WRITTEN EVIDENCE FROM JUSTICE AND ILPA (RWA0024)

Joint Evidence of JUSTICE and ILPA

1. JUSTICE is a cross-party law reform and human rights organisation working to strengthen the justice system. It is the UK section of the International Commission of Jurists. Our vision is of fair, accessible and efficient legal processes in which the individual's rights are protected and which reflect the country's international reputation for upholding and promoting the rule of law.

2. The Immigration Law Practitioners' Association ('ILPA') is a professional association and registered charity, the majority of whose members are barristers, solicitors, and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-governmental organisations, and individuals with a substantial interest in the law are also members. ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law, to act as an information and knowledge resource for members of the immigration law profession, and to help ensure a fair and human rights-based immigration and asylum system.

3. We welcome the opportunity to jointly respond to the Committee's Inquiry, as together we have legal expertise in matters relevant to the Committee's scrutiny of the Safety of Rwanda (Asylum and Immigration Bill) ('the Bill'). We would also direct the Committee to our detailed response to the International Agreements Committee's Inquiry into the UK-Rwanda asylum Agreement.[1] The lack of detail or response to any specific question should not be taken as indicating that no issues arise in relation to the matter.

Q1: 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?

Q2: 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?

Q3: Does allowing for some claims based on compelling evidence relating to particular individual circumstances affect the Bill's compliance with human rights?

[1] Immigration Law Practitioners' Association (ILPA) and JUSTICE, Joint Written Evidence (21 December 2023) <https://committees.parliament.uk/writtenevidence/127222/pdf/> accessed 16 January 2023.

Q4: 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?

4. The requirement in Clause 2 of the Bill, for every decision-maker to conclusively treat Rwanda as a safe country, which is a legal fiction, as well as the ousting of the jurisdiction and narrowing the granting of interim remedies of our courts and tribunals very likely do not comply with the UK's human rights obligations.

5. As evidence of this, if this Bill clearly complied with the UK's international human rights obligations, the Bill would not need to be accompanied by a statement under section 19(1)(b) of the Human Rights Act 1998, that the Home Secretary cannot say it is compatible with Convention rights. It would also not need to contain numerous clauses applying its provisions notwithstanding any interpretation of international law, disapply key provisions of the Human Rights Act 1998, or oust the jurisdiction of domestic courts and tribunals.[2]

6. The Bill places the UK at significant risk of violating its obligations under Articles 3 and 13 ECHR, including in the following four ways.

7. First, Article 3 ECHR requires the UK to conduct a '*thorough examination of the question whether the receiving third country's asylum procedure affords sufficient guarantees to avoid an asylum-seeker being removed, directly or indirectly, to his country of origin without a proper evaluation of the risks he faces from the standpoint of Article 3 of the Convention.*'[3] The UK must carry out its own *'up-to-date assessment, notably, of the accessibility and functioning of the receiving country's asylum system and the safeguards it affords in practice [...] with reference to the facts which were known to the national authorities at the time of expulsion but it is the duty of those authorities to seek all relevant generally available information to that effect.*'[4] If the existing guarantees are insufficient, *'article 3 implies a duty that the asylum-seekers should not be removed to the third country concerned'.*[5]

8. Instead, the Bill places a mandatory statutory obligation on the Home Secretary, immigration officers, courts, and tribunals to conclusively depart from the fact-finding of our Supreme Court, and prohibits any reconsideration of Rwanda's general safety[6] on the

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[2] Clause 2(5) of the Bill.

[3] *Ilias and Ahmed v Hungary*, Application No. 47287/15, 21 November 2019 at §137.

[4] Ibid §141.

[5] Ibid §134.

[6] A safe country is defined in Clause 1(5) as *'a country to which persons may be removed from the United Kingdom in compliance with all of the United Kingdom's obligations under international law that are relevant to the treatment in that country of persons who are removed there'.* This is further defined as including, a country *'from which a person removed to that country will not be removed or sent to another country in contravention of any*

basis of up-to-date factual evidence, including reconsideration in light of the UK Government's Policy Statement[7] and the new UK-Rwanda Treaty.[8] Clause 4(1) only permits challenges based on narrow circumstances where Rwanda would not be a safe country for an individual seeking asylum, *'based on compelling evidence relating specifically to the person's particular individual circumstances'*. Clause 4(2) prevents the Home Secretary, immigration officers, courts, and tribunals from considering '*any matter, claim or complaint to the extent that it relates to the issue 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 (including in particular its obligations under the Refugee Convention)'*.

9. Accordingly, even with the consideration of individual circumstances under Clause 4(1), the Bill inhibits a proper evaluation of risks from the standpoint of Article 3 ECHR. It prohibits not only a *thorough* examination, but *any* examination of whether Rwanda's new asylum procedure, including its forthcoming asylum law and untested First Instance Body and Appeal Body, affords sufficient guarantees against *refoulement*.[9]

10. Second, it is our respectful opinion that the evidence in the Policy Statement and the asylum partnership arrangements contained in the (as yet unratified) UK-Rwanda Treaty are insufficient. They do not meaningfully address the concerns of the Supreme Court, in its unanimous detailed judgment of fact in November 2023,[10] finding precisely that Rwanda was unsafe. The Court had substantial grounds for believing that the removal of individuals seeking asylum to Rwanda would expose the individuals to a real risk of ill-treatment by reason of *refoulement*, citing substantial evidence in support of its findings, including the particularly important evidence of the UN High Commissioner for Refugees ('UNHCR'). It did not dispute that the Rwandan authorities entered into its agreement with the UK in good faith, rather it found that:

> *'the central issue… is [Rwanda's] practical ability to fulfil its assurances… in the light of the present deficiencies of the Rwandan*

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international law' and *'in which any person who is seeking asylum or who has had an asylum determination will both have their claim determined and be treated in accordance with that country's obligations under international law'.*

[7] The Policy Statement was first published on 12 December 2023, but was updated on 11 January 2024.

[8] Clause 2(3)-(4) of the Bill.

[9] The Supreme Court noted that the principle of *non-refoulement* (i.e. to not directly or indirectly send individuals to a country where there is a real risk of ill-treatment) was *'enshrined in several international treaties which the United Kingdom has ratified',* including the Refugee Convention, UNCAT, ICCPR, and ECHR, and is given effect in numerous domestic statutes. Further, there is significant consensus that it forms part of customary international law and has arguably reached the status of a peremptory norm, as it is a norm from which no derogation is permitted. See Cathryn Costello and Michelle Foster, 'Non-refoulement as Custom and Jus Cogens? Putting the Prohibition to the Test' (2016) in Heijer, M., van der Wilt, H. (eds) Netherlands Yearbook of International Law (T.M.C. Asser Press 2015) vol 46.

[10] *R (AAA and others) v Secretary of State for the Home Department* [2023] UKSC 42.

asylum system, the past and continuing practice of refoulement… and the scale of the changes in procedure, understanding and culture which are required.'[11]

11. As we set out in our evidence to the International Agreements Committee ('IAC'), the UK Government's provision of further training and resources to Rwanda to strengthen its asylum processing system under the new Treaty, whilst welcome, are unlikely to deliver the scale of change needed to overcome the systemic issues the Supreme Court identified. This is reflected in the IAC's conclusion that the Treaty is *'unlikely to change the position in Rwanda in the short to medium term'*.[12] Given the IAC concluded that *'significant legal and practical steps have to be taken before the assurances provided in the Rwanda Treaty can be fully implemented'* and the Government has provided no timeframe for the completion of these steps,[13] it is clearly unsuitable to conclusively legislate that Rwanda is a safe country. Nevertheless, the Bill provides for this upon the Rwanda Treaty coming into effect.

12. Third, it is crucial to note that neither the Bill nor the UK-Rwanda Treaty secure any legal remedy or injunctive process in either the UK or Rwanda if an individual is removed to Rwanda, and Rwanda *in fact* tries to *refoule* them.

13. Fourth, it is well-established in Strasbourg jurisprudence that *'in view of the importance which the Court attaches to Article 3 of the Convention and the irreversible nature of the damage which may result if the risk of torture or ill-treatment materialises, the effectiveness of a remedy within the meaning of Article 13 imperatively requires'* 'close', 'independent and rigorous scrutiny' of an individual's complaint that to remove them to another state would expose them to a risk of ill-treatment, by a competent national authority, prior to the applicant's removal,[14] and access to 'a remedy with automatic suspensive effect'.[15]

14. However, under this Bill, domestic courts and tribunals are inhibited from granting interim remedies preventing or delaying removal to Rwanda under the Illegal Migration Act 2023,[16] even if the evidence before them demonstrates that, if removed, individuals would in fact face *refoulement* and/or other breaches of their human rights in Rwanda.

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[11] Ibid at §102.

[12] International Agreements Committee, 'Scrutiny of international agreements: UK– Rwanda Agreement on an Asylum Partnership' (HL Paper 43, published 17 January 2024) §45.

[13] Ibid §20.

[14] *A.M.A. v The Netherlands*, Application No. 23048/19 at §§67 – 71.

[15] *M.S.S. v Belgium and Greece*, Application No. 30696/09 at §293 and §387. See also, *Jabari v Turkey*, Application No. 40035/98; *Shamayev and Others v Georgia and Russia*, Application No. 36378/02 §448; *Gebremedhin [Gaberamadhien] v France*, Application No. 25389/05 §58; *Hirsi Jamaa and Others v Italy*, Application No. 27765/09, §198; and *De Souza Ribeiro v France*, Application No. 22689/07, §82).

[16] Clause 4(6) of the Bill.

For removal under any of the other 'Immigration Acts', from 1971 to 2022,[17] the ambit for our courts and tribunals to grant interim remedies is restricted to *'only if the court or tribunal is 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*.'[18] This would be insufficient to guard against non-imminent breaches of human rights, particularly given that in combination with the ouster in Clause 4(2) and mandatory obligation in Clause 2(1), a court may be unable to consider Rwanda's general safety, including the possibility of *refoulement*, and it cannot examine harm which would arise following the determination of an appeal or review.

15. A declaration of incompatibility under section 4 of the Human Rights Act 1998, which cannot be made on the sole basis of a breach of Article 13 ECHR,[19] is insufficient to ensure compliance with Article 13 ECHR. Section 4(6) of the Human Rights Act 1998 is clear that such a declaration 'does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given' and 'is not binding on the parties to the proceedings in which it is made'. It fails to provide the automatic suspensive effect necessary under Article 13 ECHR.

16. Clause 2, combined with the restriction of domestic interim remedies, the disapplication of key provisions of the Human Rights Act 1998,[20] and the inability of a court or tribunal to have regard to an interim measure indicated by the European Court of Human Rights, places individuals subject to removal to Rwanda at real risk of ill-treatment, contrary to the UK's international legal obligations, and with no recourse to a domestic effective remedy.[21] The JCHR has itself noted that, after removal, individuals will likely '*have no route to retrospectively challenge or undo their removal via UK courts*'.[22]

17. As detailed in our evidence to the IAC, the harm faced by transferred individuals is not limited to the risks of ill-treatment and/or *refoulement* in the current Rwandan asylum

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[17] UK Borders Act 2007, section 61(2).

[18] Clause 4(4) of the Bill.

[19] Article 13 ECHR is excluded from the definition of 'the Convention rights' in section 1(1) of the Human Rights Act 1998.

[20] Similarly, the JCHR stated in its report regarding 'The Government's Independent Review of the Human Rights Act' (HL Paper 31, 23 June 2021) that the Convention requires independent courts to discharge Article 13, and at §147 that '[*a*]*ny efforts to exclude or limit certain subject-matters or categories of people from the scope of the HRA would risk putting the UK in breach of its obligations under Article 13 ECHR, as well as being a retrograde step for compliance with human rights and the rule of law in the UK. Moreover, any effort to limit the way that individuals can access effective remedies or enforce their rights under the HRA would risk creating gaps in individuals' ability to enforce their human rights and to obtain an effective remedy, which again would risk placing the UK in breach of its duty under Article 13 ECHR to provide any person whose rights have been violated with an effective remedy at the national level*.'

[21] For further discussion, see JUSTICE and ILPA, 'International Agreements Committee: UK-Rwanda Asylum Agreement: Joint Evidence', pp. 12 – 13 at §§38 – 40.

[22] JCHR, 'Chair's Briefing Paper: Safety of Rwanda (Asylum & Immigration) Bill' (11 December 2023), p.5 at §13.

system. The Treaty also fails to address particular risks posed to children seeking protection[23], victims of trafficking,[24] and harm arising from transferred individuals' potential inability to meet their essential living and support needs, including in relation to employment opportunities, poverty, and mental healthcare.[25]

Q5: 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?

18. Clause 5(2) of the Bill provides for a Minister to decide *'whether the United Kingdom will comply with the interim measure'*. However, if a Minister were to exercise the power under Clause 5(2) and fail to comply with an interim measure indicated by the European Court of Human Rights, the UK would breach its obligation under Article 34 ECHR not to hinder the effective exercise of an individual's right of application.[26] The UK's commitment to the ECHR is a part of crucial international agreements, including the Good Friday Agreement,[27] the UK-EU Trade and Cooperation Agreement,[28] and the Windsor Framework.[29]

19. The power in Clause 5(2) of the Bill builds on the uncommenced power conferred on Ministers by section 55 of the Illegal Migration Act 2023. However, since the passage of the Illegal Migration Act 2023, and the interim measure indicated to prevent removal to Rwanda in June 2022 of a person the Home Office accepts had been the subject of flawed decision-making, on 26 June and 6 November 2023 the Plenary Court decided to disclose the identity of judges who make decisions on interim measure requests, issue formal

[23] JUSTICE and ILPA, 'International Agreements Committee: UK-Rwanda Asylum Agreement: Joint Evidence', p. 19 at §§62 – 63.
[24] Ibid, pp.19 – 21 at §§64 – 69.
[25] Ibid, pp. 16 – 19 at §§54 – 61.
[26] *Mamatkulov and Askarov v Turkey* (2005) 41 EHRR 494.
[27] The UK affirmed 'mutual respect, the civil rights and the religious liberties of rights of everyone in the community', and agreed that 'the British Government will complete incorporation into Northern Ireland law of the European Convention on Human Rights (ECHR), with direct access to the courts, and remedies for breach of the Convention. See the Belfast Agreement: An Agreement Reached at the Multi-Party Talks on Northern Ireland (April 1998, Cm 3883) 16, para 2.
[28] It threatens the withdrawal arrangements with the European Union, including in trade and law enforcement, as the UK-EU Trade and Cooperation Agreement allows the EU to suspend or terminate the agreement as a whole if there is a 'serious and substantial failure' by the UK to respect human rights and the international human rights treaties to which both are parties'. See Articles 763(1), 771, 772.
[29] Article 2 ensures no diminution of rights. See the Protocol on Ireland/Northern Ireland to the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community.

judicial decisions to parties, and maintain adjourning the examination of requests and requesting submission of information where the situation is not extremely urgent.[30] Therefore, it is unclear what valid reason the UK Government has for attempting to bar our courts and tribunals from consideration of such interim measures.

20. The circumstances in which a Minister may decide not to comply with an interim measure are unknown and unparticularised in the Bill and its ancillary material. This ambiguity is deeply unsatisfactory, given the potential for severe consequences to the rule of law and the UK's international standing in the event of such a unilateral reneging on the UK's international legal commitments.

21. Interim measures are issued rarely and only on an exceptional basis where there is an *'imminent risk of irreparable damage'*.[31] They have been proven to be a vital safeguard of individuals' absolute rights. They place a temporary stop on an action likely to produce a significant breach of human rights to allow time for the European Court of Human Rights to fully examine an individual's complaint. For example, in June 2022, the European Court of Human Rights granted interim measures in the cases of *Pinner v Russia* and *Aslin v Russia and Ukraine* (Application Nos. 31217/22 and 31233/22) concerning British nationals who are members of the Armed Forces of Ukraine, who surrendered to Russian forces, and who had been sentenced to death. A failure of the UK to comply with interim measures, may lead other contracting States to follow suit.

Q6: 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?

22. A clear modern statement of the principle of the rule of law was John Laws' in *The Constitutional Balance*: *'judges must ensure, and have the power to ensure, that State action falls within the terms of the relevant published law'*.[32] More recently, the President of the Supreme Court Lord Reed stated, in *UNISON*, that at *'the heart of the concept of the rule of law is the idea that society is governed by law'* and that people must *'in principle have unimpeded access'* to the courts.[33] Albert Venn Dicey, in his orthodox statement of the nature of Parliamentary sovereignty and legislative supremacy, similarly states, *'We mean…when we speak of the "rule of law" as a characteristic of our country, not only that with us no man is above the law, but (what is a different thing) that here*

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[30] European Court of Human Rights, Press Release: 'Changes to the procedure for interim measures (Rule 39 of the Rules of Court)' (13 November 2023).

[31] See European Court of Human Rights, 'Practice direction: Requests of interim measures (Rule 39 of the Rules of Court)'.

[32] John Laws, *The Constitutional Balance* (Oxford: Hart Publishing, 2021) 16.

[33] *R (Unison) v Lord Chancellor* [2017] UKSC 51 at §68.

every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals'.[34]

23. The Bill is an attack on independent judicial scrutiny and domestic courts' constitutional role in the separation of powers. It attempts to legislate away a factual judgment of a court of competent jurisdiction, the Supreme Court, without permitting any domestic court or tribunal to reconsider the issue in light of the new Treaty arrangements and any new evidence. We would observe that this would set a dangerous precedent for future legislation. Clause 2(1) rides roughshod over the competencies and jurisdiction of the Supreme Court and the lower courts, which made judgments of fact contrary to the Bill's provisions and are best-placed to ultimately assess whether there have been any material changes since the Supreme Court's finding of deficiencies within the Rwandan asylum and legal system.

24. By seeking to restrict and prohibit interim remedies granted by domestic courts and tribunals, to restrain unlawful conduct of public authorities, this Bill undermines the fundamental aspect of the rule of law that such judge-granted remedies are available to all and against all.

Q7: Does the Bill give rise to any other significant human rights concerns?

25. In our joint evidence to the IAC, we noted that the Bill and the UK-Rwanda Treaty give particular cause for concern in relation to the UK's duties owed to victims of modern slavery and trafficking.[35] We reiterate that Clause 2 of the Bill requires that Rwanda be treated as safe, 'notwithstanding' both the ECHR and European Convention against Trafficking ('ECAT'). Article 4 ECHR and ECAT both prohibit slavery and trafficking and place positive obligations on the UK to protect victims of trafficking and to prevent their exploitation. Rwanda is not a party to either of these Conventions and there is evidence that Rwanda does not meet the minimum standards for the elimination of trafficking.[36] The UK risks breaching its multilateral international legal obligations through these bilateral arrangements.

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[34] A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (8th edition, 1915) Chapter IV, p. 114.

[35] JUSTICE and ILPA, 'International Agreements Committee: UK-Rwanda Asylum Agreement: Joint Evidence' §§64 – 69. Article 13(2) of the Treaty specifically envisages Rwanda receiving individuals for whom the UK has made a positive reasonable grounds decision, before the UK has made a conclusive grounds decision.

[36] US Department of State, '2023 Trafficking in Persons Report: Rwanda'.

26. In light of the above, JUSTICE and ILPA conclude that were the Bill to pass in its current form, it would present grave risks to individual human rights protections, the UK's constitutional balance, and its domestic and international obligations.

(31 January 2024)