WRITTEN EVIDENCE FROM THE LAW SOCIETY OF ENGLAND AND WALES

(RWA0007)

1. The Law Society of England and Wales is responding to this call for evidence in its representative capacity as the independent professional body for 200,000 solicitors in England and Wales. Our role is to be the voice of solicitors, to drive excellence in the profession and to safeguard the rule of law.

2. This response outlines our views on the human rights implications of the Safety of Rwanda (Asylum and Immigration) Bill, particularly from a rule of law and access to justice perspective.

Question 1: *Does the requirement to conclusively treat Rwanda as a safe country comply with the UK's human rights obligations, including in particular the prohibition of refoulement and the prohibition of inhuman or degrading treatment under Article 3 ECHR?*

3. Whether there is a risk of refoulement or inhuman or degrading treatment is a question of fact which cannot be answered in advance. Both the prohibition of refoulement and Article 3 of the European Convention on Human Rights (ECHR) therefore require a thorough and effective judicial examination of the risk to these rights on all the facts of a case prior to the person's removal. The Bill removes this possibility.

4. By requiring decision-makers (including courts) to conclusively treat Rwanda as safe and ousting the jurisdiction of the court to assess this, it is using law to manufacture fact and supplanting the role of the courts to assess questions of fact based on the evidence. It would prevent a court or tribunal from not only ruling that Rwanda is not a safe country, but also from even considering the question. Even if the court were presented with overwhelming evidence that Rwanda is unsafe the court would have to ignore this and treat it as a safe country. This therefore creates a very real and likely incompatibility with the principle of non-refoulement and Article 3 ECHR.

5. The Government claims that the risk refoulement and breaches of Article 3 ECHR for asylum seekers sent by the UK to Rwanda has been removed by the legally binding nature of the treaty both countries have signed. The act of signing a treaty, just the same as passing domestic law, does not of itself change practical realities on the ground. Indeed, the Supreme Court addressed this in its judgment, finding that the issues in the Rwandan asylum system were structural and stating that: *"intentions and aspirations do not necessarily correspond to reality: the question is whether [changes] are achievable in practice."*[1] While the treaty and its implementation will be evidence that could be considered by a court, whether it sufficiently reduces or

[1] AAA (Syria) & Ors, R (on the application of) v Secretary of State for the Home Department [2023] UKSC 42 (15 November 2023), para 102.

removes the risk of refoulement or inhuman and degrading treatment remains a question that is rightfully for the judiciary.

Question 2: *Does legislating, in clause 2, to prevent the courts considering any claim that Rwanda is not safe comply with the UK's human rights obligations, including in particular Article 13 ECHR?*

6. As stated above, Clause 2 places an absolute bar on legal challenges claiming that Rwanda is in general not a safe country for asylum seekers. This applies "*notwithstanding*" the Human Rights Act (HRA) to the extent it is disapplied in Clause 3. This is very likely incompatible with Article 13 ECHR as it prevents an effective remedy. While Article 13 does not always require the availability of a judicial remedy and allows non-judicial remedies as an alternative, in this instance the rights at stake are of such a serious and fundamental nature that a judicial examination and remedy is necessary. In any case, no alternative non-judicial remedy is provided.

7. The remaining judicial avenues of challenge are also not sufficient to compensate for preventing the courts from considering whether Rwanda is safe. The Bill's provisions for challenges based on individual circumstances are inadequate, as addressed below.

8. Other than these provisions, there is a limited possibility of challenging the Bill's provisions on grounds that it is incompatible with the ECHR under Section 4 HRA, which has not been disapplied. This is acknowledged in the Bill's explanatory notes.[2] However, a declaration of incompatibility issued under Section 4 HRA is a weaker remedy and one which the European Court of Human Rights (ECtHR) has stated is not an effective remedy (without an accompanying constitutional convention that the executive and legislative are required to respond) due to their non-binding nature.[3] Given that the context of this Bill strongly suggests that the Government would be unlikely to consider acting on a declaration of incompatibility, it is doubtful this route for legal challenge would be sufficient to meet the requirements of Article 13.

Question 3: *Does allowing for some claims based on compelling evidence relating to particular individual circumstances affect the Bill's compliance with human rights?*

9. We do not believe the provision for challenges against removal to Rwanda based on particular individual circumstances is sufficient to ensure the Bill's compliance with human rights. This is due to the express exclusion of the ability of courts to consider whether an individual would be at risk of refoulement if sent to Rwanda.[4] This therefore extends the general exclusion of judicial consideration of the risks of refoulement made in Clause 2, adding to the likelihood of the Bill's incompatibility

[2] Safety of Rwanda (Asylum and Immigration) Bill: Explanatory Notes, p.10, para.41. Available at: https://bills.parliament.uk/bills/3540/publications
[3] Burden and Burden v UK, App. 13378/05, ECHR 2008, para.40 and 43.
[4] Safety of Rwanda (Asylum and Immigration) Bill, Clause 4(2).

with human rights. The Supreme Court ultimately found that the Rwanda policy was unlawful on this point, so it is of grave concern that the courts cannot consider it for individual cases.

10. The requirement for "*compelling evidence"* also sets a high threshold that will be difficult to meet in practice.[5] It will place a burden on individuals to provide evidence which is often difficult or expensive for an individual who has fled their home country to obtain, or dangerous for them to travel with. An unduly high threshold can therefore limit the effectiveness of individual challenges under this Bill as a safeguard.

Question 4: *Does the way in which the Bill deals with applications for interim remedies from domestic courts, including by allowing them only in narrow circumstances, comply with the UK's human rights obligations?*

11. The restrictions placed on domestic interim remedies are likely incompatible with the UK's human rights obligations, in particular Article 13.

12. All of the key Sections of the HRA are disapplied to applications for an interim remedy, meaning that human rights arguments cannot be considered.[6] The only ground on which an interim remedy may be granted is therefore where there is a "*real, imminent and foreseeable risk of serious and irreversible harm*", as defined in Section 39 of the Illegal Migration Act 2023 (IMA).[7] While this definition includes examples that reflect the requirements of Articles 2 and 3 ECHR, it is still much narrower than the extent of the UK's human rights obligations as it excludes consideration of all other rights, and the disapplication of Section 2 HRA prevents the courts from considering any ECtHR interpretation of the requirements of Articles 2 or 3.

13. Furthermore, interim remedies are only available to a narrow category of individuals. They are unavailable to all who are being removed under the IMA, in which case the ouster clause in Section 54 IMA excluding interim remedies will apply once that provision is commenced.

14. Interim remedies are also excluded where there is a legal challenge to the Bill's compatibility with Convention rights (seeking a declaration of incompatibility under Section 4 HRA), and in the event of a legal challenge before the ECtHR.

Question 5: *Is expressly stating that it is for Ministers to decide whether to comply with interim measures issued by the European Court of Human Rights, and prohibiting courts or*

[5] *Ibid.,* Clause 4(1)(a) and (b).
[6] *Ibid.,* Clause 3(5)(b) and (c).
[7] *Ibid.,* Clause 4(4).

tribunals from having regard to them, consistent with the UK's obligations under the ECHR? Would deciding not to comply with interim measures put the UK in breach of the ECHR?

15. Clause 5(2) – which states: "*It is for a Minister of the Crown (and only a Minister of the Crown) to decide whether the United Kingdom will comply with the interim measure*" – is already a reflection of the constitutional position that the obligation to comply with interim measures lies with the Government. However, it is seriously concerning that this provision signals a clear and unmistakable intention not to comply in the circumstances outlined.

16. The Law Society is clear that interim measures are binding on the Government by virtue of Articles 1 and 34 of the ECHR. Refusing to comply with an interim measure would be a clear and serious breach of international law.

17. Compliance with an interim measure of the ECtHR is a matter of international law and so the Government's obligations under this could not, in any case, be altered by domestic law. Failure to comply could give rise to further proceedings at the ECtHR or Committee of Ministers of the Council of Europe. This would be damaging to our relations with those bodies and to our reputation as a country that respects the international rule of law, and the rule of law in general.

18. In relation to preventing courts and tribunals from having regard to interim measures issued by the ECtHR, it is already the case that, while courts may take an interim measure into consideration, they are not strictly bound by them.[8] The Law Society believes that this existing approach is the correct one as it enables domestic courts to balance the multiple facets of their role in upholding and applying national law, supporting compliance with the UK's Convention obligations and providing protection and access to justice for individuals. Preventing courts and tribunals from having regard to interim measures prevents them from taking into consideration a clear expression of the UK's obligations under the ECHR, and from assisting in ensuring compliance with these.

19. It should also be noted that the ECtHR is currently updating its processes in relation to interim measures.[9] These changes address several of the concerns voiced by the UK Government, most notably by making clearer within the text of Rule 39 that interim measures are only awarded in exceptional circumstances. These changes are welcome and demonstrate that the ECtHR is willing to engage constructively with national governments and respond to their concerns to make improvements where they are

[8] *Ibid.,* Clause5(3).
[9] European Court of Human Rights, 'Changes to the procedure for interim measures (Rule 39 of the Rules of Court), Press Release ECHR 308 (2023), 13 November 2023. Available at: https://hudoc.echr.coe.int/eng-press#{%22fulltext%22:[%22Changes%20to%20the%20procedure%20for%20interim%20measures%22],%22sort%22:[%22kpdate%20Descending%22],%22itemid%22:[%22003-7796609-10812486%22]}

needed. The UK Government's antagonistic stance in passing defensive domestic law provisions fails to display a similar willingness to engage with international bodies in good faith. This continues to do damage to the international reputation of the UK both within the Council of Europe and far beyond.

Question 6: *Does the Bill have any significant implications for constitutional principles, such as the sovereignty of Parliament, the separation of powers between the courts and Parliament and the rule of law, and the way in which they affect the protection of human rights in the UK?*

20. The Bill has profound implications for constitutional principles.

21. Firstly, by requiring decision-makers to "*conclusively*" treat Rwanda as safe, it is seeking to overturn an evidence-based finding of fact made by the Supreme Court, the highest court in the United Kingdom. This is a highly concerning response which is damaging to the rule of law, the role of the judiciary and the constitutional balance of powers by creating a legal fiction to bypass a judicial decision. While Parliament has the right to respond to a court judgment by passing legislation to change a point of domestic law, it cannot use law to change fact.

22. Secondly, as discussed above, the broad ousting of the jurisdiction of the court raises profound concerns with regards to the rule of law and access to justice. By eliminating the prospect of judicial oversight of fundamental legal issues – and especially those that have only recently been decided against the Government – the Bill would enable the Government to act above the law. It is a fundamental principle of the UK's constitution that the UK Government is subject to the law.

23. Lastly, the Bill makes sweeping use of "*notwithstanding*" clauses in a bid to immunise the UK Government from international law. The scope of these clauses is on a much wider scale than has previously been attempted and seeks to exclude all possible sources of the principle of non-refoulement. This is seriously concerning from a rule of law perspective.

24. It bears repeating that international law does not have effect in the UK unless, and only to the extent that, it is provided for in domestic legislation. Domestic legislation is also not capable of altering international obligations. Therefore, to the extent that this Bill is incompatible with international law, it only increases (rather than shields the UK from) the likelihood of judicial and non-judicial scrutiny on the global stage. Beyond this, it also sends a troubling warning to other countries and global partners that the UK can no longer be relied upon to uphold international agreements and is prepared to disregard the rule of law.

(12 January 2024)