularly relevant. It remains questionable whether Rwanda, and particularly its officials on the ground, can be relied upon to comply with this element of the new treaty.

[14] Humanitarian protection is the status granted to a person who does not meet the definition of refugee under the Refugee Convention but nevertheless cannot be removed for a human rights related reason.

Persons are still free to leave Rwanda if they choose, of course. Steps short of removal designed to 'encourage' a person to leave can be envisaged.

b. The Supreme Court's judgment focused on the risk of refoulement, rather than any risk to human rights within Rwanda itself. The Court of Appeal judgment also discussed evidence of the mistreatment of refugees within Rwanda itself, which would not be addressed by removing the risk of refoulement.[15]

44. Also important in the treaty are changes to the Rwandan asylum process that will be applied to those who are sent there from the UK and claim asylum. The current process essentially involves one government body preparing asylum claims for determination by another body, with an internal administrative appeal, followed by the possibility of appeal to the High Court of Rwanda. The evidence heard by the Supreme Court indicated that the early stages involved poorly qualified decision-makers who failed to give reasoned decisions, while a lack of independence from government pervaded the whole system and undermined judicial oversight. A lack of legal representation was also a problem, despite the MEDP purporting to resolve this by guaranteeing access to legal advice and assistance.[16]

45. The new process is set out in Annex B to the treaty. The most significant changes are:

a. The initial asylum decision shall be taken by a body made up of individuals who are "appropriately trained, including in asylum and refugee law" following an interview designed to ensure the claim can be properly presented. Detailed reasons for the decision, in both fact and law, will be given. For the first 6 months, no claim will be rejected unless advice has first been taken from a seconded independent expert (although that advice need not be followed).

- As the Supreme Court indicated, it appears unlikely that it will be possible in the short to medium term to ensure that there are sufficient appropriately trained decision makers in Rwanda, regardless of what the treaty provides.
- It is positive, in addressing the Supreme Court's concerns, that the treaty requires reasoned decision-making, but this is only possible if the decision maker is properly trained and sufficiently independent to fulfil this task.
- A seconded independent expert could theoretically improve decision-making (albeit only for the first 6 months) but it is unclear from where these experts will be sourced to ensure both expertise and independence.

[15] In particular, the Court of Appeal referred to an incident at Kiziba camp in Rwanda in 2018 when Congolese refugees protesting against a cut in food rations were fired upon by Rwandan police, resulting in 12 deaths and 66 arrests. This was factored into the Court of Appeal's conclusion that the Rwandan policy was incompatible with Article 3 ECHR. See https://www.bailii.org/ew/cases/EWCA/Civ/2023/745.html at para 103.
[16] See paras 77-94 of the Supreme Court judgment

c. Appeals will be to a new appeal body, with two co-Presidents with asylum experience. One of these will be from Rwanda and the other from another Commonwealth nation. They will select judges from "a mix of nationalities" who shall, for the first 12 months, receive and take into account the opinion of a seconded independent expert before deciding their appeals.

- The new appeal body appears designed to meet the Supreme Court's concerns about a lack of independence in the Rwandan courts. Judges from other jurisdictions are less likely to be influenced by the Rwandan government – although this cannot be guaranteed. It remains to be seen how the co-presidents would operate, including whether the Rwandan co-president would play a leading role.

- An entirely new appeal body staffed by properly trained judges from around the world appears unlikely to be something that can be established quickly.

d. The treaty guarantees free legal advice during the asylum process and legal representation during any appeal, from a legal professional member of the Rwanda Bar Association.

- Legal representation is valuable to ensure an asylum applicant is treated in accordance with the law, including this treaty. Rwanda has committed to take all reasonable steps to ensure there is sufficient capacity. Nevertheless, signing a treaty cannot ensure that lawyers will be available. Neither does it address the general concerns about independence from Government influence raised by the Supreme Court.

46. Plainly all of these changes to process will only be of any value in addressing the Supreme Court's concerns if Rwanda can be relied upon to comply with them. The treaty includes a monitoring mechanism, but this is largely the same as that which applied under the MEDP (with the addition of the possibility of confidential complaints). The Supreme Court did not consider the monitoring mechanism was sufficient to prevent breaches of the MEDP, so it seems unlikely that it would be considered sufficient to prevent breaches of the treaty.

Does the treaty meet the Supreme Court's concerns?

47. It is arguable that if the treaty were complied with, it would meet the concerns of the Supreme Court regarding the risk of refoulement. This is partly down to the proposed changes to the asylum process but more clearly as a result of the guarantee that everyone removed to Rwanda will be given a permanent right to reside there. But the question of whether the treaty would – or indeed could – be complied with remains in issue. Since the Supreme Court proceeded on the basis that Rwanda was entering the MEDP in good faith, it seems reasonable to presume that any other court would also proceed on the basis that the treaty has been entered in good faith. Nevertheless, for the reasons given

by the Supreme Court, Rwanda's compliance with international agreements is not something that can be guaranteed, even if their good faith is not directly called into question. This treaty cannot guarantee that Rwandan officials will recognise their obligations and comply with them, nor that there is sufficient capacity and resources on the ground for them to do so. The courts are unlikely to accept that the Supreme Court's concerns have been met without real evidence of the capacity building and attitude change on the ground that their judgment made clear was needed.

48. What appears inescapable is that the Treaty cannot prevent there remaining a legitimate legal question over the safety of Rwanda. This is a question that would usually be for the courts to resolve in light of evidence provided to them, but the Government has now introduced a Bill that would take a different approach.