



# BOFAXE

## Out of Sight, out of Mind? (Part 1)

### WHY THE UK-RWANDA DEAL ON OFFSHORE MIGRATION PROCESSING MAY (NOT) SERVE AS AN EXAMPLE FOR OTHER IMMIGRATION-SKEPTIC STATES IN THE GLOBAL NORTH

On June 14th 2022, the European Court of Human Rights (ECtHR) issued an interim measure against the United Kingdom, effectively halting a deportation flight at the 11th hour that would have marked the starting point of the implementation of a new migration policy pursued by the Johnson administration in cooperation with the Republic of Rwanda. According to the Memorandum of Understanding (MoU), agreed on by the UK and Rwanda in April 2022, the UK will send migrants which “irregularly” entered the country to Eastern Africa, regardless of their nationality or their origin. In Kigali, Rwanda’s capital, the asylum seekers will then be housed in detention centers while their asylum bid is being evaluated. If their claim is successful, they will be granted asylum in Rwanda but are barred from returning to the UK.

This post will analyze the legality of the UK-Rwanda deal with regard to international law and afterward evaluate whether it is to be feared that other states might follow the UK’s lead and pursue comparable schemes by deporting refugees without assessing their status themselves.

#### **The Illegality of the UK-Rwanda Agreement**

Right from the start the agreement between the UK and Rwanda has sparked a massive outcry. It was not only criticized as “cruel”, “appalling” and “inhumane” but also as plainly “unlawful”. It is thus highly likely that by pursuing the deal, the UK violates its obligations under refugee and human rights law.

First of all, the differentiating feature that the Johnson government chose to determine which migrants may be removed to Rwanda is highly problematic. The MoU allows the UK to deport “asylum seekers whose claims are not being considered” to Eastern Africa. As Boris Johnson and other conservative politicians made clear, this regulation is mainly to be applied to those refugees which entered the country “irregularly”, i.e. migrants that crossed the Channel in small boats organized by smugglers or by hiding in trucks or ferries. According to the Johnson administration those migrants, no matter where they come from, are not in-need asylum seekers but should be categorized as “economic migrants” from safe countries since they can afford to pay for the smuggling routes. These considerations are clearly incompatible with Art. 31 (1) of the 1951 Refugee Convention which forbids penalization of refugees for illegal entry. As Human Rights Watch (HRW) criticized, the UK thereby creates a two-tiered refugee system and discriminates against one group of asylum-seekers due to its mode of arrival even though the refugee status only depends on the threat of persecution or serious harm.

The removal of refugees from the UK to Rwanda is also hardly compatible with the principle of non-refoulement which is enshrined in several international treaties (e.g. Art. 33 (1) Refugee Convention, Art. 3 ECHR, Art. 3 (1) CAT) and is considered to be a part of customary international law. The principle forbids states to transfer individuals from their jurisdiction when they would be at risk of irreparable harm in the state to which they are expelled. In theory, this principle is also recognized by the UK government. Indeed, the 2021 Nationality and Borders Bill, which can be seen as the legal basis of the Rwanda policy, only allows the transfer of asylum-seekers to a “safe third country” while their asylum claim is pending. However, concerning Rwanda’s human rights record, many experts highly doubt that Rwanda can actually be categorized as a “safe country” as stated by the Johnson administration. Regarding the assessment of the human rights situation in Rwanda the UK was even accused of “cherry-picking facts or ignoring them completely”. NGOs such as HRW and Amnesty International regularly report about grave human rights issues in Rwanda such as extrajudicial killings, suspicious deaths in custody, unlawful or arbitrary detention, torture, and abusive prosecutions, particularly targeting critics and dissidents. Furthermore, with respect to the treatment of migrants in the East African state, there is reason for concern. In the past, there have been accounts of Rwandan authorities using excessive force against and killing a dozen refugees after they had protested over cuts in food rations. Against this backdrop, it appears particularly cynical that the UK itself raised concerns about respect for human rights in Rwanda and in 2021 granted asylum to several Rwandans who had fled their country.



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## Out of Sight, out of Mind? (Part 2)

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#### **Dangerous Precedent or Deterrent Example for Other States?**

Notwithstanding its ethical and legal dubiety, some experts have argued that the agreement between the UK and Rwanda might serve as an example for further anti-migration politicians, especially in the Global North, and inspire them to pursue comparable policies.

On the one hand, it is true that the almost carried out deportation of asylum-seekers from the UK to Rwanda is the current culmination point in a global trend towards the externalization of migration and asylum functions. For instance, the EU and states such as Switzerland and Canada have been paying Rwanda since 2019 for receiving refugees from camps in Libya. At the end of 2021 Filippo Grandi, the UN High Commissioner for Refugees, warned EU lawmakers not to take part in the “race to the bottom” concerning the erosion of refugee rights. The big difference and the new quality of the UK’s scheme is, however, that – unlike the migrants brought to Rwanda on behalf of the EU that are resettled to Europe in case of being granted asylum – the refugees deported from the UK will have to start a new life in Rwanda even if their asylum claim is successful and do not have any prospect of being allowed to live in the UK. After all, Denmark already in June 2021 passed legislation that allows it to remove refugees to asylum centers in a partner country, but so far failed to find a state that is willing to receive those asylum-seekers deported from Denmark. Yet, after the UK announced its deal with Rwanda in April, it was made public that the Scandinavian country is currently exploring a similar agreement with Rwanda.

On the other hand, there is reason enough to believe that the UK’s Rwanda policy will not be followed by other states. First of all, it must be brought to mind that the concept of offshore migration processing is not new but has been around since the 1980s. As maybe the most prominent examples, the US used to send Haitian and Cuban refugees to Guantanamo Bay while Australia is still today expelling migrants to the island state of Nauru after only ceasing to fly them out to Papua New Guinea in 2021. However, these policies cannot be described as success stories but rather as cautionary tales. Especially the deportation scheme of Australia failed to effectively deter immigrants from entering the country and at the same time reports about the horrific abuse of deported asylum-seekers massively damaged the state’s reputation. The UK now faces comparable backlash – admittedly an issue that the Johnson administration seems not to be too troubled by as it promised to organize further deportation flights despite the ECtHR’s decision and some Tories are now even demanding that the UK leaves the ECHR.

The ECtHR’s interim measure itself might be another factor that keeps western states from following the UK’s example. Although the court’s measure is of course not a final decision on the merits, it acknowledged concerns “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” and recognized doubts about the UK’s “decision to treat Rwanda as a safe third country”.

When it comes to the EU there is also no serious concern that it might further tighten its asylum policies based on the UK’s model. Back in June 2021, when Denmark adopted its deportation legislation, a Commission spokesman declared the implementation of Denmark’s plans was “not possible under existing EU rules” and thereby already discouraged EU states from following suit.

Finally, the UK and the Johnson administration in particular, currently find themselves in a unique position. After the “partygate” scandal the UK government now seems to be especially eager to adopt headline immigration rules to appeal to the Tory base and distract from its own failures. And indeed, about 75 percent of Britain’s Conservatives support the Rwanda policy. What is more, the UK-Rwanda deal must be seen in the broader context of the UK’s restructuring of its refugee and asylum law after leaving the EU. Despite the Brexiteers’ vow to “take back control”, the country’s departure from the EU actually led to record numbers of migrants crossing the Channel from France to the UK and also made it harder for the UK to relinquish responsibility for asylum seekers, as it can no longer make use of the Dublin Regulation and return migrants to the state they first set foot on within the bloc.

#### **Conclusion**

All things considered, one can ascertain that although experts observe a tendency of states towards externalizing parts of the asylum process, there are numerous arguments for assuming that the UK’s Rwanda policy, which is most likely to be incompatible with international law, will not be picked up by further states.