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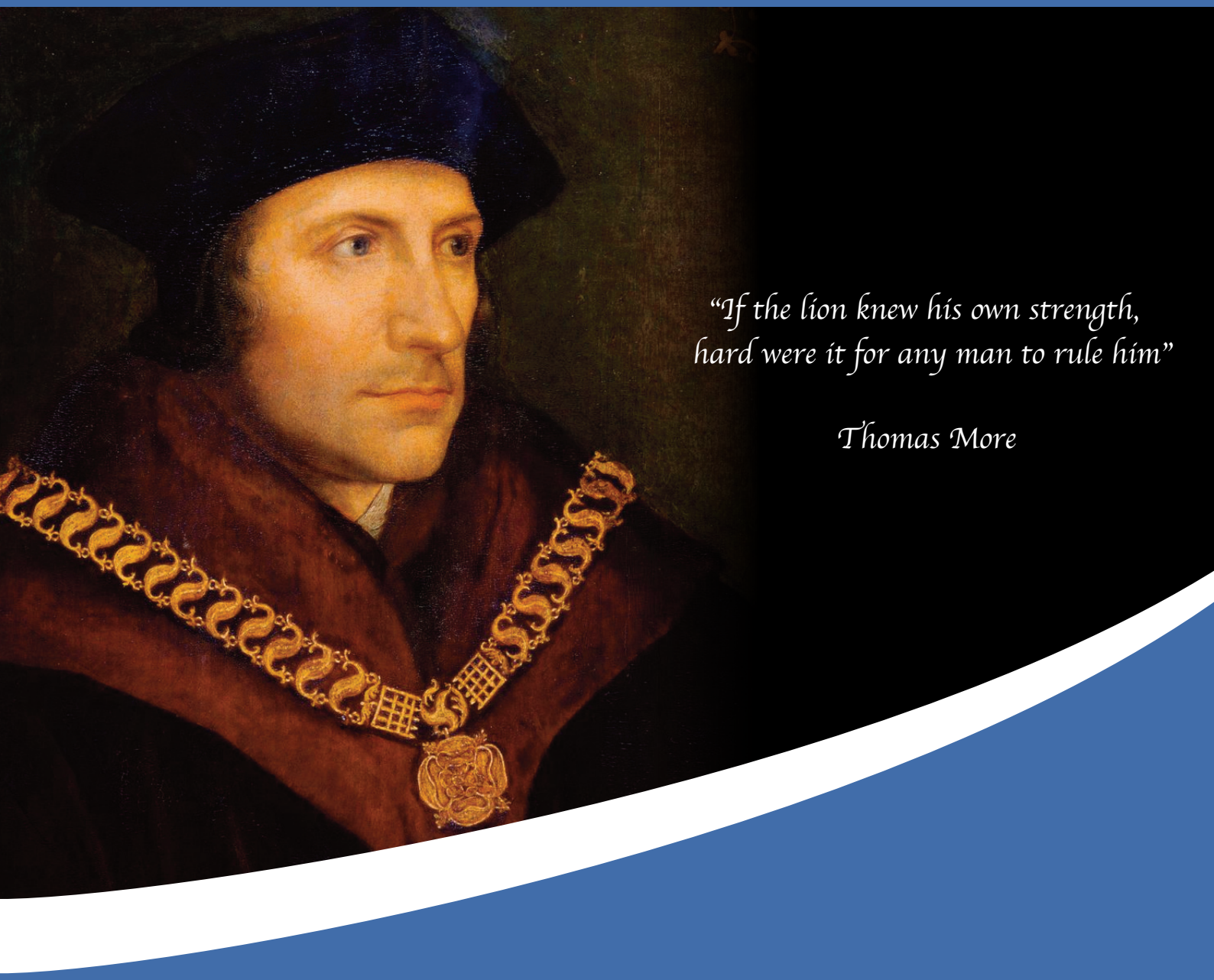

THE SAFETY OF RWANDA (ASYLUM AND IMMIGRATION) BILL

A COMMENTARY

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About the author

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INTRODUCTION

In the fortnight since the publication of the Safety of Rwanda (Asylum and Immigration) Bill (the 'Rwanda Bill') and the writing of this article much ink has been spilt, many voices have been made hoarse in argument and many tweets furiously typed attempting to explain, persuade and coax people toward a firm view on its prospects for success.

This piece does not take a position on the principle of sending people to Rwanda. In that sense, it is apolitical. Instead, as a public law barrister, I want to highlight issues which may need to be addressed, whether in Parliament or by the Court. I identify some of the key challenges it raises, in particular the most contentious aspects of clauses 1–5, and the areas of legal difficulty that the legislation may face in Parliament and then in the courts.

Suffice to say the Rwanda Bill seeks to address the judgment of the Supreme Court in *R (AAA) and others v Secretary of State for the Home Department* [2023] UKSC 42 ('R (AAA)'), under which Rwanda was not found to be a 'safe' country. In response, the Government has introduced the Bill which has now passed its second Reading in the Commons. Thereby it hopes to address those aspects of the judgment that frustrate Government policy.

CLAUSE 1: INTRODUCTION

Clause 1 has been criticised by some who say it uses excessive and declaratory phrasing with no legal effect[1].

But I would argue that the declaration in Clause 1(4)(a) *'the Parliament of the United Kingdom is sovereign' and (b) 'the validity of an Act is unaffected by international law'* is of key importance to the framing of the Rwanda Bill. Clause 3 disapplies some sections of the Human Rights Act (the 'HRA'), but the UK will remain bound vis a vis the Convention countries by the whole of the ECHR. Clause 3 removes from *domestic* law certain Treaty obligations. While the UK remains bound by the entire Convention, henceforth, in construing this Bill once enacted, the courts will have to read the HRA as if it did not contain the provisions disapplied by Clause 3. This is permissible under English constitutional theory – the 'dualist' principle. But it is an uncomfortable position to be in.

This declaration in Clause 1(4)(a) sits uncomfortably for another reason. The Bill makes clear that Rwanda's commitment to honour international law is key in classing it as a safe country (clause 1(3)). Yet, clause 1(4)(b) says that for its part the UK Parliament may disregard its international obligations! As Professor Mark Elliot sets out:

> "the Bill…is premised on a policy that presupposes that Rwanda will honour its obligations in international law while demonstrating that the UK is prepared to breach its own obligations".

CLAUSE 2(1): THE DEEMING PROVISION

This clause states that *"every decision-maker must conclusively treat the Republic of Rwanda as a safe country"*. Some have said this has a rather Humpty Dumptyesque[2] ring to it.

The Supreme Court in R(AAA) found that Rwanda was not a *'safe'* country. There is a presumption against absurdity in the interpretation of legislation[3]. One is reminded of Sir Thomas More and Richard Riche in the Tower of London:

> "I said to him, suppose Parliament were to pass an act saying that I, Richard Riche, were to be King. Would you not take me for king…he said yes majestic Richard, I so take you for Parliament can do it…
>
> ...More said, well you have put a case, I shall put you a higher case. Suppose Parliament were to pass an act saying God should not be

1 See for example Ronan Cormacain: What's wrong with the Safety of Rwanda Bill? – UK Constitutional Law Association

2 *'When I use a word,' Humpty Dumpty said in rather a scornful tone, 'it means just what I choose it to mean—neither more nor less.'*

3 *Craies on Legislation* 19.1.12

God? I said, it would have no effect, for Parliament has no power to do it. Then he said, aye, well young man at least you recognise an absurdity."[4]

It would not be correct to say the presence of a clause in a Bill declaring the effect that some action or thing is to be treated as if it were another thing is wholly contrary to principle. Such clauses, known as deeming clauses, do appear in legislation particularly in the context of tax[5]. However, whilst a deeming clause *can* technically be used, this does not necessarily mean that it *should* be. As explained in *Craies*, it can be an inefficient drafting technique which brings with it a raft of difficulties:

"There are of course limits on the efficacy of the deeming which Parliament may chose to indulge in: as a draftsman once put it in connect with a privatisation exercise 'a United Kingdom statute can, at least as a proposition of United Kingdom law, deem there to be an apple in Trafalgar Square: but it is unlikely that there will be much of a market for the deemed apples'"[6]

In the recent case of *Commissioners for His Majesty's Revenue and Customs v Vermilion Holdings Ltd*[7], the Supreme Court reiterated the five-part approach the Court is to take when assessing deeming clauses. The most important aspects in this context are these:

(2) For that purpose the court should ascertain, if it can, the purposes for which and the persons between whom the statutory fiction is to be resorted to, and then apply the deeming provision that far, but not where it would produce effects clearly outside those purposes.

(3) But those purposes may be difficult to ascertain, and Parliament may not find it easy to prescribe with precision the intended limits of the artificial assumption which the deeming provision requires to be made.

(4) A deeming provision should not be applied so far as to produce unjust, absurd or anomalous results, unless the court is compelled to do so by clear language.

Several points are of note here:

1. It is of interest that the vast majority of the case law on this subject relates to tax law, in many senses a more abstract environment than one involving the issue whether or not somewhere is physically safe. Further, deeming clauses in fields other than tax have been little tested. In any case:
2. Even to take the test in *Vermilion Holdings Ltd* at its highest, it is not difficult to imagine a circumstance in which this clause could create arguably 'absurd' results. To take a hypothetical case, say a major, systematic human rights abuse or environmental disaster were to happen in Rwanda. If Rwanda is deemed 'safe' under the legislation, would it not be absurd to say Rwanda would still be considered safe, particularly given that Clause 4 only allows 'compelling evidence relating specifically to the person's particular individual circumstances'?
3. Even if the government *can* legislate in such a manner and successfully steer such a clause through the courts, there remains a general policy point as to appearance. To create a legislative fiction in this way when the Supreme Court has earlier found there is extensive fact-based evidence to the contrary may have implications for the rule of law[8],[9].

In my view, the Government risks a prolonged battle through the courts on the question of absurdity at the very least. That would delay effective implementation of the legislation. This might be mitigated, given the constitutional

4 Hilary Mantel (2009) *Wolf Hall*, London: Harper Collins p.632

5 See another paper published by the Society of Conservative on this subject at The Safety of Rwanda Bill on p.1

6 *Craies on Legislation* 8.2.21

7 [2023] UKSC 37

8 For further interesting analysis on this point please see again Ronan Cormacain: What's wrong with the Safety of Rwanda Bill? – UK Constitutional Law Association

9 One is again reminded of Wolf Hall *"When you are writing laws you are testing words to find their utmost power. Like spells, they have to make things happen in the real world, and like spells, they only work if people believe in them."*

significance of this legislation, if use were made of the 'leapfrog procedure' (as per the Administration of Justice Act 1969), as used in the two *Miller* cases[10] so that appeals on this issue skip the Court of Appeal and go straight to the Supreme Court. However, legislators should ponder the delays this would nevertheless cause, as well as the risk the issue might be lost altogether.

CLAUSE 2(3) AND (4): OUSTER CLAUSES

"It is a principle not by any means to be whittled down that the subject's recourse to Her Majesty's courts for the determination of his rights is not to be excluded except by clear words"[11]

An ouster clause is one which seeks to remove an area of decision-making from review by the courts. Such ousters are inserted by clauses 2(3) and 2(4). These exclude courts and tribunals from considering any review of a decision to remove a person to Rwanda on the ground it is not a 'safe country'.

Ouster clauses will be well familiar to readers in the context of the seminal *Anisminic and Burma Oil* decisions[12]. Their use is always scrutinised strictly by the courts. As the Independent Review of Administrative Law (IRAL) panel concluded in its 2021 report:

> "Statutory (or regulatory) abrogation of judicial review can only be excluded by the most clear and explicit words in statute and will not be implied" (IRAL report 1.43)
>
> and
>
> "there should be highly cogent reasons for taking such an exceptional course" as to exclude a public function from the scope of judicial review (IRAL report 2.89)[13].

More recently, the (somewhat controversial) obiter observations of Lord Carnwath in *R (on the application of Privacy International) v Investigatory Powers Tribunal and others*[14] suggested that:

> "binding effect cannot be given to a clause which purports wholly to exclude the supervisory jurisdiction of the High Court to review a decision of an inferior court or tribunal, whether for excess or abuse of jurisdiction, or error of law".

Of course, ouster clauses have been used and given effect by the courts, in particular those created under section 2 of the Judicial Review and Courts Act 2022 regarding so-called *Cart* cases[15]. That provision was recently given effect by the High Court in *R (on the application of Oceana) v Upper Tribunal (Immigration and Asylum Chamber)*[16]. However, this does not give a carte blanche to this use of ouster clause: the *Oceana* decision related to a narrow and partial exclusion of judicial review in a context where the claimant had had access to an expert tribunal. It was not in respect of an executive decision. Here the position is far less clear.

A very practical issue with the Bill is that the inclusion of ouster clauses, given this somewhat uncertain legal framework, creates an easy ground for legal challenges. The comments of Lord Carnwath are very much *obiter*, but it is a subject much debated and in need of clarification by the courts. This clause offers another opportunity for those affected to litigate through the courts. It risks creating tensions between the judiciary and parliament as it goes.

Indeed, there are good rule of law reasons to use ouster clauses very sparingly. They can sit uncomfortably with our constitutional checks and balances, they put courts and parliament at odds with one another. As Nick Wrightson puts it :

> "Our constitution relies on parliamentarians exercising good judgment and extracting an appropriate political price from governments

10 *R (on the application of Miller) v Secretary of State for Exiting the European Union [2017] UKSC 5 and R (on the application of Miller) v The Prime Minister [2019] UKSC 41.*

11 *Pyx Granite v Ministry of Housing and Local Government* [1960] A.C. 260 at 286

12 *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147; *Burma Oil Company v Lord Advocate* [1965] AC 75.

13 The Independent Review of Administrative Law (publishing.service.gov.uk)

14 [2019] UKSC 22 [144]

15 See 'Ouster clauses: left out in the cold?' and 'Lunges, parries & the ouster clause'

16 [2023] EWHC 791 (Admin), [2023] All ER (D) 56 (Apr)

> that enact ouster clauses. If such clauses become more common, tensions between Parliament and the courts will increase as mutual respect between our institutions declines. The rule of law may someday be sufficiently imperilled — either by a single sweeping ouster clause or by the cumulative effect of the routinisation of lesser ouster clauses — to justify a constitutional lunge"[17].

The lion (Parliament) does have the strength but is this a risk that is truly worth it?

CLAUSE 3: DISAPPLICATION OF THE HUMAN RIGHTS ACT 1998

Three distinct aspects of the HRA are disapplied under Clause 3. These are:

Section 2, which states that courts and tribunals must take into account convention rights and decisions of the ECtHR;

Section 3, which states that 'so far as it is possible to do so' legislation should be read and given effect in a way which is compatible with the Convention rights;

Sections 6 to 9, which cover public bodies, how they must act in accordance with Convention rights and the means by which this may be enforced.

It is interesting however that section 4 of the HRA (which allows a court to issue a declaration of incompatibility when legislation is not found to be compliant with the HRA) is not disapplied in this instance. This is understandable: section 4 achieves its aim politically as opposed to a legally binding disapplication - by declaring incompatibility, the court encourages but does not compel the legislature to take action to bring the legislation into compliance. It does not bind the parties to the proceedings in which it is made nor invalidate legislation.

Furthermore, given that the Government has already conceded that this legislation is not compatible with the HRA in its so-called section 19(1)(b) statement, the effect that such a declaration could have on a government already determined to disregard it, seems likely minimal.

The practical consequence of this is that the disapplication of the sections in Clause 3 coupled with the repudiation of the ECHR in in Clause 1(4)(a) means that even if the UK courts accept this construction, an appeal to the ECtHR Strasbourg seems inevitable.

From a more philosophical standpoint, great care should be taken before disapplying our international obligations. Although in this instance some may think the disapplication a sensible way of dealing with this particular policy concern, it creates a precedent (and not just for the UK). One can think of alarming consequences should, for instance, other ECHR signatory countries seek to disapply fundamental rights. It sets an example which might be followed in more extreme ways in the future and have serious consequences for the rule of law across Europe. Furthermore, a departure from international human rights laws makes it harder for the UK to influence other countries on human rights issues, without, seeming hypocritical. It may erode the UK's soft power on the international stage.

CLAUSE 4: DECISIONS BASED ON PARTICULAR INDIVIDUAL CIRCUMSTANCES

Concerns have been raised regarding the amount of individual legal cases which might be brought by applicants. However, the language of Clause 4, which makes very specific reference to *'compelling evidence relating specifically to the person's particular individual circumstances'* is sufficiently tight to avoid this difficulty.

To have adopted a completely unqualified clause would have been even more problematic from a humanitarian perspective. This is set out eloquently in a letter dated 10 December in *The Telegraph* by Charles Banner KC, Sir Geoffrey Cox KC MP, Lord Sandhurst (Guy Mansfield KC), Anthony Speaight KC:

17 Lunges, parries & the ouster clause

"Are MPs willing to argue that a late-stage pregnant woman should be unable to challenge her removal to Rwanda, or that a patient with a rare cancer that cannot be treated in Rwanda should have no ability to present their medical records? These may sound like extreme cases, but that is precisely because the Bill as currently drafted would only allow claims to succeed in extreme situations like these. The ousting of all claims would not just have legal consequences, if successful it would have serious human consequences too"[18].

CLAUSE 5: RULE 39

Clause 5 provides that it is for a Minister of the Crown alone to decide whether the UK will comply with an interim remedy from a court or tribunal that prevents or delays the removal of the person to the Republic of Rwanda. This is undoubtedly aimed at preventing the application of Rule 39 of the ECHR's Rules of the Court ('Rule 39') [19], which were used to block an early attempt at deportation to Rwanda in June 2023[20].

Whilst this appears to be a compromise which neither unequivocally suspends the application of Rule 39 nor lets it remain unfettered, this clause was a cause of serious contention between the government, claiming it makes:

"clear that it is for a Minister of the Crown (and they alone) to decide whether the United Kingdom will comply with an interim measure"

and

"clause 5(3) makes clear that a court must not have regard to any rule 39 interim measures"[21],

and the European Research Group, arguing that:

"this does no more than restate the existing legal position…[and that] it would be preferable if the Bill were positively to require such interim indications to be disregarded when UK courts refuse interim relief"[22].

Further, there is an argument a clause based on the ERG's approach would be incompatible with the right of individual petition to Strasbourg under Article 34 ECHR, as effectively blocking individual applications to the ECtHR for interim relief in the usual way.

In that context, it is noteworthy that on 13 November 2023, the ECtHR announced changes to procedure for interim measures. It clarified they may be used in '*exceptional circumstances'* only. It amended the wording of Rule 39[23]. To the author's eyes, the timing does not seem coincidental: might it not be a subtle indication that in future the ECtHR may be less willing to find 'exceptional circumstances' as they did originally regarding flights to Rwanda? This press release also promises greater transparency, with disclosure of the identity of the judges who render the decisions on interim measure requests - a bone of contention in the past.

CONCLUSION

The Rwanda Bill is perhaps unique for its determination to cut down the application of international law from the UK's domestic legal framework. It is certainly ambitious, pushing and testing legal principles close to their maximum. It is a trial case for the strength and will of Parliament and the checks and balances of our constitution.

Can Parliament, knowing what it wishes to achieve, achieve its ends in an Act without the courts preventing its core aims? If it cannot, it raises serious questions about the tools available to Parliament to achieve its ends. If it can, care must be taken to do so without doing damage to the UK's long and established constitutional rules and safeguards.

18 Back the Rwanda Bill or risk the sovereignty of Parliament, say KCs (telegraph.co.uk)

19 FS_Interim_measures_ENG (coe.int)

20 Interim measure granted in case concerning asylum-seeker's imminent removal from the UK to Rwanda (1).pdf

21 Safety of Rwanda (Asylum and Immigration) Bill 2023: legal position (accessible) – GOV.UK (www.gov.uk)

22 Rwanda-111223-final-.pdf (lawyersforbritain.org)

23 Changes to the procedure for interim measures (Press release)

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