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You say refoulement, I say refinement… Let's call the whole thing off!

Can a law change the facts? Malcolm Bishop KC & Dr Satvinder Juss

Lawyers now have a new word, courtesy of the Supreme Court—'refoulement'. Well known of course to immigration lawyers, but a rather strange concept to the rest of us, sounding a bit foreign and French even, and so to be treated with caution. But the Rwandan case has opened our eyes to this important concept. We have learnt that non-refoulement is a fundamental principle of international law. It forbids a country receiving asylum seekers from returning them to a country in which there would be 'a reasonable likelihood' of their being at risk of persecution based on 'race, religion, nationality, membership of a particular social group or political opinion'. The unanimous decision of the Supreme Court was that there was a substantial risk of illegal immigrants to the UK after transportation to Rwanda being sent back to their country of origin and thereby being at risk or ill-treatment, torture or even death.

Refoulement is a principle of customary international law, and so applies even to states that are not parties to the 1951 Convention Relating to the Status of Refugees or its 1967 Protocol.

Modern law

The modern law against refoulement stems from one of the darkest periods of history and is an affirmation of the civilised world's resounding condemnation of the refusal of the grant of sanctuary to the vulnerable and needy when it was most needed.

This is when during the years leading up to and during the Second World war, several states forcibly returned or denied admission to German and French Jews fleeing the Holocaust. In 1939, the ocean liner *MS St Louis* sailed from Germany with over 900 Jewish passengers who were fleeing Nazi persecution. The ship sailed for Cuba, where the passengers expected to find refuge. However, Cuba admitted only twenty-eight passengers and refused to admit the rest. The ship then set sail for Florida in the hope of finding refuge in the US. But the US government, and later also Canada, refused to allow the ship to dock and refused to accept any passengers, with President Franklin D Roosevelt remarking that the US could not accept any more European refugees because of its immigration quotas. With conditions on the ship deteriorating and seemingly nowhere else to go, the ship returned to Europe, where 600 of the 937 passengers were later murdered in the Holocaust. Many Americans were embarrassed when the US refused *St Louis* permission to land, but when they discovered what had happened to them afterwards, there was deep national shame. Despite being the home of the League of Nations, Switzerland refused entry to nearly 20,000 French Jews who sought asylum there after the Nazi conquest of France. The Swiss argued the 'boat is full' with respect to refugees during the War, and they were not obligated under existing law to accept French Jews for resettlement. As a result the Jews were forced to return to France, where most were murdered.

History matters

Those who claim all that is history, and the world is now a better place should perhaps pause to consider more recent outrages, including Thailand's forcible repatriation of 45,000 Cambodian refugees at Prasat Preah Vihear, on 12 June 1979. The refugees were forced at gunpoint across the border and down a steep slope into a minefield. Those who refused were shot by Thai soldiers. Approximately 3,000 refugees (about seven per cent) died.

Tanzania's actions during the Rwandan genocide in 1994 plainly violated the non-refoulement principle. During the height of the crisis, when the refugee flow rose to the level of a 'mass exodus', the Tanzanian government closed its borders to a group of more than 50,000 Rwandan refugees fleeing genocidal violence. In 1996, before Rwanda reached an appropriate level of stability, around 500,000 refugees were returned to Rwanda from Zaire.

These violations occurred even though the 1951 Geneva Convention on Refugees attempted to strengthen the doctrine by recognising non-refoulement as a subsidiary of prohibitions on torture. As the ban on torture is *jus cogens*, this linkage rendered the prohibition on refoulement absolute and so asserted its legality for all purposes, including state security, even in time of war. This means that treaties

incompatible with its provisions (including the proposed Rwanda treaty) are null and void.

Thus, not only is the European Convention on Human Rights the sole protector against refoulement, it has been recognised and implemented in other international treaties and UK statutes, and, as the Supreme Court decided, is now firmly embedded in our common law. In fact, the Court's judgment begins with these other treaty obligations. It starts with the Refugee Convention 1951 (at para 20) where Art 33 (1) makes clear that 'No Contracting State shall expel, or return ('refouler') a refugee in any manner whatsoever… where his life or freedom would be threatened …'

As long ago as 1987 when refugee law was still in its infancy, the court had held in *Bugdaycay* that this was a provision 'prohibiting not only direct return of refugees ….but also their indirect return via a third country'. That same provision is repeated almost verbatim in the Torture Convention 1984, (Art 3(i)) where there is 'danger of being subjected to torture', (see para 21). Further, the court placed emphasis on the International Convention on Civil & Political Rights which imposed 'an obligation not to extradite, deport, expel or otherwise remove a person from their territory…', (see para 22).

It is only after this exposition that the court refers to the ECHR (see para 23). This means that disapplying parts of the convention will not of itself disapply the doctrine of 'non-refoulment'. To do so it would be necessary to abrogate all the relevant international treaties which would have undesirable consequences such as the Good Friday Agreement, the devolution settlements among others, but it would also have to declare that the common law itself does not apply.

Principles

It is a nice question whether parliament can abolish the underpinning principles of our constitution. Perhaps a glimpse into past history may help. When King James I believed he could govern through royal proclamations by imposing further duties on imports Coke CJ firmly reprimanded him because, '… the King cannot change any part of the common law, nor create any offence, by his proclamation…' (*Case of Proclamations,* (1610)). When the King's chief messenger, broke into the home of a writer 'with force and arms' and walked off with 100 charts and 100 pamphlets under orders 'to make strict and diligent search for…the author, or one concerned in the writing of several weekly very seditious papers', Lord Camden ruled that the liberties of the individual could not be encroached upon by executive power (*Entick v Carrington,* [1765]). Thus, government officials were subject to the same dictates of the rule of law as are citizens.

Facing the future

Two questions now face the government. The first is procedural, and the second is substantive. Both involve insuperable difficulties. The procedural difficulty lies in getting the law changed before 28 January 2025, which is the latest the general election has to be called. The government could enter into another Treaty with Rwanda. It could hold it to higher standards. But time for that is short. There has to be renewed negotiation, signing, and then ratification. The treaty can then be internalised through domestic legislation. A better alternative is to pass the legislation first for the purposes of public consumption. Then once the treaty stage is done, bring the legislation into effect. However, can the government pass the legislation quickly enough? This will not now be plain sailing, and if the lords block it as is likely, the commons will have to invoke the Parliament Acts, but this means that the government has to pass its Bill twice, leaving a full year between second reading in the commons the first time, and the third reading in the commons the second time. Meanwhile the clock is ticking.

The second difficulty is a substantive one, namely, the change in the law itself. If parliament declares that Rwanda is safe for refoulement can the courts stop refoulement from actually happening? Can a law change the facts? That would involve a novel exercise in the doctrine of parliamentary sovereignty. Parliament legislates on the law. The courts apply the law to the facts as they determine them to be. Here the highest court in the land has found Rwanda to be an unsafe country. So can it now create a legal fiction mandating the courts to treat Rwanda as a safe third country? It might as well tell us the moon is made of cheese or that the Sahara desert is a thriving rain forest. Someone, however, is bound to say that 'the Emperor has no clothes'. Would that someone be the courts again? Likely so, because the Supreme Court having now decided the facts definitively, could easily say that this is a grubby attempt by the executive to trespass on the turf of the judiciary which violates the separation of powers doctrine famously once uttered by Montesquieu as being the hallmark of the British system of governance. Parliament may deem a man to be a woman but still, a man cannot conceive, and a woman cannot begat. As has been pointed out such an enactment would place this country on a par with North Korea, Russia and Iran.

As Lord Denning reminded us: 'To every subject of this land, however powerful, I would use Thomas Fuller's words over three hundred years ago, "Be ye never so high, the law is above you."' NLJ

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