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ECtHR, press release 14 June 2022 concerning the application of an interim measure, K.N. v. the United Kingdom, Application no. 28774/22

The UK – Rwanda Migration Partnership under the scrutiny of the Strasbourg Court: Externalising asylum while bypassing refugee law?

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Abstract

On June 14th the European Court of Human Rights granted urgent interim measures under Rule 39 of the Rules of the Court in the case of N.S.K. v. the United Kingdom (application no. 28774/22). The contribution outlines the decision of the Court, while shedding light on the Memorandum of Understanding signed by the UK and Rwanda within the context of their Migration and Economic Development Partnership. The post also seizes the chance to contextualize the UK-Rwanda agreement within a migration policy pursued by the UK Government since 2003 and stigmatizes the policy's adverse consequences on the human rights of asylum-seekers deported in the African country. Finally, the post emphasizes the connection between the UK-Rwanda partnership and the European Union support for externalisation strategies and for the outsourcing of asylum-processing, as demonstrated by the incorporation of such policies in the recent proposal for a New Pact on Migration and Asylum.

A. FACTS OF THE CASE AND DECISION

1. The partnership between the UK and Rwanda

In April 2022, a Migration and Economic Development Partnership was agreed between the UK Government and Rwanda. The decision to stipulate the deal was prompted by rising numbers of migrants arriving in the UK by boat. According to the UK Government, crossings through the English Channel have increased sharply since 2019. For instance, around 4,540 people were detected arriving from France, from January to March 2022. However, the Migration Observatory at the University of Oxford highlighted how reliable and accurate estimation of the UK's irregular migrant population is not possible, therefore available estimates should be treated with caution.

Under the Memorandum of Understanding, a five-year asylum partnership will allow the UK to send back to Rwanda those migrants who might claim asylum in the UK yet have a connection with the African country. As declared by the British Government, the Rwanda policy is aimed at deterring the journeys of people who arrive in the UK through «illegal, dangerous or unnecessary methods» such as on small dinghies or hidden in lorries.

Pursuant to the deal, the UK is responsible for the initial screening of asylum-seekers and may request the transfer of migrants whose claims are considered "inadmissible" to Rwanda. The MoU clarifies that inadmissibility applies to people who pass through or have a connection with a safe country. Rwanda will consider the asylum-seekers for permission to stay or return them to their country of origin. Where asylum is granted, migrants will be permitted to stay in the African country for at least five years, yet they will not be eligible to return to the UK.

2. The interim measure in the case N.S.K. v. the United Kingdom

The first removal flight under the Rwanda scheme was scheduled to take place on June 14th. On June 13th, the European Court of Human Rights received a request to issue an urgent interim measure to the UK Government, under Rule 39 of the Rules of Court. On June 14th, the Court granted the interim measure in the case of *N.S.K. v. the United Kingdom* (application no. 28774/22).

The applicant in the case before the ECrtHR was an Iraqi national who left Iraq in April 2022. Alleging that he feared for his life in his origin country, he claimed asylum upon arrival in the UK, on 17th May 2022. On 24th May, the UK sent the applicant a "notice of intent", informing him that his application was considered inadmissible and he would be removed to Rwanda.

In its decision on the interim measure, the ECrtHR stated «that the applicant should not be removed until the expiry of a period of three weeks following the delivery of the final domestic decision in the ongoing judicial review proceedings». In coming to this decision, the Court gave great weight to concerns expressed by the UN High Commissioner for Refugees «that asylum-seekers transferred from the United Kingdom to Rwanda will not have access to fair and efficient procedures for the determination of refugee status». Thus, the Court concluded

that it was necessary to grant the interim measure due to the «risk of treatment contrary to the applicant's Convention rights as well as the fact that Rwanda is outside the Convention legal space (and is therefore not bound by the European Convention on Human Rights) and the absence of any legally enforceable mechanism for the applicant's return to the UK in the event of a successful merits challenge before the domestic courts».

B. COMMENT

The case of *N.S.K. v. the United Kingdom* testifies to the relevance of interim measures in the context of the Council of Europe monitoring system. As well known, urgent interim measures often represent the sole means to prevent irreparable harm to Convention rights, which cannot be remedied by a subsequent judgment on the merits. In the case *N.S.K. v. the United Kingdom* the potentially irreparable harm to Convention rights was linked on the one hand to the fact that Rwanda is not a signatory to the ECHR – circumstance which would have left the applicant with no legal protection under the Convention – and on the other hand to the absence of legally enforceable mechanisms for the applicant's return to the UK, had his merits challenge before UK courts achieved a positive outcome.

As for the legal nature of interim measures, it should be noted that although they are only incorporated in the Rules of Court – its internal rules of procedure – and not in the Convention itself, States Parties to the Convention are under a legal obligation to comply with them. In fact, while in *Cruz Varas and Others v. Sweden* the Strasbourg Court held that States Parties were not legally bound to respect its interim measures, in 2005 the Grand Chamber overruled this finding in *Mamatkulov and Askarov v. Turkey*. In this case, the Court held that the extradition of two Uzbek applicants despite the order of interim measures had violated their right to submit an individual application under Article 34 ECHR. In other words, the ECrtHR attached the binding character of interim measures to the right of individual application under Article 34 ECHR.

Interim measures are often requested in connection with the fundamental prohibition of *refoulement*. In fact, they are regularly employed to protect aliens in case of imminent deportation or extradition to third countries, where the person concerned risks losing their life upon return (Article 2 ECHR), being ill-treated (Article 3), or being separated from their family (article 8). In exceptional cases, the Court has also extended the application of interim measures to other rights, such as the prohibition of slavery (Article 4), or the right to a fair trial (Article 6). Generally, requests for interim measures in cases of potential deportation to "suspect" third countries like Uzbekistan, Belarus, Somalia, Iraq, or Tunisia are accepted by the Court.

Arguably, in the case at hand the Court employed interim measures to clarify the contrast between externalisation deals and the protection of Convention rights, stigmatizing the violations of international law which might derive from such agreements. Yet, the attempt to tackle migration through controversial deals with third countries is by no means a novelty within the British political landscape. Discussions around the idea of outsourcing the processing of asylum applications outside EU borders began after former UK Prime Minister Tony Blair published a document summarising the British new approach to the refugee

question in 2003, during the British presidency of the European Council. The letter, which accompanied a policy paper titled "A New Vision for Refugees", suggested the creation of processing centres in protected zones in third countries, preferably transit countries (transit processing centres, TPC). Pursuant to the proposal, asylum seekers arriving in the territory of EU Member States should have been transferred to those transit processing centres to have their asylum applications processed offshore. Then, those recognised as refugees would have been resettled in Member States while others would be returned to their country of origin.

The MoU with Rwanda resumes the strategy outlined in the 2003 document. It was adopted pursuant to a Nationality and Borders Bill aimed at outsourcing asylum processing to third countries. Notably, before reaching the deal with Rwanda, earlier attempts to secure agreements for the outsourcing of migration with Albania and Ghana failed. In fact, Albania denied any intention to stipulate a deal with the UK, slamming the possibility as "totally unacceptable" and "against international law". Similarly, Ghana categorically debunked news of a processing and resettlement agreement with the UK. In this regard, it is worth recalling that the African Union recently condemned a similar policy adopted by Denmark, stating that the Nordic country would be abdicating its international responsibilities in the asylum realm, and that such policies were worrying, xenophobic, and completely unacceptable.

Human rights defenders and scholars repeatedly underlined the detrimental consequences of externalisation policies on the human rights of people on the move, arguing that European countries are shutting their borders to *bona fide* asylum seekers and avoiding their responsibilities under the global refugee regime. However, the trend towards the externalization of asylum has been encouraged by the EU itself. The adoption of the "safe third country rule" – which became the "first safe country" principle in the Dublin Convention of 1990 – represented one of the earliest forms of externalization. Then, since the Tampere European Council, in 1999, reference was made to the importance of partnerships with countries of origin. The Council Conclusion underlined that «[p]artnership with third countries […] will be a key element for the success of [a Common European Asylum System], with a view to promoting co-development». In 2004, the Hague Programme – adopted by the European Council – emphasized the need «to continue the process of fully integrating migration into the EU's existing and future relations with third countries». Further, since 2011 the Global Approach to Migration and Mobility (so-called GAMM) promoted a close cooperation with third countries, acknowledging the need to tackle migration through a close partnership between the countries of origin, transit, and destination.

Finally, externalization strategies made their way into the proposal for a New Pact for Migration and Asylum, presented by the EU Commission in September 2020. The proposal considers enhanced partnerships with third countries as a fundamental pillar of a new European approach to migration. The New Pact aims to develop a «comprehensive and mutually beneficial» cooperation with origin and transit countries, based on a «joint assessment of the interests of both the EU and its partner countries». Nonetheless, the Pact does not require an appropriate assessment of the human rights situation in third countries as a prerequisite for the stipulation of agreements between the EU and such countries. Similarly, the Commission is not asked to evaluate whether a particular third country ratified the Geneva Convention, before reaching a deal with said country. This clearly demonstrates how the main

concern driving the EU in the implementation of partnerships with third countries is represented by the desire to externalising migration management, outsourcing it to origin and transit countries, without any concern for an appropriate assessment of the human rights situation in the partner third countries. In this regard, there seems to be no difference between the EU proposal and the British approach as enshrined in the Rwanda policy.

Returning to the MoU, although the UK and Rwandan Governments promoted the deal as an «innovative solution for a broken international refugee protection regime», the deal raises a number of legal dilemmas, particularly under the profile of the violation of the principle of *non-refoulement*. In the first place, it was demonstrated that whilst Rwanda has a long history as a receiving country – hosting Congolese refugees since 1996 – the country remains a controversial destination due to its poor human rights record. According to the 2022 World Report by Human Rights Watch, in fact, «[t]he ruling Rwandan Patriotic Front (RPF) continued to stifle dissenting and critical voices and to target those perceived as a threat to the government and their family members. Several high-profile critics, including opposition members and commentators using social media or YouTube to express themselves, went missing, were arrested, or threatened». Further, the High Court in London heard on the 16th of August that an official at the Foreign Office, who had expertise on Rwanda, raised some concerns about the contents of the official "Country Policy and Information Note" of Rwanda.

UNHCR expressed its concerns with regard to shortcomings in the capacity of the Rwandan asylum system in its July 2020 submissions to the Universal Period Review. In particular, the UN Agency observed that asylum-seekers are often arbitrarily denied access to refugee status determination procedures, discriminatory access to such procedures is observed in the case of LGBTIQ+ applicants, reasons for negative decisions are seldomly provided, and practices for appeal decisions are ambiguous. In addition, UNHCR evidenced the harsh living conditions to which some migrants are subjected, and the substantial risk of detention and deportation.

UNHCR's position with regard to the UK-Rwanda MoU is that asylum-seekers and refugees should ordinarily be processed in the territory of the State where they arrive. Moreover, the Agency stressed that in the context of initiatives involving the transfer of asylum-seekers for the purpose of asylum processing, transferring States retain responsibilities under international refugee and human rights law. Therefore, the UK would retain international responsibility for the treatment of asylum-seekers transferred to Rwanda. Further, UNHCR acknowledged that although States may plan arrangements with other States to ensure international protection, such deals must advance international cooperation to uphold refugee protection. In this regard, the Agency recalled that international law requires States to fulfil their treaty obligations in good faith. Finally, UNHCR noted that the MoU with Rwanda risks overstretching the capacity of the Rwandan asylum system, undermining its ability to provide protection to those who seek asylum. Therefore, in the eyes of the Refugee Agency, the MoU does not contribute to burden and responsibility sharing, nor does it enhance international cooperation or enhance the protection space in any State.

In addition to representing a blatant violation of international refugee law, the UK-Rwanda deal provides a further demonstration of the UK progressive withdrawal from international mechanisms of cooperation. For instance, as a result of the decision of the Strasbourg Court for interim measures, the UK is planning legislation to make it easier to disregard ECtHR's

injunctions. While currently having no plans to leave the Convention, the UK Government believes that the Strasbourg Court "overstepped its powers in blocking the deportation", as held by deputy prime minister and Britain's justice secretary, Dominic Raab. Under the newly proposed Bill of Rights, ministers would be able to ignore Strasbourg Court's injunctions. The Bill would be coherent with the isolationist policy inaugurated by the UK with Brexit and leading towards a progressive departure from pivotal mechanisms and institutions devoted to international cooperation and human rights protection.

In this regard, it is important to stress that amending UK legislation with a view to making it easier to disregard Rule 39 orders will not suffice to bypass UK legal obligations under the global refugee regime. As underlined by UNHCR, in fact, «[…] 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 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». In other words, as clearly summarised by Deprose Muchena, Amnesty International Director for East and Southern Africa, «[b]y trying to dump asylum seekers in Rwanda, the UK Government is shirking its international responsibility under the Refugee Convention to protect people in need of asylum». European governments should rather focus their efforts in designing legal and safe pathways to international protection, while improving existing avenues to asylum.

C. FURTHER READINGS

To read the text of the judgment:
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