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CURRENT DEVELOPMENTS: CASE COMMENT

R (AAA) v SSHD and the implications of customary international law for the UK

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Introduction

The judgment in *R (AAA) v Secretary of State for the Home Department (SSHD)* represents a significant development in the approach of the UK courts to the oversight of the government's asylum policy.[1] The attempt to effectively outsource the processing of asylum seekers, and their longer-term future as refugees, to Rwanda has been criticised on a range of grounds, including its cost, its effectiveness, and its challenge to prevailing human rights norms.[2] It has been subjected to extensive litigation in both domestic and international courts. As this commentary will make clear, the recent decision by the Supreme Court may not be the final occasion on which the legality of the scheme is judicially examined.

The background to the Rwanda scheme is first outlined. Earlier litigation involving the scheme is briefly described before the Supreme Court's decision is considered. This commentary focuses its analysis on what at first sight might seem to be a minor part of the judgment – the Supreme Court's brief but significant mention of the place of the principle of *non-refoulement* in customary international law. Despite being an obiter dictum, this may yet prove to be one of the most significant parts of the judgment given that it may shape legislative responses to the judgment. At the time of writing, the government has introduced the Safety of Rwanda (Asylum and Immigration) Act 2024 which, as will be discussed, not only reverses the Court's finding that Rwanda is a safe country, but specifically directs courts to ignore customary international law. This, the note will conclude, is itself a fundamental breach of international law.

1. Background

In April 2022, the UK announced the commencement of the Migration & Economic Development Partnership (MEDP) with Rwanda,[3] an arrangement under which UK planned to 'relocate' certain

[†]We would like to thank the anonymous reviewer for their constructive comments. Any errors remain our own.

[1][2023] UKSC 42.

[2]See, for example, the commentary by the UN High Commissioner for Refugees 'UNHCR analysis of the legality and appropriateness of the transfer of asylum-seekers under the UK-Rwanda arrangement' (8 June 2022), https://www.refworld.org/legal/natlegcomments/unhcr/2022/en/124120 (last accessed 23 May 2024) and the UNHCR's evidence submitted at various stages of the litigation which resulted in the Supreme Court judgment, compiled at Home Office *Country Information Note: Rwanda*, Annex 2 (UNHCR Evidence) (December 2023), https://assets.publishing.service.gov.uk/media/65a15c7b74ae660014738a48/CIN_RWA_UNHCR_evidence.pdf (last accessed 23 May 2024). The entire Rwanda policy has also been criticised by former Prime Minister and Home Secretary Theresa May MP, see *Hansard* HC Deb, vol 712, col 29, 19 April 2022.

[3]*R (AAA)* [2023] EWCA Civ 745, at [3].

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asylum seekers to Rwanda where they could apply for asylum through Rwanda's domestic asylum system. This resulted in considerable public debate, and legal proceedings.[4] Individuals who were selected for removal sought injunctions to prevent this from happening. These applications were unsuccessful in the domestic courts,[5] but succeeded at the European Court of Human Rights.[6]

In the main proceedings challenging the lawfulness of the policy, the High Court held that the relocation to Rwanda was, in principle, lawful, but that the process followed by the SSHD in implementing it was procedurally flawed because it did not consider the individual circumstances of each asylum seeker. This decision was appealed to the Court of Appeal, who in turn held by a majority that the policy was unlawful.[7] It was held that the deficiencies in the asylum system in Rwanda were so significant that there were substantial reasons for believing that there was a real risk of *refoulement*. The removal of asylum seekers to Rwanda would therefore be unlawful under section 6 of the Human Rights Act 1998, as it would breach Article 3 of the European Convention on Human Rights (ECHR) which prohibits torture and inhuman or degrading treatment.

2. Supreme Court judgment

The Supreme Court unanimously upheld the conclusion that the Rwanda policy was unlawful, again holding that there are substantial grounds for believing that asylum seekers would face a real risk of ill-treatment by reason of *refoulement* to their country of origin. The Court confirmed that *non-refoulement* is a core principle of international law and that asylum seekers are protected against *refoulement* by several international treaties ratified by the UK,[8] which had been given effect in domestic legislation.[9] According to the Supreme Court, the correct test is whether the court has decided for itself if 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.[10] It held that it was not clear from the High Court's judgment whether this was the test it had applied, but also that Court of Appeal was in any event entitled to consider the *refoulement* issue for itself, and in doing so, interfere with a finding of the High Court.[11]

The High Court was held to have fallen into error because it held that the Home Secretary was entitled to rely on assurances given by the Rwandan government while failing to engage with other evidence. It had therefore erred by failing to carry out a fact-sensitive evaluation of how Rwanda's assurances would operate in practice.[12] On this basis, the Court of Appeal was entitled to hold that there were substantial grounds for believing that asylum seekers would face a real risk of ill-treatment by reason of *refoulement* following their removal to Rwanda.[13] Rwanda had recently been criticised by the UK government for 'extrajudicial killings, deaths in custody, enforced disappearances and torture'.[14] There was also evidence that there are serious and systemic defects in Rwanda's procedures and institutions for processing asylum claims, including the surprisingly high rate of rejection of asylum claims from certain countries in known conflict zones and Rwanda's practice of

[4]A brief summary of the background prior to the judicial proceedings can be found at [2022] EWHC 3230 (Admin) [6]–[10] and [15]–[35].

[5]The Administrative Court refused the application on 10 June 2022; subsequently the Court of Appeal dismissed the appeal and the Supreme Court dismissed an application for permission to appeal: see *R (AAA)*, CA, above n 3, at [17].

[6]*NSK v the United Kingdom* Application No 28774/22, formerly *KN v the United Kingdom*.

[7]*R (AAA)* CA, above n 3.

[8]These protections are set out in Art 33(1) of the United Nations 1951 Convention relating to the Status of Refugees and its 1967 Protocol, and have been read into Art 3 ECHR. See *R (AAA)* SC, above n 1, at [19]–[26].

[9]Domestic law referred to by the Court included the Human Rights Act 1998 (s 6), as well as provisions in the Asylum and Immigration Appeals Act 1993, the Nationality, Immigration and Asylum Act 2002 and the Asylum and Immigration (Treatment of Claimants etc) Act 2004; see ibid [27]–[33].

[10]*R (AAA)* SC, above n 1, at [34].

[11]Ibid, at [23], [34], [38]–[41].

[12]Ibid, at [44]–[49].

[13]Ibid, at [73].

[14]Ibid, at [75]–[76].

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refoulement.[15] Rwanda has also failed to comply with an explicit undertaking to not to breach the *non-refoulement* principle in the context of a similar agreement with Israel.[16]

The Supreme Court accepted that the Rwandan government entered into the MEDP in good faith, that it had incentives to ensure that it was adhered to, and that monitoring arrangements provided a further safeguard. Nevertheless, it concluded that there was a real risk of both improper processing of applications and of *refoulement*. They confirmed that, though the changes and capacity-building needed to eliminate that risk may be delivered in the future, they were not shown to be in place when the lawfulness of the Rwanda policy had to be considered in these proceedings.[17]

3. Analysis

The case has prompted discussion of the UK's treaty obligations of *non-refoulement*,[18] and how this policy breaches those obligations.[19] This commentary, however, focuses exclusively on a more specific aspect of this judgment: the reference made to customary international law (CIL), specifically in relation to *non-refoulement*. An obiter comment made by the Court – which considered whether the principle of *non-refoulement* was a rule of CIL – is noteworthy because those state obligations exist regardless of whether the state is party to any specific treaty.

The Supreme Court went into some detail as to the international treaties which have been ratified by the UK and which create *non-refoulement* obligations on their signatories.[20] In doing so, it highlighted that any right of a state to impose immigration restrictions must be 'subject to [the state's] treaty obligations and to any relevant principles of customary international law'.[21] Their lordships stated that:

> It may be that the principle of *non-refoulement* also forms part of customary international law. … The significance of non-refoulment 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.[22]

CIL is the oldest source of international law and may be understood as comprising 'established modes of conduct [state practice], widely accepted as binding upon states [*opinio juris*] even though they are

[15] Ibid, at [77]–[94].

[16] Ibid, at [95]–[100].

[17] Ibid, at [101]–[105].

[18] T Kostadinides 'Reassessing the UK's Rwanda asylum policy: tinkering with international law and the Constitution' (*UKCLA Blog*, 22 November 2023), https://ukconstitutionallaw.org/2023/11/21/theodore-konstadinides-reassessing-the-uks-rwanda-asylum-policy-tinkering-with-international-law-and-the-constitution/ (last accessed 23 May 2024); A Tucker 'The Rwanda policy, legal fiction*(s)*, and Parliament's legislative authority' (*UKCLA Blog*, 22 Novembe 2023), https://ukconstitutionallaw.org/2023/11/22/adam-tucker-the-rwanda-policy-legal-fictions-and-parliaments-legislative-authority/ (last accessed 23 May 2024); M Elliott 'The Rwanda Bill and its constitutional implications' (*Public Law for Everyone*, 6 December 2023), https://publiclawforeveryone.com/2023/12/06/the-rwanda-bill-and-its-constitutional-implications/ (last accessed 23 May 2024); L Dubinsky et al 'Supreme Court rules governments Rwanda policy unlawful' (*Doughty Street Chambers Blog*, 15 November 2023), https://www.doughtystreet.co.uk/news/supreme-court-rules-governments-rwanda-policy-unlawful (last accessed 23 May 2024).

[19] Human Rights Watch 'Human Rights Watch issues damning verdict for UK' (12 January 2023), https://www.hrw.org/news/2023/01/12/human-rights-watch-issues-damning-verdict-uk (last accessed 23 May 2024); Amnesty International 'UK: Government is "bulldozing" UK human rights – global human rights review' (27 March 2023), https://www.amnesty.org.uk/press-releases/uk-government-bulldozing-uk-human-rights-global-human-rights-review#:~:text=Focusing%20on%20developments%20from%202022,impose%20limitations%20on%20the%20UK's (last accessed 23 May 2024).

[20] As indicated at [20]–[26], these include the UN Refugee Convention 1951 (Art 33(1)), the UN Convention against Torture and Other Cruel, Inhuman and Degrading Treatment 1984 (Art 3(1)), the UN International Covenant on Civil and Political Rights 1966 (Arts 6–7), ECHR (Art 3); The UK is a signatory to all of these treaties.

[21] *R (AAA)* SC (above n 1), at [19].

[22] Ibid, at [25].

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not based on formal agreement'.[23] Both state practice and *opinio juris* must be present to create a new rule of CIL.[24] Rules of CIL are applicable to all states, regardless of whether or not a given state is a party to treaties which also happen to reflect such rules. Therefore, even if the UK were not a party to treaties with *non-refoulement* provisions, it would still be subject to CIL on the issue of *non-refoulement*. The question then arises as to the effect that this would have in both domestic and international law.

There is also precedent for the UK acknowledging CIL as a source of UK law,[25] both at state level and in the form of judicial decisions.[26] However, given that the UK operates a dualist approach to international law,[27] the UK judiciary could not 'create, abrogate or modify municipal law [to comply with unincorporated] international law, whether customary or treaty-based'.[28] Yet, unlike treaties, CIL does not require any incorporating legislation in order to be taken into account in a municipal court.[29] In practice courts are entitled (though arguably not bound) to take account of CIL as a form of unincorporated international law where relevant and appropriate, so that it may 'affect the interpretation of ambiguous statutory provisions, guide the exercise of judicial or executive discretions and influence the development of the common law'.[30]

The Supreme Court recognised that *non-refoulement* may be a principle of CIL. Indeed, it stated that the UK has already accepted such a view.[31] In a 2001 Declaration the UK recognised that the principle of *non-refoulement* is embedded in CIL. The Supreme Court may have felt that this Declaration by the UK partly served to illustrate that the state practice and *opinio juris* limb(s) of the test of CIL was satisfied. Arguably, the Supreme Court need not have been so circumspect when it stated that *non-refoulement* 'may' form part of CIL. Many in the international law community state unequivocally that *non-refoulement* is a principle of CIL.[32] The UK has not been a persistent objector to *non-refoulement*; quite the reverse, if its treaty membership and official pledges are anything to go by.[33] However, the reason the Supreme Court may have been reluctant to be more conclusive might have been because CIL was not raised in submissions, so the Supreme Court did not rely on it in their reasoning.[34]

[23] *North Sea Continental Shelf Case* [1969] ICJ Reps 3; Art 38(1)(b) Statute of the International Court of Justice; see further C Greenwood 'Sources of international law – an introduction' (United Nations, 2008), https://legal.un.org/avl/pdf/ls/greenwood_outline.pdf (last accessed 23 May 2024).

[24] As confirmed in *Case of the SS Lotus, France v Turkey*, Judgment No 9, PCIJ Series A No 10, ICGJ 248 (PCIJ 1927), see also the *Advisory Opinion on Nuclear Weapons* [1996] ICJ 3.

[25] Note there are differing opinions on whether: (i) CIL is a part of UK common law, per *Pitman v Trinidad & Tobago* [2018] AC 35 [35]–[41]; or (ii) [C]IL is a source of UK common law, which is a source of the UK Constitution, see further *Belhaj & another v Straw & others* [2017] UKSC 3, at [252].

[26] Examples of such acknowledgements include as state party to the Refugee Convention (Preamble) and the 2001 Declaration (UN Doc HCR/MMSP/2001/09). Examples of UK Court acknowledgement include *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 3)* [2000] 1 AC 14 and *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia* [2007] 1 AC 270; see also *Belhaj v Straw*, ibid.

[27] See further F De Londres 'Dualism, domestic courts and the rule of international law' in M Sellers and T Tomaszewski (eds) *The Rule of Law* (Springer, 2010) p 217.

[28] *Belhaj v Straw*, above n 25; see also *Miller v SSEEU* [2017] UKSC 5, at [55].

[29] *Trendtex v Central Bank of Nigeria* [1977] QB 529, at 554 per Denning LJ.

[30] *R v Lyons* [2003] 1 AC 976, at [13]. See also the comments in *R (Hurst) v London Northern District Coroner* [2007] 2 AC 189, at [53]–[59] and *R (Wang Yam) v Central Criminal Court* [2015] UKSC 76, at [35]–[36]; *Belhaj v Straw,* above n 25; *cf* an older interpretation by Lord Bingham in *A v Secretary of* State *for the Home Department (No 2)* [2005] UKHL 71, when at [27] he stated that a treaty 'even if ratified by the United Kingdom, has no binding force in the domestic law of this country *unless it* is given effect by statute or *expresses principles of customary international law*' (emphasis added).

[31] The 2001 Declaration, above n 26.

[32] W Schabas *The Customary International Law of Human Rights* (Oxford: Oxford University Press, 2021) p 249; A Duffy 'Expulsion to face torture? *Non-refoulement* in international law' (2008) 20(3) International Journal of Refugee Law 373.

[33] *R (AAA)* SC (above n 1), [20]–[25].

[34] Ibid.

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In fact, some commentators go further still and argue that *non-refoulement* should be considered as a *jus cogens* norm.[35] To do so it would have to 'meet the normal requirements for customary international law … and furthermore have that additional widespread endorsement as to its non-derogability'.[36] *Jus cogens* norms therefore mature from preceding CIL. The fact that many sources are engaging with whether *non-refoulement* is a *jus cogens* norm more firmly establishes it as a rule of CIL, upon which its potential as a *jus cogens* norm is claimed.

At the very least, therefore, it can be quite safely stated that *non-refoulement* is widely regarded as a rule of CIL. This raises a further jurisprudential obstacle to those in Westminster who would seek to 'get around' this judgment by simply legislating their way out of certain human rights obligations. It is a matter of record that, in the aftermath of this judgment, there were numerous government MPs engaging in rhetoric critical of the Supreme Court, the ECHR and international treaties which refer to *non-refoulement*.[37] The Supreme Court's choice of wording may have been intimating that, regardless of whether threats of disapplying human rights laws or ceding from international treaties in future legislation are realised, Parliament cannot legislate itself out of CIL; at least not without serious ramifications at the international level.

Another implication of this *obiter* comment is that the UK government should now seriously consider its international position in respect of the principle of *non-refoulement*, and the inevitable damage to the UK's (erstwhile) reputation for both championing human rights and defending and upholding the rule of law, itself another source of the UK Constitution.[38] The rule of law requires that the state adhere not just to its national law obligations but to its international law obligations too.[39] The UK government's unwavering commitment to the Rwanda policy, despite the Supreme Court judgment and criticism from the UNHCR,[40] speaks volumes to its indifference as to how the UK will be perceived by the international community in the future.

The Prime Minister's response to the judgment was to introduce legislation that would disapply treaty obligations so that the government could continue with its plans for the relocation scheme.[41] The Safety of Rwanda (Asylum and Immigration) Act 2024 effectively declares that for the purposes of asylum and refugee policy, Rwanda is a safe country to which asylum seekers can be removed. It further states that a court cannot consider a review of, or appeal against, a decision to relocate a person to Rwanda on the basis that it is not a safe country, or that it may breach its legal obligations, including the obligation of *non-refoulement*.[42] Further, these exclusions are to apply regardless of any provision of domestic or international law.[43] In this context, international law includes both customary

[35]See for example J Allain 'The *jus cogens* nature of non-refoulement' (2001) 13 International Journal of Refugee Law 533; see also UN High Commissioner for Refugees (UNHCR) *Advisory Opinion on the Extraterritorial Application of Non-refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007; *The Prosecutor v Germain Katanga*, ICC-01/04-01/07. For further analysis see D Tladi, Special Rapporteur *Fourth report on peremptory norms of general international law (jus cogens)* UN doc A/CN.4/727 (31 January 2019), [131]–[134].

[36]C Costello and M Foster '*Non-refoulement* as custom and *jus cogens*? Putting the prohibition to the test' (2016) 46 *Netherlands Yearbook of International Law* 273.

[37]S Braverman MP 'Tinkering with a failed plan will not stop the boats' (*The Telegraph*, 16 November 2023); M Knowles 'Rishi Sunak told leaving ECHR won't stop boats before election with thousands more waiting' (*The Daily Telegraph*, 28 November 2023), H Line 'Tory right urge Rishi Sunak to put quitting the ECHR at the heart of the next election if the Rwanda scheme is blocked' (*Mail Online*, 19 December 2023), https://www.dailymail.co.uk/news/article-12879265/Tory-Right-urge-Rishi-Sunak-quitting-ECHR-heart-election-Rwanda-scheme-blocked.html (last accessed 23 May 2024).

[38]The rule of law was recognised by statute as a principle of the UK Constitution in the Constitutional Reform Act 2005, s 1.

[39]T Bingham *The Rule of Law* (London: Penguin, 2011).

[40]In addition to the UNHCR material cited at n 2 above, see also UN High Commissioner for Refugees 'UNHCR Analysis of the Legality and Appropriateness of the Transfer of Asylum-Seekers under the UK-Rwanda arrangement: an update' (15 January 2024), https://www.refworld.org/legal/natlegcomments/unhcr/2024/en/147086 (last accessed 23 May 2024).

[41]Rishi Sunak MP, https://www.gov.uk/government/speeches/pm-remarks-on-supreme-court-judgement-15-november-2023 (last accessed 23 May 2024).

[42]Section 2(3) and 2(4).

[43]Section 2(5).

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international law,[44] and *jus cogens* norms.[45] The intention is clear; the government means to prevent any and all forms of international law from being used to lessen its ability to relocate asylum seekers regardless of a real and substantial risk of *refoulement*.

This attempt by government to limit the extent to which domestic courts can use human rights law or international law more generally to prevent the implementation of the Rwanda scheme may be successful at the municipal court level. Although the International Court of Justice (ICJ) is the ultimate arbiter of CIL, the UK courts have recognised various rules of CIL as a source of UK law.[46] As such, the Supreme Court could find that the state is in breach of CIL in future legal challenges based on the disapplication of treaty provisions, or where the state has withdrawn from treaties. However, assuming that the current constitutional orthodoxy towards parliamentary sovereignty prevails, the domestic courts will likely feel compelled to uphold any version of the scheme which might be based on primary legislation whether or not that legislation breaches international law.[47]

If a dispute between the UK and another state arises on whether *refoulement* is a rule of CIL, then the appropriate forum would be the International Court of Justice (ICJ), as it regularly provides judgments on whether the requisite components of a rule of CIL have been satisfied.[48] The 'primacy of international law' is a fundamental principle amongst nations that a state may not invoke provisions of its own domestic law as a justification for breach of an international obligation. This principle has been upheld by internationals courts since the 1920s and also appears in various international legal instruments.[49] Should a situation arise where the UK attempts to disapply *non-refoulement* provisions, or leave treaties with such rules, it is easy to envisage the ICJ finding that the primacy of international law means that the *non-refoulment* principle must trump municipal law, at least within the international law sphere. The UK has been a respondent in ICJ proceedings relating to CIL before;[50] it can be again.

Conclusion

The decision in *R (AAA) v SSHD* clearly places the obligation of *non-refoulement* at the centre of the global system of refugee protection. In holding that Rwanda was not a safe country to which to send asylum seekers because of its established record of breaching this key obligation, as well as its problematic procedures for managing asylum claims, the Court could do nothing else but hold that the decision to send asylum seekers to Rwanda was unlawful. While the decision primarily focused on the responsibilities of the Home Secretary under the Human Rights Act and other domestic legislation, the Court pointedly went beyond the scope of the arguments addressed to it by highlighting that the *non-refoulement* principle may be a rule of customary international law. We have argued above that not only is *non-refoulement* a rule of customary international law, but it is increasingly recognised as having the character of a *jus cogens* norm of international law.

The impact of this is significant. In drawing attention to the fact that the *non-refoulement* obligation exists beyond the text of international treaties, the Supreme Court has indicated that any attempt to pursue a version of the Rwanda policy which ignores or tries to limit the application of this rule is likely to lead to further legal barriers. The present attempt by government to limit the extent to which domestic courts can use human rights law or international law more generally to prevent the

[44]Section 1(6)(f).

[45]Section 1(6)(g).

[46]See the discussion at nn 25–30 above.

[47]On the reluctance to attribute any legal effect to unincorporated treaties, see *Cheney v Conn* [1968] 1 WLR 242 and *Miller*, above n 28.

[48]S Talmon 'Determining customary international law: the ICJ's methodology between induction, deduction and assertion' (2015) 26(2) European Journal of International Law 417.

[49]See Art 3 of the Articles on State Responsibility; see also Art 27 of the 1969 Vienna Convention on the Law of Treaties, though that applies to treaties specifically.

[50]See, for example, *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v United Kingdom)*, ICJ 5 October 2016, 189 ILR 593.

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implementation of the Rwanda scheme may be successful on precisely those terms. Assuming that current constitutional orthodoxy towards parliamentary sovereignty prevails, the domestic courts will likely feel compelled to uphold any version of the scheme which might be based on primary legislation. That will not, and cannot, prevent international courts from declaring the scheme to be unlawful in international law. Should it fall to one of those bodies to pass judgment on the scheme, the government will likely feel the full impact of the Supreme Court's subtle introduction of customary international law into this controversy.

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