Cambridge Law Journal, **83(2)**, July 2024, pp. 206–209 © The Author(s), 2024. Published by Cambridge University Press on behalf of The Faculty of Law, University of Cambridge.
doi:10.1017/S000819732400028X

THE MEANING OF "SAFE" AND THE UK AND RWANDA ASYLUM PARTNERSHIP ARRANGEMENT

IN April 2022 the UK and the Republic of Rwanda ("Rwanda") agreed a Memorandum of Understanding (MOU) for the provision of an Asylum Partnership Arrangement. It provided for some asylum seekers arriving in the UK to be sent to Rwanda where their claims would be processed. On 8 June 2022 the United Nations High Commissioner for Refugees (UNHCR) published *Analysis of the Legality and Appropriateness of the Transfer of Asylum-Seekers under the UK-Rwanda Arrangement* expressing serious concerns that asylum seekers since transferred to Rwanda are at risk of refoulement (at [17]). Asylum seekers have challenged the policy in a number of cases, culminating in *AAA v SSHD* [2023] UKSC 42, [2023] 1 W.L.R. 4433, in which the Supreme Court unanimously held that it is unlawful.

In *AAA* the purported legal basis for the Secretary of State's policy was paragraphs 345A–D of the Immigration Rules, made in accordance with section 3 of the Immigration Act 1971. This provided that where an asylum seeker had the opportunity to apply for asylum in a "safe third country" but did not do so their application could be deemed inadmissible. Following which the asylum seeker could be removed to the safe third country where the opportunity to apply for asylum had arisen (if that country was willing to accept them), or to any other safe third country which agreed to accept them. The Rwanda policy was premised upon the notion that those facing removal had the opportunity to apply for asylum in a safe third country (usually, France) but had not done so, and Rwanda is a safe third country which has agreed to accept them. The legality of the policy was thus contingent on whether Rwanda is a "safe third country". The criteria for which were specified in paragraph 345B which included a requirement that the country respects the principle of non-refoulement that is, that refugees would not be returned to a country where their life or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion. In *AAA* the claimants argued that Rwanda is not a "safe third country" according to those criteria. The Divisional Court found procedural flaws but rejected the legality challenge. However, the majority of the Court of Appeal found the policy unlawful as there were substantial grounds for believing there were real risks that the asylum claims would not be properly determined and real risks of refoulement. The Court of Appeal granted permission to appeal.

Three questions were considered by the Supreme Court. The first was whether the Divisional Court had applied the wrong test. The second was whether the Court of Appeal was entitled to interfere with the Divisional Court's conclusion. The third was whether the Court of Appeal was

entitled to conclude there were substantial grounds for thinking that there was a real risk of refoulement.

In respect of the first question the Supreme Court unanimously found the Divisional Court *may* have applied the wrong test. The Supreme Court stated the correct test is "whether there are substantial grounds for believing that the removal of asylum seekers to Rwanda would expose them to a real risk of ill treatment, as a consequence of refoulement" (at [38]). Yet there were several passages in the Divisional Court judgment which suggested it saw its "function as one of *reviewing* the Secretary of State's assessment and deciding whether it was a tenable view, rather than *making its own assessment"* (at [39], emphasis added). The situation was complicated, however, by another passage in which the Divisional Court recognised that it must make its own assessment. Consequently, it was not easy to determine what test had been applied. Ultimately, the Supreme Court concluded that it was not necessary to determine this as the Court of Appeal was in any event entitled to interfere with the Divisional Court's conclusion (at [41]–[42]).

Turning then to the second question, the Supreme Court held the Court of Appeal was entitled to interfere as the Divisional Court had erred in its treatment of the evidence. Instead of evaluating the evidence the Divisional Court had deferred to the executive's assessment and stated it should only "go behind that opinion" if there was "compelling evidence to the contrary" (at [51]). The Supreme Court made it clear that courts are not "required to accept the government's evaluation of assurances unless there is compelling evidence to the contrary" (at [52]). In this respect it observed "the government is not necessarily the only or the most reliable source of evidence" (at [55]). Moreover, the court must bring to bear its own expertise and experience in evaluating evidence and assessing whether there are grounds for apprehending a risk, tasks which are "familiar judicial functions" (at [55]). In this respect the Divisional Court made two errors. The first was its failure to consider evidence that Rwanda had failed to abide by assurances given to Israel under a previous asylum partnership agreement. The second was its determination that the evidence of the UNHCR "carries no special weight". The Supreme Court found the evidence of the UNHCR was of "particular significance" due to its status, role, expertise and experience in Rwanda, and the fact its evidence was "essentially uncontradicted by any cogent evidence to the contrary" (at [64]–[70]). Consequently, its evidence "should not have been treated as dismissively as it was by the Divisional Court" (at [70]).

The third question was whether the Court of Appeal was entitled to conclude there were substantial grounds for thinking there was a real risk of refoulement. The Supreme Court found not only was the Court of Appeal *entitled* to conclude this, but agreed that there were substantial grounds for thinking that there was a real risk. Three factors led to that

conclusion (at [74]). First, the general human rights situation in Rwanda. Here the evidence included findings by a British court that Rwanda had instigated political killings, the UK's own criticism of Rwanda in January 2021 for "extrajudicial killings, deaths in custody, enforced disappearances and torture", advice provided by officials to ministers which stated that Rwanda had a poor human rights record, and incidents in which the Rwandan police had fired live ammunition at refugees (at [76]). The second factor was the operation of Rwanda's asylum system (at [77]–[94]). There were numerous problems with this which included the absence of a right to appeal in practice, a lack of judicial independence and independence within the legal profession, 100 per cent rejection rates for asylum applications of nationals from known conflict zones, and evidence of refoulement. The third was Rwanda's asylum agreement with Israel in which it had promised to comply with non-refoulement and failed to do so (at [95]–[100]). The Secretary of State argued that the failed Israel agreement was irrelevant. Unsurprisingly, the Supreme Court disagreed (at [100]).

Consequently, the Supreme Court found "substantial grounds for believing that there is a real risk that asylum claims will not be determined properly, and that asylum seekers will in consequence be at risk of being returned directly or indirectly to their country of origin" (at [105]). The policy was therefore unlawful (at [149]). The Supreme Court observed that "significant changes need to be made to Rwanda's asylum procedures, as they operate in practice, before there can be confidence that it will deal with asylum seekers sent to it by the United Kingdom in accordance with the principle of non-refoulement" (at [104]). It also observed that "[t]he necessary changes may not be straightforward, as they require an appreciation that the current approach is inadequate, a change of attitudes, and effective training and monitoring" (at [104]).

Since *AAA* the Government has agreed the *UK-Rwanda treaty: provision of an asylum partnership*. The Government also introduced *The Safety of Rwanda (Asylum and Immigration) Bill*, section 2(1) of which stated that "[e]very decision-maker must conclusively treat the Republic of Rwanda as a safe country" with section 2(2)(b) providing that this includes a court or tribunal, and section 2(3) providing that a court or tribunal must not consider a review, or an appeal brought on the grounds that Rwanda is not a safe country. The Bill faced stiff opposition in the House of Lords, but was eventually passed. The Lords were not content to accept that the Bill could simply state that Rwanda was "a safe country", it must instead contain a mechanism for establishing whether Rwanda is safe. They proposed a clause which provided that Rwanda "will be a safe country, when, and so long as, the arrangements provided for in the Rwanda treaty have been fully implemented and are being adhered to in

practice", coupled with a clause stating that that the Rwanda treaty would be "fully implemented" when the Secretary of State has laid before Parliament a statement from the independent Monitoring Committee confirming that the treaty objectives have been secured by the creation of the mechanisms listed in the treaty. The Lords also proposed a provision obliging the Secretary of State to consult the Monitoring Committee every three months and make a statement to Parliament if the advice of the Committee is that the treaty is not being adhered to in practice. In such circumstances the treaty would then cease to be treated as "fully implemented" and Rwanda would cease to be a "safe country" for the purposes of the Act. The Government opposed these amendments and they did not form part of the final Act. The position taken by the Lords was, however, in line with the Supreme Court, namely that it must be demonstrated that Rwanda is a "safe country", it cannot simply be deemed to be so by the Government.

KIRSTY HUGHES

Address for Correspondence: Clare College, Trinity Lane, Cambridge, CB2 1TL, UK. Email: kh391@cam.ac.uk