



BOFAXE

UK-Rwanda Deal Pushed Through Parliament (PART 1)

— On 25 April 2024, the long-awaited Safety of Rwanda (Asylum and Immigration) Act 2024 (Safety of Rwanda Act) received royal assent in the United Kingdom (UK). This followed months of legislative debate culminating in a bruising extended parliamentary session on 22 April 2024 in which the House of Lords, Britain's unelected second parliamentary chamber, finally capitulated shortly after midnight, dropping their objections to the Bill's legal declaration that Rwanda constitutes a "safe country" for the purposes of non-refoulement. This legislation was introduced by the UK government following a Supreme Court decision in November 2023 that the UK's controversial Rwanda scheme (a topic previously explored here) was inconsistent with international law, particularly the European Convention on Human Rights (ECHR). Since Brexit and the UK's resulting withdrawal from the European Union's (EU) readmission agreements with third countries, the number of people seeking asylum in the UK has increased by 60%, leading the UK government to return to restrictive asylum policies. Consequently, the government passed the Nationality and Borders Act in 2022 and the Illegal Migration Act in 2023 which "goes considerably further than any previous immigration bill" and has been condemned as "an affront to human dignity" that "would amount to an asylum ban". This blogpost seeks to explore the legal landscape of the UK's Rwanda scheme which ultimately led to the adoption of the Safety of Rwanda Act, highlighting the specific legal challenges with the scheme and the difficulty of reconciling the UK's new legislative position with the prevailing consensus in international law (a theme previously explored in the Bofax series).

The Prior Legislative Basis of the Rwanda Agreement

The purpose of the Illegal Migration Act is to prevent and deter unlawful migration by categorically deeming people arriving illegally in the UK inadmissible for asylum applications, irrespective of valid claims to asylum under international law. Thus, even if asylum seekers cannot be returned to their home country due to security concerns, their asylum claim will not be considered by the UK, but they will be sent to safe third countries instead. As the UK's former Home Secretary recognized, this new law "push[es] the boundaries of international law".

Turning away an individual to a territory where their life or freedom would be threatened on account of their race, religion, nationality, membership in a particular social group, or political opinion is prohibited by the principle of non-refoulement as enshrined in Article 33 of the Refugee Convention. It also follows from Article 3 ECHR (prohibition of torture, inhumane or degrading treatment or punishment) which also extends to "indirect refoulement" – an expulsion to a State from where migrants may face further deportation without a proper assessment of their situation. According to Article 31 of the Refugee Convention, refugees who enter a host country illegally must not be punished for this act. Thus, an application for asylum must not depend on the legality of the entry. The UK government, however, justifies the compliance of the Illegal Migration Law with Article 31 of the Refugee Convention with a rather formalistic interpretation by stating that the Article only refers to people "coming directly" from a country of persecution, excluding people who passed through other safe countries (see Nationality and Borders Act, s.37, Article 31(1) (1) and here). This interpretation of Article 31 is a highly dubious one, even called a "misunderstanding" (para 12) of the Article by the United Nations High Commissioner for Refugees (UNHCR), a view which has been acknowledged (p.37) by the UK House of Commons Research Library. While some have argued that the ECtHR has softened its stance on this issue since N.D. and N.T. v. Spain, it is important to note that this case was rooted not on Article 3 but Article 4, Protocol 4 of the ECHR (collective expulsions), and thus not indicative of a general change in the rule.

Nevertheless, returns or transfers to safe third countries may be permissible if certain thresholds, notably adherence to Refugee Convention rights, are met. To this end, the Illegal Migration Act lists 57 "safe" countries where people can be transferred to if a transfer agreement with the UK was concluded. To date such an agreement has only been reached with Rwanda. The first flight, which was scheduled to depart in June 2022, was blocked at the last minute by an interim measure of the ECtHR. Shortly after, the Court of Appeal deemed Rwanda unsuitable as a safe third country due to flaws in its asylum procedures which raised concerns about the potential wrongful return of individuals to countries where they may face persecution and found a violation of Article 3 ECHR.



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UK-Rwanda Deal Pushed Through Parliament (PART 2)

The Supreme Court Judgment of 15 November 2023

While the Supreme Court has been known to encroach on key governmental policy areas in the recent past, a change in President in 2020, as well as a longstanding tradition of deference to executive powers in the UK legal system, had led many to believe this case could sway in the government's favour despite the clarity of international law on the matter. After all, this was the outcome of the Divisional Court's initial decision.

However, the Supreme Court did not find the Rwanda policy to be lawful. That is because there are several pieces of legislation in the UK, such as the Asylum and Immigration Appeals Act 1993 and the Human Rights Act 1998, which directly transpose the Convention principle of non-refoulement into domestic law (paras 27-28). Conversely, the UK-Rwanda Agreement itself was neither binding nor justiciable and did not confer any individual rights (para 12).

Rightly, the Court found that any assessment must seek to uncover a real risk of ill-treatment, emphasizing that relying on the Rwandan government assurance alone is insufficient. What matters, as the ECtHR confirmed in Othman v UK, is how things operate in practice. Assurances themselves are not sufficient if they can be countered by evidence to the contrary (paras 46-47). The Supreme Court, in assessing this evidence, found little ambiguity. The weight of Rwanda's human rights record (paras 75-76), UNHCR observations on the shortcomings of Rwanda's asylum policy (paras 77-94), as well as severe and well-documented UNHCR concerns surrounding a similar asylum agreement between Israel and various African states including Rwanda (para 60), in which Rwanda failed to uphold its obligations of non-refoulement (paras 95-100), were enough to convince the Court that the UK government was wrong to rely solely on assurances, and to avoid probing Rwanda on its asylum practices in the negotiation of the Agreement (para 60). In justifying the overturning of the Divisional Court ruling, the Supreme Court highlighted that the Divisional Court did not lend enough weight to those concerns by focusing on the UK-Rwanda Agreement in isolation of that evidence, and further evidence of refoulement generally (para 62).

The Safety of Rwanda Act, and International v Domestic Law

Following the judgment's publication, the UK government announced plans to update the policy to ensure its "lawfulness" while claiming to respect the Court's ruling. But how could the UK government, through Parliament, unilaterally alter the reliability of human rights and asylum processes in Rwanda?

There are two steps to the government's approach: first, formalising the Agreement as a binding Treaty, and second, enacting the aforementioned Safety of Rwanda Act ostensibly confirming the safety of Rwanda. Unlike the previous Agreement, the new Treaty enjoys the status of domestic law and is therefore enforceable in UK courts. The British government believes that the enforceability of the non-refoulement principle – and a new confidential complaints committee – should quell the Supreme Court's fears of the possibility of ill-treatment. The Safety of Rwanda Act – which was condemned in its debate stage by the UK's Joint Committee on Human Rights and the UN High Commissioner for Human Rights – obligates immigration officials and courts in the UK to treat Rwanda as a safe country (s.2). Many have pointed out that this essentially overturns a factual determination of the Supreme Court, much like if an Act of Parliament were to determine that the sky is green, not blue. Indeed, since indirect non-refoulement is based on a factual assessment of real risk, no statute can change a determination of safety, which is a normative standard. As the UNHCHR warned in his criticism, "you cannot legislate facts out of existence." Further criticisms of the Act include the absence of exemptions for vulnerable groups and victims of modern slavery, and the Act's effect on the rule of law, including the prohibitively high threshold applicants must satisfy to be eligible for lodging appeals against decisions to remove them. These concerns were raised frequently by the House of Lords, and were all rejected by the UK's elected chamber.

The UK legal system is built on parliamentary sovereignty, giving the parliament the power to create or revoke any law, and as a result UK courts are not authorised to declare an Act of Parliament unlawful. This presents an interesting – and perhaps unsolvable – dilemma: what if a valid Act of Parliament directly contradicts a non-derogable norm of customary international law? Given the strength of parliamentary sovereignty in the UK, early commentators have noted it is possible that UK courts would have no choice but to follow such legislation. The counterargument goes that, since Parliament declaring the sky green does not make it so, legislation on matters of fact may not fall under the scope of parliamentary sovereignty. An interesting clash between the UK constitution and the global legal order of asylum law may be on the horizon.

Conclusion

The House of Lords – the final barrier to the statute's enactment – has now capitulated, as it often does when it reaches an impasse with parliament's elected chamber. However, the statute's issues do not end there. Immediately following publication of the Act's first draft, the UK Immigration Minister resigned from his post, saying the Bill will not end legal challenges to the scheme. On this point, international lawyers may reluctantly agree with him (without adding, as he does, that the Bill ought to go even further). The Act as adopted did not meaningfully confront those shortcomings. Since enactment, both the UN High Commissioners for Refugees and Human Rights have once again criticised the Act's blatant disregard for the UK's international obligations. Furthermore, the UK's FDA Civil Service Union has already sought a judicial review of the government's plans, citing concerns that carrying out their jobs under the new Act will surely lead to a breach of their own international obligations.

Following the adoption of the Act, the UK Home Office already began detaining involuntary asylum seekers from 1 May 2024, who are due to leave the UK on the first flight to Rwanda in July. Per the statute, this will occur regardless of ECtHR intervention since the statute explicitly disappplies Strasbourg jurisprudence from the relocation scheme (s.3) and gives government ministers broad powers to ignore interim measures (s.5) such as the one issued in June 2022, placing a significant amount of discretion for the scope of international human rights in the hands of the executive. Such disregard of its international obligations in order to reduce migration is perhaps further proof of the UK's trend of disintegration in the international community. It is to be hoped that the UK has learned from its exit from the EU and reconsiders its trend of increasing isolation on the world stage.