HOUSES OF PARLIAMENT

Joint Committee on Human Rights

Uncorrected oral evidence: Safety of Rwanda (Asylum & Immigration) Bill, HC 435

Wednesday 24 January 2024

3 pm

Watch the meeting

Members present: Joanna Cherry MP (Chair); Lord Alton of Liverpool; Lord Dholakia; Ms Harriet Harman MP; Lord Henley; Dr Caroline Johnson MP; Baroness Kennedy of The Shaws; Baroness Lawrence of Clarendon; Baroness Meyer; Jill Mortimer MP; Bell Ribeiro-Addy MP; David Simmonds MP; Lord Murray of Blidworth.

Questions 46 - 92

Witnesses

I: Lord Sandhurst KC, Chair of Research, Society of Conservative Lawyers; Lord Sumption, former Justice of the Supreme Court.

II: Martin Howe KC, Barrister, 8 New Square.

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Examination of witnesses

Lord Sandhurst and Lord Sumption.

Q46 **Chair:** Good afternoon. You are very welcome to today's meeting of the Joint Committee on Human Rights. We are a cross-party committee and a Joint Committee, which means that we have Members here from both the House of Commons and the House of Lords.

Today, we continue to take evidence in our legislative scrutiny of the Safety of Rwanda (Asylum & Immigration) Bill. We will be hearing from Lord Sandhurst, chair of research at the Society of Conservative Lawyers, and Lord Sumption, former Supreme Court Justice, before breaking briefly at 4 pm and returning at about 4.30 pm for our second evidence panel, when we hope to hear from Martin Howe KC.

We will focus our questioning today on compliance of the Bill with the UK's human rights obligations—in particular, those arising from the European Convention on Human Rights and the refugee convention.

May I formally introduce our first panel? First, we have Lord Sandhurst, a former recorder, barrister and deputy High Court judge. He is the chair of research of the Society of Conservative Lawyers and has been a member of the House of Lords since 2021. Good afternoon, Lord Sandhurst.

Lord Sandhurst: Good afternoon.

Chair: Secondly, we have Lord Sumption, an author, medieval historian and very senior judge who sat on the Supreme Court of the United Kingdom between 2012 and 2018. Good afternoon, Lord Sumption. You are very welcome.

Lord Sumption: Good afternoon.

Q47 **Chair:** I will kick off with our first question and direct it first to you, Lord Sumption. It has been said that the Bill will "give effect to the judgment of Parliament that Rwanda is a safe country", despite the UK Supreme Court having recently concluded that Rwanda is not a safe country to send asylum seekers to. Do you think it is an appropriate step for Parliament to make a declaration or to deem Rwanda to be a safe country in this way? Do you think it is consistent with the separation of powers and the rule of law?

Lord Sumption: It is not uncommon for statutes to deem things that may or may not be correct. It is usually intended to cut out forensic argument about disputable questions, and the courts give effect to them according to their terms. There is a recent decision of the Supreme Court on that very question in the context of a taxing Act earlier this year.

It is a standard technique in tax law and some regulatory statutes. In addition, there have been immigration Acts, including the recent Illegal Migration Act, which included schedules of safe places, places that were treated as safe for the statutory purposes. What is unusual is to use a deeming provision in a case as controversial as this one, and to include a

deeming provision that effectively forecloses the whole argument in a high proportion of cases.

Chair: I noticed that before the Bill was introduced you told the BBC that you have never heard of the Government "trying to change the facts, by law ... For as long as black isn't white, the business of passing Acts of Parliament to say that is profoundly discreditable". That was before you saw the Bill.

Lord Sumption: Yes. It was also before I saw the contents of the revised treaty, which are very significant in my view. Leaving aside the morality of this, with which I am not concerned at all, the draft treaty does two significant things: it provides that, irrespective of the refugee status or any findings of the Rwandan courts about the refugee status of deportees, they can stay in Rwanda unless—and this is the second point—the Rwandan Government decide to remove them back to the United Kingdom. It seems to me that that addresses the particular complaint about refoulement that the Supreme Court made.

Q48 **Chair:** What about this question of whether it is consistent with the separation of powers and the rule of law to have a deeming provision? You gave an example there of a deeming provision that was looked at by the Supreme Court in tax law.

Lord Sumption: Yes.

Chair: What is the difference between that and this situation?

Lord Sumption: It is a political difference. The more controversial the question on which you require the courts to make certain assumptions that may or may not be right, clearly the more questionable the exercise is. As it happens—this is perhaps a point you will come to—although the Rwanda Bill is inconsistent with international law in its closing down of access to the courts in very significant respects, what we know about Rwanda, which in my case is simply based on the contents of the judgment given by the Supreme Court, suggests that it is not inconsistent with international law to send illegal immigrants there.

Chair: You are saying that you think the Bill is inconsistent with international law, because it closes down access of parties to the courts?

Lord Sumption: Yes.

Chair: Which international laws do you think the Bill is inconsistent with?

Lord Sumption: Article 16 of the refugee convention requires refugees to have access to the courts. That is obviously, in its context, particularly intended to enable them to obtain the decision of courts on their status. Article 6 of the human rights convention requires access to the courts generally and in all circumstances. There are difficult questions in some of these cases as to whether the right of access to the courts precludes removing rights.

There is a distinction to be made between procedural bars on access to the courts and bars that arise simply because the law does not give somebody the relevant right, but this is unquestionably procedural. If an Act of Parliament says that the courts have to assume certain facts, that is clearly procedural. So I have no doubts that this is not consistent with Article 6 of the human rights convention either.

Chair: What about Article 13 of the EHRC, the right to a remedy?

Lord Sumption: The right is effectively barred by the absence of a right of access to the courts, combined with the statutory provision permitting their deportation. I do not think Article 13 adds anything to Article 6, but clearly it points in the same direction.

Chair: On the face of the Bill, the Home Secretary was unable to state that the provisions of the Bill were compatible with convention rights, but the Government have argued that they are. We have heard from the Lord Chancellor that there is an argument that they are, but they cannot be certain beyond, I think, a 50% certainty that that argument would succeed. To be quite clear—I think it is clear from your answer, but I want to make sure I have understood it properly—you think the Bill is not compatible with Article 6.

Lord Sumption: That is correct.

Q49 **Chair:** Thank you. Lord Sandhurst, can I turn to you and ask you the same questions? We have had the benefit of reading the advice that was published by you and a colleague from the Society of Conservative Lawyers. What is your view on whether this deeming provision—deeming Rwanda to be a safe country—is an appropriate step for Parliament to take and whether it is consistent with the separation of powers and the rule of law?

Lord Sandhurst: I think it is a reasonable step for Parliament to take. The facts have changed since the Supreme Court reached its decision. That was based on facts in June 2022, 18 months ago, and we now have a treaty with very detailed provisions. I think anyone who looks at the treaty with care will see that it is very thorough. It has very strict obligations. It becomes part of Rwandan domestic law. If Rwanda does not like the way we are operating it, it can cease to operate it, in the sense that it can say, "We're not having any more of these refugees".

What it has done is to say, "Rwanda is a safe country for these reasons, because all these steps will have to be taken". The parties, under Article 3, have to take all steps necessary to ensure that their obligations can be and are complied with. That is the point I was making. These steps include discussions, support, co-operation and monitoring. It will remain to be seen whether that is done properly.

Chair: I think UNHCR has made that point in its recent intervention commentary on the Bill and the agreement: that there are all sorts of aspects of the agreement that have yet to be fulfilled, steps that the Rwandan Government has said they will take but have not yet taken.

That is not meant to be a criticism of them; they have not necessarily had the time. If this Bill comes into force fairly quickly—say it comes into force in March—and the Rwandan Government have not had the chance or have not completed all the steps that they promised to take under the treaty, is it not questionable whether Rwanda is a safe country at that stage?

Lord Sandhurst: That may be a question that arises later, but it is not a reason for saying it is not a safe country now.

Chair: If it is a question that arises later, how are the courts going to look at it if Parliament passes an Act of Parliament that says they cannot look at it?

Lord Sandhurst: It will be for Parliament to look at it. It is actually in Parliament's power to override a treaty. I think it was Lord Diplock who said, as long ago as 1967, that the Queen and Parliament can do that; it can break a treaty if it wishes to. Parliament is supreme, and if Parliament decides to do that, it can.

What will happen in reality will be that if things go wrong on the ground, there will be a fuss made, people in Parliament will know, the MPs will know, and it is inconceivable that people will not complain and that action will not be taken. The Minister will have to justify what is happening, and they are human beings.

Chair: The courts will not be able to look at the situation on the ground, though, will they?

Lord Sandhurst: No, the courts will not be able to, but if it was apparent that there was a structural problem of the sort we are considering, in practice there would be an outcry.

Q50 **Lord Alton of Liverpool:** Can I ask Lord Sandhurst to go further in response to your question about the role of the UNHCR and what it has been saying as recently as last week? It said that the treaty is an improvement on what went before, but it then said, "The conclusion of the treaty in itself does not overcome continued procedural fairness and other protection gaps". In those circumstances, what do you think Parliament should do?

Lord Sandhurst: I think Parliament is entitled to ignore the UNHCR if it wishes to. It has a supervisory role, but one has to remember that it has been very rude about Australia as well, and it has been going on for eight years there. It does not like what the Australians have been doing. It comes from a particular position.

We now live in a very difficult state of affairs where there are people coming to this country. Some of them are genuine asylum seekers. Many are people who do not, for whatever reason, like the countries they live in because of economic or social reasons. They come from France, which is a safe country. Some of them have flown into Belgium and then come across to France. They cross in the most appalling circumstances, in very

dangerous small boats, and a lot of money is paid to the most dangerous gangsters, which is then recycled.

I think we have to take a very different approach. The UNHCR, with respect, is applying treaties that were designed for a very different world, the world of Europe and so on of the 1950s.

Chair: Are we not still a signatory to those treaties?

Lord Sandhurst: We are still a signatory.

Chair: Do you accept that we are still bound by them in international law? No matter what the British Parliament legislates in respect of the domestic position, we are still bound by those treaties unless we withdraw from them.

Lord Sandhurst: Yes, of course we are, and we will be answerable in the international courts for that.

Chair: I think you said, in your opinion for the Society of Conservative Lawyers, that you believed that excluding the right to bring a challenge on the basis of the particular circumstances of the individual would likely be a breach of Article 13. Do you think this Bill breaches the ECHR as well?

Lord Sandhurst: No. I said, "If it excludes individual circumstances altogether", and it does not do that.

Q51 **Chair:** Sorry. You are absolutely right. I am jumping ahead of myself. Forgive me.

I come back to the deeming clause, which we are focusing on at the moment. We will come to Clause 4 on individual claims. We have heard Lord Sumption's opinion that the Bill, as is—you were criticising amendments to it at that stage, I think—

Lord Sandhurst: Yes.

Chair: —breaches Article 6 on the procedural grounds. Do you think it breaches Article 6 on the procedural grounds and, if not, why not?

Lord Sandhurst: I had not looked at it that way, because you have access to the courts. It is limited, but if you have particular personal reasons—let us say health, for example kidney treatment; some example where you are receiving treatment here, a clear case—you would be able to show that the mere fact of going to Rwanda or anywhere else would be likely to be dangerous to your health if you need ongoing treatment. You would not be debarred from going to the courts for that. I am not going to try to anticipate every individual circumstance that could arise, but the fact is that if you have personal circumstances, you can apply to the courts.

Chair: There is quite a high bar, is there not, in Clause 4?

Lord Sandhurst: Yes.

Chair: What about those who do not pass the high bar? Would you not agree with Lord Sumption that for those who do not pass the high bar of Clause 4, this Bill breaches Article 6?

Lord Sandhurst: I would not agree with it unconditionally, no. I think we will have to see. It is a question of fact and degree, and you have to apply it case by case.

Q52 **Chair:** Would you allow, at least theoretically, the possibility, if this Bill is passed as is, that there will be some individuals for whom the court is not accessible because they do not pass the high bar of Clause 4, and therefore Lord Sumption is right and the Bill breaches Article 6? Article 6 is there to protect everyone, not just those who pass Clause 4.

Lord Sandhurst: It is to protect everyone. They have to show they have good reasons, and we know that many of them will not have good reasons and they will fail to overcome that barrier. It is not as if they are not allowed. A decision will have been taken by an immigration officer, will it not, and he or she, or the Minister, will have found as a fact that you are not going to be in danger if you go back. Is that not right?

Chair: In this case there will not be an immigration officer involved, because these people will not be able to make asylum applications at all because of the Illegal Migration Act.

Lord Sandhurst: Yes.

Chair: We are not really dealing with that. We are looking at the role of the courts. As things stand, when people make an asylum application or are to be sent elsewhere, they can have a right of appeal to the court. Everyone. Nobody is carved out. Is it not the case that this Bill carves out a substantial proportion of people who have arrived in this country who might otherwise seek asylum from having any redress, unless they can pass the high bar of Clause 4? If my description of the Bill is correct, is Lord Sumption not right that it is a breach of Article 6?

Lord Sandhurst: Unless they can carve out grounds.

Chair: People are carved out. Unless they can fit themselves into Clause 4, they have no access to the court. Is Lord Sumption not right that this is a breach of Article 6? The rights contained in the convention are universal. There are no carve-outs, regardless of the country you come from, by law.

Lord Sandhurst: Yes, I accept that.

Chair: This Bill is carving out the right of access to a court for asylum seekers—or illegal migrants, depending on whatever language you want to use—who cannot fit themselves into Clause 4. Is that not a matter of logic, really, and therefore Lord Sumption is right on Article 6?

Lord Sandhurst: I had not looked at it that way before your questioning. I would have wanted time to consider that.

Chair: We are very tight for time, and I will bring other colleagues in now. Perhaps we can write to you on that when you have had time to consider it. My colleagues will remind me to do that.

Lord Sandhurst: Yes, do.

Q53 **Lord Murray of Blidworth:** Obviously, I should declare by way of an interest that I know Lord Sandhurst and he has led me in a professional capacity at the Bar previously.

Lord Sandhurst, is it right to say that if one looks at the Safety of Rwanda Bill, the exclusion of access to domestic courts applies only to one specific question, and that is the safety of Rwanda?

Lord Sandhurst: Yes.

Lord Murray of Blidworth: It does not exclude any other kinds of claims at all, does it?

Lord Sandhurst: No. That was, I thought, the point I was rather ineptly making. Rwanda is deemed to be safe, and you cannot challenge that—safe in generic terms.

Lord Murray of Blidworth: There is no other ouster clause in this Bill that I have noticed, is there?

Lord Sandhurst: No.

Chair: Yes, but my point was that any asylum seeker who wants to challenge his or her being sent to Rwanda cannot do so on the grounds of safety of Rwanda unless they can fit themselves into the very narrow ambit of Clause 4, which means, as a matter of logic, that there will be people who will not have the right of access to a court. That is a breach of Article 6. because that is a universal right, not a right that we can carve lumps out of for people we do not like.

Lord Murray of Blidworth: You might like me to ask this question. Is it not right, Lord Sandhurst, that this Bill does not affect any individual's right to bring a claim in the European court in Strasbourg?

Chair: Well, that is not the question I asked, with due respect. Let us move on in our order.

Lord Murray of Blidworth: Perhaps the witness should answer that question.

Lord Sandhurst: It does not stop someone applying.

Chair: I do not think anyone is suggesting that it stops people applying to the European court. I was asking questions about British domestic law.

Colleagues, we must keep this tight, because we have a lot of questions

to get through before 4 pm. Can I continue with our order and hand over to Baroness Meyer for the next question, which is on the UN? I think we have touched on it already.

Q54 **Baroness Meyer:** The UN Refugee Agency, tasked with supervising the application of the refugee convention, has recently said that it is its firm view that the scheme established under the Bill would not be consistent with the refugee convention. Do you agree with its view, and what weight would you give to this view?

Lord Sumption: I agree with that view so far as it is based on the refusal of access to a court, for the reasons I have given.

The view expressed by the High Commission on removal to Rwanda itself is rather more nuanced. Essentially, it says in what I think is its latest document that it does not think it is good enough to provide that people will be entitled to stay in Rwanda—that is, not be refouled—even if they do not apply for refugee status in Rwanda, or they apply and are refused. It does not think that that is good enough, essentially because it believes that it is important that the status of refugees should be determined by a judicial body.

I think there is some force in that, but I do not regard it as a game changer at all. It seems to me that if it does not matter whether the person is entitled to refugee status or not because they will have the same rights in either case, I find it difficult to see that this is a legitimate objection.

What the United Nations Commissioner is really saying is that he is concerned at what he calls the integrity of the international system for dealing with claims to refugee status, and that, I think, is a different point. It may be a powerful one, but it is essentially a political point rather than a point based on international law. I am also quite surprised by the fact that the UNHCR has not said anything to speak of about the other provision, which is that if the people removed to Rwanda are to be removed to anywhere, it has to be to the United Kingdom. The significance of that is that it is very difficult to see why the Rwandan Government would wish to export someone to any unsatisfactory destination when they have an unfettered right to export them back to the United Kingdom.

The answer that I would give to your question about how much weight should be put on it is that I would put limited weight on it. The United Nations Commissioner is extremely well informed, but this is not a point based on any specific information. He is also, of course, in principle, opposed to the whole notion of outsourcing adjudication of refugee claims. I think the comments that he has made are a mixture of legal and political comments, and that while the political comments have considerable force, we must recognise them for the political position that they represent.

Baroness Meyer: Lord Sandhurst, do you agree with this?

Lord Sandhurst: I would not want to differ with Lord Sumption on that.

Q55 **Baroness Kennedy of The Shaws:** The interesting thing is that it is clear that it is not about outsourcing. In fact, there are two things going on here. One is that we have done a deal with Rwanda that means that it does not matter whether you are an economic migrant or an asylum seeker; Rwanda, as a result of being given a whole load of money, will accept any of the folk Britain sends to them. That is the reality.

Lord Sumption: It does not have to accept them. There is a preliminary procedure under which the UK identifies those it wishes to send there, and the Rwandans have the right to say, "We will take one, two and three, but not four".

Baroness Kennedy of The Shaws: Essentially, we know—and the matter of concern that was being expressed by the UNHCR—that no distinction will really be made between whether you are a refugee who has gone through a judicial process to establish whether you are or not, and whether you are an economic migrant, because Rwanda, for the most part, will take anybody Britain sends, because we have paid them a lot of money. Is not that the reality?

Lord Sumption: Yes, it is, but I do not see that that is legally objectionable.

Baroness Kennedy of The Shaws: No. People may feel that as a great country we might not like that moral reputation, but I think we should stick to the fact that that is the reality. We are paying people to not worry too much about the distinctions. "Here they are. We don't want them. You have them. Here's the money to make it possible".

Lord Sumption: I will stick to legal propositions.

Q56 **Baroness Kennedy of The Shaws:** All right. I will make a declaration myself: I was present with Lord Sumption when he was interviewed by the BBC—as indeed was I—about the judgment of the Supreme Court. I understood you to say that your real concern was about the idea that a Government would pass a Bill to say that black was white, as they are doing here, and that a country that is not safe should be deemed safe when in fact, only three years ago, the British Government were criticising Rwanda for its extrajudicial killings, deaths in custody, enforced disappearances and torture. Indeed, the State Department of America did the same thing only two years ago. Very recently, Rwanda had a 100% rejection rate for asylum claims from Afghanistan and Syria, some of the places that have the greatest amount of torture and persecution.

If we just consider all of that, I heard you saying at the time that you were deeply concerned about the inability of a country to be able to change the infrastructure that is described in the judgment of the Supreme Court and the failings that there are within that system, and that they could not be corrected in the short period of time that we are talking about. That was your view as you expressed it.

Lord Sumption: Yes. That was my view.

Baroness Kennedy of The Shaws: Has it changed?

Lord Sumption: No. What has changed are the facts to which it has to be applied. At the time, I had no idea—I did not think any of us did—what the proposed new treaty was going to say. The proposed new treaty does nothing very significant to improve the system in Rwanda for adjudicating on asylum claims. There is apparently to be some reinforcement of the personnel, advice and so on, but I doubt whether that would achieve results very quickly and I think I said that in the interview.

What it does do, however, is to make the absence of an effective system for adjudicating on refugee asylum claims irrelevant by ensuring that, in either case, they can stay in Rwanda and cannot be deported to anywhere else other than the United Kingdom.

Baroness Kennedy of The Shaws: Therefore, we go back to the position that I have just put before you, that in fact we are buying a place for people, whether they have been persecuted or not, whether they are economic migrants or not. It is not a question of us doing as they did in Australia, which was outsourcing the process, whereby Australian officials went to islands and went through a process offshore. That is not what we are doing. We are handing it all over there and we are saying that the process does not really matter. Is that not right?

Lord Sumption: That is what we are doing. Whether that is objectionable is not a legal question and it is not, therefore, a question on which I feel I can pronounce with any claim to authority.

Q57 **Baroness Kennedy of The Shaws:** Clause 4 will allow claims, as we have already heard, resisting removal based on compelling evidence relating to the particular individual circumstances of someone. The Immigration Minister described this as an extremely limited route for individual challenge. We have had the Lord Chancellor here in front of us and he sounded much more generous in his interpretation of it.

I want to ask about people who quite clearly have mental health problems and who are already seen to have mental health problems. Would it not be possible to introduce, in those individual applications under Clause 4, the failure of Rwanda to create a system of mental health care that would adequately deal with people who have suffered persecution?

Lord Sumption: Of course it would be possible to amend the Bill so as to address that point. I would expect a very large number of people who would otherwise not have claimed that they had any special problems that made it unsafe for them to try to devise some such problem. I think we must assume that quite a lot—I cannot be more precise than that—of people subject to this Act will invoke Clause 4. Some of them will be entitled, others will not. There are, of course, tight timetables in which the court has to decide that question.

What seems absolutely clear to me is that Clause 4 is essential if the Bill is to comply with international law, because the new treaty deals with the problem of countries that are unsafe for refugees in general—for example, because of the risk of refoulement. The treaty does not deal with the problem of countries that are in general perfectly safe but not for certain categories, such as mental health patients of the kind you have been talking about, or gays in the countries where they may be persecuted. I am not suggesting that is true of Rwanda, but I cite it as a hypothetical example.

Without Clause 4, the Bill would be inconsistent with international law in authorising deportation and not just in denying access to a court, and my understanding from the public statements of the Prime Minister is that Rwanda would not accept that.

Baroness Kennedy of The Shaws: If someone making an individual challenge under Clause 4 said, "I'm in need. I've had some psychotic episodes as a result of the torture I experienced and the witnessing of both my parents being slaughtered before my eyes", would the declaration that Rwanda is a safe place prevent one from saying, "Rwanda is not in a position to be able to deal with my condition"?

Lord Sumption: The whole point about Clause 4 is that it is an exception to the general position stated elsewhere in the Act. Rwanda is a safe place in general. The courts are required to assume that. That is what the other provisions say. Clause 4 provides that if it is a safe place in general but none the less may be unsafe for the particular claimant, that does not apply.

Baroness Kennedy of The Shaws: I see. Thank you very much. That is very helpful. Thank you, Lord Sumption. That is the answer.

Q58 **Lord Alton of Liverpool:** Chair, may I take Lord Sumption back, and Lord Sandhurst, to what you were saying about our international obligations and what the UNHCR had stated, which was cited by my colleague Lady Meyer in her earlier question? You have just said to us, Lord Sumption, that Rwanda would not accept the Bill or these procedures in the treaty if it thought it was in breach of its international obligations, if it thought that international law was being breached. I think you also quoted the Prime Minister, who has said much the same thing.

We have the UNHCR saying as recently as last week—again, I quote—"UNHCR has not observed changes in the practice of asylum adjudication that would overcome the concerns set out in its 2022 analysis and in the detailed evidence presented to the Supreme Court". The UNHCR has also concluded that excluding asylum seekers from some of the protections within the Human Rights Act "undermines the universality of human rights, has implications for the rule of law both domestically and internationally, and sets an acutely troubling precedent". Do you agree with that analysis? Is it based purely on political considerations, or are there legal arguments there that we need to understand?

Lord Sumption: I do not agree with all of it. When I say I do not agree, it is really a question of relevance more than anything else. Its point about the importance of having judicial adjudication seems to me to be satisfactorily met by the fact that it does not make any difference to the way the deportees will be treated whether they apply for asylum or whether they get it if they do apply.

The concern of the UNHCR is much wider than with international law, properly so called. What it is concerned with, possibly above all but certainly among other things, is the orderly functioning of the international system for asylum and for dealing with very large numbers of refugees displaced by natural catastrophes, civil wars and so on.

That is a perfectly legitimate concern for it to have, but its concern is with the orderly functioning of this system and not only with questions of international law, properly so called. Basically, it is animated by a view that the UNHCR has taken for a long time, which is that measures like this are effectively "beggar my neighbour" measures; they are "pass the parcel" measures that have the result that an unfair proportion of the burden is lumbered on other countries, which may not be in a position to take the same measures or may not wish to.

That is an important point—I do not wish to devalue it in any way—but it is not a point based on international law. It is essentially a judgment based on the orderly administration of a very complex system of international treatment of refugees.

Q59 **Lord Alton of Liverpool:** That is a really helpful answer, and I am grateful to you. It seems to me, and it was a point made in our debates on Monday in the House, that outsourcing can very easily become offloading, passing responsibilities to others in the way you have just described.

What you also point to, though, is a world where there are 110 million displaced people, according to the UNHCR. It is a growing number, 20 million more than it was just two years ago. In those circumstances, does international law need to be revisited, and how could it be best revisited? What can we do about updating it in the way that I think Lord Sandhurst was suggesting earlier needs to be done? It is true that many of these treaties and obligations were entered into a long time ago. There was massive upheaval in Europe at the time. We have been here before, to some extent. What would your wise counsel, your advice, be about what needs to be done at an international level?

Lord Sumption: It will always be extremely difficult to modify a treaty to which I think, on the latest count, something like 160 countries are party. It is one thing to devise such a treaty initially with a small number of countries and have it gradually expand as states come into existence with decolonisation and so on. It is a quite different thing to take an existing system and modify it.

There is another problem about that too, which is that there are two kinds of amendments that people would want. Many people take the view—I am not expressing my own view at all—that there is a strong current of opinion that suggests that relative ease of travelling, the availability of large people-smuggling gangs, and other developments have made mass movement to other countries a great deal easier than was the case in 1951.

The sheer scale of the problem, combined with the relative ease of moving across the globe, means that the whole principle underlying the refugee convention needs to be changed. Other people take the view, right on the opposite end of the spectrum, that the refugee convention ought to create obligations to accept refugees—currently it does not do that; it governs the treatment of refugees when they are here but not whether we have to accept them—and would wish to strengthen the protection of refugees under a revised treaty.

The problem of reopening the whole issue of the terms is that you are never going to get agreement between these extremes. I think a lot of people feel that if they reopen it for the purpose of strengthening the protection of refugees, they may end up with Governments very much narrowing the protection of refugees because of the first of the two considerations I mentioned.

Lord Alton of Liverpool: Thank you very much.

Chair: That was so beautifully summarised. I am very grateful to you for that. It is the dilemma facing countries across the world.

We heard from evidence last week that the vast majority of displaced people tend to stay in neighbouring countries and do not come to Europe at all, and that is something that we need to bear in mind in putting the problem in perspective.

Q60 **Baroness Lawrence of Clarendon:** Lord Sumption, when individuals want to make a challenge to the courts, is there a time limit? If they are going to be moved to Rwanda and there is some element of their case that they want to challenge in the courts, is there a time limit for them?

Lord Sumption: There is a time limit under the only window that will enable them to do that, which is the Clause 4 window. It is basically 30 days. They have seven days in which to bring their complaint. and the courts are required to adjudicate on it within 23 days. That is a very tight timetable indeed. I do not know whether it is feasible. That will depend on the volume of cases. It is a tight timetable.

Baroness Lawrence of Clarendon: Therefore, there will be times when those individuals would be transported to Rwanda rather than having their case be heard, because if they are not able to do so within the time limit, they would be deported to Rwanda.

Lord Sumption: As I understand it from statements by the Government—again, I neither endorse nor criticise those statements—a

significant proportion of people who apply for judicial review start with very simple grounds and then add extra grounds as time goes on, thus, it is said, delaying things and complicating the process. My understanding is that the tight timetable is designed partly to preserve the deterrent effect of rapid removal—which the Government believe, rightly or wrongly, will have an impact on the number of people crossing the channel—and partly out of a desire to stop people reinventing their case as the proceedings continue.

Q61 **Lord Murray of Blidworth:** Lady Kennedy and Lord Alton raised the question of offshoring or outsourcing the process of processing asylum claims with you and suggested to you, Lord Sumption, that it was in some way inappropriate. In the proceedings brought against the Secretary of State—

Baroness Kennedy of The Shaws: I did not say that.

Lord Murray of Blidworth: —in the Divisional Court there was a suggestion that it was unlawful. My recollection is that the Divisional Court held that it was not unlawful and the Court of Appeal agreed with that. Is that still the legal position in your view?

Lord Sumption: I believe that the point was abandoned when the case came to the Supreme Court, and it was rightly abandoned because it was not a good point, for exactly the reasons given by the Divisional Court. Outsourcing is not contrary to international law, let alone English law. Indeed, although the UNHCR regards the practice as undesirable, it accepts that there are circumstances in which bilateral treaties, for example, may outsource these things. It does not like the practice but basically it seeks to distinguish between cases where this is, in effect, an example of international co-operation to deal with a common problem and cases where it is offloading the problem to someone else. There is a distinction to be made there but it is a very difficult distinction indeed and it is a pretty porous concept. However, the UNHCR has never said that outsourcing is, in principle, necessarily contrary to international law.

Baroness Kennedy of The Shaws: I am not saying it either. I think you misunderstood, Lord Murray, if you thought I said that. The point I was making was that the situation in Australia of outsourcing their process is distinctly different from what is planned here, where we are not talking about sending British personnel out to Rwanda to—

Lord Murray of Blidworth: Lady Kennedy, I think we know you have a morally different view, but the witness has—

Chair: Hang on; let us not have this debate here.

Baroness Kennedy of The Shaws: This is a legally different view.

Q62 **Chair:** I think we have had a very clear answer from Lord Sumption. Clearly, as a committee, we will have much to debate, but let us do it privately because we want to use our questions. Helena, you wanted to correct Simon's understanding of what you said and I think we have that

on the record, but I am keen that we ask our witnesses about Section 4 of the Human Rights Act and about interim measures. We have only 15 minutes left, so I want to bring us on to that.

The Bill does not expressly disapply Section 4 of the Human Rights Act, which gives the higher courts the power to declare that statutes are incompatible with human rights. That power is expressly preserved by the Bill. Does that mean that, if this Bill becomes law, a legal claim challenging the incompatibility with the ECHR can be brought? If so, what effect would a declaration by the courts that the Act was incompatible with the Human Rights Act have? What effect would that have and is it likely to prevent the removal of asylum seekers to Rwanda?

Lord Sandhurst, I know you spoke about this in your opinion for the Society of Conservative Lawyers and I know that the ERG has a different view from you, so I am keen to ask you about it.

Lord Sandhurst: I am sorry; I was just looking at my notes. Are you asking, in other words, about being unable to make a declaration of incompatibility?

Chair: If the Bill passes as is and the power to make a declaration of incompatibility is preserved because Section 4 of the HRA is not disapplied, and if such a declaration were made, what would be the likely effect of that and what impact would it have on the removal of asylum seekers to Rwanda?

Lord Sandhurst: I suppose the strict answer is none. It would depend on Parliament and the Ministers. We have this vision of declarations of incompatibility. Sometimes Parliament acts very quickly; sometimes it does not and there is no obligation on Parliament to do anything. This was deliberately left in or put in when the Act was passed. There we are.

Obviously, if there is a very clear judgment in a very strong case—I am not going to start speculating on facts—the Minister and the Secretary of State may well feel that we have to do something about this and provide in some way for exceptional circumstances that were not in contemplation when the Bill was before Parliament. Particular facts might have arisen or a category of facts that nobody had thought about. As a matter of law, a declaration of incompatibility is simply saying that and saying to Parliament, "Now over to you". We can all think about whether that is a good or a bad thing, but that is what it is and Parliament remains supreme.

Chair: We will hear from Martin Howe later this afternoon but the ERG legal committee said, "In practice, it would be very difficult to maintain the policy in the face of a declaration of incompatibility—especially one issued by the Supreme Court". They say this is because such an outcome would indicate the Rwandan scheme as a breach of convention rights and would lead to very significant political pressure to comply with what would be seen as an authoritative judicial pronouncement. Indeed, on that basis, it recommended disapplying Section 4. What do you think of

this?

Lord Sandhurst: I am not attracted by that at all. It has to go back to Parliament. We live in a democracy so, if Parliament thinks, "We must think again", it will, and if it says, "No, we will plough on because the policy is generally working and we like it", it will. If it wants to bring in a specific amendment, it will, and it can do that very quickly if it wants to. We have seen what happens quite differently in the context of the Post Office compensation and the quashing of convictions, if Parliament wants to do something—or rather, the Government do. There would be pressure, one can see, because not all those on the Government Benches are members of the ERG. There are people on the other side, as we know—possibly five different groupings; I do not know. It would depend on the facts.

Chair: Lord Sumption, what do you think about this? What do you think would be the impact of a declaration of incompatibility?

Lord Sumption: I think that Lord Sandhurst is correct to say that it has no legal impact at all. Section 4 of the Human Rights Act was designed as a means for the courts to put pressure on Parliament in cases where Parliament may be assumed to have overlooked the incompatibility of some statutory measure with the human rights convention.

I think the Government must have faced up to this already. It seems to me pretty obvious that it is inconsistent with Article 6 of the human rights convention, and it seems to me that, in deciding that they were going to put forward this Bill without the usual statement that it is consistent with the human rights convention, they must have made a decision that, in principle, they were prepared to ignore a declaration of incompatibility. I rather doubt whether the pressure foreseen by the ERG's legal committee will make a great deal of difference.

What seems absolutely clear is that the declaration of incompatibility will not, barring a statutory amendment, affect the removal of the complainant or others to Rwanda. Remember that under the Illegal Migration Act their removal from this country has become a statutory duty with quite limited exceptions, and those exceptions are narrower still in the case of removal to Rwanda. Therefore, it seems to me that its effect will be very limited indeed, barring statutory reconsideration by Parliament.

Q63 **Chair:** What about a final decision from the European Court of Human Rights? If somebody took a claim to Strasbourg and the Strasbourg court said authoritatively that the Act was in breach of the convention, what impact would that have on the removal of asylum seekers to Rwanda?

Lord Sumption: It is quite likely to happen sooner or later and it would produce a classic collision between an irresistible force and an immovable object. This is one of the basic problems about this: there is no way in which an English statute can remove the right of access to the Strasbourg

court. The only thing that could do that is a withdrawal from the convention in toto.

Sooner or later, it seems likely that there will be an adverse decision of the Strasbourg court. Under the convention, Britain has an international law obligation—that is not incorporated into the Human Rights Act but exists at the international law level—to abide by decisions of the Strasbourg court in cases to which it is a party. It will then have to decide whether it will disregard what is quite plainly an international obligation subject to the supervision of the Council of Europe, withdraw from the convention altogether or simply decide to modify the law. That will be a very uncomfortable situation.

Lord Sandhurst: To finish on that, it did occur to me that that will be a little way down the road, by definition, when we get to it. We will see how the policy is working in any event. Is it working and are fewer people coming across? We did have prisoners' votes—we never complied with that—and we had to wait for Horncastle for about seven or eight years to override Khawaja on the criminal hearsay provisions. I will not interrupt further.

Q64 **Chair:** I think that is a point well made. However, what will not be so far down the line, and is likely to happen quite quickly, is the declaration of interim measures by the Strasbourg court. Someone is quite likely to go to Strasbourg in the immediate future, once the Bill is passed, to try to get an interim interdict, as we say in Scotland, or an interim injunction to prevent removal.

Of course, Clause 5 of the Bill states that only a Minister can decide whether the UK will comply with interim measures and the Immigration Minister said in the House of Commons that "we can and will lawfully use that power if the circumstances arise". Is the UK, in your view, required to comply with interim measures and could a Minister refusing to comply with interim measures be consistent with the UK's obligations under international law?

Lord Sumption: There are two decisions of the Strasbourg court in which it held that there is an obligation under the convention to comply with interim measures. In my view, this was an excess of jurisdiction by the Strasbourg court, since the convention itself quite plainly limits the obligation in international law to comply with rulings to final orders. It does not include interim orders and the interim order provision was created by the internal procedures of the court itself as part of its procedure.

This is a very difficult situation because the only way in which a state can deal with a court that defines its own jurisdiction, without any process of legislative amendment or reversal being possible, is to make a declaration that it does not acknowledge the right of the court to proceed in that way. Personally, I think that would be justified.

However, the immediate and technical question is that the Government, having taken specific powers by statute to ignore a Rule 39 order, are, as a matter of English domestic law, entitled to proceed on that basis. They will have to cope with the international complications that that gives rise to as best they may.

I do not think it is by any means certain that this will lead to the same kind of crisis as might arise if the Strasbourg court were to say that deportation to Rwanda is illegal, because the Strasbourg court is pretty sensitive to political concerns if they are widely shared. The reality is that the problems that we have affect most countries in Europe, and important countries like Italy, Germany, the Netherlands and France in particular. Simply cruising on as if there were no concerns about this or as if they were confined to the United Kingdom is something that the Strasbourg court would probably be reluctant to do.

Lord Sandhurst: I agree with Lord Sumption. I remind the committee that there is a powerful paper from Policy Exchange—was it last year?—by Professor Ekins and others, with a foreword by Lord Hoffmann, which says that you can ignore interim orders for the precise reason that it was the court pulling itself up by its own bootstraps to justify it. We will not go into that.

Chair: I am very conscious, Lord Sandhurst, that we must let you go because you have a train to catch.

Lord Sandhurst: It is all right; I have five minutes.

Chair: What puzzles me about all this is that it is standard for courts to pass interim measures to preserve the situation, the status quo, pending a decision. I hear what you say, Lord Sumption, and I understand the arguments about the Strasbourg court expanding its jurisdiction without the agreements of the states parties to the treaty. What puzzles me about it is that most courts issue interim orders to preserve the status quo and, in fact, not being able to issue interim orders or having one's interim orders ignored has huge consequences. As those of us who are lawyers know, often, once the status quo is upset, it is very difficult to get back to the status quo.

Lord Sandhurst: We have a return date.

Q65 **Baroness Kennedy of The Shaws:** My point is on the same thing and I am interested to hear Lord Sumption's view. Many of us recognise that there are seriously unsatisfactory aspects of the whole interim measures procedure in Europe, in that it can happen without both parties being there and without an opportunity being given to the opposing party to make arguments. We can rehearse what the problems are, why we think it is unsatisfactory and how they ought to be getting their house in order—and I think that they are talking about getting it in order.

The test is of serious, irreparable harm of only introducing interim measures where the consequences cannot be put right if you send someone off to Rwanda—supposing it were a health issue of some

significance and seriousness or something that meant you will not be able to make this right subsequently. You would agree that that is an important element within legal systems.

Lord Sumption: Yes, I would, but I will make two points. First, taking your health issue, the route to deal with that is via Clause 4, assuming it is enacted in that form. I also point out that the Supreme Court held that there was no likelihood of irreparable harm even if Rwanda proved to be unsafe because of the risk of refoulement, provided that the Government were prepared to give undertakings that they would bring the affected people back, were that to materialise. That was regarded as a decisive factor by the Supreme Court in this country. I do not know—none of us knows—what, if any, attention was given to the Supreme Court's decision on the interim points, the earlier judgments, when the Strasbourg court decided to make their Rule 39 order 18 months ago. However, on the face of it, it does not follow, simply because a removal to Rwanda might be unlawful in international law or even in English law, that an interim order is either necessary or appropriate. The Supreme Court gave an obvious example of quite common cases where it would not be necessary or appropriate.

Chair: But there would be cases where it would be necessary and appropriate.

Lord Sumption: Absolutely, but most of them are going to fall under Clause 4, because the reasoning of the Supreme Court on the interim measures point was based on the proposition that it was being said that Rwanda is an unsafe place for everybody. If it is being said that it is an unsafe place for particular categories of people, there is a judicial remedy in that case under Clause 4.

Lord Sandhurst: I agree.

Chair: You agree, Lord Sandhurst. Also, Lord Sandhurst, we must let you go because we promised.

Lord Sandhurst: I am very grateful. I am sorry that I cannot stay longer, but I can stay for two minutes.

Chair: We are very grateful to you both. It may only have been an hour, but it has been a very rich hour. We are grateful to you both for your time. I will bring this part of the public meeting to a close. Once again, I give my thanks to you both for joining us.

Examination of witness

Martin Howe KC.

Q66 **Chair:** Good afternoon and welcome back to today's meeting of the Joint Committee on Human Rights. As I said at the beginning, we are a cross-party committee and also a Joint Committee, which means we have

Members here from both the Lords and the Commons.

Today we are taking evidence on the legislative scrutiny of the Safety of Rwanda (Asylum and Immigration) Bill. We will hear in this next session from Martin Howe KC, who is joining us online. You are very welcome, Martin. Martin practises across commercial and public law. He is one of the authors of the opinion of the legal committee of the European Research Group of Conservative parliamentarians on the Rwanda Bill. We are delighted to have him with us this afternoon to ask him a few questions pertaining to the Bill.

I will kick off with the first question. The Bill would give effect to the judgment of Parliament that the Republic of Rwanda is a safe country, despite the Supreme Court having recently concluded that Rwanda is not a safe country to send asylum seekers to. Is this an appropriate step for Parliament to take and is it consistent with the separation of powers and the rule of law?

Martin Howe: I think it is constitutionally appropriate. I personally would have preferred to achieve the result in a different way, because the way it has been done is to invite criticisms along the lines—I think most forcefully expressed criticism by Lord Sumption, if I remember correctly—that what Parliament would be doing by this Bill is ordering the courts to treat black as if it were white. I do not think it goes that far, because the Government's position is that safety in Rwanda has been enhanced by the new treaty. The Government's position is that it has successfully resolved all the problems identified in the judgment of the Supreme Court.

I have a reservation about using this technique because it seems to me that the fundamental position is that the courts, by and large, should apply domestic law under the control of Parliament and should not be encouraged to venture into areas of international law. That is, of course, subject to areas where Parliament has brought international law into our domestic legal order where the courts have to apply it in that context. Of notable relevance here is the Human Rights Act, where the European convention and the Geneva refugees convention come in by virtue of statutory provisions.

Rather than a Bill that in effect requires courts and decision-makers to deem something to be true that might or might not be true—in fact Parliament has no power as such to make true—which is the international law status, a more appropriate way of achieving the result would be to have a Bill that simply says that removals to Rwanda can go ahead regardless of this international law issue.

Chair: If that were passed by Parliament, it would change domestic law in the domestic legal systems of the United Kingdom, but it would not have any impact on international law, would it?

Martin Howe: Nothing that Parliament does—sorry, that may be too wide a statement, but Parliament could direct the Government to leave

various treaties, which would have an effect on our international law obligations. In essence, as a general rule, what Parliament says in a Bill or an Act does not alter the international law obligations of the United Kingdom.

Q67 **Lord Alton of Liverpool:** Thank you, Mr Howe, for being a witness today. The judgment that you provided, the legal opinion that the European Research Group gave, states that the Bill "crosses the Rubicon of overt defiance of Strasbourg Court jurisprudence". Do you therefore think that the Bill is currently incompatible with the convention rights? Perhaps we can add to that the 1951 refugee convention as well.

Martin Howe: They are different things, actually. Can I deal with the European convention first? The reason why I question the proposition that it is incompatible with convention rights is that we were saying that it is incompatible with the Strasbourg court's jurisprudence. I do not believe that those are necessarily the same things. In many respects, the Strasbourg court has developed doctrines that go beyond the convention rights as adhered to by this country and others when they signed up to the convention. Without going into the ins and outs of it, it is a debatable whether defying the Strasbourg court's interpretation of the convention is in any way a breach of the actual convention rights.

The Strasbourg court position is actually quite different from that of the Luxembourg court within the European Union legal order, where principles and interpretations laid down by the Luxembourg court are binding. That was reflected, as is well known, in the 1972 European Communities Act. In the Strasbourg court there is no equivalent, and the only respect in which Strasbourg court judgments are expressed by the convention to be binding is that the final judgments in particular cases are binding on the state against whom the case is brought. I think that "overt defiance" of the Strasbourg court, which we referred to in the paper, is not the same as breaching the convention rights. I am sorry; it was quite a long clarification.

Lord Alton of Liverpool: It was, but it was very helpful. Can you say further, on convention rights generally, whether you think it would be prudent for a country like this to be in breach of convention rights? Also, you said you would reference, in that context, the 1951 refugee convention and what our obligations might be.

Martin Howe: Dealing first with your broader question about other convention rights, I think that there are other respects in which the Strasbourg court has gone beyond what the convention actually provides.

Chair: Can I pop in here, because I want to make sure that I understand you properly? Your position is that, whereas this Bill might not be compatible with the Strasbourg jurisprudence, it is compatible with the rights that we signed up to in 1950.

Martin Howe: Correct.

Chair: You do not subscribe to the doctrine that the Strasbourg

convention is a living instrument that is interpreted by the court. You would accept that the majority view is that it is a living instrument. When submissions are being made in cases in this jurisdiction, my own jurisdiction in Scotland and other jurisdictions across the Council of Europe, the lawyers do not confine themselves to the black-letter text of the convention; they look at how the convention has been interpreted by the court, do they not?

Martin Howe: Certainly, they do. In our own jurisprudence under the Human Rights Act, we have the House of Lords, subsequently the Supreme Court and Lord Bingham in particular, saying, in effect, that clear and consistent Strasbourg jurisprudence should be treated as binding. I agree that that is a widely held point of view, but it does not follow that it is right.

Chair: This committee will have to publish a report summarising our evidence on whether or not the Bill is compatible with the convention. Are you inviting this committee to disregard all the jurisprudence and look merely at the black-letter law of the rights set out in the convention back in 1950? That seems rather an odd approach.

Martin Howe: You may regard it as odd, but this is the fundamental point.

Chair: It is novel.

Martin Howe: It is not particularly novel, but this is the fundamental point: the European convention has no asylum right in it. It was intentionally not drafted to contain an asylum right. There is a reason for that, and it is because the Geneva refugee convention, which is different in important respects, was in development at the same time by very much overlapping countries. They were not quite identical but an almost identical group. Asylum was being dealt with by the Geneva convention.

The Strasbourg court has extended, in particular, Article 3 so that it has an extraterritorial effect. Instead of it relating to inhuman and degrading punishment and treatment meted out or tolerated by states in their own territory, the court has extended it beyond what the convention says. In particular, the actual test, which comes from the Strasbourg court jurisprudence that the Supreme Court applied, extends it to whether there are substantial grounds for believing that there could be a risk of treatment, which is way below what the convention says.

Q68 **Chair:** To look more broadly at the convention and to refer you to evidence we heard earlier, this afternoon we heard from Lord Sumption, who expressed the view that the Bill contravenes Article 6 because it restricts those who can have access to a court and determination of their rights. He was quite clear on that. Even if we remove it away from Article 3, would you not agree that by deeming Rwanda to be a safe country and by allowing only certain individuals with quite a high bar, under Clause 4, to refer the issue of whether they should be sent to Rwanda to the court, effectively there is a curtailment of some people's Article 6 rights by the

Bill?

Martin Howe: That may be a good reason why my preference is to say for Parliament to legislate that the arguments that Rwanda is unsafe in general are not an objection to being sent to Rwanda. The reason for saying that is that Article 6 is concerned with having access to a court for determine a right that you have; it is not to do with what rights you do and do not have. I hope you understand me correctly.

However, there is another basis on which the Strasbourg jurisprudence is more what we had in mind in that report. Particularly in the Chahal case and other cases following it, they considered that Article 3 in combination with Article 13 gave rise to a right of access to the courts for people who were at risk of being deported and potentially at risk of Article 3 mistreatment in the country of destination. That, in essence, is what our remark about crossing the Rubicon was directed to.

Chair: If we set the Chahal case to one side, is it not of the very essence of the convention as drafted in 1950 that it applies to everyone? The rights in it are universal. I cannot remember the exact words, but in determination of their rights and obligations, everyone should have access to a court. I think that is the point that Lord Sumption was getting at: as a result of this Bill, in determination of their rights and obligations in so far as being sent to Rwanda is concerned, there will be a significant cohort of people who will not have access to the court because they cannot fit themselves into the narrow category of Clause 4.

Martin Howe: I apologise because unfortunately I was not able to listen to Lord Sumption and I might be able to perhaps give a better or clearer answer if I had been able to.

Chair: That is a fair point. Perhaps we could write to you about that because I am conscious of bringing in other colleagues. I think that we will write to you about that, putting to you specifically what Lord Sumption said earlier.

Q69 **Lord Alton of Liverpool:** I think that Mr Howe has covered what I wanted to ask about and that the point about Article 6 reinforced what I was asking, Chair. I do not need to pursue it any further, unless you have anything to add about our other obligations under international law and whether you think it places the United Kingdom in a difficult position to wag its finger at the People's Republic of China or Putin's Russia, when they are in breach of international obligations, if we seem to be in breach of such obligations ourselves. Does that matter?

Martin Howe: I owe you an answer on the Geneva refugees convention, which I promised to give you, but I am afraid was taken off a couple of times and then perhaps went off track. To complete that side of it, as is well known, the Geneva refugees convention contains the article on non-refoulement. However, a big difference between the Geneva refugees convention and the European Convention on Human Rights is that the Geneva convention does not contain any specific provisions requiring, say, adjudication by the court. Indeed, it contains provisions requiring

adjudication or assessment of cases, but it can be by an administrative authority. There is a material difference between that and the Strasbourg court jurisprudence.

The broader point you raised is, in a way, more of a political and legal point. It is often raised. My view is that we should look at whether these treaties and conventions actually serve our own interest as a country. I do not think that, say, Mr Putin or China will be influenced one way or the other by decisions by this country on what it does and does not do on a convention such as the European Convention on Human Rights.

Chair: The difficulty with that, Martin, is that when this committee visited Strasbourg the summer before last, we were told in terms by many of our interlocutors at the Strasbourg court and at the Council of Europe that other countries in the Council of Europe do look to what Britain does and will pray in aid their own bad behaviour if we ignore international law. I think that they had in mind some of the eastern European countries.

Lord Alton of Liverpool: I might add that the Prime Minister of Pakistan recently cited the Rwanda legislation as a justification for sending 450,000 Afghans from Pakistan back to Afghanistan. I am not suggesting that you would favour that, but that illustrates the point behind my question: if we believe in the architecture of international law and the rule of law, it behoves this country to try to abide by the very things that we are signed up to. That was the gist of my question.

Martin Howe: I follow that and am fundamentally in agreement with you on that point, which is why, not in this particular paper but in the broader context, I am in favour of leaving the European Convention on Human Rights. I think that we should not accept a situation where the Strasbourg court keeps on putting out judgments that impose on us obligations we never signed up to. Staying in the system but defying the judgments is highly unsatisfactory, even though I have adduced arguments as to why I think you can contend that, in doing that, we are not breaching international law even if we are disagreeing with the court's judgments. But I agree that it causes serious problems.

Q70 **Lord Murray of Blidworth:** Mr Howe, I understand the originalist position on the convention. I want to investigate with you how that sits with the provision in the Human Rights Act Section 2, that a court or tribunal determining a question which has arisen in connection with a convention right must take into account any judgment, decision or declaration of the European court. I have one question after that.

Martin Howe: Clearly, that is an instruction by Parliament to take into account Strasbourg judgments. In interpreting the convention rights, clearly our courts are not entitled, in the light of Section 2, to completely ignore them, not to not consider them. It is well known that Lord Irvine had a public disagreement with the Ullah case and that line of cases and suggested that our Law Lords adopting the proposition that, in effect, treating Strasburg judgments as binding, at least in certain

circumstances, went beyond what Parliament had instructed the courts to do in Section 2.

Chair: In fairness, you are absolutely right. There has been a big debate about what the words "take into account" should mean. The Ullah case was the high point, then there was a retreat from the Ullah case. I think what we could possibly agree is that "take into account" does not mean ignore. Your position seems to be that we should ignore the jurisprudence completely when deciding whether this Bill fits with the European Convention on Human Rights. We might argue about what "take into account" means; it cannot mean ignore.

Q71 **Lord Murray of Blidworth:** I want to explore one point on the Rwanda Bill. Mr Howe, to what extent do you think the Rwanda Bill provisions disapply Section 2 effectively or not?

Martin Howe: I think that this application is extremely narrow. Indeed, it has been one of the puzzles that I faced when going through this Bill. I think that the disapplication you are referring to is in Clause 3(3), which disapplies Section 2 where a court or tribunal is determining a question relating to whether the Republic of Rwanda is a safe country for a person to be removed to. In effect, that governs the continuing individual danger applications that may be made.

One of the oddities is that disapplying Section 2 removes the duty on courts that they must take account of Strasbourg court judgments. It does not tell them to disregard them. I am wondering what this would achieve in practice since, even if Section 2 had not been there, the courts would have been able, on general principles, to take account of the persuasive authority of international court decisions on the treaty with which they are dealing.

Chair: That point was made to us when we were dealing with potential proposals to repeal the Human Rights Act. Even if you took Section 2 away, the courts still approach their work by looking at case law not just the original black-letter law. Even taking away that duty to take into account would not mean that the courts would not consider looking at the jurisprudence. I find it a curious idea that any court in the United Kingdom should adopt the procedure whereby we ignore all the jurisprudence of the last 75 years and look just at the original document. It is a novel approach; I think you would agree.

Martin Howe: I am not arguing this in court. The courts have their approach. I am suggesting that it is a proper role for Parliament to say that we, the United Kingdom, do not agree that this line of jurisprudence accurately reflects the international obligations we undertook in signing up to the convention; and we, Parliament, will, in effect, direct the courts to disregard that line of cases.

Q72 **Lord Murray of Blidworth:** I have one other line of questions. Mr Howe, I want to go back to your point about Article 6 of the convention. Is it your view, following Chahal, that the kinds of claims brought by these

illegal entrants are such that they do not fall within the ambit of Article 6 as "determination of his civil rights and obligations or of any criminal charge"? Those are the words of Article 6(1) of the European convention.

Martin Howe: The Chahal case itself did not put it on Article 6 as such. It put it on Article 13, which is providing a remedy.

Lord Murray of Blidworth: Was the logic for that not that it did not fall within Article 6, so they had to find another avenue?

Martin Howe: Yes. I apologise again: not having heard Lord Sumption's evidence on this point, I might need to think about it and look it up before giving evidence on Article 6.

Chair: We will get back to you on that, in fairness.

Lord Murray of Blidworth: That is entirely reasonable.

Chair: We will get back to you once we have a transcript. I will bring in Doreen Lawrence now with a slightly different angle.

Q73 **Baroness Lawrence of Clarendon:** The ERG's legal opinion also concluded that the Bill does not go far enough to deliver the policy as intended. Do you think that it is possible for the Bill to be made effective and yet compliant with human rights and international law?

Martin Howe: I think that it is possible to make it effective and compliant with international law. I suspect that it is not possible to make it effective and compliant with the Strasbourg court's interpretations, or at least all of them, of the European convention.

Chair: That is the same point as before. You think it is possible that you could make it comply with the original text of the convention, but not with the way that it has been interpreted over the last 75 years. I think we have that.

Baroness Lawrence of Clarendon: I do not know; it seems a very short answer. I suppose I expected a little more explanation as to why you think it is effective as well as compliant. You are saying that we should come out of part of human rights law but, by us dismissing that, where human rights are concerned, there is so much that we should be compliant with, not looking to dismiss or move away from. Am I wrong?

Martin Howe: I am sorry; I am not sure what question you are asking me to answer.

Chair: I think that your position is quite clear, in fairness to you. Obviously you want to comment on Jonathan Sumption's point, but your position is that you think it is possible to make this Bill comply with the black-letter law of the convention but not with the court's jurisprudence interpreting the convention.

Martin Howe: I cannot see how you can create an effective Bill while still complying with all the ECHR cases.

Chair: People tried to amend the Bill in the Commons without success and it went unamended to the Lords. Looking at that Bill as it has entered the Lords unamended, and looking to Doreen's question, do you think it is possible for the Bill to be made effective and yet be compliant with human rights and international law? Do you think the Bill, as it stands, will be effective?

Martin Howe: I do not believe that the Bill, as it stands, will be effective. The theory behind the Rwanda policy—and I suppose it is based on the Australian experience—is that if you set up a system where people know that if they cross the channel they are certainly, or at least highly likely, not to be allowed to stay in the United Kingdom but will be sent off to Rwanda and their claims dealt with there, the incentive for people to take that dangerous journey across the channel will go away.

If you have a system where you announce the Rwanda policy and nothing happens since mid-2022—we are now at well over 18 months and not a single person has been sent there—it will fail to achieve any deterrent effect. If that situation carries on despite this Bill or if the Bill achieves merely a handful of people being sent off, while many of the rest delay their departure based on legal challenges, again it is hard to see that the Bill will be effective and achieve its policy objective.

Baroness Lawrence of Clarendon: My understanding is that it is suggested that probably about 100 people may be deported to Rwanda. Considering that thousands of people are crossing the channel, hearing about Rwanda will not deter them from crossing the dangerous channel to come here. With only about 100 going to Rwanda, I do not see how effective that is for those who are trying to get to the UK.

Martin Howe: I think I said that to make it effective you need a legally watertight, or nearly watertight, system under which people know that they will get sent there if they come across the channel. Then there is no point in crossing. If you have a system where only 1% of them are sent off to Rwanda, it strikes me—and this is not a legal point but a matter of common sense—that it will not be an effective deterrent.

Q74 **Lord Dholakia:** Your opinion refers to the problem of legal challenges in the United Kingdom courts being used to delay or defeat the removal of illegal migrants to Rwanda. Are there circumstances in which a legal challenge to the removal of a migrant to Rwanda based on human rights would be legitimate? Is there a way of preventing unjustified claims being brought without preventing legitimate concerns?

Martin Howe: I would argue that, if you have a system that is provided under the treaty, which is that if they have a claim they can still pursue it after being sent to Rwanda, why would you need exceptions?

Lord Dholakia: Is that your answer?

Martin Howe: Yes.

Lord Dholakia: I will just pursue this one. The ERG legal opinion also

states that "Experience to date in cases about attempted removal of illegal migrants to Rwanda demonstrated that individual challenges are likely to be numerous, and that they have had a high rate of success". Is the high rate of success in challenges to removals a reason to prevent them taking place?

Martin Howe: The high rate of success of challenges is based on looking at a number of the cases and, notably, the Divisional Court's first instance decision on the Rwanda scheme, where apart from dealing with the general question on the safety of Rwanda, it dealt with quite a large number of individual grounds. Although at that stage and before the case went to the Court of Appeal, the Divisional Court held that the Rwanda policy in general was lawful because Rwanda in general was safe, I think that in every one of the individual cases it considered it found some flaw in the process. Most of them, from memory, were procedural flaws. Something had not been considered properly and it all had to be sent back.

We had in mind in that high rate of success not necessarily that there is actually a ground upon which someone ought to be allowed to remain in the United Kingdom but the difficulty in dealing with many intricate procedural obstacles which, if not got right, can result in delay to removal.

Q75 **Chair:** To be clear about this, I understood you to say in general terms at the beginning of your answer that you do not think there is any need for the individual claims that are carved out in Clause 4, because anyone who gets sent to Rwanda cannot suffer refoulement under the new treaty. Is that your position?

Martin Howe: Yes. Under the treaty, if they have a claim, they can pursue it while in Rwanda.

Chair: I will give you an example. Rwanda, unlike the United Kingdom, does not have any anti-discrimination law for gay or trans people. It is perfectly lawful to discriminate against someone in Rwanda on the grounds of their sexual orientation or their gender identity. At present, the Foreign Office advice to UK citizens advises them to think twice about going to Rwanda if they are gay or trans because they will not have the same legal protections as they enjoy in this country. Is it not possible to envisage an argument whereby somebody could say, "I do not want to go to Rwanda, because although it might be a safe country for people generally, it is not a safe country for me because I am gay or trans. That is why I actually left my original country and came to the United Kingdom, because I knew the United Kingdom is a safe place for gay and trans people because of the Equality Act. Therefore, although I am not worried about suffering refoulement, I am worried about being stuck in Rwanda, in a country where I will be discriminated against and will not have the same rights as other people because I am gay or trans"?

Martin Howe: That question leads to a double-edged point, because if that is indeed a ground for not being sent to Rwanda, I fear, cynically

speaking, that very large numbers of refugees, or claimed refugees, will be raising that as a ground and claiming to be gay.

Chair: That is the point I was making. You are saying if that argument was available people would exploit it as a loophole. I am making the point to you that from a human rights perspective, it is not simply sufficient to say to someone who is gay or trans, "It is all right for you to go to Rwanda because they will not send you back to your original country". Their answer to that is, "Yes, but you are sending me to a country where I will not have the same rights as I should have under international law and would have had in the UK".

Martin Howe: With respect, I am not sure even the Strasbourg court goes that far. As is well known in its jurisprudence, it has said that Article 3 mistreatment, which of course is the most serious mistreatment at the very most serious end of the spectrum, gives rise to this obligation on member states not to send people to countries where there is a risk of that happening. The Strasbourg court has not gone that far across the spectrum of human rights. A right not to be discriminated against is too low a threshold for imposing that obligation on us, nor do I think it is an obligation that we should voluntarily assume.

Q76 **Lord Alton of Liverpool:** Can we set aside the Strasbourg court for a moment and think about our own Supreme Court? What has changed since it said this is not a safe country to return people to?

Martin Howe: The new treaty is the change. There are a number of—

Lord Alton of Liverpool: How has that made it any safer or less safe? You disagree with the Supreme Court about it being unsafe.

Martin Howe: No. One of the Supreme Court's points was that the arrangements with Rwanda were based on a memorandum of understanding rather than a treaty. We now have a formal treaty. I think the position is under Rwanda law the treaty itself becomes part of the law under a monist constitutional system. That is one point. There are other, more practical arrangements that have been altered.

Lord Alton of Liverpool: Building on the question that the Chair put to you about people who could be persecuted because of their sexual orientation, I saw a report from Human Rights Watch just a few weeks ago, and I quote, "Commentators, journalists, opposition activists, and others speaking out on current affairs and criticizing public policies in Rwanda continued to face abusive prosecutions, enforced disappearances, and have at times died"—and have at times died—"under unexplained circumstances." Has that changed as a result of signing a treaty or promoting the Bill?

Martin Howe: I do not know and I do not know what the basis of that report is, but that seems to be referring to people who are political activists or at least campaigning activists.

Lord Alton of Liverpool: "Commentators, journalists … and others

speaking out on current affairs". Even if you do not take that into account, you probably saw the statement from the United Nations High Commissioner on Refugees just a few days ago, which said: "As of January 2024, UNHCR has not observed changes in the practice of asylum adjudication that would overcome the concerns set out in its 2022 analysis and in the detailed evidence presented to the Supreme Court". It goes on to say: "the conclusion of the treaty in itself does not overcome continued procedural fairness and other protection gaps". Nothing has changed in the view of the UNHCR, Human Rights Watch and many others who have looked at the situation on the ground.

I am asking you the question: do you think it is reasonable in those circumstances? The Supreme Court said that, until those things have been overcome—it is not that you should never send anyone, but until those things have been overcome—you should not be sending people to Rwanda. Do you agree with that or not?

Martin Howe: I do not agree with that because I think there is a very important public policy here, which is in maintaining the control of our borders. I completely respect your viewpoint, which, of course, is to give a very high value to the human rights of individuals, but there are other factors and other considerations. Things that can happen that are not Article 3 level of mistreatment fall below the threshold of what we are required to have regard to in this context. This is a policy question rather than a legal question. My own view is that we should pursue the policy.

Q77 **Chair:** That is very clear. You are saying, because of important public policy considerations, we should perhaps set to one side our concerns about human rights.

Martin Howe: Those aspects of human rights, yes.

Chair: That is quite a difficult thing for the Joint Committee on Human Rights to do, to be frank. We are charged to monitor and scrutinise the application of human rights law in the UK. It is quite difficult for us to set public policy goals above human rights.

Lord Murray of Blidworth: Of course, proportionality requirements in the human rights convention—

Chair: I would quite like to hear the witness's answer, Simon, and then I will bring you in.

Can you see the difficulty I face as the chair of the Joint Committee on Human Rights? We are not really here—it would not be appropriate; it is hard for me—to accede to the suggestion that public policy means we should set human rights aside. Is it not a bit of a slippery slope?

Martin Howe: I understand the point you are putting and fully respect where you are coming from. However, as you indicated, your committee is responsible for the protection of human rights in the United Kingdom. Your committee is not charged with the protection of human rights in the whole world.

Chair: Yes, but these people are in the United Kingdom. They are here. I would also stress that the Rwanda Bill does not just apply to people who arrive in small boats. It will also apply to people all over the United Kingdom who are presently here and want to seek asylum. It does fall within this committee's remit; otherwise we would not be sitting here. If it was just human rights in Rwanda, this committee would not be able to look at it. We are looking at the human rights of people who are present in the United Kingdom.

Lord Alton of Liverpool: My question was about the United Kingdom court, the Supreme Court, which said it is not safe at the present time to send people to Rwanda. I asked you the question: has anything changed since it made that announcement? Nothing has changed, but your position is quite clear that that does not matter.

Chair: I think I should bring in Caroline at this point. We need to move on and make sure we cover everything. We want to ask you also about other aspects of the Bill, and I will bring in Caroline.

Q78 **Dr Caroline Johnson:** Presumably, when defining a right to something, there is a spectrum and a threshold that applies, somewhere between mild discrimination to severe discrimination to maltreatment to severe maltreatment. Presumably, there is a cut-off point somewhere that the law has to apply to when deciding whether or not a right has been broken. With the right to family life, there must be a spectrum of what constitutes family or family life. There must be some sort of defined threshold at some point.

Martin Howe: Clearly, there are different rights. The position is that inside the United Kingdom or inside another European convention country, people there should have all the rights in the convention available to them, whatever they are. However, what we are talking about here is the position of people who are being, or are proposed to be, removed from the territory of a contracting state and sent to somewhere else in the world. I do not think that anyone has gone so far as to suggest that, because in that territory not all of the rights of the European convention are available, that itself should be a ground for requiring the host state not to send the person there. The Strasbourg court has based it very much on Article 3 as being really special in this regard.

Dr Caroline Johnson: Thank you. Can I ask you about Section 4 of the Human Rights Act? That does not specifically disapply. I am not entirely clear—

Martin Howe: On incompatibility declarations?

Dr Caroline Johnson: Yes, but it is not specifically in the Act. The ERG report to which you have contributed seems to suggest that that poses a loophole. Can you explain that further, please?

Martin Howe: I do not think it is a loophole, because the effect of a declaration of incompatibility is not to suspend anything or stop things

happening. However, it seems to me—sorry, I am not saying it is a loophole—a sort of odd thing in the Act because Parliament is requiring the courts to consider that Rwanda is safe, and it is then leaving, in effect, an escape clause in this Bill that would allow a court to say, "I am compelled to conclude that Rwanda is safe. Therefore, Mr X in front of me has to be removed there, but looking at, say, evidence from the UN High Commissioner for Refugees or whatever, I, as a court, do not agree that the treaty has had the effect the Government claim and, therefore, I am issuing a declaration of incompatibility". Obviously, that would cause severe political problems for the Government. It would also cause serious problems in the case of an individual who lodged a petition with the Strasbourg court, because the Strasbourg court would then look at the UK court and say, "Even the UK court is holding that this is incompatible; our own job looks very easy".

Q79 **Dr Caroline Johnson:** Okay. When the Bill came before Parliament, there was much discussion about whether it would work. What really matters with any piece of legislation is whether it achieves the stated goals, aims and objectives of what it is supposed to do. You have said already that you do not think it would in its current form. There were two amendments by Mr Jenrick, the right honourable Member for Newark, and there were amendments by Bill Cash, the honourable Member for Stone. Had those been passed, would the Bill have been effective? Would it have helped, or would it not have helped? What is your view on those?

Martin Howe: I agreed with the thrust of those amendments. I think they would have closed up a lot of problems with the current Bill.

Dr Caroline Johnson: They would have made it effective. Thank you.

Q80 **Lord Murray of Blidworth:** Mr Howe, the Bill obviously does not preclude applications being made by individuals to the European court. If the European court were to conclude—let us begin with final proceedings—that Rwanda was an unsafe country and removals were in breach of the convention, what would you say the United Kingdom's response should be?

Martin Howe: My personal view is that, certainly for the long term, I cannot see the benefit to this country of remaining in that convention, given the way that the court has gone. I would suggest it is such an important point of public policy to get it working—we have to control our borders—that we should defy it.

Q81 **Dr Caroline Johnson:** You have said already that we entered into this agreement a long time ago and, essentially, the court now continues to interpret that. Lawyers not necessarily appointed entirely by the UK continue to interpret that law and effectively to potentially change the nature of the agreement that we originally made. What mechanism is there for the British Government to disagree with such a movement to interpret it in a way that we did not intend it to be interpreted at the moment?

Martin Howe: While remaining a member in the framework of the convention, we can disagree. The area that perhaps provides the best practical example is that of prisoner voting, where the court invented an individual right to vote that not only is not in the first protocol to the convention but was actually rejected from being included in it in the course of drafting the first protocol. What happens is you defy the judgment. In that case, it is sort of negative in that Parliament did not change the law and the case comes up in the Committee of Ministers occasionally but nothing further happens. It is practical. I do not think it is necessarily a good idea, because I think one should be intellectually coherent, which is why my position is I think we should leave the convention.

Q82 **Dr Caroline Johnson:** When you said earlier that you would interpret the law as being the original black and white—as I think our Chairman described it—letter of the law rather than necessarily following all of the jurisprudence, it is not entirely novel because it is something we have done before on prisoner votes and something that other countries have also done where they believe that the jurisprudence does not entirely tie in with their interpretation of what they signed in the first place.

Martin Howe: In fairness, the phrase "black and white" or "black letter law" was not my phrase but I think the learned Chair's phrase.

Chair: Why do we not use the phrase "the original text"? Black letter law in my jurisdiction means the law that is written down on the page as opposed to the jurisprudence, but I think we can all agree that what you mean is the original text. We should only look at the original text and none of the case law, which as I have said is a very novel approach.

Dr Caroline Johnson: No, that was not my question. My question was, when you say look at the original law and not all of the case law, you are saying there is no proper mechanism, formal mechanism, for the British Government or any other Government signatory to disagree with jurisprudence that does not follow what the Government think they have agreed to or intended to agree to in the purposes of the original text or indeed if they feel that the judges have gone beyond what was allowed for in the original text. But there are examples of how the British Government have previously ignored select pieces of jurisprudence and other jurisdictions have as well, where they feel that the judges have gone beyond the original remit of the original text.

Martin Howe: I apologise if I have not answered the question directed to me. Is there a formal mechanism under which you can protest against a Strasbourg court interpretation of the convention? No, there is no formal mechanism. In fact, an intrinsic problem is that there is a sort of internal process in which cases can go up to the Grand Chamber. If the court takes a particular view on interpretation of the convention and you, as a contracting state, argue that that should be corrected, the only mechanism would be some sort of protocol amending or correcting it. That would have to be agreed to by every single contracting state, which makes the process very difficult if not impossible.

Dr Caroline Johnson: In practice, some countries will just not apply particular pieces of jurisprudence such as the British Government on prisoner voting.

Q83 **Lord Alton of Liverpool:** I would like to pursue the point that Caroline Johnson has quite rightly raised with you. When Lord Sumption was before us earlier, I asked about what potential there was for reform. It seems to me that you are not arguing for reform or evolution. You are saying that we should just get out because we have not been able to make it work. Arguably, we could complain that all the jurisprudence that has evolved since Runnymede in 1215 or the Magna Carta was a waste of time and we should go back to the black letter and not think about the jurisprudence that has emerged in the meantime. Is it capable of reform? If so, what would have to happen to the European convention, and maybe the refugee convention as well, given that other jurisdictions are facing some of the same challenges that we are all facing? There are 110 million people displaced in the world, and criminal gangs are operating across the whole continent of Europe. There is a lot that we should have in common with one another, surely, rather than just opting out. Is anyone doing anything to try to get some coherent, rational discussion about reform and evolution rather than simply leaving?

Martin Howe: Part of that, I am afraid, is outside my ability to answer. I am not aware of what diplomatic steps might be being taken by our Government or others along those lines. There are people who argue for revision and reform of the refugee convention in particular and also the provisions of the European convention that bear on this area of, in effect, rights to asylum that come in under the jurisprudence of the Strasbourg court.

I was involved some years ago because I was a member of the coalition Government's Commission on a Bill of Rights for the United Kingdom. Another of the members was Baroness Kennedy, who I think briefly waved to me as I came in but has to be elsewhere. One of the things we were tasked with looking at was involvement in the then Government's attempt to reform the processes of the court rather than particular substantive rights. It achieved a measure of success, on things like better filtering mechanisms for spurious cases. There was a curtailment of the time limit for bringing claims from, I think, six months down to four months. That had to be achieved through a protocol amending the convention, which started off in 2012, from memory, and I think took 10 years, during which some very mild reforms that could be agreed by everyone finally became law and became part of the treaty only about a year or so ago.

Reform is possible. Reform in a politically realistic or politically relevant timetable seems to me really out of the bounds of possibility.

Q84 **Chair:** I wonder about that. I am just about to come on and ask you about interim measures and of course we know that there has been quite swift issuing by the court of various proposals to deal with the UK's concerns about interim measures after the Rwanda judgment, which

happened in, I think, 2022. Yes, it was when we were there because there was some suggestion that our committee's presence in Strasbourg might have had something to do with it, which of course was nonsense.

Before I do that, I wanted to query something you said about prisoner voting, and I am just looking at the House of Commons briefing here because I had to refresh my own memory. On prisoner voting rights in 2005, the Strasbourg court ruled that the UK was in breach of Article 3 of Protocol No. 1 to the European Convention on Human Rights and the issue remained unresolved until 2018, but it is now resolved, Mr Howe. In December 2017, the UK Government came up with proposals that the Council of Europe said were sufficient to signify compliance with the 2005 ruling and the council finally closed the case. It is not ongoing; Britain has complied to the satisfaction of the Council of Europe. I wonder if that is perhaps not the best example to illustrate the point that was being made.

Martin Howe: Thank you for that. I was not aware it had resolved itself in that way.

Chair: Five years ago.

Martin Howe: The point is that, if you are talking about what needs to be done in the short term, you can in practice defy the court. That can be done and if you, as a country, take the view that this jurisprudence is wrong and furthermore it is important and not tolerable, I do not see why one should not do it. I do not agree with arguments that, just because it is a court judgment, it is sacrosanct. This is an interpretation of international obligations; it is not international obligations as such, and I think that one is entitled to disagree with it.

Q85 **Chair:** I think we hear you on that, but I want to explore this thing about the original text as well. If, as you say, the Strasbourg court should confine itself to resolving disputes about whether or not rights have been infringed, confine itself to looking at the original text of the convention, if there is dispute about what the original text means, how do we decide what it means? A lot of people who wrote it are dead now, so we cannot ask them. Seriously, there is a very novel legal concept here. I know it has been argued in America, I know Scalia and people have argued this in relation to the American constitution and they would have it rolled back. I do not know how far they would roll back the rights. Would they have black people enslaved again? I do not know, but I want to understand from a European perspective and from the perspective of a Scots lawyer who has an interest in the English system.

If you are saying that the Strasbourg court should only look at the original text, if there is a dispute about the meaning of the original text—and we are both lawyers, so we know that there will be disputes about the meaning of the original text—how do we determine what it means if we cannot have case law decisions to guide us, a system that is very familiar to us as common lawyers with precedents and so on?

Martin Howe: No, I am not saying we should have no case law at all, because case law can be and normally is helpful. Let us take it in a different context. If you have a statute with a provision that has a meaning that might not be too clear, a series of decisions where the courts apply that to different individual sets of circumstances can then be very useful in clarifying what its meaning is, but that is not what the Strasbourg court has done, in my view. It has not taken the original text and just interpreted it. It has taken the original text and then claimed a power to add doctrines on to it, which are not there. It is not merely a matter of them not being in the text; it is a matter of that they just are not there in what that text means.

Chair: Okay, I hear you on that.

Q86 **Dr Caroline Johnson:** I am not a lawyer, so I apologise if my questions are not terribly legally framed. I think it will surprise some of my constituents to hear the idea that we entered an agreement with a group of other countries substantially before many of them were born, and then some lawyers in a distant land get to continually change, potentially, the law over time, and if we do not like it we do not have a mechanism to do very much about it. Is that normal? When we enter into agreements with other countries on all sorts of other different issues, are there courts around the world doing the same thing, or is it specific to this particular agreement that we have made here?

Martin Howe: I think it depends. If we are talking about international treaties, there may or may not be courts or tribunals attached to them. Some do not have any particular court or tribunal structure attached to them at all and others do. However, the Strasbourg court is unusual—I will say that—in being a treaty court and the extent to which it has gone about, as it claims, dynamically interpreting it and, I would argue, in fact rewriting it. The Luxembourg court stands as being comparable in many ways in its approach, in that European Union law has been progressively changed by doctrines developed by that court. I am struggling to think whether there are any other international courts around the world that have similar track records, and I am not sure that I can think of any.

Q87 **Lord Alton of Liverpool:** Just before we finish on this, Mr Howe, can you remind us of the genesis of the European Convention on Human Rights? It was Winston Churchill, surely, in the 1940s who said that we need a great charter of human rights and who strongly advocated the creation of the ECHR, so this was not a foreign invention. It was not even an international invention. The genesis came from Churchill and British lawyers, by and large. I want to get straight in my own mind whether you are arguing that it is just the jurisprudence you do not like or whether it is the convention itself and you would like us to leave the convention regardless of what Churchill and others did at that time and did, I think, for the public good.

Martin Howe: Personally, I am happy with the convention, if it were interpreted according to its original meaning. If there were a mechanism under which we could remain parties to the convention but not be subject

to the jurisdiction of the court, I would favour that course, but, unfortunately, since the introduction of Protocol 11 that is no longer possible. If you are a party to the convention, you have to accept the jurisdiction of the court. That is really my reason for favouring leaving the convention.

Lord Alton of Liverpool: Thank you.

Q88 **Chair:** It has been put to you by my colleague Caroline Johnson that other countries sometimes do not always like the rulings of the court and perhaps try to get around them or do not always obey them very quickly. Having said that that may be the case, I think only one country in recent memory has left the convention, and that is Russia, which was, basically, booted out because of the invasion of Ukraine. Do you really think it is desirable for the United Kingdom to be the only other country in Europe that is not a member apart from Russia and Belarus? Is that good company for us?

Martin Howe: Actually, there is one other historical example, which is the Greek colonels regime.

Chair: We are talking about now. We have had dictatorships in Europe in our living memories—we have had the Greek colonels regime, Franco and so on—but I am talking about contemporary times. Is it really what we want as participants in British public life, whether a political party or lawyers, for Britain to stand alongside Russia and Belarus in feeling unable to remain a member of the convention?

Martin Howe: If we left, it would be for completely different reasons and in completely different circumstances, because it would be our voluntary decision to leave, not because the Council of Ministers was on the verge of expelling us for gross violations. This is probably entering into more of a political argument than a legal one, but I do not personally see that—

Chair: My point was a legal one. If all the other countries in Europe bar Russia and Belarus can live with being legally bound by the convention and the court as it develops its jurisprudence, does it not look a bit odd if the United Kingdom says, "We alone cannot live with being bound by that legal system"?

Martin Howe: I hate to be cynical—maybe that is not right—but a number of other countries have developed ways of living de facto with aspects of the court's jurisprudence they do not like in ways that we either do not or should not or cannot because of our legal traditions. We are, as a country, very wedded to the rule of law so that, by and large, if we sign up to something we try to adhere to it and comply with it. It is because of this desire not to fudge things or not to get out of things by indirect or underhand means that the court's jurisprudence bears on us particularly harshly and why, personally, I think it is right that we should leave.

Chair: Okay, I hear you. Caroline, and then we will have to wind this up because we are running out of time.

Q89 **Dr Caroline Johnson:** I find it interesting because pretty much every day that Parliament sits it is changing UK law, the original text of it, in some way, shape or form to improve, modernise, enhance it, or at least that is what we believe we are doing. International law appears to be agreements between countries. Churchill may have been a great man, but he died more than 10 years before I was born and so it is not inconceivable—

Lord Alton of Liverpool: And on this very day. This is the anniversary of his death.

Dr Caroline Johnson: I am sorry to hear that. It is not inconceivable that an agreement that he made so long ago would not necessarily be completely applicable to today. Clearly, if you have lawyers dynamically interpreting it in a way that changes our law, there is a democratic deficit there. Are there any mechanisms that—

Chair: Not everyone would agree that there is a democratic deficit, but I think it is an argument.

Dr Caroline Johnson: In what way do we vote as British citizens for those judges? Do we vote for those judges?

Chair: We do not vote for our own judges.

Dr Caroline Johnson: No, but if there is not a democratic deficit, these people—

Chair: We do not really have time to get into this.

Dr Caroline Johnson: Can I raise the question?

Chair: Hang on a second. We are very tight for time. We had an hour earlier with two witnesses. We have been an hour and a quarter with this witness, and I am going to bring this session to a close, much as I find this debate endlessly fascinating. All I was interrupting to say, Caroline, is that not everyone agrees there is a democratic deficit. It is a viewpoint, and I know it is a viewpoint that some people hold, but not everyone agrees that there is a democratic deficit. We do not elect our judges in the United Kingdom either. As this committee has documented in detail—hang on a second.

Dr Caroline Johnson: We normally ask witnesses the questions.

Chair: Yes, but I just want to make a point, because I think it is important that we make this point.

Dr Caroline Johnson: I want to ask a question.

Chair: Yes, I am going to let you finish your question. I just wanted to interfere to say that, although you said, "Clearly there is a democratic deficit", all I wanted to say was that not everyone agrees that there is a democratic deficit, but it is a respectable viewpoint and I will let you finish your question.

Dr Caroline Johnson: I believe that, if the law is being changed outwith the United Kingdom without the influence of the United Kingdom, based on something the United Kingdom signed 50-odd years ago, in a way that we cannot influence now, that is a democratic deficit. Are there mechanisms—I am not a lawyer, and I may not be aware that they exist—by which the UK Government can change this agreement, or can change the boundaries from which judges are permitted to dynamically or non-dynamically interpret it, or is it a case of take it or leave it with this?

Martin Howe: I am afraid that I think it is a case of take it or leave it, but I do agree—

Chair: We have just been through your evidence about the protocol over a number of years, following on from the Brighton meeting and about how the UK has influenced it; am I right?

Martin Howe: The problem is you have a body that is meant to be judicial, which in fact acts as a legislature by creating new laws without a democratic mandate for what it has done. The body of the judges of the European court in Strasbourg, consisting of a judge from each contracting state, is not anyone's idea of a lawmaking body. The problem is it has morphed from being a law-interpreting body, which is what it should stick to, into becoming a lawmaking body.

I fear, on that fundamental point, it is take it or leave it. I cannot see how the UK Government, within the ambit of the convention and the need to secure unanimity, can curtail this.

Lord Alton of Liverpool: Has it tried to do that?

Dr Caroline Johnson: There is no mechanism for the UK Government to say to the Strasbourg court, "We will only allow you to interpret this law, not allow you to make new ones"?

Martin Howe: I suppose you could say that, but you then have to identify what you consider to be the new laws it has made. I could give you a list. But then what happens? If you do not implement those aspects of the court's jurisprudence, you end up with judgments of the court going through the system and this then becomes very difficult. I think that, at the end of the day, this problem is only resolvable for us by leaving the convention. I cannot see another practical way of curing the democratic deficit, which, with all full respect to the Chair and the views she has expressed, I personally think there clearly is in Strasbourg.

Q90 **Chair:** Some people were very clear. The only reason I interrupted the question was to make clear that not everybody thinks it is a democratic deficit. The question was put to you, "Clearly, there is a democratic deficit." I am not saying that my view is correct. I am simply saying that not everyone holds the view that there is a democratic deficit. I am very well aware that some people do, and it is a view that they hold and they are entitled to hold. Let us not have any of this, "I am trying to shut it down" because I am not. What I am trying to do is to get this committee

back on to scrutiny of the Rwanda Bill, rather than a fascinating discussion about ECHR, which the committee has touched on before. We have been sitting now for nearly three hours and I need to bring this to a conclusion, and I want to ask you about interim measures.

One of my other colleagues wanted to ask you about this, but they have had to leave because we have run over time. I think I know what your answer will be, Martin, because I hear what you are saying, and very clearly in your last answer, but I need to ask you about this because it is obviously a big area of controversy about the Bill. I will bring others in if they want to, but this meeting will have to end at 6 pm.

The European Court of Human Rights has ruled that its interim measures are binding under the convention. The court, in a decision, decided that, from its point of view, the interim measures were binding under the convention, but we know that there is nothing about interim measures in the original treaty. Do you agree that the court got it right, saying that interim measures are binding? Is that a correct statement of the current position on international law, or do you think a Minister should be free to refuse to comply with interim measures? Do you think they could do so lawfully? I hope that is clear.

Martin Howe: There are three different questions, and I will be quick because of the time. I do not agree with the court's view that interim indications of measures are binding in international law. I think the judgment which held that or at least is interpreted as holding that—the majority judgment—is incoherent. It says if there is an interim measure, by going against it you are interfering with the right of access to the court for the person concerned. You might or might not be doing something that interferes with the right of access to the court. Whether you are doing it or not is not affected by whether or not there is an interim measure, but the treaty itself says that final judgments are binding. The interim indications are a creature of the court's rules of procedure. I cannot see a basis for a court being able to expand or create a new jurisdiction for itself through adopting rules of procedure, when its jurisdiction should be bounded by the treaty.

Should Ministers be free to disregard them? I believe they should and they are.

Is it lawful for them to disregard it? Yes. There is nothing unlawful in disregarding them, in my view.

Chair: Can I bring anyone else in on interim measures? Does anybody else want to come in?

Q91 **Lord Alton of Liverpool:** I would like to pursue a point that was made to our earlier panel about interim measures. If a Minister refuses to comply with interim measures, is that consistent with our obligations under international law?

Martin Howe: Yes, I believe it is. They are not binding. Clearly, there is something one ought to reflect upon, and I think that is the original purpose of their inclusion in the rules of procedure of the court.

Lord Alton of Liverpool: What about civil servants in those circumstances? Would they be required to do the same?

Martin Howe: I think civil servants should do their job, which is their job under the laws and constitution of the United Kingdom, to comply with the instructions of Ministers. I see no basis upon which civil servants are entitled not to do their jobs because there is an indication of interim measures involved.

Chair: It is quite common, is it not, for a court to issue orders to preserve the status quo pending the determination of rights and obligations? Regularly in England, somebody will seek an interim injunction at the start of a case. Regularly in Scotland, someone will seek an interim interdict. We have heard a lot of fuss about pyjama injunctions. It will be in your experience, as in mine, Martin, that sometimes judges are got out of bed in the middle of the night to issue an interim order, and that is done to preserve—I think you would agree with me there. It does happen. It is not unusual for a court to seek to issue interim orders to preserve the status quo pending the final determination, is it?

Martin Howe: It is not unusual. Many courts have that power, but I do not think that the Strasbourg court has that power.

Chair: I think you would argue that it is not in the original text, and it is something that, in a sense, the Strasbourg court created for itself in a decision. I think it is a 2005 decision that you were critical of. I cannot remember the name of it, but there have been a number of decisions since that have agreed with that. Are they all incoherent?

Martin Howe: I think the fundamental argument is incoherent. There is quite a coherent minority judgment in that original 2005 case, which says this is just expanding the jurisdiction of the court with no basis in the convention to do so. The trouble is that you get this self-serving tendency—unfortunately, it is a tendency of many courts—to try to expand their jurisdiction. It is not unique to the Strasbourg court. I think in the international context, it is particularly problematical because you, as a country, sign up to a treaty that confers certain jurisdiction on the international court that is set up by the treaty. Then you find that the court is acquiring new jurisdiction you never agreed to.

Chair: I thought that some of the objections to the Strasbourg interim measures were quite well founded. The lack of seeing who the judge was and the lack of giving reasons all struck me as well-founded objections. Going back to the speed with which Strasbourg responds to member states' concerns, is it not the case that, as I said earlier, since that interim measure was issued on Rwanda, the court has undertaken to improve its procedures for interim measures by naming the judge, publishing reasons and other such concerns? I do not have them all at my fingertips just now. There is increased transparency and accountability. That has happened quite quickly, within a few months. Is that not an indication that it can sometimes move quickly?

Martin Howe: Yes, but in a way that that does not require member states to agree to it all unanimously. The whole interim indication process is within the court itself. The rules were created by—I do not know if anyone dissented—a majority vote of the members of the court, not the external parties. It can change its procedures internally through that mechanism. The stopping of the Rwanda flight was a particularly egregious example because our Supreme Court and the courts below had given careful consideration to the issue of whether there should be interim relief in that case and concluded that there should not on the basis of an undertaking by the Home Secretary to bring the individual back if ultimately the case would go their way. Then you have this very ill-considered indication coming out of Strasbourg, and the UK Government, in my view unfortunately, caving into it rather than proceeding as it should have.

Chair: I hear you. I think that is a point you are making, which is a concern that many others have made. Caroline, did you want to come in there?

Q92 **Dr Caroline Johnson:** One final question. You suggested that we leave this convention. That will worry many people because they will think, "What about the rights related to that convention? Does that mean I will lose those rights? Does that mean my fellow citizens will lose those rights?" Presumably, there is a way of replicating those rights within the British law in the British Parliament, so there would be no necessity for anyone to lose any rights if we produced a Bill in the UK with a specific, non-dynamic, law-creating court to go with it.

Martin Howe: I am conscious I am trespassing outside the Rwanda Bill, but it would be possible. In the paper, I mentioned advocating leaving the convention. I suggested one possibility would be to keep—and it is because of my view, which I expressed earlier, that I do not find the convention rights as such problematical; it is the jurisprudence that is problematical—the convention rights in our law in a similar way as under the Human Rights Act but strip off the Strasbourg jurisprudence. You could do that. The provisions would still have special status and still be semi-entrenched in our law, but you would get rid of the international side.

Chair: Our committee looked at proposals to do that in some great detail over the last year and a half. We produced a report commenting on the independent review of the Human Rights Act. Then we produced a report on the putative Bill of Rights. This committee has looked at those issues in very great detail and published a number of pretty hefty reports on our views on them, which I do not think we have time to go into just now.

I think I will bring it to a close there. I want to thank you, Martin, for your generosity of time. I know you have had a very busy day today. We have kept you an hour and a half, and it is appreciated. Thank you very much and I look forward to sparring with you on a future occasion, perhaps in future debates not in this committee but as we have done before. It is a very great pleasure to have you in front of us. Thank you

for your generosity of time.

Martin Howe: Thank you for all your questions and the whole committee. Thank you.

Chair: Thanks for your forbearance.