HOUSE OF LORDS

Select Committee on the Constitution

3rd Report of Session 2023–24

Safety of Rwanda (Asylum and Immigration) Bill

Ordered to be printed 9 February 2024 and published 9 February 2024

Published by the Authority of the House of Lords

HL Paper 63

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Introduction

1. The Safety of Rwanda (Asylum and Immigration) Bill was introduced in the House of Commons on 7 December 2023 and brought to the House of Lords on 18 January 2024. Second reading took place on 29 January 2024 and committee stage is scheduled to begin on 12 February 2024.

2. In the Government's words, the purpose of the Bill is "to prevent and deter unlawful migration, and in particular migration by unsafe and illegal routes, by enabling the removal of persons to the Republic of Rwanda under provision made by, or under, the Immigration Acts."[1]

3. The Bill follows the enactment of the Illegal Migration Act 2023[2] and the decision of the UK Supreme Court in November 2023 that, on the evidence presented to the Court, there were substantial grounds to believe that individuals sent to Rwanda would face a real risk of refoulement.[3] Consequently, the Court concluded that the policy was unlawful.[4]

4. Following the judgment of the UK Supreme Court, the Government entered into a new treaty with the Government of the Republic of Rwanda (Rwanda).[5] This aims to ensure that Rwanda upholds the principle of non-refoulement, ensures that it has an effective and fair legal process for asylum seekers, and protects human rights.[6]

Parliamentary sovereignty, the separation of powers and the rule of law

5. Clause 1(2)(b) is a deeming provision. It states that the Bill "gives effect to the judgement of Parliament that the Republic of Rwanda is a safe country".[7] It deems Rwanda to be a safe country, regardless of whether, in fact, Rwanda is a safe country. Clause 2(1) states that "every decision-maker must conclusively treat the Republic of Rwanda as a safe country".[8] This means, for example, that even where there is clear evidence that individuals removed to Rwanda are at serious risk of refoulement, immigration officials must nevertheless treat Rwanda as a safe country when determining whether to remove an individual to Rwanda. Courts are also unable to conclude that it is unlawful for an immigration official to send an individual to Rwanda even if there is evidence of a serious risk of refoulement.

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1 Explanatory Notes to the Safety of Rwanda (Asylum and Immigration) Bill, para 1

2 The Illegal Migration Act 2023 places a duty on the Home Secretary to remove those who arrive unlawfully in the United Kingdom.

3 Refoulement is the return of refugees or asylum seekers to a country where they are liable to be subjected to persecution.

4 Supreme Court, *R (AAA) v Secretary of State for the Home Department*, [2023] UKSC 42

5 Home Office, *UK-Rwanda treaty: provision of an asylum partnership* (5 December 2023): https://assets.publishing.service.gov.uk/media/656f51d30f12ef07a53e0295/UK-Rwanda_MEDP_-_English_-_Formatted__5_Dec_23__-_UK_VERSION.pdf [accessed 8 February 2024]

6 Safety of Rwanda (Asylum and Immigration) Bill, clause 1(3)

7 Safety of Rwanda (Asylum and Immigration) Bill, clause 1(2)(b)

8 Safety of Rwanda (Asylum and Immigration) Bill, clause 2(1)

6. Previous legislation has deemed countries to be safe for the purposes of immigration law. Schedule 3 to the Asylum and Immigration (Treatment of Claimants etc) Act 2004, for example, deems countries listed in paragraph 2 of the schedule as 'safe countries'.[9] Paragraph 3 of the schedule requires any person, court, or tribunal to treat those countries as a place to which a person can be removed without their rights under Article 3 of the European Convention on Human Rights (ECHR)[10] or their rights under the Refugee Convention being contravened. Countries listed in paragraph 2 must also be treated as places from which a person will not be sent to another state in contravention of their Convention rights or the Refugee Convention. This is the case "unless the contrary is shown by the claimant to be the case in their particular circumstances".[11]

7. However, the language of clause 1(2)(b) of the Safety of Rwanda (Asylum and Immigration) Bill is unique in that the clause is specifically expressed as giving effect to "the judgement of Parliament" that a specific country is safe. This is not the case with regard to similar provisions in the Asylum and Immigration (Treatment of Claimants etc) Act 2004, which was enacted to deem a list of countries safe in order to give effect to the UK's obligations in European Union (EU) law.

8. The language of clause 1(2)(b) differs from the provisions in the Asylum and Immigration (Treatment of Claimants etc) Act 2004. It deems Rwanda to be safe in response to a recent decision of the UK Supreme Court which had concluded that, on the evidence presented to the court, Rwanda was not a safe country for the purposes of immigration law.[12]

9. The facts may have changed in the period between the assessment of the Supreme Court and the judgement of Parliament expressed in the Bill. Since the judgment of the Supreme Court, the UK has entered into a new treaty with Rwanda to "strengthen shared international commitments on the protection of refugees and migrants".[13] Clause 1(3) provides an account of the commitments made by the Government of Rwanda in that treaty.[14]

10. Nevertheless, it remains possible that, at the time the Bill comes into force, the facts will not have changed so significantly as to mean that Rwanda is, as a matter of fact, a safe country such that, were an individual to be sent to Rwanda, there would be no breach of their rights either under the ECHR or the Refugee Convention. It is also possible that, despite the commitments made by Rwanda, circumstances arise which mean, on the facts, Rwanda is not a safe country. Nevertheless, the Bill deems Rwanda to be a safe country and consequently UK immigration officials and courts are required to treat Rwanda as if it is a safe country.

11. **Clause 1(2)(b) could be interpreted as a breach of the separation of powers between Parliament and the courts. It is the role of Parliament to enact legislation. It is the role of the courts to apply legislation to the facts. It may also be considered a usurpation of the judicial function,**

9 Asylum and Immigration (Treatment of Claimants etc) Act 2004, schedule 3
10 The prohibition of torture, inhuman or degrading treatment or punishment
11 Asylum and Immigration (Treatment of Claimants etc) Act 2004, schedule 3, para 3
12 Supreme Court, *R (AAA) v Secretary of State for the Home Department*, [2023] UKSC 42
13 Home Office, *UK-Rwanda treaty: provision of an asylum partnership* (5 December 2023): https://assets.publishing.service.gov.uk/media/656f51d30f12ef07a53e0295/UK-Rwanda_MEDP_-_English_-_Formatted__5_Dec_23__-_UK_VERSION.pdf [accessed 8 February 2024]
14 Safety of Rwanda (Asylum and Immigration) Bill, clause 1(3)

effectively replacing a factual assessment of the court with a deemed factual assessment expressed in the judgement of Parliament. Courts have long-established procedures to evaluate evidence to determine the facts. These are not replicated in the legislative process.

12. **In addition, the Bill comes into force on the day the Treaty between the Government of the UK and the Government of the Republic of Rwanda comes into force.[15] Rwanda will be deemed safe from that day, regardless of whether, on the evidence, it can be demonstrated that Rwanda has fulfilled its obligations under the Treaty.**

13. **The sovereignty of the UK Parliament is a long-established principle of the UK constitution. Nevertheless, there are constitutional consequences when legislation is enacted that significantly impacts the separation of powers. This is constitutionally inappropriate because it provides a potential precedent in which legislation could be used to effectively reverse factual conclusions, jeopardising the rule of law as well as the separation of powers.**

Access to the courts

14. Under clause 2(3) domestic courts "must not consider a review of, or an appeal against, a decision of the Secretary of State or an immigration officer relating to the removal of a person to the Republic of Rwanda to the extent that the review or appeal is brought on the grounds that the Republic of Rwanda is not a safe country."[16]

15. Clause 2(4) clarifies that a court or tribunal must not consider:

    - "any claim or complaint that the Republic of Rwanda will or may remove or send a person to another State in contravention of any of its international obligations, including in particular its obligations under the Refugee Convention,
    - any claim or complaint that a person will not receive fair and proper consideration of an asylum, or other similar, claim in the Republic of Rwanda, or
    - any claim or complaint that the Republic of Rwanda will not act in accordance with the Rwanda Treaty."[17]

16. Clause 2(5) stipulates that clauses 2(3) and 2(4) "apply notwithstanding" any provisions under the Immigration Acts, the Human Right Act 1998, domestic law and international law.

17. As a result of these provisions, an individual wishing to argue that their removal to Rwanda breaches their rights under the ECHR or the Refugee Convention faces considerable hurdles. Clauses 2(1)(b) and 2(3) prevent the individual from challenging their removal on the grounds that Rwanda is not a safe country. Clause 2(5)(b) prevents courts from relying on section 3 of the Human Rights Act to read clause 2(1)(b) in a manner compatible with Convention rights. Clause 2(5)(c) prohibits courts from using the principle

15 Safety of Rwanda (Asylum and Immigration) Bill, clause 9(1)
16 Safety of Rwanda (Asylum and Immigration) Bill, clause 2(3)
17 Safety of Rwanda (Asylum and Immigration) Bill, clause 2(4)

of legality[18] as a means to read clauses 2(1) and 2(3) in such a way as to prevent their application to decisions that would undermine fundamental common law rights.

18. Under clause 4, it is possible for an individual to argue that due to "compelling evidence relating specifically to a person's particular individual circumstances" Rwanda is not a safe country. This argument cannot be based on the grounds that Rwanda is not a safe country in general.[19] When determining this issue, the court cannot hear arguments based on the matter "of whether the Republic of Rwanda will or may remove or send the person in question to another State in contravention of any of its international obligations".[20]

19. An individual seeking to prevent their removal to Rwanda under clause 4 may first need to obtain interim relief to prevent their removal while their case is being heard. A court may only grant interim measures if "satisfied that the person would, before the review or appeal is determined, face a real, imminent and foreseeable risk of serious and irreversible harm if removed to the Republic of Rwanda."[21]

20. When making this determination, the courts should apply the examples of "serious and irreversible harm" set out in section 39 of the Illegal Migration Act 2023. However, these apply "with any necessary modifications".[22] For example, section 39 of the Illegal Migration Act 2023 lists removal of an individual to a country where they may face death, torture or inhuman or degrading treatment or punishment as an example of "serious and irreversible harm".[23] Given the provisions of the Bill, a "necessary modification" of the application of section 39 of the Illegal Migration Act 2023 may be that this can only apply with regard to the specific circumstances of the individual who would otherwise be removed to Rwanda. It may therefore not be possible to issue interim measures based on a general assessment that those sent to Rwanda may face removal to a country where they may face death, torture or inhuman or degrading treatment.

21. In our report on the *Illegal Migration Bill* we said similar provisions containing restrictions on legal claims had "implications for the rule of law by limiting or removing the ability of individuals to appeal decisions to remove them from the UK".[24]

22. **Clause 2 has implications for the rule of law because it significantly limits the ability of individuals to appeal decisions to remove them to the Republic of Rwanda. In doing so it reduces access to justice and the protection of rights. *The House may wish to consider whether these restrictions are constitutionally appropriate, particularly given the context as described in the previous section.***

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18 In AXA Lord Reed stated: "The principle of legality means not only that Parliament cannot override fundamental rights or the rule of law by general or ambiguous words, but also that it cannot confer on another body, by general or ambiguous words, the power to do so." Supreme Court, *AXA General Insurance Limited and others (Appellants) v The Lord Advocate and others (Respondents) (Scotland)* [2011] UKSC 46, para 152

19 Safety of Rwanda (Asylum and Immigration) Bill, clause 4(1)(b)

20 Safety of Rwanda (Asylum and Immigration) Bill, clause 4(2)

21 Safety of Rwanda (Asylum and Immigration) Bill, clause 4(4)

22 Safety of Rwanda (Asylum and Immigration) Bill, clause 4(5)

23 Illegal Migration Act 2023, section 39

24 Constitution Committee, *Illegal Migration Bill* (16th Report, Session 2022–23, HL Paper 200), para 3

23. The courts may use section 4 of the Human Rights Act 1998 (HRA) to declare provisions of the Bill incompatible with Convention rights.[25] A declaration of incompatibility would not affect the validity, continuing operation or enforcement of the provisions declared incompatible with Convention rights.[26] However, as noted by the Supreme Court, a declaration of incompatibility is a "judicial finding that an Act of Parliament is incompatible" with Convention rights, which imposes "pressure on Parliament to avoid the opprobrium which such a finding would entail."[27]

24. **It is possible that, if the application of provisions in the Bill undermines Convention rights, domestic courts may issue a declaration of incompatibility under section 4 of the Human Rights Act 1998. *We invite the House to consider the implications of this outcome.***

25. Clauses 1(2)(b) and 2 are limited in their application to domestic law and do not apply to decisions made by international courts or assessments made by international organisations. Where these clauses result in individuals being unable in the domestic courts to secure a review of, or an appeal against, a decision to remove them to Rwanda on the grounds that doing so would breach their Convention rights, they may choose to petition the European Court of Human Rights.

26. **We draw it to the attention of the House that clauses 1(2)(b) and 2(1) only have effect as regards the decisions of domestic courts. Where individuals are unable, in the domestic courts, to challenge a decision to remove them to the Republic of Rwanda they may choose to petition the European Court of Human Rights. This gives rise to constitutional consequences for the rule of law were the UK to be found to have acted in breach of Convention rights.**

Human rights

Disapplication of provisions of the Human Rights Act 1998

27. Clause 3 provides for the disapplication of provisions of the Human Rights Act 1998. This is no longer novel. The novelty arose with the disapplication of section 3 of the Human Rights Act (interpretation of legislation) as a feature of the Illegal Migration Act 2023 and the Victims and Prisoners Bill.[28] However, this Bill provides for a much broader disapplication of the provisions of the Human Rights Act.

28. First, the Bill disapplies section 2 (interpretation of Convention rights) and sections 6 to 9 (acts of public authorities) of the Act, in addition to section 3. Second, the disapplication of sections of the Human Rights Act applies beyond the Bill. Clause 3(3) of the Bill states that section 2 "does not apply 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 under a

25 Human Rights Act 1998, section 4
26 Human Rights Act 1998, section 4(6)(a)
27 Supreme Court, *Reference by the Attorney General and the Advocate General for Scotland – United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill*, [2021] UKSC 42 (6 October 2021), para 52. Lord Reed was discussing section 21 of the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill, which mirrored the provisions of section 4 of the Human Rights Act 1998
28 Illegal Migration Act 2023, section 1(5) and section 5(1)(b); Victims and Prisoners Bill, clauses 49, 50 and 51

provision of, or made under, the Immigration Acts".[29] Clause 3(5) clarifies that sections 6 to 9 of the Human Rights Act do not apply to sections of the Illegal Migration Act 2023 in relation to the assessment of whether the removal of an individual to the Republic of Rwanda would give rise to serious and irreversible harm.

29. **We draw clause 3 to the attention of the House—no Act of Parliament has previously sought to disapply sections 2, 3 and 6–9 of the Human Rights Act.**

30. The disapplication of provisions of the Human Rights Act 1998 provides for weaker protections of Convention rights in specific areas. The Bill of Rights Bill introduced in 2022,[30] if enacted, would have repealed section 3 of the Human Rights Act 1998. In June 2023 the Lord Chancellor announced the Government had decided "not to proceed" with the Bill of Rights Bill. Instead, the Government would take "action to address specific issues with the Human Rights Act 1998 and the European Convention" including with respect to prisoners and immigration.[31]

31. **The extent of the disapplication of provisions of the Human Rights Act in legislation concerned with specific policy areas undermines the universal nature and application of human rights and risks further such disapplication in future legislation. This is of considerable constitutional concern. Whilst individuals normally have access to the courts to ensure that a public authority does not act unlawfully by breaching their Convention rights, this will not be possible for an individual wishing to argue that the decision to remove them to the Republic of Rwanda breaches their Convention rights. *We invite the House to consider the potential consequences of undermining the universal application of human rights.***

The Good Friday Agreement

32. The disapplication of provisions of the Human Rights Act 1998, and the reduction in human rights protections, may have further consequences in Northern Ireland. The Belfast Agreement (Good Friday Agreement) contains commitments regarding adherence to the ECHR.[32] These commitments may be compromised given the possibility that decisions which breach the ECHR could be taken under the Bill with regard to asylum seekers.

33. Article 2 of the Northern Ireland Protocol, as amended by the Windsor Framework, provides for the principle of the non-diminution of rights.[33] This includes rights that were protected in EU law prior to the United Kingdom's

29 This includes, the Immigration Act 1971, the Immigration Act 1988, the Asylum and Immigration Appeals Act 1993, the Asylum and Immigration Act 1996, the Immigration and Asylum Act 1999, the Nationality, Immigration and Asylum Act 2002, the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, the Immigration, Asylum and Nationality Act 2006, the Immigration Act 2014, the Immigration Act 2016, Part 1 of the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (and Part 3 so far as relating to that Part), the Nationality and Borders Act 2022 and the Illegal Migration Act 2023.

30 UK Parliament, 'Bill of Rights Bill': https://bills.parliament.uk/bills/3227

31 HC Deb, 27 June 2023, col 145

32 Northern Ireland Office, *The Belfast Agreement: An Agreement Reached at the Multi-Party Talks on Northern Ireland*, Cm 3883 (10 April 1998): https://www.gov.uk/government/publications/the-belfast-agreement [accessed 8 February 2024]

33 Protocol on Ireland/ Northern Ireland, Article 2

departure from the EU, such as the EU Procedures Directive, which applies to asylum seekers.[34]

34. Article 27 of the EU Procedures Directive determines when a state can be considered to be a safe third country to which an individual may be removed. The criteria include the maintenance of the principle of non-refoulement by a third-party safe country.[35]

35. Under clauses 1 and 2 of the Bill, courts and immigration officers will be required to conclude that Rwanda is a safe country even if, in fact, there is a risk of refoulement.[36] This may amount to a diminution of rights of asylum seekers in Northern Ireland.

36. Clauses 1, 2 and 4—which limit the access of individuals to interim measures from domestic courts to prevent their removal to Rwanda[37]—may also undermine the right to an effective remedy provided by Article 47 of the EU Charter of Fundamental Rights and Freedoms, which continues to apply in Northern Ireland.[38] This may also amount to a diminution of rights of asylum seekers in Northern Ireland.

37. **We invite the House to pay particular attention to the constitutional consequences of the Bill for the Good Friday Agreement in Northern Ireland.**

Section 19 statements

38. Section 19 of the Human Rights Act 1998 requires that, when introducing a bill to Parliament, a minister must either state that the provisions of the bill are compatible with Convention rights or that "although he is unable to make a statement of compatibility the government nevertheless wishes the House to proceed with the Bill." The former statement is made under section 19(1)(a) and the latter under section 19(1)(b).[39]

39. When introducing the Bill to Parliament, the relevant Minister made a statement under section 19(1)(b) of the Human Rights Act 1998.

40. A section 19(1)(b) statement does not necessarily mean a bill is incompatible with Convention rights. During second reading, Lord Murray of Blidworth, former Minister of State for the Home Office, said:

> "[A] Minister will not make a Section 19(1)(a) statement of compatibility unless they are satisfied that, if there was a legal challenge to the new law or a decision taken under it, there is a greater than 50% probability that the court will find the measure to be compliant with the convention commitments of the United Kingdom. In all other circumstances, the Minister will issue a Section 19(l)(b) statement."[40]

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34 Council of the European Union, 'Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status' (1 December 2005) OJ L 326/13 13 December 2005

35 *Ibid.*, Article 27

36 Safety of Rwanda (Asylum and Immigration) Bill, clauses 1 and 2

37 Safety of Rwanda (Asylum and Immigration) Bill, clauses 1, 2 and 4

38 EU Charter of Fundamental Rights and Freedoms, Article 47

39 Human Rights Act 1998, section 19(1)

40 HL Deb, 29 January 2024, col 1045

41. The Human Rights Memorandum accompanying this Bill argues the Bill's provisions may be interpreted and applied in a manner compatible with Convention rights.[41] In particular, the Government relies on the ability of clause 4 to ensure that Articles 2 (right to life), 3 (prohibition of torture, inhuman or degrading treatment or punishment) and 13 (right to an effective remedy) are protected.[42]

42. However, the disapplication of section 3 of the Human Rights Act 1998 under clause 3 of the Bill makes it more difficult for courts to interpret clause 4 in a manner that would ensure that an individual's Convention rights would not be breached were they to be removed to Rwanda.

43. In our report on the *Illegal Migration Bill* we concluded:

> "It appears that the Government's ECHR memorandum is more optimistic about the likelihood of the Bill's compatibility with Convention rights than the ministerial section 19(1)(b) statement would suggest. *This requires further explanation. In particular, the potential impact of [the disapplication of section 3 of the Human Rights Act] on compatibility has not been adequately explained. We recommend that the Bill is amended to provide for guidance, subject to parliamentary scrutiny, on how the Bill is to be implemented compatibly with Convention rights*." [43]

44. **The assertion in the Government's ECHR memorandum that the Bill can be applied in a manner compatible with Convention rights is optimistic. This is particularly true in light of the disapplication of sections of the Human Rights Act 1998.**

45. ***The House should seek an explanation from the Government as to the impact of clause 3 on compatibility with Convention rights. We recommend the Government provides guidance to decision-makers, subject to parliamentary scrutiny, on how the Bill is to be implemented compatibly with Convention rights.***

46. When introducing the Human Rights Bill to the House of Lords, Lord Irvine of Lairg, then Lord Chancellor and the minister in charge of the Bill stated, in regard to section 19, that "Ministers will obviously want to make a positive statement wherever possible".[44] He also said that "where the Minister states that he is unable to make a positive statement about the Bill's compatibility, that will be a very early signal to Parliament that the possible human rights implications of the Bill will need and will receive very careful consideration."[45]

47. The Rt Hon Jack Straw, then Home Secretary, and minister in charge of the Human Rights Bill in the House of Commons stated that: "Clause 19 is a further demonstration of our determination to improve compliance with

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41 Home Office, 'Safety of Rwanda (Asylum and Immigration) Bill: European Convention on Human Rights Memorandum' (7 December 2023), paras 17–21: https://publications.parliament.uk/pa/bills/cbill/58-04/0038/ECHRmemo.pdf [accessed 8 February 2024]

42 Home Office, 'Safety of Rwanda (Asylum and Immigration) Bill: European Convention on Human Rights Memorandum' (7 December 2023), paras 22–27: https://publications.parliament.uk/pa/bills/cbill/58-04/0038/ECHRmemo.pdf [accessed 8 February 2024]

43 Constitution Committee, *Illegal Migration Bill* (16th Report, Session 2022–23, HL Paper 200), para 37–38

44 HL Deb, 3 November 1997, col 1233

45 HL Deb, 27 November 1997, col 1163

convention rights", adding "I am sure that Ministers will want to make a positive statement whenever possible".[46]

48. Until recently, it was rare for a minister to issue a section 19(1)(b) statement when introducing a bill to Parliament.[47] On the occasions when it was used, it was where the legislation was continuing or expanding existing policy, the compatibility of which with Convention rights was not clear (e.g. the Communications Bill in Session 2002-03), where there was on-going legal action to determine the precise scope of a Convention right (e.g. the Local Government Bill in Session 1999-2000 and the House of Lords Reform Bill in Session 2012-13), or where a later amendment was added to a Bill, the compatibility of which was not clear.

49. **Statements made by the then Government when the Human Rights Bill was introduced, combined with the infrequent use of 19(1)(b) statements before 2023, may be considered to have given rise to a practice that section 19(1)(a) statements are the norm, with section 19(1)(b) statements being used exceptionally. The section 19(1)(b) statement issued for this Bill, and for the Illegal Migration Act 2023, are a divergence from the norm, particularly as both also include provisions that have the intended effect of disapplying several sections of the Human Rights Act 1998.**

50. **This change in practice in the use of statements made under section 19(1)(b) of the Human Rights Act 1998 is constitutionally significant. *The change is an indication of a broader disregard for human rights protections and we invite the House to scrutinise the implications.***

International law and the rule of law

51. It is arguable that provisions in the Bill are incompatible with the UK's obligations under the ECHR. The Human Rights Memorandum accompanying this Bill recognises it engages Article 2 (right to life), Article 3 (prohibition of torture, inhuman or degrading treatment or punishment) and Article 13 (right to an effective remedy).[48] As noted above, the Government's reliance on the ability of clause 4 to ensure these rights are protected is impaired by the disapplication of section 3 of the Human Rights Act. It is also dependent on a change of facts which may not have occurred by the time the Bill comes into force.

52. Provisions in the Bill may also breach the prohibition of refoulement in the Refugee Convention.[49] The United Nations High Commissioner for Refugees (UNHCR) has said:

> "UNHCR notes the detailed, legally-binding commitments now set out in the treaty, which if enacted in law and fully implemented in practice, would address certain key deficiencies in the Rwandan asylum system

46 HC Deb, 16 February 1998, col 779

47 Section 19(1)(b) had only been used on five occasions prior to 2023: The Local Government Bill 1999-2000; the Communications Bill 2002-2003, the Civil Partnerships Bill 2003-2004, the House of Lords Reform Bill 2012-13, the Northern Ireland (Executive Formation) Bill 2017-19. House of Commons Library, *Safety of Rwanda (Asylum and Immigration) Bill 2023–24*, Research Briefing, Number 9918, December 2023, pp 3–4

48 Home Office, 'Safety of Rwanda (Asylum and Immigration) Bill: European Convention on Human Rights Memorandum' (7 December 2023), para 21: https://publications.parliament.uk/pa/bills/cbill/58-04/0038/ECHRmemo.pdf [accessed 8 February 2024]

49 Convention relating to the Status of Refugees, Article 33

> identified by the Supreme Court. This would however require sustained, long term efforts, the results of which may only be assessed over time. The Supreme Court judges did not question Rwanda's good faith, nor did they rule out the possibility that the necessary structural changes and capacity development needed to eliminate the risk of refoulement could be built in the future, but they concluded that "significant" changes to asylum procedures as they operate in practice would be required, noting that "the necessary changes may not be straightforward, as they require an appreciation that the current approach is inadequate, a change of attitudes, and effective training and monitoring" … In short, the treaty lays out an important basis for an improved asylum system, but until the necessary legal framework and implementation capacity is established, the conclusion of the treaty in itself does not overcome continued procedural fairness and other protection gaps."[50]

53. It is possible, therefore, that the Bill's provisions are incompatible with the United Kingdom's obligations in international law under both the ECHR and the Refugee Convention.

54. Clause 1(4)(a) recognises that "the Parliament of the United Kingdom is sovereign".[51] Clause 1(4)(b) recognises that "the validity of an Act of Parliament is unaffected by international law".[52] It is the case that the United Kingdom Parliament is sovereign, and therefore may enact legislation which breaches international law. It is also true that the validity of an Act of Parliament, in domestic law, is not affected by international law. Nevertheless, the United Kingdom is still subject to the provisions of international law.

55. In our report on the *United Kingdom Internal Market Bill* we said:

> "Any suggestion that the rule of law is not threatened by the Bill because international law is of different legal standing to domestic law under the dualist doctrine is untenable. We agree with Lord Bingham that respect for the rule of law requires respect for international law."[53]

56. In our report on the *Northern Ireland Protocol Bill* we said:

> "Legislation which puts the UK in breach of international law undermines the rule of law and trust in the UK in fulfilling future treaty commitments."[54]

57. **We reiterate that respect for the rule of law requires respect for international law. Legislation that undermines the UK's international law obligations threatens the rule of law. *We invite the House to consider the consequences should the enactment of this Bill in its current form breach the UK's international obligations.***

58. Clause 5(2) provides that "it is for a Minister of the Crown (and only a Minister of the Crown) to decide whether the United Kingdom will comply"

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50 UNHCR, 'UNHCR Analysis of the Legality and Appropriateness of the Transfer of Asylum-Seekers under the UK-Rwanda arrangement: an update' (15 January 2024), paras 19–20: https://www.refworld.org/pdfid/65a55d994.pdf [accessed 8 February 2024]

51 Safety of Rwanda (Asylum and Immigration) Bill, clause 1(4)(a)

52 Safety of Rwanda (Asylum and Immigration) Bill, clause 1(4)(b)

53 Constitution Committee, *United Kingdom Internal Market Bill* (17th Report, Session 2019–21, HL Paper 151), para 176

54 Constitution Committee, *Northern Ireland Protocol Bill* (6th Report, Session 2022–23, HL Paper 78), para 18

with an interim measure of the European Court of Human Rights.[55] This appears to suggest that a minister may lawfully disregard an interim measure issued by the European Court of Human Rights. This clause is expressed in more absolute terms than section 55 of the Illegal Migration Act 2023.[56]

59. The European Court of Human Rights issues interim measures under Rule 39 of the Court.[57] Under Article 46 of the ECHR the UK is bound as a matter of international law to abide by the judgment of the Court.[58] In addition, Article 13 of the ECHR protects the right to an effective remedy.[59] Article 1 ECHR requires that "States must ensure that everyone on their territory or on territory controlled by them has the rights and freedoms set out in the Convention".[60]

60. Arguments have been made that interim measures are not judgments of the European Court of Human Rights, such that the UK is bound to adhere to interim measures as a matter of international law.[61] Others have expressed a contrary view.[62] The European Court of Human Rights, drawing on Articles 1 and 13 ECHR, considers it a breach of international law for a signatory state not to comply with interim measures.[63]

61. A Minister may find themselves in a situation where, were they to determine that the UK was not bound by an interim measure of the European Court of Human Rights, they would be in breach of the Ministerial Code. The Ministerial Code states that its provisions "should be read against the backdrop of the overarching duty on Ministers to comply with the law".[64] In 2015 Lord Faulks KC, then Minister of State in the Ministry of Justice, stated that despite the omission of explicit reference to international law in the Ministerial Code, ministers were obliged to follow it.[65] This interpretation was affirmed by the Court of Appeal in 2018.[66]

62. In our report *The role of the Lord Chancellor and the Law Officers* we said:

> "The proper exercise by a minister of a power granted by Parliament would be lawful under domestic law. But where domestic and international law diverge, the duty reflected in the Ministerial Code to comply with international law still applies. This presents ministers with a dilemma which they should not be expected to face, and this

55 Safety of Rwanda (Asylum and Immigration) Bill, clause 5(2)
56 Illegal Migration Act 2023, section 55
57 European Court of Human Rights, 'Rules of Court' (22 January 2024), Rule 39: https://www.echr.coe.int/documents/d/echr/rules_court_eng
58 European Convention on Human Rights, Article 46. There is a debate as to whether an interim measure amounts to a judgment of the Court.
59 European Convention on Human Rights, Article 13
60 European Convention on Human Rights, Article 1
61 Policy Exchange, 'Rule 39 and the Rule of Law' (5 June 2023): https://policyexchange.org.uk/wp-content/uploads/Rule-39-and-the-Rule-of-Law.pdf [accessed 8 February 2024]
62 Bingham Centre for the Rule of Law, 'Clause 54 of the Illegal Migration Bill: A Rule of Law Analysis for House of Lords Report Stage' (3 July 2023): https://binghamcentre.biicl.org/documents/159_bingham_centre_report_on_clause_54_imb_and_the_rule_of_law_3_july_2023.pdf [accessed 8 February 2024]
63 European Court of Human Rights, *Mamatkulov and Askarov v Turkey* (Applications nos 46827/99 and 46951/99) (4 February 2005)
64 Cabinet Office, 'Ministerial Code' (22 December 2022), para 1.3: https://www.gov.uk/government/publications/ministerial-code/ministerial-code [accessed 8 February 2024]
65 HL Deb, 28 October 2015, cols 1170–71
66 Court of Appeal, *R (Gulf Centre for Human Rights) vs The Prime Minister and the Chancellor of the Duchy of Lancaster*, [2018] EWCA Civ 1855

> uncomfortable situation reaffirms our previously expressed disquiet about the constitutional desirability of Parliament legislating in violation of the UK's international obligations."[67]

63. **We reiterate that where domestic and international law diverge, the duty reflected in the Ministerial Code to comply with international law remains. There would be significant consequences for the rule of law were ministers to determine that the UK was not to abide by an interim measure of the European Court of Human Rights in circumstances which placed them in breach of international law. *We consider that clause 5 raises serious constitutional concerns.***

64. Clause 5 also has constitutional consequences for the independence of the judiciary. Section 3(1) of the Constitutional Reform Act 2005 states that "Ministers of the Crown…must uphold the independence of the judiciary".[68] Section 3(7) and (8) clarify that this duty applies to the judiciary of an international court "which exercises jurisdiction, or performs a function of a judicial nature, in pursuance of an agreement to which the United Kingdom…is a party".[69]

65. Clause 5 states that only a Minister of the Crown can determine whether the UK is bound by an interim measure issued by the European Court of Human Rights. This arguably undermines the judicial independence of the judge of the European Court of Human Rights who issues an interim measure.

66. Clause 5(3) states that "a court or tribunal must not have regard to the interim measure when considering any application or appeal which relates to a decision to remove the person to the Republic of Rwanda under a provision of, or made under, the Immigration Acts".[70] Clause 5(3) prevents the judiciary from adhering to an interim measure issued by the European Court of Human Rights. This arguably undermines the judicial independence of members of the UK judiciary.

67. **It is conceivable that a person may bring legal proceedings in the UK to compel a minister to adhere to an interim measure of the European Court of Human Rights on the basis that failure to do so would breach the obligation in the Constitutional Reform Act 2005 to uphold the independence of the judiciary. *Given the impact of clause 5 on the independence of the judiciary, we consider this raises serious constitutional concerns.***

67 Constitution Committee, *The Role of the Lord Chancellor and the Law Officers* (9th Report, Session 2022–23, HL Paper 118), para 89
68 Constitutional Reform Act, section 3(1)
69 Constitutional Reform Act, sections 3(7) and 3(8)
70 Safety of Rwanda (Asylum and Immigration) Bill, clause 5(3)

APPENDIX 1: LIST OF MEMBERS AND DECLARATIONS OF INTEREST

Members

Baroness Drake (Chair)
Lord Anderson of Ipswich
Baroness Andrews
Lord Beith
Lord Burnett of Maldon
Lord Falconer of Thoroton
Baroness Finn
Lord Foulkes of Cumnock
Baroness Goldie
Lord Keen of Elie
Lord Strathclyde
Lord Thomas of Gresford

Declarations of interest

Baroness Drake (Chair)

No interests declared

Lord Anderson of Ipswich

A member of the Bar of England and Wales.

Baroness Andrews

No interests declared

Lord Beith

No interests declared

Lord Burnett of Maldon

Previous judicial involvement in the Rwanda policy, as one of the judges who presided over the case in the Court of Appeal, AAA & others v Secretary of State for the Home Department.

A member of the Supplementary Panel of the Supreme Court.

Lord Falconer of Thoroton

A member of the Bar of England and Wales.

Baroness Finn

No interests declared

Lord Foulkes of Cumnock

A member of the UK Delegation to the Parliamentary Assembly of the Council of Europe.

Baroness Goldie

No interests declared

Lord Keen of Elie

A member of the Bar of Scotland.

A member of the Bar of England and Wales.

Chair of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe.

Lord Strathclyde

No interests declared

Lord Thomas of Gresford

No interests declared

A full list of members' interests can be found in the Register of Lords' Interests: https://members.parliament.uk/members/lords/interests/register-of-lords-interests

Professor Stephen Tierney, University of Edinburgh, and Professor Alison Young, University of Cambridge, acted as legal advisers to the Committee. They declared no relevant interests.