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The *Rwanda Case*: Testing the Limits of Judicial Competence

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Introduction

1. The policy of the previous UK government to remove asylum seekers to Rwanda (the Rwanda Policy) has attracted considerable debate and controversy. A judicial review case brought to challenge this policy, on the basis that Rwanda was not a safe country, revealed different attitudes amongst the judiciary in the UK's domestic courts on the question of whether they had judicial competence to adjudicate on the matter. This analysis reviews the rationale underpinning the findings of each court, concluding that both the Court of Appeal and the Supreme Court demonstrated a much more expansive approach towards their judicial competence compared with that exhibited by the High Court. This had profound implications ultimately for the outcome of the case. However, as a result of the Safety of Rwanda (Asylum and Immigration) Act 2024, that outcome was nearly jeopardised. Had there not been a change in government, this Act might also have had wider implications for the exercise of judicial competence in judicial review of alleged human rights breaches, and more generally for the rule of law.

2. The judicial review case was mounted in the High Court in 2022 by several asylum seekers who challenged the lawfulness of the Rwanda Policy. The Rwanda Policy refers to the then UK government's policy of proposed removal to Rwanda of asylum seekers, where such asylum seekers could have applied for asylum in another safe country before arrival in the UK.[1] This policy reflected the terms of an understanding between the UK and Rwanda, originally documented in a Memorandum signed in April 2022, and associated diplomatic correspondence (collectively, the Rwanda Agreement). The intention, under the Rwanda Agreement, was that asylum seekers selected for removal from the UK would have their application for asylum considered in Rwanda. If successful, they would have been allowed to make a new life in Rwanda. If unsuccessful, the asylum seekers *could* have been returned

[1]The Nationality and Borders Act 2022 amended the Nationality, Immigration, and Asylum Act 2002, s 77, making it easier to remove someone with a pending asylum claim to a 'safe' third country.

to their country of origin (on the basis that if the application was not allowed, that country was presumably safe for them, and they would be free from persecution).

3. The key question that the High Court and, subsequently, the Court of Appeal and Supreme Court, had to address was whether Rwanda could be considered a safe country for the purposes of the UK's obligations under the Human Rights Act 1998 (HRA). This required the courts to consider whether there were substantial grounds for believing that Rwanda might refoule asylum seekers. The principle of non-refoulement guarantees that no one should be returned to a country where they would face torture, cruel, inhumane or degrading treatment or punishment. Refoulement is deemed a breach, among other things, of art 3 of the European Convention on Human Rights (ECHR) and art 33(1) of the United Nations Convention relating to the Status of Refugees. If the UK government were found to be sending asylum seekers to a country where there was a significant risk of refoulement, the government would be considered to be in breach of s 6 of the HRA, which requires public authorities to comply with the ECHR. The High Court held that Rwanda was a safe country for these purposes. Both the Court of Appeal (by a majority) and the Supreme Court (unanimously) came to a different conclusion.

4. This analysis explores the rulings by the UK domestic courts on the issue of Rwanda's safety (collectively referred to as the *Rwanda Case*) which culminated in the Supreme Court decision in *R (AAA (Syria) and others) v Secretary of State for the Home Department*. [2] In doing so, it considers how the respective courts were influenced by the extent to which they took a restrictive or expansive view of their judicial competence (both institutional and constitutional) and the significant implications this had for the outcome of the case. The response of the government will then be evaluated, noting the constitutional ramifications of the Safety of Rwanda (Asylum and Immigration) Act 2024, with consideration given to whether the outcome of the *Rwanda Case* proved to be a pyrrhic victory, at least initially, and the effect it might have had on the exercise of judicial competence in future cases. Finally, the implications of the change of UK government on the Rwanda Policy will be considered.

The High Court decision

5. In *AAA and others v Secretary of State for the Home Department*,[3] the High Court ruled that Rwanda was a safe third country and there was not a substantial risk of refoulement by Rwanda. The court found that the Rwanda policy was therefore lawful under s 6 of the HRA. There was some debate subsequently in both the Court of Appeal and the Supreme Court as to whether the High Court had understood that its function, pursuant to the test established in *Soering v UK*,[4] was to make its *own*

[2][2023] UKSC 42, [2023] 1 WLR 433 (*Rwanda Case*, Supreme Court).
[3]*AAA and others v Secretary of State for the Home Department* [2022] EWHC 3230 (Admin), [2023] HRLR 4 (*Rwanda Case*, High Court).
[4](1989) 11 EHRR 439.

assessment of the risk of refoulement and, consequently, Rwanda's safety. Whilst the High Court did at least assess the human rights situation in Rwanda for itself (on which it determined that the situation was compliant so far as the claimants would be concerned),[5] nevertheless, its assessment of Rwanda's asylum system and the overall safety of Rwanda was deferential to the views of the Home Secretary. Underhill LJ observed this, in the Court of Appeal judgment, noting that the High Court prefaced much of its reasoning with the question of whether the Secretary of State was 'entitled to conclude'.[6] This, asserted Underhill LJ, was indicative of language more relevant to a conventional judicial review case than one which involved consideration of a breach of art 3 of the ECHR, pursuant to *Soering*.[7]

6. Judicial deference was similarly manifested in other statements in the High Court judgment – for example, 'the court's approach … will rest on a recognition of the expertise that resides in the executive to evaluate the worth of promises made by a friendly foreign state',[8] and in the assertion that the court could only go behind the opinion of a senior official in the Foreign, Commonwealth and Development Office if there was 'compelling evidence to the contrary'.[9] The latter statement was particularly puzzling, given that extensive and disturbing evidence was presented to the court by the United Nations High Commissioner for Refugees (UNHCR), which detailed concerns about serious, systemic deficiencies in Rwanda's asylum system, as well as breaches by the Rwandan government of assurances in a similar arrangement between Rwanda and Israel, and a history of refoulement (which had continued after the Rwanda Agreement had been signed). This was evidence that both the Court of Appeal and the Supreme Court were later to argue was compelling, as discussed further below.

7. In assessing the risk of refoulement by Rwanda, it was necessary for the High Court to consider the quality of the assurances given on this point by Rwanda to the UK government. The High Court should have assessed, for itself, whether those assurances could be relied upon in light of Rwanda's practices, following the approach laid down in *Othman v UK*.[10] It would have been appropriate, therefore, to evaluate not only what Rwanda promised, and the extent to which those assurances might be deemed credible in light of the longstanding bilateral relations between the UK and Rwanda, but whether Rwanda's record in abiding by similar assurances supported or undermined that credibility. The High Court, however, simply considered the reliability of the Home Secretary's assessment of the assurances in the Rwanda Agreement. It decided that this assessment was reliable and based on sufficient evidence.[11]

[5] *Rwanda Case*, High Court (n 3) [73]–[77] (Lewis LJ and Swift J).
[6] *AAA and others v Secretary of State for the Home Department* [2023] EWCA Civ 745, [2023] 1 WLR 3103 (*Rwanda Case*, Court of Appeal) [129(1)] (Underhill LJ).
[7] ibid [129] (Underhill LJ).
[8] *Rwanda Case*, High Court (n 3) [63].
[9] ibid [66] (Lewis LJ and Swift J).
[10] (2012) 55 EHRR 1 [189].
[11] *Rwanda Case*, High Court (n 3) [453].

In the court's view, the Home Secretary had done enough to satisfy her obligations to make a thorough investigation of all relevant generally available information. The emphasis was on deciding whether the Home Secretary's decision was legally flawed, not on whether there was a real risk of refoulement pursuant to *Soering*.

8. The court, moreover, seemed entirely unconcerned with the question of whether Rwanda's record in practice substantiated its written assurances. The court glossed over the Home Office's failure to investigate the terms and practical outcomes of an agreement between Rwanda and Israel[12] (the RI Agreement), and showed no interest itself in reviewing this agreement.[13] This was astonishing, given the similarities of the RI Agreement to the Rwanda Agreement. Like the Rwanda Agreement, the RI Agreement, though smaller in scope, provided for the removal of asylum seekers from Israel to Rwanda to have their claims processed. Evidence was presented by the UNHCR that Rwanda had recently breached undertakings to Israel in that agreement with regard to non-refoulement – evidence which the Court of Appeal was later to note was supported by other publicly available sources.[14] The High Court also skated over concerns raised by another body (the Independent Advisory Group of Country Information) which criticised a Home Office assessment of Rwanda as safe.[15]

9. Thus, in its deference to the views of the Secretary of State on Rwanda's safety and the adequacy of its asylum system, the High Court failed to apply the *Soering* test properly. The High Court justified its deferential approach to the government's views on the basis that both domestic and international case law provided that there was no obligation to give particular weight to evidence of the UNHCR.[16] This may have been a reasonable analysis of the general principle in case law but did not support the High Court's decision effectively to give *no* weight to it, particularly in the area of asylum and refugee law in which the UNHCR has been recognised to exercise a specific remit and expertise.[17] The High Court further attempted to justify its position by asserting that the UNHCR had augmented its evidence (in the form of three witness statements) by making additional submissions (through counsel) that Rwanda could not be relied on to comply with its obligations under the Refugee Convention. This, the High Court asserted, was 'surprising',[18] particularly given views published elsewhere by the UNHCR, principally in its July 2020 Universal Periodic Review (UPR) document, which gave no indication of the level of concern the UNHCR was now raising. As Underhill LJ alluded to in the Court of Appeal judgment, however, the views expressed in the UPR document centred primarily on the compliance of Rwandan law with international law, and less on whether, in practice, Rwanda's asylum system was

[12]ibid [68].
[13]ibid [67].
[14]*Rwanda Case* Court of Appeal (n 6) [102].
[15]*Rwanda Case*, High Court (n 3) [59].
[16]ibid [71].
[17]See e.g. *IA (Iran) v Secretary of State for the Home Department* [2014] UKSC 6, [2014] 1 WLR 384 [44]; *Al-Sirri v Secretary of State for the Home Department* [2012] UKSC 54, [2013] 1 AC 745 [36].
[18]*Rwanda Case*, High Court (n 3) [70].

adequate.[19] It was not reasonable therefore for the High Court to use this in defence of its dismissal of the UNHCR evidence.

10. In summary, the High Court took a restrictive view of its institutional competence to evaluate Rwanda's safety. Whilst the precise limits of the judiciary's institutional competence are not clearly defined, the overall rationale for such a limitation is that courts may, in relation to certain policy areas, be less well equipped than public authorities to challenge the suitability of that policy, due, for example, to a lack of resources and scope to consult,[20] or lack of access to relevant expertise or expert advice.[21]

11. The High Court judgment also indicated a more fundamental lack of confidence in the court's *constitutional* competence. This is related to the concept of institutional competence but more broadly concerns the boundaries within which the judiciary operate due to their lack of electoral accountability and the importance of respecting the executive's democratic legitimacy.[22] The specific limits of this competence are not clearly defined, however, and the extent to which judges are prepared to defer to policy makers is variable, as illustrated by the different rulings in the *Rwanda Case*. Near the outset of the High Court's judgment, the court indicated restrictive understanding of its constitutional competence in stating:

> The court is not responsible for making political, social or economic choices – for example– to determine how best to respond to the challenges presented by asylum seekers seeking to cross the Channel in small boats or by other means. Those decisions, and those choices, are ones that Parliament has entrusted to ministers. The approach of ministers is a matter of legitimate public interest and debate and, in this instance, has stirred public controversy about whether the relocation of asylum seekers to a third country such as Rwanda is an appropriate response to the problems that the government has identified. But those matters are not for the court. The role of the court is only to ensure that the law is properly understood and observed, and that the rights guaranteed by Parliament are respected.[23]

12. This reluctance to exercise constitutional competence demonstrated undue deference to the executive, because the question before the High Court, in determining whether a fundamental human right was breached by the Rwanda Policy, was one of law, not politics. An effective democracy requires judges to determine whether government and public authorities have exercised their powers and duties in a

[19] *Rwanda Case*, Court of Appeal (n 6) [143].
[20] See e.g. Patrick Hodge, 'The Scope of Judicial Law-making in Constitutional Law and Public Law' [2021] JR 17, which identifies wide ranging socio-economic policy involving contestable choices as a particular area where judges should exercise caution.
[21] See e.g. *Begum v Secretary of State for the Home Department* [2021] UKSC 7, [2021] AC 765 [109], [134] where Lord Reed criticised the Court of Appeal for exceeding its institutional competence in making an assessment of national security requirements without any available evidence.
[22] Lord Dyson MR, 'Is Judicial Review a Threat to Democracy?' (Judiciary of England and Wales, The Sultan Azlan Shah Lecture, November 2015) (*Court and Tribunals Judiciary*) <https://www.judiciary.uk/wp-content/uploads/2015/12/is-judicial-review-a-threat-to-democracy-mr.pdf> accessed 3 May 2024.
[23] *Rwanda Case*, High Court (n 3) [5].

way which upholds such fundamental legal rights.[24] This is a core tenet of the rule of law.

13. It is worth acknowledging that the issue of constitutional competence is contested, and some legal commentators have argued that in some human rights cases the judiciary have unduly expanded their powers. Richard Ekins, Professor of Law and Constitutional Government at the University of Oxford, for example, has asserted that there is insufficient consensus on the detailed nature of human rights, resulting in human rights law (notably the HRA) which is too abstract.[25] This, Ekins argues, leads to unjust judicial law making by domestic courts through, for example, the quashing of executive decisions and the distortion of primary legislation,[26] and that 'there are some reasons to worry about the delineation between the courts and the elective branches that the HRA has brought into being'.[27] Other critics are more circumspect. Former Supreme Court judge, Lord Sumption, for example, has, like Ekins, attacked the politicisation of judicial decision-making in human rights cases, which he has asserted is a threat to democracy;[28] but, unlike Ekins, Lord Sumption's critique focuses on expansion of *qualified* convention rights (for example, the right to private life) which, he contends, involves political, rather than legal, considerations that should be for the elected legislature to decide. Lord Sumption still accepts the existence of certain *fundamental* human rights as non-contestable – rights not to be arbitrarily detained, killed or injured[29] (within which the right not to be returned to a country where one might be at serious risk of torture or inhumane treatment would surely fall). Indeed, Lord Sumption has been a vocal critic of the government's legislative response to the outcome of the *Rwanda Case*, referring to its attempts to change the factual decision of the Supreme Court, through the Safety of Rwanda (Asylum and Immigration) Bill, as 'profoundly discreditable' and unconstitutional.[30]

14. Similarly, former Master of the Rolls, Lord Dyson, in the context of judicial review of human rights cases, has acknowledged that certain rights have come to be regarded by our domestic common law as so fundamental that interference with them is difficult to justify before the courts.[31]

15. There is some limited support, therefore, for the restrictive approach taken by the High Court. However, there appears to be a broader consensus that a more expansive

[24]Hodge (n 20) 28.
[25]Richard Ekins, 'Human Rights and the Morality of Law' (*UK Constitutional Law Association*, 5 June 2019) <https://ukconstitutionallaw.org/2019/06/05/richard-ekins-human-rights-and-the-morality-of-law/> accessed 3 May 2024.
[26]ibid.
[27]House of Commons Justice Committee, Oral Evidence Human Rights Act Reform, 8 February 2022 (HC 1087, Q79).
[28]Jonathan Sumption, *Trials of the State: Law and the Decline of Politics* (Profile Books 2019).
[29]Jonathan Sumption, 'The Reith Lectures 2019: Law and the Decline of Politics – Lecture 3: Human Rights and Wrongs' TX: 04.06.2019, BBC Radio 4 online, file:///C:/Users/cjr366/Work%20Folders/Documents/Research%20articles/Reith_2019_Sumption_lecture_3.pdf accessed 3 May 2024.
[30]Matt Dathan and Oliver Wright, '"No Guarantee" of Rwanda Flights Beforethe Election Continued from Page 1 Rwanda Flights Showdown', *The Times* (London, 17 November 2023) 1.
[31]Lord Dyson MR (n 22) 8.

approach to both institutional and constitutional competence can be justified, at least where fundamental human rights are at stake. The majority in the Court of Appeal exhibited this more expansive approach, as discussed next.

The Court of Appeal decision

16. An appeal by the claimants against the High Court's ruling on, among other matters, the issue of Rwanda's safety, was heard by the Court of Appeal in June 2023.[32] Sir Geoffrey Vos MR noted that:

> the policy is a politically sensitive one which has attracted significant public and media attention. Notwithstanding that position, the case must be determined on the basis of the evidence and of accepted and familiar principles of public law. Nothing in this judgment should be construed as supporting or opposing any political view of the issues.[33]

17. This wording gave some indication, from the outset, of the difference in approach that would be taken by the Court of Appeal (compared with the High Court) in its attitude to the evidence presented. By a majority of two to one, the Court of Appeal allowed the appeal by the claimants regarding Rwanda's safety, reversing the High Court ruling on this issue. Sir Geoffrey Vos MR and Underhill LJ concluded that even if Rwanda might be considered safe itself, there were notable flaws in its asylum system. These flaws meant there was a substantial risk of refoulement. The majority judges were of the view that the High Court had misapplied the test in *Soering*. A key element of this test, they pointed out, was the requirement that the assessment of Rwanda's safety should be made directly by the court itself. That assessment in this case, they reasoned, should be based not just on the UK government's evidence and assessment of the reliability of Rwanda's credibility, but 'special regard' should be paid to the evidence presented by the UNHCR regarding Rwanda's asylum system and its historical human rights record.[34] Sir Geoffrey Vos MR pointed out that even the Home Office had recognised the UNHCR's expertise in relation to Rwanda,[35] and Underhill LJ observed the UNHCR's legitimacy as an authority, based on its large and active presence in Rwanda and its extensive engagement with asylum seekers.[36]

18. The Court of Appeal asserted that the High Court had accepted too easily the UK government's assessment of the risks. Unlike the High Court, the Court of Appeal was confident of its institutional and constitutional competence to make its own evaluation Sir Geoffrey Vos MR cited the European Court of Human Rights in *Othman v UK*,[37] to support this approach, which provided that, in cases of this nature, the

[32] *Rwanda Case*, Court of Appeal (n 6).
[33] ibid [4] (Sir Geoffrey Vos MR).
[34] ibid [13].
[35] ibid [6] (Sir Geoffrey Vos MR).
[36] ibid [332] (Underhill LJ).
[37] *Othman* (n 10).

court should assess for itself the reliability of the receiving state's assurances regarding non-refoulement, in light of the prevailing human rights situation in that state at the time.[38] This language of 'assessing for itself' contrasts with the language interspersed throughout the High Court judgment regarding whether the Secretary of State 'was entitled to conclude'.

19. Underhill LJ's assessment is particularly compelling. Conducting a forensic analysis of each of the concerns raised by the UNHCR, he highlighted not only the cogency and range of the UNHCR's evidence but the paucity of the responses by the Rwandan government to many of the issues raised,[39] concluding that:

> The UNHCR evidence in my view clearly shows that there are important respects in which it [the Rwandan government] has not so far reliably operated to international standards.[40]

20. Deficiencies identified in Underhill LJ's judgment which were of particular concern included the absence of any opportunity for a claimant to present their case through a lawyer,[41] evidence that the decision-making authority in Rwanda did not have sufficient skills and experience to make reliable decisions, illustrated in part by apparently aberrant outcomes,[42] and evidence that certain non-governmental organisations (which the government of Rwanda claimed could provide legal assistance to asylum seekers during the administrative stage of their claims) were unlikely to have sufficient capacity to do so.[43]

21. Underhill LJ accepted the contention that this past practice is not necessarily indicative of future failings but argued that the deficiencies in question are on a scale so extensive and significant that they cannot be resolved satisfactorily in the short term.[44] He pointed out that even the High Court judges acknowledged it would take time to develop the capacity of the Rwandan asylum system but was less convinced than they were that this is simply a resourcing issue.[45] Given the painstaking steps he took to compare the evidence of the UNHCR alongside the corresponding responses of the Rwandan government, his conclusions are very persuasive. Had the High Court approached the matter with the same rigour as the Court of Appeal, they might have found it harder to maintain their view of the reliability of the Rwandan government's assurances. Underhill LJ's and Sir Geoffrey Vos MR's understanding of their institutional and constitutional competence, therefore, led to a more in-depth and thorough consideration of these issues.

[38] *Rwanda Case*, Court of Appeal (n 6) [80].
[39] ibid [145]–[261] (Underhill LJ).
[40] ibid [261] (Underhill LJ).
[41] ibid [189] (Underhill LJ).
[42] ibid [181]–[201, [205]–[206] (Underhill LJ).
[43] ibid [234]–[238] (Underhill LJ).
[44] ibid [272] (Underhill LJ).
[45] ibid [271] (Underhill LJ).

22. The dissenting judgment of Lord Burnett CJ could be said to be more closely aligned with the approach taken by the High Court, although there were some notable differences. Lord Burnett CJ generally acknowledged the limits of judicial institutional competence, but interestingly then went on to argue that such limits should not apply in the case in question as the prediction of future risk rested on the analysis of detailed evidence of past conduct – an analysis which could just as easily be carried out by the court, and for which the government did not have special institutional expertise.[46] Nevertheless, having distanced himself from the approach of the High Court, Lord Burnett CJ's conclusion was, like the High Court's, that Rwanda was a safe country. This was principally because he placed more confidence than his fellow Court of Appeal judges on the reliability of the Rwandan governmental assurances and the intended safeguards contained in the Rwanda Agreement, which the executive had argued overrode any concerns about past action.[47] Whilst superficially exercising institutional competence, his reasoning, like the executive's, still demonstrated overriding faith in the Rwanda Agreement, despite the UNHCR's compelling evidence of the risk of refoulement and the claimants' concerns about the adequacy of the safeguards. The Court of Appeal's decision was appealed by the UK government which continued to argue that Rwanda was a safe country.

The expectations of the Supreme Court decision

23. Given the original finding of the High Court on the issue of Rwanda's safety and given also that the Court of Appeal's decision was not unanimous, the outcome of the Supreme Court hearing was by no means certain. The UK's Secretary of State for Justice was reportedly confident that the government's appeal would be successful.[48] Recent analyses of trends in Supreme Court decision making, under the presidency of Lord Reed, might have given grounds for such confidence. Academic Lewis Graham, for example, concluded that:

> the empirical evidence does seem to suggest that the Reed court is more conservative when it comes to public law – at least in terms of a tendency to reject human rights claims and to side with public authorities – than its predecessors,[49]

24. Practitioners have similarly expressed concerns that changes in the composition of the Supreme Court since the beginning of 2020 have resulted in a more deferential attitude to the executive. For example, Helen Mountfield QC stated: 'It's hard to tell if fear of censure for "inappropriate activism" is behind what I think is the excessively

[46] *Rwanda Case*, Court of Appeal (n 6) [469] (Burnett LCJ).
[47] ibid [499]–[515] (Burnett LCJ).
[48] Joshua Rozenberg, 'Telling Judges How to do Justice Isn't a Good Idea' *The Law Society Gazette* (10 October 2023) <https://www.lawgazette.co.uk/commentary-and-opinion/telling-judges-how-to-do-justice-isnt-a-good-idea/5117500.article> accessed 3 May 2024.
[49] Lewis Graham, 'The Reed Court by Numbers: How Shallow is the Shallow End?' (*UK Constitutional Law Association*, 4 April 2022) <https://ukconstitutionallaw.org/2022/04/04/lewis-graham-the-reed-court-by-numbers-how-shallow-is-the-shallow-end%EF%BF%BC%EF%BF%BC/#:~:text=Despite%20these%20limitations%2C%20the%20empirical,account%20was%20a%20scathing%20one> accessed 3 May 2024.

cautious and deferential language of the current Supreme Court. But I fear it might be.'[50] Such a reading of the direction of the Supreme Court has been confirmed, in part, by the former Lord Chancellor, Robert Buckland QC, although he has viewed this as a good thing. In a lecture in 2022 on the ECHR, he commented that:

> the current Supreme Court, under Lord Reed's leadership, has in the last year demonstrated the appropriate degree of restraint. It is essential that this continues and that we remain blessed with sensible judges like Lord Reed.[51]

25. Meanwhile, a report on judicial independence by the All Party Parliamentary Group on Democracy and the Constitution found that 'the behaviour of the executive towards the judiciary may be considered constitutionally problematic'[52] and that in a significant number of decisions since 2020:

> the Supreme Court has departed from its previous authority and assumed a position more palatable to the executive. In some of these, the Court appears to adopt similar language to that used in the executive's political talking points.[53]

26. However, even those who have been most critical of the decision making of the Supreme Court under Lord Reed's presidency, such as academic and barrister Conor Gearty KC, have challenged suggestions that the recent direction of the court is necessarily due to executive influence and power:

> It should not be assumed that the lines the court has taken are in response (conscious or sub-conscious) to government pressure; it is entirely possible – indeed probable – that the change in direction is primarily driven by the judicial philosophy espoused by Reed and his colleagues, and would have happened even if the court (and the system of the rule of law over which it presides) were not being threatened.[54]

27. Gearty acknowledges, for example, that the Supreme Court has unanimously decided cases against the government, notably *R (Miller) v Prime Minister*[55] in which Lord Reed was sitting, and that some of Lord Reed's judgments demonstrate a clear desire to protect access to justice. Gearty went on to say that

> [p]erhaps his robust defence of access to the courts will push him towards a radical conservative position that reasserts the rule of law even at a price of democratic conflict. But it's possible that his respect for orthodox parliamentary sovereignty will triumph.[56]

[50]Alex Dean, 'The Government Wanted to Rein in the Supreme Court. Now it May Not Need To' *Prospect* (16 October 2021) <https://www.prospectmagazine.co.uk/politics/38065/the-government-wanted-to-rein-in-the-supreme-court.-now-it-may-not-need-to> accessed 3 May 2024.
[51]Robert Buckland QC, 'Lecture on the ECHR' (Speech, 28 February 2022) <https://www.robertbuckland.co.uk/news/lecture-echr> [https://perma.cc/36SC-QGZQ] accessed 3 May 2024.
[52]All Party Parliamentary Group (APPG) on Democracy and the Constitution, 'An Independent Judiciary – Challenges since 2016' (ICDR, 8 June 2022) at SOPI±Report±FINAL.pdf (squarespace.com) accessed 3 May 2024.
[53]ibid 7.
[54]Conor Gearty, 'In the Shallow End' (2022) 4(2) London Review of Books (27 January 2022) <https://www.lrb.co.uk/the-paper/v44/n02/conor-gearty/in-the-shallow-end> accessed 3 May 2024.
[55][2019] UKSC 41, [2020] AC 73.
[56]Gearty (n 54).

28. As it turned out, it was the first part of Gearty's prediction that was fulfilled, at least in relation to the *Rwanda Case*. The Supreme Court decision in that case will be explored next.

The Supreme Court decision

29. The Supreme Court in *R (AAA (Syria) and others) v Secretary of State for the Home Department*,[57] unanimously dismissed the government's appeal. Like the Court of Appeal, it found there were substantial grounds for believing there was a significant risk of refoulement for those removed to Rwanda and that Rwanda was consequently not, at least for the time being, safe for the purposes of the Rwanda Policy. In coming to this decision, the Court made clear, in line with *Soering*, that this was an assessment the Court needed to make itself, rather than simply decide whether the Secretary of State had been entitled to draw this conclusion. Like the majority in the Court of Appeal, the Supreme Court justifiably reasoned that such a ruling required consideration of the adequacies of Rwanda's asylum system, and assurances given by the Rwandan government needed to be evaluated in the light of all the evidence, as per the factors outlined in *Othman*.[58]

30. The court was arguably even more dismissive than the Court of Appeal had been of the scant appraisal given by the High Court of the UNHRC's evidence. It pointed to both domestic and European case authorities which clearly endorsed the UNHCR's credentials in this regard.[59] Whilst the court recognised that such evidence was not necessarily decisive, and the government's own views should be given due consideration, particularly those of the Foreign, Commonwealth and Development Office,[60] it nevertheless concluded that

> in the circumstances of the present case, however, [the UNHCR's] evidence on significant matters of fact is essentially uncontradicted by any cogent evidence to the contrary … It should not have been treated as dismissively as it was by the Divisional Court.[61]

31. The Supreme Court also reiterated Lord Burnett CJ's assertion (from the Court of Appeal judgment) that the court was institutionally competent to consider detailed evidence from the past in assessing the credibility of the Rwandan government's assurances and likelihood of future compliance.[62] This was not, the Supreme Court maintained, something for which the UK government could claim any special expertise. Indeed, the court criticised the UK government's own investigations in some respects, noting a report by the Independent Advisory Group on Country Information, which had identified shortcomings.[63]

[57] *Rwanda Case*, Supreme Court (n 2).
[58] Othman (n 10).
[59] *Rwanda Case*, Supreme Court (n 2) [65]–[68].
[60] ibid [52].
[61] ibid [70].
[62] ibid [58].
[63] ibid [53]–[55].

32. Furthermore, the Court responded robustly to suggestions (made by counsel on behalf of the Secretary of State) that the Court's constitutional competence, in assessing the validity of assurances given by Rwanda, was analogous to assessing whether a particular course of action was in the interests of national security and, therefore, limited.[64] It is possible that the decision in the case of *Begum v Secretary of State for the Home Department*[65] may have given the impression that Lord Reed's Supreme Court would be sympathetic to these suggestions. *Begum* is a complex case, however, and those who supposed Lord Reed and his fellow Justices would adopt a similarly deferential stance in the *Rwanda Case* had, perhaps, missed the nuanced differences between the cases. In *Begum*, the appellant (Shamima Begum) did not argue that the Secretary of State had failed to comply with his statutory duty under s 6 of the HRA. Instead, she tried to argue that the Secretary of State had failed to follow non-statutory policy. On this basis, Lord Reed concluded that it was not constitutionally appropriate for the court to reach its own view on the minister's exercise of a discretionary power, according to conventional administrative principles of judicial review, and the court could only review the reasonableness of the decision. Importantly, though, he noted that, had Begum specifically argued that the decision not to give her legal right of entry to the UK was a breach of art 3 of the ECHR (and thus s 6 of the HRA), a different approach would have been taken.[66]

33. The *Begum* decision has been regarded as controversial, harsh and the reasoning 'impenetrably legalistic',[67] but there was a logic nevertheless to Lord Reed's reasoning which led commentators such as Monaghan to conclude that it was 'legally and constitutionally correct'.[68] Even Gearty, generally scathing in his appraisal of the Supreme Court's decision making under Lord Reed, reluctantly acknowledged that it 'may have been right in law'.[69] When it came to the *Rwanda Case*, where art 3 of the ECHR and breach of s 6 of the HRA were directly in issue, the government should not have assumed that the Supreme Court would accept similar limits on its constitutional competence to those applied in *Begum*. Indeed, not only did the Court refute this suggestion, but it also went on to state that even if issues of national security had been at stake in this case, consideration of these would not have been within the exclusive province of the executive. In support of this,[70] the Court cited Lord Hoffmann:

[64]ibid [56].
[65][2021] UKSC 7, [2021] AC 765.
[66]ibid [37], [120].
[67]Gearty (n 54).
[68]Chris Monaghan, 'The Court of Appeal … Appears to Have Overlooked the Limitations to its Competence, Both Institutional and Constitutional, to Decide Questions of National Security': Shamima Begum, the Supreme Court and the Relationship Between the Judiciary and the Executive' [2021] JR 134.
[69]Gearty (n 54).
[70]*Rwanda Case*, High Court (n 3) [56].

> A good example is the question … as to whether deporting someone would infringe his rights under article 3 of the Convention because there was a substantial risk that he would suffer torture or inhuman or degrading treatment. The European jurisprudence makes it clear that whether deportation is in the interests of national security is irrelevant to rights under article 3. If there is a danger of torture, the Government must find some other way of dealing with a threat to national security. Whether a sufficient risk exists is a question of evaluation and prediction based on evidence. In answering such a question, the executive enjoys no constitutional prerogative.[71]

34. This reasoning was echoed by Lord Bingham in *A and others v Secretary of State for the Home Department*,[72] who concluded that the courts should not be precluded, by the notion of judicial deference, from scrutinising the actions of the executive in relation to alleged breaches of fundamental rights under the ECHR, even where national security was at stake. He famously stated:

> I do not in particular accept the distinction which [the Attorney General] drew between democratic institutions and the courts. It is of course true that the judges in this country are not elected and are not answerable to Parliament. It is also true, as pointed out in para 29 above, that Parliament, the executive and the courts have different functions. But the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself.[73]

35. Whilst the High Court might have doubted its institutional and constitutional competence in this case, the Supreme Court was in no such doubt. If government policy exposes others to a risk of ill treatment in direct breach of the HRA, the executive should expect the court to make its own assessment and to intervene where there is compelling and cogent evidence of past conduct which indicates that that risk is significant.

The previous government's response

36. The previous government responded to the Supreme Court's judgment in the *Rwanda Case* by introducing the Safety of Rwanda (Asylum and Immigration) Act 2024. This declared Rwanda to be a safe country, contrary to the Supreme Court's findings, and prohibited the judiciary from adjudicating on the issue of Rwanda's safety. It also disapplied much of the HRA, including s 6, from those to whom the Rwanda Policy would apply. The previous government justified these provisions by arguing that the concerns about risks of refoulement by Rwanda were historic because these had been addressed through further undertakings given by Rwanda in a new binding treaty between the UK and Rwanda.[74] However, if they were so confident of this, it begs the question as to why they felt it necessary to remove

[71] *Secretary of State for the Home Department v Rehman* [2001] UKHL 47, [2003] 1 AC 153 [54].
[72] [2004] UKHL 56, [2005] 2 AC 68.
[73] ibid [42].
[74] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Rwanda for the provision of an asylum partnership to strengthen shared international commitments on the protection of refugees and migrants ('the Rwanda Treaty').

the opportunity for judicial scrutiny of Rwanda's safety. This unprecedented step was described as a 'constitutional tipping point'.[75] It prioritised parliamentary sovereignty and, indeed, set it in direct conflict with the rule of law. Legal challenges to removal under the Act were extremely limited. The Act signalled a seismic shift in the constitutional power dynamic between the executive, parliament and the courts.

37. Had the Supreme Court allowed the government's appeal, there is an argument that those at risk of removal pursuant to the Rwanda Policy would have been better protected ultimately, as the legal framework to challenge removals under s 6 of the HRA, based on Rwanda's safety, would, at least, have remained in place. This would not have been of assistance if the position remained unchanged but, had new evidence come to light to support significant concerns about Rwanda's safety which had not been previously presented to the Supreme Court, then potentially further challenges could have been commenced on that basis. That said, hindsight is a wonderful thing and had the Supreme Court balked at exercising competence to adjudicate in the *Rwanda Case*, where the evidence was so compelling and where fundamental rights were so clearly at risk, it would have been difficult to be confident they would take a different approach in any future case.

38. As it happens, the question of whether the Safety of Rwanda (Asylum and Immigration) Act would subdue the courts' readiness to exercise institutional and constitutional competence is now, in any event, a moot point, given the outcome of the recent election and the current UK government's stated intentions (discussed further below). However, considering that the Supreme Court has generally tended to take a deferential approach, outlined above, it is perhaps reasonable to presume that they might have reverted to a more conservative and restrained stance.

The current government's response

39. The current UK government, elected on 4 July 2024, promised in its manifesto that it would not proceed with removals to Rwanda and would terminate the Rwanda Agreement.[76] The money saved from this, it proposed, would be used to clear the asylum backlog, and set up a new Border Security Command.[77] The King's Speech reiterated these intentions, noting that they would be implemented through the introduction of a Border Security, Asylum and Immigration Bill.[78] The King's Speech did not specifically refer to the repeal of the Safety of Rwanda (Asylum and

[75]Stuart Wallace, 'The Rwanda Bill: A Constitutional Tipping Point?' (*The Constitution Society*, 14 February 2024) <https://consoc.org.uk/the-rwanda-bill-a-tipping-point/> accessed 3 May 2024.
[76]'Labour Party Manifesto 2024: Our Plan to Change Britain' (London, 2024) 15–16 <https://labour.org.uk/change/strong-foundations/> accessed 2 August 2024.
[77]ibid.
[78]'The King's Speech 2024', Crown Copyright (Prime Minister's Office, London, 17 July 2024) 7 <https://assets.publishing.service.gov.uk/media/6697f5c10808eaf43b50d18e/The_King_s_Speech_2024_background_briefing_notes.pdf> accessed 2 August 2024.

Immigration) Act, but it did refer to the scrapping of the Rwanda scheme,[79] and there have been no removals of asylum seekers to Rwanda to date. Indeed, it is reported that most challenges to the Act have been settled, and that the Rwanda Policy is in its death throes.[80]

40. It seems very unlikely, therefore, that any removals to Rwanda will now take place. This will be welcome news for those affected. However, whilst the current government's proposed measures to tackle the trafficking gangs, through the Border Security, Asylum and Immigration Bill, are certainly laudable and necessary, it is not wholly clear yet how the government plans to resolve the backlog of asylum seekers (currently in the region of 87,000).[81] There is also uncertainty surrounding the processing of those asylum seekers categorised as inadmissible under current immigration rules, and whether they will now have their claims heard in the UK. Furthermore, it is not clear whether there will be increased safe and legal humanitarian routes to the UK to reduce the large numbers of asylum seekers still arriving on small boats.[82] Indeed, the emphasis on border security in the King's Speech,[83] and the rumours that the current government may be considering offshore processing,[84] may suggest that security will be the priority, and that the rights of asylum seekers will continue to be precarious. Further judicial review cases may thus be mounted in the future, but at least it seems fair to assume that the current government will not try to curtail the jurisdiction of the courts to hear such cases and the remedies available.

Conclusion

41. This analysis has reviewed the rulings by domestic courts in the *Rwanda Case* concerning the issue of Rwanda's safety for the purposes of the Rwanda Policy. In doing so, it has noted the extent to which the judges in question demonstrated a restrictive or expansive attitude towards their institutional and constitutional competence to adjudicate. The judges in the High Court collectively took a more restrictive approach, resulting in a decision which, according to all the evidence, would have exposed relevant asylum seekers to a significant risk of refoulement. The Court of Appeal took a more expansive approach, but ultimately the decision rested on the Supreme Court. Whilst some doubts were expressed that the Supreme Court

[79]ibid 55.
[80]Jed Pennington, 'The Rwanda Policy is in its Death Throes' (*Free Movement*, 2024) <https://freemovement.org.uk/the-rwanda-policy-is-in-its-death-throes/> accessed 9 August 2024.
[81]Home Office, 'Immigration System Statistics, Year Ending March 2024 (updated June 2024)' (*Gov.UK*) <https://www.gov.uk/government/statistics/immigration-system-statistics-year-ending-march-2024/summary-of-latest-statistics> accessed 9 August 2024.
[82]Home Office, 'Small boat activity in the English Channel' (*Gov.UK*) <https://www.gov.uk/government/publications/migrants-detected-crossing-the-english-channel-in-small-boats> accessed 14 August 2024.
[83]The King's Speech (n 78) 54.
[84]Erica Consterdine, 'Labour's immigration policy: will focus on "security" win an election?' (*The Conversation*, 11 October 2023) <https://theconversation.com/labours-immigration-policy-will-focus-on-security-win-an-election-213923> accessed 2 August 2024.

would follow the Court of Appeal majority, based on analyses of its recent decision making, these proved to be unfounded.

42. However, the outcome of the *Rwanda Case* did not prove to be the victory the appellants might have hoped for. It was, in many ways, a pyrrhic victory (at least initially) unleashing a response from the government that potentially would have had a devastating impact on the vulnerable group of people it sought to safeguard, and setting a constitutional precedent that threatened this country's democratic infrastructure. That is not to criticise the Supreme Court – they were correct, in this writer's view, to consider themselves competent to adjudicate in the way they did, and they could be forgiven for failing to anticipate the extreme response it would provoke.

43. In light of the change of government, and consequent change of policy, we will never know if the Safety of Rwanda (Asylum and Immigration) Act would have had a chilling effect on the Supreme Court's attitude to its competence. Bearing in mind that the Supreme Court is already regarded, in the general scheme of things, as legally conservative when it comes to adjudication on human rights issues, there was certainly a risk.[85] This Act is, however, a salutary reminder of the fragility of judicial competence and the rule of law. Comfort can be taken, at least, from the fact that the judiciary in the *Rwanda Case* ultimately felt competent to hold the executive to account where a fundamental human right was at stake. This will give hope to those who perceive that, irrespective of a change in government, border security may continue to be prioritised over and above the fundamental rights of asylum seekers.

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[85]Lewis Graham, 'Has the UK Supreme Court Become More Restrained in Public Law Cases?' (2024) MLR, Early View <https://doi.org/10.1111/1468-2230.12866> accessed 21 August 2024.