

The duty to remove asylum seekers under the Illegal Migration Act 2023: Is the government's plan to 'Stop the Boats' now doomed to failure?

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Abstract

With 'Stop the Boats' high on the government agenda, legislation has come into force to try and uphold this pledge. However, the methods the government is deploying to bring about this stated aim are highly controversial and potentially unlawful. In the latest government attempt to halt the crossings, the Illegal Migration Act 2023's central provision places a duty on the Home Secretary to remove those who arrive in the UK by irregular means 'as soon as reasonably practicable'. However, the section of the Act that places this duty on the Home Secretary has not yet come into force. This is largely because the Home Secretary does not currently have a lawful agreement with any third country to remove people to. The so-called 'Rwanda asylum deal' that the duty in the Act relies upon to operate was ruled unlawful by the Court of Appeal in June 2023. This article will consider the enforceability of the duty outlined at s.1(2)(a) of the Illegal Migration Act 2023 in light of developments in the ongoing litigation regarding the lawfulness of the UK government's Rwanda asylum deal and the broader motivation and implications of pursuing such a policy to address the so-called 'small boats crisis'.

Keywords

Illegal Migration Act 2023, Rwanda asylum deal, Stop the Boats

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Introduction

The current Sunak-led Conservative government set out a list of key priorities for 2023, specifically five pledges of which one was to ‘Stop the Boats’ arriving across the English Channel.¹ This is a targeted pledge, exclusively focusing on inflatable dinghies crossing the world’s busiest shipping route. These inflatable dinghies are carrying people who are seeking safety and a better life, but crucially do not have the legal paperwork for entry to the UK due to a failure to provide safe and regular routes to the UK for refugees or a so-called ‘safe passage’ visa. People who make these journeys have been called ‘illegal migrants’, although crossing a border to seek asylum is lawful under international law.² The UK government has cited safety concerns regarding the use of this route to enter the UK, reducing the cost of administering the asylum system and disrupting the tactics of people smuggling gangs as reasons for wishing to ‘Stop the Boats’, concerns shared across the broad spectrum of opinion on asylum policy. However, the methods the government is deploying to bring about this stated aim are highly controversial and potentially unlawful. In the latest government attempt to halt the crossings, the Illegal Migration Bill was devised, becoming an Act of Parliament on 23 July 2023. The central provision places a duty on the Home Secretary to remove those who arrive in the UK by irregular means ‘as soon as reasonably practicable’.³ However, the section of the Act that places this duty on the Home Secretary has not yet come into force. This is largely because the Home Secretary does not currently have a lawful agreement with any third country (excluding Albania for some Albanian nationals) to remove people to. The so-called ‘Rwanda asylum deal’ that the duty in the Act relies upon to operate was ruled unlawful by the Court of Appeal in June 2023.⁴ Surrounding the passage of the Bill through Parliament and domestic caselaw regarding the Rwanda Deal there has been both loud opposition from Parliamentarians, NGOs, immigration lawyers, trade unions and others, as well as harsh rhetoric from the government against their opponents and asylum seekers themselves. This article will consider the enforceability of the duty outlined at s.1(2)(a) of the Illegal Migration Act 2023 in light of developments in the ongoing litigation regarding the lawfulness of the UK government’s Rwanda asylum deal and the broader motivation and implications of pursuing such a policy to address the so-called ‘small boats crisis’.

Context of the Bill

The Illegal Migration Bill is not the first Bill brought forward by the current government intended to address the issue of small boat arrivals from the English Channel. In March 2021, the then Home Secretary, Priti Patel, introduced her ‘New Plan for Immigration’ with the Nationality and Borders Bill as the centrepiece. It passed into law in April 2022, with many of the central provisions coming into force in June 2022.⁵ This Bill took a different approach to that put forward by the Illegal Migration Bill. Instead of placing a duty on the

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1. Rishi Sunak, ‘Prime Minister outlines his five key priorities for 2023’ (GOV.UK, 4 January 2023) <<https://www.gov.uk/government/news/prime-minister-outlines-his-five-key-priorities-for-2023>> accessed 08 September 2023.
 2. Article 31, Refugee Convention 1951. See also *R v Uxbridge Magistrates Court and another ex parte Adimi* [1999] EWHC admin 765 for discussion of lawfulness of passing through safe third countries en route to country of safety.
 3. s.1(2)(a) Illegal Migration Act 2023.
 4. *AAA v SSHD* [2023] EWCA Civ 745.
 5. Nationality and Borders Act 2022 (Commencement No 1, Transitional and Saving Provisions) Regulations 2022.

Home Secretary to enact removals to Rwanda, it was a skeleton Bill that granted the Home Secretary very wide discretionary powers to differentiate between asylum seekers based on mode of travel, including provisions on removal of people to the so-called ‘safe’ third countries via secondary legislation and changes to the immigration rules.⁶ Although flexibility likely seemed attractive to the UK government at the time, it left the Home Secretary vulnerable to judicial review because, unlike primary legislation, regulations and immigration rule changes can be challenged in the courts. In addition, the processes developed under the provisions of the Act were complicated and added additional layers of consideration for asylum decision-makers. Many of the provisions of the Nationality and Borders Act as they relate to the differentiation of asylum seekers were abandoned in July 2023. The Illegal Migration Bill intended to resolve these problems for the government, placing a duty to remove persons arriving in the UK in small boats in statute thereby (in theory) evading challenge in the courts and effectively preventing any person arriving irregularly in the UK from accessing the asylum system in the UK at all.⁷ In a system where people who arrive by small boat cannot make asylum claims, there is no need to make asylum decisions for them.

The Rwanda asylum deal

The possibility of the Home Secretary being able to comply with the duty she has given herself in the Illegal Migration Act hinges on her ability to remove people to ‘safe’ third countries. The Rwanda deal – or to give its full title ‘The UK-Rwanda Migration and Economic Development Partnership’ – was signed on 13 April 2022 by the UK and Rwandan governments, intending to enable this to become a reality.⁸ The partnership allows the UK government to partially offshore its asylum decision-making responsibility to the Rwandan state. In return, Rwanda will receive hefty financial rewards⁹ as well as relocation of some of Rwanda’s refugee population to the UK.¹⁰ However, the partnership will only allow a small percentage of asylum seekers who arrive in the UK to be deported to Rwanda with some news sources estimating that Rwanda could only accommodate 100–200 asylum seekers from the UK at a time.¹¹ This is at odds with the duty of the Illegal Migration Act to remove *all* asylum seekers found to have arrived by irregular means to other countries as soon as possible. The Home Secretary claims that the threat of removal to Rwanda will act as a deterrent to asylum seekers making the

6. See, for example, s.12(8), or Sch.4 para 9B amending Sch.3, para 20(1) of Asylum and Immigration (Treatment of Claimants etc.) Act 2004 re safe countries list.

7. See, for example, ‘UK Illegal Migration Bill: UN Refugee Agency and UN Human Rights Office warn of profound impact on human rights and international refugee protection system, *UNHCR* (18 July 2023) <<https://www.unhcr.org/uk/news/speeches-and-statements/uk-illegal-migration-bill-un-refugee-agency-and-un-human-rights-office>> accessed 15 September 2023.

8. Memorandum of Understanding between the UK and Rwanda Rwanda for the provision of an asylum partnership arrangement, 14 April 2022.

9. The UK has paid £120 million to Rwanda in development funding and will pay additional costs for processing and integration of asylum seekers. Melanie Gower, Patrick Butchard, CJ McKinney, UK-Rwanda Migration and Economic Development Partnership (House of Commons Library, Research Briefing, 20 December 2022) <<https://commonslibrary.parliament.uk/research-briefings/cbp-9568/>> accessed 13 September 2023.

10. Memorandum of Understanding between the UK and Rwanda for the provision of an asylum partnership arrangement, 14 April 2022. Para 16.1.

11. ‘One-way ticket to Rwanda for some UK asylum seekers’ *BBC News* (14 April 2022) <<https://www.bbc.co.uk/news/uk-politics-61097114>> accessed 15 September 2023.

crossing and vastly reduce the numbers who do so.¹² However, research does not support this outcome.¹³ From the perspective of the UK government, therefore, it is essential that their Rwanda asylum deal becomes operational to allow their stated plan to deter asylum seekers from crossing the English Channel to take effect.

Legal challenges

Around 130 asylum seekers were initially issued with notices of intent to remove them to Rwanda with the first flight chartered to take off on 14 June 2022. Several legal challenges to both individual notices of intent and the policy as a whole were initiated by individual immigration lawyers and interested NGOs¹⁴ as well as the PSC Trade Union which represents around 80% of Home Office staff.¹⁵ The High Court gave permission to a number of the Applicants and the parties involved sought an interim injunction, first from the High Court and later the Court of Appeal, to prevent removal to Rwanda whilst a substantive decision in the litigation was outstanding. Both applications were unsuccessful. On 14 June 2022, the date that the flight was due to depart, the Supreme Court refused permission to appeal to itself on this issue and all domestic remedies were exhausted.¹⁶

Several of the legal teams then looked to the European Court of Human Rights and applied for an urgent measure¹⁷ (which has the same effect in practical terms as an interim injunction) under Rule 39 on the grounds that there was an imminent risk of irreversible harm contrary to Article 3 of the European Convention on Human Rights (ECHR).¹⁸ At around 10 p.m. on 14 June 2022 – whilst six of the asylum seekers involved in the litigation were boarded onto a plane bound for Rwanda on the runway at MoD Boscombe Down – the European Court of Human Rights issued a Rule 39 urgent measure citing ‘serious triable issues’ in the outstanding litigation and with regard to country conditions in and risk of refoulement from Rwanda, as well as there being no mechanism to enforce the return of deported asylum seekers to the UK in the event that the policy was found to be unlawful.¹⁹ The UK government was bound to comply with the Court’s judgment and the plane did not take off.²⁰

In December 2022, the High Court ruled that the Rwanda policy was lawful but that it had been wrongly applied in the individual cases before it and quashed those decisions.²¹ The litigation as to the lawfulness of the policy as a whole continued in the Court of Appeal. In June

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12. Suella Braverman, Migration and Economic Development Partnership (Volume 735, Hansard, 29 June 2023) <<https://hansard.parliament.uk/commons/2023-06-29/debates/6D789210-ABC0-4694-8F9B-830B494CFE39/MigrationAndEconomicDevelopmentPartnership>> accessed 13 September 2023 clm 512.
 13. Madeline Gleeson and Natasha Yacoub, ‘Cruel, costly and ineffective: the failure of offshore processing in Australia’ (Policy Brief 11, Kaldor Centre) August 2021.
 14. Detention Action, Care4Calais and others.
 15. Emma Brazell, ‘Judges reject last-ditch bid to block Rwanda flight take off tomorrow’ *The Metro* (13 June 2022) <<https://metro.co.uk/2022/06/13/judges-reject-last-ditch-bid-to-block-rwanda-flight-take-off-tomorrow-16820628/?ito=socialmetrouktwitter>> accessed 15 September 2023.
 16. Supreme Court judgment to refuse permission to appeal in R (NSK (Iraq)) v SSHD, 14 June 2022.
 17. For more information, see: European Court of Human Rights ‘Fact Sheet – Interim measures’ (December 2022).
 18. NSK v UK (app no: 28774/22) ECHR 197 (14 June 2022).
 19. NSK v UK (app no: 28774/22) ECHR 197 (14 June 2022).
 20. Joseph Lee and Doug Faulkner, ‘Rwanda asylum flight cancelled after legal action’ *BBC News*, (15 June 2022) <<https://www.bbc.co.uk/news/uk-61806383>> accessed 15 September 2023.
 21. AAA and others v SSHD [2022] EWHC 3230 (admin).

2023, the Court of Appeal ruled that the policy to remove asylum seekers to Rwanda in its current format was unlawful and contrary to Article 3 ECHR because the asylum system in Rwanda is not sufficient and there is a risk of refoulement to asylum seekers taken to Rwanda to have their claims considered there.²² At the time of writing, permission to appeal to the Supreme Court has been granted to the Home Secretary.

The blame game and flawed policy-making

The Court of Appeal's finding that the Rwanda deal as currently formatted is unlawful has, as stated above, rendered the implementation of the duty to remove asylum seekers to 'safe' third countries in the Illegal Migration Act unenforceable. This has caused the government to go on the defensive and launch attacks against anyone in civil society they perceive as opposing their plan. Throughout the course of the Rwanda litigation through the courts, the Home Secretary has ramped up the rhetoric on the role of the European Convention on Human Rights and the court in Strasbourg, stating that they are at odds with 'British values'.²³ This is despite a recent poll indicating that 77% of the population are not in favour of the UK leaving the ECHR.²⁴ Government rhetoric has also targeted the motivation and remuneration of immigration lawyers. This is despite a total crisis in access to qualified lawyers for asylum seekers,²⁵ extremely low legal aid rates for asylum law work²⁶ and many immigration lawyers already fearing for their personal safety.²⁷

The Home Secretary Suella Braverman has openly stated that, although she expects the Supreme Court to side with her position that the Rwanda deal is lawful, if the government is 'thwarted' they are prepared to do 'whatever it takes' to action the Rwanda deal policy, displaying a total disregard for the principles of the separation of powers and independence of the judiciary.²⁸ However, the Home Secretary's expressed view is at odds with the decision-making

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22. See principles in *Soering v UK* (app no: 14038/88) (1989) and *Ilias and Ahmed v Hungary* (app no: 47287/15) (2019), and the Court of Appeal judgment *AAA and others v SSHD* [2023] EWCA Civ 745.
 23. See for example 'European court at odds with British values, says Suella Braverman', *BBC News* (10 March 2023) <https://www.bbc.co.uk/news/uk-politics-64907772> accessed 15 September 2023, Matthew Weaver, 'Suella Braverman says 'we will do whatever it takes' if Strasbourg thwarts Rwanda plan' *The Guardian* (28 August 2023) accessed 15th September 2023.
 24. 'Poll reveals marginal support in UK for ECHR withdrawal' (*Irish Legal News*, 21 August 2023) <<https://www.irishlegal.com/articles/poll-reveals-marginal-support-in-uk-for-echr-withdrawal>> accessed 08 September 2023.
 25. Jo Wilding, New Freedom of Information data indicates half of asylum applicants are unable to access legal aid representation, *Refugee Law Initiative – School of Advanced Studies*, (4 November 2022) <<https://rli.blogs.sas.ac.uk/2022/11/04/new-freedom-of-information-data-indicates-half-of-asylum-applicants-are-unable-to-access-legal-aid-representation/>> accessed 15 September 2023.
 26. See, for example, ILPA and Public Law Project, 'ILPA/PLP joint statement on the government's response to the recent consultation on immigration legal aid fees' (23 January 2023) <https://publiclawproject.org.uk/content/uploads/2023/01/230123_New-Fees-for-New-Services-consultation-response-ILPA-PLP-statement.pdf> accessed 18 September 2023.
 27. Diane Taylor, 'Man faces terror charge over alleged attack at immigration law firm' *The Guardian* (23 October 2020) <<https://www.theguardian.com/uk-news/2020/oct/23/man-faces-terror-charge-over-alleged-attack-at-immigration-law-firm>> accessed 13 September 2023, Rowena Mason and Aletha Adu, 'Government attacks on lawyers degrading, say former Tory law officer' *The Guardian* (11 August 2023) <<https://www.theguardian.com/uk-news/2023/aug/11/government-attacks-on-lawyers-degrading-and-disgusting-say-former-tory-law-officers>> accessed 11 September 2023.
 28. Suella Braverman, *Today*, Radio 4, 28 August 2023 <<https://www.bbc.co.uk/sounds/play/m001q0mp>> accessed 18 September 2023. 2:20–2:24:30.

processes of her own department. The UK receives only a small number of asylum claims from Rwandan nationals, but they have a high rate of success. Available data demonstrates that the UK government has granted asylum to 58% of Rwandan asylum applicants in the last three years.²⁹ In addition, all the Country Policy and Information Notes (CPINs) on Rwandan asylum claims (that outline the Home Office's published country-specific policy on how to assess different categories of asylum claims) were withdrawn at the time the Rwanda asylum deal was signed and were re-published in May 2022.³⁰ It would be reasonable to speculate that the currently published Home Office CPINs on Rwanda may be influenced by a desire to present Rwanda as a 'safe' third country to which removal of asylum seekers is appropriate. However, this is not in keeping with objective sources of country information,³¹ or with serious concerns raised about the repressive conditions in Rwanda by multiple commentators in respect of the Rwanda asylum deal.³² In addition, the cost of removing an asylum seeker to Rwanda for consideration of their claim there is estimated to be £63,000 more per person than if their claim were determined in the UK.³³ Therefore, removing asylum seekers to Rwanda is vastly more expensive and undermines the government commitments to reduce the cost of administering the asylum system. The government states that the deterrent effect of the threat of removal to Rwanda will massively reduce the asylum budget, but such an outcome is not supported by the research of similar policies pursued in other countries.

Conclusion

The UK government's rhetoric has inextricably linked the duty to remove asylum seekers who arrive in the UK by irregular means with the perhaps now doomed Rwanda asylum deal. Regardless of its likely unlawfulness, huge economic cost and probable ineffectiveness, in making 'Stop the Boats' one of the five pledges and key priorities for 2023, the government has nailed its flag to the mast. Any inability to achieve the stated aim must be blamed on others to deflect the unworkability of the policy – to date this includes the European Court of

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29. Jack Peat, 'Leaked figures show UK has granted asylum to dozens of Rwandans', *The London Economic* (22 August 2023) <<https://www.thelondoneconomic.com/news/leaked-figures-show-uk-has-granted-asylum-to-dozens-of-rwandans-355165/>> accessed 13 September 2023.
 30. Home Office CPIN list for Rwandan asylum cases, all published 9 May 2022 'Rwanda: country policy and information notes' *GOV.UK* <<https://www.gov.uk/government/publications/rwanda-country-policy-and-information-notes>> accessed 13 September 2023.
 31. For example, '2022 Country Reports on Human Rights Practices: Rwanda' *United States Department of State*, 'The State of the World's Human Rights 2022/23 (Rwanda)' *Amnesty International*. <<https://www.amnesty.org/en/location/africa/east-africa-the-horn-and-great-lakes/rwanda/report-rwanda/>> accessed 13 September 2023. 312–314, 'World Report 2022, Rwanda' *Human Rights Watch*, <<https://www.hrw.org/world-report/2022/country-chapters/rwanda>> accessed 13 September 2023.
 32. Victoire Ingabire Umuhoya, Rwanda is no refuge for UK asylum seekers, *Al Jazeera* (20 June 2023) <<https://www.aljazeera.com/opinions/2023/6/20/rwanda-is-no-refuge-for-uk-asylum-seekers>> accessed 13 September 2023, Lewis Mudge, UK's Rights Assessment of Rwanda Not Based on Facts, *Human Rights Watch* (12 May 2022) <<https://www.hrw.org/news/2022/05/12/uks-rights-assessment-rwanda-not-based-facts>> accessed 13 September 2023, Eloise Barry, Britain is sending asylum seekers to Rwanda. It sets a dangerous precedent, *Time* (14 June 2022) <<https://time.com/6187390/uk-rwanda-asylum-seekers-deportation/>> accessed 13 September 2023.
 33. The Home Office, *Illegal Migration Bill* (Impact Assessment, 2023 HO 0438). 124.

Human Rights, ‘lefty lawyers’ and other members of the ‘tofu-eating wokerati’.³⁴ Should the Supreme Court uphold the decision of the Court of Appeal and find the Rwanda asylum plan to be unlawful we can predict that our domestic courts will also suffer the brunt of the government’s ire. However, it is highly unlikely the government’s plan would ever in fact ‘Stop the Boats’ and until a less ideology-fuelled and more research-based policy is pursued it seems likely that criminal gangs will continue to ply their trade and many more innocent lives will be lost in the English Channel.

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34. Aubrey Allegretti, ‘Raab says court was wrong to block Rwanda deportation flight’ *The Guardian* (16 June 2022) <<https://www.theguardian.com/uk-news/2022/jun/16/dominic-raab-european-court-human-rights-rwanda-deportation-flight>> Accessed 11 September 2023; Rowena Mason and Aletha Adu, ‘Government attacks on lawyers degrading, say former Tory law officers’ *The Guardian* (11 August 2023) <<https://www.theguardian.com/uk-news/2023/aug/11/government-attacks-on-lawyers-degrading-and-disgusting-say-former-tory-law-officers>> accessed 11 September 2023, Haroon Siddique, ‘Top UK lawyer hits out at “authoritarian” attacks on legal profession’ *The Guardian* (10 September 2023) <<https://www.theguardian.com/law/2023/sep/10/top-lawyer-helena-kennedy-hits-out-at-authoritarian-attacks-on-legal-profession>>, accessed 13 September 2023, Suella Braverman, ‘House of Commons’ (Parliamentlive.tv, 18 October 2022) <<https://parliamentlive.tv/event/index/93474d66-43f3-43a2-b38e-2ad2dd65721c>> accessed 11 September 2023.