Public Law Project

Public Law Project evidence to House of Lords International Agreements Committee inquiry on UK-Rwanda Memorandum of Understanding

AUGUST 2022

Contents

Summary and recommendations

1. This response addresses questions 1, 2, 4 and 7 of the call for evidence, as that is where our expertise and experience lie.

Question 1

2. The primary implication of signing an agreement which asserts that it is not binding on either Party in international law is that the parties do not intend it to be a treaty governed by the international law of treaties or the rules of state responsibility for internationally wrongful acts, and not subject to any domestic rules on publication or parliamentary oversight of treaties. This is not an appropriate vehicle for any international instrument that engages individual rights, as it shows a lack of commitment to rights, justice and accountability.

3. Any international instrument that engages individual rights should be published and submitted for scrutiny by Parliament before it comes into force, whatever its form. In the longer term, the Government should work with other States towards agreeing a clear international instrument setting out what types of international arrangements should be MoUs and which should be treaties.

Question 2

4. If an international instrument becomes operational on signature, there is no opportunity for transparency or scrutiny between finalising the text and it coming into effect. For those that engage individual rights, the Government should seek to include a provision that they will enter into effect on a future date, or that the date they enter into effect is to be agreed in future.

Question 4

5. The constitutional right of access to justice is the mechanism by which all asylum seekers should be able to seek legal assistance and access the court. However, the speed of the Rwanda selection process means there is a high risk that individuals will be unable to access legal advice, properly put forward their case and access the court to challenge and prevent their relocation to Rwanda. Strong, effective safeguards which are monitored and subjected to independent scrutiny are needed to ensure the process allows individuals to have access to justice, otherwise any mechanisms to provide legal assistance prior to relocation to Rwanda risk being ineffective and meaningless.

Question 7

6. The Rwanda MoU imposes no legally binding or enforceable obligations on either party, so only political consequences can be imposed for a breach. Nor can individuals rely on its terms in any court. This raises serious questions about what would happen if Rwanda did not meet its assurances under the MoU. An example of the problems caused by such a lack of enforceability is the case of Yunus Rahmatullah, where the UK was unable to convince the US to keep its promise under an MoU to return a prisoner on request.

7. Although the Rwanda MoU contains monitoring mechanisms, these have not yet been set up. Even when/if they are, monitoring does not make up for a lack of enforcement. The question is: what will happen if monitoring uncovers any breaches? This is a question which even the leading case of Othman unfortunately did not address.

8. PLP's position is that the UK should never transfer asylum seekers to a third country where their rights may be at risk. Further, that the UK should not transfer persons to a third country in the absence of legally binding provisions on their treatment, and enforceable mechanisms for dealing with

any breaches of those provisions, including an independent supervision mechanism with the power to suspend transfers and ensure the safe return of transferees to the UK.

Q1. What are the implication of signing an agreement that asserts that it is not binding on either party in international law? Is the MoU an appropriate vehicle for this agreement?

Identifying non-binding MoUs

9. Many significant international arrangements are contained in instruments that are intended to be binding only as a matter of political or moral obligation, rather than treaties binding under international law. The efficacy of these instruments - often called Memorandums of Understanding (MoUs) - therefore rests on the shared interests of the countries that have concluded them. In recent years scholars and practitioners across the globe have noted with concern the "relentless rise of the MoU", fearing that they may be sidelining treaties.[1]

10. The crucial factor determining whether a document is a treaty or not is whether the parties intend to be bound under international law.[2] This might be expressed clearly in the text, or it may be inferred from the language used (for example 'shall' in treaties but 'will' in non-binding arrangements)[3] or by the circumstances in which the instrument was concluded.[4] In some cases a document might first be considered a non-binding international arrangement and then be ruled to be a treaty.[5]

11. The Rwanda MoU explicitly states at paragraph 1.6 that "This Arrangement will not be binding in International law". This provision would carry significant - perhaps even conclusive - weight in any dispute about its status.

International law of treaties does not apply

12. The first major feature of non-binding MoUs is that they are not governed by the international law of treaties, as embodied in the 1969 Vienna Convention on the Law of Treaties (VCLT).

13. Non-binding MoUs do not therefore have to be performed in good faith (see Article 26 VCLT), and can be breached without legal consequences (see below). They can also remain entirely secret, as the international requirements to register and publish treaties (Article 80 VCLT and Article 102 Charter of the United Nations) do not apply.

Rules of state responsibility for internationally wrongful acts do not apply

14. Under customary international law, legal consequences flow from the breach of any international obligation. For example, the 'wronged' state may demand restitution or reparation, or take (proportional) countermeasures for alleged breaches of a bilateral treaty. These 'rules of state

[1] See for example Curtis Bradley, Jack Goldsmith and Oona Hathaway, 'The Rise of Nonbinding International Agreements: An Empirical, Comparative, and Normative Analysis', University of Chicago Law Review, Vol. 90, 2023, 1 February 2022; Anthony Aust, 'Modern Treaty Law and Practice', 3rd edition, Cambridge University Press, 2013, 28

[2] Anthony Aust, 'Modern Treaty Law and Practice', 3rd edition, Cambridge University Press, 2013, 30.

[3] Foreign, Commonwealth and Development Office, Treaties and MOUs: Guidance on Practice and Procedures, last updated 22 March 2022, p17

[4] See for example *Aegean Se Continental Shelf Case (Greece v Turkey)*, ICJ Reports (1978) p40 at pp39-44

[5] See for example *Somalia v Kenya*, International Court of Justice, 2 February 2017

responsibility' do not apply to non-binding MoUs.[6]

Domestic rules on publication and parliamentary oversight do not apply

15. Non-binding MoUs are not subject to the UK's (minimal) provisions on publication and parliamentary oversight of treaties in Part 2 of the Constitutional Reform and Governance Act 2010 (CRAG). The Government can therefore bring them into effect without publicaation, or involving or even notifying Parliament. Nor is there a requirement for explanatory information or impact assessments. They are a purely executive instrument.

16. The 1924 Government statement that first set out the UK rules on publishing treaties for parliamentary scrutiny also stated that Parliament should also scrutinise important non-binding MoUs.[7] However, the current Government asserts that MoUs are "not routinely submitted to parliamentary scrutiny".[8]

17. Although the UK-Rwanda MoU was published, this only happened on the day it came into effect (14 April 2022). Parliament thus had no opportunity to scrutinise or object to it before it was in operation. Even if the current inquiry recommends a debate and vote on the MoU, and these take place, a negative vote would have no binding force. None of the other parliamentary activities on the MoU have had any binding effect either.[9]

18. The lack of any parliamentary imprimatur for an MoU may affect the intensity of its scrutiny by the courts. The analogy here is statutory instruments, where a long line of cases has held that the intensity of the courts' review of delegated legislation will depend on whether and to what extent the measure had been approved by Parliament.[10] Parliament has neither approved the UK-Rwanda MoU, nor judged it appropriate despite its effects on rights.

When does the UK use non-binding MoUs?

19. Governments have complete discretion over whether to write an international instrument as a treaty or as a non-binding MoU. There are no internationally accepted rules around which to use when, so the stronger negotiating partner's view is likely to win out. The content of an instrument is not generally a guide to its status,[11] nor is its importance: some treaties are very slight or technical and some MoUs are extremely important politically.

20. FCDO guidance suggests that MoUs are used where "it is considered preferable to avoid the

---

[6] International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001, General commentary, para 4(c)
[7] HC Deb 1 April 1924 cc2004-5
[8] Letter from Dominic Raab to Lord Goldsmith, 26 January 2021
[9] See for example: Home Affairs Committee, Oral evidence: Migration and asylum (HC 197, 2021-22); Home Affairs Committee, Oral evidence: Work of the Home Office (HC 200, 2021-22); Joint Committee on Human Rights, Oral evidence: The UK-Rwanda Migration and Economic Development Partnership and Human Rights (HC 293, 2021-22); Public Accounts Committee, Oral evidence: Police uplift programme/Ministerial direction on Rwanda, HC 1215, 2021-22; Home Office oral questions HC Deb 25 April 2022 cc453-4; Lords Private Notice Question HL Deb, 25 April 2022 cc15-19; FCDO oral questions HC Deb 26 April 2022 cc563-5; Home Office Urgent Question HC Deb 13 June 2022 cc35-46; Home Secretary oral statement HC Deb 15 June 2022 cc291-313; Home Office oral statement, HL Deb, 15 June 2022 cc1588-99; Home Office oral questions HC Deb 20 June 2022 cc543-4;
[10] *R (Salvato) v Secretary of State for Work and Pensions* [2021] EWCA Civ 1482 at [80] onwards; *R (SG and JS) v Secretary of State for Work and Pensions* [2015] UKSC 16 at [94]; *Bank Mellat v H M Treasury (No 2)* [2013] UKSC 39 at [44]. See also *R (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26 at [182-184]
[11] Anthony Aust, 'Modern Treaty Law and Practice', 3rd edition, Cambridge University Press, 2013, 32

formalities of a treaty".[12] The Government told this Committee in 2021 that MoUs "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".[13]

21. A group of UK MoUs that is somewhat related to the UK-Rwanda MoU is those on 'deportation with assurances' (DWA). These are diplomatic assurances aimed at allowing the deportation of terrorist suspects to countries where there is a risk of torture or ill treatment. Between 2005 and 2011, the UK negotiated six such generic assurances, which were subject to much litigation.[14]

22. Another group of international instruments concerning the transfer of persons is readmission agreements. These set the conditions for a state to transfer a person whose entry or residence is illegal to another state where they have citizenship or residence. UK practice here is mixed: some are treaties[15] and others are MoUs.[16]

23. Extradition arrangements are normally set out in treaties rather than MoUs. Although assurances against ill treatment have long featured in the extradition context, this is said to reflect the greater procedural protections against extradition than against deportation.[17]

Is an MoU an appropriate vehicle for this agreement?

24. No, it is not, primarily because its terms cannot be legally enforced. This shows a lack of commitment to rights and justice. Further, choosing an MoU avoided even the minimal parliamentary oversight to which treaties are subject.

25. The Rwanda MoU contains treaty-like features, for example obligations that are specific enough that performance against them could be assessed.[18] The partnership also incurs significant financial commitments,[19] which would usually require a treaty to ensure that both sides are held to specific obligations.[20]

26. The Government asserts that an MoU rather than a treaty was chosen to allow changes to be made easily.[21] However, there are ways of amending treaties easily, for example by setting up joint committees under the treaty that are authorised to make amendments that do not need ratification.

27. For such an ethically, politically, financially and legally controversial policy, the government should be

---

[12] Foreign, Commonwealth and Development Office, Treaties and MOUs: Guidance on Practice and Procedures, last updated 22 March 2022

[13] HM Government, Government response to the House of Lords International Agreements Sub-Committee Report: Treaty Scrutiny, Working Practices

[14] See David Anderson QC and Clive Walker QC, Deportation With Assurances, Cm 9462, July 2017

[15] See for example the February 2022 UK-Serbia Agreement on the Readmission of Persons Residing Without Authorisation and the July 2021 UK-Albania Agreement on the Readmission of Persons

[16] See Home Office, 'New deal with Nigeria to deter illegal migration', 4 July 2022; Letter from Tom Pursglove to Dame Diana Johnson, 15 June 2022; Written Ministerial Statement JCWS369, 16 December 2016

[17] Metcalfe, E., 'The False Promise of Assurances against Torture' (2009) 6 JUSTICE Journal 63, 65, quoted in David Anderson QC and Clive Walker QC, Deportation With Assurances, Cm 9462, July 2017 at para 5.3

[18] Jill Barrett and Robert Beckman, 'Handbook on Good Treaty Practice', Cambridge University Press, 2020, 107

[19] See oral evidence from Home Office MInister Tom Pursglove to House of Commons Home Affairs Committee, 11 May 2022; Government accused of 'outrageous cover-up' after refusing to reveal cost of Rwanda plan', *Independent*, 2 July 2022

[20] Jill Barrett and Robert Beckman, 'Handbook on Good Treaty Practice', Cambridge University Press, 2020, 111

[21] Letter from Baroness Williams of Trafford to Baroness Chakrabarti and the Earl of Kinnoul, 3 May 2022, DEP2022-0381

accountable to parliament. It should not be able to avoid that scrutiny and accountability simply by choosing a different type of international agreement.[22]

28. Moreover, the MoU is only one of several international instruments relating to the Rwanda Migration and Economic Development Partnership. The Home Office disclosed during court challenges that two 'Notes Verbales' accompanied the MoU but were not published.[23] These are still not published although their existence and scope are now in the public domain.

Recommendations

29. Any international instrument that engages individual rights should be published and submitted for scrutiny by Parliament before it comes into force, whatever its form. This would help avoid any temptation to create a non-binding MoU when a public, scrutinised treaty would be more appropriate.

30. In the longer term, the Government should work with other States towards agreeing a clear international instrument setting out what types of international arrangements should be MoUs and which should be treaties. This would increase confidence that an instrument that should be a treaty is drafted as one, and therefore subject to the international law of treaties, rules on state responsibility and domestic rules on parliamentary oversight.

Q2. What are the implications of a significant MoU, such as this, becoming operational on signature? In what circumstances should there be a gap between signature and "entry into force"?

31. The main implication of an MoU becoming operational on signature is that there is no opportunity for transparency or scrutiny between finalising the text and coming into effect. Treaties can also become operational on signature, but this is possible only if there is no need for new domestic legislation or other domestic procedures.[24] Both treaties and MoUs may contain express provisions about entry into force, for example setting a future date or saying that the date will be agreed in future.

Recommendations

32. For MoUs with significant implications for rights or domestic legislation, the Government should seek to include a provision that they will enter into effect on a future date or that the date they enter into effect is to be agreed in future, to allow time for parliamentary scrutiny.

[22] See Arabella Lang, 'Rwanda MoU: scrutiny is the oxygen of democracy', Law Society Gazette, 16 June 2022
[23] *R (A) v Secretary of State for the Home Department*, Queen's Bench Division (Administrative Court) 2022 WL 02111491, 10 June 2022, para 6
[24] Anthony Aust, 'Modern Treaty Law and Practice', 3rd edition, Cambridge University Press, 2013, 95

Q4. Given Article 5.1 of the MoU does not impose an obligation on the UK to provide legal assistance during the screening of asylum seekers before relocation to Rwanda, what mechanisms are there for legal advice to be provided to the individuals selected for relocation?

Access to Justice

33. Any removal policy or process, including the scheme to relocate individuals to Rwanda, must guarantee that individuals are provided with legal advice and assistance prior to their removal from the UK. The legal obligation to do so most clearly arises at common law under the constitutional right of access to justice.

34. Access to justice means that individuals facing removal to Rwanda must be given sufficient time to: access legal advice; put forward their case to the Home Office; seek legal advice on negative decisions on their case; access the court to challenge decisions; seek an injunction from the court preventing removal (if necessary).

Access to Legal Advice

35. In the context of the Rwanda relocation policy, most individuals are likely to be detained prior to removal to Rwanda and are likely to be eligible for legal aid. Where legal aid is available, the Lord Chancellor has a statutory duty to make arrangements to ensure it is accessible. The primary method of accessing legal advice in immigration detention centres is through the Detained Duty Advice Scheme (DDAS) where individuals can access 30 minutes of free legal advice on their case at an advice surgery from a legal aid lawyer. The purpose of the surgery is for the lawyer to ascertain the basic facts of the individual's case, advise on bail and decide what further action can be taken, if any. At the end of the 30 minutes the lawyer must provide their advice in writing to the individual and determine whether they qualify for legal aid - if so the lawyer should represent the person under legal aid.

Are the mechanisms effective?

36. The critical issue is whether in practice the process prior to an asylum seeker's removal to Rwanda allows for all these steps to be taken. This issue will be considered by the courts in the judicial review test cases on the Rwanda policy which are due to be heard by the court in the Autumn of 2022. We outline some of the key concerns below.

37. The timescales under the Rwanda policy are very tight. Any representations about whether a person should not be removed to Rwanda must be submitted to the Home Office within 7 days of service of a Notice of Intent. A decision about whether the asylum claim is inadmissible and whether the person should have their claim considered in Rwanda is served within days of that deadline expiring. At the same time the individual may be served with a notice of removal - giving them 5 working days' notice of the date that they will be put on a plane to Rwanda.

38. In order to properly advise their client, make representations to the Home Office and, if necessary, access the court, the lawyer will need to conduct investigations and request and await disclosure of a variety of documents about their client. The lawyer will need to take detailed instructions on those documents and on all relevant issues from their client. It may be necessary to instruct experts on specific issues arising from the individual's case, such as medico-legal reports, expert reports on country conditions in any relevant country (e.g. Rwanda or the individual's country of origin), or documents in relation to any factual disputes, (e.g. their journey to the UK, or whether a person is a child or an adult). It also takes time to apply for legal aid to bring a judicial review of that decision and

for the Legal Aid Agency to make a decision on that application.

39. Some asylum seekers will be particularly vulnerable and will include: victims of torture or mistreatment, victims of trafficking, children whose age is disputed, those with fragile mental health or suffering from mental health conditions as a consequence of their experiences prior to arriving in the UK and also because they may fear what may happen to them if removed to Rwanda. It may be difficult for them to disclose very sensitive information or traumatic events they have suffered to a lawyer they have only just met and within a very short period of time – particularly as the policy has been applied to people who have only just arrived in the UK. Putting forward all relevant matters is necessary otherwise the Home Office will be unable to make a fully informed and lawful decision about whether to relocate a person to Rwanda.

40. The time it takes is increased where an interpreter is required – which will be in most cases. It also takes time to arrange and attend visits to detention centres and the time provided for appointments will be far more limited than for someone who is at liberty. Contacting clients by phone may not always be straightforward, problems include poor signal in some areas of some detention centres, and there are sometimes difficulties or delays in sending or receiving important documents to clients in detention, which may be essential to progress a case.

41. There may be a variety of decisions susceptible to judicial review in addition to the decision about whether a persons' asylum claim is admissible and whether they are suitable for transfer to Rwanda. Each case will depend on its facts, but these may include: decisions disputing a minor's age; certification decisions of human rights claims which remove an in-country right of appeal; negative 'reasonable grounds' to treat a person as a victim of trafficking; decisions refusing to treat further submissions as a fresh asylum/human rights claim; detention; a refusal of the Home Office to allow more time for a person to have effective access to justice.

42. Therefore, time is of the essence and very prompt access to legal advice is required. Even a short delay in obtaining legal advice can mean there may not be enough time for the lawyer to take instructions, obtain all the key documents, prepare representations and access the court to challenge a decision. However, in the DDAS it is not unusual for it to take a few days before a person can access the advice surgery. We understand that individuals who were facing removal to Rwanda experienced these difficulties.

43. We also understand that where lawyers for the individuals who were at risk of removal to Rwanda asked the Home Office for an extension of time (as they did not have enough time to take all the necessary steps), it is understood that in practice at the most only a single short extension of between 3 to 7 days was granted.

44. In short it seems almost impossible for all of the necessary steps to be taken and for there to be effective access to justice within the very short time frames prior to removal to Rwanda.

Recommendations

45. The Home Office must have strong, effective safeguards that are properly applied to ensure that a person has had adequate time to take all of the necessary steps and to access the court following any refusal decisions, so that they will not be removed from the UK and denied their constitutional right of access to justice to challenge that decision.

46. Monitoring of whether asylum seekers have effective access to justice is essential, otherwise the government will not know whether or not the process is violating that right or whether there is a high risk of it doing so. The Home Office and Ministry of Justice

(which is responsible for ensuring access to legal assistance under the legal aid scheme) must gather and publish data on how effectively the scheme allows effective access to justice.

47. The way in which the Rwanda scheme is operated prior to relocation should be subject to periodic independent scrutiny by the Independent Chief Inspector of Borders and Immigration and HM Chief Inspector of Prisons (who inspects immigration detention centres), to assess the extent to which it allows individuals access to justice.

Q7. Does the agreement impose any binding or enforceable obligations on either party? Given the arrangement asserts it is non-legally binding, and the wording of Article 2.2, what are the consequences if either party were to breach any of their assurances under the arrangement, and what recourse would be available to those affected?

Non-binding MoUs are not legally enforceable

48. The most significant feature of a non-binding MoU is that, unlike a treaty, the parties cannot enforce it under international law. They cannot take the matter to an international court or tribunal, or impose the countermeasures that they might be entitled to if a treaty were breached (see above).[25] Either side can breach the terms of an MoU, or walk away, without any legal penalty.[26]

49. By contrast, a material breach of a bilateral treaty by one of the parties entitles the other to terminate the treaty or suspend its operation in whole or in part (Article 60 VCLT), as long as any procedures or dispute resolution procedures agreed between the parties are followed (Articles 65-68 VCLT). Many treaties will contain their own binding provisions for settling disputes and remedies in case of a breach, and some allow individuals to enforce rights under them, but non-binding international arrangements by definition cannot.[27]

50. While the Rwanda MoU states that the UK and Rwanda will make "all reasonable efforts" to resolve disputes,[28] it states explicitly that "neither Participant will have recourse to a dispute resolution body outside of this". The two countries "assure one another that the understandings reached in this Arrangement will be met in respect of all Relocated Individuals"[29] - but the MoU provides no consequences for any breach. "For the avoidance of doubt", paragraph 2.2 of the MoU adds that the arrangement is not justiciable in a court of law, and that it does not confer individual rights or obligations.

51. This raises serious questions about what would happen if Rwanda did not meet its assurances under the MoU, for example to ensure that a relocated person was protected from inhuman and degrading

[25] Anthony Aust, 'Modern Treaty Law and Practice', 3rd edition, Cambridge University Press, 2013, 50
[26] In some circumstances and depending on its precise terms of an MoU, a unilateral declaration may be considered binding in international law as a result of the principle of good faith, or a state might be estopped from going back on its statement in an MoU if another state has in good faith relied on that statement to its detriment, but "the exact scope of the international law doctrine [of estoppel] is far from settled" - Anthony Aust, 'Modern Treaty Law and Practice', 3rd edition, Cambridge University Press, 2013, 51
[27] Jill Barrett and Robert Beckman, 'Handbook on Good Treaty Practice', Cambridge University Press, 2020, 107
[28] para 22.1
[29] para 4.1

treatment and refoulement,[30] or to return a relocated person to the UK following a request from the UK.[31]

52. The European Court of Human Rights (ECtHR) was alive to this when it granted interim measures preventing some of the proposed removals under the MoU until the domestic courts have ruled on its lawfulness. It held that there was an "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".[32] Its assessment of enforceability differed from that of the High Court, which looked instead at the political enforceability of the MoU.[33]

53. Responding to questions about the remedies available to the UK Government if assurances given in the agreement are not met, the Home Office Minister Tom Pursglove said that "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".[34]

54. The UN refugee agency UNHCR considers that whether a bilateral transfer arrangement is legally binding, challengeable, and enforceable in a court of law is an important consideration when assessing its compatibility with refugee protection obligations under international law.[35] It notes that the UK-Rwanda MoU is not legally binding, and concludes that it "does not meet the requirements necessary to be considered a lawful and / or appropriate bilateral transfer arrangement".[36]

55. Similarly, the recent Refugee Law Initiative Declaration on Externalisation and Asylum states that bilateral agreements for third country asylum processing should be able to protect rights:

> "International agreements concerning third country processing must take a form suitable for protecting transferees' rights and ideally be binding under international law."[37]

56. The lack of legal enforceability of MoUs - and the serious impact that can have on individuals - was brought home vividly by the case of Yunus Rahmatullah.[38] Mr Rahmatullah was taken prisoner by the British Army in Iraq, transferred to US authorities and taken to the Bagram air base in Afghanistan, where he was allegedly mistreated. The UK sought his return under an MoU with the US that allowed for the return of prisoners on request - but the US refused. Even when the Court of Appeal granted habeas corpus, and the UK government sent a letter of request to the US authorities, the request was ignored. The result was that the UK government acted unlawfully, because it was unable to convince a close ally to keep its political promise[39] and there was no way of legally enforcing it.

---

[30] para 9.1.1
[31] para 11.1
[32] Press release ECHR 197 (2022), 14 June 2022
[33] *R (A) v Secretary of State for the Home Department*, 2022 WL 02111491, 10 June 2022
[34] Home Affairs Committee, Asylum and migration oral evidence, HC 197, 11 May 2022 Q93
[35] UNHCR, Guidance Note on bilateral and/or multilateral transfer arrangements for asylum-seekers, May 2013
[36] UNHCR Analysis of the Legality and Appropriateness of the Transfer of AsylumSeekers under the UK-Rwanda arrangement, 8 June 2022
[37] 'Refugee Law Initiative Declaration on Externalisation and Asylum', International Journal of Refugee Law, 28 June 2022
[38] [2012] UKSC 48. For subsequent civil actions, see *Belhaj v Straw and others, Rahmatullah (No 1) v Ministry of Defence* **[2017] UKSC 3;** *Rahmatullah (no.2) v Ministry of Defence, Mohammed v Ministry of Defence* [2017] UKSC 1
[39] David Anderson QC and Clive Walker QC, Deportation With Assurances, Cm 9462, July 2017, para 5.41

Monitoring mechanisms

57. The UK-Rwanda MoU provides for a Joint Committee (of UK and Rwanda government representatives)[40] and an independent Monitoring Committee[41] to oversee Rwanda's promises on reception arrangements and accommodation (paragraph 8), asylum processing (paragraph 9) and treatment post asylum decision (paragraph 10). This may be part of an attempt to make the agreement 'Othman-proof' (see below). But the Monitoring Committee has not yet been set up, nor is there a date for doing so.[42]

58. Two unpublished Notes Verbales between the UK and Rwanda address the asylum process in Rwanda, and practical support before and after an asylum decision.[43] It is not clear what these secret documents add or how their standards could be assessed or upheld.

59. The effectiveness of any monitoring mechanism is a vital question that has arisen frequently in the context of DWA. The UN Human Rights Committee has not entirely ruled out the use of diplomatic assurances but has stressed the need for the transferring state to be in a position to effectively monitor people's treatment after transfer:

> "the more systematic the practice of torture or cruel, inhuman or degrading treatment, the less likely it will be that a real risk of such treatment can be avoided by diplomatic assurances, however stringent any agreed follow-up procedure may be. The State party should exercise the utmost care in the use of such assurances and adopt clear and transparent procedures allowing review by adequate judicial mechanisms before individuals are deported, as well as effective means to monitor the fate of the affected individuals."[44]

60. The UN Committee Against Torture has endorsed that balancing exercise, but concluded that it meant diplomatic assurances should never be used:

> "Therefore, the Committee considers that diplomatic assurances are unreliable and ineffective and should not be used as an instrument to modify the determination of the Convention".[45]

61. The ECtHR has attempted a practical assessment of DWA. This is most clearly set out in its 2012 judgment in the case of Othman (Abu Qatada) v UK.[46] It considered that DWA could be legitimate in principle, but set out six factors for assessing the quality of the assurances, and five further factors for assessing whether, in the light of the receiving state's practices, they can be relied upon (paragraph 189)

62. But crucially, as Clive Walker, Professor of Criminal Justice Studies at the University of Leeds, has pointed out, the ECtHR in Othman made no mention of how to enforce an MoU:

---

[40] para 21
[41] para 15
[42] See House of Lords written question 900, answered 27 June 2022
[43] *R (A) v Secretary of State for the Home Department*, 2022 WL 02111491, 10 June 2022, para 6
[44] Human Rights Committee, Consideration of reports submitted by states parties under Article 40 of the Covenant, Sixth Periodic Report, United Kingdom of Great Britain and Northern Ireland (CCPR/C/GBR/CO/6, Geneva, 30 July 2008) para.12
[45] Committee against Torture, Concluding observations on the fifth periodic report of the United Kingdom, adopted by the Committee at its fiftieth session (CAT/C/GBR/CO/5, 24 June 2013) para.18
[46] Application 8139/09 Othman (Abu Qatada) v United Kingdom, ECtHR 17 January 2012

> "Without a treaty, it may be hard to envision what 'enforcement' would entail. The sending state can of course refuse to render any more prisoners, if one is abused, which might be a source of irritation to the receiving state. But the irritation of the sending state in not be able to remit troublemakers will probably be the greater. More to the point is how any remedy for broken promises would avail the subject rather than repairing diplomatic relations and reputation of the relevant states. Once the transfer is enforced, it will be hard to impose any effective remedy which will benefit the returnee."[47]

63. The Refugee Law Initiative has argued that an effective supervision mechanism should have the power to suspend the transfer of asylum seekers where there is substantial evidence of breaches of international obligations.[48] It would also have to be able to ensure the safe return of transferees to the UK. The Monitoring Committee under the Rwanda MoU can do neither of these.

Recommendations

64. PLP's position is that the UK should never transfer asylum seekers to a third country where their rights may be at risk. Further, that the UK should not transfer persons to a third country in the absence of legally binding provisions on their treatment, and enforceable mechanisms for dealing with any breaches of those provisions, including an independent supervision mechanism with the power to suspend transfers and ensure the safe return of transferees to the UK.

[47] David Anderson QC and Clive Walker QC, Deportation With Assurances, CM 9462, July 2017 at para 5.41
[48] Cantor et al, 'Externalisation, Access to Territorial Asylum, and International Law', *International Journal of Refugee Law*, 2022, Vol XX, No XX, 1-37, para 5.2.1

Public Law Project

Contact

Luke Robins-Grace
Communications Director
l.robins-grace@publiclawproject.org.uk

About PLP

Public Law Project is an independent national legal charity.

For over 30 years we have represented and supported individuals and communities who are marginalised through poverty, discrimination, or disadvantage when they have been affected by unlawful state decision-making.

Our vision is a world where the state acts fairly and lawfully. Our mission is to improve public decision making, empower people to understand and apply the law, and increase access to justice.

www.publiclawproject.org.uk/resources-search/