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The Baroness Drake CBE
Chair, Constitution Committee
House of Lords
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Dear Baroness Drake,

SAFETY OF RWANDA (ASYLUM AND IMMIGRATION) BILL

Thank you for your report following the Committee's scrutiny of the provisions of the Safety of Rwanda (Asylum and Immigration) Bill. The Government has considered the Committee's findings and our response is set out below.

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

The Committee's finding

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 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. 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.

Government Response

The Government fully respects the role of the courts and indeed the decision of the Supreme Court in the case of AAA v Secretary of State for the Home Department.

However, the judgment was based on information provided to the Court on Rwanda up until the summer of 2022. Their Lordships recognised, explicitly and in terms, that those deficiencies may be addressed in future.

In response, the Home Secretary signed a new internationally binding treaty between the United Kingdom and the Government of Rwanda, which responds to and addresses the concerns raised by the Court. Alongside this treaty, the Government has also introduced this Bill - the Safety of Rwanda (Asylum and Immigration) Bill - which buttresses the treaty, and supports the relocation of people to Rwanda under the Immigration Acts.

Since summer 2022, when judicial review proceedings in relation to the Migration and Economic Development Partnership (MEDP) began the UK Government and the Government of Rwanda have been closely working together to strengthen Rwanda's asylum system and build capacity. This includes developing a new Appeal Body and enhancing the functions of the independent Monitoring Committee. We have developed and commenced new operational training to Rwandan asylum decision-makers, established clear Standard Operating Procedures, and strengthened procedural oversight of the MEDP and asylum processes.

This has not only strengthened the operational readiness of Rwanda to receive and support migrants relocated under the Partnership but also the legal footing of the agreement and the commitments both sides undertake to ensure national and international obligations and standards are met, having closely and carefully scrutinised all the circumstances of the country and information from appropriate sources. The treaty enhances the roles of the Monitoring Committee, who will ensure that the obligations under the treaty are adhered to in practice.

The treaty, alongside the evidence of changes in Rwanda since summer 2022, will enable Parliament to conclude that Rwanda is safe and the new Bill provides Parliament with the opportunity to so.

It is our view that Parliament and the Government are well placed to address the sensitive policy issues involved in this legislation and ultimately tackling the major global challenge of illegal migration.

Article 10 of the treaty in particular sets out the assurances for the treatment of relocated individuals in Rwanda, including abiding by the Refugee Convention in relation to those seeking asylum. We have assurances from the Government of Rwanda that the implementation of all measures within the treaty will be expedited and Rwanda will fulfil its obligations under the treaty. We will not ratify the treaty until the UK and Rwanda agreed that all necessary measures in the treaty are in place.

The Committee's finding

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.

Government Response

We do not accept that this Bill is being used to reverse factual conclusions made by the Supreme Court. It simply responds to the key concerns of the Court to ensure the policy can go ahead.

The Bill reflects the strength of the Government of Rwanda's protections and commitments given in the treaty to people transferred to Rwanda in accordance with the treaty. The treaty, alongside the evidence of changes in Rwanda since summer 2022, will enable Parliament to conclude that Rwanda is safe, and the new Bill provides Parliament with the opportunity to do so.

Access to the courts

The Committee's finding

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.

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.

Government Response

We are satisfied the Bill (clause 4) explicitly protects access to justice by ensuring that courts can continue to consider the safety of Rwanda based on compelling evidence relating specifically to a person's particular individual circumstances. This underpins the principle that no one should be put into a position where they would face a real risk of harm and is in line with the UK's international legal obligations, including under Articles 2, 3 and 13 of the European Convention on Human Rights.

The Bill will however preclude almost all grounds for individual challenge that could be used to suspend or frustrate removal. This means that illegal migrants will not be able to make an asylum claim in the UK, argue that they face a risk of refoulement in Rwanda, or make any other ill-founded human rights claim to frustrate removal.

The Bill strikes the appropriate balance of limiting unnecessary challenges that frustrate removal whilst maintaining the principle of access to the courts where an individual may be at a real risk of serious and irreversible harm.

A declaration of incompatibility, by virtue of section 4(6) of the Human Rights Act 1998, does not affect the validity, continuing operation or enforcement of the provision in respect of which it is made, and is not binding on the parties to the proceedings in which it is made. It is therefore for Parliament to decide whether and how to change

the legislation in light of a declaration of incompatibility. A declaration of incompatibility will not affect our ability to carry out the policy.

The Committee's findings

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.

Government Response

We accept that individuals will still be able to take claims to Strasbourg, however, this Bill also states that it is only ever for a Minister of the Crown to decide whether to comply with a Rule 39 measure of the Strasbourg Court and that domestic courts must not have regard to Rule 39 measures when considering domestic interim relief applications. Rule 39 interim measures are not final judgments of the European Court of Human Rights. They are not binding on the UK domestic courts.

The retention of the extremely limited routes for individual challenge in the Bill, including through the retention of section 4 of the Human Rights Act provides for the Bill's compatibility with the UK's international obligations**.** Our approach is in line with our international obligations, Clause 4 provides for an equivalent domestic remedy, there should in fact be no need for the Strasbourg Court to intervene.

Human rights

Disapplication of provisions of the Human Rights Act 1998

The Committee's finding

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.

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.

Government Response

The UK has a longstanding tradition of ensuring rights and liberties are protected domestically, and of fulfilling our international human rights obligations. The Government remains committed to that position and will ensure that our laws continue to be fit for purpose and work for the people of the UK. Stopping illegal migration is an important issue, for both the public and this Government. Parliament and the British people want an end to illegal immigration, and we need to apply bold and novel solutions to achieve this and bring to an end the dangerous channel crossings to save lives at sea. There's nothing improper or unprecedented about pursuing ambitious and innovative ways of solving such endemic issues as migration. The Bill strikes the balance between our legal obligations to protect rights and tackling illegal migration.

As has previously set out in this response the Bill explicitly protects access to justice by ensuring that courts can continue to consider the safety of Rwanda based on compelling evidence relating specifically to a person's particular individual circumstances. This underpins the principle that no one should be put into a position where they would face a real risk of serious and irreversible harm and contributes to the Bill's compatibility with the UK's international legal obligations, including under Articles 2, 3 and 13 of the European Convention on Human Rights.

It is legitimate to treat people differently in different circumstances: to take just two examples, a citizen may legitimately be treated differently, and have different legal rights, from a non-national; and a person in detention may have certain rights restricted when compared to a person at liberty. The European Convention on Human Rights, as interpreted by the case law of the ECHR, fully recognises this principle. Rights are therefore universal, but what rights may mean for different people may legitimately differ depending on the circumstances, so long as any difference in treatment is justifiable within the framework of the relevant right. Therefore, everybody holds their rights without distinction on any ground; but the extent to which those rights may be limited, restricted, interfered with, or indeed vindicated, depends on each individual's circumstances, and the legitimacy of the limitation, restriction, interference, etc.

The Good Friday Agreement

The Committee's finding

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

Government Response

The Safety of Rwanda (Asylum and Immigration) Bill will apply in full in Northern Ireland in the same way it does in the rest of the UK. This is set out on the face of the Bill, reflecting that immigration policy is a UK-wide matter. There is nothing in the Windsor Framework that affects that. The Bill does not engage the Belfast (Good Friday) Agreement, including the rights chapter – those rights do not extend to matters engaged by the bill. The Government remains fully committed to that Agreement in all its parts.—The Safety of Rwanda Bill Factsheet Safety of Rwanda (Asylum and

Immigration) Bill: factsheet - GOV.UK (www.gov.uk) has been updated to reflect the Government's position on this.

Section 19 statements

The Committee's findings

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 decisionmakers, subject to parliamentary scrutiny, on how the Bill is to be implemented compatibly with Convention rights.

Government Response

The Bill is predicated on both Rwanda and the UK's compliance with international law in the form of the treaty, which itself reflects the international legal obligations of the UK and Rwanda. The Bill does not disapply any of the Convention rights and allows direct access to the courts in appropriate cases, and a similarly appropriately limited possibility of interim relief, consistent with what is required by the European Convention on Human Rights.

Clause 3 ensures that considerations about the Rwanda treaty and the safety of Rwanda are firmly located in domestic sphere, with appropriate deference to Parliament's sovereign and final determination on the matter.

We are not repealing the Human Rights Act: we are disapplying section 2 Human Rights Act ensures that considerations about the Rwanda treaty and the safety of Rwanda are firmly located with Parliament, and taken together with the rest of clause 3 and the Bill as a whole, makes clear that appropriate deference should be given to Parliament's sovereign and final determination on the matter; section 3 in relation to the whole Bill; and sections 6-9 where the Courts are considering whether Rwanda is safe and where the test that must be met before removal is whether it will result in serious and irreversible harm.

Through this legislation we are not seeking to disapply any of the Convention rights. The Bill permits a route for direct access to the courts, which ensures that the Bill is consistent with the requirements of the European Court on Human Rights.

As is the case for any new piece of legislation or policy position which will impact the decision making of caseworkers within the Home Office, guidance will be provided. The Home Office produces numerous pieces of guidance on a regular basis and it would not be appropriate or proportionate for Home Office guidance to be put before Parliament.

The Committee's finding

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.

Government Response

The use of a section 19(1)(b) statement does not mean that the Bill is incompatible with the European Convention on Human Rights. There is nothing improper or unprecedented about pursuing bills with a section 19(1)(b) statement. It does not mean the Bill is unlawful or that the Government will necessarily lose any legal challenges on human rights grounds. Parliament clearly intended section 19(1)(b) to be used as it is included in the Human Rights Act 1998. All such a statement means is that the Home Secretary is not able to state now that the Bill's provisions are more likely than not compatible with Convention rights. A range of bills have also had section 19(1)(b) statements in the past, including the 2003 Communications Bill under the last Labour Government.

It is an important measure to safeguard Parliamentary sovereignty. The use in this case recognises the novel and ambitious approach taken by this Bill, and the fact there is room for argument both ways. Legislation and policy nearly always engage human rights and there are very often arguments on both sides of the equation on compatibility.

The approach adopted is new and ambitious, but that does not mean that the Bill is not compatible with the Convention rights.

The UK has a longstanding tradition of ensuring rights and liberties are protected domestically, and of fulfilling our international human rights obligations. The Government remains committed to that position and will ensure that our laws continue to be fit for purpose and work for the people of the UK. Although some of the provisions in the Bill are novel, the Government is satisfied that the Bill is compatible with the Convention rights.

International law and the rule of law

The Committee's finding

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.

Government Response

The Government is satisfied and has made it clear that this legislation is compliant with our international obligations, including the ECHR.

The Committee's finding

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.

Government Response

The Bill makes clear that it is only for a Minister of the Crown to determine whether to comply with an interim measure of the European Court of Human Rights. It also makes clear that domestic courts may not have regard to the existence of any interim measure when considering any domestic application flowing from a decision to remove a person to Rwanda in accordance with the treaty. Consideration will be on a case-by-case basis depending on the facts.

The Committee's finding

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.

Government Response

This Bill takes the same approach as was adopted in section 55 of the Illegal Migration Act. The Constitution Reform Act is not referenced in the Illegal Migration Act. Under both provisions it is for a Minister of the Crown alone, and not a Court, to decide whether to comply with an interim measure. This reflects the orthodox position that

international obligations act on the Government rather than having effect on the domestic plane, and is not an attack on judicial independence.

The Government takes its international obligations very seriously and considers that the provision is capable of being operated in a way that avoids any conflict with Convention obligations.

The judiciary is independent. Judicial decisions are made independently.

Rt Hon Michael Tomlinson KC MP
Minister for Illegal Migration