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Case Nos: CA-2023-000176Y;
CA-2023-000180Y;
CA-2023-000170;
CA-2023-001189;
CA-2023-000178;
CA-2023-000193;
CA-2023-000172;
CA-2023-000189

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
DIVISIONAL COURT
LORD JUSTICE LEWIS AND MR JUSTICE SWIFT
[2023] EWHC 55 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/03/2023

Before :

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))

- -

Between :

THE KING on the application of AAA (Syria) AHA (Syria) AT (Iran) AAM (Syria) NSK (Iraq)	**Appellants**
- and –	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**
-and-	
THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES	**Intervener**

And Between:

THE KING
on the application of
HTN (Vietnam) **Appellant**

-and-

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT **Defendant**

And Between:

THE KING
on the application of
RM (Iran) **Appellant**

-and-

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT **Defendant**

And Between:

THE KING
on the application of
AS (Iraq) **Appellant**

-and-

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT **Defendant**

And Between:

THE KING
on the application of
AB (Albania) **Appellant**

-and-

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT **Defendant**

And Between:

THE KING
on the application of
SAA (Sudan) **Appellant**

-and-

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT **Defendant**

And Between:

THE KING
on the application of
ASM (Iraq) **Appellant**

-and-

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT **Defendant**

And Between:

THE KING
on the application of
ASYLUM AID **Appellant**

-and-

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT **Defendant**

- -
- -

Raza Husain KC, **Christopher Knight**, **Rayan Fakhoury**, **Emmeline Plews**, **Will Bordell** and **Tim Johnston** (instructed by **Duncan Lewis**) for the **Appellants** in ***AAA and others*** and ***HTN (Vietnam)***
Neil Sheldon KC, **Edward Brown KC**, **Mark Vinall** and **Sian Reeves** (instructed by **the Treasury Solicitor**) for the **Respondent** in ***AAA & Ors*** and ***HTN (Vietnam)***
Laura Dubinsky KC and **David Chirico** (instructed by **Baker McKenzie**) for the **Intervener in** ***AAA & Ors***

Richard Drabble KC, **Alasdair Mackenzie**, and **David Sellwood** (instructed by **Wilson Solicitors LLP**) for the **Appellant** in ***RM (Iran)***
Neil Sheldon KC, **Edward Brown KC**, **Mark Vinall** and **Sian Reeves** (instructed by **the Treasury Solicitor**) for the **Respondent** in ***RM (Iran)***

Sonali Naik KC and **Isaac Ricca-Richardson** (instructed by **BHD Solicitors**) for the **Appellant** in ***AS (Iraq)***
Neil Sheldon KC, **Edward Brown KC**, **Mark Vinall** and **Sian Reeves** (instructed by **the Treasury Solicitor**) for the **Respondent** in ***AS (Iraq)***

Anthony Metzer KC, and **Sharaz Ahmed** (instructed by **no. 12 Chambers**) for the **Appellant** in ***AB (Albania)***
Neil Sheldon KC, **Edward Brown KC**, **Mark Vinall** and **Sian Reeves** (instructed by **the Treasury Solicitor**) for the **Respondent** in ***AB (Albania)***

Manjit Gill KC, **Tony Muman** and **Harjot Singh** (instructed by **Twinwood Law Practice Limited**) for the **Appellant** in ***SAA (Sudan)***
Neil Sheldon KC, **Edward Brown KC**, **Robin Hopkins**, **Mark Vinall** and **Sian Reeves** (instructed by **the Treasury Solicitor**) for the **Respondent** in ***SAA (Sudan)***

Richard Drabble KC and **Leonie Hirst** (instructed by **Wilson Solicitors LLP**) for the **Appellant** in ***ASM (Iraq)***

Neil Sheldon KC, **Edward Brown KC**, **Mark Vinall** and **Sian Reeves** (instructed by **the Treasury Solicitor**) for the **Respondent** in ***ASM (Iraq)***

Charlotte Kilroy KC and **Michelle Knorr** (instructed by **Leigh Day**) for the **Appellant** in ***Asylum Aid***
Neil Sheldon KC, **Edward Brown KC**, **Mark Vinall** and **Sian Reeves** (instructed by **the Treasury Solicitor**) for the **Respondent** in ***Asylum Aid***

Hearing date: 6 March 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 14 March 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Underhill :

INTRODUCTION

1. In this judgment I consider a number of applications for permission to appeal against decisions made by the Divisional Court (Lewis LJ and Swift J) in claims for judicial review of what I can for present purposes refer to loosely as "the Rwanda scheme". Eight such claims were heard over two hearings, in September and October 2022: I will refer to them as *AAA*, *HTN*, *RM*, *ASM*, *AS*, *AB*, *SAA* and *Asylum Aid*. The parties to the claims, as they now stand, appear in the title to this judgment. All the eleven individual Claimants are asylum-seekers whom the Government proposed to remove to Rwanda under the scheme: in *AAA* three organisations were originally also claimants but permission to appeal in their cases has already been refused. The United Nations Commissioner for Human Rights ("UNHCR") was given permission to intervene in *AAA*.

2. So far as relevant for the purposes of these applications, the primary decisions challenged were threefold:

   (a) an "inadmissibility decision", by which an individual's asylum claim was decided not to be eligible for consideration in the UK pursuant to paragraph 345A of the Immigration Rules;

   (b) a "removal decision", by which it was decided to remove him (all the Claimants are men) to Rwanda under the terms of a "Migration and Economic Development Partnership" ("the MEDP") between the UK Government and the Government of Rwanda ("the GoR") (which comprises a Memorandum of Understanding ("the MoU") and a number of *Notes Verbales*), on the basis that Rwanda is a safe third country for the purpose of paragraph 345C of the Rules;

   (c) a "human rights decision", under which the Secretary of State certified the individuals' claims that their removal was in breach of their rights under the European Convention on Human Rights as "clearly unfounded", pursuant to section 94 of the Nationality, Immigration and Asylum Act 2002.

   The inadmissibility and removal decisions were made in the same letter in each case, but the human rights decision was made in a separate letter and by a different decision-maker, though on the same date (or, rather, dates – see para. 4 below). (I should mention, because it is mentioned below, that the inadmissibility and removal decisions were also the subject of certificates by the Secretary of State under paragraph 17 of Schedule 3 to the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 that Rwanda was, to put it broadly, a safe country for the Claimant in question to be removed to; but that is not directly relevant to any of the applications which I have to consider.)

3. By a judgment handed down on 19 December 2022 the Divisional Court rejected what it characterised as the "generic" grounds of challenge to the relevant decisions and also to the procedural fairness of the system generally; but it found that there were legal flaws in the decision-taking in all of the individual cases. In five of the claims (involving nine claimants) – *AAA*, *HTN*, *ASM*, *SAA* and *AB* – all three of the relevant decisions were quashed, but in *RM* and *AS* only the human rights decision was quashed.

4. I should note one point from the judgment of the Divisional Court which is of relevance to one aspect of what follows. In all the cases the Secretary of State had in fact made the relevant decisions twice. The first round of decisions was between late May and early June. However, in each case she re-made all three decisions on 5 July 2022, in response to further materials which she had received in the meantime. The Divisional Court held, plainly rightly, that notwithstanding that they referred back to the earlier decisions it was the later decisions which were the operative decisions and were the proper focus of the Claimants' challenge.

5. All the Claimants sought permission from the Divisional Court to appeal on the issues on which they had failed. At a hearing on 16 January 2023 the Court gave permission to appeal on all or some of the grounds advanced in each of the individual cases save *SAA* and *AB*. In *ASM* and *Asylum Aid* permission was granted on all grounds. I attach an Annex setting out the grounds for which it granted permission in each case: it will be seen that there is a substantial degree of overlap.

6. Appellant's Notices have been filed in all eight cases. In the case of the four where the Divisional Court granted permission to appeal on only some grounds, the Claimants have sought permission from this Court to appeal on the remaining grounds. In the cases of *SAA* and *AB* permission to appeal is required on all grounds.

7. I initially reviewed the applications for permission to appeal on the papers in accordance with CPR 52.5 (1). I refused permission to appeal on several grounds: my reasons are given in the orders in question. However, there were a number of grounds in respect of which I directed an oral hearing in accordance with CPR 52.5 (2). That hearing took place on 6 March 2023. A large number of counsel attended, as listed in the title to this judgment. I am grateful for their assistance and that of the solicitors instructing them. It was not possible for me in the time available to reach decisions on the applications for permission to appeal and I accordingly reserved judgment. The hearing was also an occasion to review the arrangements for the substantive hearing. I do not deal with those in this judgment, save to record that that hearing is now listed for four days between 24th and 27th April 2023.

8. In this judgment I give my decisions, with reasons so far as appropriate, in each of the applications for permission. Because these are decisions on permission to appeal and have no status as authority in other cases I have expressed myself more economically than in a full judgment. Among other things, I have not set out the terms of the relevant legislation and rules, and I have generally referred to passages in documents without quoting them or in some cases explaining the status of the documents in question.

9. I should deal with one point by way of preliminary. Most of the grounds on which the Divisional Court granted permission relate to generic issues: in other words, if the challenge is well-founded the reasoning will apply not only to the decisions taken in the case of the Claimant in question but also to those taken in the cases of all the other Claimants in whose case the relevant circumstances apply. The Divisional Court only permitted one counsel for one party to address it on any particular generic ground, with counsel for the other parties adopting their submissions. In their appeals to this Court, not all the parties have pleaded all the generic grounds, on the basis, as I understand it, that it was sufficient that they be pleaded by the parties whose counsel argued them below. That is a sensible course, but I took the opportunity to confirm with Mr Sheldon, who appeared for the Secretary of State, that she accepted that if the appeal succeeded

on any of the generic issues it would be treated as covering any Claimants to whom the relevant reasoning applied.

AAA and *HTN*

10. The Claimants in *AAA* and *HTN* are represented by the same solicitors and counsel. Substantially the same issues arise in both and their grounds of appeal are identically pleaded. Permission is sought on grounds (1)-(3) and (5).

11. Grounds (1)-(3) read:

> "(1) The Court erred in its interpretation and application of the *Ilias* test when determining whether the SSHD conducted a sufficiently 'thorough examination' of the adequacy of Rwanda's asylum system, including by (i) effectively conflating the *Ilias* duty with the *Tameside* duty, and (ii) adopting the wrong approach in law to the SSHD's evidence, the evidence of UNHCR, and the unsworn material provided by the Government of Rwanda.
>
> (2): The Court erred in concluding that the Assessment Document and/or the applicable inadmissibility decisions were based on a *Tameside* sufficient inquiry, including by (i) failing to have regard to the proper point in time at which to assess the SSHD's compliance with that duty, and (ii) concluding that the SSHD could make a reasonable decision in relation to future refoulement risk without at least attempting an assessment of past violations.
>
> (3): The Court erred in its interpretation and application of the *Soering* test in determining whether asylum-seekers relocated to Rwanda faced a real risk of refoulement or other Article 3 ill-treatment."

12. I propose to give permission on those grounds (although I made it clear to Mr Husain, the Claimants' leading counsel, that the phrase "including by" in grounds (1) and (2) did not open the door to any arguments not already identified in his skeleton argument). I do so essentially because I regard them as raising issues which are liable to overlap substantially with those raised by ground (4), on which the Divisional Court has already granted permission. If, as it held, there was a compelling reason to give permission on that ground I believe there is a compelling reason to give permission on grounds which may not be easily separable in practice.

13. Ground (5) reads:

> "The Court erred in failing to address the question of whether asylum-seekers removed to Rwanda would be accorded their rights under the Refugee Convention as a matter of vires as opposed to rationality."

As pleaded that is rather opaque, but the nature of the challenge is clearly explained in paras. 51-58 of the Claimants' skeleton argument. I need not summarise those paragraphs here save to say that the central contention is that the obligations of which the Secretary of State is said to be in breach arise under section 2 of the Asylum and Immigration Appeals Act 1993 rather than simply as a matter of public law rationality. Whether or not this ground has a real prospect of success, as to which I have not found it necessary to reach a concluded view, the Court will in any event have to consider the effect of section 2 of the 1993 Act in *ASM* (see ground 1B, on which the Divisional Court gave permission), and although the particular issues may be different I think it desirable for both to be before the Court. I accordingly grant permission.

RM

14. We are concerned with two grounds of appeal, (6) and (7), which I will take in turn.

15. Ground (6) reads:

> "Ground 6: the Court failed to consider adequately or at all:
>
> (i) Whether the existence of 'significant vulnerabilities', as set out in (among other things) the SSHD's Standard Operating Procedures, was a criterion for whether a person should be considered ineligible and/or unsuitable for transfer to Rwanda; and/or
>
> (ii) Whether the SSHD had lawfully applied that criterion to RM's circumstances when considering whether he should be transferred to Rwanda."

16. The background to this ground can be sufficiently summarised as follows. The Immigration Enforcement Unit in the Home Office had at the relevant date issued a Standard Operating Procedure ("SOP") for "Referring small boat arrivals into Detained Asylum Casework (DAC) and Migration and Economic Development Partnership (MEDP)". The introductory section to the SOP, headed "Background", sets out what are described as "criteria" for consideration of whether individuals arriving by small boat may be suitable for relocation to Rwanda under the MEDP. One of these is that:

> "The individual has no significant vulnerabilities or safeguarding concerns and meets the criteria for onward detention under current Detention Gatekeeper procedures."

17. It was RM's case in the Divisional Court that he did in fact have significant vulnerabilities which meant that the "criterion" referred to in that quotation was not satisfied in his case and that the removal decision had been procedurally unfair because he had not been given the opportunity to draw those vulnerabilities to the Home Office's attention and/or that they had not been taken into account properly or at all.

18. It was the Secretary of State's case that the words which I have quoted from the SOP did not state or reflect any policy that no-one would be transferred to Rwanda if they had "significant vulnerabilities or safeguarding concerns" (for short, "with vulnerabilities"). The definitive statement of her policy was to be found in the Inadmissibility Guidance, which says only that decisions as to whether relocation to a

third country is safe and appropriate for a particular individual will be judged on case-by-case basis having regard to their individual circumstances. The reference in the SOP on which RM relied merely reflected the fact that in the initial stages priority was to be given to individuals who could be held in detention, which, because of the rules governing detention, would necessarily exclude those with vulnerabilities. That case was stated in full and clear terms at paras. 11.93-100 of the Secretary of State's skeleton argument below and supported by a witness statement from Mr Ruaridh MacAskill, the Acting Head of the Home Office Third Country Unit.

19. The Divisional Court addressed this issue at para. 357 of its judgment, where it said:

> "The inadmissibility decision was not unlawful. The position is as follows. Save for the procedural fairness issue, the only specific ground of challenge was that the Home Secretary had failed to consider the medical evidence and RM's vulnerability. We do not consider that the policy documents establish that a person will not be relocated to Rwanda if he can establish that he is vulnerable. It will be a question for the Home Secretary to consider, case by case. In this case the Home Secretary did consider the medical evidence available at the time of the decision on 5 July 2022 ... She did not act unreasonably in not making further inquiries. The grounds of claim in relation to the 5 July 2022 inadmissibility decision, therefore, fail"

20. I would refuse permission on this ground. It is fair to say that the Divisional Court does not explain its implicit conclusion at para. 357 that the SOP does not amount to a policy. But I see no real prospect that if the issue were considered on appeal this Court would reach any different conclusion. The starting-point is that the SOP, being an internal document giving operational guidance to officials, is less likely to be a source for policy than the carefully considered and public Inadmissibility Guidance. But in any event when the passage in question is read in the context of the document as a whole, and in the light of the evidence of Mr MacAskill, which there is no reason to impugn, the Secretary of State's explanation is in my view entirely convincing. There is nothing inherently implausible about her having a policy which would permit the removal of persons with vulnerabilities if the criteria in the Inadmissibility Guidance were met; and Mr Sheldon pointed out that there were detailed provisions in the MEDP documents about the treatment of such individuals in Rwanda which would be redundant if it was contrary to her policy to transfer them in the first place.

21. Mr Drabble submitted that Mr MacAskill's evidence was inadmissible to contradict an unambiguous statement in the SOP. I do not agree. The SOP, when read as a whole, is not in my view unambiguous; and I can see no basis for excluding Mr MacAskill's evidence. Parts of it are, as Mr Drabble pointed out, hearsay because he says he has derived it partly from discussions with other officials; but that is not objectionable in principle.

22. I turn to ground (7). This concerns a decision of the Immigration Enforcement Competent Authority ("IECA") – which is an entity within the Home Office established as part of the National Referral Mechanism ("NRM") procedure – that there were no reasonable grounds to conclude that RM was a victim of modern slavery (to which I will refer because there is no material difference in this context, as "trafficking"). RM

sought judicial review of that decision as part of his claim. The Court dismissed that challenge. RM contends that it was wrong to do so.

23. I need not set out in full the definition of trafficking to which IECA works, which derives from the European Convention on Action against Trafficking. For present purposes I need only say that it has three elements, conventionally summarised as: (a) the act ("recruitment, transportation, transfer, harbouring or receipt" – for short, "transporting"); (b) the means (broadly, coercion of any kind); and (c) that the act is "for the purpose of exploitation". "Exploitation" is defined as including forced labour, which is defined by the International Labour Organisation as "all work or service which is exacted from any person under the menace of any penalty and for which the person has not offered himself voluntarily": Mr Drabble also referred me to *Basfar v Wong* [2022] UKSC 20, [2022] 3 WLR 208.

24. RM's evidence, principally set out in the witness statement submitted to IECA but also contained in the record of his screening interview and the document making the reference to the NRM, can be sufficiently summarised as follows. He is a Kurd of Iranian nationality, now aged 26. He arrived in the UK in a small boat on 14 May 2022. He left Iran because he believed that he was suspected by the authorities of Kurdish separatist sympathies. His uncle paid people smugglers to arrange his journey to the UK. In the course of the journey he was subjected to various kinds of threats and ill-treatment by the smugglers, but what he relies on specifically is the fact that he was on occasions required by them to perform what he characterises as forced labour. This was of two kinds:

(1) He was required to do various tasks in return for food. At paras. 45-46 of his witness statement he says:

> "45. … Between Turkey and France I was promised by the smugglers that if I did certain tasks I would receive payment. For this, I was told to take boxes here and there, which I did. I was asked to give them cigarettes and other items the agents wanted, which I did. I was asked to wash their clothes, which I did. But there was no payment. They just gave me a bit of food for this. They said we will pay you but they didn't. I had no choice so I did what I was told or ordered to do.
>
> 46. The smugglers were clear that the money was paid for them for the journey in my situation but they told me that money for food was not settled, so for this I had to do these jobs for them. That is why I would get a little bit of food in return for these jobs. I therefore had to work to earn the right to 'buy' my food from smugglers, without keeping any money from them. … I did not have any money myself and they knew this."

(2) He was forced to help carry into the water the boat in which he crossed the Channel. I need not quote the full account from his witness statement, but the gist is that the smugglers used threats and blows to force him and a few others to carry the boat, though he was unwilling to do so both because he was now frightened of making the journey and also because he had an injured shoulder. He says that he did not in fact help carry the boat but stood under it "pretending

to carry it otherwise I would have been beaten up or worse". The NRM referral also contained a reference to him having "tried to sabotage the mission".

25. IECA's "no reasonable grounds" decision is dated 15 July 2022. It made the point that people-smuggling as such is not a form of trafficking: its purpose is not the exploitation of the people being smuggled but their illegal transportation, for reward, to another country, at which point the transaction ends. It observed that the fact that the smugglers in RM's case used threats and force in the course of the journey was not for the purpose of exploitation but "as a catalyst to complete the task". As for the submission that he had been made to carry out forced labour, its conclusions were:

    (1) As regards the various tasks that he described, RM was not acting under the menace of any penalty or in response to threats but in exchange for food, "due to pure economic necessity and a requirement for survival", which was not a situation falling within the definition of forced labour;

    (2) As regards carrying the boat, this was not forced labour "as you entered this situation voluntarily after your uncle paid the smugglers, and you tried to sabotage the journey". Earlier in its reasons it amplifies the reference to sabotaging the journey by saying that RM "only pretended" to carry the boat.

26. The Divisional Court records Mr Drabble's criticisms of that reasoning at paras. 347-348. At paras. 353-354 it says:

> "353. The trafficking decision did not fail to have regard either to RM's account of events or to any relevant policy. Nor did it rest on any error of law. The Home Secretary was fully entitled to reach the conclusion she did. The third element of the definition of modern slavery concerns whether the individual was being transported for the purpose of exploitation. That looks to the purpose for which the individual is being transported to the United Kingdom. It is primarily concerned with what will happen to the individual after he arrives in the United Kingdom. The Home Secretary was entitled to conclude that there was nothing to suggest that RM was transported in order to be exploited after he arrived in the United Kingdom. He was transported here because his uncle had paid for him to be taken to the United Kingdom.
>
> 354. So far as events on the journey are concerned, the Home Secretary was fully entitled to conclude that RM being told that he would be paid, or given food, if he completed certain tasks did not involve forced labour. Similarly, she was entitled to conclude that when he was told to help carry the boat which was to take him and others to the United Kingdom, that did not involve RM being transported for the purposes of exploitation and did not involve forced labour. The reality is that this was part and parcel of the journey to the United Kingdom that his uncle had paid the agents to arrange, not any form of exploitation of RM by the agents. There is no flaw in the reasoning underlying the decision that there were no reasonable grounds for concluding that RM was trafficked. …"

(That reasoning does not refer to IECA's point about RM having only pretended to carry the boat: the point which the Court does make is obviously the one that counts.)

27. Mr Drabble's skeleton argument focuses on IECA's reasoning about the tasks which RM says he had to carry out in order to obtain food. He submits that in characterising that as "economic necessity" IECA failed to have regard to the context. RM was in the power of the smugglers, who had made threats of violence, and he had no opportunity to work anywhere else: in practice if he was to get food to survive he had to do the work. He emphasises that IECA was not concerned with a definitive finding that RM had been a victim of trafficking but only with whether there was "credible suspicion"; also that at this stage I am concerned only with whether this ground of appeal is arguable. The skeleton argument does not address the issue about carrying the boat, and in his oral submissions Mr Drabble accepted that that was the weaker of the two bases.

28. I do not believe that if this ground went to a full appeal there is a real prospect that IECA would be held to have made any error of law. Although its decision was indeed only concerned with whether there were credible grounds to believe that RM was a victim of trafficking, it had before it the entirety of the available evidence and it was in a position to reach a firm conclusion on the basis of RM's own account. As to that, his witness statement certainly says that the smugglers did on occasion use threats and violence, but his account of why he undertook the tasks in question (other than carrying the boat) does not refer to any such threats: he agreed to work because he needed to eat. But even if it is arguable that in some circumstances such a transaction could amount to "forced labour" in the relevant sense it is not enough for him to show that he suffered exploitation: the act of transportation has to be done "for the purpose of" that exploitation. That was plainly not the case. It is quite unrealistic to think that part of the smugglers' purpose in transporting RM to the UK was to get him to perform the kind of incidental tasks that he describes – carrying boxes to and fro and washing their clothes. As I understand it, this is the point being made by the Divisional Court at para. 354. As regards his being made to carry the boat the same point is even more obvious: RM was not being transported in order to help carry a boat.

29. I accept, of course, that it is always important to have regard to the context, and I have no reason to doubt RM's account that his experience of his journey, including his treatment by the smugglers, was harrowing. But people smuggling is not the same as people trafficking, and IECA's task was to establish whether there was anything in RM's account that meant that he was being transported "for the purpose of exploitation". I can see no arguable error in its conclusion that there was not.

30. I accordingly refuse permission to appeal on ground (7).

AS

31. AS seeks permission on five grounds which I take in turn. Each ground is pleaded in the form of a short headline, followed by several paragraphs of exposition for each, in addition to the skeleton argument.

32. Headline ground 1A reads:

> "R's policy was procedurally unfair, as R failed to disclose to A the criteria applied to select individuals for inadmissibility and removal, preventing A from making informed representations on those criteria, and the court erred by concluding otherwise."

As the expository paragraphs confirm, this ground rests on an alleged criterion for removal to Rwanda that the individual in question has no significant vulnerabilities.

33. For the reasons given above in relation to RM's ground (6), there is no real chance that if the appeal were to proceed this Court would accept that proposition. Ms Naik, representing AS, drew my attention to two entries in his GCID notes in May 2022 recording that there were no safeguarding concerns or vulnerabilities; but since he was in detention that is wholly consistent with the Secretary of State's evidence.

34. The Secretary of State in her para. 19 representations makes the further point that in any event AS had the opportunity to, and did, make representations about his medical condition prior to the decision of 5 July 2022 and that they were expressly considered in the inadmissibility decision letter. Specifically, the letter refers to representations from his solicitors, a rule 35 report dated 28 May 2022 which referred to mental health issues, and a psychiatric report from a Dr Olowookere dated 9 June 2022 which diagnosed him as suffering from moderate depression and PTSD. Ms Naik responded that that was not the same point, because AS's representations had not been directed to a specific criterion appearing from the SOP; but that is not an answer if, as I believe is clear, there is no such criterion. (I note in passing that the terms of AS's decision letter tend to confirm the Secretary of State's position that she will take an individual's medical condition into account as part of her consideration of all the circumstances but will not treat vulnerability as a criterion preventing removal.)

35. Headline ground 1B reads:

> "R's policy was procedurally unfair, as the timeframes operated by R offered no adequate opportunity for detection of medical vulnerabilities relevant to R's decision making, and the Court erred by concluding otherwise."

36. I do not believe that this ground is arguable. As noted above, AS did have an opportunity to, and did, draw the Secretary of State's attention to his medical vulnerabilities and they were considered in the decision letter of 5 July. Ms Naik's point is that that letter says that an inadmissibility decision is being made for the reasons given in it "and in the previous letter", i.e. the letter conveying the "first-round" decision referred to in para. 4 above, which in AS's case was dated 3 June (although sometimes referred to as dated 2 June); that at the earlier date no proper opportunity to make representations had been made; and that accordingly the later decision remained tainted by the earlier unfairness. I see no prospect that this Court would accept that argument. The operative decision is that of 5 July. Since the Secretary of State considered the medical evidence submitted in that letter, any failure to consider such evidence first time round is irrelevant.

37. Headline ground 1C reads:

> "R's process by which A's individual vulnerabilities were disclosed to Rwanda prior to acceptance for removal there were inadequate and insufficient to avoid risk of an Article 3 ECHR breach on removal to Rwanda for him and further invalidated R's inadmissibility decision in his case."

The point being made here, as expanded in the expository paragraph and skeleton argument, is based on paragraph 5.2 of the MoU. This requires the UK Government when seeking the consent of the GoR to the transfer of an individual under the MEDP to provide it with specified information, including (at 5.2.2) "any health issues it is necessary for Rwanda to know before receiving [them]". On the eve of the hearing in the Divisional Court the Secretary of State disclosed the form sent to Rwanda on 13 May 2022 in purported discharge of that obligation. This says nothing about any health issues experienced by AS. His point is that that created a real risk that he would not receive proper treatment in Rwanda for his mental health problems, and consequently of a breach of article 3.

38. I note that at the date that the form was sent the Secretary of State did not have the medical evidence that was considered in her decision of 5 July, though I appreciate that AS would say that that was because he had not had the opportunity to supply it. However, even if the failure to supply the information at that stage was culpable that does not mean that it could not be supplied later. In fact, the Secretary of State says in terms in her decision letter that on transfer she will notify the Rwandan authorities of AS's medical needs so that they can be catered for on arrival, and there is no reason to suppose that that would not have occurred if his transfer had proceeded. That notification would in principle ensure that he was in a position to receive any necessary care (subject to any question about the standards of healthcare available in Rwanda – but that is not the issue being raised as regards this ground).

39. That being so, the allegation that the UK Government was in breach of the MoU goes nowhere. I am not in fact sure that the failure to supply the information to the GoR in advance of its decision to accept AS was a breach of para. 5.2.2. But, even if it was, such a breach would be a matter between the two governments: the MoU is an international treaty and can confer no rights on individuals who may be transferred under it.

40. For those reasons ground 1C has no real prospect of success.

41. Headline ground 2 reads:

> "R's inadmissibility decision was unlawful and flawed in circumstances where the human rights decisions, and consequently A's proposed removal to Rwanda, were found to be unlawful and the Court erred in upholding it."

As already noted, in AS's case only the human rights decision was quashed: the inadmissibility and removal decisions stand. In fact, the Divisional Court quashed not only the decision of 5 July 2022 but the earlier decision of 3 June. AS's case is that the inadmissibility and human rights decisions in his case are inter-related so that they must stand or fall together. In that connection Ms Naik referred me to the second paragraph on p. 22 of the Inadmissibility Guidance, which reads:

> "If a claimant makes detailed representations regarding a risk of serious harm or refoulment from the country of removal, they will need to be considered as part of the inadmissibility claim and as a human rights claim under Article 3 of the European Convention on Human Rights. In such cases where the issues overlap, they must be properly considered and decided consistently between decisions. It may be appropriate in such cases to delay the inadmissibility decision, to share decision-making with the Barrier Casework Team and to ensure that certificates under the relevant provisions of Schedule 3 to the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 are applied appropriately."

42. It is clear from the expository paragraphs (and the skeleton argument) that the alleged inter-relationship between the inadmissibility and human rights decisions consists in the fact that the human rights decision of 3 June was quashed because the decision-maker had failed to have regard to the rule 35 report in AS's case. That report, Ms Naik says, was relevant to the question of whether Rwanda was a safe third country, because the mental condition which it evidenced meant that he might suffer "article 3 harm" if relocated there. She points out that the inadmissibility decision of the same date cross-refers to the human rights decision.

43. I do not believe that this argument has any real prospect of success. The operative human rights decision is that of 5 July not 3 June. Although it too was quashed, that was not for the same reason as the earlier decision: as noted earlier, by that time the Secretary of State had had, and considered, the rule 35 report. Rather, the reason was the Secretary of State had failed to take into account a witness statement from AS's son, who lives in the UK, giving evidence about his relationship with his father. AS advances no argument for any inter-relationship between that ground of invalidity and the issue of whether he would suffer article 3 harm in Rwanda; and clearly there is none.

44. Headline ground 3 reads:

> "The Court was wrong to conclude that R's inadmissibility policy on removals to Rwanda was not unlawful either under the conventional *Gillick* test or under a *Gillick* test necessarily modified in cases involving a real risk of Article 3 ECHR breach."

45. The Divisional Court addressed the Claimants' case based on *Gillick* at para. 72 of its judgment. As I read it, it rejected that case essentially on the basis that the Inadmissibility Guidance merely gave effect to the relevant Immigration Rules in the context of a lawful decision that Rwanda was a safe third country. But if the Claimants succeed on their other grounds of appeal that basis disappears, and it would in my view be arguable that the Inadmissibility Guidance required case-workers to act unlawfully to the extent that it required them to treat Rwanda as a safe third country.

46. I accordingly give permission to appeal on this ground. I can at present see no basis for the argument that the test in *Gillick*, as explained in *A*, should be modified in cases involving a potential breach of article 3 of the Convention (nor indeed why that

proposition is likely to be necessary to AS's case); but it would not be straightforward to try to excise it at this stage.

47. For those reasons I refuse permission on grounds 1A-1C and 2, but grant it on ground 3.

AB

48. There are two outstanding grounds of appeal in AB's case – (c) and (d), which raise issues about, respectively, the procedural fairness of the system and the *Tameside* duty. The Divisional Court refused AB permission to appeal on those grounds on the basis that at the hearing in September 2022 the grounds which he had been permitted to advance were limited to two quite different grounds (namely (1) whether the Secretary of State had erred in law by failing to publish certain guidance and (2) discrimination): see para. 43 of the consequentials judgment. As I understand it, this restriction reflected the fact that certain aspects of his challenge had been stayed because IECA had decided that AB was a victim of trafficking, which meant that his position would have to be reconsidered.

49. I explored the position with Mr Ahmed, who represented AB at the hearing, and also with Mr Sheldon. I was at that stage attracted by the argument that, since the Court had in some of the other appeals found that permission to appeal should be granted on (essentially) grounds (c) and (d), AB was entitled to permission on those grounds also. On reflection, however, I think that the Divisional Court was right. This is not a case where a party had a right to argue a point below but chose to adopt the submissions on that point made on behalf of other parties: the effect of the Court's order was that as a result of the stay AB did not have the right to advance these points at all at the hearing in September.

50. I would accordingly refuse permission to appeal on both grounds. AB is not disadvantaged by this. As I pointed out to Mr Ahmed, even if he (or Mr Metzer KC, who has signed AB's skeleton argument) had been instructed to appear, they would almost certainly not have had the opportunity to make substantive submissions because this Court, like the Divisional Court, will only allow submissions on generic grounds to be made by one counsel, being one who had argued the ground in question below. And of course, as noted at para. 9 above, he will have the benefit of any success by other parties on the generic grounds that is relevant to the circumstances of his case.

SAA

51. Three grounds of appeal by SAA were initially to be considered at the hearing. One – ground 6 – fell away because SAA did not comply with a condition that he supply copies of the documents necessary for me to consider it. Ground 4 was in two parts. As regards one part I refused permission earlier on the papers. As regards the other, which appeared to adopt wholesale all other generic grounds advanced by other Appellants, I understood Mr Gill, who appeared for SAA, to have confirmed at the hearing that he no longer wished to pursue it, on the understanding noted at para. 9 above. I have recently received an e-mail from SAA's solicitors the effect of which appears to be that that was a misunderstanding. I will make no order in that regard until the position has been clarified.

52. The third ground – ground 3 – challenges the Divisional Court's dismissal of SAA's case below that the relevant decisions were unlawful because they involved breaches by the Secretary of State of her obligations under the data protection legislation: see paras. 127-149 of its judgment. The basis on which it dismissed SAA's case was that even if the Secretary of State had committed the breaches alleged none of them was of a character which rendered the substantive decisions unlawful: although it went on to consider whether the breaches had in fact occurred, it avowedly did so on a summary basis. The pleaded ground simply avers that the Court was wrong to take that approach and to fail to treat SAA's case as to breach adequately, but that case is elaborated in detail over some sixteen pages in the skeleton argument.

53. I am far from persuaded that this ground is arguable. But in the end I have concluded that the issues which it raises, which are of a rather different character from the others that I have had to consider, are such that I cannot fairly refuse permission on the basis of the submissions which were possible at last week's hearing. I believe that the right course is to defer SAA's application on this ground to the full hearing in April. If the Court decides to grant permission, it may proceed to determine it on that occasion, and the parties should be prepared for that eventuality, but it may decide that it is better not to do so, in whole or in part. Mr Gill indicated that if permission to appeal were given he might want to reconsider parts of his skeleton argument. Although I have not granted permission to appeal, I will give him permission to submit a revised skeleton argument, on the understanding that it will not raise new points, and for the Secretary of State to submit a skeleton argument in response, within the same time limits as have been set for the Claimants in whose case permission to appeal has been granted.

ANNEX

GROUNDS ON WHICH PTA GRANTED BY DIVISIONAL COURT

AAA and *HTN*

(4) The Court erred in its application of the *Othman* test in determining whether the assurances contained in the MOU and the *Notes Verbales* provide a sufficient guarantee to protect relocated asylum-seekers from the risk of refoulement and other Article 3 ill-treatment.

(6) The Court erred in finding that inadmissibility and/or removal to Rwanda did not constitute a penalty for the purposes of Article 31 of the Refugee Convention.

(7) The Court erred in concluding that the SSHD's use of the certification power in Part 5 of Schedule 3 to the Asylum and Immigration (Treatment of Claimants etc.) Act 2004 was intra vires in circumstances where the Assessment Document created a presumption of safety which circumvented the statutory scheme.

(8) The Court erred in concluding that the Rwanda Removal Policy was not systemically unfair, including by finding that procedural fairness did not require that each claimant have an opportunity to make representations in relation to the matters set out in paragraph 345B(ii)-(iv) of the Immigration Rules

RM

1. The Court misdirected itself in concluding that Articles 25 and 27 of the Procedures Directive (2005/85/EU) had ceased to be 'retained EU law' by virtue of s.1 and Schedule 1 to the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 ('ISSCA 2020'); in particular (i) the Court misdirected itself as to the correct interpretation and application of ISSCA 2020 and (ii) its conclusion that the Procedures Directive was no longer retained EU law was contrary to binding Supreme Court authority in *G v G* [2022] A.C. 544, and the Court's reasons for departing from that authority were not adequate.

2. As regards procedural fairness, the Court was wrong:

(i) to find that the process for determining whether an individual should be transferred to Rwanda was procedurally fair, either generally or in RM's specific circumstances;

(ii) in particular, to find that fairness did not require applicants to be provided with the material on the basis of which the Respondent had determined that Rwanda would generally comply with its non-refoulement obligations and/or to have an opportunity to make representations directed to that issue, in circumstances where the Respondent, when deciding whether to certify individual asylum claims and/or human rights claims as clearly unfounded, (a) was herself entitled to take account of general information about Rwanda but (b) was found by the Court to have made no irrebuttable assessment as to the safety of Rwanda;

(iii) alternatively, if it was correct to find it unnecessary for applicants to be given an opportunity to make representations on the general safety of Rwanda, to conclude from that that the process was fair, either generally or in RM's specific circumstances;

(iv) in particular, to find that the process provided RM, at material times, with a fair opportunity to make representations on his individual circumstances, especially as regards (a) why he had not claimed asylum in France, either upon being turned back from the UK border on 9 May 2022 or otherwise, (b) his mental health and/or cognitive difficulties, (c) whether he was potentially or actually a victim of trafficking and/or (d) whether there were aspects of the Rwandan refugee status determination system which meant that it was not a safe country for him personally; and/or

(v) to find that the Respondent's inadmissibility decision in RM's case did not fall to be quashed on the basis of his procedural unfairness and/or a failure to take account of the evidence of his vulnerability.

3. As to whether Rwanda met the conditions in para 345B of the Immigration Rules, the Court was wrong:

(i) to find that it required 'compelling evidence' to go behind the assessment of HM Government that Rwanda would honour its commitments under the MEDP;

(ii) further or alternatively, to find that there was no such compelling evidence;

(iii) in any event, to find that the SSHD's failure to take account of the Israel-Rwanda arrangement and/or the extradition cases was not a material error of law; and/or

(iv) to find, with respect to RM's specific case and/or generally, that the refugee status determination system envisaged in Rwanda by the MOU and Notes Verbales, even if taken at its highest, was adequate to avoid a risk of unlawful onward refoulement, given (a) the deficiencies in the Refugee Status Determination Committee, (b) the Government of Rwanda's misunderstanding of the requirements of the Refugee Convention, (c) the lack of provision for medico-legal expert reports, (d) the lack of access to adequate country information, including relevant expert evidence, (e) the lack of evidence of the availability of suitable interpretation facilities and (f) the lack of evidence on the effectiveness of the right of appeal.

4. The Court was wrong to find, for the purposes of Article 31 of the Refugee Convention, that the removal of RM, before his asylum claim would have been considered, to a third country with which he has no prior connection, with the avowed aim of deterring them or others from seeking asylum in the UK after arriving by unlawful means, did not constitute a penalty and therefore was consistent with s.2 of the Asylum and Immigration Appeals Act 1993.

ASM

1. The Court misdirected itself in concluding at [118] that Articles 25 and 27 of the Procedures Directive (2005/85/EU) had ceased to be 'retained EU law' by virtue of s1

and Schedule 1 to the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020.

2. The Court erred in concluding at [126] that the MEDP Scheme as set out in paragraphs 345A-D of the Immigration Rules was consistent with the Refugee Convention and therefore not *ultra vires* s2 of the 1993 Act.

AS

The Court erred in its application of the test for measuring the reliability of assurances laid down by the ECtHR in *Othman* (App No. 8139/09) and the legal test as to procedural duties on D relating to enquiries into safety and conditions in Rwanda.

Asylum Aid

1: The Court erred in rejecting Asylum Aid's grounds of claim and concluding that the Rwanda Removal Policy was not systemically unfair, including by finding that procedural fairness did not require the provision of information relating to, or the opportunity to make representations on the matters set out in §345B(ii)-(iv) of the Immigration Rules.

2: The Court is wrong to conclude that fairness does not require access to lawyers to make representations.

3: Even if the scope of the duty to allow an opportunity to make representations were as limited as the Court has concluded, the Court is still wrong to conclude that seven days is enough time to make representations.

4: The Court is wrong to conclude that the common law does not require individuals to have access to the SSHD's provisional conclusions against them.

5: The Court erred in concluding that the Court's reasons for dismissing AA's procedural fairness arguments mean that AA's access to justice argument 'falls away'.

6: The Court's analysis of the Immigration Rules and para 17 of Schedule 3 to the 2004 Act is flawed.