IN THE HIGH COURT OF JUSTICE **Claim No: AC-2024-LON-001503**
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
B E T W E E N:

THE KING
on the application of FDA

Claimant

- and --
(1) MINISTER FOR THE CABINET OFFICE
(2) MINISTER FOR THE CIVIL SERVICE

Defendants

- and –
SECRETARY OF STATE FOR THE HOME DEPARTMENT

Interested Party

SKELETON ARGUMENT
ON BEHALF OF THE CLAIMANT

for hearing on 6 June 2024

References:
Hearing Bundle, in the form [B/page]
Detailed Grounds of Resistance, in the form (DGR §para.)
Supplementary Bundle in the form [SB/page]

A. INTRODUCTION

1. The Civil Service Code requires civil servants to comply with international law and uphold the administration of justice. It is legally binding on civil servants as part of their terms of service (Constitutional Reform and Governance Act 2010 ("CRAG 2010"), section 5(8)). On 29 April 2024, the Director General of the Propriety and Constitution Group in the Cabinet Office issued guidance to civil servants stating that in the event that a Minister decides not to comply with an interim measures indication given by the European Court of Human Rights ("Strasbourg Court") relating to removals to Rwanda, it is the responsibility of civil servants under the Civil Service Code to implement that decision ("Guidance"). The issue in this judicial review is whether the Guidance is correct in law or whether the Minister for the Civil Service would need to amend the Civil Service Code in order for civil servants to implement

a decision not to comply with an interim measures indication consistently with their terms of service.

2. The claim gives rise to two distinct but related questions of law, in respect of which the Claimant and the Defendants adopt different positions:

   (1) The first is whether, apart from the terms of section 5 of the recently enacted Safety of Rwanda (Asylum and Immigration) Act 2024 ("SRA 2024"), the Civil Service Code requires civil servants to comply with interim measures issued by the Strasbourg Court, or whether the Code requires them to implement a Ministerial direction to breach an interim measure.

   (2) The second is whether section 5 of the SRA 2024 affects this position in relation to asylum-seekers sought to be removed to Rwanda.

3. The Defendants accept that if a Minister directed a civil servant not to comply with a domestic court order, it would not be consistent with the Civil Service Code for the civil servant to comply with that instruction (DGR, §5(1)). The Defendants nonetheless maintain that if a Minister instructs a civil servant to disregard an order of the Strasbourg Court, the Civil Service Code requires that instruction to be complied with and the order to be disregarded (e.g. DGR §§28-29, 31). The Defendants further submit that this general position has been "*expressly confirmed*" in relation to removals to Rwanda by section 5(2) of the SRA 2024 (DGR §6(1)).

4. The Claimant submits that the distinction drawn between domestic and international court orders is wrong given that the Civil Service Code requires civil servants to comply not only with domestic law but also with international law. A failure to comply with an interim measure of the Strasbourg Court represents a clear violation of international law, just as a failure to comply with an interim injunction by a domestic court would constitute a clear violation of domestic law. Neither situation is consistent with the Civil Service Code and with the terms of service of civil servants. Section 5 of the SRA 2024 does not affect this analysis because it is a purely codificatory provision that does not change the law.

5. If the Civil Service Code does require civil servants to comply with interim measures, then, (1) the Guidance is erroneous in law and should be quashed, and (2) the Civil

Service Code must be amended prior to any instruction to civil servants not to comply with interim measures issued by the Strasbourg Court.

6. In addition, if the Claimants are wrong and the Civil Service Code does not require them to comply with interim measures of the Strasbourg Court then the Civil Service Code is unclear and misleading and it is irrational not to make clear the limits on the obligation to comply with international law.

The importance of the Issue

7. The objective of this judicial review is to clarify the legal obligations on civil servants. It is not to frustrate the Government's policy of removing asylum-seekers to Rwanda. For this reason, the claim was brought very quickly to allow the matter to be determined well before any such removals take place.

8. The Defendants have accepted that the claim raises a genuine issue that is not academic and that the claim should be determined on an expedited basis. Indeed, the very fact that the Cabinet Office issued the Guidance is demonstrative of the fact that there is uncertainty as to the legal obligations of civil servants if instructed not to obey an interim measures indication and the need to clarify the effect of the Civil Service Code.

9. On 23 May 2024, the Second Defendant announced that Parliament would be dissolved and a general election called. He has also made public statements to the effect that removals to Rwanda will now not take place until after the general election. However, the Prime Minister (who is also the Second Defendant) stated that if the present Government is re-elected, removals to Rwanda will commence in the course of July.

B. FACTUAL AND LEGAL CONTEXT

(a) The Civil Service Code

10. The Civil Service Code is made by the Minister of the Civil Service under section 5 of the Constitutional Reform and Governance Act 2010, which provides:

"(1) The Minister of the Civil Service must publish a code of conduct for the service (excluding the diplomatic service).

…

(4) In this Chapter "civil service code" means a code of conduct published under this section as it is in force for the time being.

(5) The Minister for the Civil Service must lay any civil service code before Parliament.

…

(8) A civil service code forms part of the terms and conditions of service of any civil servant covered by the code."

11. Section 5 also makes provision for separate codes of conduct governing civil servants who serve the Scottish Executive and Senedd Government.

12. Section 7 provides for certain minimum requirements that must be included in the Code:

"(1) This section sets out the provision that must be included in a civil service code or the diplomatic service code in relation to the civil servants covered by the code. (The code may include other provision as well.)

(2) The code must require civil servants who serve [Her Majesty's Government] to carry out their duties for the assistance of the administration as it is duly constituted for the time being, whatever its political complexion. […]

(4) The code must require civil servants to carry out their duties – (a) with integrity and honesty, and (b) with objectivity and impartiality."

13. The Civil Service Code was last updated by amendment on 16 March 2015. In addition to the mandatory provisions above, it provides under the heading "*Standards of Behaviour*":

"…
• Comply with the law and uphold the administration of justice"

14. Under the hearing "Objectivity" it states:

"You must not:
• frustrate the implementation of policies once decisions are taken by declining to take, or abstaining from, action which flows from those decisions."

15. Under the heading "*Political Impartiality*" it states:

"You must:
• serve the government, whatever its political persuasion, to the best of your ability in a way which maintains political impartiality and is in line with the requirements of this code, no matter what your own political beliefs are

• *act in a way which deserves and retains the confidence of ministers, while at the same time ensuring that you will be able to establish the same relationship with those whom you may be required to serve in some future government"*

16. By Section 5(8) the Code is incorporated into the employment terms and conditions of service of all civil servants covered by the Code.

(b) Interim Measures of the European Court of Human Rights

17. Article 25 of the European Convention on Human Rights ("**ECHR**") authorises the Strasbourg Court to adopt rules of Court. Rule 39 of the Rules of Court states:

"1. The Court may, in exceptional circumstances, whether at the request of a party or of any other person concerned, or of its own motion, indicate to the parties any interim measure which it considers should be adopted. Such measures, applicable in cases of imminent risk of irreparable harm to a Convention right, which, on account of its nature, would not be susceptible to reparation, restoration or adequate compensation, may be adopted where necessary in the interests of the parties or the proper conduct of the proceedings.

2. The Court's power to decide on requests for interim measures shall be exercised by duty judges appointed pursuant to paragraph 5 of this Rule or, where appropriate, the President of the Section, the Chamber, the President of the Grand Chamber, the Grand Chamber or the President of the Court.

3. Where it is considered appropriate, immediate notice of the measure adopted in a particular case may be given to the Committee of Ministers.

4. A duty judge appointed pursuant to paragraph 5 of this Rule or, where appropriate, the President of the Section, the Chamber, the President of the Grand Chamber, the Grand Chamber or the President of the Court may request information from the parties on any matter connected with the implementation of any interim measure indicated. 5. The President of the Court shall appoint Vice-Presidents of Sections as duty judges to decide on requests for interim measures."

18. Article 32(1) of the ECHR provides that the jurisdiction of the Court "*shall extend to all matters concerning the interpretation and application of the Convention…"* and Article 32(2) provides that if there is a dispute as to the Strasbourg Court's jurisdiction, the Court shall decide on its jurisdiction.

19. Article 34 of the ECHR permits the Court to receive individual applications and states that that the Contracting Parties, "*undertake not to hinder in any way the effective exercise of this right*."

20. The Strasbourg Court has held on many occasions that a failure by a State to comply with an interim measure constitutes a breach of the State's obligation under Article 34.

21. In *Mamatkulov and Askarov v Turkey*, App. Nos. 46827/99 and 46951/99, the Grand Chamber held that Article 34 requires Contracting States not to hinder in any way the effective exercise of the right of individual petition. It stated, at [128]:

> "*A failure by a Contracting State to comply with interim measures is to be regarded as preventing the Court from effectively examining the applicant's complaint and as hindering the effective exercise of his or her right and, accordingly, as a violation of Article 34.*"

22. In *Paladi v Moldova*, App. No. 39806/05, 10 March 2009, the Grand Chamber stated, at [90]:

> "*it is not open to a Contracting State to substitute its own judgment for that of the Court in verifying whether or not there existed a real risk of immediate and irreparable damage to an applicant at the time when the interim measure was indicated. Neither is it for the domestic authorities to decide on the time-limits for complying with an interim measure or on the extent to which it should be complied with. It is for the Court to verify compliance with the interim measure, while a State which considers that it is in possession of materials capable of convincing the Court to annul the interim measure should inform the Court accordingly.*"

23. In *Lui v Poland*, App. No. 37610/18 decided in October 2022 and final on 30 January 2023, the Court reiterated that "*the Contracting States are obliged under Article 34 of the Convention to comply with interim measures indicated under Rule 39 of the Rules of Court*" (at [101]; also *O.M. and D.D. v Ukraine*, App. No. 18603/12, 15 December 2022, at [125]).

(c) The Safety of Rwanda (Asylum and Immigration) Act 2024

i. Background

24. In April 2022, the Government concluded an arrangement with the Government of Rwanda for the processing in Rwanda of asylum-seekers entering the United Kingdom and subsequent settlement in Rwanda of persons found to have refugee status.

25. Transfers from the UK to Rwanda were halted following interim measures rulings by the European Court of Human Rights in June 2022 that related to three asylum-seekers.

26. The Government's policy was challenged in the domestic courts. The Divisional Court held, broadly, that the policy was lawful. The Court of Appeal reversed the Divisional Court and held that removal of UK asylum-seekers to Rwanda is incompatible with Article 3 of the ECHR because there are substantial grounds to believe that that such

persons will be at real risk of being returned to their countries of origin to face torture, cruel, inhuman or degrading treatment. On 15 November 2023, the Supreme Court unanimously upheld the Court of Appeal's judgment: *R (on the application of AAA and ors) v Secretary of State for the Home Department* [2023] UKSC 42, [2023] 1 WLR 4433.

27. The SRA 2024 was a direct consequence of the Supreme Court's ruling. On the same day that the ruling was announced the Prime Minister stated during Prime Minister's questions in the House of Commons that, "*The Government have been working already on a new treaty with Rwanda, and we will finalise that in the light of today's judgment. Furthermore, if necessary I am prepared to revisit our domestic legal frameworks.*" (HC, Hansard col. 638 [SB/7])

28. Later the same day, the Prime Minister gave a press conference at which he announced that the Government would introduce emergency legislation that "*will enable Parliament to confirm that, with our new Treaty, Rwanda is safe*" [SB/2].

29. The Prime Minister continued:

> *"It will ensure that people cannot further delay flights by bringing systemic challenges in our domestic courts …and stop our policy being repeatedly blocked.*
>
> *But of course, we must be honest about the fact that even once Parliament has changed the law here at home …we could still face challenges from the European Court of Human Rights in Strasbourg. I told the Parliament today that I am prepared to change our laws…and revisit those international relationships to remove the obstacles in our way. So let me tell everyone now – I will not allow a foreign court to block these flights.*
>
> *If the Strasbourg Court chooses to intervene against the express wishes of Parliament…I am prepared to do what necessary to get flights off. I will not take the easy way out."*

ii. The terms of the Act

30. The SRA 2024 received Royal Assent on 25 April 2024.

31. Section 1(1) of the Act provides that its purpose is to prevent and deter illegal migration by "*enabling the removal of persons to the Republic of Rwanda*" under the Immigration Acts.

32. Section 1(2) provides:

> *"(2) To advance that purpose –*
>
> *(a) the Rwanda Treaty has been laid before Parliament under section 20 of the Constitutional Reform and Governance Act 2010 (treaties to be laid before Parliament before ratification) with a view to ratification by the United Kingdom, and*

(b) this Act gives effect to the judgement of Parliament that the Republic of Rwanda is a safe country."

33. The term "*safe country*" is defined to mean, "*a country to which persons may be removed from the United Kingdom in compliance with all of the United Kingdom's obligations under international law that are relevant to the treatment in that country of persons who are removed there…"* (s.1(5)).

34. Section 2(1) requires that every decision-maker must "*conclusively treat Rwanda as a safe country*".

35. It then provides:

> "*(3) As a result of subsection (1), a court or tribunal must not consider a review of, or an appeal against, a decision of the Secretary of State or an immigration officer relating to the removal of a person to the Republic of Rwanda to the extent that the review or appeal is brought on the grounds that the Republic of Rwanda is not a safe country.*
>
> *(4) In particular, a court or tribunal must not consider –*
> *(a) any claim or complaint that the Republic of Rwanda will or may remove or send a person to another State in contravention of any of its international obligations, including in particular its obligations under the Refugee Convention,*
> *(b) any claim or complaint that a person will not receive fair and proper consideration of an asylum, or other similar, claim in the Republic of Rwanda, or*
> *(c) any claim or complaint that the Republic of Rwanda will not act in accordance with the Rwanda Treaty."*

36. Section 3 disapplies certain provisions of the Human Rights Act 1998. Section 4 creates an exception to section 2 in respect of certain risks to individuals relating to their specific individual circumstances (for example, where their individual circumstances might place them at risk from the Rwandan authorities themselves rather than the authorities of their home state).

37. Section 5 provides as follows:

> "***Interim measures of the European Court of Human Rights***
>
> *5 (1) This section applies where the European Court of Human Rights indicates an interim measure in proceedings relating to the intended removal of a person to the Republic of Rwanda under, or purportedly under, a provision of, or made under, the Immigration Acts.*

(2) It is for a Minister of the Crown (and only a Minister of the Crown) to decide whether the United Kingdom will comply with the interim measure.

(3) Accordingly, a court or tribunal must not have regard to the interim measure when considering any application or appeal which relates to a decision to remove the person to the Republic of Rwanda under a provision of, or made under, the Immigration Acts.

(4) In this section –

(a) a reference to "the Immigration Acts" does not include the Illegal Migration Act 2023 (see instead section 55 of that Act);

(b) a reference to a Minister of the Crown is to a Minister of the Crown acting in person."

38. Section 10(1) provides that the Act comes into force on the day that the Rwanda Treaty enters into force. The treaty was ratified by the Government of Rwanda on 19 April 2024 and by the United Kingdom Government on 25 April 2024 and accordingly entered into force on that day.

(d) The Guidance to civil servants

39. In early 2024, media reports suggested that the Government intended to amend the Civil Service Code, as part of proposals relating to the Rwanda policy. The General Secretary of the FDA contacted the Cabinet Office, and was informed that they had no intention of amending the Code, and had not heard of such plans [B/9-10 §§19-20].

40. On 17 January 2024, the Government published a letter from Darren Tierney, Director General, Propriety and Constitution Group in the Cabinet Office to Sir Matthew Rycroft, Permanent Secretary at the Home Office. The letter stated that if the Bill were to remain in its current form following Royal Assent "*guidance would be issued to civil servants to set out the implications of Clause 5 for Ministers and civil servants*." [B/69].

41. Draft guidance was set out in that letter as follows:

"As a matter of UK law, the decision as to whether to comply with a Rule 39 indication is a decision for a Minister of the Crown. Parliament has legislated to grant Ministers this discretion. The implications of such a decision in respect of the UK's international obligations are a matter for Ministers. In the event that the Minister, having received policy, operational and legal advice on the specific facts of that case, decides not to comply with a Rule 39 indication, it is the responsibility of civil servants - operating under the Civil Service Code - to implement that decision. This applies to all civil servants."

42. On the same date, the Government published a letter from Sir Matthew to Simon Case, Cabinet Secretary and Head of the Civil Service [B/70]. That letter stated an intention to "*issue guidance to those involved in removals to Rwanda, and revised guidance to caseworkers*." This would "*amend the existing Home Office Guidance in in relation to removals under the Illegal Migration Act and Safety of Rwanda Bill that says 'where you have been notified that a R39 indication has been made you must defer removal immediately."*. The draft amended guidance was set out in the letter as follows:

> *"Where a Rule 39 measure is indicated by the Strasbourg Court, the Home Office case worker must immediately refer the case for a ministerial decision on whether or not to proceed with removal. This must be done without delay, irrespective of when the Strasbourg Court has issued an interim measure. Given the nature of removal flights, officials should be available to advise ministers at short notice and during evenings and weekends.*
>
> *Home Office officials shall proceed with removal if the relevant Minister approves that course of action."*

43. Neither the FDA, nor any of its officers or members within the Home Office, had been consulted prior to the publication of the draft guidance [B/11, §24]. Members contacted the FDA, expressing concerns about their obligations should a Minister direct them to effect removal contrary to an interim measure indication, and about potential consequences which could arise should they breach the Code [B/12, §30].

(e) Correspondence between the FDA and Government

44. On 8 March 2024, the General Secretary of the FDA wrote to the Minister for the Cabinet Office and the Secretary of State for the Home Department, setting out the FDA's concerns regarding the process of issuing the guidance and its draft contents. It was noted, in particular, that the FDA considered that the draft guidance was erroneous in law and explained the grounds why FDA took that position. The FDA explained why the guidance gave rise to uncertainty for civil servants, rather than resolving such uncertainty, who would be foreseeably placed in an exceptionally difficult position. The letter asked for the Civil Service Code to be amended [B/24-29].

45. On 14 March 2024, Mr Tierney responded, stating that the FDA's concerns regarding the content of the guidance were premature and unsubstantiated [B/30-31]. He set out the position of the Cabinet Office as to the legal obligations of civil servants under the Code as follows:

"In the event that Parliament, which is sovereign, had seen fit to pass and enact the Safety of Rwanda Bill in any form, it would under the Civil Service Code be the responsibility of civil servants to implement the decisions of their Ministers made under the then Act, unless the courts had intervened to find such a decision unlawful.

Those decisions would have been made as authorised by the powers in primary legislation made by our sovereign Parliament, and with regard to policy, operational and legal advice on the facts of the case. Ministers will have considered such a decision with reference to the relevant domestic and international legal position.

In implementing those decisions, civil servants would be acting in line with the Civil Service Code."

46. In the light of that statement of the Government's legal position, the FDA responded to Mr Tierney pointing out that the Government's position misstated the true legal position in at least two respects. It reiterated that Civil Service Code should be amended [B/32-35]. On 21 March 2024, Mr Tierney responded to the FDA stating that he had nothing further to add [B/36].

47. On 11 April 2024, Slater and Gordon acting on behalf of the FDA sent a pre-action protocol letter to the Government setting out the grounds for a proposed judicial review of the draft guidance and the final guidance when issued. On 17 April 2024 the GLD responded to Slater and Gordon stating that as the Bill had not become law and no final guidance had been issued, a response would be provided within 14 days of the Bill coming into force [B/55].

48. On 29 April 2024, the Government Legal Department responded to the pre-action protocol letter and supplied the Guidance. The Guidance states:

"As a matter of UK law, the decision as to whether to comply with a Rule 39 indication is a decision for a Minister of the Crown. The sovereign Parliament has legislated to grant Ministers this discretion. In the event that the Minister, having received policy, operational and legal advice on the specific facts of that case, decides not to comply with a Rule 39 indication, it is the responsibility of civil servants to implement that decision. This applies to all civil servants.

The implications of such a decision in respect of the UK's international obligations are a matter for Ministers, exercising the discretion which has been granted to them by Parliament.

In implementing the decision, civil servants would be operating in accordance with the Civil Service Code, including the obligation not to frustrate the implementation of policies once decisions are taken. They would be operating in compliance with the law, which is the law enacted by Parliament under which the Minister's specifically recognised and confirmed discretion would be exercised. The Code does not require or enable civil servants to decide not to do so, and so to frustrate the will of Parliament and Ministers, on the basis that non-compliance with a Rule 39 indication would or might be a breach of Article 34 ECHR.

Accordingly, in the present context, neither the Civil Service Code, nor the broader constitutional function of the impartial Civil Service, require or enable the Civil Service to decline to implement such a decision by Ministers."

(f) Statements of the Prime Minister

49. On 18 January 2024 at a press conference on "*Stop the Boats*" the Prime Minister responded to a question concerning section 5: "*I would not have put that clause in the Bill if I was not prepared to use it* […] *if you're asking me are there circumstances in which I will ignore rule 39s, then the answer is clearly yes*" [SB/14].

50. On 22 April 2024, the Prime Minister gave a press conference at which he stated that the Government had *"put beyond all doubt that Ministers can disregard"* interim measures indicated by the European Court of Human Rights, "*with clear guidance that if they decide to do so, civil servants must deliver that instruction."* [SB/26].

51. The Prime Minister also referred to the fact that individuals would be removed on flights to Rwanda *"come what may"* and that *"No foreign court will stop us from getting flights off"*. The first flights, he said, "*will leave in 10 to 12 weeks"*.

52. There is therefore a very significant risk that Ministers will instruct civil servants to disregard interim measures indicated by that Court.

C. GROUNDS FOR JUDICIAL REVIEW

53. The Guidance requires that: (i) where an interim measure is indicated by the Strasbourg Court, a civil servant must immediately refer the case to a Minister; and (ii) in the event that the Minister decides not to comply with the interim measure, "*it is the responsibility of civil servants to implement that decision."*. The Guidance goes on to state that "*in implementing the decision, civil servants would be operating in accordance with the Civil Service Code, including the obligation not to frustrate the implementation of policies once decisions are taken."* [B/68-9]

54. There are two steps in the Defendants' argument defending the legal position set out in the Guidance. The Defendants submit, firstly, that the general position—that is to say the position prior to the SRA 2024 and that still pertains in relation to removals to countries other than the Republic of Rwanda—is that the Civil Service Code requires

civil servants to breach interim measures if directed to do so by Ministers (DGR §§6(2), 28-29, 31). The Defendants submit that if civil servants were not bound by the Civil Service Code to comply with such Ministerial instructions, the position would be "*unworkable and constitutionally untenable*" (DGR §31).

55. This position is also reflected in the letter dated 14 March 2024 from Mr Tierney in which he stated, during the passage of the SRA 2024, that "*it would under the Civil Service Code be the responsibility of civil servants*" to implement the decisions of Ministers not to comply with interim measures if Parliament enacted the Bill "*in any form*" [B/30-31]. In other words, the wording of clause 5, now section 5, is immaterial to whether civil servants are required to comply with Ministerial instructions concerning interim measures.

56. The second step in the Defendants' reasoning is that section 5 of the SRA 2024 "*confirms*" this existing position "*in the specific context of Rwanda*" (DGR §6(1), 33). The Defendants do not rely on section 5 as an alternative basis for arguing that civil servants must comply with directions to disregard interim measures, such that, if the Defendants are wrong in the first step of their argument, the position is different in relation to removal to Rwanda than in relation to deportations to other countries. The Defendants rely on section 5 as confirming and reinforcing the general position that, they say, applies not only in respect of Rwanda but removals of illegal immigrants to their countries of origin.

57. The Claimant submits that the Government is wrong in relation to both steps of its reasoning. It is helpful to consider the issue of law raised by each step separately and sequentially.

(a) Does the Civil Service Code require civil servants to comply with interim measures issued by the Strasbourg Court, or does the Code require civil servants to implement a Ministerial direction not to comply with such a measure?

58. The Claimant submits that civil servants are required by the Civil Service Code to comply with orders of the Strasbourg Court, whether interim or final, and an instruction from a Minister not to do so would not override this obligation. The obligation arises from the duty imposed on civil servants under the Civil Service Code to comply with international law and to uphold the administration of justice. In support of this submission, the Claimant advances six points.

59. First, compliance with orders of courts is fundamental to the rule of law and integral to any system of law. This was recognised by the Supreme Court in R (Majera) v Secretary of State for the Home Department [2021] UKSC 46, [2022] AC 461, in which Lord Reed (with whom Lord Sales, Lord Leggatt, Lord Burrows and Lady Rose agreed) stated that the rule that court orders must be obeyed "*is based on the importance of the authority of court orders to the maintenance of the rule of law: a consideration which applies to orders made by courts of limited jurisdiction as well as those by courts possessing unlimited jurisdiction.*" Whilst the Court was specifically concerned with orders of domestic courts, the principle was said to be "*a crucial feature of a civilised society which has respect for the rule of law*" (at [55] citing R v Kirby (John Martin) [2019] 4 WLR 131 at [13] (Singh LJ)).

60. The Defendant accepts that if a Minister directed a civil servant not to comply with a domestic court order, that would not be consistent with the Civil Service Code (DGR §5(1)). However, the Defendants' position is that this is different in relation to orders of international courts. Although the Defendants do not spell this out, the logic of their position necessarily means that civil servants are not bound to comply with final rulings of the Strasbourg Court as well as interim measures.

61. Second, civil servants are servants of the Crown and have a separate constitutional status and responsibility to that of Ministers. The distinct constitutional personality of the civil service is recognised by part 1 of CRAG 2010. CRAG 2010 s.7(4)(b) requires civil servants to act with objectivity and impartiality and with additional obligations imposed on civil servants in the Civil Service Code. The Code can only be amended by the Second Defendant and must be laid before Parliament (s.5(1), (5)). The Civil Service Code cannot be changed by Ministerial fiat. The constitutional responsibilities of civil servants are distinct from those of the Government, although in most cases they will align. Thus, for instance, during the lead-up to the general election, civil servants have responsibilities to restrict the activities of Government and to engage in confidential briefings with members of the shadow Cabinet.[1] The Defendants are accordingly wrong to suggest that "*the civil service has no constitutional personality or responsibility separate from the duly constituted Government*" (SFG §72(3)). The civil service has both a distinct constitutional personality and a constitutional responsibility separate from the duly constituted Government.

[1] *The Cabinet Manual* §2.21, §2.28-§2.29

62. Third, reference to "*the law*" in the Civil Service Code refers to both domestic law and international law. It appears that this is common ground. The reason that the Civil Service Code bears this meaning is that:

(1) The reference to the law is general and not specific to domestic law. It is apt to include international law because acts of the civil service are attributable to the United Kingdom under international law and therefore if a civil servant acts in a manner that is inconsistent with the requirements of an international treaty or rule of customary international law, that will result in the United Kingdom being in breach of international law: ILC Articles on State Responsibility, Article 4 (Conduct of organs of a State); *Bosnia and Herzegovina v Serbia and Montenegro, ICJ* 26 February 2007, para 385.[2]

(2) The original version of the Civil Service Code included an express reference to international law and international treaty commitments. In 2006, as part of a project to simplify the Code, the wording was changed to refer simply to the law in general. The Government confirmed at the time that no change in substance was intended: "*We felt that the compliance with international law and treaty obligations is implicit in "comply with the law" and did not see the need to give the additional qualification.*" (Summary of Responses to Consultation on a New Civil Service Code, Cabinet Office June 2006, at §35 [B/191]).

(3) This position was reconfirmed on 17 September 2020, by the Minister of State for the Cabinet Office, Lord True, who stated in the House of Lords in response to a question about the scope of the Civil Service Code: "… *Do the Government maintain the position set out by previous Administrations that law includes international law? Yes, they do*." (Hansard, Col 1399 [B/249]).

63. Fourth, the Civil Service Code is binding on civil servants as a matter of domestic law by virtue of section 5(8) of CRAG 2010 (subsection 5(3) of CRAG 2010 also refers to a current Code being "*in force*"). The obligation on civil servants to comply with

[2] *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide*. The relevant passages refers to, "*the well-established rule, one of the cornerstones of the law of State responsibility, that the conduct of any State organ is to be considered an act of the State under international law, and therefore gives rise to the responsibility of the State if it constitutes a breach of an international obligation of the State. This rule, which is one of customary international law, is reflected in Article 4 of the ILC Articles on State Responsibility.*"

international law is therefore one that is binding on them as a matter of domestic legal obligation, just as the obligation to act impartially and objectively.

64. Fifth, since the Civil Service Code is binding under domestic law, Ministers cannot properly instruct civil servants to breach the Civil Service Code, whether it is the duty to act impartially or objectively or the duty to comply with the law and uphold the administration of justice (or another obligation imposed by the Civil Service Code).

65. The Defendants nonetheless submit that civil servants do have an overriding duty to implement Ministerial directions in all circumstances short of an order by a domestic court. Thus,

    (1) At paragraph 31 of the DGR the Defendants submit that that the Claimant is wrong to state that, "*civil servants' terms and conditions of employment* [are capable of] *overriding decisions taken by Ministers*…" that are otherwise lawful.

    (2) At paragraph 27(3)-(5) of the DGR, the Defendants submit that civil servants have no distinct constitutional status or responsibility from Ministers –that they are, in effect, mere cyphers of the will of Ministers. The Defendants further submit that this is reflected in the Civil Service Code which provides that civil servants shall not, "*frustrate the implementation of policies*" and that the service "*supports the government of the day*".

    (3) This position is also reflected in the letter from Mr Tierney on 14 March 2024 in which he stated: "*it would under the Civil Service Code be the responsibility of civil servants to implement the decisions of their Ministers … unless the courts had intervened to find such a decision unlawful*." [B/30].

66. The Defendants are wrong to contend that the Civil Service Code requires the implementation of Ministerial instructions in all circumstances short of a domestic court order:

    (1) The Civil Service Code cannot be overridden by a Ministerial instruction. As explained above, the Code is binding on civil servants as a matter of law and it can only be amended through the statutorily prescribed mechanism of re-publication and laying before Parliament. It cannot be amended by a Ministerial instruction (or Cabinet Office guidance).

(2) The obligation under the Civil Service Code not to frustrate the implementation of Government policies is a facet of the requirement of objectivity and is therefore clearly intended to refer to civil servants not frustrating policies because they conflict with their own personal convictions. It is not a basis for contending that civil servants must act implement policies that clearly breach the law or conflict with the other requirements of the Civil Service Code.

(3) Similarly, the refence in the Civil Service Code to the fact that the civil service supports the Government of the day is a description of the civil service's general functions in the introductory section of the Civil Service Code. The manner in which the civil service is required to support the government of the day is then specified in the substantive provisions of the Code, to which the general description of the civil service's functions is clearly intended to be subject.

(4) The Civil Service Management Code, issued under CRAG 2010 s.3(1), makes clear that the duty to assist Ministers is subject to the Civil Service Code [B/218]:

> "*Civil servants are servants of the Crown and owe a duty of loyal service to the Crown as their employer. Since constitutionally the Crown acts on the advice of Ministers who are answerable for their departments and agencies in Parliament, that duty is, subject to the provisions of the Civil Service Code* […] *owed to the duly constituted Government.*"

(5) The fact that Ministers cannot properly instruct civil servants to breach the obligations set out in the Code is also reflected in the Ministerial Code, which states at §5.1 that Ministers, "*must … not ask civil servants to act in any way which would conflict with the Civil Service Code and the requirements of the Constitutional Reform and Governance Act 2010.*" [B/278]

(6) The Civil Service Management Code also contemplates the situation in which civil servants are instructed to do something that is in breach of the law [B/240]. It requires them to report such matters or, in urgent cases, record their dissent and the reasons for it. The Management Code makes clear however that Civil Servants should not carry out an instruction even in an urgent case that is in clear breach of the law (emphasis supplied):

> "***12.1.2*** *A civil servant should not be required to do anything unlawful. In the very unlikely event of a civil servant being asked to do something which he or she believes would put him or her in clear breach of the law, the matter should be reported* […]
>
> ***12.2.6*** *It will sometimes occur that the instruction* […] *is urgent* […]. *In such cases, the civil servant wishing to raise a concern, if satisfied that there is no alternative action available under the procedure, and provided it would not put him or her in clear breach of the law, should carry out the request or instruction in question and immediately afterwards formally record in writing their dissent and the reasons for it."*

(7) Finally, the Defendant argues that an obligation on civil servants always to follow instructions of Ministers is "*also consonant with basic employment law*" (DGR §27(4)). This is also mistaken. Employment law does not recognise any right for employers to instruct employees to breach the law or their terms and conditions of employment. There is an implied term in all employment contracts that employees are not required to act unlawfully: *Gregory v Ford* [1951] 1 All ER 121; *Morrish v Henlys (Folkstone) Ltd* [1973] IRLR 61.

67. Therefore, duties of civil servants under the Civil Service Code prevail over inconsistent instructions from Ministers.

68. Sixth, it follows from the points made above that the Civil Service Code requires civil servants to comply with international law as a domestic legal obligation and that if a Minister instructs a civil servant to act in a manner that is in breach of international law, the Minister will be instructing the civil servant to act unlawfully as a matter of domestic law because the instruction conflicts with the Civil Service Code.[3]

69. The Claimant accepts that this does not mean that the civil service cannot be asked to implement policies whenever there is a risk, even a substantial risk, that conduct might breach international law. However, as made clear in the Management Code §12.2.6, there are cases where civil servants are entitled to object to the instruction they have been given on the basis that it is unlawful, and the Management Code also indicates that civil servants should not act in cases where it is "*clear*" that by acting they would breach the law [B/240].

[3] The Defendants state at SFG §5(1) that the Claimant does not advance any argument that implementing a ministerial decision not to comply with an interim measure would breach domestic law. This is clearly wrong: it is part of the Claimant's argument that the obligation on civil servants to comply with international law is a domestic legal requirement, imposed on them personally, by s.5(8) of CRAG 2010.

70. Non-compliance with an interim measure indicated by the Strasbourg Court falls into the category of a clear breach of international law (paragraphs 20-23 above). The only answer to this provided by the Defendant is that in *Paladi v Moldova* the Grand Chamber held that there would be no breach of international law if compliance with an interim measure was impossible. This however does not reflect a situation in which a Minister instructs a civil servant not to comply with an interim measure. It refers to a situation in which the State attempts to comply but is unable to do so due to an "*objective impediment*" and where officials take all reasonable steps to comply, whilst keeping the Strasbourg Court informed. That is clearly not the situation envisaged by the Prime Minister in stating that he is prepared not to comply with an interim measure (see paragraphs 49-51 above).[4]

71. The Defendants raise other objections. The Defendants state that if civil servants were not always required to implement Ministerial instructions it would constitute a "*constitutional aberration*" that would place the civil service "*into the position of primary constitutional decision maker*" (SFG §35, 36(2)). This is incorrect. The legal and constitutional scheme created by CRAG 2010 and the Civil Service Code does not mean that civil servants are primary decision makers. They have no proper role in resisting Government policies due to their own contrary convictions, for instance. However, that scheme does make clear that the overriding fidelity of civil servants under the United Kingdom constitution is to the rule of law. The Defendants' objection is, in effect, an objection to the position articulated in §12.2.2, §12.2.6 of the Management Code, which recognises ultimate limits on the rights of Ministers to instruct civil servants to act in a manner that is likely to breach the law.

72. The Defendants also submit that it is "*the logic of the Claimant's position*" that all unincorporated international law is, for all intents and purposes, part of domestic law (DGR §31). This does not follow. The obligation imposed on civil servants to comply with international law does not impose obligations (or create rights) for other persons, such as when a treaty has been implemented by statute. It simply means that as a matter of the terms of service of civil servants, they must not act in breach of international law. The implementation of international treaties does not necessarily involve civil servants,

[4] It is also difficult to conceive how impossibility of compliance could arise in relation to the removal of a person from the country, as opposed to other contexts in which interim measures can be issued.

if it does, civil servants must act compatibly with international law. Breach of an interim measure of the Strasbourg Court, for the reasons explained, constitutes a clear breach of international law.

73. It is also important to be clear that there is no immovable obstacle, as a matter of domestic law, to the Government acting in breach of interim measures of the Strasbourg Court. There is a clear path open to Government to do so: the Second Defendant can amend the Civil Service Code so that it either applies only to domestic law or it makes clear that notwithstanding the duty of civil servants to comply with international law, their duty is to disregard an interim measure issued by the Strasbourg Court if instructed to do so by a Minister.

(b) Does section 5 of SRA 2024 affect the general legal position in relation to asylum-seekers sought to be removed to Rwanda?

74. The Defendant contends that section 5 of the SRA 2024 "*confirms in the specific context of Rwanda*" that civil servants are required to ignore interim measures of the Strasbourg Court if instructed to do so by Ministers. It is said that the general position is "*specifically and expressly confirmed*" by section 5 (DGR §6(1)) and that section 5 provides "*clear confirmation*" of the general position (DGR §6(4)).

75. It is also the Claimant's case that section 5 is merely confirmatory or codificatory of the legal position that applies in respect of removal to other countries. It therefore appears that neither the Claimant nor the Defendant submit that section 5 of the SRA 2024 has any effect on the position that would otherwise apply.

76. The Claimant nonetheless addresses the question of whether section 5 changes the legal analysis set out in the preceding section. It is submitted that it does not do so.

77. The general position, absent the SRA 2024, is as follows. A decision of the Secretary of State to deport a person to Rwanda is a decision taken under a statutory discretion, namely, under Part 4A of the Nationality, Immigration and Asylum Act 2002 as amended by the Nationality and Borders Act 2022.[5] As explained above, if the

[5] A decision to remove a person to their country of origin is taken under powers set out in section 5 and Schedule 2 of the Immigration Act 1971.

Strasbourg Court has issued an interim measure requiring such a person not to be removed from the country, it would clearly breach international law for that removal nonetheless to go ahead. This is the case notwithstanding that the removal of the person would be within the power of the Minister under statute and thus lawful as a matter of domestic law. In such a situation, the Claimant submits, it would be contrary to the Civil Service Code for civil servants to facilitate such a removal.

78. Read in this context, it is clear that section 5 of the SRA 2024 makes no change to the law. It provides:

> *"(2) It is for a Minister of the Crown (and only a Minister of the Crown) to decide whether the United Kingdom will comply with the interim measure.*
>
> *(3) Accordingly, a court or tribunal must not have regard to the interim measure when considering any application or appeal which relates to a decision to remove the person to the Republic of Rwanda under a provision of, or made under, the Immigration Acts."*

79. Section 5 merely confirms what is already the position: that it is for a Minister to decide whether to comply with an interim measure. If the Minister decides not to do so, that would be a clear breach of international law.

80. The merely codificatory character of s.5(2) is apparent from the following:

(1) The terms of subsection (2) itself, which say no more than that it is for a Minister to decide whether to comply with an interim measure.

(2) Section 5(3) makes clear that the purpose of subsection (2) is simply to confirm that courts and tribunals must not give any effect to an interim measure in considering an application or appeal from a decision to remove a person to Rwanda and ensures that domestic courts do not develop the law so as to enforce interim measures. The word "[a]*ccordingly*" demonstrates the integral connection between the two subsections and that the purpose of subsection (2) is as support for subsection (3).

(3) This form of confirmatory or codificatory drafting is supported by the Act read as a whole: other sections contain an analogous approach:

a. Section 1(3) records terms agreed in an international treaty between the Government and the Government of Rwanda.

b. Section 1(4) "*recognises*" that Parliament is sovereign and that the validity of an Act is not affected by international law.

Neither of these provisions has any legal effect other than to confirm an existing legal position.

81. There is nothing in section 5 to suggest that it overrides or repeals the Civil Service Code, or indeed other legal impediments that might exist to Ministers removing persons in breach of an interim measure. For instance, private contractors that are involved in immigration removals might have contractual obligations to act compatibly with international law: such obligations would not be overridden by a decision of a Minister not to comply with an interim measure.

82. The scheme of the Act demonstrates that where Parliament intends to bind officials, courts or tribunals, and override their obligations it does so expressly. Section 2(1), for example, provides that "[e]*very decision-maker must conclusively treat the Republic of Rwanda as a safe country*". Section 2(2) defines "*decision-maker*" to include immigration officers, courts and tribunals. It also includes the Secretary of State, which on conventional principles of statutory construction includes his or her civil servants.

83. Section 5(2) is not however drafted in this manner. On the contrary, it makes clear that it only refers to Ministers acting in person and does not relate to civil servants acting on their behalf (s.5(4)(b)).

84. The Explanatory Note confirms the limited effect of section 5(2), stating that "*Subsection (2) states that only a Minister of the Crown has the ability to decide whether the UK will comply with the interim measure.*" (7 December 2023 [B/385]). There is no suggestion that it is intended to sanction Ministers to act in breach of international law, still less to alter the civil servants' responsibilities under the Civil Service Code. Explanatory notes which "*cast light on the objective setting or contextual scene of the statute, and the mischief at which it is aimed*" are "*always admissible aids to construction*" (Lord Steyn in *R (Westminster City Council) v National Asylum Support Service* [2002] UKHL 38, [2002] 4 All ER 654, at [5]).

85. During the passage of the Bill, on 6 December 2023, the Government published a memorandum concerning the Bill's compliance with the European Convention on Human Rights [B/366-372]. This is also a legitimate aid to ascertaining the purpose and mischief of section 5 since it was a publicly available document available to

parliamentarians.[6] It states in relation to section 5 that its purpose is merely "*to… State that it is for a Minister of the Crown, and a Minister of the Crown only, to decide whether the United Kingdom will comply with a Rule 39 interim measure….*" (emphasis supplied). The use of the word "State" reinforces that the provision is confirmatory or codificatory. The memorandum goes on to confirm that it is no part of the mischief of the section to override the Code or sanction breaches of international law: "[t]*he Government considers that the provision is capable of being operated compatibly with Convention rights, in the sense that it will not necessarily give rise to an unjustified interference with those rights, meaning that the legislation itself will not be incompatible*." (§29) In other words, the Government's position is that section 5 does not sanction breaches of international law.

86. The Defendants state that the Memorandum does not in its terms encompass Article 34, which is not a "*Convention right*" because it is not given effect by the Human Rights Act 1998. However, the purpose of examining external aids is to identify the meaning that would have been conveyed to Parliamentarians and the wider public. Given that the Convention right engaged by clause 5 was Article 34, this is how it would have been understood. Indeed, the Memorandum's title refers to the ECHR in general terms, as does its paragraph 1. Paragraph 5 of the Memorandum identifies the Convention rights raised by the Bill as including Article 13, which is, like Article 34, not given effect by the Human Rights Act 1998. Therefore, on an objective and fair reading of the Memorandum, it clearly indicates that clause 5 is merely codificatory and that it did not sanction any breach of Article 34.

87. This analysis of clause 5 is further supported by Hansard statements made during the course of the passage of the Bill by responsible Ministers.

88. These statements are legitimate interpretative aids in identifying the objective setting, mischief and context of the sections of the Act (e.g. *Williams v Central Bank of Nigeria* [2014] UKSC 10, [2014] AC 1189 at [105]; *The Presidential Insurance Co Ltd v Resha St Hill* [2012[UKPC 33 at [23]). The statements can also be referred to in circumstances in which a provision of an Act is ambiguous or obscure in its effect under the rule in *Pepper v Hart* [1993] AC 593 where the statements clarify the meaning or purpose of a provision.

[6] *R (Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department*, [2022] UKSC 3, [2022] 2 WLR 343 at [30], [58]-[76].

89. The Claimant submits that clause 5 is clearly codificatory and, when read with section 5(3), does nothing more than confirm that decisions about whether to comply with interim measures are to be taken by Ministers and not the courts. However, in order for the Court to reach the conclusion that, as the Defendants contend, section 5 overrides the Civil Service Code obligation on civil servants to comply with international law, it would need to be given an extended meaning as it would change the law as it had previously applied. The existence, nature and extent of that change is unclear and goes beyond the literal wording of the provision.

90. Accordingly, if the court is minded to accede to the Defendant's interpretation of clause 5(2), it should consider the Hansard materials on the basis that the provision is ambiguous as to its effect. An examination of those materials—which is in any event permitted in order to ascertain the purpose and mischief of the provision, as explained above—confirms unequivocally that (i) clause 5 is intended to be merely codificatory, and (ii) its purpose was not to permit breaches of international law or override the Civil Service Code:

    (1) The Secretary of State for the Home Department, when asked whether it would be compatible with international law for a Minister to refuse to comply with an interim measure, confirmed "*that the Government's position is that this is in accordance with international law*", and further confirmed that it was "*absolutely right*" that "*the Bill … simply restates what is the position anyway: that it is the member state that it applies to, not the courts*." (Hansard, 12 December 2023, Col. 751-2) [SB/9] (emphasis supplied).

    (2) The Advocate General for Scotland, Lord Stewart of Dirleton, stated on behalf of the Government on 24 February 2024, that "*Nothing in Clause 5 requires the United Kingdom to breach its international obligations*" (Hansard, 19 February 2024, Col. 477 [B/364] (see also Hansard, 6 March 2024, Col. 1602 [SB/21]) At the Report Stage (House of Lords), Lord Stewart stated that a decision not to comply with an interim measure did not entail a breach of international law, because it is not correct that "*a failure to comply with interim measures automatically involves a breach of international law*" and adding that "*the Bill is in line with international law. …*" (Hansard, 6 March 2024, Col 1601 [SB/21]).

(3) Michael Tomlinson, Minister for Illegal Migration, stated on behalf of the Government in relation to that amendment that it "*… implies that the legislation is not compliant with the rule of law, but I can confirm that it is… There is nothing in the Bill that requires any act or omission that conflicts with our international obligations*", adding that "*… this Bill … reflects the international legal obligations of both the United Kingdom and Rwanda*." (Hansard 18 March 2024, Col. 659 [B/361-3]).

91. The Defendants refer at paragraph 36(6) of the DGR to what they describe as a clear and unambiguous statement by the Minister of State for Illegal Migration at Committee Stage on 17 January 2024 that section 5(2) authorises Ministers to breach international law and overrides the Civil Service Code. However, the passage read as a whole (not in the edited form contained in the DGR) provides no support for the Defendants' case. The Minister stated that if the Government decided not to comply with an interim measure, it would do so "*lawfully*". That is in line with the statements above and, in particular, the statement of Lord Stewart. The Minister's further comment, on which the Defendants rely, that, "[w]*e must go further still*" and "*confirm that the civil service must implement any such decision*" is not directed at clause 5 but the Minister expressly referred to the guidance issued by the Cabinet Office as requiring civil servants to implement Ministerial decisions not to comply with the Civil Service Code [SB/12]. That supports the Claimant's case that it is not the purpose of section 5 to address that issue.

(c) Is the Civil Service Code unclear ?

92. If, contrary to the submissions set out above, it is compatible with the Civil Service Code for Ministers to instruct civil servants not to comply with interim measures indicated by the Strasbourg Court, the Code is misleading in its requirement that civil servants must comply with international law and should make clear that there is an exception to this obligation. Codes intended to assist civil servants in complying with the law must be clear and capable of allowing them to ensure they comply with their legal obligations: *R Equality and Human Rights Commission) v Prime Minister* [2012] 1 WLR 1389 at [93]-[94].

D. CONCLUSION

93. The obligations of civil servants under the Civil Service Code require them to comply with international law and uphold the administration of justice. The consequence is that they are required by their terms of service to comply with interim measures of the Strasbourg Court. This is not a "*constitutional aberration*", as the Defendants submit, but a reflection of the terms of the Civil Service Code, the terms of which were approved and promulgated by the Second Defendant and laid before Parliament. It reflects the important constitutional requirement that the loyalty of civil servants to an incumbent administration does not trump their duty to uphold the law. Nothing in section 5 of the SRA 2024 displaces the established constitutional duties of civil servants under the Civil Service Code.

94. The Court is therefore requested to grant permission for judicial review and allow the claim granting the quashing and declaratory relief sought in the Claimant's draft Order.

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24 May 2024