GARDEN COURT CHAMBERS

Rwanda High Court Judgment: implications and next steps







6.30 pm

Wednesday 18th January 2023

Rwanda: Implications and Next Steps

Sonali Naik KC, Garden Court Chambers

18 January 2023

Rwanda: Summary of Judgment

- It is lawful for the government to make arrangements for relocating asylum seekers to Rwanda and for their asylum claims to be determined in Rwanda, rather than in the United Kingdom.

- On the evidence before the court, the government has made arrangements with the government of Rwanda, intended to ensure that the asylum claims of people relocated to Rwanda are properly determined in Rwanda.

- Relocation of asylum seekers to Rwanda is consistent with the Refugee Convention and with the statutory and legal obligations including the Human Rights Act 1998

- The SSHD must consider properly the circumstances of each individual claimant and decide if there is anything about each person's particular circumstances which means that his asylum claim should be determined in the UK, or whether there are other reasons why he should not be relocated to Rwanda. She failed to do this in the eight individual claimants, and their decisions will be set aside and their cases consider afresh by the SSHD.

- Two NGOs and PCSU did not have standing to bring claims where individuals were better placed to do so.

Permission to appeal granted under limb two – CPR 52 – other compelling reason: AAA, Asylum Aid, RM, ASM and AS

(a) The arrangements made by the Home Secretary for the removal of asylum claimants from the United Kingdom to Rwanda:

(i) are inconsistent with article 31 of the Refugee Convention and as such are contrary to the provisions of section 2 of the Asylum and Immigration Appeals Act 1993;
(ii) are inconsistent with retained EU law;
(iii) rest on incorrect use of powers available to the Home Secretary under the Asylum and Immigration (Treatment of Claimants etc) Act 2004; and
(iv) are inconsistent with the requirements set out in paragraph 345B of the Immigration Rules;

(b) The Home Secretary's conclusion that Rwanda is a safe third country to which asylum claimants can be removed is not consistent with the requirements of article 3 of the European Convention on Human Rights;

(c) The Home Secretary's arrangements for taking such decisions are systemically unfair because they do not permit the asylum claimants concerned the opportunity to consider her reasons for concluding that Rwanda is a safe third country and make representations in response.

Summary of Grounds

- Application of the *Othman* test: did the assurances contained in the MOU and the *Notes Verbales* provide a sufficient guarantee to protect from the risk of *refoulement* and other Article 3 ill-treatment?
- Does inadmissibility and/or removal to Rwanda constitutes a penalty for the purposes of Article 31 of the Refugee Convention?
- Whether the use of certification power in Part 5 of Schedule 3 of the 2004 Act was *intra vires*, where the Assessment Document created a presumption of safety which circumvented the statutory scheme
- Whether the MEDP Scheme as set out in paragraphs 345A-D of the Immigration Rules was consistent with the Refugee Convention and therefore not *ultra vires* s2 of the 1993 Act.
- Whether the Rwanda Removal Policy was systemically unfair, including that procedural fairness did not require that each claimant have an opportunity to make representations in relation to the matters set out in §345B(ii)-(iv) of the Immigration Rules.
- Retained EU law: Whether Articles 25 and 27 of the Procedures Directive (2005/85/EU) had ceased to be 'retained EU law' (EU Withdrawal) Act 2020

Possible renewal to Court of Appeal - 30 January 2023

(1) The interpretation and application of the *Ilias* test when determining whether the SSHD conducted a sufficiently "*thorough examination*" of the adequacy of Rwanda's asylum system

(2) the Assessment Document and/or the Inadmissibility Decisions were based on a *Tameside* sufficient inquiry

(3) The interpretation and application of the *Soering* test re: real risk of *refoulement* or other Article 3 ill-treatment in Rwanda

(4) Whether asylum-seekers removed to Rwanda would be accorded their rights under the Refugee Convention as a matter of *vires* as opposed to rationality

(5) Standing

(6) Whether the Rwanda removals policy is *Gillick* unlawful

(7) Whether there has been procedural unfairness in the application of the inadmissibility guidance in the individual case of AS.

Third country inadmissibility regime post-AAA

Mark Symes

18 January 2023

Inadmissibility regime: pre-28 June 2022

“Safe third country”

- Immigration Rule 345B “safe third country” where
  - Life and liberty not threatened for Refugee Convention reason
  - Non-refoulement respected
  - Prohibition of removal respected re torture/inhuman and degrading treatment
  - Possibility of requesting refugee status and receiving protection as per Refugee Convention

Inadmissibility Candidates

"*may be treated as inadmissible*" if in "*safe third country*" r345A(i)-(iii):

- Recognised as refugees & can still avail themselves of protection
- Enjoys sufficient protection including non-refoulement
- Could enjoy sufficient protection including non-refoulement
- Already made a protection application
- Could have made a protection application but failed to do so and no exceptional circumstances
- connection to that country and reasonable to go there

Consequences of inadmissibility

- **345C -** When an application is treated as inadmissible, the Secretary of State will attempt to remove the applicant to the safe third country in which they were previously present or to which they have a connection, or to any other safe third country which may agree to their entry.
- No right of appeal in-country, no entry to the UK asylum system
- **345D –** if removal to a third country within a reasonable period of time unlikely, *or* if SSHD determines it inappropriate, will admit claim for consideration

Certification regime - Asylum & Immigration (Treatment of Claimants, etc.) Act 2004

Sch 3 AITCA 2004

- Para 17: *where* SSHD certifies the person is not national of a third country and life/liberty not threatened there, & not to be sent elsewhere in breach of Refugee Convention *then*
- Para 18: usual ability to remove asylum seekers lifted
- Para 19: no immigration appeal can contest the alleged breach of Refugee Convention (i.e. deemed safe), and may not bring an appeal if certified as *"clearly unfounded"*
- So there is an out-of-country appeal

Inadmissibility regime: post-28 June 2022 (modern claims)

NBA 2022 scheme

- May declare inadmissible where there is a “connection” to a “safe third state”
- s80B(6): declaring claim inadmissible due to connection to a particular safe third State does not prevent SSHD from removing the claimant to any other safe third State
- No out-of-country right of appeal against “clearly unfounded” certification of a human rights claim (because there are no longer any appeals, see NIAA 2002 s94 in post-June 2022 form)

“Safe Third Country”

- NIAA 2002 s80B(4) “safe third country” where
  - Life and liberty not threatened for Refugee Convention reason
  - Non-refoulement respected
  - Prohibition of removal respected re torture/inhuman and degrading treatment
  - Possibility of requesting refugee status and receiving protection as per Refugee Convention

NIAA 2002 s80B – 5-stage "connection" test

- NIAA 2002 s80C(4) "connection" with "safe third state" where
  - Recognised as a refugee & remains able to access protection
  - Enjoys sufficient protection including non-refoulement & remains able to access protection
  - Non-determined or refused asylum claim
  - Reasonable to expect a claim to a third state where present and eligible to make claim
  - In particular circumstances reasonable to expect a claim in safe third State rather than in UK

The SSHD's scheme

Inadmissibility Policy

- Policy states inadmissibility pursued where

  (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*"
- Suggestion in some refusal letters that AAR policy also relevant: court did not address this

Divisional Court Judgment in *AAA*

Judgment in *AAA* 1

- The duty of "*thorough examination*" requires national authorities to conduct "*of their own motion an up-to-date assessment, notably, the of the accessibility and functioning of the receiving country's asylum system and the safeguards it affords in practice*" (*Ilias* in ECtHR)
- SSHD had performed this duty via reviewing public domain materials and diplomacy (memo of understanding, notes verbales "MoU/NV")
- UNHCR's arguments (discrimination v LGBTI community, inexpert decision makers, no representation in first instance hearings, no track record of appeals to High Court, protection gaps in legislation, lack of capacity re legal assistance & languages) answered by MoU/NV

Judgment in *AAA 2*

- Compliance with assurances is measured via ECtHR *Othman* duty (specificity, authority of person giving them, whether local authorities will comply with central government edict, whether treatment illegal/legal, objective verification, record of past compliance)
- *Othman* satisfied: good diplomatic relations, Rwanda has significant financial incentive to comply – UNHCR's concerns were not consistent with previous public position, came late in day via submissions
- SSHD did not need to compare Israel/Rwanda agreements (whereby asylum seekers did not receive support & many left Rwanda) with MoU/NV
- No reason to think Rwanda would harm complainants or that generalised human rights problems for refugees would affect those protected by MoU/NV – no track record of relevant protest amongst Claimants

Inadmissibility certificate successes

- Claimants succeeded on the exceptional circumstances inadmissibility criteria re the opportunity to claim asylum abroad because:
  - Errors of fact re UK connections and thus relative incentives to pursue asylum claims in UK/EU countries
  - Misstatement of alleged ill-treatment by police in EU countries
  - Being locked up in a lorry (SSHD entitled to draw inferences about past experiences of asylum and length of journey), control of people smugglers the impact of charity's abroad intervention,
  - Conduct amounting to trafficking (as opposed to instructing people smugglers)

Challenges to decisions to certify human rights claims as clearly unfounded

Isaac Ricca-Richardson, Garden Court Chambers

18 January 2023

Key points to address

1. The purpose of the human rights claim.

2. The test for challenging certification as ‘clearly unfounded’.

3. The impact of the AAA judgment on challenges to ‘clearly unfounded’ certificates.

4. Key things to focus on to set up your challenge.

The purpose of the human rights claim

- If all A has made is an asylum claim, the only step the SSHD must take to facilitate removal to Rwanda is to certify/declare that claim inadmissible and certify/declare that Rwanda would be a safe country for them for Refugee Convention purposes (*pre 28 June 2022* – 345A-D of the Rules and Schedule 3 AITCA 2004; *post 28 June 2022* – s16 and Schedule 4 NABA 2022).

- If A also makes a human rights claim, A's removal will be prevented by their in country appeal right, unless the SSHD also certifies that claim as 'clearly unfounded' (ss 94, 78, 82 NIAA 2002, as amended *post 28 June 2022* by s28 NABA 2022).

- In the Rwanda context, the SSHD likely will certify the human rights claim as 'clearly unfounded'. The key question is therefore how to challenge that certification to regain the appeal right and prevent removal.

The test for challenging certification as clearly unfounded

- Although technically a rationality challenge, in reality, less onerous due to the court's *"intensive"* review: *FR & Anor (Albania)* [2016] EWCA Civ 605 at para. 48.

- In effect, the Court will decide for itself whether the human rights claim is clearly unfounded: see e.g. *YH (Iraq) v SSHD* [2010] EWCA Civ 116 and *ZT (Kosovo)* [2009] 1 W.L.R. 348.

- That is helpful because the test for certifying as clearly unfounded is a very high one; in effect, claims should only be certified as clearly unfounded if it is clear beyond reasonable doubt that no FTT judge, taking A's claim at its highest, would be entitled to allow an appeal: see e.g. *SP (Albania) v SSHD* [2019] EWCA Civ 951 and EM (Eritrea) [2014] UKSC 12.

The impact of the AAA judgment on 'clearly unfounded' challenges

- The unhelpful: conditions in Rwanda are not such that there would, in general, be any real risk of Article 3 breach – see paras. 73-77.

- The helpful: just as with inadmissibility decisions, decisions on certification of human rights claims must be made case by case based on the individual facts and evidence – see illustration at 376-378 and other individual decisions.

- The very big question mark: unclear how difficult such challenges will be to make out in the Rwandan context because the Court did not determine in any individual case whether it would be reasonably open to an FTT judge to conclude that on the individual facts the claim should succeed - despite being asked to do so (see para. 373).

Key things to focus on to set up your challenge

- Focus on the individual facts giving rise to a risk of breach of ECHR rights e.g. Article 3 or Article 8 – vulnerabilities relating to mental health; requirement for additional provision/assistance as victims of torture or trafficking; any family life with individuals in the UK – including the extent of dependence and why family life goes beyond normal emotional ties if not with spouse/partner / minor children; any family life with individuals outside the UK due to different provision for a family reunion.

- If possible on the facts, investigate the relevance of political expression/opinion adverse to the Rwandan authorities to Rwanda – see paras. 75-77.

- Obtain evidence on which an FTT Judge could conceivably allow the appeal – expert / medico-legal reports, Rule 35 Reports, and witness statements from family members.

The relevance and weight to be given to UNHCR evidence in asylum claims and legal challenges

Adrian Berry

18 January 2023

UNHCR's Position

Special regard is due both to:

- UNHCR's assessment of factual matters within its remit, and

- UNHCR's interpretation and analysis of the protection and standards required under the Refugee Convention

R (EM (Eritrea)) v SSHD [2013] 1 WLR 576, §41, per Sedley LJ

UNHCR 'is today the holder of an internationally respected office with an expert staff (numbering 7,190 in 120 different states7), able to assemble and monitor information from year to year and to apply to it standards of knowledge and judgment which are ordinarily beyond the reach of a court' and it was 'intelligible in this situation that a supranational court should pay special regard both to the facts which the High Commissioner reports and to the value judgments he arrives at within his remit'.

UNHCR Statute, Article 2

2. The work of the High Commissioner shall be of an entirely non-political character; it shall be humanitarian and social and shall relate, as a rule, to groups and categories of refugees.

Weight to be given to UNHCR's interpretation of the Refugee Convention

'[t]he guidance given by the UNHCR is not binding, but "should be accorded considerable weight", in the light of the obligation of Member States under article 35 of the Convention to facilitate its duty of supervising the application of the provisions of the Convention'.

Al Sirri v SSHD [2012] UKSC 54; [2013] 1 AC 745, §36 per Lady Hale and Lord Dyson

UNHCR Observations in the Case

- It is a necessary (albeit not sufficient) condition for the lawful transfer, by one State to another, of asylum seekers whose claims have yet to be determined for there to be fundamental safeguards in place. *The requisite safeguards include the existence of an accessible, reliable, fair and efficient refugee status determination ('RSD') system* in the receiving State. In the absence of such an RSD system in the receiving State (a) the vital rights and protections to which refugees are entitled under the Refugee Convention cannot be ensured so that (b) transfer should not take place.

- *The RSD system in Rwanda lacks irreducible minimum components of an accessible, reliable, fair and efficient asylum system.*

UNHCR Observations in the Case

- *UNHCR is moreover aware of specific instances of refoulement from Rwanda.* The denial by the Secretary of State for the Home Department and Government of Rwanda of any history of refoulements from Rwanda rests, at least in part, upon a misunderstanding of the prohibition of refoulement. There is a serious risk of onward refoulement from Rwanda.

- The SSHD's contentions that Rwanda operates a 'no deportation' policy and that all rejected asylum seekers transferred under the UK-Rwanda Arrangement would be given a residence permit are not supported by the evidence, including her own. In any event, the provision of alternative status would offer no lawful substitute for the rights and protections owed to recognised refugees under the Refugee Convention.

UNHCR Observations in the Case

- *The defects in Rwanda's RSD system are not addressed by the Memorandum of Understanding ('MoU') dated 14 April 2022 or the Notes Verbales ('NVs') between the UK and Rwanda*. The MoU and NVs impose only non-binding, unenforceable obligations; describe an RSD system which would require profound changes; and propose no concrete steps or timeframe by which those changes are to be achieved.

- The defects and risks in the Rwandan RSD system have the consequence that decisions to treat an asylum seeker's claim as inadmissible and to transfer him or her to Rwanda, owing to arrival in the UK by a 'dangerous journey', amount to unlawful penalisation contrary to Article 31 of the Refugee Convention where the asylum seeker 'came directly' within the meaning of the Convention.

UNHCR Observations in the Case

- Contrary to the objects and purposes of the Refugee Convention, the UK-Rwanda Arrangement is, moreover, a burden-shifting arrangement which will diminish the overall provision of international protection and whose replication would threaten the international protection system.

- *UNHCR's unequivocal position is that there should be no transfers of asylum seekers from the UK to Rwanda under the UK-Rwanda Arrangement.*

The Court's Response

47. The United Nations High Commissioner for Refugees ("the UNHCR") has filed three witness statements. For present purposes, the most significant is the statement Lawrence Bottinick made on 26 June 2022. That sets out, in some detail, the UNHCR's evidence and opinion on the asylum system in Rwanda. The information in that statement both goes beyond and is a little different from, information previously published by the UNHCR on Rwanda (for example in its "Universal Periodic Review" document on Rwanda dated July 2020). Generally, Mr Bottinick is critical of the scope of Rwandan law, and the competence and capacity of the Rwandan asylum system effectively to determine asylum claims...

The Court's Response

53. The Claimants' submission as to the position in Rwanda relies heavily on the information contained in the statements made by Mr Bottinick. The Claimants contend as follows….

1. There are instances where the Rwanda authorities have refused to register claims for asylum…
2. Mr Bottinick also considers the process before the RSDC [Refugee Status Determination Committee] is inadequate…
3. Mr Bottinick is sceptical about the value of appeal to the Minister…

The Court's Response

53. The Claimants' submission as to the position in Rwanda relies heavily on the information contained in the statements made by Mr Bottinick. The Claimants contend as follows….

> 4. Mr Bottinick also says that the lack of reasoned decisions from the RSDC and the Minister impedes the effective use of the right of appeal to the High Court. This right of appeal was introduced in 2018. There is no evidence that such appeals have been filed with or heard by the High Court.
>
> 5. Rwandan asylum law is said to be defective. Mr Bottinick refers to a "protection gap". He says that the definition of "political opinion" in article 7 of Rwanda's 2014 Law on Asylum does not cover the possibility of protection against persecution on grounds of imputed political opinion or from the risk of ill-treatment by non-state actors.

The Court's Response

53. The Claimants' submission as to the position in Rwanda relies heavily on the information contained in the statements made by Mr Bottinick. The Claimants contend as follows….

6. Mr Bottinick's opinion is that the Rwandan asylum system lacks the capacity and expertise necessary to deal effectively with asylum claims. This is material in two ways. Important aspects of asylum law may not be properly understood and properly applied… Further, the Rwandan system will not be able to cope with the volume of claims generated by the MEDP…

The Court's Response

55…The Home Secretary observes that in the July 2020 "Universal Periodic Review" the UNHCR described the 2014 Law relating to Refugees" as "fully compliant with international standards". There was no suggestion of any "protection gap".

The Court's Response

64. In the present case we consider the Home Secretary is entitled to rely on the assurances contained in the MOU and *Notes Verbales*, for the following reasons…

65. The terms of the MOU and *Notes Verbales* are specific and detailed. The obligations that Rwanda has undertaken are clear…

The Court's Response

67. The UNHCR relied on two matters. The first was the experience of an agreement made between the State of Israel and Rwanda in 2013. We have not been provided with definitive evidence on the nature and terms of that agreement, but we do not consider that it is critical for our purposes…

68. The second point advanced by the UNHCR was its own opinion of the likelihood that Rwanda will comply with its obligations under the MOU and the *Notes Verbales*. This was not set out in either of Mr Bottinick's witness statements. Rather, in the course of submissions, and on instructions from Mr Bottinick, Miss Dubinsky KC, counsel appearing for the UNHCR, stated that the UNHCR's opinion was that, in the light of the history of refoulment and of defects in its asylum system, Rwanda could not be relied on to comply with its obligations under that Convention and, by extension, would fail to comply with the obligations it had assumed under the MOU and *Notes Verbales*.

The Court's Response

71. There are several authorities that have considered the weight to be attached to evidence and conclusions of fact set out in UNHCR reports and other materials. Those authorities speak with one voice: that evidence carries no special weight, it is to be evaluated in the same manner and against the same principles of any other evidence: see for example per Elias LJ in *HF (Iraq) v Secretary of State for the Home Department* [2014] 1 WLR 1329 at paragraphs 42 to 47; and per Davis LJ *in AS (Afghanistan)* [2021] EWCA Civ 195 at paragraphs 17 to 23....

The Court's Response

71….The context here is different, but if anything, that renders the conclusion clearer still. As explained by Mr Mustard, the conclusion that Rwanda will act in accordance with the terms of the MOU and the *Notes Verbales* rests on HM Government's experience of bilateral relations extending over almost 25 years and the specific experience of negotiating the MOU over a number of months in 2022.

The opinion of the UNHCR now expressed on instructions from Mr Bottinick carries no overriding weight. We must consider it together with all the evidence before us and decide whether, on the totality of that evidence, the Home Secretary's opinion is undermined to the extent it can be said to be legally flawed. For the reasons we have already given, the Home Secretary did not act unlawfully when reaching the conclusion that the assurances provided Rwanda in the MOU and *Notes Verbales* could be relied on….

Procedural fairness in the Rwanda High Court judgment

Amanda Weston KC, Garden Court Chambers

18 January 2023

AAA para 380 onwards

- Under the MEDP, removal from the UK involves two decisions:
    1. An asylum claim is inadmissible
    2. A decision to remove a claimant to a safe third country

- The power to remove to a safe third country is provided by paras 17 and 18 of Pt 5, Sch 3 of the Asylum and Immigration (Treatment of Claimants etc) Act 2004.

- The Secretary of State's practice is to treat separately issues arising under the human rights convention and in MEDP cases to certify human rights claims under para 19(c) to Sch 5 of the 2004 Act.

- In this part of the presentation we are looking at the procedure adopted by the Secretary of State in making that decision and whether it meets the requirements of the statutory framework and the common law in making those decisions..

The procedure adopted by the Secretary of State

- Arrival
- Screening interview
- Referral into the MEDP
- Detention
- 7-day window to make representations
- Inadmissibility guidance indicates no flexibility
- Standard removals
- If human rights claim is made, a separate decision-making procedure

The Home Secretary's position on procedural fairness at the hearing

At para 386 of the judgment:

> "7. As to what procedural fairness requires in this context … the Secretary of State should inform the Claimant of, and allow him or her an opportunity to make representations on, the following matters:
>
> (1) The Secretary of State is considering whether the Claimant was previously present in or had a connection to one or more safe third States and what the name of each such State was.
>
> (2) The Secretary of State is considering whether to declare the asylum claim inadmissible and to remove the Claimant to Rwanda.
>
> (3) The Secretary of State considers that Rwanda is a safe country.
>
> (4) The Secretary of State will consider whether there is any reason specific to the Claimant why Rwanda would not be a safe third country in the individual circumstances of the Claimant."

- BUT

The Asylum Aid hearing

- The Secretary of State resiles from her position, and no longer accepts that fairness requires opportunity to make representations about whether Rwanda is a safe country.

AAA: what the admissibility procedure requires

The court finds that the procedural fairness obligation is two-fold:

1. To enable the Claimant to have an opportunity to explain why his asylum claim should not be treated as inadmissible, i.e. why he had not claimed asylum in various EU Member States passed through *en route* to the UK. **Fairness did not require the opportunity to make representations in response to the Home Secretary's evaluation (or provisional evaluation) of whether exceptional circumstances existed which prevented an asylum claim being made.**

2. Procedural fairness requires a Claimant to have the opportunity to explain why, in his case, his right to life and liberty would be threatened if he were removed to Rwanda (his or her individual circumstances).

AAA: what the admissibility procedure requires

- Therefore the court concluded:

  a) fairness did not require the Home Secretary to provide each Claimant with all the information she relied on to form her general opinion on Rwanda – for example that Rwanda meets the criteria at paragraph 345B(ii) – (iv) of the Immigration Rules; and

  b) fairness did not require that each Claimant have the opportunity to make representations on those matters.

- The court also rejected Asylum Aid's case on systemic unfairness

The Claimants' complaints about the process

1. Timetable to referral into the MEDP too short to meet the individualised assessment required

2. Lack of disclosure about conditions in Rwanda

3. 7-day period to make representations too short

4. Lack of access to lawyers, in particular in detention

5. Unlawful use of standard removal directions (5 days) – insufficient time to access a court of review

6. Screening interviews inadequate / *Tameside* breaches

- The court focused on the Secretary of State's inadmissibility procedure under 345A, certification under para 17 of Sch 3 to the 2004 Act and 345B.

- For the purposes of the decision under paragraph 17 of Schedule 3 to the 2004 Act the Home Secretary must be of the opinion that the State to which she proposes to remove the asylum claimant

- "… is a place –
  - (i) where the person's life and liberty will not be threatened by reason of his race, religion, nationality, membership of a particular social group or political opinion, and
  - (ii) from which the person will not be sent to another State otherwise than in accordance with the Refugee Convention."

Under paragraph 345B of the Immigration Rules, a country is a safe third country "for a particular applicant" if

"(i) the applicant's life and liberty will not be threatened on account of race, religion, nationality, membership of a particular social group or political opinion in that country;

(ii) the principle of non-refoulment will be respected in that country in accordance with the Refugee Convention;

(iii) the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman, or degrading treatment as laid down in international law, is respected in that country; and

(iv) the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Refugee Convention in that country."

Points to remember

- Inadmissibility guidance held by the court to be lawful in *Gillick* terms nevertheless doesn't provide a comprehensive indication of factors material to the decision to refer to the MEDP.

- In AS' case, a prompt Rule 35 report did not serve to take him out of the MEDP because although disclosed documents demonstrated that fitness for detention under the AAR was a highly material factor militating against referral into the MEDP, the lack of opportunity to submit one in time owing to the truncated process meant by the time it went in it was effectively too late because removal was proximate.

- In these cases, entitlement to an in-country right of appeal against rejection of a human rights claim couldn't be a solution as the court declined to determine the certification issue on the usual tests.

- However, in the AAA cases, all the human rights certificates were quashed AND the underlying decisions which meant the court ducked deciding whether it would have been open to an FTT judge to allow the appeal against a refusal of a human rights claim.

Practical implications of the Rwanda Judgment: How to deal with NOIs/removal

Eva Doerr, Garden Court Chambers

18 January 2023

Content

1. What is happening in practice while litigation is ongoing?

2. NOI received – what next?

3. NOI response – issues to address

What is happening in practice while litigation is ongoing?

- NOIs are being issued → individuals are required to make representations
- Currently no inadmissibility decisions issued and no removal action taken
- No general legal barrier/injunction preventing removal
  - One Claimant granted Rule 39 interim measure by ECtHR. Stays their removal *"until the expiry of a period of three weeks following the delivery of the final domestic decision in the ongoing judicial review proceedings"*
  - Rule 39 interim measure only applies to the specific person it was granted to
  - BUT: Court of Appeal granted interim relief to other Claimants on basis that the reasons for the interim measure were generic and would have been granted to others who applied
  - If SSHD started removal action before the conclusion of litigation, injunctions should be secured in domestic Courts and/or, if necessary, ECtHR
- Political statements from Government suggest that no removal action would be taken until the conclusion of the litigation

NOI received – what next?

1. Seek disclosure of relevant documents from SSHD

2. Respond to NOI

- NOI usually accompanied by leaflet which invites person to make representations within 7 days if detained and 14 days if not detained

3. Request extension of time to respond to NOI

- Past experience: varying success. If granted, it is usually granted for short period.
- Extension requests should set out:
  - All difficulties and delays in accessing representation
  - Documentation that is being sought and reasons for delays in obtaining it
  - Reports commissioned and time frames for receipt - including why material necessary

4. If person detained, apply for bail

NOI response – issues to address (1)

- To affect removal, SSHD has to make a series of challengeable decisions including (depending on circumstances):
    - Declare asylum claim inadmissible
    - Certify human rights claim as clearly unfounded
    - Treat the putative child as an adult
    - Resolve trafficking issues
    - Detain
- These potential decisions should be the target of representation and evidence in response to NOI

NOI response – issues to address (2)

- Result of judgment: individualised assessment is key – ensure that you drill down into specifics of facts

- Read sections of the judgment dealing with individual Claimants (§§178-379):

  - Be mindful of Court findings on certain specific issues (as SSHD will no doubt refer to these in response)
  - Spot gaps of arguments that have as yet not been raised by any of the *AAA* Claimants (e.g. possibility of refugee family reunion in Rwanda)

NOI response – issues to address (3)

Issues to consider include:

- Their age – are they age disputed?
- Journey to the UK and reasons for not applying for asylum in safe countries passed through, or why not reasonable to remain there (see inadmissibility provisions in s. 16 NAB 2022 for the legal test)
- Basis of asylum claim (e.g., religion, political opinion) – consider this in the context of removal to Rwanda
- Physical health issues and treatment received or needed
- Mental health issues and other vulnerabilities
- History of detention, torture, mistreatment, and abuse. Ongoing consequences, treatment history if relevant and evidence of this.

NOI response – issues to address (4)

Issues to consider include (continued):

- Family members in the UK and, importantly, details of their relationship with them, contact, reliance, the significance of the relationship given other vulnerabilities etc.
- Issues relevant to relocation to Rwanda: interpretation, need for representation, educational level, ability to negotiate procedures, healthcare needs, etc.
- Fitness to fly
- History of NOI process in the UK and any procedural unfairness issues (e.g., difficulties accessing lawyers)

Gather documentation in support:

- Witness statements (from a person, family members, etc.)
- Medical records, Rule 35 report
- Expert reports: medico-legal, country (e.g., Rwanda), trafficking


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Practical Issues: Potential Victims of Trafficking/Modern Slavery

Grace Capel, Garden Court Chambers

18 January 2023

Practical issues - PVoTs: current position

- The Order of 3 August 2022 made in AAA following a CMRH prior to the full hearing, stayed certain individual cases involving PVoTs until 7 days after the final decisions in the NRM referral process (CG/DL) or if later, 7 days after final orders are made in the claims to be heard on 5-9 September 2022.

Practical issues – PVoTs: identification and referral

- Failure to identify (before detention, referral into Inadmissibility Process, issue of NOI, Inadmissibility Decision).
- Have trafficking indicators been missed?
  - Screening Interview, including questions re route of travel, see *R (DA) v Secretary of State for the Home Department* [2020] EWHC 3080 (Admin).
  - Initial screening/Rule 34 assessments/Rule 35 reports/IRC medical notes.
  - Detention Engagement Team 'induction interview'.
- Does an NRM referral need to be made, recalling the low threshold? *R (TDT (Vietnam)) v SSHD* [2018] 1 WLR 4922. If a referral has already been made, check it covers *all* incidences of trafficking.

Practical issues – PVoTs: following a referral/RG

- Once the NRM identification process has commenced and/or a positive RG decision has been made, representatives should consider requesting that:
    - any extant NOI/Inadmissibility Decision be withdrawn and the PVoT be removed from the inadmissibility process; or in any event
    - that the Inadmissibility Process be suspended pending the conclusion of the NRM process (including any grant of DL as a VoT) and reconsideration of any Inadmissibility Decision made prior to the NRM process.
- If a negative RG is received, request that no Inadmissibility Decision be taken until a challenge to the negative RG can be brought and determined.
- HO approach to such requests has been variable.

Practical issues – PVoTs: responding to the NOI

- Set out **procedural fairness points** which may be relevant including:
  - Home Office's failure to identify client as a PVoT and/or any delays in referral into the NRM.
  - Inability to provide instructions/a full account within the 7/14 day deadline on account of the numerous barriers to disclosure identified in the MSASG – identify which of these apply e.g. effects of trauma, fear of authorities, the impact of detention.
  - Outline the need for additional time to obtain critical evidence.

- Trafficking may be relevant to the **inadmissibility criteria** – if a person has been trafficked to the UK, is it "reasonable to expect" them to have made an asylum claim in a country en route? C.f. §308-309 of the judgment. Even if not under the control of traffickers throughout their journey, are their experiences as a PVoT relevant to this issue in other ways?

Practical Implications: PVoTs – Responding to the NOI

- **Safe third country**: Ensure individual circumstances are drawn to the fore-given conclusions of AAA on the general safety of Rwanda.

- Human Rights representations: consider **Article 4 ECHR** arguments in addition to arguments under Article 3 and 8 ECHR. Again, ensure individual circumstances are drawn to the fore including those relevant to vulnerability to re-trafficking in Rwanda. Consider whether Article 3 ECHR medical claim is appropriate.

Practical issues – PVoTS: Reflection and Recovery period

- Representations/evidence in support of a positive CG.
- Respond to any 'requests for information' from the IECA, which often raise 'credibility' points (including vis-a-vis issues relevant to an Inadmissibility decision).
- May also be helpful to document/evidence:
  - The impact of the Inadmissibility Process on the PVoTs ability to reflect and recover from their experiences of trafficking.
  - The impact of detention pursuant to the inadmissibility process on PVoTs ability to access support to meet their trafficking-related recovery needs.
  - Whether (if released on immigration bail) the PVoT has been able to access support to meet their trafficking-related recovery needs, via the MSVCC (and what that support is).

Practical Issues: VoTs – temporary stay as VoT

- HC719, 18 October 2022 statement of changes inserted Appendix VTS, which specifies eligibility criteria for ”temporary permission to stay” for victims of trafficking.
- The criteria are set out at VTS 3.1 and are that the grant of permission to stay is necessary for:

  (a) assisting the person in their recovery from any physical or psychological harm arising from the relevant exploitation; or

  (b) enabling the person to seek compensation in respect of the relevant exploitation, or

  (c) enabling the person to cooperate with a public authority in connection with an investigation or criminal proceedings in respect of the relevant exploitation.
- VTS 3.2 defines “physical or psychological harm”, “assisting the person in their recovery”, “seeking compensation” “investigation of criminal proceedings’ and “relevant exploitation”.

Practical Issues: VoTs – temporary stay as VoT

- VTS 3.3 -3.4:

  VTS 3.3**. Permission to stay is not necessary** for the purpose of VTS 3.1(a), as set out in Section 65 (4) (a) of the Nationality and Borders Act 2022:

  (a) if the Secretary of State considers that **the applicant's need for assistance is capable of being met in a country or territory of which they are a national or citizen; or one to which they may be removed in accordance with an agreement between that country or territory and the UK** (which may be, but does not need to be, an agreement contemplated by Article 40(2) of the Trafficking Convention).

  VTS 3.4 **Permission to stay is not necessary** for the purpose of VTS 3.1(b) as set out in Section 65 (4) (b) of the Nationality and Borders Act 2022, **if the applicant is capable of seeking compensation from outside the UK**, and it would be reasonable for them to do so in the circumstances.

- Representations in support of a grant of leave need to address this.

Thank you

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