



**THE SAFETY OF RWANDA
(ASYLUM AND IMMIGRATION) BILL
CONSTITUTIONAL AND EFFECTIVE?**

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About the authors

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INTRODUCTION

In a judgment given on 15 November 2023, the Supreme Court ruled that the UK Government's Rwanda policy was unlawful. Their basis for doing so was that Rwandan asylum processes were, at the present time, inadequate and that individuals sent to Rwanda faced a risk of onward refoulement (i.e. being sent to territories where they might be persecuted, as explained in further detail below).

The UK Government has recently published the Safety of Rwanda (Asylum and Immigration) Bill (the "Rwanda Bill"). The Rwanda Bill has come under criticism for both going too far, breaching supposed constitutional norms and, in certain quarters, for not going far enough to exclude challenges by those subject to removal decisions.

We disagree that the Bill, in its current form, could be regarded as 'unconstitutional': it is a fundamental principle of the UK constitution that Parliament is sovereign and that primary legislation passed by Parliament should be given effect by the courts regardless of what it requires. Nor is there anything constitutionally improper about 'deeming' provisions, where Parliament legislates that a

certain state of affairs is the case (regardless of what the courts might otherwise conclude).¹ The extent to which the Rwanda Bill represents an ouster of the courts' jurisdiction is discussed further below, as is the question of whether it is compatible with the UK's obligations under international law.

This paper considers whether the Rwanda Bill as drafted represents the approach most likely to achieve its objectives in practice, and in particular the legislative approach most likely to ensure the effective functioning of the Migration and Economic Development Partnership between Rwanda and the UK (the "MEDP").

¹ These are well-established in, for example, tax law: see e.g. *DCC Holdings (UK) Ltd v Revenue and Customs Commissioners* [2010] UKSC 58; *Fowler v HMRC* [2020] UKSC 22. While the courts will be averse to a deeming provision that produces unjust, anomalous or absurd results, they will however uphold such an outcome where it is "clearly within the purposes of the fiction" (see *DCC Holdings* at [37]) or where "compelled to do so by clear language" (*Fowler* at [27(4)]).

PARLIAMENTARY SOVEREIGNTY, INTERNATIONAL LAW AND THE RWANDA BILL

Since publication of the Rwanda Bill, concerns have been raised about whether that Bill goes far enough towards ensuring effective operation of the scheme. In particular, clause 4 of the Bill has been criticised for allowing challenges to be brought to a removal decision on the basis of compelling evidence relating specifically to a person's particular individual circumstances and clause 5 for giving ministers discretion to ignore Rule 39 orders issued by the European Court of Human Rights rather than requiring them to do so. This paper addresses the question of whether, in the authors' opinion, the Bill could have further restricted rights of challenge without undermining the objectives and purpose of the MEDP and the Rwanda Bill itself.

We note, in this regard, that the Government of Rwanda appears to have signalled its intent to discontinue its partnership with the UK under the

MEDP were the UK to act 'unlawfully'. We understand the Rwandan Foreign Minister made the following statement after publication of details of the Rwanda Bill:²

"It has always been important to both Rwanda and the UK that our rule of law partnership meets the highest standards of international law, and it places obligations on both the UK and Rwanda to act lawfully," he said.

"Without lawful behaviour by the UK, Rwanda would not be able to continue with the Migration and Economic Development Partnership."

We are, of course, not in a position to assess the Rwandan Government's actual intention, and in

² www.politicshome.com/news/article/government-publishes-new-rwanda-legislation-declaring-country-safe.

particular what would cause the Rwandan Government to repudiate the MEDP in practice. Nevertheless, we note that there may be good reasons why the Rwandan Government would adopt the position set out above, in particular that it might undermine Rwanda's ability to enter into comparable agreements with other nations, particularly those who are members of the European Convention on Human Rights ("ECHR"). Furthermore, Rwanda has an apparent desire to be perceived as an international law-compliant member of the international community.³ Accordingly, for the purposes of this paper we assume that the Rwandan Government is serious in its stated intention not to continue with the MEDP were the UK to act 'unlawfully'.

There is, of course, some ambiguity as to what would constitute 'unlawful' behaviour for these purposes. We assume here that the Rwandan Foreign Minister's comment did not concern acts that would be unlawful as a matter of domestic UK law. Under the UK's constitutional system, Parliament is supreme, and primary legislation, once given royal assent, cannot be unlawful in UK domestic law (regardless of whether the effect is to legislate in contravention of the UK's obligations under international law, however owed).

There may further be a question about whether the Rwandan Government would consider the UK was acting 'unlawfully' in breaching any obligations under international law to which the Rwandan Government is not itself subject. In this regard, we note that Rwanda is not a signatory to the ECHR. Nevertheless, for the reasons set out further below we do not in practice consider this would make any real difference.

As a result of the matters above, it appears to us that insofar as Parliament were to legislate in a manner patently contrary to the UK's (or Rwanda's) international law obligations, there is a considerable risk that the effect of this would be that Rwanda discontinues the MEDP. As will be obvious, the scheme of removing asylum seekers to Rwanda would be entirely defeated without an

agreement by the Rwandan Government to accept persons removed to Rwanda.

We do not, for the avoidance of doubt, say that Parliament cannot legislate in manner contrary to the UK's international law obligations. As stated by Diplock LJ (as he then was) in *Salomon v. Commissioners of Customs and Excise* [1967] 2 Q.B. 116 at p. 143:

"If the terms of the legislation are clear and unambiguous, they must be given effect to... for the sovereign power of the Queen in Parliament extends to breaking treaties ... and any remedy for such a breach of an international obligation lies in a forum other than Her Majesty's own court."

Nor do we make any comment on whether it would be, in the proper circumstances, desirable to do so, save that we consider that the ability of Parliament to legislate including contrary to international law is an important constitutional constraint in extremis on the Executive's prerogative powers to conduct the UK's foreign affairs. As the late Lord Judge put it:

"[A]lthough Parliament is expected to respect a Treaty obligation, it is not bound to do so... For us this principle, embodied in a constitution which is partly written and partly unwritten, underpins the rule of law and represents the rule of law in operation."⁴

This is not, therefore, a matter of Parliamentary sovereignty, but practicality: the UK cannot place Rwanda under an obligation to accept asylum seekers by Parliamentary legislation (and the MEDP Treaty does not do so – while it imposes international law obligations on Rwanda and, per Article 3(6), upon ratification becomes domestic law in Rwanda, all requests to transfer a person to Rwanda require Rwanda's approval (Article 4(2)), and each party may terminate the treaty by giving three months' notice to the other (Article 23(5)).

We therefore consider that in order to be effective in furthering the aims and objectives of the MEDP and removing asylum seekers from the UK to Rwanda, the Rwanda Bill cannot patently breach

³ www.aa.com.tr/en/africa/rwanda-disagrees-with-uk-court-ruling-on-migrant-deportation-plan/3055027.

⁴ www.counselmagazine.co.uk/articles/view-london

international law. By that we mean that there must be at least a properly arguable case that the

Rwanda Bill is compliant with the UK's international obligations.

THE RELEVANT INTERNATIONAL LAW OBLIGATIONS

The relevant obligations under international law are those set out in the Supreme Court's judgment in *R (AAA and others) v Secretary of State for the Home Department* [2023] UKSC 42 ("AAA") at [19-26]. These consist in particular of obligations arising under:

- (a) Article 33(1) of the United Nations 1951 Convention Relating to the Status of Refugees, read with its 1967 Protocol (the "Refugee Convention", to which both the UK and Rwanda are signatories);
- (b) Article 3(1) of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984 ("UNCAT", to which both the UK and Rwanda are signatories);
- (c) Articles 6 and 7 of the United Nations International Covenant on Civil and Political Rights of 1966 ("ICCPR", to which both the UK and Rwanda are signatories);
- (d) The ECHR, in particular Articles 2 and 3 (to which the UK, but not Rwanda, is a signatory); and
- (e) Possibly customary international law ("CIL"), in light of the 2001 Declaration of States Parties to

the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees (UN Doc HCR/MMSF/2001/09): both the UK and Rwanda were represented at the 2001 ministerial meeting that produced that declaration,⁵ as noted in AAA at [25].⁶

However arising, the core of the relevant obligations is the principle of non-refoulement, which while it has several slightly different meanings in different contexts (AAA at [19]) obliges a state not to return an asylum seeker to a territory in which they would be in probable danger of persecution based on "race, religion, nationality, membership of a particular social group or political opinion" or where they would be in danger of being subjected to death, torture, or other cruel, inhuman or degrading treatment or punishment.

⁵ www.unhcr.org/sites/default/files/legacy-pdf/3e7747684.pdf.

⁶ We do note that insofar as the principle of non-refoulement is a principle of CIL (unless it is a peremptory norm) the persistent objector doctrine in international law would have allowed the UK or Rwanda not to be bound under CIL had either persistently and clearly objected the relevant principle since its emergence, but it appears that neither state has.

THE SUPREME COURT'S JUDGMENT ON THE RWANDA SCHEME AND PARLIAMENT'S RESPONSE

The Supreme Court in AAA was, for the most part, concerned with the risk that persons removed to Rwanda might be subject to removal from Rwanda contrary to the refoulement principle. That concern has been met by the UK Government:

- (a) In the introduction of commitments, binding on Rwanda in both international and Rwandan domestic law, not to remove persons sent to Rwanda save back to the UK with the consent of the UK, regardless of the outcome of any application by them for asylum: Article 10(2) and (3) of the MEDP Treaty; and

- (b) In the provisions in clause 2 (in particular clause 2(4)) and clause 4(2) of the Rwanda Bill, which prevent a court considering a claim (i) that Rwanda is not generally a safe country and in particular (ii) in any circumstances that Rwanda will breach the non-refoulement principle by sending that individual to another state.

These measures, taken together, are a robust response to the Supreme Court's judgment in AAA. The drafting of the provisions is clear and unambiguous. They leave very limited, if any, room for interpretation by the UK courts contrary to the

intended purpose and effect of the Rwanda Bill and should be effective in preventing challenges on the basis that Rwanda is unsafe as a destination for asylum seekers generally.

Insofar as criticisms of these provisions as legislating contrary to reality are concerned, there are two points to make. The first, as above, is that 'deeming' provisions which conclusively state that a certain state of affairs or factual outcome is the case are well-established as a tool in Parliament's arsenal. The response that the reality might not in fact reflect the deeming provision is, in a real sense, neither here nor there. While the courts will interpret such provisions carefully, there is nothing improper about them per se. The second is to note that contrary to some suggestion, Parliament is not simply legislating that the facts are different to the Supreme Court's conclusions. Rather, the facts have changed (through the introduction of a binding treaty between the UK and Rwanda, which includes in particular an obligation on the Rwandan Government to not to remove any person sent to Rwanda from Rwanda save back to the UK, and a number of other provisions for monitoring of Rwanda's asylum processes and proper appeals of asylum decisions).

In these circumstances, the proper analysis is that Parliament is looking afresh at a different set of facts, and insofar as the Rwanda Bill deems that set of facts to be conclusive, that reflects Parliament's assessment of the revised position, not simply a disagreement with the conclusions of the Supreme Court. While it is perhaps unusual for Parliament to reserve the assessment of facts to itself, rather than leaving this to the courts, there is nothing improper about it doing so.

Analysed simply in terms of removing individuals to Rwanda as soon as possible, clause 4 of the Bill represents a potential weakness. It seems likely that challenges to removal decisions will be brought on the basis of individual circumstances in most or all cases. Nevertheless, it seems to us that in light of the need, as above, to remain at least arguably compliant with the UK and Rwanda's international law obligations for the continued operation of the MEDP, it is impossible to avoid some provision along the lines of clause 4 without

running the risk of collapsing the scheme.

That is so for the following reasons. First, given the drafting of the provisions in the Rwanda Bill, a challenge cannot be brought on the grounds that a person may face removal from Rwanda. It will, therefore, be in all likelihood brought either (i) on the grounds that a person would face persecution in Rwanda itself, or (ii) on the basis that the very act of removal to Rwanda would constitute treatment breaching his rights (for example, because the person in question has health conditions that would prevent him flying to Rwanda).⁷

It is important to note that (i) in particular would constitute breach of all the international law obligations noted above, as it would represent refoulement of that person to a territory where he would be at risk of persecution (i.e. Rwanda itself). It is not implausible – and the courts, domestic and international, are unlikely to accept that it would be – that individuals might face persecution in Rwanda due to matters specific to them (for example, as noted in *AAA* at [76]). Insofar as the Rwanda Bill were straightforwardly exclude the right to challenge a removal decision on the basis of risk of persecution in Rwanda or other circumstances specific to the individual, it would represent a breach of the international law obligations set out above. As again above, it appears that in those circumstances there would be a real risk that Rwanda would discontinue the MEDP.

This is not, therefore, an issue arising solely under the ECHR. In respect of the ECHR, excluding the right to bring a challenge on the basis of the particular circumstances of the individual would

⁷ So far as (ii) here is concerned, this should in the vast majority of cases be capable of swift and decisive determination by the courts, being a matter of straightforward medical evidence. We expect, in light of the UK Government's stated intention to remove in the first instance primarily unaccompanied young men entering the country, in the majority of cases pleaded on these grounds alone removal should be possible without considerable delay. Similarly, we consider that challenges on the basis that the individual would face persecution in Rwanda ought to be capable of swift resolution, and in great majority of cases are unlikely to succeed.

likely be a breach of Article 13 (not, of course, included among the rights in Schedule 1 to the Human Rights Act 1998 (“HRA”)), which requires an effective remedy before a “national authority”. Importantly, the national authority must be sufficiently independent: it cannot, for example, be the Secretary of State responsible for the decision alleged to infringe a person’s rights, as that would involve the Secretary of State being judge in their own case: see *Silver and others v UK*, 1983, at [116]. What is apparent from the above is that even were the UK to disapply the ECHR in respect of these provisions, it would not solve the broader issue of the other international law obligations, compliance with which appears to be a condition of Rwanda’s cooperation with the scheme.

Furthermore, we do not understand how in practice Parliament could prevent a challenge being brought to the European Court of Human Rights and the risk of a judgment against the UK (see e.g. *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 at [55] on the UK’s dualist approach to international law). The Rwanda Bill does, for the most part, disapply relevant provisions of the HRA: while it leaves in place section 4 HRA, we consider that (i) a declaration of incompatibility would, per s. 4(6) HRA, have no actual impact on the “validity, continuing operation or enforcement” of any provisions declared incompatible and (ii) given the limited practical significance, represents a valuable safety valve both in respect of the domestic courts’ views on compliance of the Rwanda Bill with HRA and in terms of providing an effective remedy for Article 13 ECHR purposes.

As such, we do not understand how further ‘disapplication’ of the ECHR (without ECHR withdrawal) would in practice make any difference, nor indeed how ECHR withdrawal without accompanying repudiation of (at least) all the international law obligations set out above would either.

Removal of the right to bring challenges on an individual basis might allow swifter removals of persons subject to a removal order. It is in our view overwhelmingly likely, however, that any version of this Bill passed by Parliament would face serious,

sustained and aggressive challenge in the UK courts and European Court of Human Rights. As a result of this that removal of the right to challenge decisions on the basis of individual circumstances would raise a number of serious risks.

First, as above, this would in our view constitute a clear breach of international law. In those circumstances, we consider that there is a real risk that Rwanda would discontinue the MEDP. That would render the entirety of the Rwanda Bill, any successor legislation, and the entire scheme pointless, and for obvious reasons is entirely contrary to the Rwanda Bill’s objectives.

Second, while the possibility that the UK courts may react negatively to the Rwanda Bill even as drafted cannot be discounted, exclusion of a right to challenges on the basis of individual circumstances would substantially increase that risk. Removing a right of individual challenge would amount to an ouster of judicial review: the courts would, in those circumstances, apply the principles developed in their case law concerning read-down of ouster clauses. There have, of course, been recent judgments on this issue by the High Court in *R (Oceana) v Upper Tribunal* [2023] EWHC 791 (Admin) and the Court of Appeal in *R (LA) v Upper Tribunal* [2023] EWCA Civ 1337 where the courts have upheld ouster clauses, but those cases related to judicial bodies. In relation to executive decisions, the courts have not been asked to confront more modern examples of ouster clauses directly.

Such a reaction by the courts could take two forms. The more likely, and in our view less constitutionally damaging, would be for the UK courts to find a way to creatively interpret any provisions such that, in practice, their intended effect was defeated. There is a long history of such interpretations by the courts, including pre-dating the HRA and UK membership of the ECA / EU.⁸ While the exclusion of s. 3 HRA may, separately, be of some assistance in preventing departure from the clear language of the Rwanda Bill, in circumstances where the courts are sufficiently

⁸ As e.g. in *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147.

hostile to the approach adopted by Parliament, that may in practice be insufficient.

This risk can be mitigated by sufficiently clear drafting: in that regard, our view would be that it is more likely than not that the courts will find the provisions of the Rwanda Bill do what they are intended to. It is possible that drafting excluding a right to bring individual challenges could be made sufficiently clear for the courts to hold that a contrary interpretation is not possible. This approach does, however, raise a risk that the courts would adopt the *obiter* suggestions in *R (Jackson) v Attorney General* [2005] UKHL 56 at [102] and *Privacy International* [2019] UKSC 22 at [144] that there may be limits on Parliament's constitutional authority to legislate without constraints.

In practice, the two approaches will substantially blend into one: it is unlikely that the courts will declare outright that Parliament has no theoretical authority to pass a certain piece of legislation, but perfectly plausible that they will adopt an interpretation of that legislation entirely at odds with any conventional reading of the wording.

As noted above, there have been recent developments on the doctrine regarding read-down of ouster clauses in recent judgments. In particular Dingemans LJ in *LA* noted at [30] that the comments in *Privacy International* were endorsed by only three out of seven justices, implicitly endorsing the dissenting judgment of Lord Sumption (which was, it might be noted, agreed by Lord Reed, the current President of the Supreme Court). He went on at [36] to conclude that *Oceana* was correctly decided on the basis that:

“It is the duty of the Courts to give effect to the clear words used by Parliament, because no one, including a Court, is above the law.”

Likewise, we note Lord Wilson's description of Parliamentary sovereignty in his (dissenting) judgment in *R (Evans) v. Attorney General* [2015] UKSC 21 as “among the most precious [constitutional principles], emblematic of our democracy”.

The issue of the proper approach to ouster clauses has not, however, been resolved by the Supreme Court. A total ouster of domestic judicial right, in circumstances where the (claimed) rights at issue would, by reason of the rights protected by the principle of non-refoulement, engage categories of rights protected by Articles 2 and 3 of the ECHR, as given effect in UK law by the HRA (i.e. threats to life or of torture or inhuman and degrading treatment), is not favourable territory on which to resolve this matter. In the absence of the provisions in clause 4, our view is that in response to a challenge to the Rwanda Bill, there would be considerable risk that the courts would endorse the hard-line approach in *Privacy International* suggested *obiter* by Lord Carnwath (even though only two other judges endorsed that approach and one, Lord Lloyd-Jones, dissociated himself from the majority on that issue).

Moreover, if the courts on one occasion find that they have the right to constrain Parliamentary sovereignty in this manner – particularly if not resolved satisfactorily subsequently – this will encourage future challenges to Parliamentary legislation, and in the worst case embolden the courts to take a more activist approach in the future. We do not, for the avoidance of doubt, say that the courts would be right to do so (indeed, were the courts in fact to declare Parliament had no authority to pass certain legislation, this would in our view be contrary to basic and fundamental principles of the UK's constitution system). We nevertheless take the view that where possible, it is prudent for Parliament to avoid legislating in a manner that might trigger such a response from the courts at all without very good reason.

On balance, it is our view that the Rwanda Bill as drafted represents the best approach we can see at present to resolving the tension between complying with international law, not entirely ousting judicial review and ensuring effective operation of the MEDP.

Clause 5 of the Bill allows the UK Government to ignore interim measures of the European Court of Human Rights, and by clause 4(4), the ability of domestic courts to grant interim remedies

preventing removal are heavily restricted: they may do so “only if ... 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”. This ought, in practice, be a high hurdle, which will not be met in the great majority of cases (particularly where the Rwandan Government is able to offer suitable protection). As above, removing this right to interim relief entirely would in our view represent a clear breach of Article 13 ECHR and the other provisions of international law set out there, as well as engaging the courts’ doctrine in respect of ouster clauses particularly where a more nuanced approach may be, in practice, more effective.

We understand that there may be concerns that clause 5 provides UK Government ministers with a discretion to ignore an order for interim measures made under Rule 39 of the Rules of Court of the European Court of Human Rights. We make two comments on this. The first is that, for the reasons set out above, it is unclear whether the Rwandan Government would tolerate the UK ignoring such an order. In those circumstances, we can see the sense in allowing UK ministers discretion to respond differently on a case-by-case basis depending on the circumstances at issue, and (we would anticipate) following discussion with Rwandan counterparts. Furthermore, this is

ultimately a political question and the importance of clause 5 is to prevent interference by UK courts (notwithstanding that there would be no basis on which to do so in any case). As recently reported, France appears to have ignored an order from the European Court of Human Rights not to deport an individual to Uzbekistan, an important development in respect of wider attitudes to the ECHR among signatory states.⁹

Second, our view is that clause 5 in essence simply states the constitutional position, that the ECHR (including, therefore, Rule 39 orders) have no binding effect as a matter of domestic UK law, and it is for the Executive (given prerogative powers to conduct foreign affairs) to decide how to respond. While there is nothing preventing Parliament constraining the prerogative powers of the Executive to act in this field, it would nevertheless be an unusual step, particularly where, as here, ministers are better placed to make a case-by-case assessment than Parliament would be. Accordingly, we at present consider that imposing a duty to ignore Rule 39 orders would be inadvisable. We consider that insofar as there are concerns about whether ministers will comply with Rule 39 orders, this is best resolved through political pressure, rather than binding legislation.

⁹ www.lemonde.fr/societe/article/2023/12/01/la-france-procede-a-l-expulsion-en-passant-outre-une-decision-de-la-cedh-pour-la-premiere-fois_6203343_3224.html.

CONCLUSION

While the Rwanda Bill does allow individual challenges and there is the possibility of delay by the courts, our view is that the objectives of the MEDP are met better by the Rwanda Bill as drafted than the proposed alternative approaches. In particular, so far as the MEDP’s objectives are concerned, the approach in the Rwanda Bill is far preferable to one that runs a serious risk of collapsing the scheme in its entirety.



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