WRITTEN EVIDENCE FROM LIBERTY (RWA0010)

Liberty's submission to the Joint Committee on Human Rights call for evidence on legislative scrutiny of the Safety of Rwanda (Asylum & Immigration) Bill, January 2024

Liberty welcomes the opportunity to provide evidence to the Joint Committee on Human Rights to support their legislative scrutiny on the Safety of Rwanda (Asylum & Immigration) Bill. For a fuller overview of the Bill, consult Liberty's second reading briefing.[1]

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?

1. Requiring courts to conclusively treat Rwanda as a safe country would not comply with the UK's human rights obligations. Specifically, it risks breaching the principle of non-refoulement, which the Supreme Court highlighted in its judgment is enshrined in several international treaties which the UK has ratified including the Refugee Convention, the UN Convention on Civil and Political Rights, the UN Convention against Torture, and the European Convention on Human Rights (ECHR) (in particular the prohibition of inhuman or degrading treatment under Article 3 ECHR).[2] It does so by taking away the ability of courts to decide for themselves whether there are substantial grounds for believing that the removal of asylum seekers to Rwanda would expose them to a real risk of ill treatment as a result of being refouled to another country (apart from for the purpose of making a declaration of incompatibility under section 4 HRA). In other words, even if a court heard overwhelming evidence that Rwanda was unsafe, it would have to stick its fingers into its ears, and pretend that it was. This applies notwithstanding previous domestic legislation, the Human Rights Act (HRA), any other provision or rule of domestic law, as well as any interpretation of international law by the court/tribunal. In effect, clause 2 operates as a judicial blindfold, eroding the ability of our domestic courts to scrutinise the legality of Government decisions.

2. In its judgment, the Supreme Court did not express 'concerns' that can be addressed through legislation or indeed a treaty – it made an authoritative, unanimous ruling based on extensive expert evidence, including regarding the lack of independence of the judiciary in Rwanda, that it is not a safe country. Therefore, if the UK Government were to send a person to Rwanda under its policy, this would be unlawful. Writing in legislation that the "judgement of Parliament" is that Rwanda is safe does not make it so.

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?

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[1] Liberty's briefing for Second Reading of the Safety of Rwanda (Asylum and Immigration) Bill, December 2023: https://www.libertyhumanrights.org.uk/wp-content/uploads/2023/03/Libertys-briefing-on-the-Rwanda-Bill-for-Second-Reading-HoC-December-2023-1.pdf

[2] R (on the application of AAA and others) v Secretary of State for the Home Department [2023] UKSC 42

3. In addition to making breaches of Article 3 ECHR almost inevitable, the Rwanda Bill is also likely to be incompatible with Article 13 ECHR. Under Article 13 ECHR, the Government has an obligation to provide individuals with effective remedies for breach or threatened breach of their rights. Where a breach or threatened breach relates to the prohibition against torture and inhuman and degrading treatment under Article 3 ECHR, the European Court of Human Rights (ECtHR) has confirmed that individuals are entitled to a remedy with automatic suspensive effect (that is, a legal remedy that suspends the enforceability of a challenged decision).[3]

4. The Bill explicitly disapplies section 2, section 3, and sections 6 to 9 of the HRA– it does not, however, disapply section 4 HRA. According to the Government's ECHR memorandum, it "considers that a Declaration of Incompatibility is sufficient to provide an Article 13 effective remedy for challenges to decisions under the presumption of safety in clause 2 to treat Rwanda as safe."[4]

5. Retaining section 4 HRA (and thus, the possibility of challenging the presumption that Rwanda is a safe country) is not enough to ensure the compliance of clause 2 with Article 13 ECHR. First, a declaration of incompatibility under section 4 HRA is not automatically suspensive (and as detailed below, the Bill also seeks to restrict domestic interim measures). Second, whereas the ECtHR has previously considered that "evidence of a long-standing and established practice of ministers giving effect to the courts' declarations of incompatibility might be sufficient to persuade the Court of the effectiveness of the procedure" for the purposes of Article 13,[5] it appears almost certain that the Government will take the opposite approach in relation to the Rwanda Bill. Not only does the Government not accept there is a basis for such a declaration in the first place, it has said that the making of any such declaration "would simply mean that Parliament and the government would be able to review the issue as it saw fit, with flights able to continue to embark for Rwanda as Parliament considered the issue."[6] The implication here is that notwithstanding a court's making of a declaration of incompatibility on the basis that the Bill is incompatible with Article 3 ECHR, the Government would continue operating removals to Rwanda – effectively allowing human rights violations to continue taking place until it allotted time for Parliament to reconsider the Bill (if ever).

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

6. Clause 4 sets an incredibly high threshold for individual claims, which must be based on "compelling evidence relating specifically to the person's particular individual circumstances." The Government has stated that the purpose of this "extremely

[3] MSS v Belgium and Greece (Application no. 30696/09) (ECtHR, 21 January 2011)
[4] Paragraph 21, Safety of Rwanda (Asylum and Immigration) Bill European Convention on Human Rights Memorandum: https://publications.parliament.uk/pa/bills/cbill/58-04/0038/ECHRmemo.pdf
[5] Burden and Burden v UK (Application No. 13378/05) (ECtHR, 29 April 2008)
[6] Safety of Rwanda (Asylum and Immigration) Bill 2023: legal position, 11 December 2023: https://www.gov.uk/government/publications/safety-of-rwanda-asylum-and-immigration-bill-2023-legal-position/safety-of-rwanda-asylum-and-immigration-act-2023-legal-position-accessible#:~:text=4%20declaration%20of%20incompatibility.,or%20application%20of%20the%20legislation.

limited route"[7] is to comply with the UK's international obligations. In practice, however, the difficulty of meeting this threshold (not to mention the practical obstacles to securing legal representation)[8] means that it will only provide the feeblest mitigation for any potential breaches of human rights. Further, the Bill explicitly prohibits individual claims from relying on grounds that Rwanda is not a safe country in general. Thus, notwithstanding any individual grants that *are* made under clause 4, the Bill continues to strip the courts of the ability to prevent transfers to Rwanda on the basis of potential breaches of the principle of non-refoulement.

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?

7. Clause 4(3) limits the ability of a court or tribunal to grant an interim remedy, so that it may only do so if it is satisfied that the person would face a real, imminent, and foreseeable risk of serious and irreversible harm if removed to Rwanda. This does not apply to people who are to be removed under the Illegal Migration Act 2023 (IMA), as section 54 of that Act (which has not yet been commenced) expressly prohibits the granting of such a remedy to this group.

8. As noted above, Article 13 ECHR in the Article 3 context requires individuals to have access to an automatic suspensive remedy. By disapplying key parts of the HRA (notwithstanding the continued operation of section 4 HRA) while also restricting interim remedies to extremely narrow circumstances, the Rwanda Bill risks breaching Article 13 ECHR. More widely, the continued and targeted erosion of access to domestic interim remedies – which are orders granted by a judge based on principles of fairness and justice – is contrary to equality under the law, a key component of the rule of law.[9]

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 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?

9. Interim measures are issued only "on an exceptional basis, when applicants would otherwise face a real risk of serious and irreversible harm". They are a vital tool that allows the European Court in extreme circumstances to place a temporary stop on an action likely to produce a significant breach of human rights to allow time for a full judgment to take place. Applications for interim measures are most often rejected.

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[7] Safety of Rwanda (Asylum and Immigration) Bill 2023: legal position, 11 December 2023: https://www.gov.uk/government/publications/safety-of-rwanda-asylum-and-immigration-bill-2023-legal-position/safety-of-rwanda-asylum-and-immigration-act-2023-legal-position-accessible#:~:text=4%20declaration%20of%20incompatibility.,or%20application%20of%20the%20legislation.

[8] As of October 2023, over half of asylum applicants in England and Wales are unable to find a legal aid lawyer. See: Wilding, Jo., Over half the people seeking asylum are now unable to access a legal aid lawyer, *Free Movement*, 25 October 2023: https://freemovement.org.uk/over-half-the-people-seeking-asylum-are-now-unable-to-access-a-legal-aid-lawyer/#:~:text=At%20least%2051%25%20of%20asylum,of%20new%20applications%20for%20asylum. Also see: Access to immigration legal aid in 2023: An ocean of unmet need, September 2023: https://publiclawproject.org.uk/content/uploads/2023/09/Oceans-of-unmet-need-Sep-2023.pdf

[9] ILPA, Illegal Migration Bill: Briefing on the Removal of the Interim Remedies Clause for Consideration of Lords Amendments in the House of Commons, July 2023: https://ilpa.org.uk/wp-content/uploads/2023/07/Illegal-Migration-Bill_-Briefing-on-the-Removal-of-the-Interim-Remedies-Clause-for-Consideration-of-Lords-Amendments-in-the-House-of-Commons.pdf

When they are granted, it is on the basis of serious need, and contracting states are under an obligation to comply with them.

10. Giving Ministers the power to decide whether to comply with interim measures and prohibiting courts from having regard to them is inconsistent with the UK's obligations under the ECHR. The Government admits as much in its ECHR memorandum: "this provision is capable of being operated compatibly with Convention rights, in the sense that it will not necessarily give rise to an unjustified interference to those rights."[10] In other words, the Bill is only compatible to the extent that this power is not used.

11. Should a Minister decide not to comply with an interim measure, this would be a breach of our Article 34 ECHR responsibility not to hinder the effective exercise of individual application to the Court.[11] It would also be an extraordinary and reckless shift of power away from Parliament and towards the Executive – with a Minister given the power to unilaterally decide whether or not to put the UK in breach of its international obligations, with the attendant risks of undermining the Good Friday Agreement which underpins peace in Northern Ireland, the Windsor Framework, the UK-EU Trade and Cooperation Agreement, devolution, and other vital institutions.

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?

12. The Bill seeks not only to overturn the Supreme Court's recent finding of fact about the safety of Rwanda, but also to pre-empt any future consideration of this question. This is an unwarranted and disturbing excursion onto judicial ground, with concerning implications for the separation of powers. The Government here proposes to 'mark its own homework', denying the courts their duty to assess the factual question of the risk of refoulement and therefore a potential breach of Article 3 ECHR.

13. Within the separation of powers that forms the basis of our political system, the courts' function is to ensure that every person and body (including the state) acts in accordance with the law, and to provide a system of accountability for when this does not happen. In doing so, the courts play a vital role in upholding the rule of law – including ensuring equality before the law and that the law provides adequate protection for human rights. By tying the courts' hands, the Rwanda Bill undermines this function and thus the principle of the rule of law.

Question 7: Does the Bill give rise to any other significant human rights concerns?

14. The Rwanda Bill is the latest – and the most egregious – example of the recent trend in Government legislation to undermine the universality of human rights protection through the targeting of particular groups – in this case, people the Government intends to remove to Rwanda. Whereas other legislation such as the IMA and Victims and Prisoners Bill disapplies section 3 HRA, and the IMA also gives Ministers the

[10] Safety of Rwanda (Asylum and Immigration) Bill European Convention on Human Rights Memorandum, 6 December 2023: https://publications.parliament.uk/pa/bills/cbill/58-04/0038/ECHRmemo.pdf
[11] See Mamatkulov and Askarov v Turkey (46827/99, 46951/99) 2005.

power to ignore interim measures of the ECtHR, the Rwanda Bill takes this a step further by disapplying additional aspects of the Human Rights Act.

15. We wholly reject the Rwanda Bill's entrenchment of a two-tiered system of human rights protection, whereby people seeking sanctuary are denied the same level of human rights protections as everyone else. Human rights are universal and we all have them on the basis of being human; any erosion of this principle is unacceptable.

(12 January 2024)