Bend it like Britain?

Pia Lotta Storf

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Is the current UK government "cowardly [and] reckless," forcing its civil servants to implement ministerial decisions which violate human rights? This is the claim of the FDA, a trade union for British and Northern Irish public service staff.

What happened? After months of parliamentary ping-pong, the UK Parliament passed the "Safety of Rwanda (Asylum and Immigration) Act" in late April. Not even two weeks later, 66 persons were detained to be deported to Rwanda, and the FDA launched an unprecedented legal action before the High Court, claiming the Act conflicts with the Civil Service Code obligation to "uphold the rule of law and administration of justice".

The Act declares Rwanda a safe country with no legal possibility to challenge this determination – even if there is evidence to the contrary. It thereby paves the way for the government's plan to deport (non-Rwandan) asylum seekers to Rwanda without assessing their refugee status if they entered the UK irregularly from another country classified as safe such as France. The Act will mostly target protection seekers who enter the UK via the Channel, often in small boats ("dinghies"), whose number rose by 23 % in comparison to last year.

By seeking to avoid the prohibition of refoulement, the Safety of Rwanda Act undermines both core principles of the rule of law and disapplies fundamental human rights protections. This blog post discusses key provisions of the new Act, the concerns they raise and some remaining avenues for legal challenges.

Bending Reality with a Fiction of Safety?

The Act's point and purpose is to legislate the fiction of Rwanda's safety into a legal reality. It thereby seeks to override a unanimous UK Supreme Court judgment from November 2023 that declared Rwanda manifestly not safe, mostly due to a real risk of refoulement.

In that judgment, the Supreme Court emphasised that Rwanda did not recognize any persons from Afghanistan as refugees between 2020–2022, whereas the recognition rate for Afghan asylum seekers in the UK was at 74% (at § 85). This is especially concerning as Afghan asylum seekers are currently among the largest groups attempting to cross the Channel. While (some) disparities in recognition quotas may not raise rule of law concerns per se, the rejection of all protection seekers from a major conflict zone points to systemically embedded violations of non-refoulement.

In reaction to the judgment, the UK and Rwanda agreed in a treaty, i.a., that no relocated protection seeker may be deported from Rwanda except back to the UK, irrespective of whether they were granted international protection or not. This means that even rejected asylum seekers will be able to stay in Rwanda in an attept to assuage concerns over a risk of refoulement following flawed asylum procedures.

Yet, concerns prevail regarding refoulement and the availability of fair and consistently accessible procedures. In its written submissions to the UK Supreme Court for the 2023 judgment, UNHCR criticised the Rwandan asylum system for a lack of access to legal representation, a lack of "sufficient skills or experience" of decision-makers, and brief interviews with "no adequate opportunity to explain their asylum claim, respond to potentially adverse points, or provide more than minimal documentation (at p. 217 f.)."

While the UK-Rwandan treaty attempts to address some of these shortcomings, UNHCR maintains that the necessary changes could only be achieved with significant long-term efforts. The realisation of the required systemic change requires "appreciation that the current approach is inadequate, [...] effective training and monitoring" as well as "changes in institutional culture." (at § 20).

Bending Human Rights…

Legal presumptions of safety for the purpose of externalizing asylum procedures are clearly en vogue: the EU is planning to lower the standards for the designation of so-called Safe Third Countries despite major human rights concerns. However, as the European Court for Human Rights (ECHR) held in its 2019 *Ilias and Ahmed v. Hungary* judgement, states may not simply claim another state's safety and thereby evade their non-refoulement obligations. Instead, they are obliged to thoroughly assess accessibility and adequacy of the asylum system and the state's overall protection against non-refoulement (at § 134). The UK is party to the European Convention of Human Rights (the Convention) and has incorporated its rights into domestic law with the 1998 Human Rights Act (HRA). The Act includes an interpretive obligation to read legislation compatibly with the Convention (s3), taking account of ECHR case law (s2), while also requiring public authorities to act in accordance with the Convention (s6). As such, neither the government nor its public servants can simply rely on a legal declaration of safety if there are in fact real concerns under Article 3 ECHR.

The UK government insists that the new Rwanda Safety Act is lawful because of a number of changes that have been made since the Supreme Court's findings. It points, i.a., to the fact that Rwandan decision-makers have received further training, the establishment of a monitoring mechanism, and the introduction of amendments to the asylum system, including some pertaining to accessing legal representation, and that Rwanda is obliged under international (treaty) law to respect fundamental human rights and non-refoulement. Yet, the Act's architecture reveals that UK lawmakers might have doubted the Act's compliance with the UK's human rights obligations. In particular, the Act's definitions and stipulation that Rwanda is safe is followed by a section that is specifically designed to prevent any legal challenges to that statement. It contains an ouster clause, restricting judicial review by UK courts, and the explicit disapplication of domestic and non-domestic human rights protection mechanisms.

… and the Rule of Law?

For example, s 5(3) disapplies the obligation of public authorities, which includes the FDA, under the Human Rights Act to act in accordance with the Convention in relation to treating Rwanda as a safe country and all connected legal challenges. What is more, section 5 explicitly permits a Minister of the Crown to decide whether to comply (or not) with interim measures by the ECHR. Were a minister to decide not to comply with an interim measure, this would constitute a flagrant breach of Rule 39 of the Rules of the ECHR. Notably, the potential violation of human rights by acting in accordance with a minister's decision but contrary to an interim measure is the main focus of the FDA's claim.

Section 5 may be explained with a view to the history of the UK-Rwanda deal. The first attempt to implement the UK Rwanda policy in 2022 was stopped by an ECHR interim measure. The ECHR held that prior to any relocation, UK courts must consider, firstly, whether deported asylum seekers have access to fair and efficient asylum procedures, and, secondly, whether the decision to treat Rwanda as a safe third country was irrational or based on insufficient enquiry.

Under the new ouster clause in section 2(3) of the Act, however, UK courts and tribunals can no longer examine any claim (including one relying on ECtHR interim measures) regarding the safety of Rwanda, the risk of refoulement, and the fair and proper consideration of a claim for international protection.

This is in direct contravention of the Supreme Court's holding in 2023 that it "is itself required by law to form a view as to whether there are substantial grounds for believing that asylum seekers who are removed to Rwanda are at risk of refoulement, in the light of all the evidence bearing on that issue". While it deemed "[t]he government's assessment of whether there is such a risk is an important element of that evidence … the court is bound to consider the question in the light of the evidence as a whole and to reach its own conclusion" (at § 57).

Remaining Legal Avenues for Asylum Seekers

Despite the Act's severe restriction of judicial review, asylum seekers affected by the Act are left with at least three options.

UK courts may still hear concerns for individual safety as long as they focus solely on the conditions in Rwanda. Concerns regarding refoulement or the asylum system are barred from consideration. However, injunctions suspending removal from the UK require proof of "real, imminent and foreseeable risk of serious harm" (s4). These substantial and procedural requirements constitute a high threshold for protection seekers, especially in light of the UNHCRs assessment of remaining structural deficiencies in the Rwandan asylum system.

The government also explicitly referred to the possibility of seeking a declaration of incompatibility under the Human Rights Act (s4). The provision allows the courts to declare an Act of Parliament incompatible with the European Convention of Human Rights without affecting the Act's legal validity. Instead, the declaration allows Parliament to consider revising the Act under a fast-tracked procedure. Notably, because this declaration is neither legally binding nor offers compensation to the parties, the ECHR does not consider it a legal remedy which needs to be exhausted before a party may address the ECHR (Burden v. UK, at §§ 40 ff).

Given that all other domestic remedies are precluded by the Act, protection seekers could thus go directly to the ECHR to challenge the Act for violating article 2, 3 or the right to an effective remedy under article 13 of the Convention. However, filing such an application requires knowledge, time and money, and many applicants will not have all three. Moreover, as the respect for interim measures is now subject to ministerial decision, recourse to the ECHR may not be immediately helpful. Finally, the political costs to bringing such a case should not be underestimated – PM Sunak has even threatened that the UK might exit the Convention over the issue.

All these options have limits regarding the effective access to fundamental human rights, either procedural, practical or political.

What's Next?

While the Act severely restricts the courts' ability to hear legal challenges, it does not foreclose judicial review of the Act per se. However, some commentators fear that pursuing such a course of action would strategically be "unwise", fearing further political backlash against the courts.

Against this backdrop, the FDA's application for judicial review appears to chart a useful middle ground both because it emphasises the role of civil servants as opposed to the more politicized rights of asylum seekers, and because it addresses not the Act but a guidance given on 29 April 2024 by the Cabinet Office to civil servants about their legal responsibilities in relation to their role implementing the Act. More specifically, the application for judicial review focuses on the conflict which would arise when a minister decides not to comply with an ECHR interim measure. It argues that civil servants would then face an impasse whereby their obligation to follow government orders would contravene their obligation to follow the civil service code, which includes compatibility with Convention law.

The FDA's lawsuit is special because it is not NGOs or strategic litigation organizations on one side and the state on the other, as is usually the case. Instead, these are civil servants taking legal action against their employer. The potential political repercussions of a successful lawsuit are yet to be seen. However, there is symbolic and political power in civil servants voicing their disagreement with the UK government's restriction of the fundamental human rights of asylum seekers.

Conclusion

The UK's Safety of Rwanda Act constitutes a deeply troubling development and "bends" the rule of law, human rights protections, and asylum procedures. However, the FDA's application for judicial review regarding their legal responsibilities in implementing

the Act gives hope that there are some avenues left to prevent the UK's "cowardly, reckless" evasion of the prohibition of refoulement.

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ABOUT THE AUTHOR
Pia Lotta Storf
Pia Lotta Storf is a Ph.D. candidate and research assistant for Prof. Dr. Nora Markard at University of Münster.

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