

INTRODUCTORY NOTE TO R (AAA (SYRIA) AND OTHERS) V. SECRETARY OF STATE
FOR THE HOME DEP'T (UKSC)
BY GUY S. GOODWIN-GILL*
[November 15, 2023]

Introduction

There have many developments since the publication in *International Legal Materials* of the initial United Kingdom–Rwanda Memorandum of Understanding (MoU) in 2022, not the least being the unanimous judgment of the UK Supreme Court published below. In addition, the present government has secured the passage of several new laws, including the Illegal Migration Act 2023 and the Safety of Rwanda (Asylum and Immigration) Act 2024, intended to both buttress its policy of removing asylum seekers to Rwanda for processing of their claims and meet the objections of the Court. It has also “translated” the MoU into a binding treaty, since ratified by both parties,¹ and Rwanda has enacted new asylum laws, as it had agreed.²

With an election to be held in July 2024, it is not clear what, if any, elements of policy and practice the anticipated Labour government will accept,³ or indeed whether any removals will even take place in the meantime.

Narrow Focus of the Judgment

The Supreme Court focused on one issue, which was to determine the legality of the Rwanda policy—“a legal question which the court has to decide on the basis of the evidence and established legal principles” (§2). This meant that several lines of argument potentially engaging international law could be left aside, including the lack of cooperation by the United Kingdom with the Office of the United Nations High Commissioner for Refugees,⁴ which is required under the 1951 Convention and the UNHCR Statute, among others; whether Article 31 of the 1951 Convention (which prohibits the penalisation of refugees who enter illegally) could be relied on, and whether its reference to penalties included expulsion or prejudice due to the discriminatory categorisation of arrivals; and the status of the so-called safe third country in international refugee law.

Instead, the Supreme Court looked at the fundamental principle of *non-refoulement*, noting that, as incorporated in Article 33 of the 1951 Convention, it prohibits sending an individual to a country in which their life or liberty would be threatened on certain grounds. It is, said the Court, one limitation of the state’s right to expel non-citizens (§ 19), and is “a core principle of international law, to which the United Kingdom government has repeatedly committed itself on the international stage, consistently with this country’s reputation for developing and upholding the rule of law” (§26).⁵ This was amply supported by the inclusion of the principle in domestic law, the overall effect of which was to provide also that a country was only a “safe third country” if it respected the principle (§§27–33).

The Supreme Court then considered the decisions of the Divisional Court and the Court of Appeal.⁶ The Divisional Court had rejected the wider challenge that the Rwanda policy was unlawful (though it found in favor of individual claimants), while a majority of the Court of Appeal upheld the challenge. It found that, on the evidence before the Divisional Court, there were real risks that asylum claims would not be properly determined, and that in consequence there were also real risks of refoulement.⁷ The Supreme Court agreed, finding that the Divisional Court had applied the wrong test (it should have made up its own mind) and that it had failed “to engage with the evidence of UNHCR concerning problems affecting the processing of asylum claims in Rwanda” and prior examples of refoulement, including under an earlier agreement with Israel (§§35, 42, 95–100). It emphasized that there must be adequate procedures in place, and the removing state cannot merely assume that asylum seekers will be treated in accordance with Convention standards and with assurances from the third state—the question is whether, “in their practical application,” such assurances provide a sufficient guarantee (§§45–50). Moreover, the question of risk requires an assessment of “what has happened in the past, and in the light of the situation as it currently exists, as well as in the light of what may be promised for the future” (§§103–105).

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UNHCR's Evidence

The Supreme Court was particularly scathing of the Divisional Court's dismissive approach to UNHCR's evidence (it "carries no special weight") and considered that it was in fact of particular significance (§§62–72). First, the status and role of UNHCR were important; it was entrusted with supervising the application of the Convention and its guidance was to be accorded considerable weight.⁸ Next, there was UNHCR's "unique and unrivalled expertise . . . in the field of asylum and refugee law"⁹ and the fact that UNHCR had deep practical experience in Rwanda since 1993. Moreover, despite having an institutional interest in the outcome, UNHCR's "evidence and submissions were presented with moderation, and did not appear to reflect a partisan assessment. It has also to be borne in mind that, as a responsible United Nations agency accountable to the General Assembly, UNHCR will not lightly make statements critical of any state in which it operates" (§69). This does not mean that its evidence was to be taken as decisive, but it was essentially uncontradicted and the existence of procedural defects leading to real risks of refoulement was clearly material.

UNHCR's views on the minimum procedural requirements to ensure non-refoulement and treatment in accordance with the Convention were largely approved by the Court (§§73–87), which noted its emphasis on practical results, on the importance of the interview stage, on how the reliability of the system "ultimately depends on the right of appeal," on the provision of reasons at each stage, on the necessity for independence in politically sensitive cases, for legal representation, and for access to the system. The various examples of deficiencies illustrated "a culture of, at best, insufficient appreciation" of Rwanda's obligations under the Convention and, "at worst a deliberate disregard for those obligations" (§§88, 91).

The Court emphasized the central issue as not being the good faith of the Rwanda government, but its practical ability to fulfil its assurances, at least in the short term, given the scale of changes in "procedure, understanding and culture" required (§102). As things then stood, there were substantial grounds to believe that there was a substantial risk "that asylum claims will not be determined properly, and that asylum seekers will . . . be at risk" of refoulement (§105).

What Next?

Following the judgment, UNHCR issued a paper maintaining its position that the arrangement does not meet required standards of legality and appropriateness and is not compatible with international refugee law.¹⁰ It stressed its earlier conclusion that the arrangement amounts to "burden-shifting," and that asylum seekers would not have access to fair and efficient procedures, which are essential for the avoidance of refoulement. It recognized that the commitments undertaken in the UK–Rwanda Asylum Partnership Treaty anticipate various substantial changes and would address some of the deficiencies identified by the Supreme Court, but these would require sustained, long-term efforts and require "an appreciation that the current approach is inadequate, a change in attitudes and effective training and monitoring" (§104).

UNHCR also doubted that the "duty to remove" interview being prepared under the Illegal Migration Act 2023 is sufficient to ensure the lawfulness and appropriateness of removal and expressed its concern at the exclusion from international protection of asylum seekers on the basis of their mode of arrival.

The Safety of Rwanda (Asylum and Immigration) Act 2024 received royal assent on April 25 after a back-and-forth process between the House of Commons and the House of Lords, in which all the latter's proposed amendments were rejected, generally without any consideration of their merits. Among those proposed and rejected was one that would have obliged ministers to abide by domestic and international law, one that would have prevented the government from declaring Rwanda to be a safe country until the promised safeguards had been implemented, and one that would have exempted those who had worked with British armed forces abroad. The Act entered into force the same day, when the UK–Rwanda Treaty itself was also ratified.¹¹

Section 1 of the Act now states that Parliament is sovereign and that international law does not override acts of the Parliament. It goes on to say that declaring a country to be a safe country means that removing someone there complies with all relevant international law; that "international law" includes various treaties, such as the European Convention on Human Rights, the 1951 Convention, the International Covenant on Civil and Political Rights, the

Convention against Torture, the Council of Europe Convention Against Trafficking, customary international law and “any other international law, or convention or rule of international law, whatsoever.”

Sections 2 and 3 then aim to prohibit legal challenges based on the argument that Rwanda is unsafe, by prohibiting a court from hearing a legal challenge and “disapplying” most of the Human Rights Act 1998. Section 5, in turn, empowers a Minister of the Crown (and only a Minister) to decide whether to comply with an interim measure ordered by the European Court of Human Rights.

Whether the Act and the accompanying legislation will have any effect on Channel crossings remains to be seen. There will certainly be other litigation in Europe and perhaps elsewhere, while the alleged deterrent effect is still unproven—“an unfounded and ideological position,” as one commentator recently described it.¹² What is certain is that hundreds, and perhaps even thousands, of people will be left in limbo, and that protests will continue.

ENDNOTES

- 1 See Home Office, Statement concerning the 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 (Apr. 25, 2024), https://assets.publishing.service.gov.uk/media/6631f2f6f3e54f33b3bb08b8/FINAL_Statutory_Statement_under_Constitutional_Reform_and_Governance_Act.pdf; Home Office, UK-Rwanda Treaty completes ratification process (Apr. 25, 2024), <https://www.gov.uk/government/news/uk-rwanda-treaty-completes-ratification-process>; For text of the treaty, see https://assets.publishing.service.gov.uk/media/656f51d30f12ef07a53e0295/UK-Rwanda_MEDP_-_English_-_Formatted_5_Dec_23_-_UK_VERSION.pdf. Rwanda ratified the treaty on April 18, 2024; see Law N° 040/2024 of 18/04/2024, Republic of Rwanda, Year 63, Official Gazette n° Special of 19/04/2024: <https://www.minijust.gov.rw/index.php?eID=dumpFile&t=f&f=96770&token=f64bf7dcb1ba7f2a7beb50d022c6c9d848ef99a6>.
- 2 On April 19, 2024, Rwanda adopted three laws relating to refugees and refugee claims; see Republic of Rwanda, Year 63, Official Gazette n° Special Bis of 19/04/2024: <https://www.minijust.gov.rw/index.php?eID=dumpFile&t=f&f=96771&token=e8402d8c7aa9ed9bf75cb7c0cd8bfb643a8aa70e>.
- 3 The leader of the Labour Party said that his government would stop removals, but did not commit to taking back anyone removed in the meantime; see Rajeev Syal, *First UK deportation flight to Rwanda could take off in June, court papers suggest*, THE GUARDIAN, May 10, 2024, <https://www.theguardian.com/uk-news/article/2024/may/10/first-uk-deportation-flight-to-rwanda-could-take-off-in-june-court-papers-suggest>; Elena Courea, *Labour government would stop Rwanda deportation flights, Starmer says*, THE GUARDIAN, May 10, 2024, <https://www.theguardian.com/uk-news/article/2024/may/10/labour-government-would-stop-rwanda-deportation-flights-starmer-says>.
- 4 UNHCR first became aware of the UK-Rwanda Arrangement when it was announced on April 14, 2022: Home Office, Country Information Note, Rwanda: Annex 2 (UNHCR evidence) (Dec. 2023), 213: https://assets.publishing.service.gov.uk/media/65a15c7b74ae660014738a48/CIN_RWA_UNHCR_evidence.pdf.
- 5 As developed in jurisprudence and practice, non-refoulement also prohibits indirect return. The Court relied on inclusion of the principle in the 1989 Convention against Torture, and in the jurisprudence developed under Article 7 of the 1966 International Covenant on Civil and Political Rights and Article 3 of the 1950 European Convention on Human Rights (particularly following the decision of the European Court of Human Rights in *Soering v United Kingdom* (1989) 11 EHRR 439).
- 6 R (on the application of AAA and others) v. Secretary of State for the Home Department [2022] EWHC 3230 (Admin); [2023] EWCA Civ 745.
- 7 A further point on which leave to appeal was allowed concerned the argument that the policy violated “retained EU law,” requiring a “connection” between the asylum seeker and the country to which they were to be removed. The Supreme Court dismissed this argument, on the ground that the legislation revoking the relevant provisions of EU law was clear and unambiguous (§§107–148).
- 8 The Court relied on *Al-Sirri v. Secretary of State for the Home Department* [2012] UKSC 54 and *IA (Iran) v. Secretary of State for the Home Department* [2014] UKSC 6.
- 9 Quoting R (EM (Eritrea)) v. Secretary of State for the Home Department [2014] UKSC 12, ¶ 72.
- 10 UNHCR, *UNHCR Analysis of the Legality and Appropriateness of the Transfer of Asylum-Seekers under the UK-Rwanda arrangement: an update* (Jan. 2024), <https://www.refworld.org/legal/natlegcomments/unhcr/2024/en/147086>.
- 11 *Supra*, note 1.
- 12 Enver Solomon, *The Lords have pulled apart the cruel and Orwellian Rwanda bill—yet still, the Tories press on*, THE GUARDIAN, Mar. 7, 2024, <https://www.theguardian.com/commentisfree/2024/mar/07/house-of-lords-cruel-orwellian-rwanda-bill-tories-refugees>. Enver Solomon is the chief executive of the United Kingdom Refugee Council. See also, Refugee Council, Briefing Paper, *Cost, chaos and human misery—the impact of the Illegal Migration Act 2023 and the Rwanda Plan* (Apr. 2024), <https://www.refugeecouncil.org.uk/wp-content/uploads/2024/04/Cost-chaos-and-human-misery-the-impact-of-the-IMA-2023-and-the-Rwanda-Plan-April-2024.pdf>.

R (AAA (SYRIA) AND OTHERS) V. SECRETARY OF STATE FOR THE HOME DEP'T
(UKSC)*
[November 15, 2023]

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.



**Michaelmas Term
[2023] UKSC 42**

On appeal from: [2023] EWCA Civ 745

JUDGMENT

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)

before

**Lord Reed, President
Lord Hodge, Deputy President
Lord Lloyd-Jones
Lord Briggs
Lord Sales**

**JUDGMENT GIVEN ON
15 November 2023**

Heard on 9, 10 and 11 October 2023

Secretary of State for the Home Department

Lord Pannick KC
Sir James Eadie KC
Neil Sheldon KC
Edward Brown KC
Mark Vinall
Sian Reeves
Jack Anderson
Natasha Barnes

(Instructed by the Government Legal Department (Immigration))

AAA (Syria) and HTN (Vietnam)

Raza Husain KC
Phillippa Kaufmann KC
Christopher Knight
Jason Pobjoy
Anirudh Mathur
Emmeline Plews
Will Bordell
Rayan Fakhoury

(Instructed by Duncan Lewis (City of London))

RM (Iran)

Phillippa Kaufmann KC
Alasdair Mackenzie
David Sellwood
Rosa Polaschek

(Instructed by Wilsons Solicitors LLP)

AS (Iran)

Sonali Naik KC
Adrian Berry
Mark Symes
Eva Doerr

Isaac Ricca-Richardson

(Instructed by Barnes Harrild & Dyer (Croydon London Road))

SAA (Sudan) and others

Manjit Gill KC
Rambert Demello
Tony Muman
Professor Satvinder Juss
Rashid Ahmed

Harjot Singh [Solicitor Advocate]

Mohd Mosem [Solicitor Advocate]

(Instructed by Twinwood Law Practice, Birmingham)

ASM (Iraq) and others

Richard Drabble KC

Leonie Hirst

Sarah Dobbie

Angelina Nicolaou

(Instructed by Wilsons Solicitors LLP)

United Nations High Commissioner for Refugees (Intervener)

Angus McCullough KC

Laura Dubinsky KC

David Chirico

Jennifer MacLeod

Agata Patyna

George Molyneaux

Joshua Pemberton

(Instructed by Baker McKenzie LLP (London))

LORD REED AND LORD LLOYD-JONES (with whom Lord Hodge, Lord Briggs and Lord Sales agree):**1. Introduction****(1) THE NATURE OF THE ISSUE BEFORE THE COURT**

1. This appeal is concerned with the Secretary of State's policy that certain people claiming asylum in the United Kingdom should not have their claims considered here, but should instead be sent to Rwanda in order to claim asylum there. Their claims will then be decided by the Rwandan authorities, with the result that if their claims are successful, they will be granted asylum in Rwanda.

2. In this appeal, the court is required to decide whether the Rwanda policy is lawful. That is a legal question which the court has to decide on the basis of the evidence and established legal principles. The court is not concerned with the political debate surrounding the policy, and nothing in this judgment should be regarded as supporting or opposing any political view of the issues.

(2) THE LEGAL FRAMEWORK OF THE POLICY

3. For asylum claims made on or before 27 June 2022, including those with which these proceedings are concerned, the policy is given effect under paragraphs 345A to 345D of the Immigration Rules (as then in force), made in accordance with section 3 of the Immigration Act 1971 ("the 1971 Act"). In broad terms, under those paragraphs an asylum claim can be ruled inadmissible, with the consequence that the merits of the claim need not be considered, where the asylum seeker had the opportunity to apply for asylum in a safe third country but did not do so. If it is decided that an asylum claim is inadmissible, the asylum seeker can be removed either to the safe third country where the opportunity to make the asylum claim arose, if that country is willing to accept the asylum seeker, or to any other safe third country which agrees to accept him or her. The policy proceeds on the basis that the asylum seekers who are to be removed to Rwanda had the opportunity to apply for asylum in a safe third country (in most cases, France) but did not do so, and that Rwanda is another safe third country which has agreed to accept them, and to which they can therefore be removed.

4. The criteria for designation as a safe third country are set out in paragraph 345B:

"A country is a safe third country for a particular applicant, if:

- (i) the applicant's life and liberty will not be threatened on account of race, religion, nationality, membership of a particular social group or political opinion in that country;
- (ii) the principle of non-refoulement will be respected in that country in accordance with the Refugee Convention;
- (iii) the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law, is respected in that country; and
- (iv) the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Refugee Convention in that country."

5. The principle of non-refoulement, to which paragraph 345B(ii) refers, is guaranteed by the United Nations 1951 Convention relating to the Status of Refugees (Cmd 9171) and its 1967 Protocol (Cmnd 3906) ("the Refugee Convention"), to which the United Kingdom is a party. As explained below, it requires that refugees are not returned to a country where their life or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion. In order to qualify as a safe third country under paragraph 345B(ii), Rwanda must accordingly be a country in which the principle of non-refoulement will be respected, ie a country which will not return refugees to another country where their life or freedom would be threatened. As we shall explain, refoulement is also prohibited under a number of other international conventions which

the United Kingdom has ratified. There are also several Acts of Parliament which protect refugees against refoulement.

6. The Immigration Rules are supplemented by guidance to Home Office case workers, known as Country Policy Information Notes (“CPINs”). A CPIN entitled “Inadmissibility - Safe Third Country Cases”, published by the Secretary of State on 9 May 2022, explains arrangements for the transfer and processing of asylum seekers which have been entered into by the governments of the United Kingdom and Rwanda, known as the Migration and Economic Development Partnership (“MEDP”), and advises that certain categories of asylum seeker can be removed to Rwanda in accordance with paragraphs 345A and 345B of the Immigration Rules. Another CPIN published on the same date, entitled “Review of asylum processing – Rwanda: assessment”, considers the processing of claims for asylum in Rwanda, and advises that there are no substantial grounds for believing that a person, if relocated to Rwanda, would face a real risk of treatment that is likely to be contrary to article 3 of the European Convention on Human Rights (“the ECHR”) by virtue inter alia of refoulement or shortcomings in the asylum process. Article 3 prohibits torture and inhuman or degrading treatment or punishment. As we explain in para 28 below, by enacting the Human Rights Act 1998 (“the Human Rights Act”), Parliament has given the ECHR effect in domestic law.

7. At the time of the decisions with which these proceedings are concerned, it was also necessary, in order for an asylum seeker to be removed to another country while an asylum claim was pending, for the Secretary of State to certify, under paragraph 17 of Schedule 3 to the Asylum and Immigration (Treatment of Claimants etc) Act 2004 (“the 2004 Act”), that the country in question was a place where the asylum seeker’s life and liberty would not be threatened by reason of race, religion, nationality, membership of a particular social group or political opinion, and from which the asylum seeker would not be sent to another state otherwise than in accordance with the Refugee Convention.

(3) *THE MEDP*

8. The MEDP comprises a Memorandum of Understanding (“MOU”) between the governments of the United Kingdom and Rwanda, entered into on 13 April 2022, and two diplomatic Notes Verbales regarding “the asylum process of transferred individuals” and “the reception and accommodation of transferred individuals”, executed by the government of Rwanda on the same date. As we shall explain, these documents are critical to the Secretary of State’s assessment that Rwanda is a safe third country for the purposes of paragraph 345B of the Immigration Rules. It is unnecessary to set out their terms in full, but we should draw attention to certain provisions.

9. Under paragraph 9 of the MOU, Rwanda undertakes that “it will treat each Relocated Individual, and process their claim for asylum, in accordance with the Refugee Convention, Rwandan immigration laws and international and Rwandan standards, including under international and Rwandan human rights law, and including, but not limited to ensuring their protection from inhuman and degrading treatment and refoulement”. Paragraph 9 also sets out a number of procedural guarantees, including access to an interpreter and to procedural or legal assistance, and to an independent and impartial process of appeal. Paragraph 10 makes provision for persons whose asylum claims are refused. Unless they are found to have another humanitarian protection need, or are granted permission to remain in Rwanda under its domestic immigration law, they are to be treated in accordance with paragraph 10.4:

“10.4 For those Relocated Individuals who are neither recognised as refugees nor to have a protection need or other basis upon which to remain in Rwanda, Rwanda will only remove such a person to a country in which they have a right to reside.”

10. Under paragraph 15 of the MOU, the United Kingdom and Rwandan governments agree to establish a monitoring committee which will report on the implementation of the arrangement, including the processing of asylum claims by the Rwandan authorities. Under paragraph 16, the United Kingdom has agreed that “a portion of Rwanda’s most vulnerable refugees” will be settled in the United Kingdom. Under paragraph 21, a joint committee of representatives of the two governments is to be formed, which will meet at least once every six months. Its remit will include monitoring the implementation of the arrangement. Financial arrangements have also been made between the two governments, which are referred to in paragraph 19. It appears from the evidence that the United Kingdom paid £20 million to Rwanda in April 2022. A further £120 million was paid by the United Kingdom

during that month as a contribution to a fund intended to promote economic development in Rwanda. Further payments to the fund are conditional on Rwanda's compliance with the terms of the MEDP.

11. It is also relevant to note that the Note Verbale concerning the asylum process of transferred individuals contains provisions concerning the procedures to be followed by the Rwandan authorities in dealing with asylum claims. They include provisions designed to address certain deficiencies in Rwandan practice which were identified by Home Office officials, such as failures to provide written decisions. Accordingly, paragraph 4.8 provides that relocated individuals will be notified in writing of the decision that has been taken on their asylum claim. Paragraph 5.1 provides that a relocated individual can appeal to the responsible minister in the Rwandan government against a decision refusing their claim. Paragraph 5.3 provides that a person whose appeal to the minister is refused can appeal to the High Court of Rwanda.

12. The MOU provides that it is not binding in international law (paragraph 1.6), that it does not create or confer any right on any individual, and that compliance with it is not justiciable in any court of law (paragraph 2.2). The Notes Verbales contain similar provisions.

(4) *THE LEGAL PROCEEDINGS*

13. In these proceedings, a number of asylum seekers challenged inadmissibility and removal decisions made by the Secretary of State under paragraphs 345A to 345D of the Immigration Rules between May and July 2022. The effect of the decisions was that their claims should not be determined in the United Kingdom and that they should instead be removed to Rwanda in order for their claims to be decided by the Rwandan authorities, with asylum being provided in Rwanda to any claimants who were successful. The decisions proceeded on the basis that Rwanda was a safe third country, and the Secretary of State issued certificates to that effect under paragraph 17 of Schedule 3 to the 2004 Act, which were also the subject of challenge. A number of interested organisations took part in the proceedings before the courts below, and the United Nations High Commissioner for Refugees ("UNHCR"), the United Nations Refugee Agency, was permitted to intervene.

14. The Divisional Court (Lewis LJ and Swift J) held that certain of the inadmissibility and removal decisions should be quashed on the ground that the way in which the Secretary of State went about the implementation of the policy in those cases was procedurally flawed: [2022] EWHC 3230 (Admin); [2023] HRLR 4. It rejected a wider challenge on the ground that the Secretary of State's policy was unlawful.

15. On appeal, the Court of Appeal, by a majority (Sir Geoffrey Vos MR and Underhill LJ, Lord Burnett of Maldon CJ dissenting), upheld the claimants' challenge to the lawfulness of the policy, and held that on the evidence before the Divisional Court there were substantial grounds for believing, notwithstanding the guarantees and assurances given, that (a) there were real risks that asylum claims would not be properly determined by the Rwandan authorities, and (b) that in consequence there were real risks of refoulement, and that so long as such grounds existed any removals under the MEDP would contravene section 6 of the Human Rights Act: [2023] EWCA Civ 745; [2023] 1 WLR 3103, particularly at paras 109-110 and 273-286. The court also concluded (unanimously) that the Secretary of State should not have certified the claims under paragraph 17 of Schedule 3 to the 2004 Act: paras 117, 302 and 480.

16. The Court of Appeal granted the Secretary of State permission to appeal to this court against its decision. It also granted one of the claimants permission to cross-appeal against its rejection of an argument that the policy was in violation of retained EU law, maintained in force by the European Union (Withdrawal) Act 2018 ("the 2018 Act"), 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"). That directive requires that the removal of asylum seekers to a safe third country must be in accordance with "rules laid down in national legislation, including: (a) rules requiring a connection between the person seeking asylum and the third country concerned on the basis of which it would be reasonable for that person to go to that country" (article 27(2)). (No question has been raised in these proceedings as to whether the removal of asylum seekers to a state with which they have no connection is compatible with the ECHR.)

17. This court subsequently granted some of the claimants permission to cross-appeal in respect of two other grounds which had been rejected by the Divisional Court and the Court of Appeal. The first was that the removal of asylum seekers to Rwanda was unlawful under section 6 of the Human Rights Act because they were at risk of ill-treatment in that country, contrary to article 3 of the ECHR. The second was that the Secretary of State had failed to consider the risk of refoulement with the degree of care required under the common law or under the Human Rights Act. In the event, as we shall explain, those grounds of appeal did not feature prominently at the hearing of the appeal, and it is unnecessary for us to express a concluded view about them. We shall accordingly focus primarily on the grounds concerning (1) refoulement and (2) retained EU law.

18. The factual background is fully set out in the judgments below and need not be repeated at length, although it will be necessary for us to consider aspects of the evidence in some detail.

2. *Refoulement*

(1) *THE LEGAL BACKGROUND*

(i) *International law*

19. Under international law, states have the right to control the entry, residence and expulsion of aliens, and to counter attempts to circumvent immigration restrictions, subject to their treaty obligations and to any relevant principles of customary international law. One limitation of the right to expel aliens is the principle of non-refoulement, which is enshrined in several international treaties which the United Kingdom has ratified. As will appear, the term bears slightly different meanings in different contexts.

20. The Refugee Convention, which has 146 states parties including the United Kingdom, provides in article 33(1):

“No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”

Article 33(1) has long been interpreted by the courts of this country as prohibiting not only the direct return of refugees to the country where they fear persecution, but also their indirect return via a third country: *R v Secretary of State for the Home Department, Ex p Bugdaycay* [1987] AC 514, 532.

21. The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984 (“UNCAT”), which has 173 states parties including the United Kingdom, provides in article 3(1):

“No State Party shall expel, return (‘refouler’) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”

22. The United Nations International Covenant on Civil and Political Rights of 1966 (“ICCPR”), also with 173 states parties including the United Kingdom, is interpreted by the United Nations Human Rights Committee, which monitors implementation of the Covenant, as imposing a similar obligation:

“[T]he article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed.”

(General Comment 31 (2004), para 12). Article 6 of the Covenant protects the right to life, and article 7 prohibits torture or cruel, inhuman or degrading treatment or punishment.

23. The ECHR, with 46 states parties including the United Kingdom, is interpreted in the same way. It has been understood since the 1989 judgment of the European Court of Human Rights (“the European Court”) in *Soering v United Kingdom* (1989) 11 EHRR 439 (“*Soering*”) that the duty of the contracting parties under article 3 not to

subject persons to torture or to inhuman or degrading treatment also imports an obligation not to remove persons to other states where there are substantial grounds for believing that they would be at real risk of such ill-treatment. This is essentially the same approach as is adopted under the UNCAT test (para 21 above) and in relation to the ICCPR (para 22 above). It is also similar to the “real risk” test long adopted by domestic courts in relation to the “safe third country” provisions of our domestic law, as explained at para 32 below. *Soering* was a case concerned with extradition, but the principle was soon applied to removal cases generally.

24. As a consequence, article 3 prohibits the expulsion of asylum seekers to countries where they face the risk of refoulement (direct or indirect) to their country of origin: see *MSS v Belgium and Greece* (2011) 53 EHRR 2 (a case concerned with the removal of an asylum seeker to a country through which he had transited). In relation to that risk, the European Court observed in *Ilias v Hungary* (2019) 71 EHRR 6 (another case concerned with the removal of asylum seekers to a country through which they had transited) at para 131 that “the main issue . . . is whether or not the individual will have access to an adequate asylum procedure in the receiving third country”. That issue is important in cases of this kind because if asylum seekers do not have access to such a procedure there will be a real risk of genuine refugees being refouled, either because their claims are not considered at all or because they are not determined properly. Whether asylum seekers removed to Rwanda would have access to an adequate asylum procedure is therefore one of the principal issues in the present proceedings.

25. It may be that the principle of non-refoulement also forms part of customary international law. The United Kingdom has subscribed to this view, along with the other states parties to the Refugee Convention, in the 2001 Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees (UN Doc HCR/MMSP/2001/09). The fourth recital to the preamble to the declaration acknowledged the continuing relevance and resilience of the international regime of rights and principles established for the protection of refugees, “including at its core the principle of *non-refoulement*, whose applicability is embedded in customary international law”. The significance of non-refoulement being a principle of customary international law is that it is consequently binding upon all states in international law, regardless of whether they are party to any treaties which give it effect. However, as we have not been addressed on this matter, we do not rely on it in our reasoning.

26. The principle of non-refoulement is therefore given effect not only by the ECHR but also by other international conventions to which the United Kingdom is party. It is a core principle of international law, to which the United Kingdom government has repeatedly committed itself on the international stage, consistently with this country’s reputation for developing and upholding the rule of law.

(ii) Domestic law

27. The principle of non-refoulement has also been given effect in our domestic law by a number of statutes enacted by Parliament. First, section 2 of the Asylum and Immigration Appeals Act 1993 (“the 1993 Act”) provides:

“Nothing in the immigration rules (within the meaning of the 1971 Act) shall lay down any practice which would be contrary to the Convention.”

In that context, “the Convention” is defined in section 1 as meaning the Refugee Convention. The Immigration Rules are the rules laid down by the Secretary of State as to the practice to be followed in the administration of the 1971 Act for regulating the entry into and stay in the United Kingdom of persons required to have leave to enter: section 3 of the 1971 Act (quoted in para 122 below). Asylum claims fall within the scope of that provision, since they are claims for leave to remain in the United Kingdom, made by persons who require leave to enter. It is therefore unlawful, under section 2 of the 1993 Act, for the Secretary of State to lay down a rule as to practice in relation to asylum claims which would be contrary to the principle of non-refoulement laid down in article 33(1) of the Refugee Convention. In the event, as we have explained, paragraph 345B of the Immigration Rules fulfils that requirement by providing that a country is a safe third country only if, inter alia, “the principle of non-refoulement will be respected in that country in accordance with the Refugee Convention”.

28. Secondly, the Human Rights Act gives domestic effect to the ECHR. Under section 6, it is unlawful for a public authority to act in a way which is incompatible with a Convention right, such as the right guaranteed by

article 3 of the ECHR. The Secretary of State is a public authority for this purpose. Section 2 requires domestic courts to take into account the judgments of the European Court when determining a question which has arisen in connection with a right guaranteed by the ECHR. Domestic courts, including this court and its predecessor, the Appellate Committee of the House of Lords, have long applied the Human Rights Act in relation to the removal of persons from the United Kingdom to other countries in accordance with the principles laid down by the European Court in cases such as *Soering* and *MSS v Belgium and Greece*. Those principles are not questioned by any party to this appeal. It is therefore unlawful, under section 6 of the Human Rights Act, for the Secretary of State to remove asylum seekers to countries where there are substantial grounds to believe that they would be at real risk of ill-treatment by reason of refoulement.

29. Thirdly, section 82(1) of the Nationality, Immigration and Asylum Act 2002 (“the 2002 Act”), read together with section 84(1) of that Act, confers a right of appeal against the refusal of a protection claim (defined by section 82(2) as including a claim that the removal of a person from the United Kingdom would breach the United Kingdom’s obligations under the Refugee Convention) on the ground that removal of the person from the United Kingdom would breach the United Kingdom’s obligations under that Convention. Section 82(1), read together with section 84(2), also confers a right of appeal against the refusal of a human rights claim (defined by section 113(1) as a claim that to remove the person from the United Kingdom would be unlawful under the Human Rights Act) on the ground that removal of the person from the United Kingdom would be unlawful under section 6 of that Act. The principle of non-refoulement is therefore given effect by sections 82 and 84 of the 2002 Act, both as it is set out in the Refugee Convention and as it applies under the Human Rights Act.

30. It is also relevant to note section 94(7) of the 2002 Act, under which, read with section 94(1), the Secretary of State may certify a protection claim or human rights claim as clearly unfounded, and thereby remove the claimant’s rights of appeal, if:

- “(a) it is proposed to remove the person to a country of which he is not a national or citizen, and
- (b) there is no reason to believe that the person’s rights under the Human Rights Convention [ie the ECHR] will be breached in that country.”

Section 94(8) provides:

“In determining whether a person in relation to whom a certificate has been issued under subsection (7) may be removed from the United Kingdom, the country specified in the certificate is to be regarded as—

- a. a place where a person’s life and liberty is not threatened by reason of his race, religion, nationality, membership of a particular social group, or political opinion, and
- b. a place from which a person will not be sent to another country otherwise than in accordance with the Refugee Convention or with the United Kingdom’s obligations in relation to persons eligible for a grant of humanitarian protection.”

The premise of these provisions appears to be that if there is no reason to believe that a person’s rights under the ECHR will be breached in the country to which he is proposed to be removed, then it follows that the person will not be removed from that country to another country otherwise than in accordance with the Refugee Convention. That is consistent with the view that the ECHR protects against refoulement, as the European Court and domestic courts have held.

31. Fourthly, as we have explained, paragraph 17 of Schedule 3 to the 2004 Act enables the Secretary of State to certify, where it is proposed to remove an asylum seeker to a country (“a specified state”) of which he is not a national or citizen, that:

- “(c) in the Secretary of State’s opinion the specified State is a place –

- (i) where the person's life and liberty will not be threatened by reason of his race, religion, nationality, membership of a particular social group or political opinion, and
- (ii) from which the person will not be sent to another State otherwise than in accordance with the Refugee Convention."

32. Paragraph 17(c)(ii) reflects the principle of non-refoulement as set out in article 33(1) of the Refugee Convention. At the time of the decisions with which these proceedings are concerned, such a certificate had the effect, under paragraph 18, of disapplying section 77 of the 2002 Act, which prohibits the removal of an asylum seeker from the United Kingdom while his or her claim for asylum is pending (paragraph 18 has since been repealed and replaced by corresponding provisions in Schedule 4 to the Nationality and Borders Act 2022, which amend section 77 of the 2002 Act; but paragraph 18 continues to apply to the decisions with which these proceedings are concerned). The Divisional Court accordingly considered that certification under paragraph 17 was an integral part of the Secretary of State's decisions to remove asylum claimants to Rwanda: para 12. It has long been held that a certificate of the kind for which paragraph 17(c)(ii) provides can be issued only where there is no real risk that the asylum seeker will be sent to another country otherwise than in accordance with the Refugee Convention: see, for example, *R v Secretary of State for the Home Department, Ex p Canbolat* [1997] 1 WLR 1569.

33. Asylum seekers are thus protected against refoulement not only by the Human Rights Act but also by provisions in the 1993 Act, the 2002 Act and the 2004 Act, under which Parliament has given effect to the Refugee Convention as well as the ECHR.

(2) THE ISSUES ARISING IN RELATION TO REFOULEMENT IN THIS APPEAL

34. As we have explained, the Divisional Court held that the Secretary of State's policy was lawful. The Court of Appeal reversed that decision, by a majority. They did so on the basis, first, that the Divisional Court had applied the wrong legal test when considering the refoulement issue. The correct test, derived from *Soering*, requires the court to decide for itself whether there are substantial grounds for believing that the removal of asylum seekers to Rwanda would expose them to a real risk of ill treatment, as a consequence of refoulement to another country. The assessment is one which must be made by the court. The majority of the Court of Appeal considered that the Divisional Court had mistakenly dealt with the issue on the basis that the court's role was confined to deciding whether the Secretary of State had been entitled to form the view that there was no such risk. The Lord Chief Justice considered that the Divisional Court had not made that mistake.

35. The majority of the Court of Appeal also considered that the Divisional Court had erred in its assessment of aspects of the evidence, most notably by failing to address the evidence of UNHCR in relation to (i) defects in the processing of asylum claims by the Rwandan authorities, (ii) prior examples of refoulement of asylum seekers from Rwanda to other countries, and (iii) the Rwandan government's failure to abide by assurances (including an assurance of non-refoulement) set out in an earlier arrangement of a similar kind which it had entered into with Israel. Again, the Lord Chief Justice disagreed.

36. On the basis that the Divisional Court had applied the wrong legal test, or in any event had erred in its approach to the evidence, the majority of the Court of Appeal carried out their own assessment of the evidence. They concluded that there were substantial grounds for believing that there was a real risk that asylum seekers removed to Rwanda would be subject to refoulement, as a consequence of the Rwandan authorities' failure to determine their claims for asylum accurately and fairly. The Secretary of State's policy was accordingly held to be unlawful.

37. Against that background, the issues raised by the Secretary of State in the appeal against the Court of Appeal's decision in relation to refoulement are as follows:

- (i) (1) Whether the majority of the Court of Appeal was correct to conclude that the Divisional Court had applied the incorrect legal test.
- (ii) (2) If the Divisional Court did apply the correct test, whether the Court of Appeal was entitled to interfere with its conclusion.

- (iii) (3) If the Divisional Court did not apply the correct test, or there was another basis for interfering with its conclusion, so that the Court of Appeal was permitted to answer the question afresh for itself, whether the Court of Appeal was wrong to conclude that, on the evidence before the Divisional Court, there were substantial grounds for thinking that asylum seekers would face a real risk of ill-treatment (in the form of refoulement) following removal to Rwanda due to the inadequacy of the Rwandan system for refugee status determination (as the majority found) or not (as the Lord Chief Justice concluded), including by giving insufficient weight to HM Government's assessment of the likelihood of the government of Rwanda abiding by its assurances.

We shall address each of these issues in turn.

(3) ISSUE 1 – WHETHER THE DIVISIONAL COURT APPLIED THE CORRECT TEST

38. The test to be applied by the court in relation to the issue of refoulement is, as we have explained, whether there are substantial grounds for believing that the removal of asylum seekers to Rwanda would expose them to a real risk of ill treatment, as a consequence of refoulement to another country. As we shall explain, there was evidence before the Divisional Court which supported the existence of such a risk, including evidence from UNHCR. On the other hand, the Secretary of State relied on the Rwandan government's assurances that asylum seekers would have their claims determined in accordance with the arrangements set out in the MEDP. In those circumstances, the Divisional Court had to consider whether in the light of all the evidence, including the assurances given by the Rwandan government, there were substantial grounds for believing that there was a real risk of refoulement.

39. Several passages in the judgment of the Divisional Court suggest that the members of the court misunderstood their function. For example, they began their consideration of the adequacy of Rwanda's asylum system, at para 62 of their judgment, by stating:

“Next we consider whether the Home Secretary was entitled to conclude that there were sufficient guarantees to ensure that asylum-seekers relocated to Rwanda would have their asylum claims properly determined there and did not run a risk of refoulement . . .”.

That statement seems to suggest that the court saw its function as reviewing the Secretary of State's assessment and deciding whether it was a tenable view, rather than making its own assessment of the grounds for apprehending a risk of refoulement in the light of the evidence as a whole. Similarly, at para 70, the Divisional Court defined “the question we must address” as “whether, notwithstanding the opinion the UNHCR has now expressed, the Home Secretary was entitled to hold the contrary opinion”. Many other passages containing similar statements could be cited. These are not accurate ways of expressing the test which the court was required to apply. The question whether the Secretary of State was entitled to reach a particular conclusion is a different question from whether the court assesses that there are in fact substantial grounds for thinking that there is a real risk of refoulement.

40. On the other hand, the court recognised at para 63 of its judgment that it had to carry out the necessary assessment itself. In that context, the court's references to the question whether the Secretary of State was entitled to conclude that Rwanda's assurances provided a sufficient guarantee might be interpreted as a way, albeit one which was misleadingly expressed, of approaching the critical question of whether there were, in the opinion of the court, substantial grounds for believing that there was a real risk of refoulement. In a situation where the absence of such a risk depended on the reliability of the assurances, the latter issue (as assessed by the court rather than by the Secretary of State) was a very important factor in the application of the *Soering* test. As the divergent interpretations in the Court of Appeal would suggest, it is possible to read the Divisional Court's judgment in more than one way.

41. In these circumstances, we do not find it easy to determine what test the Divisional Court applied. However, it is not necessary for this court to reach a concluded view as to which interpretation of the judgment should be preferred. For the reasons which we shall explain when we come to issue 2, we are satisfied that the Court of Appeal was entitled in any event to interfere with the Divisional Court's conclusion and to consider the question for itself.

(4) *ISSUE 2 - WHETHER THE COURT OF APPEAL WAS ENTITLED TO INTERFERE WITH THE DIVISIONAL COURT'S CONCLUSION*

42. We are in no doubt that, regardless of whether the Divisional Court applied the correct legal test, the Court of Appeal was in any event entitled to interfere with its conclusion. That is because the Divisional Court erred in its treatment of the evidence bearing on the risk of refoulement, essentially by failing to engage with the evidence of UNHCR concerning problems affecting the processing of asylum claims in Rwanda. As we have explained, an assessment of whether there is a risk of refoulement of asylum seekers removed to Rwanda requires an examination of how the asylum procedure operates there, in order to ensure that it affords sufficient guarantees that asylum seekers are not at risk of being removed to their country of origin without a proper evaluation of their claims.

43. In fairness to the Divisional Court, we should point out that it had to deal with a greater number and range of issues than either the Court of Appeal or this court, and that it produced its judgment at commendable speed, reflecting the public importance of the questions raised. Inevitably, this appeal has focused on the issue on which the Divisional Court is alleged to have erred, rather than on the many more issues on which its decision is unchallenged.

(i) *The correct legal approach to the evidence*

44. There are a number of decisions of the European Court and of domestic courts which bear on the correct approach to adopt to the evidence in a case of the present kind. First, the judgment of the European Court in *Ilias v Hungary* makes it clear that a state party cannot remove asylum seekers to a third country without determining their asylum status unless it has established that there are adequate procedures in place in that country to ensure that their asylum claims are properly determined and that they do not face a risk of refoulement to their country of origin. The court stated in that case (para 134):

“... in all cases of removal of an asylum seeker from a contracting state to a third intermediary country without examination of the asylum requests on the merits ... it is the duty of the removing state to examine thoroughly the question whether or not there is a real risk of the asylum-seeker being denied access, in the receiving third country, to an adequate asylum procedure, protecting him or her against refoulement. If it is established that the existing guarantees in this regard are insufficient, article 3 [of the ECHR] implies a duty that the asylum-seekers should not be removed to the third country concerned.”

45. The European Court made it clear that this requires an assessment of how the asylum system in the receiving state operates in practice, having regard to deficiencies identified by bodies such as UNHCR. In that regard it stated (para 141):

“... the national authorities ... must carry out of their own motion an up-to-date assessment, notably, of the accessibility and functioning of the receiving country's asylum system and the safeguards it affords in practice. The assessment must be conducted primarily with reference to the facts which were known to the national authorities at the time of expulsion but it is the duty of those authorities to seek all relevant generally available information to that effect. General deficiencies well documented in authoritative reports, notably of the UNHCR, Council of Europe and EU bodies are in principle considered to have been known. The expelling state cannot merely assume that the asylum-seeker will be treated in the receiving third country in conformity with the Convention standards but, on the contrary, must first verify how the authorities of that country apply their legislation on asylum in practice.”

46. The Secretary of State relies on the assurances provided by the Rwandan government in the MEDP as meeting any concerns arising from the evidence about the past and present operation of the Rwandan asylum system. In essence, the Secretary of State submits that, notwithstanding any problems that there may have been in the past or that may remain at present, the MEDP sets out arrangements for the future which provide adequate safeguards against refoulement, and the Rwandan government can be relied on to fulfil its undertaking to process the claims in accordance with those arrangements. It is therefore necessary to refer to authorities concerned with the approach to be adopted where the safety of a third country depends on assurances given by its government about the treatment which individuals who are sent there will receive.

47. The approach to be adopted in circumstances of that kind was considered by the European Court in *Othman v United Kingdom* (2012) 55 EHRR 1 (“*Othman*”). The case concerned the sufficiency of assurances given by the Kingdom of Jordan to the United Kingdom in the context of a contention that deporting the applicant to Jordan would put him at real risk of ill-treatment. The court observed at para 187 that assurances are not in themselves sufficient to ensure adequate protection against the risk of ill treatment:

“There is an obligation to examine whether assurances provide, in their practical application, a sufficient guarantee that the applicant will be protected against the risk of ill-treatment. The weight to be given to assurances from the receiving state depends, in each case, on the circumstances prevailing at the material time.”

48. In that regard, the court listed at para 189 a number of factors which were relevant. The list was not intended to be exhaustive, and in some respects reflected the particular circumstances of the case before the court. What is more important, in the context of the present case, is the European Court’s emphasis on the need to carry out a fact-sensitive examination of how assurances will operate in practice, in the circumstances prevailing at the material time. Several of the factors mentioned are, however, relevant to the present case: for example, the disclosure of the terms of the assurances to the court, the general human rights situation in the receiving state, the receiving state’s laws and practices, its record in abiding by similar assurances, the existence of monitoring mechanisms, and the examination of the reliability of the assurances by the domestic courts of the sending state.

49. The approach to be adopted where diplomatic assurances are relied on was discussed by this court more recently in *Zabolotnyi v Mateszalka District Court, Hungary* [2021] UKSC 14; [2021] 1 WLR 2569. There, the court considered the sufficiency of assurances given by the government of Hungary to the United Kingdom in the context of a contention that extraditing Mr Zabolotnyi to Hungary would put him at real risk of ill-treatment. It was held that the court was required to undertake a free evaluation of the assurance, which required the court to examine and assess all relevant evidence (para 50). In particular, past breaches of similar assurances by the requesting state, whether provided to the United Kingdom or to a third state, were relevant to the question whether the requesting state could be relied upon to comply with its assurance on the present occasion (*ibid*). In that regard, Lord Lloyd-Jones stated, in a judgment with which the other members of the court agreed (paras 46-47):

“46. . . . In deciding whether an assurance can be relied upon, evidence of past compliance or non-compliance with an earlier assurance will obviously be relevant. A state’s failure to fulfil assurances in the past may be a powerful reason to disbelieve that they will be fulfilled in the future

47. I am unable to accept that a sound distinction can be drawn in this regard between breach of a prior assurance given to the United Kingdom and breach of a prior assurance given to a third state. On the contrary, the fact of a prior breach of such an assurance, if established, is clearly relevant regardless of the identity of the state to which it was provided. As Mr Hall submits on behalf of the appellant, such a distinction would be illogical and unprincipled. The same requesting state is acting in the same context and there is no material distinction between a willingness to breach assurances given to state A and assurances given to state B.”

(ii) *The approach adopted by the Divisional Court*

50. The Divisional Court did not follow this approach in its consideration of the evidence. As we shall explain when we discuss Issue 3, the Divisional Court had before it evidence that there were serious and systemic defects in Rwanda’s procedures and institutions for processing asylum claims; that it had a history of acting in breach of the principle of non-refoulement, which had continued during the negotiation of the MEDP and following its execution; and that it had, in the recent past, failed to abide by similar assurances which it had given to another foreign government. The Divisional Court did not engage with this evidence, and consequently failed to examine the reliability of the assurances given by Rwanda in the light of that evidence.

51. Instead, the Divisional Court began its consideration of the issue by stating that its 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” (para 63). It gave three reasons why the Secretary of State was entitled to rely on the assurances. First, the

United Kingdom and Rwanda had a well-established relationship (para 64). Secondly, the terms of the MEDP were specific and detailed (para 65). Thirdly, a senior official at the Foreign, Commonwealth and Development Office (“the FCDO”) stated in a witness statement that the government was confident that Rwanda would honour its obligations under the MEDP (para 66). The last of these reasons was crucial. The court said that it could go behind that opinion “only if there were compelling evidence to the contrary”.

52. We consider that that was a mistaken approach. As authorities such as *Othman* and *Zabolotnyi* make clear, the court has to make its own assessment of whether there are substantial grounds for believing that there is a real risk of refoulement. It is not required to accept the government’s evaluation of assurances unless there is compelling evidence to the contrary. Of course, the court will attach weight to the government’s view as to the value of assurances given by another country, particularly where its view reflects the advice of officials with relevant experience and expertise. The FCDO in particular has long experience of diplomatic relations with other countries, and the advice of its officials can assist ministers to reach an informed view as to the likelihood of the country in question complying with assurances. Other departments may also have officials who are well-qualified to give such advice. Ministers do not, however, necessarily act on the advice of their officials.

53. In the present case, following the initial stage of identifying potential partner countries (when FCDO officials advised that Rwanda should not be prioritised), advice came primarily from Home Office officials. They prepared the CPINs mentioned in para 6 above, on the basis of desk-based research into the Rwandan asylum system, and on what they were told during two short visits to Rwanda in January and March 2022. Further work was also done after the MEDP had been concluded. According to the evidence of Home Office officials, the CPINs underpinned the government’s decision to enter into the MEDP. However, possibly because of the pressures under which they had to work, the officials who prepared the CPINs relied heavily on assurances by the Rwandan government, without close examination of supporting evidence, or consideration of publicly available material which placed some of those assurances in question.

54. Those shortcomings were highlighted when a review of the CPINs was undertaken in July 2022 for the Independent Advisory Group on Country Information (“IAGCI”), which provides advice to the Chief Inspector of Borders and Immigration in order to allow him to discharge his duty under section 48(2)(j) of the UK Borders Act 2007. The researcher responsible for the review criticised aspects of the way in which the CPINs were prepared, including “very limited critical information on the Rwandan asylum system” and “fundamental gaps of information and unanswered questions with regards to procedural practicalities and implications”.

55. As that evidence indicates, the government is not necessarily the only or the most reliable source of evidence about matters which may affect the risk of refoulement: such as, to mention some of the factors referred to in *Othman* and *Zabolotnyi*, the general human rights situation in the receiving state, the receiving state’s practices, and its record in abiding by similar assurances, whether given to the United Kingdom or to other states. Where evidence bearing on factors such as these is adduced from sources other than the government, the court has to consider it along with the government’s assessment of any assurances given. The court does not necessarily have to resolve conflicts in the evidence: the question it has to decide is not whether asylum seekers removed to the country in question would in fact be subjected to refoulement, but whether there are substantial grounds for believing that they would be at risk of refoulement. In deciding that question, the court has to form its own view in the light of the evidence as a whole. In doing so, the court brings to bear its own expertise and experience: weighing competing bodies of evidence, and assessing whether there are grounds for apprehending a risk, are familiar judicial functions.

56. We are therefore unable to accept the suggestion, made on behalf of the Secretary of State, that assessing the value of assurances given by another country, in the present context, is analogous to assessing whether a particular course of action is in the interests of national security, and that the role of the court is correspondingly limited, as explained in cases such as *Secretary of State for the Home Department v Rehman* [2001] UKHL 47; [2003] 1 AC 920 (“*Rehman*”) and *R (Begum) v Special Immigration Appeals Commission* [2021] UKSC 7; [2021] AC 765 (“*Begum*”). In *Rehman* itself, the House of Lords made it clear that, even in the context of questions of national security, an appeal to the courts may turn upon issues which at no point lie within the exclusive province of the executive. As Lord Hoffmann stated (para 54):

“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.*” (emphasis added)

Similarly, in *Begum* Lord Reed (with whose judgment the other members of the court agreed) stated (para 69) that “if a question arises as to whether the Secretary of State has acted incompatibly with the appellant’s Convention rights, contrary to section 6 of the Human Rights Act, [the court] has to determine that matter objectively on the basis of its own assessment”.

57. The present case raises an issue precisely of the kind contemplated in those citations. As we have explained, the court is itself required by law to form a view as to whether there are substantial grounds for believing that asylum seekers who are removed to Rwanda are at risk of refoulement, in the light of all the evidence bearing on that issue. The government’s assessment of whether there is such a risk is an important element of that evidence, but the court is bound to consider the question in the light of the evidence as a whole and to reach its own conclusion.

58. Furthermore, as the Lord Chief Justice pointed out in the present case (para 471), even if the court is not institutionally as well equipped as the government to carry out an evaluation of a diplomatic assurance, the position is different “where the assessment of future conduct engages practical considerations which arise from past conduct”. As he observed (*ibid*):

“In this case there is very detailed evidence of the way in which the Rwandan asylum system has operated when considering individual claims before the summer of 2022. There were undoubted deficiencies. Whether they are capable of being made good is not an issue on which the government has special institutional expertise.”

59. As we have explained, however, the Divisional Court decided that it could go behind the government’s opinion only if there were compelling evidence to the contrary. Following that approach, the Divisional Court did not consider that such evidence existed (para 66). In that regard, it referred to two matters which had been raised by UNHCR.

60. The first was evidence that Rwanda had failed to abide by assurances which it had given to the government of Israel under an agreement for the removal of asylum seekers from Israel to Rwanda. In that regard, the Divisional Court stated (para 68):

“There is no evidence that during its negotiations with the Rwandan government, the United Kingdom government sought to investigate either the terms of the Rwanda/Israel agreement or the way it had worked in practice. It is also apparent from [a FCDO official’s] statement that the merits of the MOU and Notes Verbales have been assessed on their own terms, not by way of comparison with the Rwanda/Israel agreement. This was a permissible approach; we do not consider it discloses any error of law.”

61. This was an inadequate treatment of the evidence in question, which we shall discuss when dealing with Issue 3 below. Evidence of a failure to abide by earlier assurances, given to another country in a similar context, was relevant to the assessment of risk, as was noted in *Zabolotnyi* at para 46 (cited at para 49 above). The government’s failure to consider it did not mean that it could or should be ignored by the court.

62. The second matter raised by UNHCR was evidence of Rwanda’s history of refoulement, and of defects in its asylum system, in the light of which UNHCR concluded that Rwanda could not be relied upon to comply with its obligations under the Refugee Convention (or, therefore, with the obligations it had assumed under the MEDP). The Divisional Court was dismissive of this evidence, and did not attempt to engage with it. It stated at para 71 that the evidence of UNHCR “carries no special weight”. It went on to state that the government’s conclusion that Rwanda

would act in accordance with the terms of the MOU and the Notes Verbales “rests on HM Government’s experience of bilateral relations extending over almost 25 years, and the specific experience of negotiating the MOU over a number of months in 2022”. It stated that it had to decide whether, on the totality of the evidence, the Secretary of State’s opinion was undermined to the extent that it could be said to be legally flawed, and concluded that it was not.

63. This again was an inadequate treatment of the evidence in question, which we shall discuss when dealing with Issue 3. Evidence that Rwanda had a history of refoulement, and of defects in Rwanda’s asylum system, was relevant to an assessment of whether persons removed to Rwanda in order for their claims to asylum to be decided by the Rwandan authorities were at risk of refoulement. As the European Court stated in *Ilias v Hungary* (para 134, cited at para 44 above), it is the duty of the removing state to examine thoroughly the question whether or not there is a real risk of the asylum-seeker being denied access, in the receiving third country, to an adequate asylum procedure, protecting him or her against refoulement. It is clear from the evidence that government officials made serious efforts to comply with that duty, although they were hampered by circumstances, including restrictions on their ability to hold discussions with UNHCR and other non-governmental organisations. The same duty also applies to the courts, as an organ of the state, when the issue is raised before them.

64. The Divisional Court’s view that the evidence of UNHCR carried no special weight was a further error. Of course, the weight to be attached to evidence is always a matter for the court, and will depend on the circumstances. However, a number of factors combined in the present case to render the evidence of UNHCR of particular significance.

65. The first relevant factor is the status and role of UNHCR. It is entrusted by the United Nations General Assembly with supervision of the interpretation and application of the Refugee Convention: see the Statute of the Office of the United Nations High Commissioner for Refugees, annexed to UN General Assembly Resolution 428(V), 14 December 1950. Under article 35 of the Refugee Convention, states parties undertake to co-operate with UNHCR in the exercise of its functions, and to facilitate its duty of supervising the application of the provisions of the Convention. Reflecting those circumstances, it is well established that UNHCR’s guidance concerning the interpretation and application of the Refugee Convention “should be accorded considerable weight”: *Al-Sirri v Secretary of State for the Home Department* [2012] UKSC 54; [2013] 1 AC 745, para 36. In *IA (Iran) v Secretary of State for the Home Department* [2014] UKSC 6; [2014] 1 WLR 384, para 44, this court stated that “the accumulated and unrivalled expertise of this organisation, its experience in working with governments throughout the world, the development, promotion and enforcement of procedures of high standard and consistent decision-making in the field of refugee status determinations must invest its decisions with considerable authority”.

66. The second factor, mentioned in that dictum, is UNHCR’s expertise and experience. That factor was also emphasised by this court in *R (EM (Eritrea)) v Secretary of State for the Home Department* [2014] UKSC 12; [2014] AC 1321, when considering the approach which should be adopted to evidence provided by UNHCR in relation to the risks involved in removing asylum seekers to another country. Lord Kerr of Tonaghmore, with whose judgment the other members of the court agreed, referred (para 72) to “the unique and unrivalled expertise of UNHCR in the field of asylum and refugee law”, and expressed agreement with the observations of Sir Stephen Sedley in the court below [2013] 1 WLR 576, para 41, which he quoted at para 71:

“It seems to us that there was a reason for [the European Court in *MSS v Belgium and Greece*] according the UNHCR a special status in this context. The finding of facts by a court of law on the scale involved here is necessarily a problematical exercise, prone to influence by accidental factors such as the date of a report, or its sources, or the quality of its authorship, and conducted in a single intensive session. The High Commissioner for Refugees, by contrast, is today the holder of an internationally respected office with an expert staff (numbering 7,190 in 120 different states, according to its website), able to assemble and monitor information from year to year and to apply to it standards of knowledge and judgment which are ordinarily beyond the reach of a court. In doing this, and in reaching his conclusions, he has the authority of the General Assembly of the United Nations, by whom he is appointed and to whom he reports. It is intelligible in this situation

that a supranational court should pay special regard both to the facts which the High Commissioner reports and to the value judgments he arrives at within his remit.”

67. As was mentioned in that passage, considerable weight is given to the evidence of UNHCR by the European Court. In *MSS v Belgium and Greece*, for example, the court attached “critical importance” (para 349) to UNHCR’s concerns about the treatment of asylum seekers in Greece. In *Ilias v Hungary*, UNHCR’s reports were described as “authoritative” (para 141, quoted at para 45 above). For the reasons we have explained, it is unsurprising that that should be so; and it is a factor which is relevant to the approach of domestic courts when considering asylum questions under the ECHR.

68. UNHCR’s evidence will naturally be of greatest weight when it relates to matters within its particular remit or where it has special expertise in the subject matter. Its evidence in the present case concerns matters falling within its remit and about which it has undoubted expertise. As the Lord Chief Justice observed in the present case, UNHCR “has unrivalled practical experience of the working of the asylum system in Rwanda through long years of engagement” (para 467). It has been operating permanently in Rwanda since 1993, and had 332 staff there at the time of its evidence in these proceedings. Its role in Rwanda includes assisting asylum seekers and refugees, funding and training non-governmental organisations working with the Rwandan asylum system, dealing with officials responsible for asylum decision-making, and engaging with the relevant department of the Rwandan government over the management of refugee camps. Although UNHCR has no official role in Rwanda’s asylum system, the Rwandan authorities have, albeit intermittently, sent it copies of asylum decisions, and UNHCR receives information from asylum-seekers and NGOs, and through communications with relevant officials. UNHCR is therefore able to collate data and gain insight into the practical realities of Rwanda’s asylum system. Its experience was recognised by Home Office officials. They reported that the Rwandan government depended heavily on UNHCR and other non-governmental organisations for delivering its asylum and refugee processes, and that UNHCR had undoubted expertise and experience of managing part of the refugee process, as well as knowledge of the Rwandan system more generally.

69. As the Lord Chief Justice noted at para 467, UNHCR can be said to have an institutional interest in the outcome of these proceedings, since it has adopted the position (set out in its Guidance Note on bilateral and/or multilateral arrangements of asylum-seekers) that asylum seekers and refugees should ordinarily be processed in the territory of the state where they arrive or which otherwise has jurisdiction over them.

The fact that UNHCR has adopted that position is a factor to be taken into account when assessing its evidence. However, its evidence and submissions were presented with moderation, and did not appear to reflect a partisan assessment. It has also to be borne in mind that, as a responsible United Nations agency accountable to the General Assembly, UNHCR will not lightly make statements critical of any state in which it operates.

70. Drawing these threads together, it is apparent from the factors which we have mentioned and the authorities which we have cited that particular importance should have been attached to the evidence of UNHCR in the present case. That is not to say that its evidence should necessarily be decisive or pre-eminent. In the circumstances of the present case, however, its evidence on significant matters of fact is essentially uncontradicted by any cogent evidence to the contrary, as the Court of Appeal explained (eg at para 136). It should not have been treated as dismissively as it was by the Divisional Court.

71. Finally, in relation to this matter, we note that the Divisional Court considered that it had to decide whether, on the totality of the evidence, the Secretary of State’s opinion was undermined to the extent that it could be said to be legally flawed (para 71). As we have mentioned, it is difficult to be certain what the court meant. However, the focus of the *Soering* test, which the Divisional Court had to apply, is not on whether there were legal flaws in the Secretary of State’s decision, but on whether there were, as a matter of fact, substantial grounds for believing that the removal of asylum seekers to Rwanda would expose them to a real risk of ill-treatment by reason of refoulement. That was an issue on which UNHCR’s evidence about defects in Rwanda’s asylum procedures had a material bearing.

(iii) *Conclusion in relation to Issue 2*

72. For all these reasons, we conclude that the Divisional Court erred in its approach to the evaluation of the evidence, and that the Court of Appeal was accordingly entitled to interfere with its conclusion.

(5) ISSUE 3 – WHETHER THE COURT OF APPEAL WAS ENTITLED TO CONCLUDE THAT THERE WERE SUBSTANTIAL GROUNDS FOR THINKING THAT ASYLUM SEEKERS WOULD FACE A REAL RISK OF ILL-TREATMENT BY REASON OF REFOULEMENT FOLLOWING REMOVAL TO RWANDA

73. We have come to the conclusion that the Court of Appeal was entitled, on the evidence before it, to consider that there were substantial grounds for believing that asylum seekers would face a real risk of ill-treatment by reason of refoulement in the event that they were removed to Rwanda. Indeed, having been taken through the evidence, we agree with the conclusion of the Court of Appeal.

74. We will not repeat the exercise of going through the entirety of the evidence, which is described at length in the judgments of the Court of Appeal (particularly in the impressive judgment of Underhill LJ). It will be sufficient for present purposes for us to summarise briefly the principal aspects which led the Court of Appeal to its conclusion. They concern the general human rights situation in Rwanda; the adequacy of Rwanda's asylum system, including its history of refoulement; and Rwanda's non-compliance with assurances given under the arrangement which it entered into with Israel. It should again be borne in mind that it is not essential for the court to resolve conflicts in the evidence: its task is to consider whether there are substantial grounds for believing that there is a real risk of refoulement.

(i) The general human rights situation in Rwanda

75. Rwanda is a country which has emerged from one of the most appalling periods of violence in modern history. Ethnic rivalry led to genocide in 1994, when over 500,000 Tutsi were killed by Hutu. Many Hutu were also killed, and estimates of the total number of deaths are much higher. There was protracted violence subsequently, until stability was restored. Under the government which then emerged, Rwanda has made great progress economically and socially. It has become a valued member of the Commonwealth, and an important partner of the United Kingdom. However, its record in relation to human rights has been much criticised.

76. In 2017, in proceedings to which the Secretary of State was party, the Divisional Court found that Rwanda was “a state which, in very recent times, has instigated political killings, and has led British police to warn Rwandan nationals living in Britain of credible plans to kill them on the part of that state”: *Government of Rwanda v Nteziryayo* [2017] EWHC 1912 (Admin), para 370. At the United Nations Human Rights Council's Universal Periodic Review of Rwanda in Geneva in January 2021, the United Kingdom government criticised Rwanda for “extrajudicial killings, deaths in custody, enforced disappearances and torture”. Advice provided by officials to ministers later in 2021, during the process of selecting a partner country for the removal of asylum seekers, advised that Rwanda had a poor human rights record. Most human rights violations were said to be linked to criticism of the Rwandan government. There were also said to be constraints on media freedom and political activities. Refugees had not been generally ill-treated, but there had been exceptions when they had expressed criticism of the government. The most serious incident occurred in 2018, when the Rwandan police fired live ammunition at refugees protesting over cuts to food rations, killing at least 12 people. As the Lord Chief Justice noted in the present case (para 511), there remain “profound human rights concerns”. Since Rwanda has ratified many international human rights conventions, including UNCAT and the ICCPR, this raises serious questions as to its compliance with its international obligations.

(ii) The adequacy of Rwanda's asylum system

77. Rwanda maintains an open door policy for refugees fleeing conflicts in neighbouring countries, particularly the Democratic Republic of Congo and the Republic of Burundi. Refugees from these countries have been permitted to remain in Rwanda without going through any formal asylum determination process. They are accommodated in camps where UNHCR has an active role. Rwanda has also supported the UNHCR emergency transport mechanism for asylum seekers from Libya. Once in Rwanda, their claims are processed by UNHCR, and the claimants have been resettled by UNHCR in third countries. By contrast, the Rwandan authorities have handled only a small number of individual claims for asylum. The Rwandan government indicated that a total of 152 cases had been decided between 2019 and June 2022. The great majority of the claimants came from Rwanda's neighbours and other African countries. The Rwandan authorities have had little or no experience of considering asylum applications from most of the

countries from which asylum claimants in the United Kingdom commonly come, such as Albania, Iran, Iraq, Pakistan, Syria and Vietnam.

78. UNHCR has expressed a number of concerns about Rwanda's asylum system. The Secretary of State observes that Rwanda's principal legislation concerning refugees, Law No 13/2014 relating to Refugees, has been described by UNHCR as fully compliant with international standards. However, the concerns expressed by UNHCR in these proceedings relate not to the text of the legislation but to how the system operates in practice.

79. First, there are concerns which relate to the asylum process itself. The initial stage in the process is the responsibility of the Directorate General of Immigration and Emigration in Rwanda ("the DGIE"), which is an entity within the National Intelligence and Security Service. Under Rwandan law, its role is to undertake the necessary preparation of asylum claims for determination by another body, the Refugee Status Determination Committee ("the RSDC"). The main function of the DGIE under the law is to conduct interviews with asylum claimants. However, although it is not authorised by law to reject asylum claims, it is said that the DGIE summarily rejected 8% of the asylum claims of which UNHCR was aware between 2020 and June 2022. UNHCR's evidence is that the true number of rejections by the DGIE is likely to be higher. Where this has occurred, no written reasons have been provided, and there is no right of appeal (since the law makes provision for appeals only against decisions taken by the RSDC). RSDC has the power to consider a claim which the DGIE has failed to refer to it, but UNHCR has no experience of this ever occurring.

80. The next stage in the process is the consideration of claims by the RSDC. That committee comprises senior representatives of the principal government departments and agencies, including the Prime Minister's Office and the National Intelligence and Security Service. They sit part-time on the RSDC and are non-specialist. Where the RSDC provides written reasons for its decisions, they are often perfunctory: the evidence includes RSDC decision letters, including several issued after the conclusion of the MEDP, which rejected asylum claims either without reasons, or with reasons which were merely formulaic. For example, a standard response from the RSDC in July 2022 was that "Refugee Status requested was not granted because you don't meet the eligibility criteria, and the reasons you provided during the interview were not pertinent".

81. The next stage in the process is the possibility of an internal administrative appeal to the responsible minister. There have been comparatively few such appeals (there appear to have been five in 2021). In practice, the absence of reasoned decisions makes it difficult to address the basis on which the claim was rejected. No reasons are given for the minister's decision on the appeal.

82. The final stage in the process, as laid down in law, is a right of appeal to the High Court (with the possibility of a further appeal to appellate courts). The reliability of the safeguards in the Rwandan asylum system ultimately depends on this right of appeal: it is the only stage in the process at which claims can be considered by anyone other than government officials or ministers. Although a right of appeal has existed since 2018, there has never been such an appeal in practice. The system is therefore untested, and there is no evidence as to how the right of appeal would work in practice. There are, however, concerns about the willingness of the judiciary to find against the Rwandan government. In *Government of Rwanda v. Nteziryayo* (para 76 above), the Divisional Court considered the independence of the Rwandan judiciary in the context of an application for the extradition of a number of individuals to face charges arising out of the 1994 genocide. It concluded at para 374 that "the evidence points to some risk, depending on the evidence before them and the safeguards in play, that judges might yield to pressure from the Rwandan authorities". It is apparent from the evidence that that view is essentially accepted by the FCDO, as the Lord Chief Justice noted (para 515).

83. The risk of a lack of independence in politically sensitive cases is not confined to the judiciary. In its comments on the draft CPIN report on asylum processing in Rwanda, mentioned in para 6 above, the FCDO commented, in relation to a statement that "independent legal support and advice is available", that legal support was likely to be independent unless the matter became political. This issue is relevant because, in an appeal, the High Court would be asked to overturn the decision of a minister and, indirectly, the decision of a committee of senior representatives of

the principal government bodies. The implication of the evidence is that the legal profession and the courts might not operate independently in such cases.

84. It appears that the process before the DGIE (which, as explained, conducts an interview of the asylum seeker), the RSDC (which considers the file prepared by the DGIE and may conduct a further interview), and the responsible minister (to whom an appeal lies against the decision of the RSDC) is marked by an absence of legal representation. The MEDP seeks to address this. However, during the negotiation of the MEDP, representatives of the Rwandan government indicated that the contemplated arrangements might not be straightforward to implement in practice. That seems to us to be a realistic view. The introduction of such a significant change of practice is liable to raise a number of issues, for example as to the role of the claimant's lawyer at each stage of the process, which may require time to resolve.

85. A second concern relates to the outcome of the asylum process, ie the decisions themselves. UNHCR's evidence shows 100% rejection rates at RSDC level during 2020-2022 for nationals of Afghanistan, Syria and Yemen, from which asylum seekers removed from the United Kingdom may well emanate. This is a surprisingly high rejection rate for claimants from known conflict zones. By comparison, Home Office statistics for the same period show that asylum claims in the United Kingdom were granted in 74% of cases from Afghanistan, 98% of cases from Syria, and 40% of cases from Yemen. UNHCR attributes the refusal of such claims by the Rwandan authorities to a view that persons from the Middle East and Afghanistan should claim asylum in their own region.

86. UNHCR has also produced evidence that a number of recent asylum seekers from a non-African country with close bilateral relations with Rwanda were denied access by the DGIE to the Rwandan asylum system. Three were peremptorily rejected by the DGIE, three were forcibly expelled to the Tanzanian border, two were instructed to leave Rwanda within days, and another two were threatened with refoulement to their country of origin. This evidence is not addressed in the responses of the Rwandan or United Kingdom governments. It raises a concern not simply that the DGIE has failed to comply with obligations imposed under the Refugee Convention, but that it has done so in the interests of the Rwandan government's foreign relations.

87. A third concern, related to the last point, is Rwanda's practice of refoulement. In addition to the cases of threatened refoulement mentioned in the previous paragraph, UNHCR reported six recent cases of expulsion of persons who claimed asylum on arrival at Kigali airport, some of which resulted in refoulement or would have done so if UNHCR had not intervened. Two Libyans were removed from the airport in February 2021 and sent to Egypt; a person from Yemen was removed from the airport in September 2021 and sent to Ethiopia, where UNHCR intervened to prevent his onward refoulement to Yemen; two Afghans were refouled to Afghanistan (via Dubai) on 24 March 2022, while the MEDP was being negotiated; and a Syrian was refouled to Syria (via Turkey) on 19 April 2022, after the MEDP had been concluded. There may be other cases: UNHCR does not maintain a presence at the airport, and only learns of such occurrences if they are contacted. This evidence is uncontested, although the Rwandan government disputes the description of these cases as constituting refoulement, as explained below.

88. The cases of airport refoulement do not establish that there would be a risk of similar refoulement under the MEDP, since asylum seekers arriving in Rwanda under the MEDP would have been pre-approved by the government of Rwanda and would arrive on planned flights. Nevertheless, these instances illustrate what Underhill LJ described at para 156 as "a culture of, at best, insufficient appreciation by DGIE officials of Rwanda's obligations under the Refugee Convention, and at worst a deliberate disregard for those obligations". This evidence is also another of the matters which are said by UNHCR to demonstrate a prejudice against asylum seekers from the Middle East and Afghanistan.

89. The Divisional Court was provided with a table of instances of at least 100 allegations of refoulement and threatened refoulement cited in UNHCR's evidence and in notes of meetings with Home Office officials. We also refer below to refoulement in the context of the Israel/Rwanda agreement.

90. The review of the CPIN on asylum processing in Rwanda carried out on behalf of the IAGCI found that Home Office officials had failed to engage with Rwanda's return practices, and with documented instances of

refoulement. It listed sources of information which were available in the public domain and which it considered that it was important for the Home Office to consider. It commented:

“Very limited critical information has been included on the current shortcomings of the Rwandan asylum system and/or its proposed practical application in the context of the UK- Rwanda Memorandum of Understanding. For example, there is no information included on how possible challenges will be overcome in relation to lack of resources in terms of decision-makers (especially in light of there only being one Eligibility Officer); lack of reasons or transcripts provided to asylum seekers to base their appeal on; delays in decisions; protection assurances against refoulement including indirect or chain refoulement leading to denial of access to the Rwandan territory let alone to the asylum process; lack of information regarding provisions for asylum seekers, and access to interpretation services to mention just a few.

Moreover, fundamental gaps of information remain, leaving unanswered questions with regards to procedural practicalities and implications.”

91. A fourth concern is the apparent inadequacy of the Rwandan government’s understanding of the requirements of refugee law. For example, its response to UNHCR’s evidence demonstrates a misunderstanding of the meaning of the concept of refoulement. It maintains, first, that asylum seekers must apply for asylum immediately upon arrival in Rwanda, and that claimants who apply for asylum only after failing to satisfy immigration requirements can properly be expelled. Secondly, it maintains that asylum seekers who use forged documents (as bona fide refugees not uncommonly do) do not meet immigration requirements, and their expulsion does not constitute refoulement. These contentions reveal an imperfect understanding of the requirements of the Refugee Convention. UNHCR also reported that the Rwandan officials who participated in training which it had organised had very limited or no understanding of how to assess refugee status. Although Home Office officials were told by the Rwandan government that their officials had received training from the International Organization for Migration, UNHCR produced written evidence from that organisation which expressly denied having provided any such training.

92. All the members of the Court of Appeal were impressed by the cogency of UNHCR’s evidence. The Lord Chief Justice, for example, stated that he shared the concerns identified by UNHCR about whether those involved in the RSDC have sufficient training and expertise to deal appropriately with asylum claims, and also whether what are reported to be ingrained attitudes of scepticism towards claims made by Middle Eastern nationals will be influential. He added that there is certainly evidence of poor practice (para 502).

93. The defects in past and current practice which we have discussed are important factors in assessing future risk, particularly because the MEDP does not establish a new asylum process, but is based on the continuation of the existing system operated by the DGIE, the RSDC and the minister, subject to some modifications. Having regard also to the Rwandan government’s misunderstanding of its obligations under the Refugee Convention, there is reason to apprehend that there is a real risk that the practices described above will not change, at least in the short term. The Secretary of State points out that resources are provided under the MEDP. However, the provision of resources does not mean that the problems which we have described can be resolved in the short term. The Secretary of State points to the monitoring arrangements under the MEDP as a safeguard. Such arrangements may be capable of detecting failures in the asylum system, and over time may result in the introduction of improvements, but that will come too late to eliminate the risk of refoulement currently faced by asylum seekers removed to Rwanda. Furthermore, the suppression of criticism of the government by lawyers and others is liable to discourage the reporting of problems, and so undermine the effectiveness of monitoring. It is also unclear whether the monitoring arrangements could provide a solution to problems emanating from the Rwandan government’s interpretation of its obligations under the Refugee Convention, or from a lack of independence in the legal system in politically sensitive cases.

94. The Secretary of State advances a somewhat surprising argument to the effect that it does not matter if asylum claims are not processed correctly, because asylum seekers will not be subject to refoulement in any event. In relation to that argument, we note that if an asylum claim is wrongly rejected, and the asylum seeker does not have some other

entitlement to remain in Rwanda, the government of Rwanda undertakes under paragraph 10.4 of the MOU (set out at para 9 above) to remove the person only “to a country in which they have a right to reside”. That country will normally be the country of which the asylum seeker is a national or citizen: that is to say, the country which he has fled, and in which (ex hypothesi) he faces persecution. It is said in response that Rwanda does not have agreements with other countries under which unsuccessful asylum seekers could be removed. However, it would not be necessary for Rwanda to have such agreements in place before being able to return individuals to countries in which they have a right to reside. The absence of such agreements has not prevented refoulement, direct or indirect, from occurring in practice, as we have explained.

(iii) *The Israel/Rwanda arrangements*

95. Israel entered into an agreement with Rwanda at the end of 2013, under which persons from Eritrea and Sudan who sought asylum in Israel were removed to Rwanda in order for their claims to be processed there. The agreement continued in operation until 2018. It was considered by the Supreme Court of Israel, sitting as the Court of Appeals for Administrative Affairs, in *Sagitta v Minister of Interior* Administrative Appeal 8101/15, heard on 9 October 2016. It is said in para 87 of the judgment (of which we were provided with an unofficial translation) that the agreement “includes an explicit undertaking of [Rwanda] according to which the deportees will enjoy human rights and freedoms and that the principle of non-refoulement shall be complied with. In addition, the agreement refers to the ability of the deportee to file a request for asylum”. It also appears from paras 7 and 92 that there were mechanisms for supervising and monitoring its implementation.

96. There is no dispute that persons who were relocated under the agreement suffered serious breaches of their rights under the Refugee Convention. UNHCR found that asylum seekers who arrived in Rwanda under the arrangement were routinely moved clandestinely to Uganda. It provided evidence relating to more than 100 nationals of Eritrea and Sudan who had arrived in Rwanda under the agreement during 2015 and 2016 and had then been taken to the Ugandan border or put on flights to Uganda. In three cases, refoulement to Eritrea (via Kenya) had only been prevented by UNHCR’s intervention. The Rwandan government’s response to this evidence lacked substance. It merely said that Rwanda had entered into other transfer arrangements for the international protection of refugees that differed from the Israel/Rwanda scheme.

97. FCDO officials mentioned the Israel/Rwanda agreement in a submission to ministers in April 2021. They explained that Rwanda had participated in a programme with Israel from 2013 to 2018 under which asylum seekers were given cash incentives to leave Israel voluntarily and the option to settle in Uganda and Rwanda. They also explained that it emerged that those who were transferred to Rwanda were not given the right to settle and were at risk of refoulement, and that the Israeli Supreme Court ruled the programme unlawful in April 2018.

98. Although ministers and officials were aware of the Israel/Rwanda agreement and the problems which arose under it, they do not appear to have investigated why it had failed, or attempted to obtain information about the terms of the agreement or the assurances which the Rwandan government had given. The subject was not mentioned in the CPIN on asylum processing in Rwanda. This omission was the subject of criticism in the review carried out on behalf of the IAGCI. It stated (citing Wilbourn and Kloos “A Commentary on the UK Home Office *Country Policy and Information Note: Rwanda, asylum system*, and the related *Country Policy and Information Note: Rwanda, assessment*”:

“... ‘the risk of deportation of asylum seekers back to their country of origin was not adequately addressed in the Home Office publications. Under a bilateral deal between the Israeli and Rwandan governments to relocate asylum seekers from Israel to Rwanda, the majority of asylum seekers were not able to access asylum in Rwanda, and were therefore forced to travel onward from Rwanda, in what may amount to a situation of indirect refoulement. By failing to consider such information, important issues and risks are minimised and the state of the Rwandan asylum system is presented in a way that is incoherent with the available information’ ... Although slightly different in nature than the UK-Rwanda Memorandum of Understanding, [the Israel-Rwanda agreement] provides a useful comparator and has been the subject of critical literature documenting its challenges, shortcomings, and ultimately its closure.”

The review noted that concern about the treatment of asylum seekers under the Israel/Rwanda agreement, and other reported expulsions by the Rwandan government, had been expressed by the United Nations Committee Against Torture. It listed numerous publicly available sources of information.

99. In the decisions challenged in these proceedings, the Secretary of State asserted that the Israel/Rwanda agreement was irrelevant. The Secretary of State has not sought in these proceedings to adduce evidence contradicting or qualifying UNHCR's account, which is consistent with the information that ministers had received from FCDO officials and with the review carried out on behalf of the IAGCI. However, it was submitted on behalf of the Secretary of State that the Israel/Rwanda agreement was a different arrangement from the MEDP, entered into some years earlier, and could shed no light on whether the government of Rwanda could be relied on to comply with its assurances under the MEDP.

100. We do not agree that it is irrelevant. Although the terms of the agreement may well have been different from the MEDP, and it ceased to operate five years ago, it is nonetheless a recent agreement for the transfer of asylum seekers for processing in Rwanda, under which the Rwandan government undertook to comply with the principle of non-refoulement. Its apparent failure to fulfil that undertaking is relevant to an assessment of the risk of refoulement under the arrangements entered into with the government of the United Kingdom.

(iv) The overall assessment

101. The Secretary of State's submission, in effect, is that the evidence of current inadequacies in Rwanda's asylum system, and of its past history of refoulement and of failing to comply with assurances given to the government of another country, is not a reliable guide to how asylum seekers removed to Rwanda under the MEDP will be treated. A predictive evaluation is required, and the MEDP provides assurances that the necessary improvements to the system will be implemented. No-one has questioned the good faith of the Rwandan government in giving those assurances, and it has financial and reputational incentives to honour them. The monitoring arrangements under the MEDP will deter non-compliance and ensure that any failures come to light.

102. There is no dispute that the government of Rwanda entered into the MEDP in good faith. We accept that Rwanda has a strong reputational incentive to ensure that the MEDP is adhered to. The financial arrangement may provide a further incentive. In addition, the monitoring arrangements, and the degree of attention which would be likely to be paid to the operation of the MEDP by organisations such as UNHCR, provide further incentives and safeguards. Nevertheless, intentions and aspirations do not necessarily correspond to reality: the question is whether they are achievable in practice. That is illustrated by the history of Rwanda's agreement with Israel: we have no reason to doubt that Rwanda gave its undertakings to Israel in good faith, and that the government of Israel believed that they would be fulfilled. The central issue in the present case is therefore not the good faith of the government of Rwanda at the political level, but its practical ability to fulfil its assurances, at least in the short term, in the light of the present deficiencies of the Rwandan asylum system, the past and continuing practice of refoulement (including in the context of an analogous arrangement with Israel), and the scale of the changes in procedure, understanding and culture which are required.

103. In agreement with the Court of Appeal, we consider that the past and the present cannot be effectively ignored or sidelined as the Secretary of State suggests. Of course, since the application of the *Soering* test requires a consideration of risk, it therefore involves prediction. But risk is judged in the light of what has happened in the past, and in the light of the situation as it currently exists, as well as in the light of what may be promised for the future.

104. The matters which we have discussed are evidence of a culture within Rwanda of, at best, inadequate understanding of Rwanda's obligations under the Refugee Convention. The evidence also goes some way to support the suggestion of a dismissive attitude towards asylum seekers from the Middle East and Afghanistan. It is also apparent from the evidence that significant changes need to be made to Rwanda's asylum procedures, as they operate in practice, before there can be confidence that it will deal with asylum seekers sent to it by the United Kingdom in accordance with the principle of non-refoulement. The necessary changes may not be straightforward, as they require an appreciation that the current approach is inadequate, a change of attitudes, and effective training and monitoring.

105. As matters stand, the evidence establishes substantial grounds for believing that there is a real risk that asylum claims will not be determined properly, and that asylum seekers will in consequence be at risk of being returned directly or indirectly to their country of origin. In that event, genuine refugees will face a real risk of ill-treatment in circumstances where they should not have been returned at all. The right of appeal to the High Court is completely untested, and there are grounds for concern as to its likely effectiveness. The detection of failures in the asylum system by means of monitoring, however effective it may be, will not prevent those failures from occurring in the first place. We accept the Secretary of State's submission that the capacity of the Rwandan system (in the sense of its ability to produce accurate and fair decisions) can and will be built up. Nevertheless, asking ourselves whether there were substantial grounds for believing that a real risk of refoulement existed at the relevant time, we have concluded that there were. The structural changes and capacity-building needed to eliminate that risk may be delivered in the future, but they were not shown to be in place at the time when the lawfulness of the policy had to be considered in these proceedings.

3. *The other issues arising in relation to article 3 of the ECHR*

106. As we have explained, this court granted permission to some of the claimants to cross-appeal in respect of two other grounds which had been rejected by the Divisional Court and the Court of Appeal. The first was that the removal of asylum seekers to Rwanda was unlawful because they were at risk of ill-treatment in that country, contrary to article 3 of the ECHR. The second was that the Secretary of State had failed to consider the risk of refoulement with the degree of care required either under the common law or under article 3 of the ECHR. Neither of these issues was the subject of detailed argument at the hearing of the appeal, and in the light of our conclusion on the issue of refoulement it is unnecessary for us to determine them.

4. *Retained EU law*

(1) *INTRODUCTION*

107. As we explained at para 16 above, one of the claimants, referred to as ASM, cross-appeals with the permission of the Court of Appeal on an issue concerning retained EU law. ASM maintains that the MEDP scheme as implemented in paragraphs 345A-345D of the Immigration Rules, under which asylum claimants may be removed from the United Kingdom to a third country with which they have no prior connection, without substantive consideration of their asylum claims and without an in-country right of appeal, is incompatible with articles 25 and 27 of the Procedures Directive. ASM maintains that articles 25 and 27 continue to have effect in domestic law as retained EU law.

108. It is ASM's case that the MEDP scheme is incompatible with articles 25 and 27 of the Procedures Directive because it is an application of the "safe third country" concept which is not set out in national legislation and which does not require a prior connection between the asylum claimant and the third country concerned on the basis of which it would be reasonable to remove him to that country. The Secretary of State does not dispute that if the Procedures Directive remains in force in United Kingdom domestic law as retained EU law, the MEDP scheme as relevant to these appeals is not compatible with articles 25 and 27 of the Directive.

109. It is common ground between ASM and the Secretary of State that the effect of section 4 of the 2018 Act was to preserve the relevant provisions of the Procedures Directive as retained EU law. However, the Secretary of State maintains that the effect of the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 ("the 2020 Act") is that those provisions no longer form part of domestic law within the United Kingdom. On behalf of ASM, Mr Drabble KC submits that on a proper interpretation of the 2020 Act, having regard to the purpose of the Act as a whole, its internal structure and content, and permissible external aids to construction, it is clear that the legislative intention behind the Act was only to address the consequences of ending EU free movement and did not extend to ending EU-derived asylum rights. On behalf of the Secretary of State, Lord Pannick KC submits that on the plain meaning of the provisions of the 2020 Act the relevant provisions of the Procedures Directive have ceased to have effect in domestic law.

110. In the present proceedings, both the Divisional Court (paragraphs 106-118) and the Court of Appeal (paragraphs 340-367) rejected ASM's submission that articles 25 and 27 of the Procedures Directive continue to have effect in domestic law within the United Kingdom.

(2) *LEGISLATIVE PROVISIONS*(i) *The Procedures Directive*

111. The Procedures Directive establishes certain minimum standards on procedures for granting and withdrawing refugee status which are required to be met by EU Member States as part of a common EU policy on asylum. Articles 25 and 27 provide in relevant part:

“Article 25 Inadmissible applications

1. In addition to cases in which an application is not examined in accordance with Regulation (EC) No 343/2003, Member States are not required to examine whether the applicant qualifies as a refugee in accordance with Directive 2004/83/EC where an application is considered inadmissible pursuant to this Article.

2. Member States may consider an application for asylum as inadmissible pursuant to this Article if:

...

(c) a country which is not a Member State is considered as a safe third country for the applicant, pursuant to Article 27; ...

Article 27 The safe third country concept

... 2 The application of the safe third country concept shall be subject to rules laid down in national legislation, including:

rules requiring a connection between the person seeking asylum and the third country concerned on the basis of which it would be reasonable for that person to go to that country;

...”

The Procedures Directive came into effect on 2 January 2006 and Member States were required to implement the relevant provisions of the Directive by 1 December 2007. (Certain aspects of substantive EU asylum law are addressed in Council Directive 2004/83/EU of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (“the Qualification Directive”) which came into effect on 20 October 2004. Member States were required to implement its provisions before 10 October 2006.)

112. The Procedures Directive and the Qualification Directive were implemented in the United Kingdom in a piecemeal fashion. Existing legislation and rules were already compliant in many respects. Some necessary changes to the Immigration Rules were made for both Directives by the September 2006 Statement of Changes to the Immigration Rules (CM 6918) (September 2006). Further required changes were made by the Refugee or Person in need of International Protection (Qualification) Regulations 2006 (SI 2006/2525) and the Asylum (Procedures) Regulations 2007 (SI 2007/3187).

However, an express requirement that there be a sufficient degree of connection between an asylum seeker and a third country on the basis of which it would be reasonable for that person to go to that country was introduced only on 24 November 2016 by the insertion into the Immigration Rules of paragraphs 345A-345D (Statement of Change HC 667).

(ii) *European Union (Withdrawal) Act 2018*

113. Section 4 of the 2018 Act (as amended by the European Union (Withdrawal Agreement) Act 2020) provides in relevant part:

“4 Saving for rights etc under section 2(1) of the ECA

(1) Any rights, powers, liabilities, obligations, restrictions, remedies and procedures which, immediately before IP completion day –

(a) are recognised and available in domestic law by virtue of section 2(1) of the European Communities Act 1972, and

(b) are enforced, allowed and followed accordingly,
continue on and after IP completion day to be recognised and available in domestic law (and to be enforced, allowed and followed accordingly).

(2) Subsection (1) does not apply to any rights, powers, liabilities, obligations, restrictions, remedies or procedures so far as they –

... (b) arise under an EU directive ... and are not of a kind recognised by the European Court or any court or tribunal in the United Kingdom in a case decided before IP completion day (whether or not as an essential part of the decision in the case). ...”

114. It is common ground on this appeal that the relevant provisions of the Procedures Directive were retained EU law within section 4 of the 2018 Act. Section 4 (as amended by the European Union (Withdrawal Agreement) Act 2020 to provide for the implementation period) came into force at 11 pm on 31 December 2020, IP completion day, ie the end of the post-Brexit implementation period (“IP Completion Day”).

(iii) Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020

115. The long title of the 2020 Act is:

“An Act to make provision to end rights to free movement of persons under retained EU law and to repeal other retained EU law relating to immigration; to confer power to modify retained direct EU legislation relating to social security co-ordination; and for connected purposes.”

116. The Act has two substantive Parts. Part 1 is headed “Measures relating to ending free movement”. Part 2 is headed “Social security co-ordination”. This appeal concerns provisions in Part 1, in particular section 1 and Schedule 1.

117. Within Part 1, section 1 gives effect to Schedule 1. Section 1 provides:

“1 Repeal of the main retained EU law relating to free movement etc

Schedule 1 makes provision to –

- (a) end rights to free movement of persons under retained EU law, including by repealing the main provisions of retained EU law relating to free movement, and
- (b) end other EU-derived rights, and repeal other retained EU law, relating to immigration.”

Sections 2 and 3 are concerned with specific aspects of the ending of the right of free movement. Section 2 relates to the entitlement of Irish citizens to enter or remain without leave. Section 3 relates to legal routes from the EU and family reunion in the case of protection claimants.

118. Schedule 1 is headed:

“Repeal of the main retained EU law relating to free movement etc”

Part 1 of Schedule 1 is headed “EU-derived domestic legislation” and revokes, omits or modifies specified provisions of primary and secondary domestic legislation. Part 2 of Schedule 1 is headed “Retained direct EU legislation” and it repeals Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union (“the Workers Regulation”).

119. Part 3 of Schedule 1 is headed “EU-derived rights etc” and comprises paragraphs 5 and 6. Paragraph 5 is concerned with rights derived from the EU agreement with Switzerland on freedom of movement. Paragraph 6 provides:

“6 (1) Any other EU-derived rights, powers, liabilities, obligations, restrictions, remedies and procedures cease to be recognised and available in domestic law so far as –

(a) they are inconsistent with, or are otherwise capable of affecting the interpretation, application or operation of, any provision made by or under the Immigration Acts (including, and as amended by, this Act), or

(b) they are otherwise capable of affecting the exercise of functions in connection with immigration.

(2) The reference in sub-paragraph (1) to any other EU-derived rights, powers, liabilities, obligations, restrictions, remedies and procedures is a reference to any rights, powers, liabilities, obligations, restrictions, remedies and procedures which –

(a) continue to be recognised and available in domestic law by virtue of section 4 of the European Union (Withdrawal) Act 2018 (including as they are modified by domestic law from time to time), and

(b) are not those described in paragraph 5 of this Schedule.

(3) The reference in sub-paragraph (1) to provision made by or under the Immigration Acts includes provision made after that sub-paragraph comes into force.”

120. The effect of paragraph 6(1)(a) is to disapply EU-derived rights so far as they are inconsistent with, or are otherwise capable of affecting the interpretation, application or operation of, any provision made by or under “the Immigration Acts”. This is to be taken as a reference to the statutes listed in section 61(2) of the UK Borders Act 2007 (as adopted and amended, inter alia, by section 4(1) of the 2020 Act). (See Schedule 1 to the Interpretation Act 1978.) It was common ground before us that at the relevant time when the decisions relevant to this appeal were made, these statutes were:

“(a) the Immigration Act 1971 . . . ,

(b) the Immigration Act 1988 . . . ,

(c) the Asylum and Immigration Appeals Act 1993 . . . ,

(d) the Asylum and Immigration Act 1996 . . . ,

(e) the Immigration and Asylum Act 1999 . . . ,

(f) the Nationality, Immigration and Asylum Act 2002 . . . ,

(g) the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 . . . ,

(h) the Immigration, Asylum and Nationality Act 2006 . . . ,

(i) this Act . . . , [ie UK Borders Act 2007]

(j) the Immigration Act 2014 . . . ,

(k) the Immigration Act 2016 . . . ,

(l) Part 1 of the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (and Part 3 so far as relating to that Part), and

(m) the Nationality and Borders Act 2022.”

121. Section 1 and Schedule 1 of the 2020 Act took effect on IP Completion Day, ie the end of the post-Brexit implementation period.

(iv) *The Immigration Rules*

122. The Immigration Rules are made under the 1971 Act, section 3(2) of which provides:

“The Secretary of State shall from time to time . . . lay before Parliament statements of the rules, or of any changes in the rules, laid down by him as to the practice to be followed in the administration of this Act for regulating the entry into and stay in the United Kingdom of persons required by this Act to have leave to enter. . . .”

123. Paragraphs 345A to 345D of the Immigration Rules in an amended form were introduced by Statement of Changes HC 1043, dated 10 December 2020, to take effect on IP Completion Day. Paragraph 345C in this amended form, which is said on behalf of ASM to be incompatible with retained EU law, provides:

“When an application is treated as inadmissible, the Secretary of State will attempt to remove the applicant to the safe third country in which they were previously present or to which they have a connection, or to any other safe third country which may agree to their entry.”

(3) THE SUBMISSIONS OF THE PARTIES

124. On behalf of ASM, Mr Drabble submits that articles 25 and 27 of the Procedures Directive have effect in domestic law as retained EU law under the 2018 Act and that the 2020 Act did not have the effect of disapplying them. He submits that, in seeking to ascertain the intention of Parliament, statutory language must always be read in the context of the legislative purpose and scheme, in particular where general words are used since their colour and content are derived from their context. He submits that when the 2020 Act is read in its context it is clear that section 1 and paragraph 6 of Schedule 1 are directed to the repeal only of retained EU law relating to free movement and not to asylum provisions such as those in articles 25 and 27 of the Procedures Directive. References in the statute to “immigration”, he submits, must be read as limited to immigration in this narrow sense which excludes asylum. This conclusion, he submits, follows from the wording of the 2020 Act and from external aids to interpretation.

125. With regard to the wording of the 2020 Act, Mr Drabble submits that the absence of any reference to asylum in the long title is significant because in each of the 13 other “Immigration Acts” as defined in section 61(2) of the UK Borders Act 2007, “asylum” is expressly referred to in the long title if the Act addresses asylum-related rights. The heading to section 1 in the 2020 Act refers only to free movement and not to asylum. Section 1 itself introduces Schedule 1 as making provision to end rights to free movement under retained EU law and to end other EU-derived rights and repeal other retained EU law “relating to immigration”. Furthermore, Schedule 1 does not refer to asylum. Part 1 of the Schedule makes changes to domestic legislation which reflect the ending of free movement rights. Part 2 revokes the Workers Regulation, again reflecting the ending of free movement rights. In Part 3, paragraph 5 revokes rights relating to the Swiss free movement agreement. Paragraph 6 does not make any reference to asylum, simply referring to “any provision made by or under the Immigration Acts” and to “functions in connection with immigration”.

126. While Mr Drabble accepts that the statutory language refers to a secondary legislative purpose other than repealing legislation relating to free movement, his case is that this does not encompass the ending of EU-derived rights in relation to asylum. Rather, he maintains, the 2020 Act’s secondary purpose is to modify retained EU legislation relating to social security co-ordination and a broader class of EU-derived third country national immigration rights contingent on free movement, derived from rights of EU citizenship and freedom of establishment in the EU Treaties. (See, for example, *Ruiz Zambrano v Office national de l’emploi* (Case C-34/09) [2012] QB 265; *Chen v Secretary of State for the Home Department* (Case C-200/02) [2005] QB 325; *Ibrahim v Harrow London Borough Council* (Case C-130/08) and *Teixeira v Lambeth London Borough Council* (Case C-480/08) [2010] ICR 1118.) These are matters relating to immigration in the narrow sense for which he contends.

127. On behalf of the Secretary of State, Lord Pannick submits that the argument that the MEDP scheme, paragraphs 345A-345D of the Immigration Rules and decisions giving effect to them are in breach of articles 25 and 27 of the Procedures Directive is unsustainable because those provisions of the Procedures Directive are not retained EU law. He submits that the combined effect of the 2018 Act (as amended by the European Union (Withdrawal Agreement) Act 2020) and the 2020 Act is that on IP Completion Day, the provisions to which Schedule 1 of the 2020 Act applies became, but then immediately ceased to be, retained EU law. At the same time the amendments to paragraphs 345A to 345D of the Immigration Rules, referred to in paragraph 123 above, came into effect.

128. Lord Pannick submits that section 1 of the 2020 Act not only addresses free movement rights but, as the long title and section 1(b) state, is designed to “repeal other retained EU law relating to immigration”. The word “other” means other than rights to free movement which are the subject of section 1(a). Paragraph 6(1) of Schedule 1

makes clear that Parliament intended the phrase “relating to immigration” in section 1(b) to have a very broad meaning which covers asylum decisions. The EU-derived rights to asylum on which ASM relies are plainly within paragraph 6(1)(a) because they are inconsistent with, or are otherwise capable of affecting the interpretation, application or operation of, provisions made by or under the Immigration Acts. In the alternative, it is submitted, they are within paragraph 6(1)(b) because they are otherwise capable of affecting the exercise of functions in connection with immigration. As a result, they ceased, by virtue of paragraph 6, to be recognised and available in domestic law and paragraphs 345A to 345D of the Immigration Rules cannot be impugned on the ground that they fail to give effect to the requirement in the Procedures Directive that there be a connection between the person seeking asylum and the proposed third country on the basis of which it would be reasonable for that person to go to that country.

(4) THE INTERPRETATION OF THE 2020 ACT

129. The process of statutory interpretation seeks to establish the meaning of the words used by Parliament in their particular context (*Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591, per Lord Reid at 613; *R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* [2001] 2 AC 349, per Lord Nicholls at 396). In *R (Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department* [2022] UKSC 3; [2023] AC 255 Lord Hodge explained (at para 29):

“Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. They are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained.”

Lord Hodge endorsed Lord Nicholls’s observation in *Spath Holme* at p397 that citizens, with the assistance of their advisers, are intended to be able to understand Parliamentary enactments so that they can regulate their conduct accordingly and that they should, therefore, be able to rely upon what they read in an Act of Parliament. Lord Hodge then went on to state (at para 30):

“External aids to interpretation therefore must play a secondary role. Explanatory Notes, prepared under the authority of Parliament, may cast light on the meaning of particular statutory provisions. Other sources, such as Law Commission reports, reports of Royal Commissions and advisory committees, and Government White Papers may disclose the background to a statute and assist the court to identify not only the mischief which it addresses but also the purpose of the legislation, thereby assisting a purposive interpretation of a particular statutory provision. The context disclosed by such materials is relevant to assist the court to ascertain the meaning of the statute, whether or not there is ambiguity and uncertainty, and indeed may reveal ambiguity or uncertainty: *Bennion, Bailey and Norbury on Statutory Interpretation*, 8th ed (2020), para 11.2. But none of these external aids displace the meanings conveyed by the words of a statute that, after consideration of that context, are clear and unambiguous and which do not produce absurdity.”

130. On a literal reading of the 2020 Act, references to “immigration” in section 1 and Schedule 6 are wide enough to include asylum. However, Mr Drabble’s case is founded on ascribing a more limited meaning to “immigration” which is said to be required by the legislative context. Section 1(b), he submits, is limited to free movement and matters connected with free movement and this limitation is carried through, in turn, to Schedule 1. References to immigration are to be read in a narrower sense as excluding asylum.

131. In support of this submission he relies on usage, submitting that in many legislative schemes a distinction is drawn between immigration and asylum. In this regard, he is able to point to the Immigration, Nationality and Asylum (EU Exit) Regulations 2019 (SI 2019/745), (“the 2019 Regulations”), made pursuant to section 8 of the 2018 Act, which provide for revocations of retained direct EU legislation. Part 1 of Schedule 1 to the 2019 Regulations provides for “revocations related to immigration and nationality” and Part 2 provides for “revocations related

to asylum”. To the extent that this may reflect a usage in EU legislation, it cannot be assumed that the 2020 Act similarly reflects such a usage. Moreover, the point can be made that the scheme of the 2019 Regulations differs fundamentally in this regard from that of the 2020 Act, which unlike the 2019 Regulations does not list those EU laws to be excluded from retained EU law but describes them by their characteristics. This matter is considered further below.

132. More generally, we are not persuaded that there exists any consistent usage or settled practice in domestic legislation which distinguishes in the manner suggested between immigration and asylum. Even if Mr Drabble is correct in his submission that the long titles of the Immigration Acts as defined in section 61(2) of the UK Borders Act 2007 expressly refer to asylum where that is part of the subject matter, that is not true of their short titles. Thus, for example, the Immigration Act 2016 addresses both immigration in the narrower sense and asylum. Similarly, the Immigration Rules, Part 11 of which governs the determination of asylum claims, do not draw any such distinction and, as we have explained at para 27 above, are themselves made under the 1971 Act.

133. The rigid distinction between immigration in the narrow sense and asylum for which ASM contends, is furthermore inconsistent with the close relationship between asylum and immigration. As we have explained, the Immigration Rules which govern asylum are made under section 3(2) of the 1971 Act which empowers the Secretary of State to make rules “as to the practice to be followed in the administration of this Act for regulating the entry into and stay in the United Kingdom of persons required by this Act to have leave to enter”. The grant of asylum status in the United Kingdom generally leads under paragraphs 330 and 335 of the Immigration Rules to the grant of limited leave to remain in the United Kingdom despite the lack of any other right to remain. In the present appeal, ASM seeks to limit the power of the Secretary of State to remove him to Rwanda. Asylum and immigration in the narrower sense are closely integrated subject matters. As Underhill LJ observed in the Court of Appeal in the present proceedings (at para 361), the broader use of the term “immigration” to include asylum is not loose or illogical. On the contrary, asylum can perfectly naturally be regarded as an aspect of immigration law.

134. For these reasons, there is no justification for reading references to “immigration” in section 1(b) and Schedule 1 of the 2020 Act as excluding matters relating to asylum.

135. In any event, the language and structure of the 2020 Act make its subject matter entirely clear. Section 1(b) states that Schedule 1 makes provision to “end other EU- derived rights, and repeal other retained EU law, relating to immigration”. Here, the word “other” can only refer to matters other than the rights to free movement of persons which are the subject of section 1(a). In this instance, section 1(b) does not define the content of Schedule 1; on the contrary, the meaning of section 1(b) is explained by Schedule 1. It does so in very broad terms. In particular, paragraph 6(1)(a) makes clear that “any other EU-derived rights” are to cease to be available in domestic law so far as they are inconsistent with, or are otherwise capable of affecting the interpretation, application or operation of, any provision made by or under the Immigration Acts. As we have explained, the Immigration Rules, Part 11 of which governs asylum applications, are made under the 1971 Act, which falls within the statutory definition of “the Immigration Acts”. Paragraph 6(1)(b) explains that “any other EU-derived rights” are to cease to be available in domestic law so far as they are otherwise capable of affecting the exercise of functions in connection with immigration. EU-derived rights and other retained EU-law relating to asylum are clearly capable of falling within these two categories.

136. Furthermore, the breadth of the categories established by sub-paragraphs 6(1)(a) and 6(1)(b) of Schedule 1 is inconsistent with Mr Drabble’s submission that the “other EU-derived rights relating to immigration” and the “other retained EU law relating to immigration”, the end and repeal of which are contemplated by section 1(b), are limited to social security co-ordination and a broader class of EU-derived third-country national immigration rights contingent on free movement, derived from rights of EU citizenship and freedom of establishment in the EU Treaties. Those categories clearly extend to EU-derived rights relating to asylum.

137. The EU-derived rights as to asylum on which ASM seeks to rely in this appeal fall within paragraph 6(1)(a) of Schedule 1. ASM seeks to rely on EU-derived rights to impose obligations on the Secretary of State as to how his asylum claim is dealt with and in particular as to whether the Secretary of State exercises powers of removal available under the 1971 Act, the 2004 Act (Schedule 3 of which confers powers to remove claimants for asylum to a safe third country, as explained at paras 7 and 31-32 above) and the Immigration Rules. In the alternative, should this not be

correct, the EU-derived rights as to asylum on which ASM seeks to rely would fall within paragraph 6(1)(b) of Schedule 1. ASM seeks to rely on EU-derived rights as restricting the function of the Secretary of State in deciding whether to remove him to a third country. That function is “in connection with immigration” because it involves a decision whether to grant him leave to enter or remain in the United Kingdom.

138. In support of the more limited reading of the provisions of the 2020 Act for which he contends, Mr Drabble also relies upon external aids to interpretation. First, he relies upon the Explanatory Notes to the Bill which became the 2020 Act. He points out that they make no express or implied reference to asylum, nor do they identify repeal of any retained EU law relating to asylum. He draws attention to the following features in particular.

- (1) The overview section identifies the purpose of the Act as ending free movement of EU, EEA and Swiss citizens, protecting the status of Irish citizens once free movement ends, and making provision to amend retained direct EU legislation relating to social security co-ordination.
- (2) The sections addressing the policy background and legal background to the Bill make no reference to asylum but set out the legal consequences of the ending of free movement at the end of the post-Brexit implementation period.
- (3) The paragraphs addressing “EU-derived rights etc” under Part 3 of Schedule 1 (paragraphs 66-69) state that the Bill “disapplies other retained EU law relating to free movement of persons” (para 67). In particular, they make reference to the residence rights that are derived from articles 20 and 21 of the Treaty on the Functioning of the European Union (rights of citizenship and free movement).
- (4) They include (at para 69) a table of directly effective rights relevant to paragraph 6 but the table includes no reference to asylum rights.

(Corresponding points are made in relation to the similar passages which appear in the Explanatory Notes to the 2020 Act.)

139. Secondly, Mr Drabble relies upon Parliamentary Committee reports and materials produced during the passage of the 2020 Act which, he submits, indicate clearly that the legislative intention behind the Act was only to end free movement and co-ordinate social security measures. In particular, he relies on the following matters.

- (1) The House of Lords Delegated Powers and Regulatory Reform Committee report (22nd Report of Session 2019-21, HL Paper 118, 25 August 2020) refers to the Bill having two principal parts: Part 1 ending free movement of persons and Part 2 conferring powers to co-ordinate access to social security. The report makes no reference to asylum, the Procedures Directive or the Qualification Directive.
- (2) The Delegated Powers Memorandum dated 24 July 2020, supplied to the Committee by the Home Office during the preparation of its report on the Bill, provided a detailed outline of the Bill and the powers contained in it. It refers to the law relating to free movement but makes no reference to asylum, the Procedures Directive or the Qualification Directive.
- (3) The Committee’s subsequent report (25th Report of Session 2019–21, HL Paper 141, 14 October 2020) refers to the ending of free movement and makes no reference to asylum.
- (4) The report of the House of Lords Select Committee on the Constitution (11th Report of Session 2019–21, HL Paper 120, 2 September 2020) refers to the purposes of the Bill as “to end free movement of persons under EU law and to provide for the amendment of retained EU law governing social security co- ordination”.

140. In the process of seeking the meaning of the words which Parliament has used, external sources necessarily play a secondary role. In the present case, none of the extraneous aids relied upon gives rise to an ambiguity capable of displacing the clear and unambiguous meaning of the statute. The statements in the Explanatory Notes relied on do not assist ASM because they are not exhaustive. The Explanatory Notes state that “they are not, and are not intended

to be, a comprehensive description of the Bill [or Act]”. The table of directly effective rights relevant to paragraph 6 of Schedule 1 to the 2020 Act (at para 69 of the Explanatory Notes to the Bill) expressly states that it is a non-exhaustive list. Similarly, the statements in the Parliamentary Committee reports and materials are not exhaustive. Furthermore, there is no absurdity in the Secretary of State’s reading of the statute. While it is a curious feature of the external aids to interpretation on which ASM relies that they contain no reference to EU-derived asylum law, one possible explanation may be that provided by Underhill LJ in the Court of Appeal (at para 366): that is that it is not clear that there was any reason at the time the Bill was going through Parliament for the Government to have considered the question of its impact on asylum rights one way or the other. An inconsistency did arise from the new paragraph 345C of the Immigration Rules, but the statement of changes which introduced this change was only laid before Parliament on 10 December 2020 ie after the 2020 Act received Royal Assent (on 11 November 2020). In any event, this fact cannot displace the plain meaning of the words of the statute itself.

(5) THE PRINCIPLE OF LEGALITY

141. ASM submits that the conclusion that the legislative intention behind the 2020 Act did not extend to removing asylum rights is further supported by the principle of legality as a special rule of construction. The principle was stated in the following terms by Lord Browne-Wilkinson in *R v Secretary of State for the Home Department Ex p Pierson* [1998] AC 539, 575:

“A power conferred by Parliament in general terms is not to be taken to authorise the doing of acts by the donee of the power which adversely affect the legal rights of the citizen or the basic principles on which the law of the United Kingdom is based unless the statute conferring the power makes it clear that such was the intention of Parliament.”

Mr Drabble submits that in the present case the principle of legality operates to preserve the rights conferred by articles 25 and 27 of the Procedures Directive because of the absence of clear and unambiguous wording in the 2020 Act demonstrating that Parliament intended to remove them.

142. The principle of legality does not assist ASM. First, the principle is concerned essentially with an interference by statute with a common law constitutional right or with a statutory provision which declares such a fundamental or constitutional right. (See *R (Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department* per Lord Hodge at paras 33, 43.) In that case, which concerned a statutory procedure for registration by which a person can acquire British citizenship, Lord Hodge considered that, notwithstanding the importance to an individual of the possession of British citizenship, the court was not dealing with an interference with a fundamental or constitutional right. As a result, the normal canons of statutory construction applied. In the same way, in the present case the relevant protection afforded by articles 25 and 27(2)(a) of the Procedures Directive, despite its importance, does not bring the principle of legality into play.

143. Secondly, the purpose of the 2020 Act is to end the application within domestic law in the United Kingdom of parts of retained EU law. As Lord Pannick observed in his written case, such an Act of Parliament should be construed fairly in accordance with its terms, and not by reference to a presumption that it applies to as little retained EU law as possible.

144. Thirdly, in any event, the principle of legality does not permit a court to disregard an unambiguous expression of Parliament’s intention such as that with which we are concerned in the present case.

(6) G v G

145. Finally, it is necessary to say something about the reliance placed by Mr Drabble on the decision of the Supreme Court in *G v G* [2021] UKSC 9; [2022] AC 544. In that case, a mother and father had lived in South Africa with their young child. Following their divorce, the mother wrongfully brought the child to England where she applied for asylum and named the child as a dependant in her application. The father applied in England for an order returning the child to South Africa, pursuant to the Hague Convention on the Civil Aspects of International Child Abduction 1980. The appeal concerned the relationship between the asylum proceedings and the Hague Convention proceedings.

146. In the Supreme Court, the only judgment was that of Lord Stephens (with whom Lord Lloyd-Jones, Lord Hamblen, Lord Leggatt and Lord Burrows agreed). Lord Stephens recorded (at para 84):

“The Secretary of State accepts, for the purposes of this appeal, and I agree, that the relevant provisions of the [Procedures Directive and the Qualification Directive] are directly effective and remain extant in domestic law as “retained EU law” after the United Kingdom’s withdrawal from the EU.”

Lord Stephens also noted (at para 107) that the Secretary of State’s procedures governing the approach to processing and determining claims for asylum had as their objective ensuring that the United Kingdom’s obligations under the Refugee Convention, the Qualification Directive and the Procedures Directive were in practice met. (In this regard, Mr Drabble also referred us to *Secretary of State for the Home Department v Ainte (material deprivation – Art 3 – AM (Zimbabwe))* [2021] UKUT 203 (IAC), at paras 63-65 and *NM (Art 15(b) – Intention Requirement (Iraq)) v Secretary of State for the Home Department* [2021] UKUT 259 (IAC) at paras 13-15. In both cases, following *G v G*, it was common ground between the parties and the Upper Tribunal accepted that the Qualification Directive was retained EU law.)

147. Argument in the appeal of *G v G* proceeded on the basis of a concession by the Secretary of State for the purposes of that appeal that the relevant provisions of the Procedures Directive remained in force in the domestic law of the United Kingdom as retained EU law. The Supreme Court heard no argument on the point and no reference was made to the effect of the 2020 Act in this regard. The fact that Lord Stephens had heard argument in *Robinson (Jamaica) v Secretary of State for the Home Department* [2020] UKSC 53; [2022] AC 659 some two months earlier as to the effect of the 2020 Act on the law of free movement is irrelevant for present purposes. The earlier case was not concerned with the law of asylum but solely with the law of free movement. A likely explanation of what occurred during the appeal in *G v G* is provided by the Divisional Court in the present case (at para 117): since the 2020 Act came into force (on 31 December 2020) between the judgment of the Court of Appeal in *G v G* (on 15 September 2020) and the hearing of the appeal in the Supreme Court (25-27 January 2021), the parties may simply not have turned their minds to the matter.

148. In circumstances where the point was not argued in *G v G*, the Practice Statement (Judicial Precedent) [1966] 1 WLR 1234, concerning the departure of the Supreme Court from its earlier decisions, has no application. On the present appeal, the Supreme Court, having heard full argument on the point, has come to the clear conclusion that the effect of the 2020 Act is that articles 25 and 27 of the Procedures Directive do not have effect in the domestic law of the United Kingdom as retained EU law.

5. CONCLUSION

149. For the reasons we have explained in our discussion of Issues 2 and 3, at paras 42-105 above, we conclude that the Court of Appeal was correct to reverse the decision of the Divisional Court, and was entitled to find that there are substantial grounds for believing that the removal of the claimants to Rwanda would expose them to a real risk of ill-treatment by reason of refoulement. It was accordingly correct to hold that the Secretary of State’s policy is unlawful. The Secretary of State’s appeal is therefore dismissed. For the reasons explained in our discussion of Issue 4, at paras 107-148 above, the cross-appeal by ASM is also dismissed.