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Research Briefing

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UK-Rwanda Migration and Economic Development Partnership

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Contents

Summary

The asylum partnership arrangement

The UK and Rwanda agreed a Migration and Economic Development Partnership in April 2022. It includes a five-year 'asylum partnership arrangement' as detailed in a Memorandum of Understanding (MoU) signed by the Home Secretary and Rwanda's Minister for Foreign Affairs.

The asylum arrangement allows the UK to send some people to Rwanda who would otherwise claim asylum in the UK. Rwanda will consider them for permission to stay or return to their country of origin. They will not be eligible to return to the UK.

In return, the UK is providing £120 million funding to Rwanda. It will also pay for the processing and integration costs for each relocated person. Ministers expect these will be similar to asylum processing costs in the UK. The UK has also committed to resettling an unspecified number of vulnerable refugees currently in Rwanda.

'Inadmissible' to the UK's asylum system

The Home Office is initially using the relocation agreement to remove people who make dangerous journeys to the UK and are considered 'inadmissible' to the UK's asylum system. Inadmissibility applies to people who pass through or have a connection with a safe country, including people who make irregular journeys across the English Channel. People who arrived in the UK from 9 May are being prioritised for consideration for relocation.

The asylum arrangement with Rwanda is part of a broader package of asylum reforms. The Government wants to discourage people who make irregular journeys to the UK and do not claim asylum in other safe countries. It also cites objectives to improve the fairness and efficacy of the asylum system and prevent loss of life on journeys to the UK.

Only a subset of inadmissible cases will be relocated to Rwanda (or other safe third countries). For example, the UK will consider inadmissible asylum claims belonging to people who are unsuitable for removal, or if their removal is impossible within a realistic timeframe.

Outstanding questions

There are several unknowns about the arrangement and its likely outcomes. For example, the Home Office has not modelled its potential impact on the number of asylum claims in the UK. It has not published estimates of the number of people it expects to relocate or published detailed costings for the policy. It has confirmed that unaccompanied children and EU and Rwandan nationals will not be relocated. It is unwilling to identify publicly any other cohorts that it might consider un/suitable for relocation.

Some commentators have queried how the parties to the agreement and individuals subject to its provisions will be able to enforce compliance or pursue redress if commitments made in the MoU are not adhered to. The MoU is not legally binding, is not justiciable in a court of law and does not confer rights or obligations.

Controversy

The UK and Rwandan governments are promoting the arrangement to UN agencies and other countries as an innovative solution for a "broken" international refugee protection regime. They contend it will deter criminality, exploitation and abuse and support the humane and respectful treatment of refugees.

But the deal is controversial and has been criticised by a broad range of domestic and international stakeholders. Some Conservative MPs have voiced doubts about its legality, practicality, and value for money.

Asylum rights advocates have practical concerns about the arrangement and Rwanda's suitability as a host country. They also object in principle to the use of 'externalisation' policies and consider that the deal undermines the post-WW2 international protection regime. The UN Refugee Agency and other refugee law experts have questioned whether the deal is compatible with the UK's obligations under refugee and human rights laws.

Legal challenges

People facing relocation to Rwanda can bring individual challenges to the policy's application in their cases.

Some groups opposed to the policy have also initiated challenges to the lawfulness of the policies and procedures underpinning the UK-Rwanda deal. A related judicial review is scheduled to be heard in the High Court in mid-

July. The hearing is expected to last three days and a decision is expected by the end of July.

The first removal flight to Rwanda had been scheduled to leave on 14 June. In the days leading up to 14 June the number of people due to fly reduced to single figures. Many people had their removal directions cancelled, either by the Home Office or after their individual cases had been scrutinised by the courts.

Some of the organisations and individuals seeking judicial review of the Rwanda policy applied for injunctions to prevent removals to Rwanda prior to the outcome of their challenges. The UK courts refused the injunction applications. But on 14 June the European Court of Human Rights granted injunctions to some individuals who were still due to fly, under its 'Rule 39' procedures. These decisions led to the Home Office cancelling the flight very shortly before its departure.

Parliamentary scrutiny

The UK-Rwanda MoU is publicly available but the Government has not placed it before Parliament for a vote or formal scrutiny. It is a type of non-binding arrangement that is not a treaty. It does not create any legal obligations between the parties and so does not fall under the parliamentary scrutiny requirements of the Constitutional Reform and Governance Act 2010.

The constitutional position on whether the Government should lay non-binding MoUs before Parliament for scrutiny is less certain than the requirements for treaties. The Government does not consider that there is a constitutional convention requiring it to inform the House of Commons of all non-treaty arrangements, although some stakeholders disagree.

1 The Migration and Economic Development Partnership

1.1 Overview and stakeholder reactions

The UK and Rwanda have agreed a Migration and Economic Development Partnership (MEDP).

This bilateral agreement centres around an 'asylum partnership arrangement'. The arrangement allows the UK to ask Rwanda to assume responsibility for some people who would otherwise seek asylum in the UK. After transfer to Rwanda, relocated individuals will be able to apply to Rwanda for permission to stay. Those refused will face removal to their country of origin or previous legal residence. No-one will be eligible for return to the UK.

In return for assuming responsibility for those individuals, the UK is paying Rwanda an unspecified amount for each relocated person, to cover the costs associated with processing their cases. It is also funding a five-year integration package for each person granted asylum in Rwanda and providing £120 million to Rwanda. The UK has also committed to resettle in the UK an unspecified number of vulnerable refugees currently in Rwanda.

Details of the asylum partnership arrangement are set out in a Memorandum of Understanding (MoU) document.[1] The deal is also summarised in a Home Office press release, 'World first partnership to tackle global migration crisis', and a media factsheet: 'Factsheet: Migration and Economic Development Partnership'.

The partnership agreement is part of a broader package of measures being introduced by the Government to reform the asylum system, under its overarching New Plan for Immigration policy agenda.[2] The prospect of relocation to Rwanda is one of the ways in which the Government is seeking to deter people who make irregular journeys to the UK and do not claim asylum in safe countries they may pass through on the way (eg, EU states).

1 Home Office, Memorandum of Understanding between the government of United Kingdom of Great Britain and Northern Ireland and the government of the Republic of Rwanda for the provision of an asylum partnership arrangement, 13 April 2022

2 The Plan's central objectives are to increase the fairness and efficacy of the asylum system, deter illegal entry to the UK, and remove more easily people without the right to remain in the UK.

Controversy

The Government's interest in securing asylum partnership agreements with other states has been well-known over the past couple of years and was commented on throughout the passage of the Nationality and Borders Act 2022. Nevertheless, the announcement of the MEDP with Rwanda has generated considerable controversy and commentary domestically and overseas.

Some opposition parties in Rwanda have objected to the scheme and the EU Commissioner for Home Affairs, Ylva Johansson, has also criticised it for not being a "humane and dignified migration policy."[3]

The arrangement has been opposed in Parliament, including by the former Prime Minister, Theresa May, and some other senior Conservatives.[4] Their criticisms have highlighted concerns about the policy's likely legality, practicality, efficacy and expense. The Archbishop of Canterbury has said that the plan does not stand the judgment of God, and it has been reported that some Home Office officials have also raised objections.[5]

Aside from having a range of practical concerns, asylum rights advocates object in principle to the use of 'externalisation' policies by developed states such as the UK.[6] A coalition of over 150 civil society organisations wrote to the Prime Minister and Home Secretary outlining their opposition to the policy, which they argued is "fundamentally out of step with public attitudes towards refugees."

Ministers have accused critics of failing to offer viable alternatives.[7] One of the policy's supporters, Tony Smith (a former head of UK Border Force), has welcomed the deal for having "opened up a very real possibility of removing persons who enter illegally to another country." Writing in The Telegraph, he suggested it reflected the limited options available to the Government:

> It takes two to tango. Absent any international collaboration from France, the EU or source and transit countries, the Government has nowhere to go other than to negotiate returns agreements like this with countries like Rwanda. Anything less means, in effect, open borders. If that's what refugee groups and lawyers are advocating, then they should be honest about it and say so.[8]

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3 The Guardian, 'Rwandan opposition criticises deal to accept UK's asylum seekers', 14 April 2022; Sky News, 'Migrant crossings: PM defends Rwanda plan as 'the morally right thing to do'', 15 April 2022;

4 HC Deb 19 April 2022 c29; David Davis, Red Box: Hard-won Brexit freedoms shouldn't be abused to outsource asylum, The Times, 19 April 2022; Andrew Mitchell, The Government's Rwanda plan will be impractical, ineffective – and expensive, Conservative Home, 19 April 2022

5 BBC News, 'UK's Rwanda asylum plan the 'opposite of nature of God' – Welby', 17 April 2022; Civil Service World, 'Home Office perm sec 'tells staff to get on with' Rwanda asylum scheme', 22 April 2022

6 Refugee Council, Briefing on the UK Government's agreement with Rwanda, April 2022

7 The Guardian, 'Priti Patel: Rwanda plan critics 'fail to offer their own solutions'', 18 April 2022

8 Tony Smith, 'Time to push ahead with Rwanda deportations, no matter what the lawyer-activists say', The Telegraph, 23 May 2022

Refugee law practitioners and academics have argued the deal undermines the post-WW2 international protection regime. The Migration Policy Institute thinktank has commented:

> Not only does it derogate from, and openly question, the principle of territorial asylum, i.e. the right to access the (national) asylum process upon setting foot on land, but it also advances the idea that states can pay to cast off the responsibilities they signed up to under the 1951 Geneva Convention. (...)
>
> The arrangement threatens to intensify the reshaping of the global protection regime from a system driven by a shared moral commitment to a transactional one where countries that are willing to host (even more) refugees lever it to strike deals on trade, economic cooperation, or development, as exemplified by the larger partnership that Rwanda reached with the United Kingdom. And for the refugees themselves, it further makes them pawns, removing any sense of control and agency over their destiny and pushing them more into the hands of smugglers and traffickers.[9]

The UN Refugee Agency (UNHCR)'s response to the MEDP announcement said the UK was abdicating responsibility to others and therefore threatening "the international refugee protection regime, which has stood the test of time, and saved millions of lives":

> The UK has supported UNHCR's work many times in the past and is providing important contributions that help protect refugees and support countries in conflicts such as Ukraine. However, financial support abroad for certain refugee crises cannot replace the responsibility of States and the obligation to receive asylum seekers and protect refugees on their own territory – irrespective of race, nationality and mode of arrival.
>
> While UNHCR recognizes the challenges posed by forced displacement, developed countries are host to only a fraction of the world's refugees and are well resourced to manage claims for asylum in a humane, fair and efficient manner.[10]

In contrast, the UK and Rwandan governments contend that the global asylum system is "broken". They believe the MEDP is a "world leading" approach which "can set a new international standard" and will support the humane and respectful treatment of refugees. They are taking opportunities to promote it to UN agencies and other states.[11] They argue:

> [it] is a first-class policy that will see major investment in jobs, skills, and opportunities in Africa. (...)
>
> And it is a template for how to deliver a fairer and more effective global asylum system – one that deters criminality, exploitation and abuse, and promises a bright new future for those who find a new home in a wonderful country.[12]

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9 Migration Policy Institute, Commentaries, The UK-Rwanda Agreement Represents Another Blow to Territorial Asylum, April 2022

10 UNHCR UK, UN Refugee Agency opposes UK plan to export asylum, 14 April 2022

11 GOV.UK, News, 'Home Secretary and Rwandan Minister Biruta visit Geneva', 19 May 2022

12 Home Office in the media blog, Repairing the broken asylum system is a moral imperative, 19 May 2022

1 What are inadmissible asylum claims?

All asylum seekers are potentially eligible to be considered for relocation to Rwanda under the terms of the Memorandum of Understanding. It appears the Home Office initially intends to use the agreement to remove some people who fall within the scope of its inadmissibility policy.

The grounds for treating a non-EU application for asylum as inadmissible based on a connection with a safe third country are currently provided for in the Immigration Rules.[13] Similar provisions introduced by the Nationality and Borders Act 2022 will come into effect on 28 June.[14] The inadmissibility immigration rules will mostly be deleted on the same date.[15]

Briefly, the current Immigration Rules and forthcoming changes made by the 2022 Act both provide for people who were previously present in or have another type of connection with a safe third country to be treated as inadmissible to the UK's asylum system. The Home Office can remove them to any safe third state that agrees to receive them, without first having to consider the asylum claim.

From 28 June, "connection" to a safe third state will mean any of the following:

- Having been recognised as a refugee or otherwise granted international protection in another country.
- Having an outstanding or refused claim for asylum in another country.
- Having previously been present in another country and failed to take advantage of an opportunity to claim asylum there when it would have been reasonable to expect the person to do so.
- When, considering the person's particular circumstances, it would have been reasonable to expect them to claim asylum in a safe third State rather than the UK.

Home Office decision-makers have some scope to make exceptions. An asylum claim that has been declared inadmissible can be fully considered in the UK "if there are exceptional circumstances in the particular case that mean the claim should be considered", or if otherwise provided for in the Immigration Rules. The Immigration Rules provide for inadmissible claims to be admitted for consideration in the UK if the person's removal to a safe third country within a reasonable period is considered unlikely.

13 HC 195 of 1993-4 as amended, paras 345A-D

14 s80B-C, Nationality, Immigration and Asylum Act 2002 as amended by s16, Nationality and Borders Act 2022

15 Statement of Changes to the Immigration Rules HC 17 of 2022-3

1.2 Key elements of the asylum partnership arrangement

The main features and commitments in the asylum partnership arrangement are set out in a Memorandum of Understanding (MoU) document. It was signed on 13 April by the Home Secretary, Priti Patel, and Vincent Biruta, Rwanda's Minister for Foreign Affairs and International Co-Operation, and came into force on the same date.

The stated purpose of the asylum partnership is to:

> create a mechanism for the relocation of asylum seekers whose claims are not being considered by the United Kingdom, to Rwanda, which will process their claims and settle or remove (as appropriate) individuals after their claim is decided.[16]

Rwanda commits to processing individual cases in accordance with its domestic law, the 1951 Refugee Convention (which it is a signatory to), and current international standards including international human rights law and assurances given in the MoU.

The MoU states the parties to the agreement will make "all reasonable efforts" to resolve disputes. However, it is not legally binding. The MoU specifically confirms that the arrangement is not justiciable in a court of law and does not confer rights or obligations.[17]

The agreement is due to last for five years, with the possibility of a further year's extension. The clock would stop ticking if a court order requires suspension of the arrangements. The agreement can be terminated at any time if both parties agree.[18]

The UK's responsibilities in the MoU

Rwanda will need to approve each individual transfer request before the person is relocated. The timing of a relocation request will be determined by the UK, but requests will not be made before the person has been through an asylum screening process in the UK.

The MoU does not specify any minimum or upper limit on the number of transfer requests made.[19]

16 Memorandum of Understanding 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 arrangement, 14 April 2022, paragraph 2.1
17 UK-Rwanda MoU, paragraph 2.2
18 UK-Rwanda MoU, paragraph 23
19 UK-Rwanda MoU, paragraph 3

When submitting a transfer request to Rwanda, the UK commits to providing the person's basic biographical details (name, sex, nationality, date of birth and travel document details). It also commits to passing on details of any special needs the person may have that would need to be accommodated in Rwanda; any health issues it would be necessary for Rwanda to know before the person's arrival (with the individual's consent); any security issues known to the UK; any available biodata and biometric data for the individual (subject to establishing data sharing processes); and any further information requested by Rwanda and agreed to by the UK.[20]

The UK would not be obliged to disclose information "if it would be contrary to domestic laws or the United Kingdom's international obligations, to do so."[21] Annex A to the MoU contains further provisions on data management and protection.

The UK assumes responsibility for making (and funding) the necessary travel arrangements and for individuals' safe transportation to Rwanda, including the provision of escorts where necessary.[22]

After arrival in Rwanda: Asylum processing and reception arrangements

Rwanda will provide all arrivals with accommodation and support that is adequate to ensure their "health, security and wellbeing". Individuals will be free to enter and leave the allocated accommodation at all times, "in accordance with Rwandan laws and regulations as applicable to all residing in Rwanda".[23]

Relocated people who claim asylum in Rwanda will be processed by Rwanda's asylum system in accordance with its national and international legal obligations.

The MoU specifies certain procedural safeguards for asylum applicants. These are:

- A commitment to ensure that they are treated in accordance with the Refugee Convention, Rwandan immigration laws and international and Rwandan standards, including ensuring protection from inhuman and degrading treatment and refoulement.

- Access to an interpreter and to procedural or legal assistance at every stage of the asylum claim, including an appeal against a decision made on their case.

20 UK-Rwanda MoU, paragraphs 5.1-5.4
21 UK-Rwanda MoU, paragraph 5.4
22 UK-Rwanda MoU, paragraph 6
23 UK-Rwanda MoU, paragraph 8

- Access to an independent and impartial due process of appeal for refused applicants, in accordance with Rwandan laws.

The Home Office's assessment of Rwanda's asylum system provides detailed information about its existing approach to determining individual asylum claims. It notes, for example, that the process does not provide access to legal assistance at the initial stage of the asylum determination process (although some people can access some support via UNHCR and a local NGO). The initial decision on eligibility for asylum is made by the Refugee Status Determination Committee.

There is a two-tier appeal system. The first appeal is to a government minister, who can convene a committee to review the initial decision. The second tier is an appeal to the High Court. Free legal support is available at the second tier.

People who do not claim asylum will have their residence status considered on other grounds in accordance with Rwandan immigration laws.[24]

Possible case outcomes and post-decision entitlements

People who are relocated from the UK to Rwanda will not be eligible for return to the UK under the partnership arrangement, regardless of the outcome of their case.

People who are found to be eligible for asylum will be granted refugee status (or an equivalent status for non-Refugee Convention cases) by Rwanda. Rwanda commits to treating these individuals in accordance with the Refugee Convention and international and Rwandan standards, and to providing "the same level of support and accommodation as a Relocated Individual seeking asylum, integration into society and freedom of movement in accordance with the Refugee Convention."[25]

Rwanda will ensure that people who are refused asylum are given relevant information to apply for permission to stay on other grounds. It will also ensure that they are given "adequate support and accommodation for [their] health and security" until they regularise their immigration status or leave Rwanda.

People ineligible to remain in Rwanda will be liable to removal to a country where they have a right to reside. The MoU states that Rwanda will regularise the person's status in Rwanda if there is no prospect for the person's removal but does not specify a timeframe for reaching such a conclusion.[26]

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24 UK-Rwanda MoU, paragraph 9

25 The 1951 Refugee Convention provides recognised refugees with some specific rights, including relating to employment, education and welfare. In some areas it requires treatment equal to the host state's nationals.

26 UK-Rwanda MoU, paragraph 10

Monitoring and oversight of MoU implementation

A **Joint Committee** comprising of representatives of the UK and Rwandan governments (mostly, officials) will be established "without delay".[27] Its role will be to monitor and review implementation of the asylum partnership arrangement and to make non-binding recommendations. It will also serve as a forum to exchange information, discuss best practice, and resolve technical or administrative issues. The Joint Committee will meet at least once every six months unless the co-chairs decide otherwise.

A **Monitoring Committee**, comprising of people independent of the UK and Rwandan governments, will also be formed.[28] It will report to the Joint Committee.[29] Its terms of reference (set by the Joint Committee co-chairs) will specify how it will monitor the entire relocation process (including initial screening and information provided in the UK and conditions, and processes and treatment and support of relocated individuals in Rwanda). It is envisaged that it will be able to make unannounced visits to accommodation, asylum processing centres and any other locations used to process cases. The MoU also provides that the Monitoring Committee is to have "unfettered access" to relevant locations, people, and documents.[30]

The MoU does not specify further details about the Monitoring Committee, such as the timeframe for its establishment, its anticipated membership, or its reporting obligations and mechanisms for accountability to Parliament.

The MoU highlights in particular the Committee's responsibility for monitoring implementation of the assurances specified in paragraphs 8 – 10 of the MoU (concerning reception arrangements and accommodation; asylum processing arrangement; and assurances to treatment post asylum decision).

Resettlement of refugees in Rwanda to the UK

As part of the deal, the UK has also committed to resettle in the UK an unspecified "portion" of Rwanda's most vulnerable refugees.[31] Tom Pursglove, Minister for Justice and Tackling Illegal Immigration, told the Home Affairs Committee that this was expected to amount to "tens" of cases, involving people who have complex needs which the UK is better placed to meet.[32]

27 UK-Rwanda MoU, paragraph 21
28 UK-Rwanda MoU, paragraph 15
29 Home Affairs Committee, Asylum and migration oral evidence HC 197, 11 May 2022, Q65
30 UK-Rwanda MoU, paragraph 13
31 UK-Rwanda MoU, paragraph 16
32 Home Affairs Committee, Asylum and migration oral evidence HC 197, 11 May 2022,, Q25

2 How will individuals be chosen for relocation?

People that the Home Office wishes to transfer to Rwanda will be identified and referred to the Rwandan authorities on a case-by-case basis, after an initial screening process soon after arrival in the UK.

Eligibility for consideration for relocation

Broad parameters on who is eligible to be relocated to Rwanda are set out in Home Office policy guidance on the 'inadmissibility' rules:

> An asylum claimant may be eligible for removal to Rwanda if their claim is inadmissible under this policy and (a) that claimant's journey to the UK can be described as having been dangerous and (b) was made on or after 1 January 2022. A dangerous journey is one able or likely to cause harm or injury. For example, this would include those that travel via small boat, or clandestinely in lorries. (...)
>
> Those progressed for consideration for relocation to Rwanda under the MEDP will be taken from both the detained and non-detained cohort and be identified in line with processing capacity. Priority will be given to those who arrived in the UK after 9 May 2022.[33]

Who is excluded?

Under current arrangements, **unaccompanied asylum-seeking children** (under 18) are excluded as a matter of policy from third country inadmissibility action and so will not be considered for relocation to Rwanda. **Asylum seekers from EU countries** are excluded (they are covered by different inadmissibility provisions in the Immigration Rules). **Rwandan asylum seekers** in the UK are also excluded (in line with the UK's international legal obligations on non-refoulement).

Factors for considering relocation to Rwanda

If a person is potentially eligible for relocation to Rwanda as well as (an)other safe country/ies, Home Office caseworkers are advised to make simultaneous referrals, to avoid unnecessary delay and to minimise the length of time the asylum seeker might spend in immigration detention (if they are being detained).

The guidance further advises caseworkers that, "If a case assessed as suitable for inadmissibility action appears to stand a greater chance of being promptly removed if referred to Rwanda, ..., rather than to the country to which they have a connection, ... consider referring the case to Rwanda."

A 'Notice of Intent' letter is issued to people whose claims are being considered under the inadmissibility rules. The letter confirms the Home Office is considering removing the person to a specified safe country/ies on the

[33] Home Office, Inadmissibility: safe third country cases, v6.0, 9 May 2022

grounds that they had a previous presence/connection there. If the person is also being considered for relocation to Rwanda under the MEDP this will also be specified in the letter.[34]

Case-by-case risk assessments

When deciding whether it would be appropriate to refer a case for relocation to Rwanda, caseworkers must consider the relevant country policy and information documents and any reasons the applicant provides in response to their Notice of Intent letter, to determine whether relocation is appropriate to the circumstances of the case. The Home Office explains:

> Even where we determine it is generally safe to transfer people from the UK to our international partners, every individual in scope for asylum processing overseas would be able to rely on the UK's obligations under Article 3 of the European Convention on Human Rights so as not to be transferred to a place where they would genuinely be at risk of inhumane and degrading treatment. This means individual vulnerabilities will be taken into consideration and assessed against our knowledge of the conditions in Rwanda.[35]

People in receipt of a Notice of Intent letter are given seven or 14 calendar days (for detained and on-detained cases respectively) to provide written reasons why their claims should not be treated as inadmissible or why they should not be removed to the countries identified in the Notice of Intent.

What happens next?

An asylum inadmissibility decision is made by the Home Office caseworker after they have considered representations against removal to a third country and other relevant information. Once that decision has been made, there are further stages and notice requirements before removal can be carried out.

Decisions to declare an asylum claim as inadmissible can be challenged through the judicial review process. Bringing a legal challenge would be likely to suspend the person's removal from the UK until the judicial review proceedings had been completed.

1.3 Parliamentary scrutiny

The UK-Rwanda MoU has not been put before Parliament for formal scrutiny or a vote.

It does not fall under the Parliamentary scrutiny requirements of the Constitutional Reform and Governance Act 2010 because it does not create

34 Home Office, Inadmissibility: safe third country cases, v6.0, 9 May 2022

35 Home Office, MEDP with Rwanda: Equality Impact Assessment, 11 May, p.4

any legally binding obligations. See the Annex to this briefing for further discussion.

The Public Law Project, a charity which conducts policy work alongside legal casework and strategic legislation, has criticised the absence of parliamentary scrutiny. It also observes that the decision to use a MoU rather than a treaty was relevant to the European Court of Human Rights' decision to grant an injunction which led to the cancellation of the first removal flight on 14 June (discussed in section 4.3 of this briefing). It explains:

> Yesterday's planned flight did not go ahead because the EcrtHR found* that the UK Government would have no effective mechanism to force the Rwandan Government to return people to the UK if the UK courts find that the policy is unlawful when they hear the case in full in July.
>
> This showed why the enforceability of the MoU matters and is just one of two crucial outcomes of the decision to write it as an MoU instead of a treaty.
>
> Firstly… there was no parliamentary scrutiny of the merits, practicality, lawfulness, implications or value for money of the deal. It is unusual and problematic that a policy with such significant obligations and effects on people was not subject to any scrutiny let alone approval by Parliament, and therefore that the only scrutiny is that provided by the courts.
>
> Secondly, the nature of an MoU means that the UK cannot enforce the agreement. If people are mistreated in Rwanda or do not have access to a fair immigration process, legally there is nothing the UK can do to put things right or ensure tax-payer's money is being well spent. There is no dispute resolution process and no recourse to international courts.
>
> (…) If the Government had chosen a treaty instead, it would have been published in advance, been scrutinised by Parliament, and could have included binding rules on what happens if the arrangements were breached. All that could have significantly altered the outcome of the cases of the last few days.[36]

Ad hoc scrutiny: Work currently underway

Home Affairs Committee

The Home Affairs Committee held a one-off evidence session about the MEDP with Tom Pursglove and a senior Home Office official on 11 May.

The Minister agreed to send further information about several issues raised during the session in follow-up correspondence. See his letter to the Committee of 15 June 2022.

Joint Committee on Human Rights

The Committee held a non-inquiry evidence session examining the human rights implications of the asylum partnership agreement on 8 June.

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[36] Public Law Project, 'Why treaties matter: statement on flight cancellation', 15 June 2022

Lords International Agreements Committee

The Lords International Agreements Committee has launched an inquiry into MoU with Rwanda.[37] Its Chair, Baroness Hayter of Kentish Town, has criticised the Government for making the deal with Rwanda through a MoU which does not have to be disclosed to or debated in Parliament.[38]

1.4 Outstanding questions

How many people will be relocated to Rwanda?

The Prime Minister said in a speech in mid-April that "Rwanda will have the capacity to resettle tens of thousands of people in the years ahead".[39]

More recent comments by Ministers suggest it is more likely that the number of people relocated to Rwanda each year will be in the hundreds.[40] This corresponds with reports that internal Home Office modelling estimated that around 300 people might be relocated under the policy each year and reported comments by the Rwandan Government that it expects to receive hundreds of people in the first year, and a few thousand over the course of the five-year period.

The UK Government has not indicated the extent of Rwanda's current or future projected capacity to receive relocated people under the terms of the asylum partnership arrangement. Nor has it published estimates of the number of people it expects to be relocated in Rwanda over the course of the five-year deal.[41]

Rwanda's recent caseloads of asylum claims eligible for individual assessment have been small. UNHCR statistics referred to in the Home Office's assessment of Rwanda's asylum system indicate that there were 465 asylum seekers in Rwanda at the end of 2020 and the total number of individual asylum decisions made during that year was 228. The comparable figures for 2019 were 613 and 307 respectively.[42]

Some observers have suggested that limited capacity in Rwanda to receive cases could undermine the policy's intended deterrent effect.[43] In response, Ministers have emphasised that the relocation arrangement is "uncapped".

37 HL Deb 19 May 2022 c606

38 HL Deb 19 May 2022 c606-7

39 GOV.UK, speech, PM speech on action to tackle illegal migration, 14 April 2022

40 The Times, Dominic Raab: Hundreds, not thousands, will be sent to Rwanda, 20 May 2022

41 HC Deb 19 April 2022 c34

42 Home Office, Review of asylum processing Rwanda: country information on the asylum system, para 4.14.1

43 HC Deb 19 April 2022 c34; Home Affairs Committee, Asylum and migration oral evidence HC 197, 11 May 2022 Q39-44

They have also highlighted that the UK will support capacity building in Rwanda during the partnership.

Will any cohorts of people be excluded?

The published parameters for which asylum applicants are eligible for relocation to Rwanda are broad. The only confirmed excluded groups are asylum seekers from the EU, unaccompanied children, and Rwandan nationals. There is no indication of whether Rwanda has specified any criteria for referrals (e.g., certain nationalities, age ranges, or household compositions).

There are no age-based exclusions (except for unaccompanied children under 18). The Home Office has said that "At least initially, families with children will only be relocated voluntarily as part of family groups and in any event will not be in the first cohorts of relocated individuals."[44] It has said relocations of children will not be initiated before a further assessment of Rwanda's capacity to accommodate children.

The Government is reluctant to identify publicly any specific cohorts or characteristics which would usually suggest un/suitability for relocation to Rwanda. It is concerned that doing so could influence decisions made by irregular migrants and people smugglers and undermine the policy's intended effect.[45] Some commentators have questioned whether keeping suitability criteria confidential will be feasible, and there is a pending legal challenge on this point (discussed further in section 5 of this briefing).[46]

Campaigners and commentators have identified various types of case that might be particularly unsuitable for relocation to Rwanda. For example, LGBTQ+ asylum seekers, victims of torture of trafficking, people with family members in the UK, and families with children under 18.

The Home Office emphasises that decisions on suitability, and whether Rwanda is "safe", will be taken on a case-by-case basis. It explains:

> The Home Office does not transfer an asylum seeker to a third country prior to refugee status determination unless it has determined the receiving state is "safe". There are two facets to this: first, the positive obligation on the sending State to carry out an up-to-date assessment of the relative conditions of the receiving State to ensure it is safe (objective test); and second, the individual must be given the opportunity to demonstrate the receiving State will not be safe for them personally (subjective test). The Home Office would therefore undertake a case-by-case risk assessment when determining eligibility for relocation.[47]

The set of country policy and information notes (CPIN) on Rwanda's asylum system inform Home Office caseworkers' assessments of whether Rwanda is a

44 Home Office, MEDP with Rwanda: equality impact assessment, 11 May 2022, p5-6

45 HC Deb 19 April 2022 c29

46 HC Deb 19 April 2022 c35

47 Home Office, MEDP with Rwanda: Equality Impact Assessment, 11 May, p.10

safe third country, with particular reference to Article 3 ECHR (freedom from torture and inhuman or degrading treatment). The Equality Impact Assessment (EIA) for the asylum partnership considers its potential impact on people with protected characteristics, drawing on evidence referred to in the CPINs.

The EIA states that the policy has a potential negative effect on some transgender people. It says that this will partly be addressed by making case-by-case decisions: "A person's sexual orientation and gender reassignment status will be closely taken into account on a case-by-case basis to decide if that an individual is eligible under the policy and may therefore be relocated to Rwanda."[48]

What legal powers will underpin removals?

There is some uncertainty amongst immigration practitioners about the legal basis underpinning the current caseload of proposed relocations to Rwanda.

The first cohort of cases being considered for relocation appear to fall within the scope of the inadmissibility provisions, although the related Home Office policy guidance implies different types of case might be considered for relocation to Rwanda as use of the policy evolves:

> In this first stage of applying the policy, removals of individuals from the UK in accordance with the MEDP are intended to deter people from making dangerous journeys to the UK to claim asylum, which are facilitated by criminal smugglers, when they have already travelled through safe third countries. In particular, but not exclusively, this is aimed at deterring arrivals by small boats.[49]

The policy guidance states that inadmissible cases being pursued for relocation to Rwanda should be certified as per powers in Schedule 3 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004.

Some powers relevant to relocating asylum seekers from the UK are due to come into effect on 28 June. Section 29 and Schedule 4 of the Nationality and Borders Act 2022 make changes to Schedule 3 of the 2004 Act and section 77 of the Nationality, Immigration and Asylum Act 2002. They will allow for a person who has a pending asylum application or appeal to be removed to a safe country without the need to certify the individual claim as clearly unfounded. There is no requirement that the claim be declared inadmissible.

Are the safeguards in the arrangement adequate?

Ministers emphasised the screening process as an important mechanism for ensuring unsuitable cases are not considered for relocation. Some observers have cast doubt on whether the short timeframe for screening will be sufficient to ensure that potentially unsuitable cases are identified,

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48 Home Office, MEDP with Rwanda: Equality Impact Assessment, 11 May, p.10-11

49 Home Office, Inadmissibility: safe third country cases, v6.0, 9 May 2022

highlighting applicants' potential difficulties in accessing legal advice, challenging age assessments, gathering supporting evidence and making representations to the Home Office within the timescales envisaged.[50] Similar issues have arisen in other asylum contexts, for example relating to mechanisms to identify cases unsuitable for immigration detention.

Questions have also been asked about how the state parties and people affected by the agreement will be able to enforce compliance with the commitments in the MoU and pursue redress if necessary. The MoU is not binding in law and does not give individuals rights or remedies challengeable in court.

Joanna Cherry, representing the Joint Committee on Human Rights, explored the issue in a recent Home Affairs Committee evidence session with Tom Pursglove.[51] Ms Cherry pressed the Minister to explain what remedies a relocated person would have if their human rights were breached in Rwanda. Mr Pursglove emphasised the Government's view that "there is no systematic breach of human in Rwanda."[52] A follow-up letter from the Minister further elaborated "The UK Government is confident of Rwanda's commitment to Human Rights. Rwanda is a State Party to the 1951 UN Refugee Convention and the seven core UN Human Rights Conventions. (...). The responsibility for the welfare and wellbeing of individuals relocated to Rwanda under the MEDP will sit with the Government of Rwanda. Anyone who wished to seek a remedy for a potential breach of their human rights would do so through the legal and criminal justice system in Rwanda."[53]

Responding to questions about the remedies available to the UK Government if assurances given in the agreement are not met, Mr Pursglove said:

> if there were concerns raised about the application of the partnership, it would be for Ministers to decide appropriately, at that time, what their response to that would be. We will have these oversight arrangements in place so that the assurance of the partnership takes place. I do not envisage those sorts of issues arising, but Ministers will make appropriate decisions in the circumstances were that to arise.[54]

Rwanda's suitability as a country for relocation

Rwanda's suitability as a partner country is contentious. Some critics have questioned, for example, whether it is appropriate for the UK to give a considerably poorer country responsibility for some of its asylum claims, and whether the country's asylum system and general conditions will provide relocated people adequate procedural guarantees and long-term integration prospects.

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50 Home Affairs Committee, Asylum and migration oral evidence HC 197, 11 May 2022 Q35-37

51 Home Affairs Committee, Asylum and migration oral evidence HC 197, 11 May 2022 Q80-93

52 Home Affairs Committee, Asylum and migration oral evidence HC 197, 11 May 2022 Q89

53 Home Affairs Committee, Letter from Minister for Justice and Tackling Illegal Migration, 15 June 2022

54 Home Affairs Committee, Asylum and migration oral evidence HC 197, 11 May 2022 Q93

Campaigners have concerns about Rwanda's human rights record.[55] The Government's assessment, as reflected in the overarching country information document on Rwanda, is that Rwanda is generally a safe country for refugees. Ministers have strongly criticised commentators for casting doubt on Rwanda's suitability as a host country. They have argued that "there is something really quite unpleasant about the undercurrent of the tone towards Rwanda."[56]

The set of Home Office country policy and information notes (CPINs) on Rwanda's asylum system provide country information and assessments of Rwanda's asylum system, support and integration opportunities and related human rights issues. One of the pending legal challenges to the asylum partnership agreement questions whether it was reasonable for the Home Secretary to conclude from the available evidence that Rwanda is a safe country (discussed further in section 5 of this briefing).

Campaigners have highlighted some of the findings in the Home Office assessments in support of their arguments that Rwanda is not safe for some groups of people, notably LGBTQI+. For example, the overarching assessment refers to "some evidence of discrimination and intolerance towards persons based on their sexual orientation and gender identity or expression".[57] Evidence is set out in further detail in the separate country report on human rights.[58] However, the Home Office's overarching conclusion is that "in general the treatment is not sufficiently serious … to establish a systemic risk or to amount to persecution or serious harm."[59]

Human Rights Watch has criticised the assessments for "cherry-picking facts, or ignoring them completely, to bolster a foregone conclusion".[60]

The Independent Chief Inspector of Borders and Immigration has recently launched a tender for a country expert to review the CPINs on Rwanda. The purpose is to assess their content is accurate, balanced, objective and up-to-date. The review is scheduled to be completed in July.

Will the deal deter irregular journeys to the UK?

There is considerable uncertainty about the likely impact of the asylum partnership arrangement on the number of irregular arrivals and asylum

55 Amnesty International UK, press release, 'UK: Banishing people seeking asylum to Rwanda is 'appalling'', 14 April 2022; BBC News, 'UK asylum deal: Is Rwanda a land of safety or fear?', 14 April 2022; The Guardian, 'Rwanda plan challenged over alleged failure to identify risks for LGBTQ+ refugees', 24 May 2022

56 HC Deb 19 April 2022 c30

57 Home Office, Country policy and information note: Rwanda, assessment, May 2022, para 2.11.1

58 Home Office, Country policy and information note: Rwanda, general human rights, May 2022

59 Home Office, Country policy and information note: Rwanda, assessment, May 2022, para 2.11.1

60 Human Rights Watch, 'UK's Rights Assessment of Rwanda Not Based on Facts', 12 May 2022

claims in the UK. The Home Office does not appear to have conducted modelling of the policy's impacts prior to its implementation.[61]

The absence of evidence that the policy will have a deterrent effect significant enough to make the policy value for money prompted the Home Office's Permanent Secretary to request a Ministerial direction to proceed with the policy. He explained: "This does not mean that the MEDP cannot have the appropriate deterrent effect; just that there is not sufficient evidence for me to conclude that it will."

Government Ministers have confirmed that deterrence is a policy objective and argue that a significant reduction in the number of people making dangerous journeys to the UK would be an indicator of its success.[62] But they have also emphasised that the policy must be considered in conjunction with broader reforms to the asylum system. Speaking to the Home Affairs Committee, Tom Pursglove, Minister for Justice and Tackling Illegal Immigration, said:

> There is no one single intervention that will resolve the issues that we are grappling with. (...) I genuinely do believe that there will be a deterrent effect. It is difficult to quantify that at this stage. You read conflicting media reports of individuals being interviewed, for example by the media in Calais. Some say they are not going to make the journeys; some say that they are still going to make those journeys. It is important to set this in the context, too, that there are individuals, for example, who have not yet made crossings and who have already paid criminal gangs, so that investment has already been made. But I do believe that, in the fullness of time, this will make a difference.[63]

Migration Watch, an organisation concerned about current levels of immigration and asylum abuse, has suggested that the policy could act as a powerful deterrent if people entering the UK by irregular means "are swiftly and routinely sent to Rwanda".[64]

Some asylum charities have reported that some service users have said they will seek to avoid relocation by losing contact with the authorities.[65] The first cohort of people in receipt of Notice of Intent letters are reportedly being detained pending relocation.

How much will the deal cost the UK?

The MoU doesn't detail the financial arrangements underpinning the deal. Ministers have said that the detailed costings must remain confidential out of

61 See Home Affairs Committee, Asylum and migration oral evidence HC 197, 11 May 2022 Q6-14

62 HC Deb 25 April 2022 c454; Home Affairs Committee, Asylum and migration oral evidence HC 197, 11 May 2022 Q19

63 Home Affairs Committee, Asylum and migration oral evidence HC 197, 11 May 2022 Q6

64 Migration Watch, Potential impact of asylum arrangements with Rwanda, 5 May 2022

65 Red Cross, Fears of deportation and harsh treatment putting asylum seekers at even greater risk of poverty and exploitation, warn British red Cross and Refugee Council, 12 May 2022

respect to the partnership with Rwanda but have suggested that future Home Office accounts will provide some information.[66]

Some broad costings have been confirmed:

- The UK is providing an initial £120 million investment towards the economic development and growth of Rwanda.[67] This investment will be part of a new 'Economic Transformation and Integration Fund'.[68]
- The UK will provide additional funding for each person relocated to Rwanda, to cover their accommodation and case processing costs (such as caseworkers, legal advice, translators, accommodation, food and healthcare).
- The UK has also agreed to fund a five-year integration package (including accommodation, training and healthcare) for each person granted asylum in Rwanda under the scheme.

Ministers have said that they anticipate that the funding for individual cases will be comparable with asylum processing costs in the UK (around £12,000 per individual).[69] Funding for individual cases will only be provided whilst a person remains in Rwanda.

Other costs that the UK will face because of the policy include the costs of conducting the initial screening process in the UK, legal aid and any related legal challenges, and travel for relocated individuals (and any Home Office/contracted escorts) to Rwanda.

The Home Secretary's written Ministerial direction for proceeding with the policy cited the existence of "safeguards … to protect taxpayer funding" within the agreement. She also expressed the view that "there are credible invest-to-save arguments in the long term."

3 Selected further reading

Migration Policy Institute, Commentaries, The UK-Rwanda Agreement Represents Another Blow to Territorial Asylum, April 2022

Refugee Council, Briefing on the UK Government's agreement with Rwanda, April 2022

66 Home Affairs Committee, Asylum and migration oral evidence HC 197, 11 May 2022 Q17
67 GOV.UK, News story, 'World first partnership to tackle global migration crisis', 14 April 2022
68 Home Office in the Media blog, Factsheet: Migration and Economic Development Partnership, 14 April 2022
69 Home Affairs Committee, Asylum and migration oral evidence HC 197, 11 May 2022 Q14

Cristiano d'Orsi, The Conversation, Outsourcing asylum seekers: the case of Rwanda and the UK, 14 April 2022

Andrew Connelly, Prospect Magazine, The performative cruelty of sending migrants to Rwanda, 16 April 2022

Tony Smith, The Telegraph, 'Ignore the hysteria: the Rwanda plan is a bold and necessary step forwards' 16 April 2022

Africanews, UK-Rwanda asylum deal: The challenges ahead, 21 April 2022

Parvati Nair, The Conversation, How the UK's plan to send asylum seekers to Rwanda is 21st-century imperialism writ large, 22 April 2022

Niall Gooch, The Critic, Why won't liberals tell the truth about immigration? 23 April 2022

Institute for Security Studies, ISS Today, Rwanda–UK deal degrades refugee conventions and Africa's approach, 26 April 2022

Migration Watch, Briefing, MW506 Potential impact of asylum arrangements with Rwanda, 5 May 2022

EU Immigration and Asylum Law and Policy, Externalisation of asylum in Europe: Unpacking the UK-Rwanda Asylum Partnership Agreement, 17 May 2022

Care 4 Calais, Refugee stories, Nadir: they're sending me to Rwanda, 24 May 2022

2 Are there comparable precedents?

There are many international examples of safe third country and externalisation policies. The Government has cited policies implemented by Australia over the past decade or so, including its experience of offshore asylum processing, in support of its own plans to reform the asylum system. However, it is keen to distinguish the UK-Rwanda deal from other countries' approaches. It maintains that the asylum partnership arrangement with Rwanda is not comparable to other examples, including a previous arrangement between Israel and Rwanda.[70]

The Government has sought to counter some criticisms of the UK-Rwanda deal by suggesting that the EU and UNHCR have supported schemes to remove asylum seekers to Rwanda, and by highlighting a previous Labour administration's interest in processing asylum claims outside of the UK.

2.1 UNHCR's Emergency Transit Mechanism project in Rwanda

The EU provides funding to UNHCR in support of its 'Emergency Transit Mechanism' (ETM) project in Rwanda. Funding comes from the EU Emergency Trust Fund for Africa. Some individual EU Member States (and some other countries) also provide financial support for the ETM scheme via UNHCR.

The Rwanda ETM was established by UNHCR in September 2019 as a temporary emergency humanitarian response to an urgent situation in Libya. Libya has been a major transit hub for migrants heading towards Europe over the past decade. There are longstanding concerns about its treatment of migrants and refugees, and it has not signed the 1951 Refugee Convention or recognised UNHCR's mandate for refugees.

The ETM's purpose is "to provide a safe space and long-term solutions to some of the most vulnerable asylum seekers and refugees in Libya."[71] Since its establishment, over 900 asylum seekers have been sent to Rwanda, of which 67% have been resettled in third countries.

[70] For background on the Israeli example, see The New Humanitarian, How Israel's Secret Refugee Deals Collapsed in the Light of Day, 3 May 2018; University of Oxford faculty of Law Blog, 'Moving under Threats: The Treacherous Journeys of Refugees who 'Voluntary' Departed from Israel to Rwanda and Uganda and Reached Europe', 12 October 2018

[71] UNHCR, 'First evacuation flight of 2022 from Libya to Rwanda brings over 100 asylum seekers to safety', 30 March 2022

Put briefly, UNHCR arranges the transfer of some asylum seekers (of various nationalities) from Libya to Rwanda. Upon arrival in Rwanda, the people are provided accommodation, food, water, medical care, psychosocial support, and life skills training by UNHCR.[72]

UNHCR considers their eligibility for asylum or another form of permission to stay, and/or for other durable solutions appropriate to their individual circumstances. For example, resettlement in a third country or return to a country of origin or to a previous country of asylum.[73]

Comparing the ETM with the UK-Rwanda deal

There are conceptual and practical differences between the UK-Rwanda asylum partnership and UNHCR's ETM. For example:

- The MoU for the Rwanda ETM is between UNHCR, the Government of Rwanda, and the African Union, whereas the UK's model is a bilateral agreement with the Rwandan government and does not provide for involvement from UNHCR or other international bodies.

- People transferred to Rwanda under the ETM are considered for asylum by UNHCR, whereas people relocated under the UK's partnership arrangement would go through the Rwandan asylum process.

- Asylum seekers in the UK do not have any choice over whether they are relocated to Rwanda, whereas the ETM has been described as a voluntary process.

- The ETM arose out of UNHCR's recognition that it had extremely limited scope to provide protection or durable solutions to refugees and asylum seekers whilst they were in Libya. The legal context and reception conditions in the UK are significantly different. The UK is a signatory to the 1951 Refugee Convention and has a well-established asylum determination system and reception facilities.

- The ETM's purpose is to evacuate asylum seekers from an emergency situation in Libya so that durable solutions to their situations could be found. In contrast, the UK Government's underlying objectives for the asylum partnership with Rwanda are to deter irregular migration to the UK and manage asylum intake in the UK. Consequently, the range of potential outcomes available to people transferred to Rwanda under the ETM is broader than under the MEDP.

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72 UNHCR, 'UNHCR organizes humanitarian evacuation of 176 vulnerable asylum seekers out of Libya', 10 December 2021

73 For more detailed background information see, for example, Altai Consulting for EUTF, Case study Emergency Transit Mechanism, June 2021

2.2 The Blair government's proposals

During the early 2000s, the Blair government considered some ideas to enable the transfer of asylum seekers from the UK to third countries whilst their claims were being processed. None were implemented.

Ideas proposed to the EU in 2003 concerned strengthening protection capacity in asylum seekers' regions of origin, and a proposal that EU Member States establish 'transit processing centres' in third countries where asylum claims to the EU would be considered.[74] People found to be in need of asylum would have been settled in EU countries.

Separately, in 2004 the then government confirmed that it had been in discussions with the Government of Tanzania, particularly about cooperation on Somali/disputed Somali nationality asylum cases. According to reports, ideas included the possibility of Tanzania receiving some asylum seekers and refused asylum seekers.[75]

Full Fact, the independent fact-checking organisation, has published a brief comparison of the proposals made under the Blair government with the MEDP proposals. It concludes that the previous proposals were "quite different" to the UK-Rwanda deal.[76]

By the time of the 2005 General Election campaign, the incumbent Labour government had abandoned plans for off-shore asylum processing. The Conservative Party was advocating sending asylum seekers in the UK to 'regional processing centres' closer to their countries of origin.[77]

Some of the legislation which underpins the UK-Rwanda plan builds on legislation introduced by Labour. For example, section 29 and Schedule 4 of the 2022 Act amend the safe country provisions in Schedule 3 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004.

74 Letter from the Prime Minister, New international approaches to asylum processing and protection, 10 March 2003

75 BBC News, 'UK plans asylum camp in Tanzania', 26 February 2004

76 Full Fact, Did David Blunkett propose sending asylum seekers abroad in 2004?, 22 April 2022

77 BBC News, 'Blair accuses Tories over asylum', 22 April 2005

3 International legal issues

3.1 UNHCR: General opposition to UK's plans

Asylum-related provisions in the Nationality and Borders Act 2022 are relevant to implementation of the UK-Rwanda MoU and the broader package of asylum reforms it falls within. Many of the relevant provisions of this Act come into force on 28 June 2022.[78]

The UN High Commissioner for Refugees (UNHCR) has produced several reports containing detailed legal observations on the Nationality and Borders Act as it progressed through Parliament, with a dedicated web page outlining the main international legal issues the UNHCR suggests the legislation raises.[79]

On the passing of the Act, the UNHCR said it regretted the Government's approach that "undermines established international refugee protection law and practices" were approved:

> The UK is a nation that rightly prides itself on its long history of welcoming and protecting refugees. It is disappointing that it would choose a course of action aimed at deterring the seeking of asylum by relegating most refugees to a new, lesser status with few rights and a constant threat of removal.
>
> Furthermore, wide-ranging inadmissibility rules have the potential to deny refugees their right to seek asylum in the UK. Such provisions are potentially at variance with the Refugee Convention.
>
> I am also concerned by the UK's intention to externalize its obligations to protect refugees and asylum seekers to other countries. Such efforts to shift responsibility run counter to the letter and spirit of the Refugee Convention, to which the UK is a party. These efforts also run counter to the Global Compact on Refugees, which was affirmed by the UN General Assembly in 2018 and calls for more equitably sharing the responsibility for refugee protection.[80]

Some of the main international legal questions raised by the UNHCR and others are outlined below, specifically as they relate to the UK-Rwanda arrangement. On the UK-Rwanda arrangement, the UNHCR has also opposed this plan, stating:

78 SI 2022/590

79 UNHCR UK, The Nationality and Borders Bill, accessed 31 May 2022

80 UNHCR, News comment: UNHCR's Grandi fears UK legislation will dramatically weaken refugee protection, 27 April 2022

> UNHCR remains firmly opposed to arrangements that seek to transfer refugees and asylum seekers to third countries in the absence of sufficient safeguards and standards. Such arrangements simply shift asylum responsibilities, evade international obligations, and are contrary to the letter and spirit of the Refugee Convention.[81]

3.2 The Refugee Convention

The 1951 International Refugee Convention acknowledges that some refugees and asylum-seekers may enter a country illegally.[82] Article 31 of this convention outlines a state's obligations when it comes to the treatment of those seeking refuge by entering a state in a way that would usually be unlawful. The provision states:

> 1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.
>
> 2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

There are several legal questions that arise out of the UK-Rwanda arrangements in light of this provision. These are:

- What amounts to a 'penalty' under Article 31(1)?
- Whether refugees must come 'directly' from the state they are fleeing, or may transit through other states, and still be protected by this provision.
- Whether asylum seekers should claim asylum in the 'first safe country' they reach.

Prohibition of penalties

In the UK, the prohibition of penalties against refugees who enter a state unlawfully is given effect by section 31 of the Immigration and Asylum Act 1999. This provides a legal defence against some immigration offences relating to illegal entry or other linked offences, such as document fraud.

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81 UNHCR, UN Refugee Agency opposes UK plan to export asylum, 14 April 2022

82 Convention Relating to the Status of Refugees, (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137

As noted above, the UK's Immigration Rules mean that an asylum claim can be declared inadmissible based on a number of conditions, including where an asylum-seeker has "previously been present in another country and failed to take advantage of an opportunity to claim asylum there when it would have been reasonable to expect the person to do so."

Some expert and academic commentators suggest that treating any potential refugee claim as inadmissible based on the fact they may have entered the UK irregularly runs contrary to Article 31 and could amount to an unlawful penalty.[83]

The UNHCR further notes that, in circumstances where penalties are permissible (ie, the asylum-seekers fall outside the scope of Article 31), they should not go so far as to interfere with the fundamental right to seek asylum, or other guarantees provided by the Convention.[84] The UNHCR said:

> Where asylum-seekers are not protected against the imposition of penalties under Article 31(1) (not having arrived directly, presented themselves without delay or shown good cause for their irregular entry or presence) any penalising measure must not undermine the right to seek and enjoy asylum or be at variance with other provisions of the 1951 Convention and international and regional human rights law. **Thus, such penalties must not involve or indirectly result in denying asylum seekers access to an asylum procedure.** Nor … can it involve the denial of the full set of rights guaranteed by the 1951 Convention. UNHCR further considers that the denial of entry or the summary removal from its territory of asylum-seekers based on their irregular entry or presence, without necessary safeguards regarding the application of safe third country concepts, would also be in breach of the UK's obligations under the 1951 Convention and applicable international and regional human rights law.[85]

UNHCR's latest legal observations from January 2022 reiterated these points.[86]

The Home Office's view is that relocation to Rwanda does not amount to a "penalty." It emphasises Rwanda's commitment to non-refoulement and its treatment of refugees.[87]

Interpretation of Article 31

The UK Government interprets the Refugee Convention as excluding some asylum seekers from the scope of Article 31, and therefore the protection against penalties. In particular, the UK's interpretation of asylum-seekers "coming directly from a territory where their life or freedom was threatened"

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83 See, for example, Maja Grundler and Elspeth Guild, "The UK-Rwanda deal and its Incompatibility with International Law", EU Immigration and Asylum Law and Policy, 29 April 2022

84 The right to seek asylum was recognised in the Universal Declaration of Human Rights, Article 14 (1): Everyone has the right to seek and to enjoy in other countries asylum from persecution.

85 UNHCR, UNHCR Observations on the New Plan for Immigration policy statement of the Government of the United Kingdom, May 2021, Annex para 14

86 UNHCR, UNHCR Updated Observations on the Nationality and Borders Bill, as amended, January 2022, para 26

87 Home Office, Equality Impact Assessment, MEDP with Rwanda, p5

has been included in section 37 of the Nationality and Borders Act 2022 (in force from 28 June). Section 37(1) provides that:

> A refugee is not to be taken to have come to the United Kingdom directly from a country where their life or freedom was threatened if, in coming from that country, they stopped in another country outside the United Kingdom, unless they can show that they could not reasonably be expected to have sought protection under the Refugee Convention in that country.

The Act does not provide for a specific definition of what is means for an asylum-seeker to have 'stopped' in another country where asylum could have been claimed.

The UNHCR reject's the UK Government's description of the Nationality and Borders Act as "aligned with", "based on" and "consistent with" Article 31(1).[88] The UNHCR argues the UK's position is based on a 'fundamental misapplication' of Article 31, reiterating its position that asylum does not have to be claimed in the first safe country a refugee may reach.

The UNHCR provides for a different and more specific interpretation of the convention, supporting the existing interpretations from UK case law:

> Article 31(1) of the Refugee Convention prohibits penalising refugees for their unlawful entry or presence if they come directly from a country where their life or freedom was threatened, present themselves to the authorities without delay, and show good cause for their unlawful entry or presence. This article was intended to address the situation of refugees who were often unable to secure the necessary authorisation to enter a country. The exemption in their favour could not, however, be claimed by those who were lawfully settled, temporarily or permanently, in another country and had already found protection there and who decided to move onward irregularly for reasons unconnected to their need for international protection. To them, administrative penalties for unlawful entry or presence could be applied. It has since been understood also to apply to those who failed to seek asylum in a timely fashion or at all, in a country where they could reasonably have done so. The UK High Court in *Adimi* introduced three benchmarks to interpret "coming directly": 1) the length of stay in the intermediate country; 2) the reason for the delay; and 3) whether or not the refugee sought or found protection *de jure* or *de facto*.[89]

The UNHCR's position reflects the outcomes of previous research conducted for the UNCHR on the interpretation of Article 31 in 2001.[90] This research indicated that the interpretation of Article 31, and significant state practice in implementing Article 31 at the time, suggested the meaning of a refugee

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88 UNHCR, UNHCR Updated Observations on the Nationality and Borders Bill, as amended, January 2022, para 26

89 UNHCR, UNHCR Updated Observations on the Nationality and Borders Bill, as amended, January 2022, para 27, footnotes omitted; case cited: *R v Uxbridge Magistrates Court* (ex parte Adimi) [1999] Imm AR 560

90 Guy S. Goodwin-Gill, "Article 31 of the 1951 Convention relating to the Status of Refugees: Non-penalization, Detention and Protection: A paper prepared at the request of the Department of International Protection for the UNHCR Global Consultations", October 2001

"coming directly" to a state did not mean that refugees cannot transition through or even stop in a safe country in order to be protected by Article 31:

> Refugees are not required to have come directly from their country of origin. Article 31 was intended to apply, and has been interpreted to apply, to persons who have briefly transited other countries, who are unable to find protection from persecution in the first country or countries to which they flee, or who have 'good cause' for not applying in such country or countries. The drafters only intended that immunity from penalty should not apply to refugees who had settled, temporarily or permanently, in another country.[91]

The UNHCR has also previously outlined that Article 31 does not require an asylum-seeker to seek protection in the first safe country they enter:

> The requirement that, in order to benefit from exemption from penalties, an asylum-seeker should be coming "directly" from a territory where their life or freedom was threatened allows States parties to treat refugees differently only if they have already settled in a country and subsequently move onwards for reasons unrelated to their need for international protection. **It is not meant to suggest that an asylum-seeker must claim asylum in the first country that could be reached without passing through another.** Given that the 1951 Convention was drafted at a time when air travel was inaccessible to most, and overland travel was by far the most common mode of transport, such a principle would have relieved the very States that drafted and signed the Convention of any significant obligations under it. A literal, temporal or geographical interpretation of "directly" would also undermine the application of Article 31(1). Rather, reflecting leading UK jurisprudence, the term "directly" is to be interpreted broadly as meaning that refugees who have crossed through, stopped over or stayed in other countries *en route*, may still be exempt from penalties.[92]

Therefore, while the UK considers refugees who have 'stopped' in another country as not coming 'directly' to the UK, the UNHCR considers such refugees as still subject to the protections of Article 31.

The Home Office's internal guidance for processing inadmissibility decisions seemingly goes further in outlining when UK Government will refuse to consider an asylum claim based on a claimant's 'presence' in a country before reaching the UK. For example, the guidance sets out a possible scenario for inadmissibility as including where "it is believed that a claimant passed through Belgium before arriving in the UK and claiming asylum …"[93] The standard for inadmissibility in the Home Office's guidance is that potential asylum-seekers have 'passed through' a third state (rather than stopped, or had been temporarily or permanently resident). The guidance also refers to evidence that an asylum-seeker 'has travelled through' a third state as grounds for an inadmissibility decision.

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91 Guy S. Goodwin-Gill, "Article 31 of the 1951 Convention relating to the Status of Refugees: Non-penalization, Detention and Protection: A paper prepared at the request of the Department of International Protection for the UNHCR Global Consultations", October 2001, para 103

92 UNHCR, UNHCR Observations on the New Plan for Immigration policy statement of the Government of the United Kingdom, May 2021, Annex para 12 (emphasis in original)

93 Home Office, Guidance: Inadmissibility: safe third country cases, Version 6, updated 11 May 2022

This possible interpretation was also addressed by the UNHCR during the passing of the Nationality and Borders Bill, suggesting that such an interpretation would make the UK an international outlier:

> In UNHCR's view, transit alone ought not be regarded as a "sufficient" connection or meaningful link to a third country to justify a finding of inadmissibility, particularly outside the context of formal agreement for the allocation of responsibility for determining refugee status between countries with comparable asylum systems and standards. Transit is often the result of fortuitous circumstances and does not necessarily imply the existence of any meaningful link or connection.[94]

More generally, the UNHCR further comments that such a right to seek protection does not equate to an unfettered right to choose where to apply for asylum:

> ... Whilst international law does not provide an unrestricted right to choose where to apply for asylum, there is no requirement under international law for asylum-seekers to seek protection in the first safe country they reach. **This expectation would undermine the global humanitarian and cooperative principles on which refugee protection is founded, as emphasized by the 1951 Convention and recently reaffirmed by the General Assembly, including the UK, in the Global Compact on Refugees.** It would impose an arbitrary and disproportionate burden on countries in the immediate region(s) of flight and threaten the capacity and willingness of those countries to properly process claims or provide acceptable reception conditions and durable solutions. This would (and does) threaten to make these first countries, in turn, unsafe and encourage onward movement.[95]

3.3 Externalisation policies in international law and human rights: "Safe third countries"

Guiding principles and legality of transfer arrangements

The use of agreements between states to share responsibility for the protection of refugees and asylum-seekers is possible in international law, but only in specific circumstances. The UNHCR has warned that such arrangements may only be in line with the Refugee Convention where they do not amount to the 'externalisation' of states' international obligations and responsibilities towards refugees, as set out below.

94 UNHCR, UNHCR Updated Observations on the Nationality and Borders Bill, as amended, January 2022, Annex, para 155

95 UNHCR, UNHCR Observations on the New Plan for Immigration policy statement of the Government of the United Kingdom, May 2021, Annex para 19 (emphasis in original)

In May 2013, the UNHCR issued guidance on the use of transfer arrangements for asylum seekers between states.[96] This Guidance recognised that "asylum-seekers and refugees should normally be processed in the territory of the State where they arrive, or which otherwise has jurisdiction over them" and that the primary responsibility to provide protection rests with the State where asylum is sought.[97]

The Guidance also recognised an increase in different types of arrangements between states for sharing the hosting of asylum-seekers and the processing of their asylum claims. The UNHCR notes in this regard that:

> The legality and/or appropriateness of any such arrangement need to be assessed on a case-by-case basis, subject to its particular modalities and legal provisions.[98]

While not all arrangements will be legal, the UNHCR sets out a number of principles to guide where these arrangements may be appropriate.[99] One of the principles is that:

- There is no obligation for asylum-seekers to seek asylum at the first effective opportunity, yet at the same time there is no unfettered right to choose one's country of asylum. The intentions of an asylum-seeker, however, ought to be taken into account to the extent possible.

Another principle suggested by the UNHCR is that states involved in transfer arrangements should be parties to the Refugee Convention and its 1967 Protocol, or otherwise party to relevant refugee and human rights treaties. But the UNHCR notes that "while being party to international and regional refugee and human rights instruments is an important indicator as to whether the receiving State meets the criteria outlined in this Guidance Note, review of the actual practice of the State and its compliance with these instruments is an essential part of this assessment."[100]

A further principle is that:

> Arrangements should be aimed at enhancing burden- and responsibility-sharing and international/regional cooperation, and not be burden shifting. Such arrangements should ideally contribute to the enhancement of the overall protection space in the transferring State, the receiving State and/or the region as a whole.[101]

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96 UNHCR, Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers, May 2013

97 UNHCR, Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers, May 2013, para 1

98 UNHCR, Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers, May 2013, para 3

99 UNHCR, Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers, May 2013, para 3

100 UNHCR, Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers, May 2013, para 3 (iii)

101 UNHCR, Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers, May 2013, para 3 (iv)

Regarding the formal status of such arrangements, the UNHCR suggests that these agreements should be legally-binding and allow a route for asylum-seekers to appropriately challenge their treatment under them. The UNHCR recommends:

> An arrangement between States for the transfer of asylum-seekers is best governed by a legally binding instrument, challengeable and enforceable in a court of law by the affected asylum-seekers. The arrangement would need to clearly stipulate the rights and obligations of each State and the rights and duties of asylum-seekers.[102]

As noted above, the UK-Rwanda MoU is not legally binding and, in fact, specifically provides in section 2.2 that the arrangement is not justiciable in a court of law and does not confer rights or obligations:

> 2.2 For the avoidance of doubt, the commitments set out in this Memorandum are made by the United Kingdom to Rwanda and vice versa and do not create or confer any right on any individual, nor shall compliance with this Arrangement be justiciable in any court of law by third-parties or individuals.[103]

One of the most fundamental principles suggested by the UNHCR is made up of an accumulation of human rights and international legal standards regarding the treatment of each asylum-seeker. Based on these international standards, the UNHCR suggests that any transfer arrangement needs to guarantee that each asylum-seeker:

- will be individually assessed as to the appropriateness of the transfer, subject to procedural safeguards, prior to transfer. Pre-transfer assessments are particularly important for vulnerable groups, including unaccompanied and separated children. The best interest of the child must be a primary consideration;
- will be admitted to the proposed receiving State;
- will be protected against refoulement;
- will have access to fair and efficient procedures for the determination of refugee status and/or other forms of international protection;
- will be treated in accordance with accepted international standards (for example, appropriate reception arrangements; access to health, education and basic services; safeguards against arbitrary detention; persons with specific needs are identified and assisted); and

[102] UNHCR, Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers, May 2013, para 3 (v)

[103] Memorandum of Understanding 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 arrangement, 14 April 2022, section 2.2

- if recognised as being in need of international protection, will be able to enjoy asylum and/or access a durable solution.[104]

Where these guarantees cannot be agreed to or met, then the UNHCR considers that a transfer would not be appropriate.

Requirement of a connection with the receiving state

While UNHCR acknowledges in some circumstances it is possible to allow asylum-seekers to be transferred to countries they have a connection to, or previously claimed asylum in, recently it has argued there should be more meaningful connections between an asylum-seeker and the state they are transferred to.[105] UNHCR legal guidance from 2018 states:

> Requiring a connection between the refugee or asylum-seeker and the third state is not mandatory under international law. The person may well be returned to a country through which s/he may have passed *en route*, or the person may be transferred to a country to which s/he has never been but that has agreed, by way of a formal arrangement, to be responsible. In follow up to relevant conclusions of UNHCR's Executive Committee, UNHCR though has consistently been advocating for a meaningful link or connection to exist that would make it reasonable and sustainable for a person to seek asylum in another state.[106]

Connections to the receiving state which may be relevant, the UNHCR suggests, could include for example:

- family relations;
- previously acquired rights in the state, such as previous residence or long-term visits;
- linguistic, cultural or other similar ties.[107]

As summarised on p.10-11 of this briefing, section 16 of the Nationality and Borders Act 2022, by amending Part 4A of the Nationality, Immigration and Asylum Act 2002, provides for a test that an asylum-seeker has a 'connection' with a receiving State. The 2022 Act inserts a new s.80C, which lists 5 conditions where an asylum-seeker may have a 'connection' to a third state,

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104 UNHCR, Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers, May 2013, para 3 (vi)

105 See, for example, UNHCR, Legal Considerations regarding access to protection and a connection between the refugee and the third country in the context of return or transfer to safe third countries, April 2018

106 UNHCR, Legal Considerations regarding access to protection and a connection between the refugee and the third country in the context of return or transfer to safe third countries, April 2018, para 6

107 UNHCR, Legal Considerations regarding access to protection and a connection between the refugee and the third country in the context of return or transfer to safe third countries, April 2018, para 6, footnote 15; see also : UNHCR, Considerations on the "Safe Third Country" Concept, July 1996; UNHCR, Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice - Detailed Research on Key Asylum Procedures Directive Provisions, March 2010, p. 311

including where they have previously made an asylum claim, or where they could have been reasonably have been expected to make such a claim.

But the new s.80B(6) also provides that:

> The fact that an asylum claim has been declared inadmissible under subsection (1) by virtue of the claimant's connection to a particular safe third State does not prevent the Secretary of State from removing the claimant to any other safe third State.

In other words, the Secretary of State can remove an asylum-seeker, even where they have no connection to the receiving state. The UNHCR has criticised this as a departure from established international standards:

> In a significant and highly problematic departure from international practice and UK caselaw, it is irrelevant whether the claimant would be admitted to the safe third State in question. While a "connection" (in the limited sense of proposed new Section 80C) between the applicant and the "safe third State" is required for a claim to be declared inadmissible, the Secretary of State may still remove the applicant to any other "safe" third State. The 'connection' requirement therefore appears to be meaningless in terms of ensuring the reasonableness and appropriateness of actual transfers.[108]

The UNHCR cites in support of this position the case of *RR (Refugee - Safe Third Country) Syria v. Secretary of State for the Home Department*.[109] This decision stated that:

> ... the type of case with which we are concerned here, involving intended expulsion of a refugee, tends only to arise as a matter of international state practice in situations where the person concerned has some connection with the third state which is said to be safe, based on nationality, prior residence, marriage, entitlement to residence, historical ties etc. it [sic] does not arise simply because there is a safe third country somewhere.[110]

The Home Office's internal guidance on inadmissibility decisions outlines the factors to be taken into account when making such a decision, and the linked decision to remove a claimant to a 'safe third country'. The guidance requires a 'connection' to any safe country (i.e. previous presence or asylum claim) for the purposes of declaring a claim inadmissible, but does not require consideration of any 'connections' to the state where the claimant will ultimately be removed to. In other words, the Home Office guidance requires no consideration of whether an asylum-seeker has any connection to the country they will be removed to.

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[108] UNHCR, UNHCR Updated Observations on the Nationality and Borders Bill, as amended, January 2022, para 38

[109] *RR (Refugee - Safe Third Country) Syria v Secretary of State for the Home Department,* [2010] UKUT 422 (IAC)

[110] *RR (Refugee - Safe Third Country) Syria v Secretary of State for the Home Department,* [2010] UKUT 422 (IAC), para 11

Decision makers within the Home Office are directed to respond to any representations made by a claimant or their representatives, and any claims based on human rights grounds must be fully considered.[111]

The UNHCR considers that sending asylum-seekers to countries in which they have no meaningful connection would risk undermining the aims of the international Refugee Convention:

> This would be fundamentally at odds with international practice, as well as incompatible with respect for human dignity. It undermines the Refugee Convention's fundamental goal of achieving durable solutions for refugees in which they can enjoy the "widest possible exercise of … fundamental rights and freedoms". This goal is a practical as well as a humanitarian one. If refugees are sent to countries with which they have no connection and where it is not reasonable for them to go, many will simply seek ways to move onwards.[112]

Non-refoulement (return to a risk of persecution)

Article 33 of the Refugee Convention provides:

> 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.

This long-standing principle is reiterated in several other international human rights treaties, and a similar principle has developed in the judicial case law relating to Article 3 of the European Convention on Human Rights (the prohibition of torture or other inhuman or degrading treatment) whereby states are prohibited from deporting people to states where they are at risk of being subject to violations of this human right.

The Nationality and Borders Act 2022, inserting new s.80B of the Immigration and Asylum Act 2002, outlines the criteria of when a country can be considered 'safe third country':

> For the purposes of this section, a State is a "safe third State" in relation to a claimant if—
>
> (a) the claimant's life and liberty are not threatened in that State by reason of their race, religion, nationality, membership of a particular social group or political opinion,
>
> (b) the State is one from which a person will not be sent to another State—
>
> (i) otherwise than in accordance with the Refugee Convention, or

[111] Home Office, Guidance: Inadmissibility: safe third country cases, Version 6, updated 11 May 2022

[112] UNHCR, UNHCR Updated Observations on the Nationality and Borders Bill, as amended, January 2022, Annex, para 159

> (ii) in contravention of their rights under Article 3 of the Human Rights Convention (freedom from torture or inhuman or degrading treatment), and
>
> (c) a person may apply to be recognised as a refugee and (if so recognised) receive protection in accordance with the Refugee Convention, in that State.

The UK-Rwanda MoU also provides for a specific commitment in this regard:

> 9.1 Rwanda will ensure that:
>
> 9.1.1 at all times it will treat each Relocated Individual, and process their claim for asylum, in accordance with the Refugee Convention, Rwandan immigration laws and international and Rwandan standards, including under international and Rwandan human rights law, and including, but not limited to ensuring their protection from inhuman and degrading treatment and refoulement;

The UNHCR, however, has been critical of these criteria for safe states as set out in the Nationality and Borders Act 2022, suggesting that the criteria do not go far enough.

> Under this provision, a State could be considered "safe" even if the applicant had been, and perhaps continues to be, at real risk of being subjected to human rights violations there that either fall short of threats to life and liberty, or to which they were not exposed for reasons of a Refugee Convention ground. Nor would inhuman and degrading treatment make a State unsafe, unless it were in the context of removal to a further country.[113]

The UNHCR offers its own suggestions as to what criteria should be considered when determining whether a state is sufficiently safe for the transfer of asylum-seekers. It suggests the criteria must also be met in practice as well as in the legal systems of those states:

> In UNHCR's view, any definition of a country's safety should include explicit benchmarks in line with the standards outlined in the Refugee Convention and under international human rights law, and these must be met in both law and practice. At a minimum, therefore, the definition of a "safe" State must include that the following are guaranteed in law and met in practice: appropriate reception arrangements and protection against threats to physical safety or freedom; protection against refoulement; access to fair and efficient asylum procedures, or to a previously afforded protective status; the legal right to remain during the asylum procedure; an appropriate legal status if found to be in need of international protection; and standards of treatment commensurate with the Refugee Convention and international human rights law. This includes recognition of the positive rights enshrined in the Refugee Convention, and not merely protection against refoulement. Furthermore, the capacity of the third State to provide protection in practice should be taken into consideration, particularly if the third State is already hosting large refugee populations.[114]

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113 UNHCR, UNHCR Updated Observations on the Nationality and Borders Bill, as amended, January 2022, Annex, para 140 (footnotes omitted)

114 UNHCR, UNHCR Updated Observations on the Nationality and Borders Bill, as amended, January 2022, Annex, para 144 (footnotes omitted)

3.4 European Convention on Human Rights

Some individuals might cite protections provided by the European Convention on Human Rights (ECHR) to challenge the Home Office's decision that it is safe to remove them to Rwanda. The Law Society of England and Wales has outlined some potential examples:

> (1) For instance, if someone:
>
> - has been trafficked to the UK and the UK does not fulfil its obligations to investigate the trafficking claim. This could mean that the government is in breach of its obligations under Article 4 European Convention on Human Rights (ECHR). Such claims may not even come to light if that individual does not have access to a legal representative
> - has a spouse or parent in the UK then their removal may be in breach of their right to family or private life under Article 8 ECHR
> - has a medical condition or is at risk of suicide the removal could not be in line with the UK's human rights obligations and so be in breach of Article 2 ECHR
> - would be at risk of persecution or inhuman or degrading treatment within Rwanda, such as LGBT individuals, this may further be incompatible with an individual's Article 3 rights under the ECHR[115]

A recent evidence session held by the Joint Committee on Human Rights considered these issues in further detail.

3.5 Other substantive and procedural protections

The principle of non-refoulement, and linked human rights law standards, sometimes require much more than simply preventing an asylum-seeker from encountering danger when removed from a country. When read in conjunction with other human rights obligations, such as the right to an effective remedy for potential human rights violations, established case law has outlined states have specific procedural obligations when considering the removal of an asylum-seeker, and that an asylum-seeker must also have available to them an effective route to be able to challenge their removal.

For example, the European Court of Human Rights (ECtHR) has set out an overview to its established case law on immigration, and summarises that in cases where an asylum-seeker may be removed to a 'safe third country', the removing state is under specific procedural duties. In particular, the Court considers the following factors:

[115] The Law Society, press release, 'Rwanda removals raise rule of law questions', 9 June 2022

- The removing state should examine thoroughly whether there is a real risk of the asylum seeker being denied access to adequate protection in the third state from refoulement without a proper evaluation of the risks they may face.

- Where guarantees from the third state are insufficient, the removing state is under a duty not to remove asylum seekers to the third state.

- To determine whether the removing state has properly assessed the asylum procedures of the third state, the removing state should take into account the available general information about the receiving third state and its asylum system in an adequate manner and of their own initiative.

- An applicant should be given sufficient opportunity to demonstrate that the third state is not a 'third safe country' in their particular case.

- Any presumption that a particular country is "safe", if it has been relied upon in decisions concerning an individual asylum seeker, must be sufficiently supported at the outset.[116]

Where an asylum-seeker has an "arguable complaint" that their removal would expose them to treatment that could violate their right to life (Article 2) or the prohibition of torture, inhuman, or degrading treatment (Article 3), the ECtHR has accepted that they must have an effective remedy, in practice as well as in law, at the domestic level in accordance with Article 13 of the Convention (the right to an effective remedy).[117] This, according to the Court, requires independent and rigorous scrutiny of any claim that there exist substantial grounds for fearing a real risk of treatment contrary to Articles 2 or 3. Such a claim should also have an automatic suspensive effect (ie, the removal procedure should be halted until the claim is considered).

The Court has elaborated on the requirements that states should adhere to in these circumstances, and factors the Court refers to when considering whether there is a violation of this standard, including:

- that individuals need to have adequate information about the asylum procedure to be followed and their entitlements in a language they understand, and have access to a reliable communication system with the authorities;

- the availability of interpreters;

- whether the interviews are conducted by trained staff;

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116 European Court of Human Rights, Guide on the case-law of the European Convention on Human Rights: Immigration, updated 31 December 2021, para 40

117 European Court of Human Rights, Guide on the case-law of the European Convention on Human Rights: Immigration, updated 31 December 2021, para 42; see also European Court of Human Rights, Guide on Article 13 of the European Convention on Human Rights: Right to an effective remedy, updated 31 December 2021, paras 121-132

- whether asylum-seekers have access to legal aid;
- that asylum-seekers be given the reasons for the decision.[118]

Further Reading

- House of Commons Library Briefing Paper, Article 31 of the Refugee Convention, 15 July 2021.
- Mariagiulia Giuffré, The Readmission of Asylum Seekers under International Law, 2020.
- Sangeetha Iengar, "The Tried and Failed Business of Exporting Asylum", University of Oxford Border Criminologies Blog, 2 May 2022.
- Maja Grundler and Elspeth Guild, "The UK-Rwanda deal and its Incompatibility with International Law", EU Immigration and Asylum Law and Policy, 29 April 2022.
- Nikolas Feith Tan, "Externalisation of asylum in Europe: Unpacking the UK-Rwanda Asylum Partnership Agreement", EU Immigration and Asylum Law and Policy, 17 May 2022.
- European Court of Human Rights, Guide on the case-law of the European Convention on Human Rights: Immigration, updated 31 December 2021.
- European Court of Human Rights, Guide on Article 13 of the European Convention on Human Rights: Right to an effective remedy, updated 31 December 2021, paras 121-132.

[118] European Court of Human Rights, Guide on the case-law of the European Convention on Human Rights: Immigration, updated 31 December 2021, para 42

4 Legal challenges

It has been widely acknowledged, including by Ministers and officials, that there will be legal challenges to the implementation of the asylum partnership arrangement.[119] Challenges are expected in respect of the lawfulness of the underlying arrangement and procedures as well as to their application in individual cases.[120] Various provisions in the MoU anticipate such scenarios.[121]

Criticisms of legal profession

Some comments made by the Prime Minister, amongst others, have been interpreted as implying criticism of legal professionals for their involvement in bringing legal challenges against removals to Rwanda.[122] The legal profession has strongly objected.[123] A statement issued by the Law Society's vice president, Lubna Shuja, prior to the High Court's consideration of an urgent interim injunction application on 10 June commented:

> Legal challenges are usually a safety net that ensure government is acting lawfully, following laws agreed by a democratic parliament, (...)
>
> In this instance – where the arrangement has been brought in through executive action and hasn't been examined in detail by parliament – the court may provide the first real scrutiny of the lawfulness of removing asylum seekers to Rwanda.
>
> Anyone at risk of such a life-changing order has a right to challenge its legality with the assistance of a lawyer. And the government could welcome this as an opportunity to check if the 'initiative' is lawful.[124]

The Supreme Court has also emphasised that lawyers acting in these cases "were performing their proper function of ensuring that their clients are not subjected to unlawful treatment at the hands of the Government."[125]

119 E.g., GOV.UK, News, 'First illegal migrants told of impending removal to Rwanda', 10 May 2022

120 For an immigration law practitioner's perspective on potential legal issues in Rwanda relocation cases, see for example Free Movement Blog, 'How to respond to Rwanda removal notices', 1 June 2022

121 E.g. para 11, 12, 23.2-23.4

122 The Independent, 'Boris Johnson defends Rwanda migrants policy with first flight set to leave', 14 June 2022; HC Deb 13 June 2022 c39; c42; c44; c45

123 Bar Council, press release, 'Prime Minister must stop attacks on legal professionals, say Bar Council and Law Society', 14 June 2022

124 Law Society, press release, 'Rwanda removals raise rule of law questions', 9 June 2022

125 Supreme Court, 'Rwanda Permission to Appeal Application refused', 14 June 2022

4.1 Challenges brought by people facing relocation

On 10 May, the Government confirmed that Notices of Intent were being sent to the first group of people being considered for relocation to Rwanda. It said that it anticipated legal challenges to prevent removal in some cases and that it expected the first flights to Rwanda to take place "in the coming months".[126]

A further press release published on 1 June said that it had begun to issue formal removal directions to the first cohort of cases and that the first flight was expected on 14 June.[127] It did not provide an update on the progress of any legal challenges.

The Home Office policy guidance on inadmissibility notes that decisions to declare asylum claims as inadmissible and to certify claims as clearly unfounded can only be challenged through judicial review, and that challenges made in such circumstances are "likely to have suspensive effect, which means that the individual must not be removed from the UK until the proceedings have concluded in the Upper Tribunal or the High Court, as the case may be."[128]

4.2 Legal challenges to the asylum partnership arrangement

Soon after the partnership arrangement was announced, media reports identified at least two judicial review challenges being initiated by individuals potentially liable to removal to Rwanda.[129]

Some campaigning organisations are also challenging the legality of the asylum partnership arrangement and the policies and procedures underpinning it.

PCS, Detention Action, and Care4Calais confirmed in late April plans to bring a legal challenge to the policy in conjunction with some individuals facing removal to Rwanda. They are represented by Duncan Lewis solicitors. A PCS press release gives some details about the challenge's grounds:

> We are challenging the Home Secretary's failure to disclose the criteria dictating who will be transferred by force to East Africa, arguing that this is an

126 GOV.UK, news story, 'First illegal migrants told of impending removal to Rwanda', 10 May 2022
127 GOV.UK, News, 'First migrants set for Rwanda to be given final notice', 1 June 2022
128 Home Office, Inadmissibility: safe third country cases, v6.0, p.25
129 The Times, 'Refugees begin legal challenge to Priti Patel's Rwanda deal', 29 April 2022; The Independent, 'Priti Patel faces legal challenge against Rwanda deportation deal', 24 April 2022

> unlawful breach of her duty of transparency and the wider constitutional right of access to justice.
>
> We also contend that the removal of individuals from the UK to Rwanda under the proposed scheme would be unlawful, as the policy penalises asylum seekers on the grounds of their irregular entry, in direct contravention of the Refugee Convention.
>
> Statements made by the Home Secretary indicate that some selection criteria are already established and being applied. If people seeking asylum are not told who is eligible for removal, they will be unable to see how the policy affects them, it risks delaying the assessment of their asylum claim, and where people are wrongly selected for expulsion, they will be unable to appeal the decision effectively if they are not aware of the criteria.[130]

The High Court granted the claimants permission to apply for a judicial review at a hearing on 10 June. The hearing is expected to take place in July. UNHCR was granted permission to intervene in the hearing. It outlined its concerns about the policy's legality under international law, highlighting shortcomings in the Rwandan asylum system and a mischaracterisation of its role by the Home Office.[131]

The claimants also sought permission for an urgent interim injunction to prevent relocations to Rwanda before the judicial review hearing. The court refused (discussed further in section 4.3 below).

Asylum Aid, a charity that provides free legal advice and representation to asylum seekers alongside research and policy work, is seeking a judicial review of the procedures underpinning the Rwanda arrangement. Its legal representatives, Leigh Day solicitors, have summarised their grounds:

> Asylum Aid argues that the government's rapid process for sending asylum seekers to Rwanda is unlawful as it is inconsistent with the statutory powers conferred on the Home Secretary by Parliament, procedurally unfair and constitutes a serious impediment to access to justice.
>
> Asylum Aid's concerns include that the plans are:
>
> - based on a blanket assessment of Rwanda as a 'safe' country, which goes against the government's commitment to case-by-case decision-making;
> - involve such tight timeframes – only seven or 14 days for each asylum seeker to obtain legal advice and to present their case – that the process is inherently flawed and unfair;
> - give rise to a real risk that individuals may be removed without having had effective access to legal advice and courts.
>
> In their legal case Asylum Aid argue that the Home Office is mimicking the "safe third country" (STC) asylum returns agreement, known as "Dublin III", that applied when the UK was a member of the EU, and applying it to the

130 PCS, 'PCS brings legal challenge against plans to send asylum seekers to Rwanda', 27 April 2022
131 BBC News, 'Rwanda asylum plan: UN warned UK deal was unlawful, court told', 10 June 2022

> Rwanda arrangement without the necessary legal safeguards. Rwanda's record on human rights, refugee status determination and commitment to the rule of law has attracted consistent international criticism and is not presumed by statute to be generally safe.
>
> As part of its claim Asylum Aid has compiled compelling evidence from legal and other service providers, who each have first-hand experience working with individuals who are subject to the new procedure. The evidence demonstrates that individuals struggle to access legal advice in the accelerated timescale, and that even when legal advice is available the time limits are too short for their lawyers to take instructions, gather evidence and make representations on the many complex factual and legal issues which the Home Office must decide. The evidence also shows the extreme difficulty of mounting effective challenges in court to the many decisions served alongside removal directions, in circumstances where there has already been inadequate time to prepare representations prior to the decisions being taken.[132]

Freedom from Torture, a UK charity providing services to support torture survivors' recovery and campaigning for policy changes, has also instructed Leigh Day solicitors in relation to its plans to challenge the asylum partnership. Leigh Day summarises the basis for the challenge:

- The conclusion that Rwanda is a safe place to send asylum seekers is irrational. This is because it is not possible to support the conclusion on the basis of evidence, the decision has been taken without the Home Secretary complying with her duty to make sufficient inquiries and without taking into account relevant considerations.

- It is clear reading the Home Secretary's speech in Rwanda on 14 April 2022 that the decision to relocate asylum seekers who arrived on small boats had already been taken at that point. Despite publicly committing to relocating asylum seekers to Rwanda, it appears however that the Home Secretary did not reach her determination that Rwanda was a 'safe third country' until May. There is therefore a real possibility that the Home Secretary had predetermined or was biased in her assessment of the evidence about Rwanda and in assessing it as a 'safe third country'.

- It is in breach of the Home Secretary's common law duty not to induce breaches of the European Convention on Human Rights (ECHR), including of Article 3 according to which: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment".

- It is contrary to the Home Secretary's duty under the Asylum and Immigration Appeals Act to comply with the Refugee Convention to enforce removals where the evidence suggests Rwanda will not observe its obligations under the Convention.[133]

Open Rights Group, a 'UK-based digital campaigning organisation…working to protect rights to privacy and free speech online', and Foxglove Legal, 'a

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132 Leigh Day, Rwanda Scheme legal challenges to continue despite unsuccessful injunction, 14 June 2022

133 Leigh Day, News, 'Freedom from Torture launches urgent challenge to decision to send asylum seekers to Rwanda', 24 May 2022

non-profit community interest company', have announced an intention to challenge the transfer of individuals' data to the Rwandan Government.

4.3 14 June: the first flight is cancelled

The first relocation flight to Rwanda was scheduled to depart on the evening of 14 June.

In the days leading up to 14 June the number of people due to fly reduced. Many people had their removal directions cancelled, either by the Home Office or after their individual cases had been scrutinised by the courts. By Friday 10 June around 30 people were still due to fly. By 14 June, this had reduced to fewer than 10 people and some of those were continuing to pursue individual legal challenges to their removal.

Some of the organisations and individuals involved in pending judicial reviews of the Rwanda policy applied for injunctions to prevent removals to Rwanda in the meantime. The UK courts refused these applications. But on 14 June the European Court of Human Rights (ECtHR) granted injunctions to some individuals who were still due to fly, under its 'Rule 39' procedures. These decisions led to the Home Office cancelling the flight very shortly before its departure.

Consideration by UK courts

On 10 June the High Court refused an application from PCS, Detention Action and Care4Calais, and four individuals due to be removed on 14 June, for an urgent interim injunction to prevent relocations to Rwanda. Mr Justice Swift decided that the balance of convenience favoured the Home Secretary rather than the appellants: the significance of the problems that the claimants might suffer if removed to Rwanda did not outweigh the importance of the Home Secretary being able to implement her policy.

The claimants' appeal to the Court of Appeal was refused on 13 June. The Court of Appeal did not consider that the High Court had made an error in law or acted unreasonably in refusing the injunction.

A request for permission to appeal against the Court of Appeal's decision was made to the Supreme Court. By this time only one of the four individuals involved in the case was still facing removal. The appellants argued that the Court of Appeal's assessment of the balance of conveniences had wrongly assumed that the Government of Rwanda would comply with the assurances in the MoU.[134] On 14 June the Supreme Court disagreed and refused permission to appeal. Its decision was influenced by an assurance provided

[134] R (NSK (Iraq)) v SSHD

by the Government Legal Department that the appellant would be returned to be considered for asylum in the UK if their July judicial review succeeded.[135]

On 13 June the High Court considered and refused a separate injunction application made by the Asylum Aid.

Consideration by the European Court of Human Rights

Late on 14 June, the ECtHR granted an urgent interim measure under its 'Rule 39', in the case of K.N (an Iraqi national who had previously been denied an injunction by the High Court and refused permission to appeal by the Court of Appeal and Supreme Court). The Court decided that K.N should not be removed until three weeks after the final decision in the related judicial review proceedings.

A press release issued by the ECtHR summarised its reasoning:

> The Court had regard to the concerns identified in the material before it, in particular by the United Nations High Commissioner for Refugees (UNHCR), that asylum-seekers transferred from the United Kingdom to Rwanda will not have access to fair and efficient procedures for the determination of refugee status as well as the finding by the High Court that the question whether the decision to treat Rwanda as a safe third country was irrational or based on insufficient enquiry gave rise to "serious triable issues". In light of the resulting risk of treatment contrary to the applicant's Convention rights as well as the fact that Rwanda is outside the Convention legal space (and is therefore not bound by the European Convention on Human Rights) and the absence of any legally enforceable mechanism for the applicant's return to the United Kingdom in the event of a successful merits challenge before the domestic courts, the Court has decided to grant this interim measure to prevent the applicant's removal until the domestic courts have had the opportunity to first consider those issues.[136]

There has been some speculation that, depending on the timescales for resolving the pending judicial review and any subsequent appeals to the High Court, Supreme Court and ECtHR, complying with the interim injunction could prevent removal flights to Rwanda for a significant length of time.

The timing and outcome of the ECtHR's intervention has generated considerable controversy.

An ECtHR factsheet on interim measures explains that requests for interim measures "apply only where there is an imminent risk of irreparable harm" and are granted only on an exceptional basis. It further comments:

> Such measures are decided in connection with proceedings before the Court without prejudging any subsequent decisions on the admissibility or merits of the case in question.[137]

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135 Supreme Court, Rwanda Permission to Appeal Application refused, 14 June 2022

136 ECtHR, press release, ECHR 197 (2022), 14 June 2022

137 ECtHR, Factsheet – Interim measures, April 2022

Speaking in the House the following day, the Home Secretary criticised the Court's "opaque" decision-making, commenting that the Home Office had not yet seen the written judgment.[138] Her comments were similar to criticisms made by the Policy Exchange thinktank's Judicial Power Project, which has described the decision as "a remarkable abuse of judicial power, which discredits European human rights law." It comments:

> (...) The ECtHR's press release says only that a request for an interim measure was received on 13 June. It says nothing about when a substantive application to the ECtHR was made, or when permission was granted. That may well be because no such application has been made, or permission granted, precisely because the applicant has not exhausted his domestic legal remedies.
>
> What seems to have happened is that the ECtHR has decided that interim measures should be granted despite there being no substantive application properly before the court. In effect, the ECtHR has taken upon itself to supervise the Supreme Court, overriding its decisions about interim relief in circumstances where it has no jurisdiction to act. Extraordinarily, the ECtHR's decision seems to have been made *ex parte* and on the papers, which means that the UK has had no opportunity to contest the decision. This is deeply unfair. It is intolerable that the UK's freedom to deport unlawful asylum-seekers is to be suspended, possibly for years, on the say-so of one (anonymous?) judge before whom the UK did not even have a right of audience.[139]

The ECtHR issued a further press release on 15 June clarifying that on 14 June five other people due to fly also lodged applications with the ECtHR and requested interim measures to stop their scheduled removal. Two of the cases were granted interim measures, two other cases had their requests rejected because they had not made use of remedies available in the national courts, and the other request was withdrawn before it had been considered because the Home Office withdrew the person's removal directions.[140]

What next?

The judicial review hearing (involving PCS, Detention Action, Care4Calais, UNHCR and Asylum Aid, and individual claimants) is scheduled to be heard in the High Court in mid-July. The hearing is expected to last three days and a decision is expected by the end of July.

On 22 June the Government published its Bill of Rights Bill. **Clause 24** of the Bill (as introduced) provides that interim measures may not be taken into account, including by UK courts. The stated intention "is to ensure that the fact that an interim measure has been issued by the ECtHR does not influence domestic courts when deciding whether to grant relief that may affect the exercise of Convention rights."[141]

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138 HC Deb 15 June 2022 c301

139 Richard |Ekins and the Judicial Power Project, Law Gazette, The Strasbourg court's disgraceful Rwanda intervention, 15 June 2022

140 ECtHR, press release, ECHR 199 (2022), 15 June 2022

141 Bill 117-EN, para 203

5 Other new asylum reforms

Alongside announcing the MEDP, the Government announced some other developments in support of its objectives to reform the asylum system.

5.1 Navy assuming operational command in English Channel

As had been previously announced, the Navy assumed operational command for responding to small boat incidents in the English Channel on 14 April. The Government has said that the military will work "in partnership" with Border Force, and that £50 million new funding will be provided to support their work:

> This change will deliver new boats, aerial surveillance and expert military personnel. In doing so it will bolster Border Force teams and their existing patrol vessels and provide a Wildcat helicopter.
>
> Together this will significantly enhance our ability to detect boats. The increased surveillance will mean we can better gather evidence for criminal investigations, ensuring more people-smugglers who trade in these life-threatening journeys can be referred for prosecution and brought to justice.[142]

The Government envisages that boats will be intercepted by specially chartered vessels and brought to facilities in Dover for screening, before being moved to appropriate accommodation locations.[143]

5.2 Asylum accommodation changes

The Government also announced the opening of a new asylum reception centre at RAF Linton-on-Ouse in North Yorkshire and confirmed plans to reform the asylum dispersal policy. These changes are intended to help ensure that asylum seekers are more equally spread between local authorities nationwide and reduce the use of hotels as temporary asylum accommodation.[144]

142 GOV.UK, News, 'World first partnership to tackle global migration crisis', 14 April 2022
143 Home Office in the Media blog, 'Factsheet: Linton Asylum Accommodation', 14 April 2022
144 HC Deb 19 April 2022 c26

The Home Office has confirmed that people accommodated at Linton-on-Ouse will not be considered for relocation to Rwanda. Decisions about who to accommodate at Linton-on-Ouse will be informed by the suitability criteria outlined in the Home Office's allocation of accommodation policy guidance.[145] The new accommodation centre is expected to open to asylum seekers within weeks. It will be used to accommodate some single adult males; initially upwards of 500 people.[146]

There is significant local opposition to the Home Office's intentions for the site.[147] The local council has said that it is preparing a legal challenge to the plans.[148]

5.3 Passing of Nationality and Borders Act 2022

The Nationality and Borders Act 2022 received Royal Assent on 28 April. Some parts of the legislation came into effect on that date. Others will be commenced at later dates.

Several of the Act's asylum-related provisions are due to take effect from 28 June, including sections relevant to inadmissibility and removal to safe third countries .[149] To coincide with those new powers coming into effect, various changes to the asylum provisions in the immigration rules were made by the new statement of changes to the immigration rules, HC 17, laid before Parliament on 11 May. Again, these mostly take effect from 28 June.

Changes particularly relevant to implementation of the asylum agreement with Rwanda are:

- Restricting applicants' scope to raise humanitarian protection grounds. They will be able to request humanitarian protection in relation to a proposed return to their country origin but not in relation to removal to a "country of return" (eg, where they are facing removal to a safe third country).

- Deleting most of the rules on inadmissibility (they will be replaced by the similar provisions in the Nationality and Borders Act 2022).

- Providing for differential treatment of recognised refugees (in line with section 12 of the Nationality and Borders Act). These changes affect people who apply for asylum on or after 28 June 2022. Successful asylum applicants will have one of the following outcomes, depending on the nature of their journey to the UK and basis of their claim:

145 PQ UIN 305-308, [on Asylum: RAF Linton-on-Ouse], answered on 16 May 2022
146 Home Office in the Media blog, 'Factsheet: Linton Asylum Accommodation', 14 April 2022
147 HC Deb 24 May 2022 c263-272
148 BBC News, 'Hambleton Council plans legal fight against asylum centre', 27 April 2022
149 SI 2022/590

- ‘Group 1’ refugees will be granted “refugee permission to stay” for at least five years. They will then be able to apply for permanent settlement (indefinite leave to remain) after five years. They will be able to sponsor family members to join them in the UK under the family reunion rules.

- ‘Group 2’ refugees will be granted “temporary refugee permission to stay” for at least 30 months (unless exceptional circumstances apply). They will then be able to apply to renew their permission if they remain eligible for refugee status but will not be eligible to apply after five years for indefinite leave to remain as a refugee. They will be unable to sponsor family members to join them in the UK unless refusal would breach the UK’s ECHR obligations.

- Anyone granted humanitarian protection will be granted “temporary humanitarian protection” for at least 30 months. They will then be able to apply to renew their permission if they remain eligible for humanitarian protection but will not be eligible to apply after five years for indefinite leave to remain as a refugee.

Annex: Parliamentary scrutiny and approval requirements

Legal status of the Memorandum

The MoU is a type of non-binding arrangement that is not a treaty and does not create any legal obligations between the parties.

The MoU itself states at para 1.6 that "This Arrangement will not be binding in International law."

The Foreign, Commonwealth and Development Office (FCDO) published updated guidance on 15 March 2022 relating to the adoption and use of this type of arrangement.[150]

The guidance states that an MOU is used to record international commitments that are not binding, and where it is considered preferable to avoid formalities of a treaty. According to the FCDO, this may be where, for example:

- there are detailed provisions which may change frequently;
- the matters dealt with are essentially of a technical or administrative character;
- there is a need for such documents to be classified, such as in matters of defence or technology; or
- where a treaty requires subsidiary documents to fill in relevant details.[151]

The title of such a non-binding agreement can also have different forms. According to the guidance:

> Like a treaty, an MoU can have a variety of names (e.g. arrangement) and can also be either in the form of an exchange of notes or a single document. However, the formalities which surround treaty-making do not apply to it and

[150] Foreign, Commonwealth and Development Office, 'Treaties and MOUs: Guidance on Practice and Procedures', 15 March 2022

[151] Foreign, Commonwealth and Development Office, 'Treaties and MOUs: Guidance on Practice and Procedures', 15 March 2022, p3

> it is not usually published. Confusingly, treaties are occasionally called memoranda of understanding.[152]

Therefore, while non-binding commitments between states are often called a "Memorandum of Understanding", this same title can also be used for some legally binding treaties. Because of this, the status of each agreement needs to be assessed on a case-by-case basis. As noted above, the UK-Rwanda MoU is clear in its provisions that it is not intended to be binding on the parties in international law.

Parliamentary scrutiny of Treaties and MoUs

For treaties, Parliament does have a role in the scrutiny and approval of certain agreements. But the constitutional position on whether the Government should lay non-binding MoUs before Parliament for scrutiny is less certain.

The UK Government is responsible for negotiating, signing, ratifying, amending and withdrawing from all international treaties involving the UK, under its prerogative powers, and it is the UK Government that is bound by them under international law.[153]

Part 2 of the Constitutional Reform and Governance Act 2010 (CRAG) gave Parliament a statutory role on treaties that includes a new power for the Commons to delay ratification.[154] In general, CRAG provides the opportunity for Parliament to object to a treaty being ratified, but it does not require Parliament's active consent.

Under CRAG, most treaties signed by the Government, and requiring ratification, should be laid before Parliament. The Government must then wait 21 sitting days before it ratifies the treaty.[155] During this time, the House of Commons has the theoretical power to delay ratification repeatedly by adopting resolutions against ratification.[156]

Only treaties and treaty amendments that require ratification (or equivalent) are covered by the CRAG Act,[157] and so those that come into force on signature alone are not laid before Parliament.

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152 Foreign, Commonwealth and Development Office, 'Treaties and MOUs: Guidance on Practice and Procedures', 15 March 2022, p3

153 For background information see Library Briefing Paper 3861, The Royal Prerogative, 17 August 2017

154 For further information on the role of Parliament in scrutinising treaties, see How Parliament treats treaties, Commons Library Briefing Paper CBP-9247, 1 June 2021

155 CRAG s20

156 The full procedure is outlined in How Parliament treats treaties, Commons Library Briefing Paper CBP-9247, 1 June 2021, p21, and CRAG s20. There are separate, enhanced mechanisms for free trade agreements

157 CRAG s25(1)

This largely reflects one part of the Ponsonby Rule, a constitutional convention established in 1924. The Foreign Affairs Minister at the time, Arthur Ponsonby, gave an undertaking to Parliament that the Government would lay treaties before Parliament for 21 days to be subject to scrutiny. [158]

Other international arrangements are not covered by the 2010 CRAG Act, including MoUs. But there are some suggestions that the Ponsonby Rule also included a commitment to inform the House of Commons of all non-treaty arrangements entered into by the Government. For example, the House of Lords European Union Committee, via the International Agreements Sub-Committee,[159] has highlighted the existence of a 'third limb' of the Ponsonby Rule', where Arthur Ponsonby went on to commit to informing Parliament of all "agreements, commitments, and understandings by which the nation may be bound in certain circumstances and which may involve international obligations of a serious character, although no signed and sealed document may exist."[160]

But despite recommendations from the Joint Committee on the Draft Constitutional Renewal Bill (which became CRAG), this part of Ponsonby Rule was not reproduced in CRAG and its current status is unclear. The House of Lords European Union Committee and International Agreements Committee have both pressed for more public information on Memorandums and Understanding and other non-treaty arrangements.[161]

The European Union Committee invited the Government to "enter into a discussion about the extent to which this commitment covers politically important Memoranda of Understanding, and about how these can be drawn to the attention of Parliament going forward."[162]

But the Government rejected this idea in its response to the report, stating:

> Memoranda of Understanding (MOUs) are used where it is appropriate to conclude a statement of political intent or political undertaking, and where there is no requirement for a legally binding framework. They can be useful tools for arrangements to be established quickly or operate flexibly, for detailed provisions which change frequently, for primarily technical or administrative matters, or for situations where confidentiality is required, for example, in defence matters or technology.
>
> In general terms, MOUs are drafted in non-legally binding language to reflect political commitments. They are not binding as a matter of international law

158 HC Deb 171, 1 April 1924, cc2000-2005

159 The International Agreements Committee became a standalone select committee when it succeeded the International Agreements Sub-Committee of the European Union Committee.

160 European Union Committee, Treaty Scrutiny: Working Practices, 10 July 2020, HL Paper 97 2019-21, para 11 and 12

161 See for example, House of Lords European Union Committee, Treaty scrutiny: working practices, HL Paper 97 2019-21, 10 July 2020 paras 97-106

162 European Union Committee, Treaty Scrutiny: Working Practices, 10 July 2020, HL Paper 97 2019-21, para 105-106

> and are not published or laid before Parliament as a matter of Government practice.[163]

The House of Lords International Agreements Committee, in its report Working practices: one year on, noted that the Government had so far refused to disclose MoUs on a regular basis.[164] The Committee continued to push for further transparency on MoUs, stating:

> The issue around the disclosure of MoUs is one we have returned to because it is important. Put frankly, the difficulty with the Government's approach is that it allows the Government to enter into secret arrangements which it does not disclose to Parliament on the grounds that it asserts that they are not legally binding in international law. In addition, and no less significantly, the use of MoUs allows the Government to fill out the details of a treaty it has signed—a practice which it acknowledges in its own Guidance on Practice and Procedures. This appears to be akin to producing an Act of Parliament with associated delegated legislation, but never showing Parliament the detailed regulations made under the parent legislation.[165]

The Committee ultimately proposed a new set of criteria to ensure that only significant Memoranda of Understanding are notified and sent to Parliament (the Committee in particular) for scrutiny "whether or not the Government believes that they meet the definition of a treaty under the Vienna Convention on the Law of Treaties."[166]

The Government, responding to the Committee Report, suggested that the Committee was mistaken in the existence of a 'third limb' of the Ponsonby Rule:

> The Government considers the Committee is mistaken in its belief that there exists a "third limb of the Ponsonby Rule" (paragraph 82 of the Report). The Government notes that there has never been a convention in the UK whereby non-legally binding arrangements are routinely submitted to parliamentary scrutiny. This is borne out by the consistent practice of successive Governments and is further supported by the fact that Parliament did not consider disclosure of non-legally binding arrangements part of the Ponsonby Rule when it was looking to put the convention on a statutory footing in CRaG.
>
> It is established Government practice that non-legally binding arrangements are not routinely published. The Government has acknowledged that it may be appropriate to draw to Parliament's attention non-legally binding arrangements which raise questions of public importance. Ministers consider this on a case by case basis.[167]

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163 Government Response to the House of Lords International Agreements Sub-Committee Report: Treaty Scrutiny, Working Practices, 25 September 2020

164 International Agreements Committee, Working practices: one year on, 17 September 2021, HL Paper 75 2021-22, 17 September 2021, para 76

165 International Agreements Committee, Working practices: one year on, 17 September 2021, HL Paper 75 2021-22, 17 September 2021, para 76

166 International Agreements Committee, Working practices: one year on, 17 September 2021, HL Paper 75 2021-22, 17 September 2021, para 82-83

167 Government Response to the International Agreements Committee Working Practices Report, 8 February 2022, p8

The Government later clarified that it does not deny that this commitment was made in 1924, but disagreed that this amounted to a constitutional convention:

> We do not dispute that the Parliamentary Under-Secretary of State for Foreign Affairs in 1924 made the statement referred to in your letter, but we respectfully disagree that this statement reflects a constitutional convention or a practice that has been followed by successive governments over the last 98 years. In light of this, the Government's position is reasonable, pragmatic, and we are satisfied that it respects the United Kingdom's constitutional settlement.[168]

The Government's position has been further confirmed in a response to a question from Lord Anderson,[169] where the Government confirmed:

> [The Government] does not hold a central record of Memoranda of Understanding (MoUs). Lead Government departments are responsible for maintaining up-to-date records and original documentation of MoUs they have signed, and may, on a case-by-case bases, choose to publish MoUs on GOV.UK.[170]

Parliamentary Scrutiny of the UK-Rwanda MoU

The UK-Rwanda MoU, because it does not create any legally binding obligations, does not fall under the Parliamentary scrutiny requirements of CRAG. It is also unclear as to whether the Ponsonby Rule also applies to it, but based upon the Government's position above it is unlikely that it will be put to Parliament for formal consideration or vote. At the time of writing, the Government has not placed the arrangement before Parliament for a vote or formal scrutiny.

The Government has, however, referred to the fact that this particular MoU with Rwanda has been made public.

When asked in a Private Notice Question in the House of Lords why the Government had opted to agree a MoU and not a treaty that would be subject to Parliamentary scrutiny, the Government responded:

> the UK has entered into a memorandum of understanding with Rwanda, which has now been published on GOV.UK, for the provision of an asylum partnership arrangement and to address the shared challenge of illegal migration. The duty to lay before Parliament under the Constitutional Reform and Governance Act 2010 applies only to treaties. However, the safety, security and dignity of and respect for those relocated is assured through the agreement and will be

168 Letter from Minister Milling to IAC on Working Practices, dated 8 March 2022, 9 March 2022

169 PQ HL7946 [Question for Foreign, Commonwealth and Development Office], 26 April 2022. The Response was sent directly to Lord Anderson and published on his Twitter Account on 3 May 2022

170 Government Response sent directly to Lord Anderson and published on his Twitter Account on 3 May 2022; see also Foreign, Commonwealth and Development Office, 'Treaties and MOUs: Guidance on Practice and Procedures', 15 March 2022, p4

> subject to monitoring. We comply fully with our legal and international obligations.[171]

During this Private Notice Question, the Government was further pressed on why they chose an MoU and not a treaty. A follow-up letter sent from Baroness Williams, Home Office Minister, subsequently explained:

> an MoU has the added benefit of allowing the partnership to change and the technical details to be adjusted quickly if needed with the agreement of both partners. Given the innovative nature of the partnership this flexibility is an important advantage. Of course, if any changes are made, these will be announced and published and my Noble Lords will be able to seek points of clarification and ask questions as they have done so this week.[172]

171 HL Deb 25 April 2022 vol 821 col 15

172 Home Office, MoU between the UK and Rwanda, DEP 2022-0381, 3 May 2022

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