

A wise court

Rwanda, Safe Third Countries and a Channel breakthrough in 2023

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UK Court of Appeal



UNHCR in Rwanda



Sunak and Macron

Executive Summary

On 29 June 2023, the UK Court of Appeal issued a historic decision with implications for the future of the global refugee system on the future of asylum and of the *safe third countries principle*. It addressed two questions: Is the basic principle of the 2022 UK-Rwanda agreement, to transfer asylum-seekers to Rwanda and thereby reduce irregular migration, in accordance with international law? And: Is Rwanda a safe third country today? With its answers – “Yes” to the first question, “Not Yet” to the second – the court shows a way for the UK and other European governments to combine migration control with respect for the Refugee Convention and the European Convention on Human Rights.

In April 2022, the UK-Rwandan “Migration and Economic Development Partnership” was presented in the capital Kigali. Rwandan politicians welcomed it, agreeing to receive asylum seekers from the UK. They committed to provide “adequate” reception conditions; guarantee asylum seekers freedom of movement “at all times”; ensuring their health, security, and access to an asylum procedure. The UK committed to pay all associated costs and support Rwanda’s development.

On 27 April 2022, Filippo Grandi, the High Commissioner for Refugees, stated his opposition to the UK’s “intention to externalize its obligations to protect refugees and asylum seekers to other countries ... such efforts to shift responsibility run counter to the letter and spirit of the Refugee Convention, to which the UK is a party.” In its public communication UNHCR presents “externalisation” as unlawful. But is this true? The answer, given by *five* judges in *two* successive recent UK Court decisions, one by the High Court in December 2022 and the other by the High Court of Appeal this week, is clear: No.

Transfers to a safe third country are *not per se* a violation of international law or of human rights. In December 2022, two UK High Court judges found that transfers to Rwanda under the UK-Rwanda Memorandum were lawful and did *not* violate the Refugee Convention, the European Convention on Human Rights, or UK law. In June 2023, three UK Appeals Court judges agreed on this principle: “if the asylum-seeker will not face persecution or refoulement in the country to which they are returned they will have received the protection which the Convention is intended to afford them.”

At the same time, the UK Appeals Court found that today Rwanda was not yet a safe third country: on balance, two of three judges concluded Rwanda’s nascent asylum system was not robust enough: “Both history and the current situation demonstrate that those mechanisms have not yet been delivered. They may in the future be delivered but they are not, on the evidence, there now.” It is a wise judgement that should be welcomed by anyone serious about the Safe Third Country principle being a tool to raise, not lower, standards of protection in the world.

Where does this leave the UK? There is an alternative strategy to stop irregular Channel crossings humanely and lawfully, without transfers to Rwanda. It is to return everyone crossing the Channel, after an agreed cut-off date, to countries which are, without any doubt, safe: to France, Germany, the Benelux countries. And for the UK to offer real solidarity in receiving refugees from these countries, given that it has a lot fewer asylum applications, and grants a lot less protection, than either France or Germany.

46,000 crossed the Channel last year. We propose that France, Germany, and others now offer that they, not Rwanda, will take everyone back who crosses the Channel as soon as the UK has processed them. This will quickly stop all crossings. In return, the UK should agree to resettle 40,000 refugees or asylum seekers a year, over the next three years, who are now in these European partner countries. This will stop both irregular migration and deaths, in line with all European human right conventions.

The judgement by the UK Court of Appeals also has a message to Rwanda and other African states. It *is* possible to become a safe third country and help reduce migrant deaths. Rwanda can still be an African pioneer, as it has been in its cooperation with UNHCR to help asylum seekers stranded in Libya. For this it also deserves support. But being truly safe will take more than political declarations. It takes access to a functioning asylum system. Then it will also be possible to persuade European judges.

Just not yet.

Table of contents

EXECUTIVE SUMMARY.....	2
A WISE COURT.....	4
RWANDA, UNHCR AND REFUGEES.....	4
THE UK-RWANDA MEMORANDUM.....	7
A MOST CONFUSING CONCEPT: “EXTERNALISATION”.....	9
UNHCR VS UK COURTS: 0-5.....	10
WHERE UNHCR CONVINCED THE COURT.....	14
“STOP THE BOATS”.....	17
WALLS ON WATER?.....	19
A CHANNEL PLAN.....	22
AUSTRALIA IS NOT IN EUROPE.....	25
ANNEX: MORE READING ON ASYLUM AND BORDERS.....	26

A Channel 40,000 Plan

In the middle of an intense debate across Europe on safe third countries, this report proposes an agreement between safe countries, the United Kingdom and a coalition of EU countries, led by France, to reduce record crossings of irregular migrants and asylum seekers in the Channel, while opening legal paths for refugees. The aim is to restore control and save lives, while fully respecting the European Convention on Human Rights.

We propose negotiations between the United Kingdom, France, Germany and other interested EU-member states to bring about migration cooperation in the Channel, based on the following steps:

- A coalition of EU countries, led by France and Germany, agrees to take back anyone irregularly crossing from the EU to the United Kingdom, starting from a set date this summer. It is up to the UK authorities to issue inadmissibility decisions, reflecting the reality that its partners in the EU are all safe third countries.
- The goal of such fast returns is to remove all incentives to try to cross to the UK irregularly, and to do so in compliance with international human rights law.
- At the same time, the United Kingdom agrees to accept annually up to 40,000 recognised refugees or asylum seekers who have some connections in the United Kingdom from these partners, for the next three years. A mechanism will be set up whereby people can apply to relocate to the UK.

Such cooperation is in the interest of the United Kingdom, the EU, as well as UNHCR and refugee rights organisations. In the face of violent pushbacks at more and more borders around the EU and in the world, such cooperation should mark a paradigm shift towards humane migration control.

A wise court

On 29 June 2023, the UK Court of Appeal issued a historic decision, clarifying a matter of great importance for the future of the global refugee system.¹

Three senior judges answered two big questions.

About Safe Third Countries in general: Is the basic principle of the UK-Rwanda agreement reached in April 2022, to transfer asylum seekers to Rwanda to process their asylum claims and thereby reduce irregular migration across the Channel to the UK, in accordance with international law?

About a particular Safe Third Country: Is Rwanda a Safe Third Country today?

With its answers – “Yes” to the first question, “Not Yet” to the second – the court has shown a way forward for the UK and other European governments that seek to combine migration control with respect for the Refugee Convention and the European Convention on Human Rights .

If governments and the UNHCR now take these ideas on board, this June 2023 judgement could be a turning point for the international refugee system.



Rwanda – a safe third country?

Rwanda, UNHCR and refugees

Rwanda obtained its independence in June 1962, when the United Nations General Assembly voted to terminate a Belgian Trusteeship Agreement. This hilly, landlocked country in the Great Lakes region of Central Africa has no British colonial history. Today, it has a population of just over 13 million people. The past two decades have seen sustained economic development.²

¹ [R \(AAA\) v. SSHD](#), 29 July 2023.

² According to the [World Bank](#) GDP per capita grew fourfold from US\$ 204 in 1996 to US\$ 822 in 2021.

According to the World Bank, the average life expectancy in Rwanda rose from 47 years in 2000 to 66 years in 2020.³

Located in a region of many armed conflicts, Rwanda has long been a host country to refugees. The overall numbers of refugees in Rwanda has been going down in recent years, from 150,000 in 2020 to 120,000 today. By the end of 2022, there were 70,000 refugees from the neighbouring Democratic Republic of Congo.⁴ Many of them arrived decades ago. There were another 50,000 refugees from Burundi. Most fled fighting there in 2015. Between December 2022 and March 2023 5,400 new asylum-seekers from the Democratic Republic of Congo arrived.⁵

In 1980, Rwanda ratified the Geneva Refugee Convention. In 2014, it adopted an asylum law. In 2016, it established a National Refugee Status Determination Committee to decide on asylum applications.⁶ An UNHCR factsheet, published in December 2022, notes that 82 percent of all refugees in Rwanda have ID cards. 94 percent of refugee children are enrolled in primary and 43 percent in secondary schools: “Laws and policy in Rwanda allow refugees the right to access national services such as education, health, finance and employment.”⁷ In 2023 UNHCR wrote that “Rwanda generally provides a favourable protection environment.”⁸

Recently, UNHCR cooperation with Rwanda has intensified. This followed a November 2017 CNN report on slave auctions in Libya that shocked the world and led some African leaders to look for ways to evacuate their citizens from Libya.⁹ For migrants who did not fear prosecution it was possible to return to their country of origin: thus, thousands were evacuated from Libya to Nigeria and The Gambia. For those who feared persecution, however, a safe place outside Libya had to be found.

Already in 2017, Rwanda offered to host some of those in need of a safe place.¹⁰ On 24 November, the foreign ministry declared: “Our door is wide open ... to ensure that we can provide minimum comfort to those in need. Given Rwanda’s political philosophy and our own history, we cannot remain silent when human beings are being mistreated and auctioned off like cattle.” The Rwandan foreign minister then estimated that her country could take in some 30,000 people from Libya.¹¹ She tweeted:

[@LMushikiwabo](#)

Indeed, Rwanda’s political philosophy & the experience of many Rwandans for many years not having a country they call home, have led this country to feel for refugees, migrants, stateless persons ... For [#Africans](#) being sold in Libya: [#Rwanda](#) is small, but we will find some space!
[7:52 AM · Nov 22, 2017](#)

³ World Bank, [Life Expectancy at Birth – Rwanda](#).

⁴ UNHCR, [Operational Data Portal](#), accessed on 13 March 2023.

⁵ UNHCR, [Humanitarian needs surge as Congolese cross to Rwanda seeking safety](#), 6 March 2023.

⁶ Home Office, [Review of asylum processing Rwanda](#): interview notes (Annex A).

⁷ UNHCR, [Monthly Factsheet, Rwanda, December 2022](#).

⁸ UNHCR, [Operational Data Portal](#), accessed on 13 March 2023.

⁹ CNN, [“Migrants being sold as slaves. Smugglers in Libya are auctioning migrants off as slaves. At a property outside Tripoli, CNN witnessed a dozen men go under the hammer in the space of minutes”](#), 2017. CNN, [“People for sale: Where lives are auctioned for \\$400”](#), 15 November 2017.

¹⁰ CNN, [“Rwanda offers refuge to ‘migrants held captive in Libya’”](#), 24 November 2017.

¹¹ Africanews, [“Rwanda agrees to resettle 30,000 Africans enslaved in Libya”](#), 23 November 2017.



[UNHCR: Grandi praises Rwanda for offering life-saving haven for refugees \(April 2021\)](#)

In September 2019, Rwanda and UNHCR signed a Memorandum of Understanding, supported by the African Union.¹² This set up an “Emergency Transit Mechanism” from Libya. It provided for asylum seekers chosen by UNHCR to be transferred directly to a specially refurbished centre in Rwanda, where they could apply for protection. There, UNHCR would establish who needed protection, something the organisation has done worldwide for decades. A positive decision could then be followed by resettlement to another country.¹³ With a one-year pause in evacuations due to the pandemic, the total number of people brought to Rwanda by the end of February 2023 stood at 1,453,932 of whom had by then already been resettled to other countries.¹⁴



Rwanda receiving arrivals from Libya

¹² UNHCR, [Joint Statement: Government of Rwanda, UNHCR and African Union agree to evacuate refugees out of Libya, 10 September 2019.](#)

¹³ UNHCR, [Evacuees from Libya – Emergency Transit Mechanism.](#)

¹⁴ UNHCR, [Rwanda Factsheet: Emergency Transit Mechanism](#), February 2023. UNHCR evacuated more than 4,400 persons of concern out of Libya since 2017: including, in addition to those evacuated from Rwanda, 2,900 through the Emergency Transit Mechanism in Niger and 425 to European countries through the Emergency Transit Centre in Romania. [AU, Government of Rwanda and UNHCR in joint rescue of asylum seekers and refugees in Libya](#), 10 March 2023.

UNHCR was full of praise for this cooperation. In April 2021, High Commissioner Filippo Grandi expressed his gratitude:

“I really want to particularly thank the Government of Rwanda. It was President Kagame’s initiative ... we will continue to need this mechanism as long as the situation in Libya continues to be as difficult as it is now.”¹⁵

In March 2022, Ahmed Baba Fall, the head of UNHCR in Rwanda, explained: “The efforts to give a chance to these new evacuees in a very safe place, that the Government of Rwanda, the African Union, and our donors continue to support, are commendable.”¹⁶

The UK-Rwanda Memorandum

In autumn 2020, the UK government began exploring options for a “protection elsewhere” solution, inspired by Australia’s Nauru and Manus policy, whereby asylum seekers arriving irregularly are transferred to another country.¹⁷ In January 2022, a team of officials travelled to Rwanda to carry out an initial assessment.¹⁸ A further visit took place in March 2022. On 14 April 2022, the UK-Rwandan “Migration and Economic Development Partnership” was presented in the capital Kigali.

The UK government announced it would be possible “within weeks or months” to send some of those who arrived irregularly from the European Union across the Channel to Rwanda for the processing of their asylum claims.¹⁹ Rwandan politicians welcomed this. They presented this plan as a model for others, as offering African solutions to global problems. On 14 April, Rwanda’s foreign minister declared in Kigali that “by relocating migrants to Rwanda ... providing education, employment and other opportunities, we are giving them the chance to make new lives in our country as full members of our communities” cooperation with the UK “will benefit Rwanda and Rwandans”:

“We believe this partnership with the UK offers a unique and innovative approach that will provide a safe haven and opportunities for those in need. And be the first crucial step towards a more effective and humane global migration system.”²⁰

The envisaged cooperation is described in the UK-Rwanda “Memorandum of Understanding ... for the provision of an asylum partnership arrangement”, a 10-page document.²¹ The arrangement is demanding. Rwanda pledges to process asylum claims “in accordance with Rwanda domestic law, the Refugee Convention, current international standards, including in accordance with international human rights law.” Assurances include that claims will be processed fairly, with interpreters and legal assistance.

¹⁵ UNHCR, [Grandi praises Rwanda for offering life-saving haven for refugees](#), 26 April 2021.

¹⁶ UNHCR, [First evacuation flight of 2022 from Libya to Rwanda brings over 100 asylum seekers to safety](#), 30 March 2022.

¹⁷ On Australia see: ESI, [The popularity of pushbacks – lessons from Australia](#), Financial Times, “[Priti Patel looked at shipping UK asylum seekers to south Atlantic](#)”, 29 September 2020.

¹⁸ Home Office, [Review of asylum processing Rwanda](#), interview notes (Annex A).

¹⁹ According to Andrew Griffith, the Conservative MP then in charge of the Prime Minister’s policy unit, on the BBC Radio 4 World at One programme, as quoted in [The Guardian](#).

²⁰ [Remarks](#) by hon. Min Dr. Vincent Biruta at the UK & Rwanda Migration and Economic Development Partnership press conference Kigali, 14 April 2022.

²¹ [Memorandum of Understanding](#) between the government of the United Kingdom of Great Britain and Northern Ireland and the government of the Republic of Rwanda for the provision of an asylum partnership arrangement.

Rwanda commits to providing “adequate” reception conditions; guaranteeing asylum seekers freedom of movement “at all times”; and ensuring their health, security and wellbeing. Those granted protection are to be provided with support to integrate into Rwandan society. Those denied protection should only be removed “to a country in which they have a right to reside”. Alternatively, their status should be regularised, “if there is no prospect of such removal.” An independent monitoring committee should report on implementation. Rwanda commits to take in an unlimited number of asylum seekers. At the same time, it keeps control, as it must approve each transfer, taking “into account Rwanda’s capacity to receive them.” The UK commits to pay all associated costs:

“The UK is also funding the processing costs for each person relocated, such as caseworkers, legal advice, translators, accommodation, food, healthcare, and for those granted protection, a comprehensive integration package to help them put down roots and start a new life. Every person’s needs are different, but we anticipate the amount would be comparable to processing costs incurred in the UK. Funding is only provided while a person remains in Rwanda.”²²



Kigali

In parallel, the UK establishes an “Economic Transformation and Integration Fund” for Rwanda, to which it already transferred “an initial” £120 million.²³ The UK also commits to resettling “a portion of Rwanda’s most vulnerable refugees in the United Kingdom.” The cooperation is to last at first for five years.

Within weeks of this announcement in Kigali, 130 asylum seekers in the UK received notification that they were liable to deportation.²⁴ 37 were slated to depart on a first flight scheduled for 14 June 2022.²⁵ By the time the flight was due to take off, as a result of legal challenges, there were just seven left – from Iraq, Iran, Albania and Vietnam.²⁶ On 8 June,

²² Home Office, [Factsheet: Migration and Economic Development Partnership](#).

²³ Home Office, [Factsheet: Migration and Economic Development Partnership](#).

²⁴ BBC.com, [“Rwanda asylum plan: Number of people on first flight close to single figures”](#), 13 June 2022.

²⁵ Ibid.

²⁶ The Guardian, [“Day of drama and despair before Rwanda flight called off”](#), 15 June 2022.

several of them challenged their deportation to Rwanda on the grounds that the policy was unlawful.²⁷ On 10 June, the High Court set a hearing for July. The applicants applied for their deportation to be delayed until the lawfulness of the policy had been decided. The High Court refused this request.²⁸ On 13 June, the Court of Appeal upheld the High Court decision. On 14 June, so did the Supreme Court.

This left one avenue to stop the first flight: the European Court of Human Rights in Strasbourg. On 14 June, only hours before the plane was due to take off, the Strasbourg court issued an interim order. It did not judge the policy itself. It stated, however, that the applicants “should not be removed until the expiry of a period of three weeks following the delivery of the final domestic decision in the ongoing judicial review proceedings.”²⁹ The flight was grounded.

Then, on 19 December 2022, the UK High Court found that transfers to Rwanda under the UK-Rwanda Memorandum were lawful and did *not* violate the Refugee Convention, the European Convention on Human Rights, or UK law. It ruled that it was reasonable for the UK government to consider Rwanda a safe third country, based on the commitments Rwanda made in the Memorandum.

The decision was appealed. Once again, no flights departed, awaiting this week’s judgement by the UK Court of Appeal.

A most confusing concept: “externalisation”

UNHCR is the most important international organisation charged with upholding the international refugee rights regime. It strongly opposed the UK-Rwanda cooperation from the very beginning, basing its advocacy on its opposition to “externalisation”, which it considers unlawful.

Already on 14 April 2022, the day the UK-Rwanda cooperation was announced, UNHCR reminded the UK government that it:

“... does not support the **externalisation** of asylum states’ obligations. This includes measures taken by states *to transfer asylum seekers and refugees to other countries, with insufficient safeguards to protect their rights, or where this leads to the shifting rather than the sharing of responsibilities to protect refugees.*”³⁰

Here, UNHCR made two separate claims. The first is that transfers to a safe third country are problematic *when there are insufficient safeguards*. This is the whole idea behind the concept of a safe third country: only if a country is actually safe and has safeguards for those to be transferred is such a transfer legal. The second claim is different: transfers to a safe third country are also illegal “*where this leads to the shifting rather than the sharing of responsibilities.*” This suggests that transfers to Rwanda are wrong *even when the necessary safeguards are in place*. As UNHCR put it on 14 April: “People fleeing war, conflict and persecution ... should not be traded like commodities and *transferred abroad for processing.*”³¹

²⁷ This first claim was followed by 19 more between 8 and 14 June.

²⁸ [Summary](#) of proceedings by Lord Reed in the Supreme Court decision of 14 June 2022.

²⁹ ECtHR, [Interim order](#), 14 June 2022.

³⁰ UNHCR, [UNHCR ‘firmly’ opposing UK-Rwanda offshore migration processing deal](#), 14 April 2022.

³¹ UNHCR, [UN Refugee Agency opposes UK plan to export asylum](#), 14 April 2022.

On 27 April 2022, Filippo Grandi, the High Commissioner for Refugees, restated his opposition to the UK's "intention to externalize its obligations to protect refugees and asylum seekers to other countries ... such efforts to shift responsibility run counter to the *letter and spirit* of the Refugee Convention, to which the UK is a party."³² But is this true? Are such transfers always a violation of international refugee law? The answer, given by *five* judges in *two* successive UK Court decisions, one by the High Court in December 2022 and the other by the High Court of Appeal this week, is clear: no.³³ Transfers to a safe third country are *not per se* a violation of international law or of human rights. On this central point, UNHCR is mistaken.

UNHCR vs UK courts: 0-5

In June 2022, the UNHCR submitted a detailed legal analysis of the UK-Rwanda agreement to the High Court in London.³⁴ There, UNHCR asked "whether the UK-Rwanda arrangement amounts to externalization of international protection?" It defined the term as follows:

"The externalization of international protection refers to measures taken by states ... which *directly or indirectly* prevent asylum-seekers and refugees from reaching a particular 'destination' country or region, and/or from being able to claim or enjoy protection there."

The judges of the UK High Court were not convinced. Their ruling on 19 December 2022 considered the claim "that the Refugee Convention imposes an obligation on contracting states to determine all asylum claims made, on their merits", only to dismiss it:

"We disagree. There is no such obligation on the face of the Convention. The obligation that is imposed is the one at article 33, not to expel or return a refugee to a place where his life or freedom would be threatened by reason of any of the characteristics that the convention protects."³⁵

What about UNHCR's claim that externalisation violates the *spirit* of international refugee law? The High Court's answer was equally clear:

"Again, we disagree. Obligations in international treaties are formulated with considerable care. They reflect balances struck following detailed negotiations between states parties. An obligation to determine every asylum claim on its merits would be a significant addition to the Refugee Convention.

There is no reason to infer the existence of an obligation of that order; to do so *would go well beyond the limits of any notion of judicial construction of an international agreement*; and the protection that is necessary if the purpose of the Convention is to be met, is provided by article 33."

In short: There is nothing in the Refugee Convention that opposes transferring asylum seekers to a safe third country. Transfer agreements, such as the Rwanda Memorandum, can be legal under international law. International law establishes an obligation on states not to violate

³² UNHCR, [UNHCR's Grandi fears UK legislation will dramatically weaken refugee protection](#), 27 April 2022.

³³ The five judges are Lord Justice Lewis, Mr. Justice Swift (High Court), Lord Chief Justice Burnett, Lord Justice Underhill and Sir Geoffrey Vos (Appeals Court).

³⁴ UNHCR, [Analysis](#) of the Legality and Appropriateness of the Transfer of Asylum Seekers under the UK-Rwanda arrangement, 8 June 2022.

³⁵ UK High Court, [Judgement on Rwanda](#), 19 December 2022.

article 33 of the Refugee Convention: non-refoulement. This allows the transfer of asylum seekers when *article 33 is not violated*.

This week's Court of Appeal judgement doubled down on this point, on which all *three* judges agreed.³⁶ As Lord Justice Underhill put it:

“The straightforward question, so far as the [Refugee] Convention is concerned, is whether the third country is safe for the applicant in the sense that there is no real risk of their being refouled (directly or indirectly) ... The state's motivation is irrelevant to the object and purpose of the Convention: *if the asylum-seeker will not face persecution or refoulement in the country to which they are returned they will have received the protection which the Convention is intended to afford them.*” (paragraph 319)



Lord Justice Underhill



Lord Burnett of Maldon

Lord Underhill quoted the following passage from the High Court's December 2022 judgement approvingly:

“Mr Drabble KC submitted that the Refugee Convention imposes an obligation on contracting states to determine all asylum claims made, on their merits. We disagree. There is no such obligation on the face of the Convention ... An obligation to determine every asylum claim on its merits would be a significant addition to the Refugee Convention.”

After quoting the High Court, Lord Underhill simply added: “I agree.” So did his colleagues. Sir Vos wrote: “I have concluded in broad terms that the Divisional Court [*High Court*] was right for the reasons given by Lord Justice Underhill” (Paragraph 14). Lord Burnett wrote: “I agree with Underhill LJ and Sir Geoffrey Vos MR that the other grounds fail” (Paragraph 525).

³⁶ [R \(AAA\) v. SSHD](#), 29 July 2023.



Sir Geoffrey Vos

In fact, all UK judges who examined this issue disagreed with UNHCR’s claim that “externalisation” is per se illegal. This should not come as a surprise, as not so long ago even UNHCR *disagreed with its current position*. In 2011, an Australian Labor government proposed an agreement with Malaysia to stop irregular arrivals across the Ocean. Malaysia would take back boat people from Australia and provide them with asylum procedures conducted in Malaysia by UNHCR. In return, Australia would take in a larger number of people in need of protection directly from Malaysia.³⁷ This would simultaneously stop boats, save lives at sea and promote legal resettlement without seeking to deter asylum seekers through poor treatment. The Labor government asserted at the time: “Don’t underestimate the determination of this government ... We don’t want people doing business with human misery. We want to remove the incentive for people to get on boats.”³⁸

On 25 July 2011, the Australian government presented a “Memorandum of Understanding between the Government of Australia and the Government of Malaysia on the Transfer and Resettlement of Refugees.” It was brief:

“The Government of Australia will transfer certain persons applying for international protection for refugee status determination to Malaysia in exchange for the Government of Australia accepting certain persons classified as refugees by the United Nations High Commissioner for Refugees (UNHCR) in Malaysia. This agreement presupposes that the UNHCR and the International Organisation for Migration (IOM) can fulfil the ... tasks and functions envisaged. Under the agreement, Malaysia will accept the transfer of up to 800 asylum seekers from Australia. In return, Australia will resettle 4,000 recognised refugees from Malaysia over a period of four years.”³⁹

UNHCR welcomed this agreement the very same day:

“UNHCR hopes that over time the agreement will lead to more protection in both countries and the region as a whole. It also welcomes the fact that another 4,000 refugees from Malaysia will be given a durable solution through resettlement in Australia.

The potential to work towards safe and humane options beyond dangerous boat journeys is also a positive aspect of this agreement. The Convention and its implementing directives contain important safeguards, including respect for the principle of non-refoulement, the right to asylum, the principle of family reunification and the best interests of the child, humane reception conditions including protection against arbitrary detention, lawful status

³⁷ Der Spiegel, [“Asylum policy: Malaysia and Australia exchange refugees”](#), 25 July 2011.

³⁸ Prime Minister, [“Transcript of joint press conference”](#), 7 May 2011.

³⁹ [Arrangement between the government of Australia and the government of Malaysia on transfer and resettlement](#), 25 July 2011.

to remain in Malaysia until a durable solution is found, and the opportunity to receive education, access to health care and a right to employment.”⁴⁰

In 2013, in a note, UNHCR summarised the requirements for transfers to a Safe Third Country:

“In summary, transfer arrangements of asylum-seekers for asylum processing need to take into account and ensure that: applicable refugee and human rights law standards are met, as outlined at paragraph (3); refugee status and/or other processing for international protection takes place fairly and efficiently; access to asylum and/or durable solutions are provided within a reasonable time; and/or the arrangement improves asylum space in the receiving State, the transferring State and/or the region as a whole.”⁴¹

In April 2018, UNHCR published another note where it declared that:

“Requiring a connection between the refugee or asylum-seeker and the third state is not mandatory under international law. The person may well be returned to a country through which s/he may have passed en route, or the person may be transferred to a country to which s/he has never been but that has agreed, by way of a formal arrangement, to be responsible.”⁴²

In its public communication, however, UNHCR continues to present “externalisation” as unlawful. In a legal opinion it submitted recently it argued that “UNHCR considers the [UK-Rwanda] arrangement as an example of externalization of international protection and it *is, as such, unlawful*.”⁴³

This position is not based on the Refugee Convention or UNCHR’s history as an organisation. It is not convincing even in countries which remain the biggest backers of UNHCR in the world today.

The UK Appeals Court judgement offers a good opportunity for UNHCR to drop its rhetoric about externalisation being unlawful and illegitimate and to return to the constructive spirit it was showing for decades, including in 2011 when it embraced the Malaysia proposal and offered to take part in its implementation.



⁴⁰ UNHCR, [“UNHCR Statement on the Australia-Malaysia Arrangement”](#), 25 July 2011.

⁴¹ UNHCR, [Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers](#), May 2013.

⁴² UNHCR, [Legal Considerations regarding access to protection and a connection between the refugee and the third country in the context of return or transfer to safe third countries](#), April 2018.

⁴³ UNHCR, [UNHCR Analysis of the Legality and Appropriateness of the Transfer of Asylum Seekers under the UK-Rwanda arrangement](#), 8 June 2022.

Where UNHCR convinced the Court

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.” (Article 3, European Convention on Human Rights)

There is nothing wrong in principle with the idea of reducing dangerous irregular migration through transfers to a safe third country. However, there is a crucial caveat. Such transfers are only legal and legitimate if, as UNHCR regularly points out, “procedural and substantive safeguards are fully guaranteed.” On this crucial point, this week’s Court of Appeal judgement overturned the assessment of the High Court from last December. It did so in a split judgement (2-1), with the majority concluding that, as a matter of fact, at this moment, Rwanda is not a safe third country.

This was a big success for UNHCR, which won the argument based on the facts it presented. This is something that should be welcomed by anyone serious about the Safe Third Country principle being a tool to raise, not lower, standards of protection in the world. As judge Sir Geoffrey Vos put it:

“We have been provided with thousands of pages of documents and authorities and heard 4 days of concentrated argument. Yet, at its foundation, the issue we have to decide is short ... The SSHD [*Secretary of State of the Home Department*] submits that the Divisional Court [*High Court*] decided, in effect, that there were no substantial grounds for thinking that: (a) Rwanda was not a safe third country, (b) there were real risks of refoulement (asylum seekers being sent back to their home countries) or breaches of article 3 (article 3) of the European Convention on Human Rights (ECHR), and (c) there were real risks that asylum claims would not be properly and fairly determined in Rwanda. The question is whether that was right.” (Paragraph 2)

Or, as Lord Burnett put it:

“The central question in these appeals is whether there are substantial grounds for believing that removal of these appellants and any individual to Rwanda pursuant to the agreement with the Government of Rwanda will give rise to a real risk of treatment contrary to article 3 ECHR either (a) as a result of deficiencies in the asylum system with a consequent real risk of refoulement or (b) in Rwanda itself.” (Paragraph 525)



ECtHR – the Strasbourg court and the defence of human dignity

The Court of Appeal judges drew on three crucial European Court of Human Rights (ECtHR) judgments: *Soering v. United Kingdom* (1989), *Othman v. United Kingdom* (2012) and *Ilias and Ahmed v. Hungary* (2019):

Soering v United Kingdom prohibits transfers of individuals to third countries where there is a risk that they will be subjected to torture or ill-treatment contrary to Article 3 of the European Convention on Human Rights.

In *Ilias and Ahmed v Hungary*, the ECtHR applied this principle to the transfer of asylum seekers to safe third countries. It ruled that a “thorough examination” is required:

“... removal to a third country must be preceded by thorough examination of the question whether the receiving third country’s asylum procedure affords sufficient guarantees to avoid an asylum-seeker being removed, directly or indirectly, to his country of origin without a proper evaluation of the risks he faces from the standpoint of art. 3 of the Convention.” (Paragraph 137)

“... the Court considers that the above-mentioned duty requires from the national authorities applying the “safe third country” concept to conduct a thorough examination of the relevant conditions in the third country concerned and, in particular, the accessibility and reliability of its asylum system.” (Paragraph 139)

In *Othman v. United Kingdom*, the ECtHR set out how courts should deal with assurances from a foreign government as to the rights of someone considered for deportation to that state:

“... assurances are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment. There is an obligation to examine whether assurances provide, in their practical application, a sufficient guarantee that the applicant will be protected against the risk of ill-treatment. The weight to be given to assurances from the receiving state depends, in each case, on the circumstances prevailing at the material time.” (Paragraph 187)

Using these standards, the Court examined the facts about Rwanda’s asylum system. For the judges, this boiled down to whether the *assurances* provided by the Rwanda government were sufficient to overcome *deep flaws* in Rwanda’s nascent asylum system. Lord Burnett considered that they did. Sir Vos and Lord Underhill concluded that, on balance, they did not. Sir Vos and Lord Underhill made it clear that their views did not exclude the possibility that changes in the Rwandan asylum system might change their assessment. As Sir Vos put it:

“I confess to having vacillated within the decision-making process. Ultimately, however, I have concluded that there were substantial grounds for thinking that asylum seekers sent to Rwanda ... faced real risks of article 3 mistreatment. That is the consequence of the historical record described by the UNHCR, the significant concerns of the UNHCR itself, and the factual realities of the current asylum process in Rwanda ... **Both history and the current situation demonstrate that those mechanisms have not yet been delivered. They may in the future be delivered but they are not, on the evidence, there now.**” (Paragraph 92)

Lord Underhill wrote:

“... aspiration and reality do not necessarily coincide. The UNHCR evidence in my view clearly shows that there are important respects in which it has not so far reliably operated to international standards ...

I have not found it entirely straightforward ... The evidence is not as complete as could be wished ... In the end, however, I have reached the conclusion that the Rwandan system for refugee status determination was not, as at the relevant date, reliably fair and effective.” (Paragraph 261)

Sir Vos and Lord Underhill placed considerable reliance on the UNHCR’s submission, the main thrust of which was quoted by Lord Vos as follows:

“The UNHCR’s evidence was that Rwanda’s asylum process is “marked by acute arbitrariness and unfairness, some of which is structurally inbuilt, and by serious safeguard and capacity shortfalls, some of which can be remedied only by structural changes and long-term capacity building.” (Paragraph 95)

UNHCR played a decisive role as a source of information about:

- the way in which asylum interviews are conducted in Rwanda today,
- the absence of any opportunity for a claimant to present their case to the Rwandan asylum authority (RSDC) through a lawyer,
- the evidence that the RSDC does not currently have sufficient skills and experience to make reliable decisions, and
- the fact that the appeal process to the High Court is wholly untested, coupled with grounds for concern about the culture of the Rwandan judiciary.

Judges Vos and Burnett concluded that UNHCR was right to warn that at this moment Rwanda cannot guarantee fair asylum decisions at this moment. Lord Underhill concluded:

“Those problems could be resolved by making further changes to the process (e.g. allowing lawyers to make representations to the RSDC); by ‘capacity building’ (e.g. as regards provision of legal assistance); and, importantly, by effective training of all those involved in the process (as noted at several points above). But the evidence is that those steps have *not yet* been taken or in any event not to the extent necessary to ensure the present fairness and reliability of the system.” (Paragraph 265)

So where does this week’s judgement leave the UK government?



November 2021: a deadly accident in the Channel, with dozens of irregular migrants drowning, while trying to cross from France to the UK in small boats.

“Stop the boats”

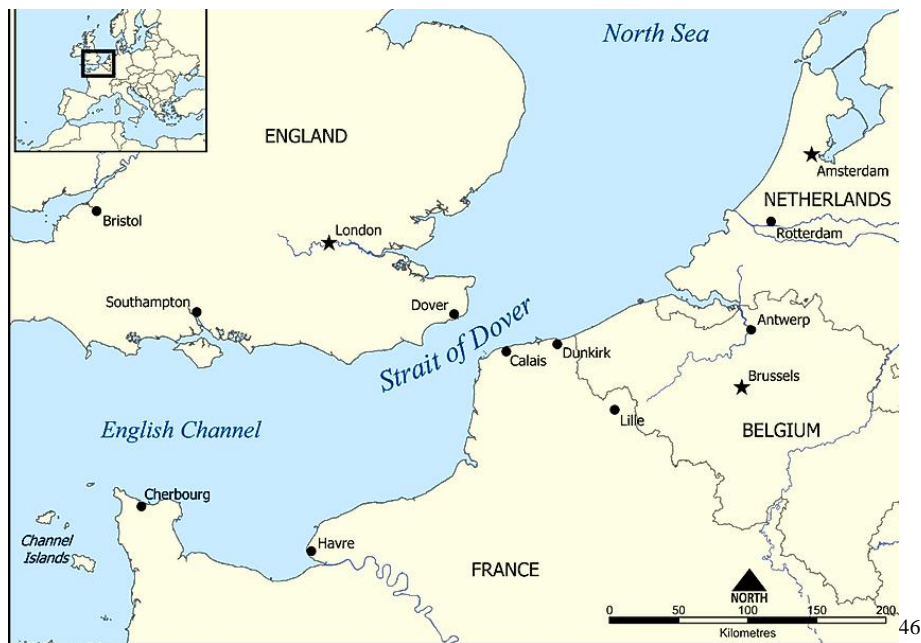
“I believe my reputation and the reputation of the Conservative party is on the line here. It’s about competence, and it’s about being faithful to the British people who put us in office to fix this problem ... I really do think that it’s the last chance for the Government to get this right.”
(Suella Braverman, Home Secretary, January 2023)⁴⁴

The numbers are remarkable, and they have been growing fast. In 2018, less than 300 irregular migrants crossed the Channel from France to the United Kingdom (UK). In 2022, it was 46,000.

Irregular Channel boat crossings⁴⁵

Year	People who crossed
2018	299
2019	1,843
2020	8,466
2021	28,526
2022	45,756

In the first six months 2023 it was more than 11,279 – roughly the same as the same period last year.



The Channel

Behind these numbers lies a wild and dangerous reality. Rich European democracies are unable to assert control over a border that has turned before their eyes into a daily crime scene.

⁴⁴ The Telegraph, [“Stop migrant boats or face defeat, Suella Braverman tells Tories”](#), 30 January 2023.

⁴⁵ Home Office, [Irregular migration to the UK](#).

⁴⁶ Map: <https://www.worldatlas.com/seas/english-channel.html>.

Smugglers, charging thousands of Euros, put men, women, and children in unstable inflatable boats, sometimes in bad weather. Hundreds of British and French police, border- and coast guards, are trying to stop them. And caught in between, there are people like Maryam Nuri Mohamed Amin, a 24-year-old from a peaceful town in Northern Iraq, who put her life into the hands of such smugglers one early morning in November 2021, and who drowned in the freezing waters when her boat deflated.



There was no legal path for her – Maryam Nuri Amin

Maryam was motivated by love: after obtaining a visa for Italy, she wanted to join her fiancé, who lived in the UK.⁴⁷ Instead, her dead body was returned to grieving relatives in Iraq.⁴⁸ That day, Gérald Darmanin, the French interior minister, spoke of an “absolute tragedy that fills us with anger.”⁴⁹ 31 people died in one accident.⁵⁰ In all other respects, however, the day she and other died was “a day like any other” (Darmanin) on the Channel. 780 French police officers were watching the coastline that Wednesday.⁵¹ There were 90 alerts to the UK Maritime and Coastguard Agency in the Channel that day, and 250 people made the crossing in flimsy vessels.⁵²

Nothing has improved since then. In August 2022, almost 1,300 people crossed the Channel in a single day. In 2022, more people crossed the Channel to get to the UK than the Atlantic and the Western Mediterranean to get to Spain from Africa. This year is on track to match last year’s record. Unless something is done to change the situation, many more people will continue to cross, and more people will die.

However, if there is one external border of the European Union where it should be possible to show immediately *how* humane control of irregular migration might work, it is here, in the Channel. All countries in the region are prosperous democracies, based on the rule of law, safe for asylum seekers. What is lacking is the right plan.

⁴⁷ BBC, [“Channel Disaster: Kurdish Woman is first Victim identified”](#), 28. November 2021.

⁴⁸ France 24, [“In Iraqi Kurdistan, family mourns victim of deadly Channel shipwreck”](#), 29 November 2021.

⁴⁹ New York Times, [“At Least 27 Dead after Migrant Boat Capsizes in English Channel”](#), 24 November 2021.

⁵⁰ The Guardian, [“A timeline of migrant Channel crossing deaths since 2019”](#), 14 December 2022.

⁵¹ The Telegraph, [“The day the luck ran out: How the migrant tragedy unfolded in the Channel”](#), 24 November 2021.

⁵² New York Times, [“At Least 27 Dead after Migrant Boat Capsizes in English Channel”](#), 24 November 2021.

Walls on water?

For many years now, UK leaders have expressed their determination to stop these crossings. In December 2018, British Home Secretary [interior minister] Sajid Javid cut short his holiday after 11 small boats, carrying 78 migrants, crossed the Channel in four days.⁵³ Javid insisted that this was not something that he “will accept”: “Protecting the UK border and safeguarding lives is one of the Home Office’s most important priorities.”⁵⁴

In January 2019, Javid told the House of Commons: “*I will continue to do all I can to stop these dangerous crossings.*”⁵⁵ In August 2019, Javid’s successor Priti Patel announced: “*I’m doing everything in my power as Home Secretary to put a stop to these illegal crossings.*”⁵⁶ In October 2022, Patel’s successor Suella Braverman told Conservative party members: “*We have got to stop the boats crossing the Channel.*”⁵⁷

Successive UK prime ministers have made similar statements. In December 2022, Rishi Sunak, told the House of Commons that stopping irregular migration was his “absolute priority”: “*We have to stop the boats. And this government will do what must be done.*”⁵⁸ On 7 March 2023, Sunak repeated this message, when he presented yet another legislative package of measures to the public: “*Today we are introducing new legislation to keep my promise to you – to stop the boats.*”⁵⁹ And shortly after the Court of Appeal’s ruling, Sunak insisted once more: “*The policy of this government is very simple, it is this country – and your government – who should decide who comes here, not criminal gangs. And I will do whatever is necessary to make that happen.*”⁶⁰



Prime Minister Rishi Sunak giving a press conference in Dover,
5 June, 2023

⁵³ BBC, “[Channel migrants: Home secretary declares major incident](#)”, 28 December 2018.

⁵⁴ The Telegraph, “[We will not stand by and allow reckless criminals to take advantage of vulnerable people](#)”, 30 December 2018.

⁵⁵ Hasard, [Migrant Crossings](#), Volume 652: debated on Monday 7 January 2019.

⁵⁶ UK government, “[Britain and France to strengthen joint action against small boats](#)”, 30 August 2019.

⁵⁷ [Speech](#) to Conservative Party Conference, 4 October 2022.

⁵⁸ Oral statement to Parliament, [PM statement on illegal migration](#), 13 December 2022.

⁵⁹ [PM statement on the Stop the Boats Bill](#), 7 March 2023.

⁶⁰ Reuters, “[UK PM Sunak dealt blow as court rules Rwanda deportation plan unlawful](#)”, 29 June 2023.

UK leaders have given a variety of reasons why they consider this a national priority. It is about state sovereignty. It is about national security. It is a legal obligation. It is a matter of stopping criminal smugglers. Irregular migration is costly to taxpayers. It is a matter of fairness. Stopping the boats saves lives. Opinion polls reveal that a majority of the UK public agree with the need to act. A poll in summer 2020 showed that 73 percent of the public – and 97 percent of Conservative voters – considered illegal Channel crossings a serious issue.⁶¹ A poll in September 2021 showed that a large majority of the UK public had an unfavourable view of those crossing the Channel:

“The public tends to have positive views of migrants coming to the UK to work (by a margin of 41% positive to 27% negative), reunite with their families (40% positive versus 22% negative), or to set up businesses (51% positive versus 13% negative).

On the other hand, the British public do not have a favourable view of those crossing the English Channel to get to the UK. By a margin of 56% to 19%, Britons take a negative view of those arriving in this way, demonstrating a clear distinction in the public eye regarding the circumstances by which migrants arrive in the UK.”⁶²

In response to public expectations and to the promises made by politicians, there has been no shortage of proposals, statements, actions.

Ever since small boats started arriving, the UK has been keen to encourage France to stop migrants before they even embark. The first thing that Sajid Javid [*then the minister of interior*] did after declaring the Christmas crossings of 2018 a “major incident” was to head to France to urge his counterpart to increase French patrols. The result was a “*Joint action plan by the UK and France on combating illegal migration involving small boats in the English Channel*” in January 2019.⁶³ The UK committed money for security infrastructure, while France promised that “Surveillance in maritime areas by air and maritime means will be reinforced. On land, the number of patrols could be increased in Calais and Boulogne-sur-Mer harbours.”

There were many more security focused joint declarations since then:

- In August 2019: “Addendum to the joint action plan by the United Kingdom and France on combatting illegal migration involving small boats in the English Channel.”⁶⁴
- In November 2020: “UK-France joint statement: next phase of collaboration on tackling illegal migration” (UK commits €31.4 million).⁶⁵
- In July 2021: “UK-France joint statement: next phase of collaboration on tackling illegal migration – 20 July 2021” (UK commits €62.7 million).⁶⁶
- In November 2022: “UK-France joint statement: enhancing co-operation against illegal migration” (UK commits €72.2 million).⁶⁷

⁶¹ Yougov, [Should the military patrol the English Channel?](#), 13 August 2020.

⁶² Yougov, [What concerns the British public about immigration policy?](#), 3 November 2021.

⁶³ [Joint action plan by the UK and France on combating illegal migration involving small boats in the English Channel](#), January 2019.

⁶⁴ [Addendum to the joint action plan by the United Kingdom and France on combatting illegal migration involving small boats in the English Channel](#), October 2019.

⁶⁵ [UK-France joint statement: next phase of collaboration on tackling illegal migration – 28 November 2020](#).

⁶⁶ [UK-France joint statement: next phase of collaboration on tackling illegal migration – 20 July 2021](#).

⁶⁷ [UK-France joint statement: enhancing co-operation against illegal migration – 14 November 2022](#).

*Numbers of small boat Channel crossings, by nationality*⁶⁸

Nationality	2018	2019	2020	2021	1/2 2022
Albania	16	13	54	815	2,165
Afghanistan	3	69	494	1,437	2,066
Iran	238	1,213	2,373	8,319	1,723
Iraq	33	471	1,648	6,117	1,573
Syria	1	14	776	2,451	1,041
Eritrea	0	0	511	2,875	850
Sudan	0	0	969	1,064	460
Egypt	0	1	53	366	305
Vietnam	4	3	118	1,403	279
Kuwait	0	2	79	537	198
Ethiopia	0	5	108	544	188
Turkey	0	2	10	69	169
Stateless	0	2	389	498	101
India	0	0	64	67	98
Pakistan	0	25	104	161	79
Yemen	0	0	252	135	68
Sri Lanka	0	0	18	80	67
Libya	0	0	28	160	40
Algeria	0	0	10	109	33
Chad	0	0	59	38	31
all others	4	23	349	699	214
not currently recorded	0	0	0	582	999
Total	299	1,843	8,466	28,526	12,747

33,000 arrived only in the second half of 2022.

None of these statements stopped the number of Channel crossings rising. Nor did continuous French efforts to intercept boats. In 2022, French police prevented over 30,000 crossings to the UK.⁶⁹ And yet, that year the number of successful crossings increased to a record level of 46,000.

This failure is not surprising. Lucy Moreton from the Immigration Services Union (ISU), the main trade union of border guards, noted: “stopping people crossing, just to let them go and try again, will not have the required impact.”⁷⁰ Pierre-Henri Dumont, a centre-right member of parliament for Calais, explained in July 2022 that additional patrols led people smugglers to “find somewhere else to cross. The fact is, having more money, having more police, having more controls will not prevent more crossing attempts. We have too many kilometres of shore to monitor. They can hide in a lot of places.”⁷¹

And yet, despite this experience, the Macron – Sunak summit in Paris on 10 March 2023 announced that they would try to do more of what was already being done. The Prime Minister’s Office put out a press release declaring:

⁶⁸ Home Office, [Irregular migration to the UK, year ending June 2022](#).

⁶⁹ According to Suella Braverman, House of Commons Debate: Illegal Cross-channel Movements: Discussions with French Counterpart, [Hansard Volume 722](#), 14 November 2022.

⁷⁰ Guardian, [“MPs, unions and refugee groups condemn Braverman’s small boats deal with France”](#), 14 November 2022.

⁷¹ The Times, [“Priti Patel defends paying French £54m more to halt migrants crossing Channel”](#), 22 July 2022.

“Hundreds of extra French law enforcement officers will use enhanced technology and intelligence insight to prevent illegal Channel crossings under a new agreement struck by the Prime Minister and President Macron in Paris today.”⁷²

It went on:

“For the first time, the UK will help fund a detention centre in France to enhance the country’s ability to cope with the level of people being trafficked across the Channel. This new centre will support French efforts to increase detention capacity, allowing more migrants who might otherwise travel by dangerous and illegal routes to the UK to be removed from the French coast.”

It was not explained how this “detention” centre is supposed to help. Asylum seekers in France are not usually detained. In fact, the actual Declaration called it a “retention centre”, in which intercepted migrants could not be obliged to remain for any length of time.⁷³

Nor was it explained how a further increase of 500 law enforcement officers and the investment “in new infrastructure and surveillance equipment to enable swifter detection of crossing attempts”, co-funded by the UK with €541m over the next 3 years, will stop the boats, as long as people will have an incentive to continue to try to cross in inflatable dinghies.⁷⁴

Harsh statements did not stop the number of Channel crossings rising. Neither did French efforts to intercept boats. In 2022, French police prevented over 30,000 crossings to the UK. And yet, that year the number of successful crossings increased to a record level of 46,000.

In reality, the UK government has been putting all its eggs in the Rwandan basket. The UK government is insisting that it is still committed to it and will appeal the Court of Appeal’s decision. It is unlikely to secure a ruling before the end of the year. And it is far from certain that the Supreme Court will deliver a different result.

A Channel plan

The obvious alternative strategy to stop irregular Channel crossing – humanely and lawfully and without transfers to Rwanda – is, after an agreed cut-off date, to return everyone arriving to countries which are, without any doubt, safe already for anyone seeking protection. Countries which have the capacity to look after asylum seekers: France, Germany, the Benelux. The question for the UK is: what is it prepared to offer in terms of solidarity given that it has far fewer asylum applications, and grants a lot less protection, than France or Germany?

UK ministers and prime ministers have urged France to “take back” those who arrive in the UK. An inadequate scheme for this existed when the UK was an EU member – the Dublin system. In 2019, the last year before the pandemic, the UK requested from France to be able to transfer some 500 people. It was able to transfer 50. In August 2020, on the eve of Brexit, the UK proposed a reciprocal readmission agreement with the EU – the effects of which, would have been heavily weighted in the UK’s favour. It was rejected.

⁷² Prime Minister’s Office, [“Prime Minister agrees unprecedented measures to tackle illegal migration alongside France”](#), 10 March 2022.

⁷³ [UK-France Joint Leaders’ Declaration](#), 10 March 2023.

⁷⁴ Ibid.

Dublin transfers from the UK to France

	2017	2018	2019	2020
Requests	513	646	495	1,197
Actual transfers	10	51	53	25

Currently the EU is responding to irregular migration to the UK the way Turkey responds to irregular migration from it to the EU: no legal returns of those who cross the water have been possible. Since 1 January 2021, there have been zero transfers of asylum seekers from the UK to France.

What is needed are steps that will not just reduce but stop most crossings. For this, France, Germany, and others forming a coalition of the willing would need to offer that they - not Rwanda – will take everyone back who crosses the Channel as soon as the UK has processed them in line with its laws.

But why would France and its EU partners take back people more quickly than ever before, now that the UK is no longer in the EU?

There are strong arguments why this would be in the national interest of France, Germany, the Benelux countries and indeed of everyone interested in how cooperation with truly safe countries might break the business model of smugglers, save lives, and sharply reduce dangerous irregular migration through fast returns after a cut-off date.

First, such cooperation and the destruction of the business model of smugglers would reduce pressure on French and Belgian police, coast guard and on coastal regions.

Second, the UK should agree to resettle refugees or asylum seekers, who are now in the European partner countries, through legal ways. How many? If the UK were to offer to take 40,000 people a year for three years, this would be real solidarity with France, Germany or the Netherlands. Why 40,000? Last year, Germany granted protection at first instance level to more than 128,000 people. Austria (population 9 million) to more than 17,000.⁷⁵ In 2022, France had 150,000 asylum applications and granted 50,000 people international protection, including decisions on appeal and resettlement. The UK had 90,000 asylum applications and gave 25,000 people some form of protection, including decisions on appeal and resettlement.⁷⁶ 46,000 arrived just across the Channel last year. 40,000 would be less than that, and less than the number given protection in any other big state.

For the UK this cooperation would bring real control, and the commitment to resettle would ensure a continued interest on the other side of the channel in cooperation. And such a policy would expand, not shrink, access to protection.

It is very much in the interest of EU countries to show how a policy based on truly safe third countries and resettlement offers might create humane control over irregular migration, without undermining refugee protection. This would be a huge benefit to anyone seeking to reconcile the European Convention of Human Rights with control of irregular migration control through

⁷⁵ German and Austrian statistics: Eurostat Data Browser, “First instance decisions on applications by citizenship, age and sex-quarterly data”.

⁷⁶ [Eurostat](#), for French Statistics; [Home Office](#) for UK statistics. Protection statistics compiled from multiple datasets. All these numbers exclude Ukrainian refugees. On these in 2022: ESI, [Olga in Paris](#), February 2023.

cooperation between partner countries. If such a Channel Plan was agreed in 2023, it would set a very useful precedent for other regions. UNHCR and refugee advocacy groups who are in favour of humane control, without pushbacks or the brutality inherent in the Australian Nauru and Manus experience, should embrace this plan. And advocate for it to be adopted now.

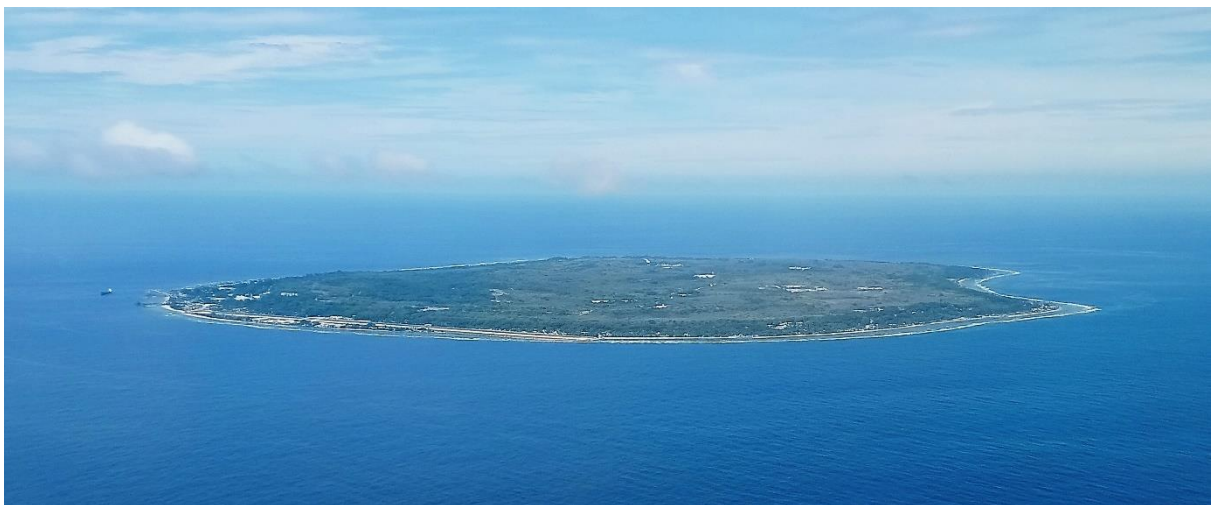
A Channel 40,000 Plan

The aim is to restore control and save lives, while fully respecting the European Convention on Human Rights.

We propose immediate negotiations between the United Kingdom, France, Germany and other interested EU-member states to bring about migration cooperation in the Channel, based on the following steps:

- A coalition of EU countries, led by France and Germany, agrees to take back anyone irregularly crossing from the EU to the United Kingdom, starting from a set date this summer. It is up to the UK authorities to issue inadmissibility decisions, reflecting the reality that its partners in the EU are all safe third countries.
- The goal of such fast returns is to remove all incentives to try to cross to the UK irregularly, and to do so in compliance with international human rights law.
- At the same time, the United Kingdom agrees to accept annually up to 40,000 recognised refugees or asylum seekers who have some connections in the United Kingdom from these partners, for the next three years. A mechanism will be set up whereby people can apply to relocate to the UK.

Such cooperation is in the interest of the United Kingdom, the EU, as well as UNHCR and refugee rights organisations.



Nauru – why this should not be the future of the global refugee system?

Australia is not in Europe

This week, UK judges reminded Europeans why solutions that ignore the rights of those transferred are not possible in Europe. However, by opening the door to genuine safe third country solutions, and by creating incentives for rich democracies and UNHCR to work together to expand the number of countries in the world that are, in fact, safe and have credible asylum systems, the UK Appeals Court has shown how irregular migration might be controlled in a humane way.

Can migrant boats be stopped? The answer is clear: yes. Australia managed to stop migrant boats arriving twice. The key for this was the external processing of asylum claims in another country *of everyone arriving after a cut-off date*. In the case of Australia, this was possible due to transfers to the tiny pacific island nation of Nauru and to Manus Island in Papua New Guinea.⁷⁷ It happened first after prime minister John Howard introduced this policy in August 2001: the number of people arriving irregularly in boats fell from more than 12,000 in three years to less than 300 in six years. Howard called this the Pacific Solution. The decline in arrivals was even stronger after another prime minister, Tony Abbott, launched Operation Sovereign Borders in September 2013: the number of people arriving irregularly in boats fell from 52,000 in five years to zero from 2014 onwards.

But there was a high price, which makes the Australian experience an inadequate model for Europeans today. Greg Lake of the Australian Immigration Department, who was responsible for the camps on Nauru and Manus in 2012, later explained that the intention behind the measures had been clear to everyone: The aim was to deprive the people on the islands of any hope for the future. Therefore, they were addressed by their number and never by their name. They were told right at the beginning that they would be stuck for many years.⁷⁸ John Zammit, an Australian psychologist who worked there in 2013, later described the camp as “hellish” and the psychological care he was supposed to provide there as pointless: John saw “people falling apart in front of [him]”, worn down by a life like a nightmare.⁷⁹ There were repeated cases of self-mutilation. One refugee was beaten to death by security staff during riots, a second died due to delayed treatment. From 2013 to 2018, 14 inmates committed suicide on Manus and Nauru. John Zammit described the conditions in the camps as torture. He later explained that he believed he would not have survived Manus as an inmate.⁸⁰

The UK Court as well as other courts in Europe rule out such transfers. This does not mean that safe third country arrangements are not important to stop irregular arrivals and deaths at sea in Europe. It does mean that implementing them will take more effort.

If UNHCR would be asked today to list which countries in Africa and Asia already have functioning asylum systems, and might now qualify as safe third countries, it might well conclude that there are close to none. This is a devastating state of affairs.

It is therefore high time to develop strategies and use incentives to *create* safe third countries where they do not yet exist. This is another way to say that the protection space for refugees needs to be expanded worldwide, instead of being closed in Europe.

⁷⁷ More on Australian policy: ESI, [The popularity of pushbacks – lessons from Australia](#), Gerald Knaus, [The Damned of Papua New Guinea Australian policy and the failure of advocacy](#), 2021.

⁷⁸ Greg Lake, [“What Kind of Nation Are We Building?”](#), *Asylum Insight*, 19 January 2015.

⁷⁹ Behrouz Boochani, *No Friend but the Mountains: News from No Man’s Land* (btb, 2020).

⁸⁰ Gerald Knaus, [The Damned of Papua New-Guinea – Australian Policy and the Failure of Deterrence](#), 2021.

This is also a message to Rwanda. It is possible to become safe. It can still be a pioneer, as it has been in its cooperation with UNHCR to help those stranded in Libya. And for this it deserves support. But being truly safe will take more than political declarations. Then it will also be possible to persuade European judges.

Just not yet.

Annex: More reading on asylum and borders

ESI report: [Olga in Paris – Why are there so few Ukrainian refugees in France?](#) (14 February 2023)

In German: [Olga in Paris – Warum so wenige ukrainische Flüchtlinge nach Frankreich gehen](#)

In French: [Olga à Paris – Pourquoi y-a-t-il si peu de réfugiés ukrainiens en France ?](#)

ESI newsletter: [Putin’s Cholodomor – Homes for Ukrainians – A plan for winter](#) (29 December 2022)

[Essay 1 – The promise and the agony – saving the refugee convention](#)

[Why International protection is at risk – Myths and facts on global asylum](#)

[Swiss tragedy – borders and refoulement](#) (From book: *Which Borders do we need?*)

[Essay 2 – The popularity of pushbacks – lessons from Australia](#)

[The Damned of Papua New Guinea](#) (From book: *Which Borders do we need?*)

[Essay 3 – Our Plan for the Aegean](#) (From book: *Which Borders do we need?*)

ESI newsletter: [The Gambia Plan – Beyond empty words and threats: how a breakthrough is possible](#) (17 February 2020)

ESI newsletter: [Gambia Plan – win-win with Africa – the 11th commandment](#) (29 July 2019)

ESI Report: [The Aegean Tragedy – Key facts and key steps](#) (24 January 2020)