IN THE HIGH COURT OF JUSTICE **Claim No: _____**
KINGS'S BENCH DIVISION
ADMINISTRATIVE COURT

B E T W E E N:

THE KING

On the application of FDA

Claimant

- and –

(1) SECRETARY OF STATE IN THE CABINET OFFICE

(2) MINISTER FOR THE CIVIL SERVICE

Defendants

STATEMENT OF FACTS AND GROUNDS

References to [XX] below are to the bundle of documents accompanying these Grounds.

A. INTRODUCTION

1. This application for judicial review is brought by the FDA, one of the principal civil service unions. It concerns guidance issued by the Cabinet Office on 29 April 2024 ("**Guidance**") [68] setting out the legal responsibilities of civil servants if the European Court of Human Rights grants interim measures suspending the removal of an asylum-seeker to Rwanda, following the enactment of the Safety of Rwanda (Asylum and Immigration) Act 2024 ("**Safety of Rwanda Act**"), which received Royal Assent on 25 April 2024.

2. The Guidance states that it is for Ministers to decide whether to comply with such an interim measure and that in implementing a decision not to do so, civil servants *"would be operating in accordance with the Civil Service Code"*. The FDA is concerned that in implementing such an instruction civil servants would not be acting in accordance with

the Civil Service Code but contrary to it, because the Civil Service Code requires civil servants to act compatibly not only with domestic law but also with international law. Disregarding an order of the European Court of Human Rights would not be compatible with international law as it would represent a clear breach of Article 34 of the European Convention on Human Rights ("**ECHR**"). The government is wrong to maintain that the Civil Service Code requires civil servants to implement any instruction of a Minister even if it involves a breach of an order of courts. The Civil Service Code requires civil servants to comply with the law. [208-211]

3. The FDA does not expect that civil servants will refuse to implement a Ministerial instruction, however, members involved in deportations to Rwanda have expressed concern that they might act unlawfully under domestic law by facilitating a breach of an interim measure (and potentially be exposed to civil or other liability).

4. The FDA has been engaged in correspondence with the Government on this issue since March 2024. Until 29 April 2024, the Government's position had been that the Civil Service Code requires civil servants to implement any Ministerial instruction even if it requires them to breach a court order, in whatever context, unless the instruction has itself been found to be unlawful by a domestic court. It is not clear whether this is still the Government's position. It is unsustainable. In its Pre-Action Protocol response dated 29 April 2024 [63-67], and in the Guidance [68], the Government now places reliance on the terms of section 5 of the Safety of Rwanda Act and appears to contend that this overrides the obligation under the Civil Service Code that civil servants must comply with international law.

5. The difficulty with the Government's reliance on section 5 (the terms of which were not amended by Parliament at any stage of the Bill's passage) is that it is not a necessary implication from the terms of section 5 that Parliament has sanctioned Ministers to breach international law. On the contrary, the Government made clear to Parliament

that, "*the provision is capable of being operated compatibly with Convention rights"* and that Parliament was therefore not being asked to approve a violation of international law.[1] Indeed, it was an overarching theme of the Government's statements to Parliament on the purpose and effect of the Safety of Rwanda Bill that it could be implemented consistently with international law and did not require or authorise violations of the UK's international commitments.

6. The FDA takes no position on the merits of the government's policy on removals to Rwanda. It brings this action because of the concerns of its members to clarify the meaning and effect of the Civil Service Code and in particular whether it does, as the Government contends, require civil servants to implement directions of Ministers to disregard orders of the European Court of Human Rights.

7. The Government can of course amend the Civil Service Code to make clear that the obligation to comply with international law does not apply in such circumstances. The Government has considered whether to amend the Civil Service Code but has chosen not to do so. Instead, as already explained, it has decided to issue guidance stating that it is the obligation of civil servants to comply with directions of Ministers. However, the Civil Service Code cannot be altered by official guidance any more than it can be overridden by an instruction from a Minister.

8. The claim raises the following question of law which the Court is asked to resolve: Is it consistent with the obligations of civil servants under Civil Service Code for them not to comply with interim measures indicated by the European Court of Human Rights concerning removals to Rwanda if instructed not to comply by a Minister?

9. If the answer is "no", as the FDA contends, the guidance will be unlawful and legally ineffective and the Minister for the Civil Service will need to amend the Civil Service

[1] *"Safety of Rwanda (Asylum and Immigration) Bill European Convention on Human Rights Memorandum",* 6 December at [29] [366-372]

Code. If the answer is “yes”, as the Government contends, then clarity will have been brought to this issue by the Court. The declarations and orders that the Court is invited to make are set out in the enclosed draft final Order.

B. APPLICATION FOR EXPEDITION AND PROCEDURAL ISSUES

(a) Reasons for expedition and proposed timetable

10. In a press conference held on 22 April 2024 the Prime Minister stated that “*the first flight will leave*” in 10 to 12 weeks “*come what may”* and that *“no foreign court will stop us.”* (see paragraphs 75-79 below) [391-397]

11. In order for civil servants to obtain clarity on the legal issue set out above, it is therefore necessary for this claim to be heard and judgment delivered within that timeframe. There also needs to be some time for consequential action taken by the Government without disturbing the Prime Minister’s timescale, should that be necessary. It is therefore submitted that this claim should be heard within five weeks.

12. That is achievable. The issue raised is a defined point of law that does not depend on any significant evidence of fact.

13. The FDA has asked the Government in correspondence to set out the timescale and degree of expedition that it says the court should adopt in determining these proceedings (see letter from Slater Gordon dated 11 April 2024 [43-54]). The Government has not provided any substantive response to that request. The FDA therefore asks that the Court expedite the claim to be heard on a rolled-up basis over one day in the week beginning Tuesday 28 May 2024.

14. The Defendants should be directed to file detailed grounds of defence and any evidence within 14 days of the issue of this claim, i.e. by 16 May 2024. The parties should be able

to agree a timetable for skeleton arguments and the filing of bundles once the hearing date is known.

C. THE CLAIMANT

15. The FDA is an independent, listed trade union which represents public servants in, principally, professional and management roles. It has a broad membership in government departments and agencies. FDA members within the Home Office and other departments are directly involved in the deportation process, and will be involved in removals to Rwanda under the Safety of Rwanda Act ([DP]). The questions raised by this judicial review are of central concern to the FDA and its members.

D. FACTUAL AND LEGAL CONTEXT

(a) The Civil Service Code

16. The Civil Service Code is made by the Minister of the Civil Service under section 5 of the Constitutional Reform and Governance Act 2010 [403-416], 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."*

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

18. 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."

19. The Civil Service Code was last updated by amendment on 16 March 2015 [208-211]. 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"

20. 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"

21. 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

22. Article 25 of the ECHR authorises the European Court of Human Rights to adopt rules of Court.

23. 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 Court's jurisdiction, the Court shall decide on its jurisdiction.

24. Rule 39 of the Rules of Court [442-450]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."

25. 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*."

26. The European Court of Human Rights 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.

27. 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."

28. 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."*

(c) The Safety of Rwanda (Asylum and Immigration) Act 2024 [417-423]

i. Background

29. 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.

30. 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.

31. The Government's policy was challenged in the domestic courts. The Divisional Court held, in broad summary, 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

32. The Safety of Rwanda Act 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)

33. 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".*

34. 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."
>
> ("Speech: PM remarks on Supreme Court Judgement: 15 November 2023"[2]).

[2] https://www.gov.uk/government/speeches/pm-remarks-on-supreme-court-judgement-15-november-2023 [391-397]

ii. The terms of the Act

35. The Safety of Rwanda Act received Royal Assent on 25 April 2024.

36. 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.

37. 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."

38. 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))

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

40. 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."

41. 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).

42. 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."*

43. 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.

iii. Explanatory Memoranda

44. Section 5 – clause 5 of the Bill – was not amended from the version contained in the Bill introduced by the Government to Parliament.

45. The Explanatory Note to Clause 5 (2) provides the following explanation of its effect: "*Subsection (2) states that only a Minister of the Crown has the ability to decide whether the UK will comply with the interim measure*."

46. On 6 December 2023, the Government published the *"Safety of Rwanda (Asylum and Immigration) Bill European Convention on Human Rights Memorandum"* ("Human Rights Memorandum"). [373-390]

47. The Human Rights Memorandum described clause 5 as providing that, "*it is only for a Minister of the Crown to decide whether the United Kingdom will comply with the interim measure*" and records that, "[*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*."[3] In other words, the Government's position is that clause 5, now section 5, does not breach Article 34 of the Convention because it is capable of being operated consistently with Article 34.

iv. Hansard statements

48. Statements made by Ministers in Parliament are legitimate interpretative aids in identifying the 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 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 clarify the meaning of

[3] The memorandum is published with the Bill documents and was referred to in debates, eg in respect of clause 5: HC Debs Col 19 February 2024, cols. 454-454. The memorandum is therefore a public document which is an aid to construction (Day v The Governor of the Cayman Islands [2022] UKPC 6)

purpose of a provision. A number of statements made by the Government made clear that the purpose and effect of the Act in general, and clause 5 in particular, is not to breach international law and that it is capable of being implemented consistently with international law.

49. During the Committee Stage of the Bill in the House of Lords, the Advocate General for Scotland, Lord Stewart of Dirleton, stated on behalf of the Government that:

> *"Nothing that I say or have said at any stage in submissions to your Lordships' Committee should be taken as suggesting that His Majesty's Government do not recognise the importance of international law or its relevance to governmental decision-making. We treat international law with the utmost seriousness and pay close attention to our obligations. But, in the case of this provision, [clause 5] the Minister will be accountable to Parliament for the exercise of that personal discretion, and each decision will be dependent upon the individual facts of each case. Nothing in Clause 5 requires the United Kingdom to breach its international obligations."* (Hansard, 19 February 2024, Col. 477). (emphasis supplied) [364]

50. At the Consideration of Lords Amendments Stage, the House of Commons considered a proposed amendment to Clause 1. The House of Lords Amendment to this introductory clause (Amendment 1) was to add the underlined words, below:-

> *"The purpose of this Act is to prevent and deter unlawful migration, and in particular migration by unsafe and illegal routes, by enabling the removal of persons to the Republic of Rwanda under provision made by or under the Immigration Acts while maintaining full compliance with domestic and international law."*

51. The Commons gave the following reasons for disagreeing to that Amendment:

> *"Because the Commons consider that the provisions of the Bill are compliant with domestic and international obligations, and that it is therefore not necessary to provide expressly that this is the case when setting out the purpose of the Bill."* (Commons Reasons, 18 March 2024).

52. During the Consideration of Lords Amendments Stage, the Rt Honourable Michael Tomlinson, Minister for Illegal Migration, stated on behalf of the Government that:

> *"[A]mendment 1 … implies that the legislation is not compliant with the rule of law, but I can confirm that it is. I do not accept that the Bill undermines the rule of law, and the*

Government take our responsibilities and international obligations incredibly seriously. There is nothing in the Bill that requires any act or omission that conflicts with our international obligations." [362]

53. He stated further:

"As for our obligations, nothing in the Bill requires any act or omission that conflicts with our international obligations. In fact, this Bill is based on compliance by both Rwanda and the United Kingdom with international law in the form of a treaty that recognises and reflects the international legal obligations of both the United Kingdom and Rwanda." (Hansard, 18 March 2024, Col. 659). [363]

54. Finally, Lord Sharpe of Epsom (Parliamentary Under Secretary of State for the Home Office) stated on 22 April 2024: "…*I say gently to the noble Lord, Lord Anderson, and the noble Baroness, Lady Bennett, that the Bill does comply with international law*…" (Hansard 22 April 2024, Col. 1363)

(d) The draft guidance

55. In early 2024, media reports suggested that the Government intended to amend the Civil Service Code, as part of proposals relating to the Safety of Rwanda legislation. 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 ([DP 20]).

56. On 17 January 2024, the Government published a letter from Mr 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*." 69

57. 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."

58. On the same date, the Government published a letter from Sir Matthew to Simon Case, Cabinet Secretary and Head of the Civil Service [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."

59. 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 ([DP24]).

60. 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 sanctions which could arise should they breach the Code ([DP30]).

(e) Correspondence between the FDA and Government and the Guidance

61. 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 ([DP10], [18-23]).

62. The letter also addressed the fact that, given the speed and uncertainty at which events might unfold, it might not be possible for the FDA to issue a further letter under the pre-action protocol for judicial review.

63. On 14 March 2024, Mr Tierney responded [30-31], stating that the FDA's concerns regarding the content of the guidance were premature and unsubstantiated. 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."

64. 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 [32-35].

65. On 21 March 2024, Mr Tierney responded to the FDA stating that he had nothing further to add.[36]

66. On 27 March 2024, the FDA wrote to Sir Matthew Rycroft, Permanent Secretary at the Home Office [37-39]. Mr Rycroft wrote back on 9 April 2024 [40-42] in materially similar

terms to Mr Tierney. He also noted that if after reviewing the final guidance issued by the Cabinet Office they still have concerns they should follow the procedures set out in the Home Office's policy "*Raising a Concern Policy and Procedure (including Whistleblowing)"* which is the *"usual process"* for "*reporting a perceived wrongdoing*". He also mentioned other ways that concerns could be raised.

67. On 11 April 2024, Slater Gordon acting on behalf of the FDA sent a further pre-action protocol letter to the Government [43-54] setting out the grounds for a proposed judicial review of the draft guidance and the final guidance when issued. The letter noted that the final guidance would be considered with care and that it might obviate the need for judicial review proceedings, however, given the extremely tight timeframes before civil servants might be presented with an interim measures indication from the European Court of Human Rights, and given the apparently clear and intractable difference of legal opinion between the FDA and the Government, the pre-action protocol had been sent to ensure proceedings can be brought on an expedited basis should they remain necessary.

68. The pre-action protocol letter again requested that the Civil Service Code be amended and also noted that it was still possible for the Government to introduce an amendment to the Safety of Rwanda Bill to clarify the position of civil servants.

69. The letter concluded by requesting a response by 17 April 2024 and noted that if no satisfactory response was received by the time the Bill received Royal Assent, judicial review proceedings would be issued urgently thereafter.

70. On 17 April 2024 the GLD responded to Slater 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 [55-56].

71. The same day, Slater Gordon responded [57-58], stating that given that the matters raised needed to be resolved in good time before any proposed deportation under the Bill occurred, waiting for 14 days after enactment was unreasonable. The issues had been ventilated and the Government was in a position to respond. In the circumstances, Slated Gordon asked for a response within 3 days of being passed by both Houses. If no such response was forthcoming, Slater Gordon stated then the FDA reserved its right to issue judicial review proceedings without further notice.

72. The Safety of Rwanda Act was passed by Parliament late in its sitting on 22 April 2024.

73. On 26 April 2024, Slater Gordon wrote to the GLD asking to be provided with the final guidance [59-60]. The Government indicated that it would be premature for proceedings to be issued before the Government had responded to Slater Gordon's letter dated 26 April 2024 [61-62]. The Government's pre-action protocol response to Slater Gordon's letter was provided at around 5.30 pm on 29 April 2024 [63-67].

74. At the same time, the Government provided a letter of the same date from Mr Darren Tierney to Sir Matthew Rycroft setting out the Guidance [68]. It 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."

(e) Statement of the Prime Minister on 22 April 2024

75. 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."* ("Speech: Prime Minister Rishi Sunak's statement on the plan to stop the boats: 22 April 2024"[4]) [391-397]

76. This statement (i) referred to the draft guidance and implied that it will be issued in the same form or materially the same form as the draft; and (ii) suggests that Ministers can disregard interim measures indications because the Government has made clear (in the guidance) that civil servants are required to comply with instructions of Ministers to disregard them.

77. The second of these statements suggests that the guidance is intended to not only reflect existing law but to effect a material change in the legal relationship that presently exists between Ministers and Civil Servants and, moreover, that it is the guidance which enables a breach of international law to occur.

78. 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"*. That means that the first flights could leave in the first week of July 2024.

79. The Government therefore appears to be committed to disregarding any interim measures indication of the European Court of Human Rights if one is given. There is

[4] https://www.gov.uk/government/speeches/prime-minister-rishi-sunaks-statement-on-the-plan-to-stop-the-boats-22-april-2024

thus at least a very significant risk that Ministers will instruct civil servants to disregard interim measures indicated by that Court.

E. GROUNDS FOR JUDICIAL REVIEW

80. Under existing guidance issued on behalf of the Home Secretary, if the Government is notified of an interim measure from the European Court of Human Rights suspending a removal or deportation, civil servants are required to defer such action immediately.[5] The Guidance dated 29 April 2024 now requires that: (i) where an interim measure is indicated by the European Court of Human Rights, 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."*

81. 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 implantation of policies once decisions are taken."*

82. The position of the Government has changed significantly. In his letter dated 14 March 2024 [30-31], Mr Tierney stated that:

> "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." (emphasis supplied).

83. The Government's position was that wherever a Minister takes a decision under statutory (or presumably also prerogative) powers then, unless the decision has been quashed or declared unlawful by a domestic court, the Civil Service Code requires the Ministerial decision to be followed. It is unclear whether this remains the Government's position. The Guidance and the Government's pre-action protocol response now rely specifically on section 5 of the Safety of Rwanda Act.

[5] See letter from Sir Matthew Rycroft to Simon Case dated 17 January 2024 (above paragraph 58). [70]

84. The Guidance is, however, wrong in law to state that by implementing a decision of a Minister not to comply with a rule 39 measure, *"civil servants would be operating in accordance with the Civil Service Code"*. They would be acting contrary to the Civil Service Code. This is for the following reasons.

85. **First**, civil servants in the United Kingdom have a separate constitutional status to Ministers and they are subject to obligations which transcend their responsibilities to the Ministers in their department. Thus:

(1) Civil servants are politically impartial, permanent officers of Crown. By contrast with some other countries, such as the United States, even the most senior civil servants are not political appointees. The CRAG Act 2010 s.7(2) and (4)(b) enshrine the principles of objectivity and political impartiality in law.

(2) The Minister for the Civil Service, rather than individual Ministers in each Department, has the power to make regulations and give instructions for the management of the civil service, this includes prescribing the conditions of service of civil servants CRAG Act (s.3(1); Civil Service Management Code, §1).[6]

(3) The Minister for the Civil Service also makes and promulgates the Civil Service Code, which is made under s.5 of the CRAG 2010. This forms part of the terms of service of civil servants and therefore is legally binding on civil servants. The Civil Service Code can only be changed by the Minister of the Civil Service by amending the terms of the Code and he or she must lay the amended Code before Parliament (s.5(5), CRAG 2010).

86. It follows that Ministers cannot override the Civil Service Code by instructing civil servants to act inconsistently with it. This is reflected in the Ministerial Code, which states

[6] The diplomatic service is managed by the Foreign Secretary: s.3(2).

at paragraph 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."*

87. **Second**, the Civil Service Code requires civil servants to observe international as well as domestic law. It states that civil servants shall "*comply with the law*". That the reference to law includes international law has not been disputed by the Government in correspondence and is confirmed by the following:

(1) 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 [XX], [DP]).

(2) A similar reference in the Ministerial Code to the duty to comply with the law, has also been held to include international law*: R (Gulf Centre for Human Rights) v Prime Minister* [2018] EWCA Civ 1885, at [20].

(3) On 17 September 2020, the then-Minister of State for the Cabinet Office, Lord True, 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 [XX]).

88. **Third**, because the United Kingdom has a dualist constitution, international law is not incorporated automatically into domestic law. Therefore a decision taken by a Minister can be perfectly lawful as a matter of domestic law but nonetheless not comply with international law. It therefore does not follow, as the Government has erroneously asserted in correspondence (e.g. paragraph 82 above), that because a decision of a Minister has been taken pursuant to a statutory power and has not been found to be unlawful by a domestic court that the decision is compatible with the Civil Service Code. Were that the case, the obligation on civil servants would be better expressed as purely an obligation to comply with domestic law, since compliance with domestic law would be sufficient to ensure compliance with the Code. However it does not: it includes compliance with international law.

89. This error is apparent in the Guidance published on 29 April 2024 which states that in complying with a Ministerial instruction not to comply with interim measures, officials "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." This elides domestic and international law and suggests that wherever Ministers act under a statutory discretion the Ministerial Code requires officials to implement the decision. That overlooks the fact that the decision might be incompatible with international law.

90. **Fourth**, respecting the orders of courts, whether domestic or international, is fundamental to the rule of law. As the Supreme Court stated in *R (Majera) v Secretary of State for the Home Department* [2021] UKSC 46, [2022] AC 461, 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.*" 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)).

91. Therefore, unless the section 5 of the Safety of Rwanda Act changes the meaning and effect of the Code (addressed below)—it is the obligation of civil servants to comply with final and interim measures of the European Court of Human Rights, which are binding on the United Kingdom in international law. An instruction by Ministers not to comply with such a measure would conflict with the duties of civil servants under the Code.

92. It is suggested in the Government's pre-action protocol response dated 29 April 2024 that there is a fundamental difference between compliance with domestic court orders and compliance with orders of an international court because, *"responsibility for compliance with Rule 39 interim measures does not lie with civil servants. Compliance …is an obligation on the UK as a state party to the ECHR. The UK takes decisions on compliance with such measures through Ministers."* This is not correct:

(1) The acts of civil servants as well as Ministers are attributable to the United Kingdom under international law. The internal arrangements within a State are not relevant to a State's obligation to comply with international law (e.g. ICJ, *Application of the Genocide Convention* (2007), para 385; Article 4, ILC Article of State Responsibility).[7] The requirement imposed on civil servants to comply with international law therefore requires them to comply with rulings of the European Court of Human Rights directed to the United Kingdom.

(2) Moreover, under domestic law, court orders are characteristically addressed to Ministers acting in their official capacity or the Crown. However, civil servants must also comply with them: e.g. *M v Home Office* [1994] 1 AC 377.

93. **Fifth**, the Government's pre-action protocol response and the final Guidance relies specifically on the terms of section 5 of the Safety of Rwanda Act. The pre-action protocol response states at paragraph 15 that Parliament has, "*considered the effect of international law in the case of removals to Rwanda and has made specific provision on it. It has expressly confirmed that the decision whether to comply with any interim measure indicated by the European Court of Human Rights is a matter for Ministers."*

94. However, section 5(2) is very limited in its terms and does not address compliance with international law. It simply provides that a decision whether or not to comply with an interim measure is a matter for Ministers. But as confirmed in the pre-action protocol response, responsibility for compliance with interim measures is and always has been a matter for Ministers (paragraph 16). Section 5(2) therefore simply codifies the existing position.

95. The Explanatory Note confirms the limited effect of section 5(2). It states 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 [XX]). There is no suggestion in the explanatory note that the subsection is intended to sanction Ministers to act in breach of international law still less alter the responsibilities of civil servants under the Civil Service Code.

96. Section 5(2) must also be read together with section 5(3) which states that, *"[a]ccordingly"*, a court or tribunal "*must not have regard to the interim measure*" when considering removals of asylum seekers. The two subsections are clearly intended to

operate together and it is subsection (3) which reveals the purpose of subsection (2). The purpose is to codify and reinforce the dualist system, by which interim measures are directed to the Government and not the Courts and are not enforced and given effect by the courts.

97. This is consistent with the scheme and drafting of the Act as a whole, which contains several provisions that are essentially codificatory or purely exhortatory (e.g. section 1(4) recognising that Parliament is sovereign and validity of an Act is not affected by international law).

98. Section 5(2) does not therefore sanction Ministers to breach the United Kingdom's international obligations. It says nothing about that question. An implication to sanction a breach of international law would need to be implied. However no such implication is warranted: the meaning and effect of the section is clear as set out above.

99. There is also a strong presumption of statutory construction that Parliament does not intend to legislate contrary to international law: e.g. *Assange v The Swedish Prosecutor* [2012] UKSC 22, [2012] 2 AC 471 at 122 (Lord Dyson). There is no basis for departing from that presumption in relation to section 5. On the contrary, the Human Rights Memorandum puts the matter beyond any doubt. It states, "[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*." In other words, the Government's position is that clause 5, now section 5, does not sanction breaches of Article 34 of the ECHR.[8]

[8] One of the explanations for the Government statement is the suggestion (albeit wrong) that interim measures are not binding in international law, e.g. "Rule 39 and the Rule of Law" Policy Exchange, 5 June 2023.

100. Furthermore, the various statements made by Ministers in Parliament set out in paragraphs 48-54 above, reinforce the fact that the purpose and mischief of the legislation as not to sanction Ministers to breach international law and Parliament proceeded on the basis the legislation was compatible with international law.

101. Therefore section 5(2) does not assist the Government's argument. It does not override the obligation under the Civil Service Code that civil servants must act compatibly with international law because Parliament has not required or sanctioned Ministers to act in breach of international law, on the contrary.

102. Finally, the fact the Civil Service Code states that the civil service *"supports the government of the day in developing and implementing its policies"* has no bearing on the analysis (pre-action protocol response, paragraph 17). That general function of the civil service is subject to the various specific obligations imposed on civil servants by the Code, such as honesty, integrity, objectivity and impartiality, and compliance with the law.[9] It does not override them.

103. 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 Civil Service is misleading in its requirement that Civil Servants must comply with international law. It 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].

[9] Employers cannot require employees to comply with unlawful directions, e.g. *Morrish v Henlys (Folkstone) Ltd* [1973] IRLR 61.

F. CONCLUSION AND REMEDIES SOUGHT

104. The Guidance issued by the Government is therefore based on an error of law in stating that it would be consistent with the Civil Service Code for civil servants not to comply with interim measures indicated by the European Court of Human Rights. The Court is therefore asked to grant permission for judicial review and declare that: (1) by requiring civil servants to comply with international law, the Civil Service Code imposes a legal duty on civil servants to respect interim measures indicated by the European Court of Human Rights; (2) if Ministers wish to direct civil servants not to comply with interim measures, the Civil Service Code must be amended; and (3) the guidance published by the Cabinet Office is erroneous in stating that civil servants would be acting in accordance with the Civil Service Code in implementing instructions from Ministers not to comply with interim measures.

105. The Court is also invited to quash the guidance (whether in draft or final form) together with such further or other relief as appropriate to give effect to the judgment of the Court.

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1 May 2024