THE COURT ORDERED that no one shall publish or reveal the names or addresses of AAA, HTN, RM, AS, SAA or ASM (the "Claimants") or publish or reveal any information which would be likely to lead to the identification of the Claimants or of any member of their respective families in connection with these proceedings.

Press Summary

15 November 2023

R (on the application of AAA (Syria) and others) (Respondents/Cross Appellants) v Secretary of State for the Home Department (Appellant/Cross Respondent)

R (on the application of HTN (Vietnam)) (Respondent/Cross Appellant) v Secretary of State for the Home Department (Appellant/Cross Respondent)

R (on the application of RM (Iran)) (Respondent) v Secretary of State for the Home Department (Appellant)

R (on the application of AS (Iran)) (Respondent/Cross Appellant) v Secretary of State for the Home Department (Appellant/Cross Respondent)

R (on the application of SAA (Sudan)) (Respondent) v Secretary of State for the Home Department (Appellant) and

R (on the application of ASM (Iraq)) (Appellant) v Secretary of State for the Home Department (Respondent)

[2023] UKSC 42
On appeal from [2023] EWCA Civ 745

Justices: Lord Reed (President), Lord Hodge (Deputy President), Lord Lloyd-Jones, Lord Briggs, Lord Sales

Background to the Appeal

Under the Home Secretary's Rwanda policy, certain people claiming asylum in the UK will be sent to Rwanda where their claims will be decided by the Rwandan authorities. If their claims are successful, they will be granted asylum in Rwanda. In this appeal, the Supreme Court is required to decide whether the Rwanda policy is lawful. This is a legal question which the Court has been asked to decide on the basis of the evidence and established legal principles, including the law as laid down by Parliament. The Court is not concerned with and should not be regarded as supporting or opposing any aspect of the political debate surrounding the policy.

For the asylum claims in these proceedings, the legal basis for the Rwanda policy was set out in paragraphs 345A to 345D of the Immigration Rules, made in accordance with section 3 of the Immigration Act 1971. Broadly speaking, these paragraphs permit the Home Secretary to treat an asylum claim as inadmissible if the claimant had the opportunity to apply for asylum in a safe third country but did not do so. The claimant can then be removed from the UK to any safe third country which agrees to accept them. Under paragraph 345B, a country will only qualify as a safe third country if the principle of "**non-refoulement**" is respected there. This principle requires that asylum seekers are not returned, directly or indirectly, 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, or they would be at real risk of torture or inhuman or degrading treatment.

On 13 April 2022, the UK and Rwandan governments entered into a Migration and Economic Development Partnership ("**MEDP**"), recorded in a Memorandum of Understanding and two diplomatic "Notes Verbales". On the basis of the arrangements made and assurances given in the MEDP, the Home Secretary decided that Rwanda was a safe third country to which asylum seekers could be removed.

A number of asylum seekers, including the respondents to the Home Secretary's appeal, challenged both the lawfulness of the Rwanda policy and the Home Secretary's decisions to remove each particular claimant to Rwanda. The United Nations High Commissioner for Refugees ("**UNHCR**"), the UN Refugee Agency, intervened in the proceedings. The Divisional Court held that the Rwanda policy was, in principle, lawful. However, the way in which the Home Secretary had implemented the policy in the claimants' individual cases was procedurally flawed. The decisions in those cases would consequently be quashed and remitted to the Home Secretary for reconsideration.

The appeal to the Court of Appeal concerned only the challenge to the lawfulness of the Rwanda policy. By a majority, the Court of Appeal held that the Rwanda policy was unlawful. This was because, on the evidence before the Divisional Court, there were substantial grounds for believing that there were real risks that asylum claims would not be properly determined by the Rwandan authorities. There were, therefore, real risks of refoulement. Accordingly, unless and until the deficiencies in the Rwandan asylum system were corrected, any removal of asylum seekers to Rwanda under the MEDP would breach section 6 of the Human Rights Act 1998.

The Court of Appeal rejected an argument that the Rwanda policy is also incompatible with retained EU law, namely Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in member states for granting and withdrawing refugee status ("the **Procedures Directive**"). This is relevant because articles 25 and 27 of the Procedures Directive only permit asylum seekers to be removed to a safe third country if they have some

connection to it. None of the asylum seekers in these proceedings has any connection to Rwanda.

The Home Secretary appeals to the Supreme Court against the Court of Appeal's decision on the refoulement ground. ASM (Iraq) cross appeals against the Court of Appeal's decision on the retained EU law ground.

Judgment

The Supreme Court unanimously dismisses the Home Secretary's appeal, and upholds the Court of Appeal's conclusion that the Rwanda policy is unlawful. This is because there are substantial grounds for believing that asylum seekers would face a real risk of ill-treatment by reason of refoulement to their country of origin if they were removed to Rwanda. Lord Reed and Lord Lloyd-Jones give a joint judgment with which the other members of the Court agree.

Reasons for the Judgment

The Supreme Court's judgment focusses primarily on the grounds of appeal concerning: (1) refoulement, and (2) retained EU law. Some of the asylum seekers were granted permission to cross-appeal on two other grounds, but given the Court's conclusion on the refoulement ground, it is unnecessary for the Court to determine them [**17**], [**106**].

Ground 1: Refoulement

Non-refoulement is a core principle of international law. Asylum seekers are protected against refoulement by several international treaties ratified by the UK. These protections are set out in article 33(1) of the United Nations 1951 Convention relating to the Status of Refugees and its 1967 Protocol ("the **Refugee Convention**") and article 3 of the European Convention on Human Rights ("the **ECHR**"), among others [**19**]-[**26**].

Parliament has given effect to both the Refugee Convention and the ECHR in our domestic law. Asylum seekers are protected against refoulement by the Human Rights Act 1998, section 6 of which makes it unlawful for the Home Secretary to remove asylum seekers to countries where there are substantial grounds to believe that they would be at real risk of refoulement contrary to article 3 ECHR. Further protection is provided by provisions in the Asylum and Immigration Appeals Act 1993, the Nationality, Immigration and Asylum Act 2002 and the Asylum and Immigration (Treatment of Claimants etc) Act 2004, under which Parliament has given effect to the Refugee Convention as well as the ECHR [**27**]-[**33**].

The Home Secretary's appeal against the Court of Appeal's decision on refoulement raises three issues, each of which is discussed in turn [**37**].

Issue 1: Did the Divisional Court apply the wrong legal test when considering the risk of refoulement?

The correct legal test to be applied by the court 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 result of refoulement to another country. The court must answer this question for itself, based on its assessment of the evidence before it. It is unclear from the Divisional Court's judgment whether it applied the correct legal test. However, as explained in relation to issue 2 below, the Supreme Court is satisfied that the Court of Appeal was in any event entitled to consider the refoulement issue for itself [**23**], [**34**], [**38**]-[**41**].

Issue 2: If the Divisional Court applied the right test, was the Court of Appeal entitled to interfere with its conclusion on the risk of refoulement?

Yes, the Court of Appeal was entitled to interfere with the Divisional Court's conclusion because there were errors in the Divisional Court's treatment of the evidence [**42**], [**72**].

The European and domestic case law is clear that, in cases like this one, the court is required to consider how the asylum system in the receiving state, in this case Rwanda, operates in practice. In doing so, the court should have regard to deficiencies identified by expert bodies such as UNHCR. Where safety in the receiving state depends on assurances given by its government about the treatment of individuals who are sent there, the court is required to carry out a fact-sensitive evaluation of how the assurances will operate. Relevant factors include the general human rights situation in the receiving state, the receiving state's laws and practices, its record in complying with similar assurances given in the past and the existence of monitoring mechanisms [**44**]-[**49**].

The Divisional Court did not follow this approach. Instead, it held that the Home Secretary was entitled to rely on the assurances given by the Rwandan government in the MEDP, and failed to engage with UNHCR's evidence, described below in relation to issue 3. UNHCR's evidence should have been given particular weight given its remit and unrivalled practical experience of working in the Rwandan asylum system [**50**]-[**71**].

Issue 3: Was the Court of Appeal entitled to conclude that there were substantial grounds for believing that asylum seekers would face a real risk of ill-treatment by reason of refoulement following their removal to Rwanda?

Yes, the Court of Appeal was entitled to conclude that there were substantial grounds for believing that asylum seekers would be at real risk of ill-treatment by reason of refoulement if they were removed to Rwanda [**73**].

The Court of Appeal's conclusion was based on the following evidence. First, Rwanda has a poor human rights record. In 2021, the UK government criticised Rwanda for "extrajudicial killings, deaths in custody, enforced disappearances and torture". UK government officials have also raised concerns about constraints on media and political freedom [**75**]-[**76**]. Secondly, UNHCR's evidence is that there are serious and systematic defects in Rwanda's procedures and institutions for processing asylum claims. In summary, these include: (i) concerns about the asylum process itself, such as the lack of legal representation, the risk that judges and lawyers will not act independently of the government in politically sensitive cases, and a completely untested right of appeal to the High Court, (ii) the surprisingly high rate of rejection of asylum claims from certain countries in known conflict zones from which asylum seekers removed from the UK may well emanate, (iii) Rwanda's practice of refoulement, which has continued since the MEDP was concluded, and (iv) the apparent inadequacy of the Rwandan government's understanding of the requirements of the Refugee Convention [**77**]-[**94**]. Thirdly, Rwanda has recently failed to comply with an explicit undertaking to comply with the non-refoulement principle given to Israel in an agreement for the removal of asylum seekers from Israel to Rwanda which operated between 2013 and 2018 [**95**]-[**100**].

The Supreme Court accepts that the Rwandan government entered into the MEDP in good faith, that it has incentives to ensure that it is adhered to, and that monitoring arrangements provide a further safeguard. Nevertheless, the evidence shows that there are substantial grounds for believing that there is a real risk that asylum claims will not be determined properly, and that asylum seekers will therefore be at risk of being returned directly or indirectly to their country of origin. The changes and capacity-building needed to eliminate that risk may be delivered in the future, but they were not shown to be in place when the lawfulness of the Rwanda policy had to be considered in these proceedings [**101**]-[**105**].

Ground 2: Retained EU law

The Supreme Court dismisses the cross-appeal brought by ASM (Iraq) on the ground that the Rwanda policy is unlawful because it is incompatible with retained EU law. Articles 25 and

27 of the Procedures Directive contain a requirement that asylum seekers may only be removed to a third country, such as Rwanda, if they have a connection to it so that it would be reasonable for that person to go to that country. These articles no longer have effect in UK domestic law as retained EU law because they fall within the scope of paragraph 6(1) of Schedule 1 to the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 [**137**]. Accordingly, they ceased to have effect in the domestic law of the United Kingdom when the transition period came to an end on 31 December 2020 [**148**]. There is no justification for reading the references in that Act to "immigration" as having a meaning which excludes matters relating to asylum [**134**]. Neither the Explanatory Notes from when the Bill was debated in Parliament nor the Parliamentary Committee reports and materials relied upon by ASM displace the clear and unambiguous meaning of the statute [**140**]. The rule of interpretation known as the principle of legality does not apply, as the relevant protection afforded by articles 25 and 27(2)(a) of the Procedures Directive does not relate to a fundamental or constitutional right [**142**].

References in square brackets are to paragraphs in the judgment.