Neutral Citation Number: [2024] EWHC 1729 (Admin)

Case No: AC-2024-LON-001503

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/07/2024

Before:

MR JUSTICE CHAMBERLAIN

- -

Between:

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**

- -

Tom Hickman KC and Jo Moore (instructed by **Slater & Gordon**) for the **Claimant**
Sir James Eadie KC, Cecilia Ivimy and Sean Aughey (instructed by **Government Legal Department**) for the **Defendants and the Interested Party**

Hearing date: Thursday 6 June 2024

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Approved Judgment

This judgment was handed down remotely at 10.00am on Friday 5 July 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Mr Justice Chamberlain:

Introduction

1 This case concerns the legality of guidance ("the Guidance") given by the Cabinet Office on 29 April 2024 to civil servants about their obligations under the Civil Service Code ("the Code"). The Code forms part of civil servants' terms and conditions of employment and includes an obligation to "comply with the law and uphold the administration of justice". The Guidance purports to explain the implications of that obligation in a scenario which could arise if the Government seeks to remove migrants to Rwanda, in accordance with Government policy when the claim was issued.

2 The scenario is that (i) the European Court of Human Rights ("the Strasbourg Court") indicates to the United Kingdom, by way of interim measure under rule 39 of its Rules of Court, that an individual or individuals should not be removed to Rwanda pending the final determination of some legal procedure, domestic or international ("a Rule 39 Indication") and (ii) a Minister decides to proceed with the removal notwithstanding the Rule 39 Indication. I refer to this as the "Guidance scenario".

3 The Guidance says that, in implementing the Minister's decision, civil servants would be acting in accordance with the Code, including its obligation to "comply with the law"; and the Code does not require or permit civil servants to refuse to implement the Minister's decision on the ground that non-compliance with the Rule 39 Indication would or might be contrary to international law.

4 The claimant, the FDA, is one of the principal civil service unions. It says that the Guidance is wrong in law, because, when the Code requires civil servants to comply with "the law", it means both domestic and unincorporated international law. Non-compliance with a Rule 39 Indication in the Guidance scenario would be a clear violation of an obligation binding on the United Kingdom in international law by virtue of Article 34 of the European Convention on Human Rights ("ECHR"). So, as presently drafted, the Code requires that civil servants refuse to act contrary to a Rule 39 Indication. Nothing in the Safety of Rwanda (Immigration and Asylum) Act 2024 ("the 2024 Act") requires or authorises them to do so.

5 The defendants are the Ministers responsible for the civil service. The Home Secretary is an interested party. The defendants and interested party are jointly represented. I refer to their submissions as "the defendants' submissions". They contend that the Guidance contains no error, because decisions on whether the United Kingdom should comply with unincorporated treaty obligations, including under the ECHR, are constitutionally for Ministers and only for Ministers. Section 5(2) of the 2024 Act confirms this with specific reference to the Guidance scenario. The Code must be interpreted in the light of two fundamental constitutional principles: dualism and Parliamentary sovereignty. Accordingly, and especially in the light of s. 5(2), the Code cannot be read as requiring civil servants to override a decision of a Minister, taken lawfully as a matter of domestic law, with respect to the United Kingdom's compliance with unincorporated international law.

6 This claim was filed on 1 May 2024. The claimant sought expedition and directions for a rolled-up hearing. The defendants and interested party did not oppose either of these

proposals. On 3 May 2024, I gave directions which resulted in the case being listed for a rolled-up hearing on 6 June 2024.

7 At that stage, I noted that it appeared from the claim that some civil servants believe (or had been advised) that it would be contrary to their terms and conditions to comply with a Ministerial decision to proceed with removals to Rwanda contrary to a Rule 39 Indication; and the prospect that they would be asked to do so, whilst far from certain, was also not hypothetical, given the Government's public statements on this subject. These included the Prime Minister's statement on 22 April 2024 that "[n]o foreign court will prevent us from getting flights off". In those circumstances, there was a powerful public interest in the determination of the claim before removals to Rwanda begin.

8 Since then, it was announced that a General Election was to be held on 4 July 2024. However, in the light of the Government's indication that it intended to begin removals to Rwanda on 24 July 2024, it was agreed that the rationale for expedition continued to apply. No application to adjourn was made.

9 The hearing therefore proceeded on 6 June 2024. Submissions were made for the claimant by Tom Hickman KC and for the defendants and interested party by Sir James Eadie KC. Further written submissions were made by both parties, with my permission, on 12 June 2024. I am grateful to leading counsel and to their respective legal teams for the clarity and cogency of their submissions.

The relevant law

The Strasbourg Court's power to grant interim relief

10 Courts cannot reach final decisions instantly. Sometimes, one of the parties threatens to do something in the period before the court makes a final decision which would render futile the other party's right to bring the case before the court or would prevent the court from giving effective final relief. In such cases, interim relief enables the court to preserve the status quo and ensure that any final relief is not rendered ineffective by the conduct of one party. Interim relief is commonly available in domestic and international courts and tribunals and in arbitrations.

11 The ECHR does not expressly confer on the Strasbourg Court any power to grant interim relief. By Article 25, however, it does confer on the plenary Court the power to adopt rules of court. That power has been exercised. The current Rules of Court include Rule 39(1), which provides that "in exceptional circumstances" the Strasbourg Court may indicate to the parties any interim measure which it considers should be adopted. Interim measures are "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" and may be adopted "where necessary in the interests of the parties or the proper conduct of the proceedings".

The obligations imposed by Article 34

12 Article 32 provides that the Strasbourg Court's jurisdiction extends to all matters concerning the interpretation and application of the ECHR and its protocols and that the Strasbourg Court is to decide disputes about its own jurisdiction.

13 Article 34 empowers the Strasbourg Court to receive applications from individuals or groups claiming to be victims of a violation by a contracting State of the rights set out in the ECHR and its protocols. This creates what is known as the right of individual petition. In its last sentence, Article 34 also imposes an obligation on contracting states "not to hinder in any way the effective exercise of this right". In *Mamatkulov v Turkey* (2005) 41 EHRR 25, the Grand Chamber of the Strasbourg Court held by a majority of 14-3 that this includes an obligation to comply with Rule 39 Indications. This was a departure from previous case law.

14 In *Mamatkulov*, a Chamber President had granted a Rule 39 Indication that Turkey should not extradite some Uzbek nationals. Turkey went ahead with the extradition anyway. This was held to constitute a breach of Article 34. The key elements of the Grand Chamber's reasoning were as follows:

(a) The undertaking not to hinder the effective exercise of the right of individual application "precludes any interference with the individual's right to present and pursue his complaint before the Strasbourg Court effectively". This includes an obligation to "refrain… from any act or omission which, by destroying or removing the subject matter of an application, would make it pointless or otherwise prevent the Strasbourg Court from considering it under its normal procedure": [102].

(b) Interim measures had been indicated only in limited spheres – in practice, "only if there is an imminent risk of irreparable damage". The vast majority of Rule 39 Indications had been in deportation and extradition proceedings": [104].

(c) Cases where states had failed to comply with indicated measures "remain very rare": [105].

(d) Other international courts, tribunals and bodies – in particular the UN Human Rights Committee, and Committee Against Torture, the Inter-American Court of Human Rights and the International Court of Justice – make interim orders which are legally binding: [111]-[117].

(e) Since 1998, states have been required to recognise the right of individual petition. As a result, "individuals now enjoy at the international level a real right of action to assert the rights and freedoms to which they are directly entitled under the Convention": [122].

(f) Accordingly, "[a] failure by a Contracting State to comply with interim measures is to be regarded as preventing the Strasbourg 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 Art. 34 of the Convention": [128].

15 The Grand Chamber of the Strasbourg Court has since reiterated the binding nature of Rule 39 Indications: see *Paladi v Moldova*, App No. 39806/05, 10 March 2009, [86]-[92]. It held that a State could not excuse non-compliance with a Rule 39 Indication by reference to the "intentions or reasons" underlying its failure. Accordingly, Article 34 would be breached if a State failed to take "all steps which could reasonably have been taken in order to comply with the measure indicated by the Strasbourg Court". Furthermore, "the fact that the damage which an interim measure was designed to prevent subsequently turns out not to have occurred despite a State's failure to act in full

compliance with the interim measure is equally irrelevant for the assessment of whether this State has fulfilled its obligations under Article 34". This meant that it was not open to a State to substitute its own judgment for that of the Strasbourg Court about whether the measure was necessary or about the period during which or extent to which compliance was required. At [92], the Grand Chamber said this:

> "In examining a complaint under Article 34 concerning the alleged failure of a Contracting State to comply with an interim measure, the Strasbourg Court will therefore not re-examine whether its decision to apply interim measures was correct. It is for the respondent Government to demonstrate to the Strasbourg Court that the interim measure was complied with or, in an exceptional case, that there was an objective impediment which prevented compliance and that the Government took all reasonable steps to remove the impediment and to keep the Strasbourg Court informed about the situation."

16 The Court has never doubted the principles established in *Mamatkulov* and *Paladi* that Article 34 imposes a duty on states to comply with Rule 39 Indications, whether or not non-compliance gives rise to harm to the applicant. On the contrary, it has repeatedly reaffirmed those principles: see e.g. *OM and DS v Ukraine*, App. No. 18603/12, 15 September 2022, at [125].

The relationship between international law and domestic law: general

17 In some legal systems, international law is automatically part of domestic law and can be directly enforced in the domestic courts. In the United Kingdom, however, international law is not part of domestic law unless it has been incorporated into domestic law by or under an Act of Parliament or, in the case of customary international law, through the common law, where incorporation is consistent with statute. This is the dualist theory of international law.

18 The present case concerns an obligation which arises under a treaty: Article 34 ECHR. In *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418, at 500, Lord Oliver explained that "a treaty is not part of English law unless and until it has been incorporated into the law by legislation. So far as individuals are concerned, it is *res inter alios acta* from which they cannot derive rights and by which they cannot be deprived of rights or subjected to obligations".

19 In *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2018] AC 61 *(Miller No. 1)*, at [55], the majority of the Supreme Court noted that, under the United Kingdom's dualist theory, "international law and domestic law operate in independent spheres". This theory was based on two propositions:

> "The first is that treaties between sovereign states have effect in international law and are not governed by the domestic law of any state… The second proposition is that, although they are binding on the United Kingdom in international law, treaties are not part of United Kingdom law and give rise to no legal rights or obligations in domestic law."

At [57], the majority said that the dualist theory was "a necessary corollary of Parliamentary sovereignty" and approved Professor Campbell McLachlan's statement that "[i]f treaties can have no effect within domestic law, Parliament's legislative supremacy within its own polity is secure": *Foreign Relations Law* (2014), para. 5.20. See also [167] (Lord Reed) and [244] (Lord Carnwath).

20 These orthodox statements of constitutional principle were reaffirmed by the Supreme Court in *R (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26, [2022] AC 223, [77]-[78] (Lord Reed).

The status of the Article 34 obligation in domestic law

21 Many of the United Kingdom's obligations under the ECHR have been incorporated into domestic law by the Human Rights Act 1998 ("the HRA"), s. 6 of which imposes on public authorities (subject to the exceptions contained in that section) the duty not to act incompatibly with "the Convention rights". These are defined in s. 1 and set out in Schedule 1 to the HRA. They do not include the right of individual petition in Article 34, with its correlative obligation on States to comply with a Rule 39 Indication. So, Article 34 is unincorporated international law.

The Ministerial Code

22 Written guidance to Ministers of the Crown on the standards of conduct expected of them was first given by Clement Attlee in 1945. Updated versions have been issued by subsequent Prime Ministers: see *R (FDA) v Prime Minister* [2021] EWHC 3279 (Admin), [2022] 4 WLR 5, [5] (Lewis LJ and Steyn J). The version issued in 2010 by David Cameron provided as follows at paragraph 1.2:

> "The Ministerial Code should be read alongside the Coalition agreement and the background of the overarching duty on Ministers to comply with the law including international law and treaty obligations and to uphold the administration of justice and to protect the integrity of public life." (Emphasis added.)

23 In 2015, paragraph 1.2 was amended to read as follows:

> "The Ministerial Code should be read against the background of the overarching duty on Ministers to comply with the law and to protect the integrity of public life."

24 The decision to delete the words "including international law and treaty obligations" was the subject of a claim for judicial review, for which permission was refused by Mitting J: *R (Gulf Centre for Human Rights) v Prime Minister* [2016] EWHC 1323 (Admin)). The Court of Appeal (Lord Burnett CJ, Sir Terence Etherton MR and Hamblen LJ) dismissed the appeal on the sole ground that the deletion did not involve any change of substance: [2018] EWCA Civ 1855. The key parts of their reasoning were as follows:

(a) The 2010 version of the Code did not impose any freestanding duty on Ministers in relation to compliance with the law, whether domestic or international. It simply referred to the "overarching" duty which Ministers already owed. This was a reference to "existing duties outside the Code": [19].

(b) The reference to "international law and treaty obligations" was subsumed with the stated duty 'to comply with the law'". These were "not independent obligations, but simply part of the 'overarching' duty of compliance with the law": [20].

(c) The relevant duty in both the 2010 and the 2015 versions of the Code was the duty "to comply with the law". Insofar as that duty includes international law and treaty obligations, they are included: [21]-[22].

(d) The deletion of the words "including international law and treaty obligations" does not involve any change of substance. This is so as a matter of ordinary language and is confirmed by statements made in Parliament, by the Cabinet Office and in the proceedings: [23] and [24].

The constitutional position of civil servants, the Civil Service Code and the Civil Service Management Code

25 The Civil Service Code was first published in its current form in 1995 and came into force in 1996. It was stated at that time that the purpose of the Code was "to set out with greater clarity and brevity than existing documents the constitutional framework within which all civil servants work and the values which they are expected to uphold": *The Civil Service: Taking Forward Continuity and Change*, Cmd 2748, para. 2.8. The Code has been revised on a number of occasions since, most recently in 2015. The history of the Code is explained more fully in House of Commons Library Standard Note SN/PC/6699, published on 18 March 2015.

26 Until 2006, the Code provided that civil servants should recognise "the duty to comply with the law, including international law and treaty obligations, and to uphold the administration of justice". In 2006, there was a consultation on amending the Code to make it shorter and more accessible. In the consultation draft, the text on the duty to comply with the law was moved to a section headed "Integrity" and amended to read: "You must… comply with the law".

27 In the consultation, the Council of Civil Service Unions commented that "there should be at least a footnote reference to the fact that 'the law' must include international law and treaty obligations which we accept are in themselves effected in the United Kingdom through Act of Parliament". The Government's response was to say:

> "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."

The final wording of the 2006 version was "You must… comply with the law and uphold the administration of justice". This wording remains in the current version.

28 Originally non-statutory, the management of the civil service and the Code were put on a statutory footing by the Constitutional Reform and Governance Act 2010 ("CRAGA").

29 Section 3(1) of CRAGA confers on the Minister for the Civil Service the power to manage the civil service. Section 5(1) requires the Minister to publish a code of conduct for the civil service ("the Code"). Section 5(5) requires him to lay the Code before

Parliament. Section 5(8) provides that the Code forms part of the terms and conditions of service of any civil servant covered by it.

30 Section 7 sets out the minimum requirements for the Code. It must require civil servants to carry out their duties for the assistance of the administration as it is duly constituted for the time being, whatever its political complexion (s. 7(2)). It must also require civil servants to carry out their duties (a) with integrity and honesty and (b) with objectivity and impartiality (s. 7(4)).

31 Section 9(2) and (3) enable civil servants covered by the Code to complain to the Civil Service Commission if they have reason to believe that they are being, or have been, required to act in a way which conflicts with the Code or that another civil servant is acting or has acted in a way that conflicts with the Code. The Commission may then make recommendations about how the matter is to be resolved: s. 9(5).

32 In its current version (dating from 2015), the Code is divided into three sections: (1) Civil Service values; (2) standards of behaviour; and (3) rights and responsibilities.

33 The first section sets out general principles, including the following:

> "The Civil Service is an integral and key part of the government of the United Kingdom. It supports the government of the day in developing and implementing its policies, and in delivering public services. Civil servants are accountable to ministers, who in turn are accountable to Parliament."

The footnote to this provision (footnote 3) says:

> "Civil servants advising ministers should be aware of the constitutional significance of Parliament, and of the conventions governing the relationship between Parliament and the government."

The values are further defined as follows:

- 'integrity' is putting the obligations of public service above your own personal interests
- 'honesty' is being truthful and open
- 'objectivity' is basing your advice and decisions on rigorous analysis of the evidence
- 'impartiality' is acting solely according to the merits of the case and serving equally well governments of different political persuasions.

34 The second section sets out standards of behaviour. Under the heading "Integrity", there is this:

> "You must […] comply with the law and uphold the administration of justice".

Under the heading "Objectivity", the Code provides:

> "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."

Under the heading "Political Impartiality", the Code provides:

> "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"

35 The third section deals with how the Code is to be enforced. It provides for civil servants to raise complaints about breaches of the Code within departments, and, if the issue is not resolved, with the Civil Service Commission. The Code goes on to say this:

> "If the matter cannot be resolved using the procedures set out above, and you feel you cannot carry out the instructions you have been given, you will have to resign from the Civil Service."

36 A much more detailed set of rules is contained in the Civil Service Management Code ("the Management Code"). The most recent version, dated November 2016, states in its Introduction that it was issued "under the authority of Part 1 of [CRAGA] under which the Minister for the Civil Service has the power to make regulations and give instructions for the management of the Civil Service, including the power to prescribe the conditions of service of civil servants" and after consultation with the recognised trade unions.

37 Paragraph 12.1.2 of the Management Code provides:

> "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 to a senior officer or to the Personnel Director or to an official nominated by the department or agency, who should if necessary seek the advice of the Legal Adviser to the department."

38 Paragraph 12.1.6 provides:

> "It will sometimes occur that the instruction which is subject to complaint under paragraph 16 of the Civil Service Code is urgent, and the full process for internal review cannot be completed within the timescale for the action in question. Events may develop so quickly that there is insufficient time to complete

> the steps described, or senior staff may not be immediately available. 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."

The Rwanda policy

39 In 2022, the Governments of the United Kingdom and Rwanda entered into an arrangement known as the Migration and Economic Development Partnership ("the MEDP"), under which certain people claiming asylum in the United Kingdom would not have their claims considered here but would instead be sent to Rwanda to claim asylum there. The legality of the policy was challenged before this Court.

40 Some of the claimants sought interim relief. That was initially refused by Swift J on 10 June 2022. The Court of Appeal dismissed an appeal on 13 June 2022. On 14 June, an application for permission to appeal was refused by the Supreme Court and three claimants applied to the Strasbourg Court for interim measures. At around 6pm, the Strasbourg Court gave a Rule 39 Indication in one case that the applicant should not be removed to Rwanda "until 3 weeks after the delivery of the final domestic decision in the ongoing domestic judicial review proceedings". On the evening of the same day, in the light of and in reliance on this Rule 39 Indication, the Court of Appeal granted short-term interim relief. Rule 39 Indications were later given in certain other cases. The Government did not contest the continuation of the interim relief granted by the Court of Appeal and the hearing listed to consider that issue was vacated. The Divisional Court said: "The practical consequence of the grant of interim measures has been that no removals to Rwanda have taken place either on 14 June 2022 or since": see *R (AAA) v Secretary of State for the Home Department* [2022] EWHC 3230 (Admin), [2023] HRLR 4, [7] (Lewis LJ and Swift J).

41 The Divisional Court held that the Rwanda policy was lawful, though it quashed the individual decisions before it. The Court of Appeal (by a majority) held that the Rwanda policy was unlawful. On 15 November 2023, the Supreme Court unanimously agreed, holding that there were substantial grounds for believing that asylum seekers removed to Rwanda would face a real risk of refoulement (i.e. removal to a country where their life or freedom would be at risk). This was prohibited not only by Article 3 ECHR, but also by a number of other international conventions to which the United Kingdom is a party and arguably by customary international law too. The principle of non-refoulement was, therefore, "a core principle of international law, to which the United Kingdom Government has repeatedly committed itself on the international stage, consistently with this country's reputation for developing and upholding the rule of law": [2023] UKSC 42, [2023] 1 WLR 4433, [26].

42 The Government responded to the Supreme Court's decision by announcing a new treaty containing what it said were substantial new safeguards and a new Bill, which became the 2024 Act. At a press conference on the afternoon of 15 November 2023, the Prime Minister (Rishi Sunak) said this:

> "…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."

The 2024 Act

43 The 2024 Act received Royal Assent on 25 April 2024 and, pursuant to s. 10(1), entered into force on that day, which was also the day on which the Rwanda Treaty was ratified by the United Kingdom.

44 The overarching purpose of the 2024 Act is set out in s. 1(1): "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". Section 1(2) provides that, to advance that purpose:

> "(a) the Rwanda Treaty has been laid before Parliament under section 20 of [CRAGA] 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."

45 Section 1(4) provides:

> "It is recognised that—
>
> (a) the Parliament of the United Kingdom is sovereign, and
>
> (b) the validity of an Act is unaffected by international law."

46 Section 1(5) provides that a "safe country"

> "(a) means 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, and

> (b) includes, in particular, a country—
>
> (i) from which a person removed to that country will not be removed or sent to another country in contravention of any international law, and
>
> (ii) in which any person who is seeking asylum or who has had an asylum determination will both have their claim determined and be treated in accordance with that country's obligations under international law."

47 Section 1(6) comprehensively defines "international law".

48 Section 2(1) requires that every decision-maker "must conclusively treat Rwanda as a safe country". "Decision-maker" for these purposes means the Secretary of State or an immigration officer when making a decision relating to the removal of a person to Rwanda, or a court or tribunal when considering such a decision: s. 2(2). Section 2 then provides as follows:

> "(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."

49 Section 3 disapplies certain provisions of the HRA.

50 Section 4(1) provides that s. 2 does not prevent the Secretary of State or an immigration officer from considering "whether the Republic of Rwanda is a safe country for the person in question, based on compelling evidence relating specifically to the person's particular individual circumstances (rather than on the grounds that the Republic of Rwanda is not a safe country in general)" and does not prevent a court or tribunal considering a review of, or an appeal against, a relevant decision "to the extent that the review or appeal is brought on the grounds that the Republic of Rwanda is not a safe country for the person in question, based on compelling evidence relating specifically to

the person's particular individual circumstances (rather than on the grounds that the Republic of Rwanda is not a safe country in general)".

51 Section 4(2) provides that s. 4(1) does not permit a decision-maker (including a court or tribunal) from considering any matter, claim or complaint "to the extent that it relates to the issue of whether the Republic of Rwanda will or may remove or send the person in question to another State in contravention of any of its international obligations (including in particular its obligations under the Refugee Convention)".

52 Section 4(3) and (4) restrict the power of a court or tribunal considering a review of, or an appeal against, a "relevant decision" (defined in s. 4(7)) to grant an interim remedy that "prevents or delays, or that has the effect of preventing or delaying, the removal of the person to the Republic of Rwanda". Such a remedy may be granted "only if the court or tribunal is satisfied that the person would, before the review or appeal is determined, face a real, imminent and foreseeable risk of serious and irreversible harm if removed to the Republic of Rwanda".

53 Section 5 provides as follows:

> "**Interim measures of the European Court of Human Rights**
>
> (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—
>
> …
>
> (b) a reference to a Minister of the Crown is to a Minister of the Crown acting in person."

The Guidance

54 On 17 January 2024, while the Bill was before Parliament, the Government published a letter from Darren Tierney, the Director General of the Propriety and Constitution Group in the Cabinet Office, to Sir Matthew Rycroft, Permanent Secretary in the Home Office. In the letter, Mr Tierney said that, if the Bill was enacted in its then current form, guidance would be issued to civil servants to set out the implications of clause 5 for Ministers and civil servants. The letter continued:

> "As a matter of United Kingdom 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 United Kingdom'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."

55 On the same date, the Government published a letter from Sir Matthew Rycroft to Simon Case, Cabinet Secretary and Head of the Civil Service, stating an intention to issue guidance to case workers about what to do in the event of a Rule 39 Indication. The draft guidance was 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."

56 On 14 March 2024, Mr Tierney responded 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."

57 There was some further correspondence, followed by a letter before claim from the FDA on 11 April 2024.

58 The final version of the Guidance was issued after the Bill had received Royal Assent. It is as follows:

> "As a matter of United Kingdom 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 United Kingdom'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."

The issues

59 I have addressed the issues arising in this case in what I consider the most logical order:

(a) The legal effect in international law of a Rule 39 Indication in the Guidance scenario.

(b) The legal effect in domestic law of a Rule 39 Indication in the Guidance scenario.

(c) The constitutional role and duties of civil servants (independent of the Code).

(d) The effect in domestic law of s. 5 of the 2024 Act.

(e) The principles governing the interpretation of the Code.

(f) The proper interpretation of the Code.

(g) Is the Code sufficiently clear?

60 On some of the issues there was no dispute between the parties. On others, there were only minor differences of nuance. Nonetheless, on each issue, I have recorded the parties' respective positions before stating my conclusions.

Issue (a): The legal effect in international law of a Rule 39 Indication in the Guidance scenario

The claimant's submissions

61 The claimant notes that the Strasbourg Court has held that a failure by a State to comply with an interim measure constitutes a breach of the State's obligation under Article 34 ECHR: see *Mamatkulov*, [128]; *Paladi*, [90]; *OM and DD v Ukraine*, [125]. Non-compliance would be a "clear breach" of international law, as that term is used in the Management Code. The Code requires a civil servant to refuse to implement an instruction which is in clear breach of the law, whether domestic or international.

The defendants' submissions

62 The defendants note that the ECHR contains no express provision empowering the Court to grant indications of interim measures. Rule 39 of the Rules of Court is not part of the ECHR itself and the Rules are not binding in international law in and of themselves. Article 34 ECHR is unincorporated international law. On the current state of the case law, the Strasbourg Court has held that failure to comply with a Rule 39 Indication "could" give rise to a violation of Article 34: *Paladi*, [86]. But not every non-compliance with an interim measure infringes Article 34. Accordingly, a decision by a Minister not to comply with an interim measure "may" give rise to a breach of Article 34, but will not necessarily do so. Accordingly, the claimant is wrong to say that such a decision would constitute a "clear breach" of Article 34. In any event, it is not necessary to determine this issue for the purposes of this claim.

Discussion: justiciability

63 The defendants did not advance a positive submission that a state's obligations under Article 34 ECHR were non-justiciable before a domestic court. I have nonetheless considered whether I should say anything about those obligations. As a general proposition, it is "axiomatic that municipal courts have not and cannot have the competence to adjudicate upon or to enforce the rights arising out of transactions entered into by independent sovereign states between themselves on the place of international law": *J.H. Rayner*, at p. 499. This general proposition does not, however, prevent domestic courts from considering questions about the effect of international law, if and to the extent that those questions are relevant to a justiciable dispute about domestic law. One way that international law may become relevant to such a dispute is through incorporation by statute or contract: ibid., at p. 500.

64 Incorporation provides what has been termed a "domestic foothold for international law". Other circumstances where a domestic foothold has been identified include those where a rule of customary international law forms part of the common law, where a party attempts to justify a defamatory allegation that a person has acted in breach of international law and (more controversially) where an administrative decision-maker has relied on an interpretation of international law which is challenged: see *Law Debenture Trust Corporation Ltd v Ukraine* [2023] UKSC 11, [2024] AC 411, [158]-[159]. In cases

in the latter category, courts have been more willing to decide questions of unincorporated international law where there is a body of jurisprudence on which they can draw. The paradigm case is the ECHR: see *R (Corner House Research) Director of the Serious Fraud Office* [2008] UKHL 60, [2009] 1 AC 756, [44].

65 It is no part of the claimant's case that the Article 34 obligation is incorporated by statute, but it is very much part of its case that the obligation is incorporated by contract, since the Code is part of the terms and conditions of every civil servant to whom it applies. On the claimant's case, the Code imports an obligation to comply with international law, which includes an obligation to comply with Rule 39 Indications. The claimant submits that, at least in the Guidance scenario, that obligation is devoid of any conceivably material qualification, hence non-compliance would involve a "clear breach" of international law.

66 In responding to that case, the defendants have joined issue with the claimant's submission that a decision not to comply with a Rule 39 Indication in the scenario to which the Guidance relates would give rise to a "clear breach" of Article 34. There are, they submit, circumstances in which such a decision could be consistent with Article 34.

67 If the defendants' submission were correct, it might be unnecessary to consider the extent to which the Code permits a civil servant to comply with a Ministerial instruction which is *clearly* in breach of international law. In other words, the question whether the submission is correct is one which arises for decision *en route* to deciding the arguable issues of domestic law that arise in this case. In those circumstances, there is, in my judgment, no good reason to avoid answering it.

68 Moreover, although Article 34 ECHR is unincorporated, it is hardly the kind of provision on which there is "no judicial authority" or which it would be necessary to interpret "from scratch", to adopt the language of Lord Bingham in *Corner House*, at [44]. On the contrary, there is an established body of jurisprudence from the Strasbourg Court, whose judgments are a routine source of interpretive authority for domestic courts.

Discussion: the legal effect of a Rule 39 Indication in the Guidance scenario

69 The Guidance scenario involves a Rule 39 Indication that the United Kingdom should not remove one or more individuals to Rwanda pending the determination of some legal procedure. In that scenario, the consistent jurisprudence of the Strasbourg Court establishes with clarity that a Ministerial decision not to comply with the Rule 39 Indication would put the United Kingdom in violation of Article 34 ECHR and therefore in breach of international law. The defendants' suggestion that there is or might be any real doubt about this does not stand up to scrutiny.

70 In *Mamatkulov*, there was a Rule 39 Indication that the applicants should not be extradited, but the Turkish Government decided to extradite them anyway: see at [24]-[27]. There was no doubt that the Turkish authorities could have complied with the Rule 39 Indication by not extraditing the applicants; they chose not to comply. The Strasbourg Court held that non-compliance was a violation of the obligation not to hinder the effective exercise of the right of individual petition: [128]. These facts are in all material respects analogous to those in the Guidance scenario.

71 In *Paladi*, the Rule 39 Indication was that the applicant should not be transferred from a specialist hospital: see at [54]. He was in fact transferred out of that hospital for a period, before being transferred back. The applicant submitted that the national authorities had "deliberately disregarded the interim measure": [80]. The respondent state argued that there had been difficulties in communicating the Rule 39 Indication, that they had "no intention of disregarding the interim measure" and that in any event no irremediable damage had been caused: [82]-[83]. In those circumstances, the Grand Chamber held that Article 34 would be breached if a contracting state "fail to take all steps which could reasonably have been taken in order to comply" with a Rule 39 Indication (see at [88]) and that, in a case of non-compliance, it was for the government to establish "an objective impediment which prevented compliance and that the Government took all reasonable steps to remove the impediment and to keep the Court informed about the situation" (see at [92]). The Court went on to reject the state's plea that compliance was not possible on the facts: [102].

72 It can thus be seen that the statements of principle at [88] and [92] of *Paladi* address the factual scenario where a state *aims to comply* with a Rule 39 Indication, is faced with an "objective impediment" in doing so, takes all reasonable steps to remove the impediment and keeps the Strasbourg Court informed about the situation. The Guidance, by contrast, addresses the very different scenario, contemplated by s. 5(1) and (2) of the 2024 Act, where a Rule 39 Indication is given "in proceedings relating to the intended removal of a person to the Republic of Rwanda" and a Minister takes a deliberate decision that the United Kingdom *will not comply* with the Rule 39 Indication. In that situation, there would be no good faith effort to comply. There is a "reasonable step" the United Kingdom could have taken if it had wished to comply: i.e. refrain from removing the individual(s). There could be no plausible suggestion of any "objective impediment" to compliance of the kind referred to in *Paladi*. Non-compliance in this scenario would clearly give rise to a violation of Article 34, which is binding on the United Kingdom in international law.

73 Although Sir James did not formally concede the correctness of this analysis, he made no real attempt to gainsay it. It is true that the ECHR contains no express obligation to comply with Rule 39 Indications, but the significance of this point should not be overstated. Article 34 does contain an express obligation not to hinder in any way the effective exercise of the right of individual petition; most systems of adjudication regard interim relief as an essential tool in ensuring the effectiveness of the right to bring cases before the court; and Article 32 establishes the Court as arbiter of the interpretation of the ECHR.

74 As Sir James pointed out, the Strasbourg Court is not bound by its own previous decisions and it is always open to a party to invite the Court to change course. That, however, is true of most apex courts, including the United Kingdom Supreme Court. If the theoretical possibility of a change of course were a sufficient basis to regard a legal proposition as unclear, few if any propositions of law could ever be described as clear. A proposition about the effect of the ECHR which is based on clear and consistent case law of the Grand Chamber of the Strasbourg Court can be regarded as clearly established, at least in the absence of some indication of an impending change of course by that Court. On this topic, there is no such indication.

Issue (b): The legal effect in domestic law of a Rule 39 Indication in the Guidance scenario

75 There was no dispute between the parties about the principles relevant to the status of international law in the domestic legal order. I have set out those principles and discussed their application in the Guidance scenario: see [17]-[21] above.

76 International law and domestic law operate on "different planes" (or, to use the language of the Supreme Court in *Miller No. 1*, in "independent spheres"). The obligations imposed by Article 34 ECHR (including the obligation to take all reasonable steps to comply with a Rule 39 Indication) are binding on the United Kingdom in international law but have not been incorporated into domestic law. On the plane of international law, a decision not to comply with a Rule 39 Indication would put the United Kingdom in breach of the law. On the plane of domestic law, however, neither the United Kingdom Government, nor any of the Ministers through whom it acts, is obliged to act so that the United Kingdom complies with a Rule 39 Indication.

77 There is a strong domestic convention that the Government will act so as to comply the United Kingdom's obligations under international law. (On one view, compliance with international law is an aspect of the rule of law, albeit one which falls outside the purview of the domestic courts: see e.g. Bingham, *The Rule of Law* (2010), pp. 110-111.) As with domestic law, there will inevitably be situations in which there is a risk – sometimes a substantial risk – that a proposed course of action will violate international law. The Government will sometimes decide to run that risk. It will generally do so on the basis that there is at least a properly arguable case that what it proposes to do is consistent with international law.

78 There have, however, been rare cases where the Government has decided to do something which clearly (and sometimes admittedly) violates international law. This has potentially serious consequences for the United Kingdom's international reputation and foreign relations. Ministers are answerable to Parliament for such decisions. In some circumstances, decisions may also be reviewable in court (for example, where it is alleged that the decision-maker has had regard to irrelevant factors, failed to have regard to one or more mandatorily relevant factors or acted irrationally).

79 For present purposes, however, the critical point is that a decision by the Government to act in a way which clearly violates the United Kingdom's international law obligations is not, *ipso facto,* contrary to domestic law. In our dualist legal system, such a decision may be contrary to a strong convention, but – in domestic law terms – is permissible in principle. Mr Hickman emphasised the special importance of complying with court orders by reference to the Supreme Court's decision in *R (Majera) v Secretary of State for the Home Department* [2021] UKSC 46, [2022] AC 461. He rightly accepted, however, that the orders in question in that case were of domestic courts and there was no domestic law rule requiring compliance with the orders of international courts. In domestic law terms, no proper analogy can be drawn between an order of a domestic court and a Rule 39 Indication by the Strasbourg Court.

Issue (c): The constitutional role and duties of civil servants (independent of the Code)

The claimant's submissions

80 The claimant submits that civil servants have a "constitutional personality" which is distinct from that of Ministers. This is recognised by Part 1 of CRAGA, s. s.7(4)(b) of which obliges them to act with objectivity and impartiality and subject to the additional obligations imposed on them by the Code. The Code can only be amended by the Minister for the Civil Service (who is also the Prime Minister) and, by s. 5(1) and (5) of CRAGA, must be laid before Parliament. One consequence of this distinct constitutional personality and responsibility is that, 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: see the Cabinet Manual paras 2.21, 2.28 and 2.29.

The defendants' submissions

81 The defendants take issue with the submission that civil servants have a distinct constitutional personality. Civil servants are servants of the Crown. The Crown acts through its Ministers, who are accountable to Parliament. Civil servants assist Ministers by advising on decisions and implementing them. But the civil service are not constitutional decision makers. In accordance with the *Carltona* principle, Ministers may act through civil servants, but decisions of civil servants are, constitutionally, attributed to the Minister: see *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560. The fact that, in the pre-election period, civil servants are authorised to hold discussions with the Shadow Cabinet does not affect this.

82 This constitutional position is reflected in the Code, which provides that civil servants are an integral part of the government of the United Kingdom and accountable to Ministers, who are accountable to Parliament. The Code provides that civil servants must not "frustrate the implementation of policies once decisions are taken by declining to take or abstaining from action which flows from those decisions". It also requires that civil servants must "act in a way which deserves and retains the confidence of ministers". These obligations are also consonant with basic employment law and the duty of trust and confidence, which is implied in all employment contracts.

Discussion

83 I am not convinced that it is necessary, or would be fruitful, to resolve the dispute about whether civil servants have a "distinct constitutional personality". It is unclear precisely what this phrase means or what legal consequences it would entail. For the purposes of this case, and before considering the effect of the Code, it is sufficient to state three simpler propositions about the United Kingdom constitution, on which the parties are agreed. First, it is Ministers (who are accountable to Parliament) who decide United Kingdom Government policy. Second, the role of civil servants is to advise Ministers, implement United Kingdom Government policy and (where authorised to do so) take decisions in the name of the relevant Minister. Third, both Ministers and civil servants must act consistently with domestic law.

84 The second of these propositions is supported, not undermined, by the convention that civil servants liaise with members of the Shadow Cabinet during the pre-election period.

Even in the pre-election period, when convention imposes constraints on the making of new policy decisions, policy remains the responsibility of Ministers. Liaison between civil servants and members of the Shadow Cabinet is appropriate precisely because the latter may shortly become Ministers.

85 The third proposition rarely gives rise to any practical difficulty, because the obligation to act in accordance with domestic law is recognised by Ministers and there are established processes to ensure that it is fulfilled. In cases where a Minister's legal advice suggests that there is a risk that a particular course of action would be unlawful as a matter of domestic law, the Minister is entitled to decide to run that risk; and civil servants (who by convention rely on the same legal advice) are obliged to implement the Minister's decision. But a Minister may not instruct civil servants to do something which is clearly contrary to domestic law. If the Minister does, the civil servant must refuse. This is reflected in para. 12.1.6 of the Management Code, which explains that, in an urgent case, a civil servant who has concerns about a Ministerial instruction should implement it and document the concerns, "provided it would not put him or her in clear breach of the law".

86 Sir James accepted that civil servants would be obliged to refuse to comply with a Ministerial instruction if, for example, it was contrary to the order of a domestic court. In that case, the order would impose personal obligations on the civil servants; they would be personally liable for breach of those obligations; and the Minister's unlawful instruction would afford no defence. In my judgment, however, the obligation on civil servants to refuse to act in ways that are clearly contrary to domestic law extends beyond cases where the law in question imposes personal criminal or civil liability on them. It includes also cases where they are instructed to act in a way which is clearly unlawful as a matter of domestic public law. The latter imposes obligations not only on a Minister but also on those who act in the Minister's name with his or her authority. This is an incident of the rule of law.

87 But there is no equivalent constitutional rule that civil servants must refuse to carry out instructions on the ground that they are clearly contrary to international law. Any such rule would make it practically impossible for a Minister to act contrary to international law. Since the implementation of Ministerial decisions almost always requires the assistance of civil servants, it would transform almost every obligation binding on the United Kingdom on the international plane into a domestic constraint on Ministerial action. This would be fundamentally incompatible with dualism.

Issue (d): The effect in domestic law of s. 5 of the 2024 Act

The claimant's submissions

88 The claimant submits that s. 5 of the 2024 Act merely confirms the pre-existing constitutional position (that it is for a Minister to decide whether to comply with an interim measure) and does not expressly or impliedly authorise any breach of international law. This is apparent from the plain words of s. 5(2). Other provisions of the 2024 Act – in particular s. 1(3) and (4) – also do no more than confirm the pre-existing position. Insofar as s. 5(2) has any other purpose, that purpose can be seen from s. 5(3): ensuring that domestic courts do not take Rule 39 Indications into account. Where the 2024 Act seeks to bind officials, courts and tribunals, it does so expressly, for example in s. 2(1).

89 The Explanatory Notes confirm the limited effect of s. 5(2), as does the ECHR Memorandum published on 6 December 2023 to accompany the Bill, which set out at para. 29 the Government's view that s. 5(2) "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 provision was not intended to sanction breaches of international law.

90 Finally, this reading of s. 5(2) is bolstered by statements made in Parliament during the passage of the Bill, in particular:

(a) The Home Secretary (James Cleverly MP) was asked whether it would be compatible with international law for a Minister to refuse to comply with an interim measure. He replied: "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": HC Deb, 12 December 2023, col. 751-2.

(b) The Advocate General for Scotland (Lord Stewart of Dirleton) said this:

> "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, 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." (HL Deb, 19 February 2024, col. 477.)
>
> "[Lord Anderson] asked whether the Government agree that if, in compliance with Clause 5, a Minister decides not to comply with an interim measure, that would place the United Kingdom in breach of its international obligations. Clause 5 provides that it is for a Minister only to decide whether the United Kingdom will comply with an interim measure indicated by the European Court of Human Rights 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. The Bill is in line with international law. The Government take their international obligations, including under the ECHR, very seriously, and there is nothing in the clause that requires the United Kingdom to breach its international obligations. In any event, it is not correct that a failure to comply with interim measures automatically involves a breach of international law. There are circumstances where non-compliance with an interim measure is not in breach of international law." (HL Deb, 6 March 2024, col 1602).

(c) The Minister of State for Illegal Migration (Michael Tomlinson MP) said this:

> "[An amendment under consideration] 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." (HC Deb, 18 March 2024, col. 659.)

The defendants' submissions

91 The defendants submit that, by s. 5, Parliament has determined that: (a) a Minister is empowered to decide to comply or not to comply with a Rule 39 interim measure; and (b) the decision is a matter entirely for the Minister, acting personally in the exercise of their discretion. The reference to the decision "whether to comply" plainly encompasses both deciding to comply and deciding not to comply. There is no scope for presuming that Parliament intended that Ministers should only have power to decide not to comply with a Rule 39 interim measure in circumstances where this would not infringe the United Kingdom's international obligation under Article 34 ECHR.

92 In principle, extraneous materials are inadmissible, since the meaning of the words in context is clear. In any event, the ECHR Memorandum does not assist because its reference to "Convention rights" is to the rights scheduled to the HRA and because in any event it only states what is self-evident – that the 2024 Act does not *require* that Ministers refuse to comply with Rule 39 Indications. The same is true of the Parliamentary statements.

93 In any event, there was at least one clear and unequivocal statement in Parliament to the effect that the civil service must implement any Ministerial decision. The Minister of State for Illegal Migration (Michael Tomlinson MP) said this:

> "Colleagues have raised concerns that, assuming the Bill passes and succeeds in closing down the vast majority of individual claims, our deterrent will be frustrated by a rule 39 interim measure. I say directly to my right hon. and hon. Friends that I understand those concerns. No one who was here in June 2022 and saw the last Rwanda plane left on the tarmac can fail to understand the importance of fixing this issue. That is why the Prime Minister has been clear that he will not let a foreign court block the flights. We simply cannot let an international court dictate our border security and stop us establishing a deterrent. That is why we have inserted clause 5, which is crystal clear that it is for Ministers, and Ministers alone, to decide whether to comply with rule 39 injunctions. We would not have inserted clause 5 if we were not prepared to use it. I confirm to the Committee that we can and will lawfully use that power if the circumstances arise. The discretion is there.
>
> We go further still and we confirm that the civil service must implement any such decision. Today, the permanent secretary

> for the Home Office has confirmed that if we receive a rule 39 indication, instead of deferring removal immediately, as is currently the practice, officials will refer the rule 39 to the Minister—not to be too grandiose but, in this case, to me—for an immediate decision. As the Cabinet Office has confirmed, it is the responsibility of civil servants, under the civil service code, to deliver that decision." (HC Deb, 17 January 2024).

Discussion

94 As Lord Steyn explained, "language in all legal texts conveys meaning according to the circumstances in which it is used": *R (Westminster City Council) v National Asylum Support Service* [2002] UKHL 38, [2002] 1 WLR 2956, [5]. Thus, the court's task in interpreting a statute is to ascertain the meaning of the words used by Parliament, in their context. A statute's context includes the historical background against which it was enacted and the perceived problem or "mischief" which it was intended to remedy. This context is relevant to the statute's meaning whether or not the words, considered in a vacuum, could be described as ambiguous or uncertain. Indeed, the context may *reveal* ambiguity and uncertainty that would not be apparent to someone who did not understand it. But if, read in context, the words convey a meaning which is clear and unambiguous, it cannot be displaced by external aids to construction: see *R (O) v Secretary of State for the Home Department* [2022] UKSC 3, [2023] AC 255, [29]-[30] (Lord Hodge).

95 It is therefore important to distinguish between two stages in the process of statutory interpretation. At the first stage, the court considers the words Parliament used, in context. If and only if this exercise yields a meaning which is ambiguous or uncertain, the court considers whether there are admissible external aids which can assist in resolving the ambiguity.

96 At the first stage, the context will often be apparent from the statute itself. The 2024 Act is an example of a recent trend towards the inclusion of introductory provisions at the beginning of an Act which are designed to set its context and explain its purpose. Additionally, the court can consider a wide range of publicly available pre-legislative documents, such as White Papers, reports of the Law Commission, Royal Commissions or advisory committees and Explanatory Notes. It may also rely on things said in Parliamentary debates, but it must bear in mind that, at this first stage in the process of construction, the purpose for which these may be admitted is strictly limited to ascertaining the statute's context. Parliamentary statements may also be relied upon at the second stage for a different purpose, as direct aids to the construction of the statute, but only if they satisfy the strict threshold conditions for admissibility set out in *Pepper v Hart* [1993] AC 593: see *Presidential Insurance Co Ltd v St Hill* [2012] UKPC 33, [2013] 3 LRC 7, [23]-[24] (Lord Mance); and *Williams v Central Bank of Nigeria* [2014] UKSC 10, [2014] AC 1189, [104]-[105] (Lord Neuberger).

97 With these principles in mind, the context for s. 5 of the 2024 Act includes the following:

(a) As a matter of fact, removals under the 2022 Rwanda policy had been the subject of a Rule 39 Indication from the Strasbourg Court in particular cases; and the grant of a Rule 39 Indication in one case was regarded as an important factor by the Court of Appeal in deciding to grant short-term interim relief in other cases. As the Divisional Court said, "[t]he practical consequence of the grant of interim measures

has been that no removals to Rwanda have taken place either on 14 June 2022 or since": see [40] above.

(b) When the Bill which became the 2024 Act was introduced, there was a widespread perception, encouraged by the Government, that the policy of removing migrants to Rwanda had up to that point been "blocked" by the Strasbourg Court; and the Government made clear that one purpose of the new legislation was to confirm or provide the legal basis to prevent this from happening again. No Parliamentarian would have been unaware of this. If sources are required, see e.g. the remarks of the Prime Minister at a press conference on 15 November 2023 (at [42] above) and of the Minister of State for Illegal Migration in the House of Commons on 17 January 2024 (at [92] above).

(c) Section 1(2)(b) and (4) of the 2024 Act provide in terms that the Act gives effect to "the judgement of Parliament that the Republic of Rwanda is a safe country" and that "the validity of an Act is unaffected by international law".

98 Against this background, and in any event by the plain terms of s. 5(1), the purpose of s. 5 is to make clear the legal position in domestic law in the scenario where the Strasbourg Court grants a Rule 39 Indication that one or more individuals whom the Government intends to remove to Rwanda should not be so removed. The operative provisions in s. 5 are subsections (2) and (3). In my judgment, there is no real doubt about what these provisions mean.

99 Some provisions in the 2024 Act appear to have been included to restate principles of constitutional law which most lawyers would have regarded as already established. Section 1(4)(a) and (b) fall into that category. The purpose of s. 5(2) may be similar. But whether it is an authoritative restatement of an already established principle, or enacts a new rule, does not seem to me to matter. Either way, its meaning must be ascertained applying orthodox canons of construction.

100 One of these canons is that, whether restating established principles or enacting new ones, Parliament does not waste words. (This has been variously stated as a presumption that every word has a meaning, that words are not to be treated as mere surplusage or that the legislature does nothing in vain: see *Bennion, Bailey and Norbury on Statutory Interpretation*, 8th ed, 2019, para. 21.2.) If the intention is to state or enact one rule, the natural way of achieving that is to use one provision. Where Parliament uses two provisions, and starts the second with "accordingly", the natural implication is that the first states a general rule and the second states one specific corollary of it.

101 Section 5(2) either restates or enacts the general rule that decisions about whether the United Kingdom will comply with a Rule 39 Indication are for a Minister and only a Minister. This entails that such decisions are not for domestic courts, but also that they are not for anyone else, including civil servants. Moreover, the use of the phrase "whether the United Kingdom will comply" necessarily implies that, as a matter of domestic law, the Minister has the option of deciding that the United Kingdom will *not* comply with the Rule 39 Indication.

102 The words of s. 5(2), read in context, admit of only one construction: the Minister has a choice whether to comply with a Rule 39 Indication or not. If Parliament had wished to limit the power to decide not to comply to situations in which non-compliance is

compatible with international law, it could and would have done that expressly. There is no such limit on the face of s. 5(2) and none can properly be implied.

103 I accept, of course, that there is in general a strong presumption in favour of interpreting English law in a way which does not place the United Kingdom in breach of its international obligations: see e.g. *R v Lyons* [2002] UKHL 44, [2003] 1 AC 976, [27] (Lord Hoffmann). However, this is an interpretive principle only; and "[i]f Parliament has plainly laid down the law, it is the duty of the courts to apply it, whether that would involve the Crown in breach of an international treaty or not": ibid, [28]. This qualification is a necessary corollary of dualism.

104 In the present case, Parliament *has* plainly laid down the law. As I have said, a decision not to comply with a Rule 39 Indication in the scenario envisaged by s. 5(1) would involve a clear violation of international law. If s. 5(2) were read as permitting a decision not to comply only where compatible with international law, the Minister would have no choice to make at all. That would be contrary to the plain meaning of the words that Parliament used.

105 It follows that there is no basis for the admission of any of the external aids to construction on which Mr Hickman relied. So far as the Parliamentary statements are concerned, the first threshold condition in *Pepper v Hart* (that the legislation is ambiguous or obscure or leads to an absurdity) is not met. Even if it were, the third condition (that the statements relied upon are clear) is not met.

106 On close analysis, the passages relied by Mr Hickman upon include answers to two separate questions: first, whether the provision is itself contrary to international law; and second, whether a Minister's decision not to comply with a Rule 39 Indication would be contrary to international law. The statement that "nothing in the clause requires the United Kingdom to breach its international obligations" (see the passage from the ECHR Memorandum at [89] and the Parliamentary statements at [90(b) & (c)] above) is an answer to the first question. The answer was accurate for the legally banal reason that s. 5(2) confers on the Minister a power to decide but does not dictate a decision one way or the other. Where the second question was addressed directly, the answer was carefully formulated so as not to include a commitment that the Minister would always act in accordance with international law. The only assurances given were that the Government would "pay close attention to" and "take… very seriously" the United Kingdom's international obligations: see the statements of Lord Stewart of Dirleton at [90(b)] above. These are consistent with a decision, taken after careful consideration, to act in a way that clearly violates international law.

107 Thus, even if the Parliamentary statements are admissible in understanding the context in which s. 5(2) was enacted, they provide no clear support for the suggestion that Parliament assumed that every decision taken under that provision would be compatible with the United Kingdom's obligations in international law.

108 For all these reasons, the clear effect of s. 5(2) is to restate or enact that, as a matter of domestic law, a Minister may decide not to comply with a Rule 39 Indication in the scenario envisaged by s. 5(1), even though that would place the United Kingdom in clear violation of international law.

Issue (e): The principles governing the interpretation of the Code

109 The Code has an unusual status. It is both an instrument made under a statutory power (s. 5(1) of CRAGA) and also, by the same statute (s. 5(5)), part of the employment contract of every civil servant to whom it applies. I invited counsel to file notes after the hearing on the question whether its interpretation should be governed by the public law principles applicable to Government policy or the private law principles applicable to employment contracts.

The claimant's submissions

110 Mr Hickman for the claimant submitted that, although incorporated into the employment contracts of civil servants to whom it applies, the Code falls to be interpreted in the same way as any other quasi-legislative instrument, such as a code of practice or policy document – that is, according to its objective meaning in context. That said, the court "should not subject the wording to the kind of fine analysis which might be applied to a statute or a contract": *R (Bloomsbury Institute Ltd) v Office for Students* [2020] EWCA civ 1074, [2020] ELR 653, [56] (Bean LJ).

111 The fact that the Code forms part of the conditions of service for civil servants, and therefore creates legal rights and obligations, is therefore relevant to its interpretation, notwithstanding that principles of contractual construction are not directly applicable. The interpretation of the Code must be informed by the fact that it is intended to create and prescribe standards of conduct which must be complied with by the civil servants to which it applies, not simply as setting out aspirations, values or guiding objectives.

The defendants' submissions

112 Sir James for the defendants submitted that the correct approach to interpretation was a hybrid one, taking full account of the fact that the Code is part of the terms and conditions of employment of civil servants to whom it applies and that it also "sits in the public law space". The principles relevant to contractual construction were usefully summarised by Andrew Burrows QC (as he then was) in *Federal Republic of Nigeria v JP Morgan Chase Bank NA* [2019] EWHC 374 (Comm), at [32], in a passage approved by the Court of Appeal at [2019] EWCA Civ 1641, [29] and [73]-[74]:

> "The modern approach is to ascertain the meaning of the words used by applying an objective and contextual approach. One must ask the term, viewed in the light of the whole contract, would mean to a reasonable person having all relevant background knowledge reasonably available to the parties at the time the contract was made (excluding the previous negotiations of the parties and their declarations of subjective intent). Business common sense and the purpose of the term (which appear to be very similar ideas) may also be relevant. But the words used by the parties are of primary importance so that one must be careful to avoid placing too much weight on business common sense or purpose at the expense of the words used; and one must be astute not to rewrite the contract so as to protect one of the parties from having entered into a bad bargain."

113 Whether interpreted as a public law document or an employment contract, the Code is to be interpreted against the relevant background of knowledge of *(inter alia)* the constitutional principles governing the allocation to Ministers (subject to Parliamentary accountability) of responsibility for the conduct of the UK's foreign relations, the fundamental principle of dualism and having regard to the likelihood (at least) that the Government would not have intended to oblige (or even entitle) civil servants to refuse to implement a considered Ministerial decision not to comply with unincorporated international law.

Discussion

114 In my judgment, the claimant is correct that the Code falls to be interpreted according to public law principles, rather than contractual ones. The position can be tested by considering the case of a statutory implied term. A statutory provision has a legal status independent of any contract into which it is implied. The tools for interpreting it come from the standard toolkit applicable to the interpretation of statutes; but statutes have to be interpreted in context and the context includes the fact that the term forms part of every contract in a particular class: see by analogy the analysis of Underhill J in the Employment Appeal Tribunal in *Hartlepool Borough Council v Llewellyn* [2009] IRLR 796, [20]-[23].

115 The Code also has a legal status, and a legal meaning, independent of the contracts into which it is incorporated. Indeed, as a matter of history, it existed before CRAGA put it on to a statutory footing and incorporated it into civil servants' contracts of employment. The interpretive tools required to determine its meaning are those applicable to codes of practice or policy documents. These are broadly similar to the principles of statutory interpretation, subject to Bean LJ's caveat in the *Bloomsbury* case that one should avoid too much "fine" (which I take to be a synonym for "black letter") analysis. In other words, the Code must be interpreted objectively, but having regard to the kind of document it is and in its proper context.

116 The context here includes the fact that the Code is intended to set out the duties of civil servants in terms that form part of an employment contract, but also that these duties arise in the context of a unique employment relationship between civil servants and the Crown. The relationship has to be understood against the background of a framework of domestic constitutional rules of law and conventions (which are expressly referred to in footnote 3: see [33] above). The framework includes:

(a) The strong convention that the Government acts so as to comply with the United Kingdom's international legal obligations.

(b) The legal rule that – notwithstanding this strong convention – a decision by the Government to act in a way which clearly violates the United Kingdom's international legal obligations is not, *ipso facto*, contrary to domestic law: see [79] above.

(c) The legal rules and conventions governing the role and duties of civil servants (see [83] and [86] above), in particular that:

(i) it is Ministers (who are accountable to Parliament) who decide Government policy;

(ii) the role of civil servants is to advise Ministers, implement United Kingdom Government policy and (where authorised to do so) take decisions in the name of the relevant Minister; and

(iii) civil servants must refuse to carry out Ministerial instructions which are clearly contrary to domestic law.

(d) The absence of any equivalent legal rule that civil servants must refuse to carry out instructions on the ground that they are clearly contrary to international law: see [87] above.

117 If, contrary to my view, the Code falls to be interpreted according to the principles governing the interpretation of contracts, this framework of constitutional rules of law and conventions is also part of the "relevant background knowledge reasonably available to the parties at the time the contract was made", as Andrew Burrows QC put it in the passage cited at [112] above. So, in the circumstances of this case, the interpretive context is the same whether viewed through a public law or a contractual lens.

Issue (f): The correct interpretation of the Code

The claimant's submissions

118 Mr Hickman for the claimant submitted that "the law" with which the Code requires civil servants to comply includes both domestic and international law.

119 First, the reference is general and not specific. It is apt to include international law because acts of the civil service are attributable to the United Kingdom under international law. Thus, 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, [385].

120 Second, the pre-2006 version of the Code expressly included international law and treaty obligations and the Government assured CCSU that the simplified wording did not involve any change in meaning: see [26]-[27] above.

121 Third, the position was confirmed much more recently by the Minister of State for the Cabinet Office, Lord True, who said this in the House of Lords in response to a question about the scope of the Code: "Do the Government maintain the position set out by previous Administrations that law includes international law? Yes, they do": see HL Rep, 17 September 2020, col. 1399.

122 A reading of the Code as incorporating a requirement to comply with international law would not undercut the principle of dualism. If the Government wished to amend the Code, so as to provide that civil servants may or must act in clear violation of international law, it could do so. The fact that it has not done this is consistent with the strong convention that the Government does not act in clear violation of international law.

The defendants' submissions

123 Sir James for the defendants submitted that the reference to "the law" "simply reference[s] existing duties outside the Code": see the Court of Appeal's judgment in the *Gulf Centre* case. These duties include the principles and provisions of law that regulate the relationship between international and domestic law; and those that identify the relevant constitutional actor and decision maker in any particular context.

124 In the present context, constitutional principle dictates, and s. 5 of the 2024 Act confirms, that Ministers are the relevant constitutional actors with the power and constitutional responsibility for such decisions; and that they can decide not to comply with a Rule 39 interim measure and the relevant part of unincorporated international law (Article 34). Parliament did not intend that, even if a Minister decided to remove a person to Rwanda despite a Rule 39 Indication, that decision could be frustrated and undermined by civil servants deciding that they would not assist. Parliament must necessarily have intended that, once taken, a Minister's decision will be implemented in the usual way by civil servants acting on behalf of the Minister.

125 If civil servants could act to frustrate or undermine such a decision, that would create a constitutional aberration, effectively placing the civil service into the position of primary constitutional decision-maker and actor, in direct opposition to the will of Parliament and Ministers. The claimant's interpretation would have surprising consequences. It would entail, for example, that civil servants were obliged to refuse to implement Ministerial policy on the deployment of armed forces abroad if the policy was in clear breach of unincorporated international law governing the use of force.

Discussion: the meaning of the Code in general

126 As a general matter, and subject to what I say at [132]-[137] below, I accept the claimant's submission that the Code's reference to "the law" includes both domestic and international law. I reach that conclusion for four reasons.

127 First, as a matter of ordinary language, both domestic law and international law are species of "law". The Court of Appeal has held that the reference to "the law" in the Ministerial Code was "general and unqualified": *Gulf Centre*, [22]. The same is true of the reference to "the law" in the Code.

128 Second, although international law for the most part imposes obligations on States, rather than individuals, neither party submitted that this was significant for the interpretation of the Code. Where the acts of a particular individual have potential consequences for the State's compliance with international law, it is coherent to say that the individual has a duty to comply with international law. The acts of both Ministers and civil servants can have those consequences. Their duty "to comply with the law" can easily be read, insofar as it applies to international law, as shorthand for a duty to act so that the United Kingdom complies with international law. The Court of Appeal had no difficulty in reading the Ministerial Code in that way. There is no reason why the Civil Service Code should be read differently. Both were intended to be written in simple language.

129 Third, and relatedly, the constitutional context against which the Code falls to be interpreted makes it more, not less, likely that "the law" includes international law. The civil servants to whom it applies are charged not only with implementing, but also

sometimes with *taking*, decisions which may have consequences for the State's compliance with international law. Unlike the employees of a private employer, their decisions might give rise to a violation of international law on the part of the State. Such a violation would breach the strong convention that the United Kingdom will comply with its international obligations and could have potentially serious consequences for the United Kingdom's international reputation and foreign relations. Against this background, it makes sense that civil servants should, in general, be prohibited by the Code from acting in ways that would put the United Kingdom in violation of international law.

130 Fourth, this construction is consistent with the drafting history of the Code: see the express reference to international law and treaties in the 2006 version of the Code and the Government's express assurance that the simplified language was not intended to herald any change in meaning.

131 I am not convinced that a Ministerial answer in 2020 is an admissible aid to the construction of a document promulgated in 2015, which falls to be construed objectively. However, Lord True's statement on 17 September 2020 shows that my interpretation of the Code coincides with that of the Government in the relatively recent past. This provides a degree of reassurance.

Discussion: the special case where domestic law is not consistent with international law

132 The preceding analysis deals with the general case, where domestic law is consistent with international law. The strong convention that Ministers will act so that the United Kingdom complies with its international obligations means that this will usually be so. But it is a corollary of dualism that domestic law may require or permit acts which violate the United Kingdom's international legal obligations. The meaning of the Code in this special case was not considered in the *Gulf Centre* case, nor in the pre-2006 version of the Code, nor in Lord True's short Parliamentary answer. It must be ascertained from first principles.

133 Mr Hickman for the claimant accepted in argument that, if a statute required a Minister to act in a way that clearly violated international law, the Code would provide no basis for the civil servant to refuse; like any other contractual obligation, the requirement to comply with international law would have to yield to the statute. The same would be true even if the Code retained its pre-2006 wording. In my view, this was a telling concession.

134 Mr Hickman might have argued that, even where the Minister was required by statute to act in violation of international law, the Code prevented civil servants from assisting him to do so, unless and until it is amended to permit them to do so. That would have been unconvincing because it would involve construing the Code in such a way as to frustrate the intention of Parliament. The Code cannot plausibly be interpreted in that way, because it is itself an instrument which has effects on the plane of domestic law; and on that plane, Parliament is supreme.

135 In my judgment, the same analysis applies in a case such as the present, where statute permits, rather than requires, the Minister to act in violation of international law. In this case, the fact that Parliament has not itself determined whether the United Kingdom should comply does not mean that it has said nothing about that question. It has said that the United Kingdom's compliance is to be decided by the Minister. Parliament must have

intended that a lawful decision by the Minister not to comply would have effect. A construction of the Code which precludes civil servants from implementing a lawful decision not to comply would frustrate the intention of Parliament just as surely as if Parliament itself had mandated non-compliance.

136 If a civil servant is required to comply with both domestic and international law, but the first is not consistent with the second, what does the Code require the civil servant to do? The answer is informed by the framework of constitutional rules and conventions against which the Code falls to be interpreted, as to which see [116] above. The Code's operative provisions must, in my judgment, be interpreted in harmony with this framework, not in conflict with it. In a dualist system such as ours, "the law" with which civil servants must comply includes the rules and conventions governing conflicts between domestic and international law. In this case, these include both the domestic constitutional rule that it is permissible in principle for Ministers to decide to act in ways which violate international law and s. 5(2) of the 2024 Act, which confirms or enacts that rule in the Guidance scenario.

137 In the Guidance scenario, compliance with "the law" involves compliance with these rules. Accordingly, civil servants must comply with any domestically lawful Ministerial decision to remove individuals to Rwanda in the face of a Rule 39 Indication. It follows that the Guidance correctly states the effect of the Code.

Issue (g): Is the Code unclear?

The claimant's submissions

138 Mr Hickman for the claimant submitted that codes intended to assist civil servants in complying with the law must be clear: see *R (Equality and Human Rights Commission) v Prime Minister* [2012] 1 WLR 1389, [93]-[94]. If, contrary to the claimant's primary submission, the Code permits civil servants to act in clear violation of international law in the Guidance scenario, or in all cases where a Minister takes a decision to that effect, it should be amended to make this clear.

The defendants' submissions

139 Sir James for the defendants submitted that the Code is a high-level document which was not intended, and did not purport, to direct how civil servants must comply with their duties in every circumstance. The level of detail to be included in the Code is entirely a matter for the Minister for the Civil Service. The obligation "to comply" with the law is not itself unclear, and there is no legal obligation for the Code to set out what that duty may mean in any specific situation. The test for the unlawfulness of a code or policy, as set out test in *R (A) v Secretary of State for the Home Department* [2021] UKSC 37, [2021] 1 WLR 3931, at [46], is not met. In any event, the Guidance correctly states the effect of the Code in the Guidance scenario.

Discussion

140 The circumstances in which the courts may entertain challenges to Government policy and guidance are now authoritatively stated by the Supreme Court in *R (A) v Secretary of State for the Home Department*. This supersedes previous case law, including *R (Equality and Human Rights Commission) v Prime Minister*. In *A's* case, at [46], Lord

Sales and Lord Burnett (with whom the other members of the Court agreed) identified three types of case where a policy or guidance may be found to be unlawful by reason of what it says or omits to say about the law:

> "(i) where the policy includes a positive statement of law which is wrong and which will induce a person who follows the policy to breach their legal duty in some way… (ii) where the authority which promulgates the policy does so pursuant to a duty to provide accurate advice about the law but fails to do so, either because of a misstatement of law or because of an omission to explain the legal position; and (iii) where the authority, even though not under a duty to issue a policy, decides to promulgate one and in doing so purports in the policy to provide a full account of the legal position but fails to achieve that, either because of a specific misstatement of the law or because of an omission which has the effect that, read as a whole, the policy presents a misleading picture of the true legal position."

141 The statement that civil servants must "comply with the law" is not, on any view, "a positive statement of law which is wrong". At worst, it is unspecific. But the Government is under no duty to provide comprehensive advice to civil servants about what that requirement means in every conceivable situation. To do so would involve writing a monograph on constitutional law. If the Government had set out to do that, and then omitted to deal with the Guidance scenario, it might no doubt be amenable to criticism under the third of Lord Sales' and Lord Burnett's categories. But the Code does not purport to cover all eventualities. It is, as Sir James submitted, a high-level document. The Government is under no obligation to amend it to provide further detail.

142 In any event, the Guidance now provides civil servants with more detailed advice about what to do in the scenario to which it relates. This judgment confirms that it is correct, and why.

Conclusion

143 For these reasons, permission to apply for judicial review is granted, but the claim is dismissed.