IN THE COURT OF APPEAL
CIVIL DIVISION

BETWEEN

THE KING
on the application of ASM

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

APPELLANT'S SKELETON ARGUMENT

Paragraph numbers [ ] refer to the Divisional Court judgment unless otherwise stated.

ISSUES AND BACKGROUND

1. The Appellant appeals from the judgment of the Divisional Court dated 19 December 2022[1] dismissing in part his claim for judicial review[2]. Permission to appeal was granted by the Divisional Court on 16 January 2023 on two grounds:

   1.1 Ground 1A (Retained EU law): The court misdirected itself in concluding [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 ('ISSCA 2020');

   1.2 Ground 1B (*Ultra vires* s2 Asylum and Immigration Appeals Act 1993): The court erred in concluding [126] that the MEDP Scheme as set out in

[1] *R (AAA) v Secretary of State for the Home Department (Rwanda)* [2022] EWHC 3230 (Admin)
[2] Grounds 2-4 of the Appellant's claim (CO/2080/2022), which challenged the decisions individual to his case, were stayed by order dated 20 July 2022 pending determination of his trafficking claim and/or final orders in this and linked claims for judicial review. The judgment below addressed the Appellant's Ground 1, which challenged the legality of the MEDP scheme as a whole.

paragraphs 345A-D of the Immigration Rules was consistent with the Refugee Convention and therefore not *ultra vires* s2 of the 1993 Act.

2. As the Divisional Court recognised in granting permission, this appeal raises issues of considerable importance relating to the legality of the scheme ('the MEDP scheme') which at the relevant time was set out in paragraphs 345A-D of the Immigration Rules and Part 5 of Schedule 3 to the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, and which permits the Respondent to remove an asylum claimant to a third country with which he has no prior connection, without substantive consideration of his asylum claim and without an in-country right of appeal.

3. Whilst the focus of the other linked appeals is largely on issues arising from the particular application of the MEDP scheme to Rwanda as the third country destination relevant in these claims, this appeal focuses on the principle and underlying structure of the MEDP itself.

4. The Appellant contends, in summary, that the purpose and structure of the MEDP scheme itself are unlawful. The scheme is incompatible with the requirements of the Procedures Directive[3] as retained EU law and/or with a good faith interpretation of the UK's obligations under the Refugee Convention.

Background: the legal framework

5. The structure of the MEDP scheme, as applicable to this appeal, is set out at paragraphs 11-17 of the judgment and the terms of the partnership between the UK and Rwanda are detailed at paragraphs 18-27. At the relevant time, the legal basis for the MEDP scheme was set out in paragraphs 345A-D of the Immigration Rules, Part 5 of Schedule 3 to the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 and associated policy guidance; the particular arrangements with Rwanda were documented in a Memorandum of

[3] Council Directive 2005/85/EU 'On minimum standards on procedures in Member States for granting and withdrawing refugee status'

Understanding ('MOU') and Notes Verbales between the UK Government and Rwanda.

6. The salient features of the MEDP scheme, for the purposes of this appeal, can be summarised as follows:

6.1 Paragraph 345A(iii) permitted certification of an asylum claim as inadmissible on the basis that an applicant could enjoy refugee protection in a safe third country because (i) he had already made an application for protection there, (ii) he could have made an application but did not do so and there were no exceptional circumstances preventing him doing so, or (iii) he had a connection to the country such that it would be reasonable for him to go there to obtain protection [11];

6.2 Paragraph 345C stated that the Secretary of State, once an application was treated as inadmissible, "will attempt" the applicant's removal to either the safe third country in which he had been previously present or to "any other safe third country which may agree to their entry" [11];

6.3 The asylum claim was certified under paragraph 17 of Schedule 3 to the Asylum and Immigration (Treatment of Claimants etc) Act 2004. That had the effect of (i) removing the bar on removal imposed by s77 NIAA 2002, and (ii) removing the right of appeal [12-13];

6.4 Removal also required the certification of any related human rights claim as 'clearly unfounded' under the separate power in s94 NIAA 2002, the effect of which was to remove an in-country right of appeal against the refusal of the human rights claim [14];

6.5 The purpose of the inadmissibility procedure in paragraphs 345A-D Immigration Rules, as set out in the relevant policy, was to encourage asylum seekers to claim asylum in the first safe country they reach and to deter them from making "unnecessary and dangerous onward journeys to the UK". Removals (in these cases, to Rwanda) were intended to "deter people from making dangerous journeys to the UK to claim

asylum…when they have already travelled through safe third countries" [16];

7. From 28 July 2022, paragraphs 345A-D of the Immigration Rules were replaced by ss80B-C Nationality, Immigration and Asylum Act 2002, as inserted by s16 Nationality and Borders Act 2022. While the submissions below are directed to the MEDP scheme as applicable in this and linked appeals, the Appellant submits that the position from 28 July 2022 is not materially different and the scheme continues to be unlawful:

   7.1 In relation to Ground 1A of this appeal, neither NABA 2022 nor ss80B-C NIAA 2002 meet the requirements of Article 27(2)(a) of the Procedures Directive. The MEDP scheme does not require any connection between the person seeking asylum and the third country of removal, nor that removal to the third country is 'reasonable'. Nor do the relevant statutory provisions lay down a methodology for determining that a country is safe for a particular applicant, as required by Article 27(2)(b).

   7.2 In relation to Ground 1B, neither NABA 2022 nor ss80B-C NIAA 2002 contain the clear and unambiguous language necessary to disavow the UK's treaty obligations under the Convention; on the contrary, the relevant statutory provisions make express reference to the Convention and the ECHR. In so far as the court is required to examine the post-28 July 2022 regime, ss80B-C NIAA 2022 must therefore still be interpreted and applied so as to give effect to those obligations: *Assange v Swedish Prosecutor* [2012] UKSC 22, [2012] 2 AC 401. The underlying principle and purpose of the MEDP scheme remains incompatible with the spirit and purpose of the Convention, and therefore with the UK's international law obligations towards asylum seekers within its jurisdiction.

GROUND 1A: RETAINED EU LAW

8. ASM contends that the court's conclusion that Articles 25 and 27 of the Procedures Directive were not 'retained EU law' was wrong in law.

Legal framework

9. The 'Procedures Directive' (Council Directive 2005/85/EC) sets out minimum standards for procedures for granting and withdrawing refugee status. The Directive includes the following provisions:

   9.1 Article 7 confers the right to remain in the member state pending a decision on the asylum application. The only exceptions are where a second asylum claim will not be further examined, or where a person will be surrendered or extradited to another member state pursuant to a European arrest warrant or to international criminal courts or tribunals;

   9.2 Article 8(1) prohibits member states from rejecting or excluding asylum applications from examination on the sole ground that they have not been made as soon as possible;

   9.3 Article 12 requires that an applicant be given the opportunity of a personal interview prior to any decision on the claim;

   9.4 Article 23 requires member states to process applications in accordance with the principles and guarantees of Chapter II of the Directive, and to "ensure that such a procedure is concluded as soon as possible, without prejudice to an adequate and complete examination", and to inform asylum seekers of the delay if a decision cannot be taken within six months;

   9.5 Article 23(4) sets out exhaustive grounds on which the examination procedure may be 'prioritised or accelerated';

   9.6 Article 25(2) permits member states to consider an asylum application as inadmissible on seven grounds. Those include that a non-member state is

considered "a first country of asylum" within the meaning of Article 26 and/or that a non-member state is considered as a "safe third country" pursuant to Article 27;

9.7 Article 27 defines a 'safe third country' as one where the asylum applicant will not be subject to persecution, will not be *refouled*, and where the possibility of obtaining refugee protection exists. However, Article 27(2) is subject to a requirement that member states set out rules "in national legislation" requiring a connection between the person seeking asylum and the third country concerned on the basis of which it would be "reasonable for that person to go to that country", and setting out the methodology by which the competent authority satisfies itself that the safe third country concept may be applied to that applicant on a case-by-case basis.

10. It was not disputed by the Respondent that the rights, obligations and procedures in the Procedures Directive, and in Articles 25 and 27 in particular, were 'retained EU law' by virtue of s4 European Union Withdrawal Act 2018 (EUWA 2018) [107]. The question for the court was therefore whether the Procedures Directive remained 'retained EU law' by virtue of s4(2)(b) EU Withdrawal Act 2018 (EUWA 2018) or has ceased to be so by virtue of s1 and Schedule 1 to ISSCA 2020.

The context: European asylum and immigration law

11. Immigration and asylum are distinct concepts in EU law which are subject to entirely separate legal frameworks. EU immigration law is concerned only with free movement rights of EU nationals and their family members, which are set out in the Citizens' Directive (2004/38/EC) and EU Association Agreements. EU immigration law is not concerned with the rights of third country nationals, save in so far as they have derived rights of free movement and residence due to their relationship with an EU member state citizen.

12. By contrast, EU asylum law is a separate body of law (the EU Common Asylum System (CEAS)) primarily set out in the Qualification, Procedures, and Reception Directives (Directives 2004/83/EC, 2005/85/EC and 2003/9/EC respectively) and the Dublin III Regulation).

13. The EUWA 2018 provided for some direct EU legislation and EU law to be retained and effective in domestic law, but provided broad ministerial powers in ss8 and 23 to make regulations in consequence of the Act, including regulations which modified primary legislation. In the area of immigration and asylum law, the relevant regulations were the Immigration, Nationality and Asylum (EU Exit) Regulations 2019 ('IANA regulations').

14. The structure and content of the Regulations is significant. The Regulations draw a distinction between revocation of 'immigration and nationality' provisions in Part 2 and 'asylum' provision in Part 3. That distinction is maintained in Schedule 1 to the Regulations, which revoked a number of specific asylum-related instruments, including the Dublin Convention and Dublin III Regulation[4]. Notably, however, the Regulations did not revoke or cease any rights arising from the asylum Directives.

15. This broader context, and in particular the distinction drawn both in EU law and in domestic legislation implementing the UK's withdrawal from EU law, is relevant to the correct interpretation of ISSCA 2020.

The interpretation of s1 and Schedule 1 to ISSCA 2020

16. It is trite that the interpretation of a statute is an objective question for the court, in which the overarching requirement is to give effect to the intention of the legislator: *R (O) v Secretary of State for the Home Department* [2022] WLR(D)) 65 at [29]. A provision in an enactment must be read in the context of the Act as

[4] Specifically, the 'Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities' (97/C 254/01) and Commission Regulation (EC) no 1560/2003 and Implementing Regulation no 118/2014 laying down detailed rules for the application of Council Regulation (EC) no 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national

a whole. External aids, including explanatory notes, reports of advisory committees and White Papers, are relevant aids to interpretation "whether or not there is ambiguity and uncertainty": *O v SSHD* at [30]. Explanatory notes are always admissible aids to construction insofar as they "cast light on the objective setting or contextual scene of the statute, and the mischief at which it is aimed": *R (Westminster City Council) v NASS* [2002] 1 WLR 2956 at [5].

17. In interpreting statutes, the principle of legality operates as a presumption of general application even in the absence of ambiguity: *R v Secretary of State for the Home Department ex parte Simms* [2000] 2 AC 115 at [130D-F] and [131E-G]. The principle of legality requires that fundamental or basic rights cannot be overridden by "general or ambiguous words"; in the absence of "express language or necessary implication to the contrary", the courts will presume that general language is intended to preserve basic rights of the individual.

18. *Simms* concerned the right of prisoners to hold interviews with journalists as an aspect of the right of free expression. In *R (Miller) v Secretary of State for Exiting the European Union* [2017] WLR(D) 53, a challenge to the use of the prerogative power to withdraw from the EU Treaties, the rights concerned were those arising under EU law, including directly applicable Treaty rights, EU legislation with direct effect, and directives [63]. The Supreme Court in *Miller* held [87] that the principle of legality prevented EU-derived rights from being overridden by the general wording of s2 European Communities Act 1972. In interpreting the scope of the 1972 Act, the Supreme Court had regard both to the long title of the Act and the side-note to s2 [88].

19. On examination of the context of ISSCA 2020 as a whole, the Appellant submits it is clear, as set out below, that s1 and paragraph 6 of Schedule 1 to the Act are directed to the repeal only of retained EU law relating to free movement, and not to asylum provisions such as the Procedures Directive. As set out below, this conclusion flows both from the wording of the provisions of ISSCA 2020 and all the other available, relevant, material.

20. The long title of the Act is "An Act to make provision to end rights to free movement of persons under retained EU law and to repeal other retained EU law relating to immigration; to confer power to modify retained direct EU legislation relating to social security co-ordination; and for connected purposes". The ending of rights related to asylum is not mentioned. "EU law relating to immigration" is not apt to cover EU asylum law because, as set out above, EU asylum and immigration law are distinct concepts which had been addressed separately in the IANA Regulations.

21. The side heading to s1 of the Act ("Repeal of the main retained EU law relating to free movement etc") again refers only to 'free movement' and other law 'relating to immigration'. The Appellant submits that 'etc' is ambiguous and insufficiently precise to indicate that the Act was intended to repeal retained EU law relating to asylum.

22. The only express reference to asylum in the Act is in s3, which provides only for a review of legal routes to the UK for 'protection claimants' and in particular for unaccompanied child claimants. s3 reflects the fact that the Dublin III Regulation, which contained family reunion provisions, had been expressly revoked by Schedule 1 IANA Regulations as set out above.

23. The detailed and lengthy Explanatory Notes to ISSCA 2020, which are highly relevant to the "objective setting" of the Act and "the mischief at which it is aimed", do not make any express or implied reference to asylum, nor identify repeal of retained EU law relating to asylum as one of the purposes of the Act:

    23.1 The purpose of the Act, set out in the 'Overview' section, is expressly defined as ending free movement of EU, EEA and Swiss citizens, protecting the status of Irish citizens once free movement ends, and provision to amend retained direct EU legislation relating to social security co-ordination.

    23.2 The policy and legal background to the Act is also set out in considerable detail at ss5-20 of the Explanatory Notes, which make no reference to

asylum or to any directive other than the Citizens' Directive (2004/38/EC).

23.3 Paragraph 6 of Schedule 1 is in Part 3 of the Schedule. Paragraphs 68-71 of the Explanatory Notes to the Act make it clear that Part 3 of the Schedule "disapplies other retained EU law **relating to free movement of persons**" [emphasis added]. Paragraph 70 of the Notes gives examples of free movement-related residence rights derived from Articles 20-21 TFEU, e.g. for *Chen* carers, and s71 includes a non-exhaustive table of 32 rights in 7 separate instruments which are covered by paragraph 6. None of the examples given relate to asylum and none of the asylum Directives is listed or referred to.

24. Similarly, Parliamentary Committee reports and materials produced during the passage of the Act, which are also relevant aids to interpretation even in the absence of ambiguity, indicate clearly that the legislative intention was only to end free movement and coordinate social security measures:

24.1 The House of Lords Delegated Powers and Regulatory Reform Committee report[5] refers to the Bill having two principal parts: Part 1 ending free movement of persons, and Part 2 conferring powers to coordinate access to social security. The report makes no reference to asylum or to the asylum Directives;

24.2 The Delegated Powers Memorandum dated 24 July 2020, supplied to the Committee by the Home Office during the preparation of its report on the Bill, provides a detailed outline of the Bill and the powers contained in it. The Memorandum makes no reference to asylum or the Directives, and repeatedly refers only to free movement law;

[5] 22nd report of session 2019-2021, HL Paper 118, published 25 August 2020

24.3 The Government response to the Committee's report, set out in Annex 1 to the Committee's subsequent report[6], again makes no reference to asylum and refers only to the ending of free movement;

24.4 The House of Lords Select Committee on the Constitution report[7] refers to the purposes of the Bill as "to end free movement of persons under EU law and to provide for the amendment of retained EU law governing social security co-ordination"; it refers to the "major constitutional importance" of removing "one of the main structures of the EU (free movement)". The Committee expressed concern at the lack of clarity in the Bill, which was worded in such a way as to "frustrate essential ingredients of the rule of law".

25. The Appellant submits that it is clear, from the wording and the context of the Act, that s1 and Schedule 1 to ISSCA 2020 were only directed to ending free movement law, and that Parliament did not intend the general words in paragraph 6 of Schedule 1 to end the status of the asylum Directives as retained EU law. Apart from the general context of the Act, this is clear if one concentrates only on the wording of s1 and Schedule 1(6).

Errors in the court's approach

26. The court erred in its construction of the Act; and in particular of the relationship between s1 and Schedule 1(6). Both are contained in Part 1 of the Act. The Long Title to the Act and the side heading to s1 are set out above. s1 itself states that Schedule 1 makes provision to end rights relating to free movement and other rights "relating to immigration". Schedule 1(6) then states which rights are in play for this purpose. Given the wording of s1 itself, there was no need for the draftsman to repeat the formula "relating to immigration". This requirement is inherent in the whole structure of the Act. The court's interpretation expands the reach of Schedule 1 beyond that envisaged by the wording of s1.

[6] HL Paper 141, published 14 October 2020
[7] 11th report of session 2019-2021, HL Paper 120, published 2 September 2020

27. Further, the court erred in its approach to interpretation of the Act. First, it was wrong to hold [113] that the side-heading to s1, the long title of the Act and the detailed Explanatory Notes were permissible aids to interpretation only where the wording of Schedule 1 was unclear. As *O v SSHD* makes clear, the context of a particular provision includes the statute as a whole and external aids are relevant to interpretation whether or not there is ambiguity. The restrictive approach taken by the court meant that its examination of "the context of the 2020 Act" [116] was artificially and wrongly constrained.

28. Second, the Appellant submits that the court failed to consider the principle of legality as a fundamental principle of statutory interpretation. The Procedures Directive, and Articles 25 and 27 in particular, impose obligations on member states and create enforceable individual rights. As such, the removal of those rights and obligations in domestic law requires clear and unambiguous language: *Miller*.

29. In the absence of clear and unambiguous language in ISSCA 2020 itself directed expressly to the removal of asylum procedural rights in the Procedures Directive, the principle of legality required that the Act be interpreted consistently with the preservation of those rights in domestic law.

30. The court failed to consider the Appellant's argument on this point and it adopted a strained interpretation of ISSCA 2020 which was contrary to fundamental principles of statutory interpretation.

31. The court's interpretation of ISSCA 2020 was also contrary to recent Supreme Court authority in *G v G* [2022] AC 544, [2021] UKSC 9, a case decided after ISSCA 2020 came into force. *G v G* involved the application of the Procedures Directive, the Immigration Rules and the Nationality, Immigration and Asylum Act 2002 in relation to an abducted child who was a dependant on her mother's asylum claim in the UK. In essence, the question was whether the child was an 'applicant' for asylum within the meaning of Article 7 of the Procedures Directive such that her removal pursuant to a Hague Convention return order was barred by the Directive and paragraph 329 of the Immigration Rules.

32. ISSCA 2020 came into force between the Court of Appeal hearing and the Supreme Court hearing. Before the Supreme Court, the Secretary of State as Intervener accepted that "that the relevant provisions of the [Qualification and Procedures] Directives are directly effective and remain extant in domestic law as "retained EU law" after the United Kingdom's withdrawal from the EU". The court agreed with that proposition [84]. The court also noted [107] that the objective of the Secretary of State's domestic asylum policies and procedures was "to ensure that the United Kingdom's obligations under the 1951 Geneva Convention, the Qualification Directive and the Procedures Directive are in practice met".

33. The Appellant submits that the Supreme Court's conclusion that the asylum Directives remained 'retained EU law' was consistent with a proper interpretation of ISSCA 2020. The Appellant notes that Lord Stephens, who gave the judgment in *G*, had heard argument as to the effect of ISSCA 2020 on free movement law in *Robinson (Jamaica) v Secretary of State for the Home Department* [2022] AC 659 following a hearing two months before the hearing in *G v G*.

34. The interpretation in *G v G* (that ISSCA 2020 does not affect the application of the asylum Directives as retained EU law but only to free movement law) is consistent not only with the wording and legislative purpose of ISSCA 2020, but also with other domestic cases decided after the Act came into force and the stance taken by the Secretary of State in those cases:

    34.1 In *Robinson v SSHD* [2021] 2 WLR 65, [2020] UKSC 53 (16 December 2020) at [29], the Supreme Court noted that ISSCA 2020 "provides for repeal of the main retained EU law relating to free movement";

    34.2 In *NM v SSHD* [2021] UKUT 00259 (IAC) the court accepted that the Qualification Directive was retained EU law;

    34.3 Similarly, in *Ainte (material deprivation – Art 3 – AM (Zimbabwe)* [2021] UKUT 00203, it was common ground, and the court accepted, that the Qualification Directive was retained EU law.

34.4 The position is also reflected in paragraph 17 of Schedule 3 to the Equality Act 2010, which sets out exemptions to the Act for immigration functions. Relevant functions are defined as including "anything which forms part of retained EU law by virtue of s2(2)(a), 3 or 4 of the European Union (Withdrawal) Act 2018 and relates to immigration or asylum". Clearly, that definition would be meaningless if paragraph 6 of Schedule 1 to ISSCA 2020 had the far-reaching effect attributed to it by the court.

35. In concluding that the decision in *G v G* was not authority that the Procedures Directive remained retained EU law, the court misdirected itself.

Incompatibility of the MEDP scheme with the Procedures Directive

36. A conclusion that the Procedures Directive is retained EU law has two significant consequences. First, the principle of the supremacy of EU law continues to apply by virtue of s5(2) EUWA 2018, which means that retained EU law takes precedence over any conflicting domestic measure.

37. Second, any question of interpretation must be decided in accordance with retained EU and domestic case law including retained general principles of EU law: ss6(3) and 6(7) EUWA 2018. In the context of this case, those principles include the *Marleasing*[8] principle that domestic law must be interpreted so far as possible to give effect to the wording and purpose of relevant Directives.

38. It was not disputed by the Respondent below that if the Procedures Directive remained 'retained EU law', the MEDP scheme as set out at the relevant time was not compatible with the clear requirements set out in Articles 25 and 27 of the Procedures Directive. The Appellant submits that the MEDP scheme is an application of the 'safe third country' concept which breaches Articles 25 and 27(2) of the Procedures Directive in three ways:

38.1 First, the scheme as applicable at the time of the decisions in these cases was not "subject to rules laid down in national legislation" as required by

[8] *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1992] 1 CMLR 305

Article 27(2). As set out at paragraphs 11-27 of the judgment, the operative basis of the MEDP scheme at the time of the decisions in these claims was paragraphs 345A-C of the Immigration Rules and policy guidance. The Immigration Rules are not legislation, but "a statement of executive policy": *Odelola v SSHD* [2009] UKHL 25, [2009] 1 WLR 1230 at [§6-7]. The provisions of Schedule 3 to the 2004 Act, used to certify claims so as to exclude a right of appeal, were at all times contingent on inadmissibility decisions taken under the Immigration Rules;

38.2 Second, Article 27(2)(a) requires that the application of the safe third country concept be subject to rules laid down in national legislation requiring "a connection between the person seeking asylum and the third country concerned on the basis of which it would be reasonable for that person to go to that country". The requirement that there be a connection between the individual and the safe third country to which they will be removed is absent from the MEDP scheme as enacted both in paragraphs 345A-C of the Immigration Rules and in ss80B-C NIAA 2002. On the contrary: it is inherent within the MEDP scheme that a presumptive refugee may be removed to a third country with which he has no connection, on the basis of his previous connection to another safe third country. Nor does the MEDP scheme require consideration of whether it would be 'reasonable' to remove the individual to the third country. The concept of removal of a refugee to a country with which he has no connection, on the basis of his mode of arrival to the UK, is entirely contrary to the framework of the Procedures Directive;

38.3 Third, Article 27(2)(b) requires rules laid down in national legislation governing "the methodology by which the competent authorities satisfy themselves that the safe third country concept may be applied to a particular country or to a particular applicant". There are no such rules in national legislation. Whilst Article 27(2)(b) permits "national designation of countries considered to be generally safe", there are no non-EEA

countries listed under Schedule 3 AITCA 2004 and the list of safe countries in s94(4) NIAA 2002 is limited to countries in which the individual is "entitled to reside". The position is not corrected by the enactment of ss80B—C NIAA 2002. Nowhere is the methodology by which the safe third country is deemed safe for the individual refugee set out.

39. The Appellant therefore submits that the MEDP scheme, both as originally set out in paragraphs 345A-C of the Immigration Rules and as subsequently in ss80B-C NIAA 2002, breaches the requirements of Article 27(2) of the Procedures Directive for the application of the 'safe third country concept' in asylum procedures.

GROUND 1B: THE REFUGEE CONVENTION

40. Section 2 Asylum and Immigration Appeals Act 1993 (headed 'Primacy of the Convention') provides that:

"Nothing in the immigration rules (within the meaning of the 1971 Act) shall lay down any practice which would be contrary to the Convention."

41. The Appellant contends that the MEDP scheme, as set out in paragraphs 345A-D of the Rules and associated guidance, is *ultra vires* s2 of the 1993 Act because, in summary:

41.1 Paragraphs 345A-D of the Rules must be interpreted and applied consistently with a good faith interpretation of the UK's international treaty obligations, absent clear and unambiguous language disavowing such obligations: *Salomon v Customs and Excise Commissioners* [1967] 2 QB 116 at p.141;

41.2 Paragraphs 345A-D permit the removal of a presumptive refugee on UK territory to a third country with which he has no connection, without substantive consideration of his asylum claim and for the express purpose of deterring other asylum claims by refugees on the basis of their mode of

travel to the UK. Such a scheme is contrary to the spirit and purpose of the Refugee Convention;

41.3 Whilst a constrained application of the 'safe third country' concept may be consistent with the Convention (as reflected in the restrictive scope of the Procedures Directive and Dublin III Regulation), the scheme in paragraphs 345A-D is not so constrained, and is inconsistent with a good faith interpretation of the Convention as reflected in both the wording of the Convention, its intention, and subsequent implementation by contracting parties.

Errors in the court's approach

42. The Appellant contends that the court misdirected itself in several material respects.

43. First, the court misdirected itself by concluding [121] that the Convention obligations owed by contracting parties to individual refugees were limited to the express prohibition on *refoulement* in Article 33. In doing so, the court failed to consider the nature and scope of implied obligations towards individual refugees, including those intrinsic to the purpose and structure of the Convention. The court failed to consider the practice adopted by contracting parties, which reflected states' interpretation of Convention obligations.

44. Second, the court misdirected itself in holding [122] that paragraph 345C of the Rules did not lay down a 'practice' of removal to a third country, or did not do so unless read with the Respondent's Inadmissibility Guidance. The court's reasoning was contrary to the plain and natural meaning of paragraph 345C.

45. Third, the court erred [121-122] in its approach to whether the Convention permitted removal to a 'safe third country', and/or the limitations on the 'safe third country' concept consistent with a good faith interpretation of the Convention.

46. Fourth, in its approach to the issue of deterrence [123], the court further erred by failing to consider or determine ASM's argument that the deterrent purpose of Paragraphs 345A-D of the Immigration Rules was contrary to the purpose and intention of the Refugee Convention. Instead, the court confined itself to the legally distinct issue of whether the deterrent purpose of the MEDP scheme rendered removal under the scheme a 'penalty' contrary to Article 31 of the Convention. The court's reasoning on that issue reflected an overly restrictive approach which wrongly conflated removal and *refoulement*.

Interpretation of the Convention

47. The Refugee Convention ('the Convention') is an international treaty which imposes binding obligations on the UK as a contracting party. As a principle of general international law, the obligations which the Convention imposes on state parties are to be presumed to be those of each individual state unless expressly stated to the contrary: Article 29 of the Vienna Convention on the Law of Treaties 1969 ('the Vienna Convention').

48. The Convention must be interpreted, both by the UK as a signatory and by domestic courts, in accordance with Part III of the Vienna Convention and in particular with the general rules of interpretation in Article 31. Interpretation of the Convention, as an international instrument created by the agreement of contracting states, is an objective exercise in which treaty concepts and provisions must be given an autonomous interpretation, ensuring that the guarantees of the Convention are not undermined by unilateral state action: *Secretary of State for the Home Department ex parte Adan* [2001] 2 AC 477 at 516A-H.

49. A treaty must be interpreted in 'good faith' and in accordance with "the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose" (Articles 26 and 31(1) Vienna Convention).

50. The principle of good faith is a basic principle of international law, which encompasses not only observance of the strict wording of a treaty obligation, but also the obligation on a state not to exercise its freedom to act with "a sense of

responsibility" and not in an abusive, arbitrary or capricious way: *R v Immigration Officer at Prague Airport and Anor ex parte European Roma Rights Centre and Ors* [2005] 2 AC 1 at [61]. The principle of good faith cannot impose obligations additional to those contained in a treaty, but is an important part of interpreting and applying treaty obligations and delineating the extent of those obligations.

51. The 'context' to the Convention, for interpretative purposes, includes the wording of the Convention itself and any *travaux preparatoires:* Article 31(2) Vienna Convention. It also includes any "subsequent practice by the parties" which establishes agreement regarding its interpretation, and any relevant rules of international law applicable in relations between the parties: Article 31(3).

52. A contracting party may not invoke domestic law as justification for its failure to perform a treaty: Article 27. Where there is ambiguity, a domestic provision must be interpreted in accordance with the principle that, absent clear and unambiguous language, the Crown does not intend to breach a treaty obligation: *Salomon v Customs and Excise Commissioners* [1967] 2 QB 116 at p.141.

Purpose and structure of the Convention

53. The purpose of the Convention, reflected in the Preamble to the Convention, is to extend the scope of international protection for refugees and to assure to refugees "the widest possible exercise of… fundamental rights and freedoms". In domestic law, it is a long-established principle that the Convention must be given a "generous and purposive interpretation bearing in mind its humanitarian objects and the broad aims reflected in its preamble": *Roma Rights Centre* at [18], *ST (Eritrea) v SSHD* [2012] 2 AC 135 at [30].

54. Under the Convention and under domestic law, refugee status is declaratory: an individual is a refugee, and entitled to the protections conferred by the Convention, as soon as his circumstances meet the definition of 'refugee' in Article 1 of the Convention: *G v G* [2021] UKSC 9, [2021] Imm AR 1050 at [81]. The distinction in domestic law between a refugee and an asylum claimant is not

recognised in the Convention; because status is declaratory, all individuals claiming asylum on the territory of a signatory state are presumptive refugees.

55. The Convention imposes binding obligations on state parties in international law which are owed to individual refugees. Those rights and obligations, which are attached to the status of refugee as defined in Article 1 of the Convention, depend on the degree of attachment of the refugee to the state in which asylum is sought: *ST (Eritrea) v SSHD* [2012] UKSC 12, [2012] 2 AC 135 at [21]. The most fundamental Convention obligations (including the prohibition on *refoulement* in Article 33 and the prohibition of penalties due to unlawful presence in Article 31) are engaged simply by the refugee's physical presence in the state's territory; how he comes to be there is immaterial for Convention purposes. The obligations on a receiving state towards a refugee physically present on its territory remain those of the receiving state even where it subjects the refugee to third country removal: *Adan* at [530E].

56. Inherent within the scheme of the Convention (and reflected in the *travaux preparatoires*) is the recognition that a refugee may have to resort to irregular means of entry in order to escape persecution: *Asfaw* at [9]. Similarly, the Convention does not impose a requirement that a refugee seek refuge in the first safe country he comes to; the requirements in Article 31 of the Convention to 'come directly' from the country of persecution and to 'present without delay' in the receiving state do not preclude the refugee from exercising choice as to where and when he claims asylum: *R v Uxbridge Magistrates Court & Ors ex p Adimi & Ors* [2001] QB 667.

The 'safe third country' concept

57. The concept underlying the MEDP scheme is that a refugee who has claimed asylum in the UK may be removed to a 'safe third country' with which he has no connection, without substantive consideration of his asylum claim by the UK, on the basis of the type of journey that he has undertaken to reach the UK.

58. The Appellant contends that there is an implied obligation on a receiving state, inherent in the basic structure of the Convention, to process a claim for asylum made by a refugee physically present in its territory. That implied obligation arises as a combination of the declaratory nature of refugee status (which requires investigation of the individual's circumstances and the nature of his claim) and Convention provisions, including the prohibition on *refoulement* (Article 33), the prohibition on penalties for illegal entry or presence (Article 31), the duty to afford refugees the same treatment as 'aliens' (Article 7), the prohibition on discrimination on grounds of country of origin and the right of access to courts (Article 16). Even Article 9, which permits provisional measures against an individual where "essential to national security", does so only "pending a determination by the Contracting State that that person is in fact a refugee".

59. The implied obligation to investigate and determine asylum claims made by refugees on the state's territory is reflected in the practice of state parties and in the limited and carefully controlled application of removal to a 'safe third country'.

60. This 'safe third country' concept, i.e. the idea that a receiving state may discharge its obligations under Article 33 of the Convention by removing a refugee to a third country which will not *refoule* him, does not appear in the Convention. The safe third country concept is therefore not part of the scheme of refugee protection which was envisaged by the parties to the Convention. That is significant, because it means that domestic measures (such as the MEDP) which purport to apply the safe third country concept must (i) give effect to the obligations imposed by the Convention in good faith, and (ii) absent 'clear and unambiguous language' disavowing such obligations, must be interpreted in a way which gives effect to the purpose and scheme of the Convention: *EN (Serbia)*.

61. In determining the extent to which an application of the 'safe third country' concept is compatible with a good faith observance of Convention obligations, the arrangements made between EU member states under the Dublin III Regulation are highly relevant as 'subsequent practice' reflecting agreement between state parties to the Convention as to both the process by which third

country removals may be effected, and the limiting constraints on such removals. The Dublin III scheme is therefore a permissible guide to a 'good faith' interpretation of the requirements of the Convention in this context (Article 31(3) Vienna Convention) notwithstanding that the UK is no longer bound by Dublin III.

62. The Dublin III Regulation sets out a binding procedural framework amongst EU member states who are subject not only to the Regulation itself but also to a common EU legal framework of EU legal standards, as well as the European Convention on Human Rights. Third country removals under Dublin III are subject not only to domestic legal redress but enforcement through the Court of Justice of the European Union and the European Court of Human Rights. The Dublin III Regulation is a fundamental part of the Common European Asylum System, which itself is intended to establish "an area of freedom, security and justice" for refugees within the European Union[9].

63. The procedure for 'take charge' or 'take back' requests under Dublin III is clear and detailed, with a hierarchy of criteria for establishing the third country state responsible for determining the asylum claim. Most notably, the Dublin III system requires that an asylum claimant have a clear prior connection with the third country member state to which he will be removed. That reflects the requirements of Article 27 of the Procedures Directive 2005/85, discussed under Ground 1A above.

64. The operation of the Dublin III scheme indicates that a constrained application of the 'safe third country' concept, with clear procedures and a robust protective legal framework, may be consistent with the Convention. However, the MEDP scheme is not similarly constrained; the Appellant contends that it represents an extension of the 'safe third country' concept beyond a good faith interpretation of Convention obligations.

Incompatibility of the MEDP scheme with the Convention

[9] Recital 2 to the Regulation

65. The Appellant contends that the MEDP scheme lays down a practice contrary to the purpose of the Convention, and is consequently *ultra vires* s2 of the 1993 Act, for three reasons.

66. First, as set out above, the underlying premise of the MEDP scheme is that refugees who arrive in the UK by 'irregular means' (i.e. without leave to enter or remain) and in particular by clandestine journeys, are not entitled to substantive consideration of their claim within the UK, or to domestic procedural safeguards in the determination of their claims, whatever the merits of their claim for protection or strength of their connection to the UK.

67. That premise is contrary to the recognition, inherent within the protection framework of the Convention and in Article 31 in particular, that refugees may need to undertake journeys by irregular or criminal means in order to reach safety: *Asfaw*.

68. Second, the stated purpose of the MEDP scheme is to deter refugees from undertaking 'irregular and dangerous' journeys to the UK. The purpose of deterring refugees from claiming asylum in the UK, based on their mode of travel, is entirely inconsistent with the spirit and purpose of the Convention and the obligations it imposes on the UK as a signatory state. In practice, as there is no 'regular and safe' means by which the overwhelming majority of asylum claimants may claim asylum in the UK, and the MEDP is not accompanied by any arrangements which increase the ability of refugees to seek asylum by safe or regular routes, deterring 'irregular' journeys amounts in practice to a policy or practice of deterring refugee claims for protection. That is entirely inconsistent with a good faith interpretation or application of the Convention.

69. Third, the Appellant contends that the deterrent purpose of the MEDP scheme is inconsistent with the prohibition on 'penalties' for illegal entry or presence imposed by Article 31 of the Refugee Convention. In that respect:

69.1 The intention behind Article 31 was to ensure that refugees, and/or those claiming asylum in good faith, were not penalised on the basis of their illegal entry to or presence in the receiving state: *Adimi*;

69.2 'Penalty' is not defined within Article 31 and must be interpreted in accordance with the purpose and spirit of the Convention as a whole. It is not limited to prosecution or conviction for illegal entry;

69.3 The Respondent's position that removal to Rwanda is not a 'penalty' is also inconsistent with the stated aim of the MEDP scheme, which is that of deterrence. In that respect, the MEDP scheme cannot be equated with previous third country removal schemes such as Dublin III, the aim of which was to ensure effective protection of those seeking asylum in member state countries.

70. Third, the MEDP scheme represents a significant departure from previous 'safe third country' removal arrangements, including in particular removals to EU member states under the Dublin III Regulation. As EU member states, Dublin III countries were all subject not only to the binding procedural framework in the Dublin III regulation, but also to a common EU legal framework of EU legal standards, as well as the European Convention on Human Rights. Third country removals under Dublin III were subject not only to domestic legal redress but enforcement through the Court of Justice of the European Union and the European Court of Human Rights.

71. The procedure for 'take charge' or 'take back' requests under Dublin III was clear and detailed, with a hierarchy of criteria for establishing the state responsible for determining the asylum claim. Most notably, the Dublin III system required that an asylum claimant had a clear connection[10] with the member state to which he would be removed. That reflects the requirements of Article 27 of the Procedures Directive 2005/85, discussed in more detail under Ground 1A above. Even with those robust common standards and a clear procedural mechanism, Dublin III

[10] In broad terms, either the presence of close family members (in respect of 'take charge' requests) or previous presence (in respect of 'take back' requests) in the member state of removal.

removal to EU member states was found to pose a real risk of a breach of ECHR rights in a number of cases[11].

72. The Dublin III scheme represents "subsequent practice" reflecting agreement between parties to the Convention as to the process by which third country removals may be effected, and the limiting constraints on such removals. It is therefore a permissible guide to interpretation of the requirements of the Convention in this context: Article 31(3) Vienna Convention.

73. The MEDP scheme represents a significant departure from the Dublin III framework and an extension of the 'safe third country' concept beyond that permitted by the Convention. Rwanda is not a country included in Parts 2-4 of Schedule 3 AITCA 2004, and is therefore not subject to the statutory presumption of safety; there has been no Parliamentary scrutiny of the Secretary of State's decision to treat Rwanda as a safe country. Rwanda is, obviously, not bound by EU standards nor the Common European Asylum System (CEAS); it is not a signatory of the ECHR; it is not subject to the jurisdiction of the CJEU or the European Court of Human Rights. The MEDP scheme is underpinned not by statutory provisions, but by the Rwandan MOU and accompanying Notes Verbales (NVs), paragraphs 345A-C of the Immigration Rules and relevant policy guidance.

74. Significantly, unlike with previous third country arrangements (whether through Dublin III or removal to 'safe list' countries in Schedule 3 AITCA 2004), the MEDP scheme does not require any connection between the asylum seeker and the third country to which he will be removed, and does not require any consideration of whether it would be reasonable to remove him there; the only requirement (in paragraph 345C of the Immigration Rules) is that the third country will agree to admit him.

75. By contrast with the robust shared legal framework underpinning the Dublin III scheme, the MEDP scheme at the relevant time was not set out in statute, but in

[11] E.g. *EM (Eritrea)* [2014] UKSC 12*, MSS v Belgium & Greece* (2011) 53 EHRR 2

paragraphs 345A-C of the Immigration Rules and relevant policy guidance, accompanied by the non-binding agreements reflected in the Government's Memorandum of Understanding ('MOU') with Rwanda and accompanying Notes Verbales (NVs).

76. Most significantly, and in sharp contrast to the Dublin III scheme, the stated purpose of the MEDP scheme is to deter refugees from attempting to travel to the UK in order to claim asylum. Whether or not the MEDP scheme constitutes a 'penalty' contrary to Article 31 of the Convention, the scheme is intended to deter refugees from claiming protection in the UK, by making it clear that the UK will not perform its obligations under the Convention for presumptive refugees who have arrived in the UK by irregular means. The deterrent purpose of the MEDP scheme is wholly contrary to the spirit and purpose of the Convention.

77. By starting from the premise that Convention obligations were limited to the express prohibition on *refoulement* in Article 33, the court misdirected itself as to the broader question, namely the interpretation of the Convention as an international treaty binding on the UK, and failed to consider whether the purpose and structure of paragraphs 345A-D of the Immigration Rules laid down a 'practice contrary to the Convention' which was *ultra vires* s2 of the 1993 Act.

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30 January 2023