Courts and Tribunals Judiciary

R (FDA) v Minister for the Cabinet Office and others (AC-2024-LON-001503)

Press Summary: For release at 10am, Friday, 5 July 2024

This press summary does not form part of the Court's judgment. It is provided by the Court for the assistance of the press and the public. References in square brackets are to numbered paragraphs of the Court's judgment.

1 The claimant, the FDA, is one of the principal civil service unions. It brought a claim seeking judicial review of guidance ("the Guidance") given by the Cabinet Office to civil servants about their obligations under the Civil Service Code ("the Code").

2 The Code forms part of civil servants' terms and conditions of employment and includes an obligation to "comply with the law and uphold the administration of justice". The Guidance purports to explain the implications of that obligation in a scenario which could arise if the Government seeks to remove migrants to Rwanda, in accordance with Government policy when the claim was issued.

3 The scenario is that:

(a) the European Court of Human Rights ("the Strasbourg Court") indicates to the United Kingdom, by way of interim measure under rule 39 of its Rules of Court, that an individual or individuals should not be removed to Rwanda pending the final determination of some legal procedure, domestic or international ("a Rule 39 Indication"); and

(b) a Minister decides to proceed with the removal notwithstanding the Rule 39 Indication.

This is referred to in the judgment as the "Guidance scenario".

4 The Guidance says that, in implementing the Minister's decision, civil servants would be acting in accordance with the Code, including its obligation to "comply with the law"; and the Code does not require or permit civil servants to refuse to implement the Minister's decision on the ground that non-compliance with the Rule 39 Indication would or might be contrary to international law.

5 The claimant says:

(a) The Guidance is wrong in law, because, when the Code requires civil servants to comply with "the law", it means both domestic and unincorporated international law.

(b) Non-compliance with a Rule 39 Indication in the Guidance scenario would be a clear violation of an obligation binding on the United Kingdom in international law by virtue of Article 34 of the European Convention on Human Rights ("ECHR").

(c) So, as presently drafted, the Code requires that civil servants refuse to act contrary to a Rule 39 Indication. Nothing in the Safety of Rwanda (Immigration and Asylum) Act 2024 ("the 2024 Act") requires or authorises them to do so.

6 The defendants are the Ministers responsible for the civil service. The Home Secretary is an interested party. They say:

(a) Decisions on whether to comply with unincorporated treaty obligations, including under the ECHR, are constitutionally for Ministers – and only for Ministers.

(b) Section 5(2) of the 2024 Act confirms this with specific reference to the Guidance scenario.

(c) The Code must be interpreted in the light of two fundamental constitutional principles – dualism and Parliamentary sovereignty. Accordingly, and especially in the light of s. 5(2), the Code cannot be read as requiring civil servants to override a decision of a Minister, taken lawfully as a matter of domestic law, with respect to the United Kingdom's compliance with unincorporated international law.

7 This claim was filed on 1 May 2024. On 3 May 2024, it was listed for a "rolled-up" hearing (where the court decides whether to grant permission to apply for judicial review and whether to grant final relief at the same hearing) on 6 June 2024. The judge noted that it appeared that some civil servants had been advised that it would be contrary to their terms and conditions to comply with a Ministerial decision to proceed with removals to Rwanda contrary to a Rule 39 Indication; and the prospect that they would be asked to do so, whilst far from certain, was also not hypothetical, given the Government's public statements on this subject.

8 Since then, it was announced that a General Election was to be held on 4 July 2024. However, in the light of the Government's indication that it intended to begin removals to Rwanda on 24 July 2024, the parties agreed that the rationale for expedition continued to apply. No application to adjourn was made.

9 For reasons set out in a judgment handed down at 10am on Friday 5 July 2024, Mr Justice Chamberlain granted the FDA permission to apply for judicial review but dismissed the claim.

10 The Court's reasoning may be summarised as follows:

(a) Article 34 imposes on contracting states (including the United Kingdom) an obligation not to hinder in any way the effective exercise of the right of individual petition to the Strasbourg Court. According to the Strasbourg Court's consistent case law, this includes an obligation to take all reasonable steps to comply with a Rule 39 Indication. Removing an individual to Rwanda in the face of a Rule 39 Indication to the contrary would constitute a clear violation of this obligation, which is binding on the United Kingdom as a matter of international law: see [69]-[74].

(b) The United Kingdom applies the dualist theory of international law. This means:

(i) International law is not part of domestic law unless it has been incorporated into domestic law by or under an Act of Parliament or through the common law, where consistent with statute.

(ii) The obligations in Article 34 ECHR (including the obligation to comply with Rule 39 Indications) have not been incorporated into, and so are not part of, domestic law.

(iii) Although there is a strong convention that the Government will act so as to comply with the United Kingdom's obligations under international law, a decision by the Government to act in a way which clearly violates those obligations is not, *ipso facto,* contrary to domestic law. As a matter of domestic law, such a decision is permissible in principle.

See [75]-[79].

(c) Ministers (who are accountable to Parliament) decide Government policy. The role of civil servants is to advise Ministers, implement United Kingdom Government policy and (where authorised to do so) take decisions in the name of the relevant Minister. Civil servants must refuse to carry out Ministerial instructions which are contrary to domestic law. But there is no equivalent constitutional rule that civil servants must refuse to carry out instructions which are clearly contrary to international law. Any such rule would transform almost every obligation binding on the United Kingdom on the international plane into a domestic constraint on Ministerial action. This would be fundamentally incompatible with dualism: see [83]-[87].

(d) Section 5(2) of the 2024 Act restates or enacts a general rule that decisions about whether the United Kingdom will comply with a Rule 39 Indication are for a Minister and only a Minister. This means that such decisions are not for domestic courts, but also that they are not for anyone else, including civil servants. As a matter of domestic law, the Minister has the option of deciding that the United Kingdom will *not* comply with the Rule 39 Indication, even though that would place the United Kingdom in clear violation of international law. Since the text of s. 5(2), read in context, is clear and unambiguous, statements made in Parliament are not admissible as aids to construction. Even if they were, the statements relied upon by the claimant provide no clear support for the suggestion that Parliament assumed that every decision taken under that provision would be compatible with the United Kingdom's obligations in international law: see [94]-[108].

(e) As to the interpretation of the Code:

(i) Public law (rather than contractual) interpretive principles apply: see [114]-[115].

(ii) In any event, the Code must be interpreted in context. The context includes the unique employment relationship between civil servants and the Crown, which has to be understood against a framework of constitutional rules of law and conventions, including those described in (c) above: see [116]-[117].

(f) Interpreted in that way:

(i) As a general matter, the Code's obligation to "comply with the law" includes an obligation to comply with domestic law *and* act so that the United Kingdom complies with its international law obligations: see [126]-[131].

(ii) However, in the special case where domestic and international law are not consistent, "the law" with which civil servants must comply includes the rules and conventions governing conflicts between domestic and international law. These include both the domestic constitutional rule that it is permissible in principle for Ministers to decide to act in ways which violate international law and s. 5(2) of the 2024 Act, which confirms or enacts that rule in the Guidance scenario. Here, the obligation to "comply with the law" requires civil servants to comply with any domestically lawful Ministerial decision to remove individuals to Rwanda in the face of a Rule 39 Indication. It follows that the Guidance correctly states the effect of the Code: see [132]-[137].

(g) The Code does not purport to cover all eventualities. Its simple instruction that civil servants must "comply with the law" is not "a positive statement of the law which is wrong": see *R (A) v Secretary of State for the Home Department* [2021] UKSC 37, [2021] 1 WLR 3931, at [46]. Nor is the Government obliged to give more detailed advice or instructions. The Code is therefore not unlawfully unclear. In any event, the Guidance tells civil servants what to do in the Guidance scenario and this judgment confirms that the instruction is correct as a matter of domestic law: see [140]-[142].

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