WRITTEN EVIDENCE FROM GARDEN COURT CHAMBERS (RWA0014)

This consultation response is submitted by Garden Court Chambers, which is a multi-disciplinary Chambers based in London. It has over 190 barristers (including 30 King's Counsel) and is one of the largest in the country with over 40 years of experience in cases with a human rights context:

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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?**
    a. The Bill seeks to legislate for a factual state of affairs, in other words writing into law the fact that Rwanda is conclusively a safe country. In our view it is constitutionally inappropriate for legislation to conclusively set out an issue of fact (rather than law or policy), particularly where the factual situation has a bearing on fundamental human rights, such as the reception condition for asylum seekers in Rwanda, or the safety of Rwanda more generally, a matter on which the Courts have a constitutional obligation to reach a conclusion in each case. Further, facts are not static and it is important that public bodies and the Courts are able to assess the lawfulness of removals based on evidence and the up-to-date facts, not snapshot factual assertions enshrined in legislation. Such a principle is fundamental to the rule of law.
    b. Neither the Bill itself nor the new UK-Rwandan Treaty can act as a practical and effective means of ensuring that the risks identified by the Supreme Court are addressed. This is an *evidential* question which concerns, amongst other things, the integrity of the Rwandan asylum system. The effect of such legislation would be to close the eyes of Courts and Tribunals from the facts and evidence available. What if there was compelling evidence (such as that which led to the SC decision) that Rwanda was not safe? Under the Bill, the Courts would be prohibited from hearing any arguments about such evidence and the implications for asylum seekers because the Bill legislates for an irrebuttable conclusion that Rwanda is safe that cannot be dislodged by contrary evidence or a change in country conditions and policy. It is important to note that if the UK Gov is able to show with evidence that the UK-Rwanda Treaty adequately addresses the SC concerns, it can and should do so. However, if that is the case, then the Bill is entirely unnecessary.
    c. Underpinning the above and as further points, the UK is bound by the obligations in the Human Rights Act 1998 (HRA 1998), the ECHR, the Refugee Convention and international law. The duty to remove to Rwanda and the accompanying ouster clauses for any Court in the UK to review the lawfulness of the removal make the Bill incompatible with domestic and international law.

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?**
    a. It is contrary to UK obligations under the HRA 1998 to exclude any right to challenge removal on the basis of generic safety concerns as the Bill expressly does. The ECHR supplements its substantive rights with a right to an effective remedy at the domestic level.[1] In the past, efforts to designate particular countries as safe have been couched as rebuttable presumptions, to ensure that an effective remedy remained available in the event that the presumption of safety could be rebutted.[2] By excluding all challenges on the basis of generic safety concerns,[3] and by disapplying the HRA 1998,[4] the Bill ensures that no domestic remedy at all is available, let alone any 'effective' remedy.
    b. It should be noted that Article 13 ECHR has not been incorporated into UK law by the HRA 1998. The justification given for this by the then Lord Chancellor was that the HRA itself gives effect to Article 13 by establishing a scheme under which Convention rights can be raised before the UK Courts. It follows that if there is no remedy, let alone an effective one, that would constitute a breach of ECHR rights and the HRA 1998.
    c. The lack of any judicial scrutiny, indeed the prohibition on any such scrutiny is, on its face, incompatible with section 7 HRA 1998.
    d. There is a reasonable likelihood that the ouster clauses are in themselves incompatible with constitutional law principles.

3. **Does allowing for some claims based on compelling evidence relating to particular individual circumstances affect the Bill's compliance with human rights?**
    a. Clause 4 provides for the public body and a Court to consider whether Rwanda is a safe country only based on '*compelling evidence relating specifically to the person's individual circumstances (rather than on the grounds that the Republic of Rwanda is not a safe country in general)*'. This creates an impossible and impractical evidential barrier: every case is necessarily considered on its own facts and merits and the judgment on whether a country is 'safe' for an individual is usually arrived at by a combination of case specific facts and the objective evidence of how they are likely to be treated in the receiving country – an assessment which, by definition, considers the trends and evidence of the receiving country's practices generally but with specific application to the individual in question.
    b. Clause 4(2) prohibits the decision maker and/or the court from considering whether Rwanda will or may remove to another country in contravention of its international law obligations. That would mean that future Courts would be prevented from reaching the very conclusion that the Supreme Court did when

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[1] ECHR Article 13.

[2] Following the decision in *R (Nasseri)* [2009] UKHL 23, [2010] 1 AC 1, where a declaration of ECHR incompatibility was issued in relation to a statutory irrebuttable presumption of safety.

[3] The Bill makes limited provisions for challenges brought on the basis of 'individual circumstances', clause 4, but not insofar as those 'individual circumstances' are said to create a risk of refoulement, clause 4(2).

[4] Clause 3.

ruling that Rwanda was not safe. Clause 4(2) is a threat to the separation of powers, and is squarely in breach of the UK's obligations under the Refugee Convention. Without the ability to review the evidence and arguments, the UK would simply not be able to ensure its compliance with the legal framework that it is bound by.

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?**
    a. Interim measures in domestic courts are dealt with in clause 4(4) applying the test of '*real, imminent and foreseeable risk of serious and irreversible harm if removed*' to Rwanda. This test broadly reflects the high test applicable to Rule 39 ECtHR interim measures, which is arguably much more stringent than the domestic test for interim relief. The main difficulty is that such interim relief would only be available in a limited number of cases owing to the way in which clause 4 seeks to circumscribe the type of cases that can be brought and the areas which the Courts can rule on. It would mean for example that cases raising the risk of onward refoulment cases from Rwanda or relying on evidence as to general conditions in Rwanda, could not make applications for interim remedies. That would mean that there would be a real risk that applications for interim measures could not be made in significant numbers of cases where serious risks upon removal arise.

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?**
    a. This would be inconsistent with ECHR, article 12 and 34 as well as a breach of the Vienna Convention on the Law of Treaties. Thus far, the UK has committed itself to faithful compliance with Rule 39 measures[5]. The Bill proposes to legislate for a structural and institutional non-compliance with Rule 39 measures, an express intention to flout rulings and the authority of the Strasbourg court.

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?**
    a. The Bill has significant implications for constitutional principles such as the sovereignty of Parliament, separation of powers, and the rule of law, some of which are addressed above. It is an attempt to foreclose judicial scrutiny, to freeze in time a factual assertion contradicted recently by the Supreme Court, and narrow the scope of challenges that can be brought. It seriously

[5] But note that the UK refused to comply in the case of Al-Saadoon who was returned to Iraq, but that decision was explained as wholly exceptional: https://hudoc.echr.coe.int/eng?i=001-97575.

compromises both the United Kingdom's international reputation, with potentially fatal consequences for those in need of international protection.

7. **Does the Bill give rise to any other significant human rights concerns?**
    a. The UK ratified the Istanbul Convention in November 2022 – IC- (the Council of Europe Convention on preventing and combating violence against women and domestic violence). Articles 60 and 61 require the UK to implement gender-sensitive asylum determination procedures and respect the non-refoulement principle, particularly for women and girls. The Bill contains no exceptions or safeguards for women and girls or those who have experienced SGBV. The operation of the Bill in the context of NABA 2022 and the IMA 2023, implementing immediate and prolonged detention posing barriers to legal advice and trauma services whilst in the UK, and the inability to challenge the general safety of Rwanda for a group such as women and girls, risks breaching the IC.
    b. More broadly, it is important to note the evidential context of the Bill and in particular the evidence of likely human rights breaches for those removed to Rwanda:
        i. There are clearly documented human rights abuses that occur in Rwanda. Hence there are in-country risks to persons sent there and there are persons fleeing persecution in Rwanda and seeking asylum from there including in the UK. Even the Secretary of State for the Home Department in his own country material disclosed in the Rwanda litigation (including that previously redacted by his claim of public interest immunity) recognised the limitations on freedom to express views for refugees relocated there. The Divisional Court acknowledged such risks, but the assessment of those wider risks in Rwanda which formed part of the appeal were not addressed by the Court of Appeal or the Supreme Court in light of their findings as to risk of refoulement.
        ii. Further, any legal representation provided to an asylum seeker within Rwanda pursuant to the Treaty must ensure that it is independent and effective, not least when conditions in Rwanda are in issue. There is no guarantee of such representation. As regards communication with UK lawyers, there is no guarantee that this will be enabled nor that it will meet our common law standard of effective access to justice. Access to independent and effective lawyers is a cornerstone of access to the courts and thus to a meaningful remedy. The absence of such sufficient guarantees is of particular concern given the documented in-country abuses of human rights in Rwanda and the need for remedies against the same.

(12 January 2024)