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Channel "pushbacks" policy abandoned

The Home Office has withdrawn its "pushback policy" which purported to set out a plan to return migrant boats in the English Channel to France.

The climbdown follows recent skirmishes over expert evidence and disclosure — see [2022] EWHC 517 (Admin) and [2022] EWHC 823 (Admin) — as part of a judicial review brought by three human rights organisations and a union representing Border Force officers. The substantive case was due to be heard in the coming days.

On 14 April, the Prime Minister mentioned in the course of announcing the new Rwanda policy that the pushbacks policy was not to be implemented. On 24 April, the Government Legal Department wrote to confirm that the turnaround tactic was being reconsidered, and that as a result "the policies and procedures which are the subject of the ongoing litigation are withdrawn". The resulting consent order is here (with thanks to Jeremy Bloom of Duncan Lewis Solicitors).

What did the pushback policy say?

As the consent order outlines, the pushback policy was contained in three separate documents. A description of these documents and key passages from them can be found in the expert evidence judgment. The description of the objective of the policy includes:

> *To deliver the strategic aim of preventing entry to the UK and to acting as a genuine deterrent to migrants and organised crime gangs, the tactics should be delivered in as many cases as is safely possible.*
>
> *Tactics must not be deployed if, in the circumstances, there is reason to suspect that action could result in inhumane treatment contrary to Article 3 of the European Convention on Human Rights…*

A later section of the same document states that Operational Commanders should not attempt to initiate a turnaround of a migrant boat unless they are reasonably confident that it can safely make it back to French shores unaided.

The disclosure judgment quotes other important passages:

> *Given the limited circumstances in which the tactics can be used, the actual number of migrant vessels successfully intercepted is likely to be extremely low.*

> *Should a migrant request asylum whilst in UK territorial waters they must be returned to the UK for processing…*

Given that the overwhelming majority of migrants crossing the Channel claim asylum, and the acceptance that turnarounds should only be carried out where it was safe to do so, it is difficult to see how the operation of the policy could have had any real or effective impact on the number of small boats. It appears that, at most, it was hoped to be a deterrent but one suspects that in reality it was a desperate attempt by the Home Secretary and her officials to be seen to be doing something about the increasing number of people making the crossing.

What was the litigation about?

The claimant organisations alleged that the policy was illegal on a number of grounds, including that immigration legislation did not provide Border Force with the necessary powers; it encouraged or authorised unlawful action, including action that would in some cases breach Articles 2 and 3 ECHR; it breached international maritime law; and it breached the Refugee Convention.

In its first reported judgment, the High Court refused claimant applications to admit expert evidence in the form of reports from an expert in domestic and international maritime search and rescue, and a second expert who is a Master Mariner and member of Lloyd's Panel of Special Casualty Representatives.

The second judgment dealt with disclosure, with the High Court ordering the disclosure of previously redacted documents and a "confidentiality ring" in respect of material the court accepted would cause serious harm to the public interest were it be allowed into the public domain. This meant that the material would be disclosed to named lawyers and staff at the claimant organisations and that any parts of the hearing where this material was considered would take place in private.

Jeremy Bloom writes

"We are convinced that the Home Secretary has withdrawn the policy because she knew that she would lose in Court if she went to trial.

The Court would have found that she does not have a power under existing legislation to do this, and that she would have been authorising her officials to use force unlawfully, and in breach of the rights to life and to be free from inhumane treatment, which are rights protected by the Human Rights Act. This is a good day for vulnerable migrants and asylum seekers and for the Border Force officials that would have been under great pressure from the Home Secretary to put their lives and the lives of refugees at risk.

Next stop for us will sadly be the Home Secretary and Prime Minister's latest attempt to act tough on immigration by showing a complete disregard for what is permissible under domestic and international law – the planned mass 'relocation' of refugees to Rwanda."

It is unclear whether there is anything more to the Rwanda plan than the pushbacks policy or whether it awaits a similar fate. The worry is that if and when that policy also fails, the government will seek to blame campaigners and lawyers, and indeed the courts and the Human Rights Act, for its failure to take effective action to reduce the numbers crossing the Channel, and use this as a pretext for further measures to curb checks on its power.

The reality is that since the UK left the European Union's Dublin system, people crossing the Channel know that if they manage to reach UK territory, there is little to no chance that they will be returned to Europe.

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