

What the Home Secretary's Ministerial Direction on Rwanda signifies - and what it does not signify

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This is a blog by David Allen Green.

The home secretary has issued 'a ministerial direction' for her proposal for a 'migration and economic development partnership' with Rwanda for the processing of asylum claims.

Such a direction is significant – but it is also important to realise what it does not signify.

The direction by itself does not mean that the proposal is wrong, or will not work, or is unlawful.

What it does mean is that there is sufficient concern within the home office that the most senior official wants Priti Patel to own the decision to go ahead with it.

And this is worth exploring.

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The partnership proposal was published last (Maundy) Thursday – which is odd, given that parliament was not sitting and we are around the time of the start of the central government 'purdah' for the local election campaigns.

Also published was a memorandum of understanding (MoU) with Rwanda.

In general terms, an MoU is a document that is supposed to impress you as being effective and formal, but is not actually effective nor formal.

A political (and legal) sleight of hand (SoH).

And followers of this blog will enjoy the wording of paragraph 2.2 of the MoU: "2.2 For the avoidance of doubt, the commitments set out in this Memorandum are made by the United Kingdom to Rwanda and vice versa and do not create or confer any right on any individual, nor shall compliance with this Arrangement be justiciable in any court of law by third-parties or individuals."

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So that was (Maundy) Thursday.

On (Easter) Saturday, in the late afternoon, two letters were published by the government.

These letters were dated 13 April 2022, that is the Wednesday before the proposal and the MoU were published on the Thursday.

The first letter was from the most senior civil servant at the home office. He was insisting on a ministerial direction.

Why?

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To answer that question we need to understand government policy on *'managing public money'*.

This policy is not the sort of partisan policy which politicians announce or publish in a manifesto.

It is instead the sort of policy which any government has, regardless of which part is in power.

And within each department the most senior official – in this case the permanent secretary – is the *'accounting officer'* responsible for ensuring the policy is complied with.

When I was a government lawyer fifteen years ago, it was known as 'VFM' – *value for money*.

Part of the *'managing public money'* policy provides:

3.6 Directions

3.6.1. The accounting officer cannot simply accept the minister's aims or policy without examination. Each departmental accounting officer should take care to bring to the attention of their minister(s) any conflict between the minister's instructions and the standards set out in box 3.2.

3.6.2. Where a departmental accounting officer determines that a proposal does not meet one or more of these standards, the best next step is to consider whether the policy or proposed course of action can be modified to make it fit. If not, and the minister decides it is nevertheless appropriate to continue with the proposal, the accounting officer should ask their senior minister for a formal written direction to proceed. An oral direction should be confirmed promptly in writing.

3.6.3. Before finalising a direction request, it is good practice for accounting officers to discuss the matter with the Treasury. Often, by their nature, issues that might call for a ministerial direction are novel, contentious, or repercussive, and therefore require explicit Treasury consent. Where this is the case, Treasury consent should be obtained before the direction request is finalised.

3.6.4. As always, the ultimate judgement in each case must lie with the accounting officer personally. The acid test is whether the accounting officer could justify the proposed activity if asked to defend it.

3.6.5. There is no set form for requesting a direction, though the accounting officer should be specific about their nature and the standard or standards that is/are not satisfied.

3.6.6. When a direction is made, the Accounting Officer should:

- follow the minister's direction without further ado
- promptly copy the direction request, the direction and other papers the accounting officer considers relevant to the Comptroller and Auditor General and the Treasury Officer of Accounts
- unless it is in the public interest that the matter is kept confidential, arrange for the direction request and direction itself to be published on the GOV.UK website promptly, notifying the chairs of the PAC and the relevant departmental select committee as soon as this occurs
- where confidentiality is required, in addition to copying to the Comptroller and Auditor General and the Treasury Officer of Accounts as usual, share the direction request and the direction with the chairs of the PAC and the relevant departmental select committee, along with an explanation of when they expect the need for confidentiality to fall away and publication to take place
- if asked, explain the minister's course of action - this respects ministers' rights to frank advice, while protecting the quality of internal debate.

The fine folk at the Institute of Government have provided this excellent explainer on ministerial directions which you should now read.

And this is the government's own page for such directions.

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Now we go back to the permanent secretary's letter.

You will see the first three paragraphs set out his understanding of the policy and what it is seeking to achieve – and this is set out in positive terms to which the home secretary herself cannot object.

The fourth paragraph then sets out his role as the accounting officer, and the fifth paragraph sets out the extent to which he sees there is no problem with the Rwanda proposal (emphasis added):

*"The Accounting Officer advice that I have received comprises a rigorous assessment of the regularity, propriety, feasibility and value for money of this policy, drawing on legal, policy and operational expertise. **I have satisfied myself that it is regular, proper and feasible for this policy to proceed.** We have incorporated learning from Windrush in developing this policy and the plans for its implementation."*

So, according to the official it is generally "regular, proper and feasible" for the proposal to proceed.

But.

There is something about which he as accounting officer is not satisfied, and this is set out out in the next paragraphs (which I have separated out for flow):

"However, this advice highlights the uncertainty surrounding the value for money of the proposal.

"I recognise that, despite the high cost of this policy, there are potentially significant savings to be realised from deterring people entering the UK illegally.

"Value for money of the policy is dependent on it being effective as a deterrent.

"Evidence of a deterrent effect is highly uncertain and cannot be quantified with sufficient certainty to provide me with the necessary level of assurance over value for money.

I do not believe sufficient evidence can be obtained to demonstrate that the policy will have a deterrent effect significant enough to make the policy value for money.

"This does not mean that the MEDP cannot have the appropriate deterrent effect; just that it there is not sufficient evidence for me to conclude that it will."

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The proposal has a "high cost" – but there is no sufficient evidence that the high cost will be offset by savings from it having any deterrent effect.

The evidence for such an effect is not only uncertain but "highly uncertain".

He therefore cannot sign off on the policy as accounting officer.

He instead needs to escalate it to the minister to sign off personally.

And so (again broken up for flow):

“Therefore, I will require your written instruction to proceed.

“I consider it is entirely appropriate for you to make a judgement to proceed in the light of the illegal migration challenge the country is facing.

“I will of course follow this direction and ensure the Department continues to support the implementation of the policy to the very best of our abilities.

“Should you issue a direction, I am required to copy all relevant papers to the Comptroller and Auditor General (who will inform the Public Accounts Committee) and the Treasury Officer of Accounts.

“I anticipate publishing our exchange of direction letters as early as practicable.”

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So this is not any usurpation of ministerial responsibility and democratic control, but a reinforcement of the priority of minister over officials.

The minister will get their way – but they have to take the decision themselves.

And so the home secretary replied, giving the direction.

Her letter is also worth looking at – though this time for what it does not say. Her letter does not engage with the value for money points but sidesteps them (again broken for flow):

“While we understand it is not possible for HMG to accurately model the deterrent effect from day one, together with Rwanda, we are confident this policy is our best chance at producing that effect.

“It is only by introducing new incentives and effective deterrents into the system, as our international partners like Denmark, Greece, and Australia have succeeded in doing, that we can take on the criminal gangs facilitating illegal entry and break their lethal business model.

“I recognise your assessment on the immediate value for money aspect of this proposal.

“However, I note that without action, costs will continue to rise, lives will continue to be lost, and that together we have introduced safeguards into our agreement to protect taxpayer funding.

“And while accepting the constraints of the accounting officer framework set out by HM Treasury, I also think there are credible invest-to-save arguments in the long term.

[...]

...I also believe there is an imperative to act now to mitigate the impact on staff wellbeing as well as departmental operational and financial pressures in the longer term.

“It would therefore be imprudent in my view, as Home Secretary, to allow the absence of quantifiable and dynamic modelling – which is inevitable when developing a response to

global crises influenced by so many geopolitical factors such as climate change, war and conflict -- to delay delivery of a policy that we believe will reduce illegal migration, save lives, and ultimately break the business model of the smuggling gangs.

"I am therefore formally directing you as Accounting Officer to take forward this scheme with immediate effect, managing the identified risks as best you can."

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For the home secretary, the lack of sufficient evidence of any deterrent effect does not matter.

She believes the Rwanda proposal will work, and so it shall be taken forward.

She is confident that in the longer-term there will be value for money, and – in any case – modelling is not easy for this sort of things.

Her decision; her call.

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Of course, one should be wary of taking documents such as these two exchanged letters seriously at face value.

Such exchanges can be choreographed and it sometimes (though not here one suspects, given the disjointed nature of the reply) the same official will draft both letters – *'sign here minister'*.

It could be that the request for a direction here is a manifestation of deeper unease within the home office at this proposal – and that such a request, framed in VFM terms, was the only way of signalling publicly this unease.

The bureaucratic equivalent of the blinking hostage.

On the other hand, the home office is certainly capable of nasty and expensive policies.

And the permanent secretary in his fifth paragraph goes out of his way to say it is *"regular, proper and feasible for this policy to proceed"*.

Who knows?

