

UNHCR Analysis of the Legality and Appropriateness of the Transfer of Asylum-Seekers under the UK-Rwanda arrangement

Overview

1. On 14 April 2022, the government of the United Kingdom of Great Britain and Northern Ireland (“the UK”) and the government of the Republic of Rwanda (“Rwanda”) published a new Migration and Economic Development Partnership, under which the two States entered into a Memorandum of Understanding (“MOU”) “for the provision of an asylum partnership arrangement to strengthen shared international commitments on the protection of refugees and migrants”¹ (also referred to in this paper as the “UK-Rwanda arrangement”). Under this arrangement, asylum-seekers in the UK may be transferred to Rwanda where their claims for international protection would be determined under the national Rwandan asylum system. Individuals transferred to Rwanda would not be relocated back to the UK once their claims have been decided upon.²
2. This note summarizes the views of the United Nations High Commissioner for Refugees (“UNHCR”) on the legality and appropriateness of this arrangement, with reference to international refugee law norms and principles, as articulated notably in the 2013 *UNHCR Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers*³ and UNHCR’s 2021 *Note on the “Externalization” of International Protection*.⁴
3. These comments are provided pursuant to the responsibility granted to UNHCR by the United Nations General Assembly to ensure the promotion and supervision of compliance with international refugee law.⁵ UNHCR’s supervisory responsibility is reiterated under two treaties binding upon the UK and Rwanda - namely the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol Relating to the Status of Refugees (hereafter collectively referred to as “1951 Convention”) – which require all States parties to “co-operate with” UNHCR “in the exercise of its functions,” and to “facilitate [UNHCR’s] duty of supervising the application” of refugee law.⁶

¹ <https://www.gov.uk/government/publications/memorandum-of-understanding-mou-between-the-uk-and-rwanda/memorandum-of-understanding-between-the-government-of-the-united-kingdom-of-great-britain-and-northern-ireland-and-the-government-of-the-republic-of-rwanda>

² Factsheet: Migration and Economic Development Partnership, April 2022, available at: <https://homeofficemedial.blog.gov.uk/2022/04/14/factsheet-migration-and-economic-development-partnership/>

³ UN High Commissioner for Refugees (UNHCR), Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers, May 2013, available at: <https://www.refworld.org/docid/51af82794.html>

⁴ UNHCR Note on the “Externalization” of International Protection, 28 May 2021, www.refworld.org/docid/60b115604.html

⁵ Statute of the Office of the UNHCR, U.N. Doc. A/RES/428(V) ¶¶ 1, 8(a) (Dec. 14, 1950) (“UNHCR Statute”)

⁶ Art. 35 of the 1951 Convention Relating to the Status of Refugees (189 UNTS 137); Art. 2 of the 1967 Protocol Relating to the Status of Refugees (606 UNTS 267).

Principles determining the legality and appropriateness of bilateral transfer agreements

4. It is UNHCR's position 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.⁷ This is also in line with general State practice.⁸
5. A State's refugee protection obligations are engaged, inter alia, when an asylum-seeker enters their territory, including territorial waters, or is intercepted at sea by their authorities.⁹ The primary responsibility to provide protection rests with the State where asylum is sought.
6. In the context of initiatives involving the transfer of asylum-seekers from one country to another for the purpose of processing their asylum claims, transferring States retain responsibilities under international refugee and human rights towards transferred asylum-seekers. In the current case, neither the arrangement entered into between the UK and Rwanda nor the fact of transfers conducted under it would relieve the UK of its obligations under international refugee and human rights law towards asylum-seekers transferred to Rwanda. At a minimum, and regardless of the arrangement, the transferring State (in this instance the UK) would be responsible for ensuring respect for the principle of non-refoulement.¹⁰ Non-refoulement obligations would be triggered in case of a risk of persecution or ill-treatment in the state to which the asylum-seekers would be transferred (direct refoulement), or of onward removal to another country where they could face such risks (indirect refoulement).
7. The assessment of the legality and / or appropriateness of bilateral transfer arrangements is governed by a number of principles outlined in the 2013 *UNHCR Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers*, which are considered below with reference to the modalities of the arrangement entered into by the UK and Rwanda, as set out in the MOU and other public statements by the UK and Rwanda, as well as UNHCR's assessment of likely difficulties in implementing the arrangement in line with those principles.
8. Although States may make arrangements with other States to ensure international protection, such arrangements must, as the Preamble of the 1951 Convention provides, advance international cooperation to uphold refugee protection, enhance responsibility sharing and be consistent with the widest possible exercise of the fundamental rights and freedoms of asylum-seekers and refugees. International law requires States to fulfil their treaty obligations in good faith.¹¹

⁷ UNHCR, *Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers*, p 1.

⁸ UN High Commissioner for Refugees, *Protection Policy Paper: Maritime interception operations and the processing of international protection claims: legal standards and policy considerations with respect to extraterritorial processing*, November 2010, available at: <http://www.unhcr.org/refworld/docid/4cd12d3a2.html>.

⁹ 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, available at: <https://www.refworld.org/docid/45f17a1a4.html>, Para 24; UN High Commissioner for Refugees (UNHCR), *Guidance on Responding to Irregular Onward Movement of Refugees and Asylum-Seekers*, September 2019, available at: <https://www.refworld.org/docid/5d8a255d4.html>, para 16; UNHCR, *Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers*, p 1; UNHCR, *General Legal Considerations: Search-and-Rescue Operations Involving Refugees and Migrants at Sea*, November 2017, www.refworld.org/docid/5a2e9efd4.html, including at para 7.

¹⁰ UNHCR, *Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers*, p3.

¹¹ Article 26 of the 1969 Vienna Convention on the Law of Treaties (1155 UNTS 331).

9. Arrangements should be aimed at enhancing burden- and responsibility-sharing and international/regional cooperation and should not result in burden-shifting.¹² Such arrangements need to contribute to the enhancement of the overall protection space in the transferring State, the receiving State and/or the region as a whole. Transfer arrangements would not be appropriate where they represent an attempt, in whole or part, by a 1951 Convention State party to divest itself of responsibility; or where they are used as an excuse to deny or limit jurisdiction and responsibility under international refugee and human rights law.
10. In UNHCR's view, the bilateral transfer modality entered into by the UK and Rwanda does not contribute to burden- and responsibility-sharing. Nor does it enhance international cooperation or enhance the protection space in any State. Developing countries, including in Africa, host the vast majority of the world's refugees, with the least developed countries providing asylum for one-third of the global total. Only a very small fraction of refugees hosted in these regions may eventually move to Europe. In light of these global perspectives, UNHCR considers the arrangement to be inconsistent with global solidarity and responsibility-sharing.
11. UNHCR notes that whilst Rwanda has generously provided safe haven to refugees for decades and has made efforts to build the capacity of its asylum system, its national asylum system is still nascent. In UNHCR's assessment, there is a serious risk that the burden of processing the asylum claims of new arrivals from the UK could further overstretch the capacity of the Rwandan national asylum system, thereby undermining its ability to provide protection for all those who seek asylum. In comparison, the UK national asylum system is highly developed and well capacitated to consider asylum claims.
12. An important consideration when assessing the compatibility of a proposed bilateral transfer arrangement with refugee protection obligations under international law is whether the transfer of asylum-seekers is governed by a legally binding instrument, challengeable and enforceable in a court of law by the affected asylum-seekers. In the case of the arrangement between the UK and Rwanda, UNHCR notes that the arrangement is currently governed through a MOU, whose terms include express stipulations that the arrangement is not binding in international law and does not create or confer enforceable individual rights.¹³
13. Bilateral transfer arrangements must also provide a number of guarantees for each asylum-seeker. Where these guarantees cannot be agreed to or met, then transfer would not be legal or appropriate. UNHCR recalls that the obligation to ensure that conditions in the receiving State meet these requirements in practice rests with the transferring State, prior to entering into such arrangements.
14. Firstly, asylum-seekers must be individually assessed as to the lawfulness and appropriateness of the transfer, subject to procedural safeguards, prior to transfer. Asylum-seekers subject to transfer under a bilateral arrangement must be protected against *refoulement* and have access to fair and efficient procedures for the determination of refugee status and/or other forms of international protection.¹⁴
15. UNHCR considers that the initial asylum screening interview, which will take place prior to deciding whether an individual may be transferred to Rwanda, is not sufficient to discharge the UK's obligations to ensure the lawfulness and appropriateness of removal to Rwanda on

¹² UN High Commissioner for Refugees, Expert Meeting on International Cooperation to Share Burdens and Responsibilities, 28 June 2011, available at: <http://www.unhcr.org/refworld/docid/4e9fed232.html>, para. 8.

¹³ Memorandum of Understanding 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 arrangement, provisions 1.6 and 2.2.

¹⁴ ExCom Conclusion No. 8 (XXVIII) (Determination of Refugee Status) (1977); UN High Commissioner for Refugees, Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures), 31 May 2001, EC/GC/01/12, available at: <http://www.unhcr.org/refworld/docid/3b36f2fca.html>.

an individual basis. There are long-standing concerns about the quality of information collected at screening and registration, and in particular about the identification of vulnerabilities.¹⁵ There are recognized barriers to disclosure in screening interviews,¹⁶ which are usually conducted shortly after arrival; for men arriving by small boat, they are normally conducted in detention, and often by telephone. Whilst the screening interview pro forma asks people for their travel route, the reasons for not accessing protection in an interim country are explored very briefly.¹⁷ Histories of trafficking and exploitation are explored in a single, complex question,¹⁸ which can make it difficult for individuals to disclose information.¹⁹ Similarly, there are significant barriers in the disclosure of a history of gender-based violence²⁰ and of sexual orientation or gender identity at screening.²¹

16. After receiving a notice of intent for removal to Rwanda, asylum-seekers in the UK will have seven days to make written representations as to why they should not be removed to the country. This places an excessive onus on the asylum-seeker who is likely to know little about conditions in Rwanda and its asylum system, being unlikely to have transited through or otherwise visited the country, and may not have had sufficient access to legal advice in order to understand the process and make representations as necessary.
17. To be deemed legal, transfer arrangements must ensure access to fair and efficient procedures for the determination of refugee status. UNHCR has serious concerns that asylum-seekers transferred from the UK to Rwanda will not have access to fair and efficient procedures for the determination of refugee status, with consequent risks of refoulement. As noted above, structures for determining eligibility for refugee status are still in development in Rwanda and have primarily provided protection to asylum-seekers from neighbouring countries on a *prima facie* basis. It is UNHCR's assessment that long-term and fundamental

¹⁵ See, e.g. Independent Chief Inspector of Borders and Immigration (ICIBI), An inspection of asylum casework (August 2020 – May 2021), para. 3.15-3.16, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1034012/An_inspection_of_asylum_casework_August_2020_to_May_2021.pdf; ICIBI, An inspection of the Home Office's approach to the identification and safeguarding of vulnerable adults, available at: <https://www.gov.uk/government/publications/an-inspection-of-the-home-offices-approach-to-the-identification-and-safeguarding-of-vulnerable-adults>.

¹⁶ YL (*Rely on SEF*) China [2004] UKIAT 00145, available at:

<https://tribunalsdecisions.service.gov.uk/utiac/2004-ukiatt-145>

¹⁷ The question is: "It appears that you may have had the opportunity to claim asylum one or more times on your way to the UK. Why didn't you?" The usefulness of this question in eliciting sufficient information to make an inadmissibility finding is also limited by the prevailing approach to the screening interview as an occasion on which only basic information is elicited, and issues are not explored. See, Independent Chief Inspector of Borders and Immigration (ICIBI), An inspection of asylum casework (August 2020 – May 2021), para. 9.5-9.11.

¹⁸ "By exploitation we mean things like being forced into prostitution or other forms of sexual exploitation, being forced to carry out work, or forced to commit a crime. Have you ever been exploited or reason to believe you were going to be exploited?"

¹⁹ In litigation around the now-abolished Detained Fast Track, the NGO had argued that the question "have you ever been tortured?" should be asked at screening "as a means of facilitating disclosure." Home Office policy was "to the contrary: he [the SSHD] will not make inquiries about torture at the initial screening. The justification is that victims of torture will possibly only have just arrived in the United Kingdom. They may not be ready to talk about their past or be too traumatised to trust anyone, particularly at the initial stage of fast track detention, and particularly to someone who appears to them to be a figure of authority." The disclosure of torture was "a rare occurrence at initial screening". *MT, R (on the application of) v Secretary of State for the Home Department & Ors* [2008] EWHC 1788 (Admin), para. 38-39, available at: <https://www.bailii.org/ew/cases/EWHC/Admin/2008/1788.html> Subsequent litigation continued to recognize the "limitations of the screening interview" in identifying victims of torture, and the importance of subsequent safeguards. *Detention Action v Secretary of State for the Home Department* [2014] EWHC 2245 (Admin), para. 122, available at: <https://www.bailii.org/ew/cases/EWHC/Admin/2014/2245.html>

²⁰ *Detention Action*, para. 150-151.

²¹ UK Home Office, *Asylum Policy instruction: Sexual orientation in asylum claims* (Version 6.0), pp. 14, 34.

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/543882/Sexual-orientation-in-asylum-claims-v6.pdf

engagement is required to develop Rwanda's national asylum eligibility structures with sustainable capacity to efficiently adjudicate individual asylum claims through fair and consistently accessible procedures.

18. UNHCR has expressed concerns with regard to shortcomings in the capacity of the Rwandan asylum system in its July 2020 submissions to the Universal Periodic Review²² and with both the Rwandan and UK authorities.²³ UNHCR's concerns in this regard include:

- a. Some persons seeking asylum are arbitrarily denied access to asylum procedures by Rwanda's Directorate General for Immigration and Emigration (DGIE) and are not referred to the Refugee Status Determination (RSD) Committee for consideration of their claims for international protection. This places those wishing to claim asylum undocumented, at risk of detention and deportation and has resulted in recent incidents of chain refoulement.
- b. Discriminatory access to the asylum procedures is of concern, including the fact that some LGBTIQ+ persons are denied access to asylum procedures.
- c. UNHCR has concerns about the impartiality of the RSD Committee's decision-making, with high rates of rejection observed for asylum applicants originating from both neighbouring and non-African countries.
- d. Lack of representation by a lawyer for asylum seekers during panel deliberations on their case.
- e. Reasons for negative decisions are not provided, rendering the right to appeal difficult or impossible to exercise in practice.
- f. Appeals against rejection at the first instance are made to Rwanda's Ministry of Emergency Management (MINEMA), which is also part of the RSD Committee which makes the first instance decisions. This raises concerns about the independent nature of the administrative appeal stage. There is no precedent for asylum appeals at the High Court.
- g. The efficiency and timeliness of the asylum procedure is of concern, with decisions taking up to one to two years to be issued in some cases. In recent years there has only been one MINEMA eligibility officer tasked to prepare all cases for the RSD Committee.
- h. There is insufficient access to interpreters for asylum claimants throughout the process.
- i. There is a need for an objective assessment of the fairness and efficiency of the asylum procedures, followed by a range of capacity development interventions including, but not limited to, sustained capacity building and training for all actors working in the Rwandan national asylum system.
- j. UNHCR has been unable to systematically monitor the quality of decision-making and compliance with procedural standards within the Rwandan asylum system. Over the past years, UNHCR has not been permitted to observe the RSD Committee and information on asylum cases is not shared systematically with UNHCR by the Rwandan authorities.

²² UNHCR [Submission for the Office of the High Commissioner for Human Rights' Compilation Report Universal Periodic Review: 3rd Cycle](#), July 2020.

²³ UNHCR's comments to the UK authorities in this regard have since been published by the UK Home Office, available at:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1073961/RWA_CPIN_Review_of_asylum_processing_-_notes.pdf, pages 52-62.

19. In terms of UNHCR's guidance, the legality of transfer arrangements further requires that those transferred are treated "in accordance with accepted international standards [including], appropriate reception arrangements; access to health, education and basic services; safeguards against arbitrary detention; [and that] persons with specific needs are identified and assisted."²⁴ These requirements reflect the rights granted to refugees under the 1951 Refugee Convention. Furthermore, Article 34 of the 1951 Convention calls on States to facilitate the assimilation and naturalisation of refugees.
20. UNHCR has concerns that asylum-seekers relocated from the UK to Rwanda may not be treated in accordance with accepted international standards. For example, in the context of protests by refugees in Rwanda against food ration cuts in 2018, 12 individuals were killed, 66 were arrested and some remain detained.²⁵ UNHCR is concerned that persons of concern relocated from the UK to Rwanda may be at significant risk of detention and treatment not in accordance with international standards should they express dissatisfaction through protests after arrival.²⁶
21. UNHCR is also concerned that the relocation of asylum-seekers from the UK to Rwanda is not in accordance with Article 31(1) of the 1951 Convention. Article 31(1) prohibits penalties imposed on account of irregular entry or presence of a refugee or asylum-seeker. UNHCR, based on widely-accepted principles of treaty interpretation and supported by academic experts, considers that the term "penalties" should be interpreted broadly, referring to any criminal or administrative measure taken by the State that has a detrimental effect on the refugee or asylum-seeker.²⁷ As such, the relocation of asylum-seekers from the UK to Rwanda is prohibited under Article 31(1) for those who have come directly, presented themselves to the authorities without delay and shown good cause for their irregular entry/presence. For those who do not meet these conditions of 'directness', 'promptness' and 'good cause', Article 31(1) does not protect them from a penalty on account of irregular entry or presence. However, notwithstanding Article 31(1), effectively depriving asylum-seekers of access to a fair and efficient asylum determination and treatment in line with international standards is not permissible, as it may expose them to the risk of refoulement and other rights violations.
22. Finally, transfer arrangements must ensure that "if recognized as being in need of international protection, [the person transferred] will be able to [...] access a durable solution".²⁸ UNHCR has concerns that the local integration prospects of relocated asylum-seekers who do not originate from countries immediately surrounding Rwanda would be limited in practice and that, if recognized as being in need of international protection, they would not be able to access

²⁴ UNHCR, Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers, p 2.

²⁵ This is referenced at page 60 (incidents at Kiziba), UK Home Office, Review of asylum processing Rwanda: interview notes (Annex A), May 2022, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1073961/RWA_CPIN_Review_of_asylum_processing_-_notes.pdf

²⁶ In this respect, UNHCR notes that some individuals in the UK who have received notifications that they are to be removed to Rwanda started a hunger strike in protest at the decision: <https://www.bbc.com/news/uk-61676961>

²⁷ The French language version of Article 31(1) of the 1951 Convention refers to '*sanctions pénales*'; possibly a narrower concept. However, in this context, in line with Article 33(4) of the Vienna Convention on the Law of Treaties, the broader concept of "penalties" from the English language version is to be preferred in accordance with the 1951 Convention's object and purpose of protecting fundamental rights and freedoms. ExCom Conclusion No. 22 (XXXII) 1981, para. II.B.2.(a). G S Goodwin-Gill and J McAdam, *The Refugee in International Law* (OUP 2021), pp. 276 and 277. G S Goodwin-Gill, *Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-Penalization, Detention, and Protection*, June 2003, p. 204, www.refworld.org/docid/470a33b10.html, referencing a decision from the Social Security Commissioner accepting that any treatment that was less favourable than that accorded to others and was imposed on account of illegal entry was a penalty within Article 31 unless objectively justifiable on administrative grounds. Noll in A Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol* (Oxford University Press, 2011), p. 1264.

²⁸ UNHCR, Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers, p 2.

a durable solution. In this respect, UNHCR recalls concerns that individuals previously relocated from Israel to Rwanda under a separate bilateral transfer arrangement did not find adequate safety or a durable solution to their plight and that many subsequently attempted dangerous onward movements within Africa or to Europe.²⁹

23. In summary, UNHCR considers that the arrangement entered into by the UK and Rwanda does not meet the requirements necessary to be considered a lawful and / or appropriate bilateral transfer arrangement.

Principles relevant to the determination of whether the UK-Rwanda arrangement amounts to externalization of international protection

24. The externalization of international protection refers to measures taken by States—unilaterally or in cooperation with other States—which are implemented or have effects outside their own territories, and which directly or indirectly prevent asylum-seekers and refugees from reaching a particular ‘destination’ country or region, and/or from being able to claim or enjoy protection there.³⁰ Such measures constitute externalization where they involve inadequate safeguards to guarantee international protection as well as shifting responsibility for identifying or meeting international protection needs to another State or leaving such needs unmet; making such measures unlawful.³¹
25. As detailed above, the arrangement between the UK and Rwanda contains inadequate safeguards to guarantee international protection. In UNHCR’s view, the arrangement also acts to attempt to shift responsibility for identifying and meeting international protection needs from the UK to Rwanda, against the principle of burden sharing. Therefore, UNHCR considers the arrangement as an example of externalization of international protection and is, as such, unlawful.

Concluding remarks

26. As shown in the present analysis, the UK-Rwanda arrangement fails to meet the required standards relating to the legality and appropriateness of bilateral or multilateral transfers of asylum-seekers. This arrangement, which amongst other concerns seeks to shift responsibility and lacks necessary safeguards, is incompatible with the letter and spirit of the 1951 Convention.
27. In UNHCR’s view, the UK-Rwanda arrangement cannot be brought into line with international legal obligations through minor adjustments. The serious concerns outlined in the present analysis require urgent and appropriate consideration by the governments of the UK and Rwanda in line with their obligations under well-established and binding norms of international refugee law.

UNHCR, 08 June 2022

²⁹ ‘UNHCR concerned over Israel’s refugee relocation proposals’, 17 November 2017, available at: <https://www.unhcr.org/news/press/2017/11/5a0f27484/unhcr-concerned-israels-refugee-relocation-proposals.html>

³⁰ UNHCR Note on the “Externalization” of International Protection, 28 May 2021, www.refworld.org/docid/60b115604.html

³¹ As above.