Case Note

A Legal Analysis of the Invalidation of the Rwanda Policy by the Court of Appeal: *AAA and others v The Secretary of State for the Home Department* [2023] EWCA Civ 745

Nusratullah Nabeel Rahimi

Abstract:
The Rwanda Deportation Case is considered one of the most controversial legal disputes in the last decade. This case has two aspects: The first aspect of this case is the issue of deporting asylum seekers, and the second aspect of the case is the invalidation of the UK and Rwanda Migration and Economic Development Partnership (MEDP) which is set out in a MoU. This paper argues that the Court of Appeal's judgment has three critical points: first, this judgment failed in applying proper consideration in the good faith of the Secretary of State for the Home Department (SSHD). Second, was the absence of any mention of the right of the UK government to remove asylum seekers to a third safe country under the principle of a safe third country in the concluding remarks. Finally, this judgment did not address lack of any review on the substance of the MoU.

Keywords: Immigration; Deportation; Third Safe Country; Asylum; Asylum Seeker.

On 14 April 2022, Home Secretary Priti Patel made a speech and announced the partnership with Rwanda on migration and economic development. The title of this partnership is called the UK and Rwanda Migration and Economic Development Partnership (MEDP), and the main aim of this agreement was to tackle the global migration crisis. Ms. Priti Patel on behalf of the Secretary of State for the Home Department (SSHD), stated that:

> Our approach as two outward-looking countries has led to the signing of a new international partnership… which is migration and economic development partnership with the country of Rwanda and UK. This will see some of those arriving illegally in the UK, such as those crossing the channel in dangerous small boats, relocated to Rwanda to resettle and rebuild their lives. (Speech by Priti Patel, Secretary of State for the Home

Office, 'UK and Rwanda migration and economic development partnership' (14 April 2022)).

The objective of Rwanda policy which is set out in a Memorandum of Understanding (MoU):

> 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 individuals after their claim is decided, under Rwanda domestic laws, the Refugee Convention, and current international standards. (Patel (14 April 2022)).

Under this partnership, the UK government promised to invest £120 million in the economic development of Rwanda state. This funding was also for the financial support of the process and social settlement of asylum seekers including operations, accommodation, and integration (Patel, 'World first partnership to tackle global migration crisis' (Home Office, 14 April 2022)).

Under the Rwanda Policy SSHD on 1 June 2022 announced that: "the first flight of asylum seekers is expected to take place on 14 June" (Patel, 'First migrants set for Rwanda to be given final notice' (Home Office, 1 June 2022)). This decision prompted more than 20 claims, filed between 8 June 2022 and 14 June 2022. On 10 June 2022, the Administrative Court heard and refused an application for an interim injunction to prevent the individual Claimants in that claim from being removed from the charter flight. On 13 June 2022, the Court of Appeal dismissed an appeal against that decision. Later, on 14 June 2022, the Supreme Court dismissed an application for permission to appeal against the decision of the Court of Appeal. On 14 June 2022, some of the Claimants made applications to the European Court of Human Rights (ECtHR). ECtHR granted an interim measure preventing them from being removed to Rwanda until the final domestic decision in the ongoing trial or judicial proceedings. On 14 June 2022, the Court of Appeal further considered the position on interim relief following the decisions of the European Court of Human Rights in *NSK v United Kingdom* (28774/33). The consequence of the grant of interim measures was following the case in the UK domestic courts. The High Court quashed SSHD's decision to remove asylum seekers to Rwanda based on procedural unfairness, and because it is in contradiction with Article 3 of the ECtHR. Meanwhile, this court dismissed the claims on generic challenges to the Rwanda Policy and announced that

this policy is lawful *AAA and others v SSHD* [2022] EWHC 3230 (Admin) 438. On 14 March 2023 Court of Appeal in *AAA and others v SSHD* [2023] EWCA Civ 266 decided to allow 11 individual asylum seekers to appeal against the decision of the High Court.

Held, affirming the High Court's earlier decision Lord Burnett of Maldon announced that the removal of any appellants to Rwanda under the Rwanda Policy would give rise to a real risk of refoulment, therefore it is considered in breach of Article 3 European Convention on Human Rights (ECHR) 1953. Further, the Court of Appeal ruled against the High Court judgment declaring that this Policy was unlawful due to the generic challenges (at [525]).

Commentary:

The Rwanda Deportation Case [2023] is considered one of the most controversial cases of the last decade. This case unfolds against the backdrop of two overarching dimensions, each carrying profound legal implications. The first aspect of this case is deporting asylum seekers as individuals. The second aspect of this case related to generic challenges of Rwanda Policy or the invalidation of the MEDP.

The focus of this commentary, looks at the second aspect of this case which is the invalidation of Rwanda Policy. In this regard, this there are three critical observations. First, the Court of Appeal failed to give proper consideration to the Secretary of State for the Home Department under the principle of good faith. Under international law, according to Article 26 Vienna Convention on the Law of Treaties (1969), and Article 2(2) UN Charter 1945 "Good Faith Principle" is an accepted legal principle. This was recongised by the UK courts in *James Hugh Allister and Others v Secretary of State for Northern Ireland* [2022] NICA 15 where it was affirmed by Lady Chief Justice Keegan (at [473]). Likewise, Lord Bingham of Cornhill confirmed that the government's good faith can be considered as a matter for justification for state action in *A (FC) and others (FC) v. SSHD* [2004] UKHL 56. His Lordship added that any measure under this principle must have been strictly necessary (at [177]). SSHD in several oral Statements to Parliament, speeches, and meetings stated that the main aim of the Rwanda Policy was the prevention of illegal migration including crossing the English Channel by dangerous small boats (see Patel 2022) and (Suella Braverman KC, HC Deb, 7 March 2023, Vol 729, Col 151). Indeed, the Rwanda Policy was for protecting the lives of people who are crossing the English Channel illegally by discouraging risky and potentially life-threatening migration routes. The Home

Secretary at the time claimed that the risky migrations are facilitated by smugglers and criminal gangs, and asylum seekers pay considerable sums of money for these groups (Braverman 'Home Secretary meets French counterpart on tackling illegal migration' (Home Office, 15 June 2023). In applying the Rwanda Policy it can be argued that the SSHD sought to protect other asylum seekers entering from safe third countries, in addition to protecting public safety in line with her obligations to do so under legislation such as part 4 of Nationality, Immigration and Asylum Act 2002 and part 1 of the Terrorism Prevention and Investigation Measures Act 2011. The Court of Appeal seemingly overlooked the overarching objective of the deportation policy and somehow the court failed to give proper consideration to the good faith of SSHD. More Interestingly, Lord Burnett of Maldon in his conclusion considered the SSHD's good faith in Rwanda Policy as a political concern rather than a legal one (at [456]). Therefore, the court by not considering the SSMD good faith in Rwanda Policy, did not fully appreciate the complexity of balancing legal norms with the practical imperatives of protecting human lives on a large scale.

Second, the Court of Appeal misled the UK legal system by not talking about the right of SSHD to remove asylum seekers to a safe country under the principle of a safe third country in the concluding remarks. The court's decision on the unlawfulness of Rwanda policy and not considering its relevance to the safe third country principle may influence any legal practice under ECtHR precedents such as *Mohammed v. Austria* (2283/12), and *Othman (Abu Qatada) v. United Kingdom* (8139/09). In *Mohammed v. Austria*, Hungarian authorities tried to send back asylum-seekers who had entered Hungary by crossing the Serbian border under the "principle of safe third country". In this case ECtHR accepted that the principle of moving asylum seekers to a safe third country is an accepted legal principle but it is followed with substantial grounds such as the principle of non-refoulment. Also, under *Othman (Abu Qatada) v. United Kingdom*, the United Kindom government tried to remove the applicant who was detained under the Anti-terrorism, Crime, and Security Act 2001 to Jordan. The ECtHR considered the deportation to be a violation of Article 6 of the European Convention on Human Rights. Meanwhile, this court affirmed the principle of removing asylum seekers to a safe third country is a legal principle if all substantial grounds are fulfilled.

The decision in this case has the potential to highly influence the legal practices in the domestic law of the United Kingdom under the Illegal Migration Act 2023, paragraph 345D of Immigration Rules 2017, section 3 of Immigration Act 1971, and Nationality and Borders Act 2022. It is submitted that the hypothetical scenario set out by the Court of Appeal on the Rwanda Policy has produced a careless decision and may result in challenging the practicing principle of removing asylum seekers to a third country in England and Scotland. By the way, the legality principle of removing asylumseekers to a third safe country and the right of SSHD to remove asylum seekers under this principle is not added in the concluding remarks of Lord Burnett of Maldon, however, it ought to have been discussed and emphasized as part of the case's concluding remarks (see [319]). It is submitted that it would have been desirable to include wording to the following effect in the judgment: *The principle of the safe third country is an internationally accepted legal principle and If Rwanda's policy met all the relevant requirements and substantial grounds, then this policy was lawful.*

Third, the Court of Appeals judgment does not address the Migration Economic Development Partnership (MEDP) with Rwanda which was set in a MoU as a political arrangement. As MoUs record international commitments but are not binding as a matter of international law, it does not require parliamentary review (Duquet *et al* 'Upholding the Rule of Law in Informal International Lawmaking Processes' (2014) 6 *HJRL* 75, 92). The question is how an important agreement like the Rwanda Policy can be set out in a MoU. As the policy talks about human rights issues it is vital that it should be capable of being sent to Parliament for review rather than circumventing this process via the MoU process (House of Lords International Agreements Committee 'Memorandum of Understanding between the UK and Rwanda for the provision of an asylum partnership agreement' (7th Report of Session, 2022-23, HL Paper 71, 18 October 2022) at [5]). These concerns are well reflected in reports of institutions such as the UK Parliament Human Rights and the House of Lords International Agreements Committee report (House Lords IAC) (Joint Committee, oral evidence: the UK-Rwanda Migration and Economic Development Partnership and Human Rights (HC 2022-08, 293)). As the House Lords IAC stated in the summary of a special report: *'Agreements that fundamentally affect individuals' rights should be entered into through a formal treaty so that the rights of those affected can be fully protected'* (at [293]). Assessing the absence of parliamentary scrutiny is not our core argument here, the point is such an important issue which is not addressed in the Court of Appeal's judgment.

In conclusion, the *Rwanda Deportation Case* [2023] is considered one of the most controversial legal disputes in the last decade. This case has two aspects: The first aspect

of this case is the issue of deporting asylum seekers, and the second aspect of the case is the invalidation of the MEDP which is set out in a MoU. The controversy is reflected by the fact that three distinct judicial decisions were rendered, each of them showing the narrative of the legal proceedings. High Court quashed the SSHD decision on the deportation of asylum seekers based on procedural unfairness and because of the breach of Article 3 of the ECHR. Meanwhile, this court dismissed the claims on generic challenges to the Rwanda Policy and announced that this policy is lawful. The Court of Appeal, against the high court's decision on the generic challenge, declared that Rwanda's Policy was unlawful. The Supreme Court approved the Appeal Court's decision, meanwhile emphasizing in direct wording that if all requirements and legal grounds under the safe third country principle were fulfilled the Rwanda Policy was lawful.

The Court of Appeals' legal test on issues such as the possibility of refoulment, recognition of Rwanda as a safe third country, the unlawfulness of deporting asylum seekers as individuals and generic challenges of the Rwanda Asylum system meets the relevant laws and there is nothing to say about that. Meanwhile, the judgment has three critical points: first, this judgment failed in applying proper consideration in the SSHD good faith, second, not talking about the right of the UK government to remove asylum seekers to a third safe country under the principle of a safe third country in the concluding remarks which may lead the UK Legal system to challenge practicing the principle of removing asylum seekers, and third, this judgment did not address lack of review on MoU.

The Court of Appeal's decision was approved by the UK Supreme Court where it was held that the Court of Appeals applied a correct legal test. Meanwhile, the Supreme Court emphasized the UK government has the right to remove asylum seekers to a third safe country if all legal grounds are fulfilled. Indeed, the Supreme Court applied a remedy to the Appeal Court's decision and facilitated to practice safe third country principle.

On 6 December 2023, James Cleverly Secretary of State for the Home Department addressed Parliament on the Rwanda Policy. According to him, a new Rwanda Policy will be drafted under the Supreme Court concerns including the "principle of non-refoulment", "principle of safe third country", and "required capacity building in Rwanda". Further, according to him a new partnership with Rwanda will be in the form of a treaty rather than MoU (James Cleverly, HC Deb, 6 December 2023, Vol 742, Col 433).