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THE SAFETY OF RWANDA (ASYLUM AND IMMIGRATION) BILL

AN UPDATE AT COMMITTEE STAGE

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About the authors

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At the second reading of the Safety of Rwanda (Asylum and Immigration) Bill, a number of Conservative MPs made clear that their support for the Bill was contingent on amendments to the Bill in advance of third reading toughening up the legislation.[1] On the other hand, other Conservative MPs indicated that the Bill already went as far as they thought acceptable, and that further amendments would lose their support.

The committee stage of the Bill will take place before the whole House of Commons on 16th and 17th January 2024. The final list of tabled amendments has been published,[2] and as expected contains a number of proposed amendments intended to strengthen the Bill from Conservative MPs.

This paper discusses the intention and effect of certain amendments tabled to clauses 3, 4 and 5 of the Bill, and in particular whether they would in practice have the effect of strengthening the legislation and enabling removals to Rwanda at the earliest opportunity.

1 See e.g. https://hansard.parliament.uk/commons/2023-12-12/debates/FA4DDF9F-19EF-4954-9BFA-6997E4A74E79/SafetyOfRwanda(AsylumAndImmigration)Bill#contribution-321D8C12-B0A9-481D-85E6-07A46F0B9004.

2 https://publications.parliament.uk/pa/bills/cbill/58-04/0038/amend/rwanda_rm_cwh_0115.pdf.

THE AMENDMENTS

Clause 4 – individual challenges

The effect of Amendments 19, 20, 21 and 22 appears to be to remove the ability of an individual to challenge a removal order made under the Bill (or the Illegal Migration Act 2023 ("IMA")) on the grounds that Rwanda is an unsafe country for the individual in question due to their own particular individual circumstances. Instead, Amendment 22 inserts a new section 8A into the IMA which attempts to exclude challenges to decisions made concerning the removal of individuals to Rwanda save in certain, narrow, circumstances.

It is unclear whether this is intended to apply to decisions made under the clause 2 of the Rwanda Bill. Clause 2(1) of the Rwanda Bill as unamended allows the Secretary of State or an immigration officer to make a decision that Rwanda is not a safe country based on a person's particular individual circumstances. Amendment 19 would appear to remove that power to make a decision that Rwanda is not safe on the basis of individual circumstances and in its place create a power to make a decision to remove an individual to Rwanda.[3]

Amendments 20–21 allow challenges to removal decisions only where "*expressly permitted by [the Rwanda Bill] or [the IMA]*". It may, therefore, be that the provisions allowing challenges in section 8A are intended to cover decisions made under the Rwanda Bill also. The issue with this, however, is that section 8A(1) of the IMA would apply only to persons named in subsection 8(18).[4] By the operation of the remainder of section 8 IMA, this appears to apply only to removal decisions made under the IMA: if this is the case, then the effect on any removal decision made under the provisions of the Rwanda Bill is uncertain.

In any event, the greater issue with the new exclusion provisions is the manner and extent to which they attempt to exclude the courts' review of executive decisions. Section 8A(2) would provide that decisions are *"final, and not liable to be questioned or set aside in any court or tribunal*". Section 8A(3) attempts *"in particular"* to exclude the jurisdiction of the High Court (or Court of Session in Scotland) and to bar any application or petition for judicial review, alongside providing that a decision maker is not to be regarded as having exceeded its powers by reasons of an error in reaching a decision. Sections 8A(4) and (5) then

3 "*Whether and in what manner a person is to be removed, or considered for removal, to Rwanda under this Act or the Illegal Migration Act 2023*."

4 Also introduced into the IMA by Amendment 22.

exclude subsections (2) and (3) only in relation to challenges concerning medical fitness to fly to Rwanda, and only so far as the there is any question whether the decision maker was acting in bad faith (which, per section 8A(7), is limited to dishonesty or personal malice, and does not include unreasonableness or actions inconsistent with international law).

The intended effect of this, it seems, is (i) to exclude all challenges whatsoever on the basis that Rwanda is unsafe for an individual based on their own individual circumstances, except (ii) where that challenge is brought on the basis that the individual is unfit to travel to Rwanda, and (iii) to provide that such decisions can be challenged only on the grounds that the decision maker acted in bad faith.

We have previously discussed the issues with attempting to oust the courts' jurisdiction to review decisions as to whether Rwanda is safe on the basis of an individual's particular circumstances.[5] The UK courts would, in our view, be deeply concerned by any attempt to exclude consideration of whether an individual would face persecution in Rwanda on the basis of their own individual circumstances. While concerns that allowing a right to bring challenges on the basis of individual circumstances may delay removals are entirely reasonable, excluding such challenges would undoubtedly face vigorous challenge, with an unacceptably high chance of success (potentially frustrating the Rwanda scheme in its entirety alongside having potentially serious constitutional implications more broadly).

This is not a matter of international law, but rather the approach taken by domestic courts to attempts to exclude their supervisory jurisdiction. As such, excluding international law or the provisions of the Human Rights Act 1998 do little to address the underlying issue, that where decisions affecting (what the courts may consider) fundamental rights of an individual are concerned, the courts will be extremely reluctant to find that Parliament intended to exclude their right to supervise and review those decisions. The attempt to introduce further and more robust ouster clauses through Amendments 19–22 would, therefore, be susceptible to interpretation in a manner that frustrates their purported purpose (and, potentially, the purpose of the Rwanda Bill as a whole). It is worth noting that the wording of the ouster in section 8A(2) is similar to that in *R (Privacy International) v Investigatory Powers Tribunal* [2019] *UKSC 22 and Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147. While attempts have it seems been made to address these judgments in subsections (3), (6) and (7), there is no guarantee that the drafting even here would be resistant to creative interpretation by the courts (leaving aside the real risk of an endorsement of the *obiter* comments in *Privacy International* concerning potential limits on Parliament's sovereignty to pass effective ouster clauses[6]).

A proper concern about allowing challenges on the basis of individual circumstances is that those individuals may seek, dishonestly, to claim circumstances that would prevent their removal. This could include taking steps, for example, to involve themselves in activities that they could argue might put them in danger in Rwanda, such as political opposition to the Rwandan government. It is this issue that Amendments 56 and 57 appear to be intended to address. It is, however, not in our view necessary to address this by legislation: previous ECtHR case law makes clear that an asylum seeker's motivations, including whether they have falsely claimed certain activities or political affiliations to prevent their removal, can be taken into account when assessing whether in fact

5 The Safety of Rwanda (Asylum and Immigration) Bill: Constitutional and Effective?, Lord Sandhurst KC and Harry Gillow, pages 5–6 (www.conservativelawyers.com/_files/ugd/e1a359_8a0ee966828549b5a05dd22fedc0199a.pdf).

6 Which, as noted at page 6 of our paper (see footnote 5 above) would be contrary to well-established constitutional principles, but which represents as significant and unacceptably high risk to take, not only in light of the potential impact on this Bill and operation of the Rwanda scheme, but also the potential effect on future legislation. For the potential risks, see e.g., the comments in R *(Jackson) v Attorney General* [2005] UKHL 56 at [102] and recently McCloskey LJ in *Wilson v Department of Health for Northern Ireland* [2023] NICA 54 at [19].

they would face serious harm on removal (*SF v Sweden*, No. 52077/10 at [66–67]; *AA v Switzerland*, No. 58802/12 at [41]).

Clause 3 – the Human Rights Act 1998

The proposed amendments to clause 3 of the Rwanda Bill would have two main effects. The first would be to provide that the exclusion of provisions of the Human Rights Act 1998 in respect of decisions made under the Rwanda Bill would also apply to decisions to remove a person to Rwanda made under the IMA. In principle, this (as with similar amendments carrying across the approach in the Rwanda Bill to the IMA) seems sensible to ensure consistency between these pieces of legislation. This would, however, require detailed examination of the effect on the IMA to make certain that there are no unintended consequences to making such consequential amendments to the IMA.

The second, and more substantive, proposed change would be to exclude sections 4 and 10 of the Human Rights Act 1998, allowing declarations of incompatibility and amendments by remedial order to primary legislation declared to be incompatible under section 4.

A strong argument for an amendment to exclude these provisions has been put forward by Richard Ekins KC, Sir Stephen Laws KCB, KC and Dr Conor Casey for Policy Exchange.[7] So far as section 4 is concerned, there are two arguments for not disapplying it. First, it may to some degree serve to provide the "effective remedy" required by the ECHR (though in practice the ECtHR may be reluctant to accept that an "effective remedy" extends to one that allows no direct remedy for the individual in question and allows the legislation at issue to continue in force). Second, it encourages the UK courts to focus (i) on specific issues with the legislation and (ii) may discourage the courts from the use of interpretative principles to defeat the Bill's purpose, since it allows an alternative means to demonstrate any dissatisfaction with the Bill. In any event, it is difficult to see how excluding section 4 could prevent a de facto declaration of incompatibility in any case, as it would not prevent a court opining on whether the Bill is in practice incompatible with provisions of the Human Rights Act 1998, with much the same political ramifications and consequences for any consideration by the ECtHR in due course.

The argument for disapplying section 10 is stronger, in that it would prevent the Bill being re-written without consulting Parliament via a formal amendment process. On the other hand, it would also remove the ability for the Government to make swift or urgent changes to the Bill, particularly in circumstances where the actual changes required might well be minor and prevent further effective further challenge to the Bill (for example before the ECtHR).

Clause 5 – interim measures

In advance of second reading of the Bill, there were suggestions that a major issue with the Bill was failing to require ministers to ignore interim or final orders of the ECtHR, as opposed to allowing a ministerial discretion to ignore such orders.[8] Amendments 23, 24 and 25 do not appear to remove this ministerial discretion, and instead merely to make certain relatively minor drafting changes (including, as above, the potentially sensible step of applying the same provisions to the IMA).

Given the absence of any particularly substantive changes to the approach to interim orders, there does not appear to be any real point of principle between the Government and those suggesting the amendments here. Where the operation of prerogative powers is concerned, if legislation can be avoided it should be, for fear of inadvertently curbing the scope of those powers: *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 (in particular [47–51]). Accordingly, a minimalist approach to legislation in these areas is preferable.

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7 Safety of Rwanda (Asylum and Immigration) Bill: A Policy Exchange Briefing Paper, pages 14–19 (https://policyexchange.org.uk/wp-content/uploads/Safety-of-Rwanda-Asylum-and-Migration-Bill.pdf).

8 www.spectator.co.uk/article/jenrick-takes-aim-at-rishis-rwanda-fix

CONCLUSION

This paper does not deal with a large number of other proposed amendments. The amendments from other parties, for the most part, would frustrate the purposes of the Bill. Other amendments from Conservative MPs would either run into similar issues to those outlined above, do not in practice significantly differ from the Government's approach in the Bill as drafted, or undermine the purpose and effect of the Bill for other reasons. As we concluded in our previous paper, the Bill goes as far as reasonably possible without risking collapse of the Rwanda scheme as a whole, and while there may be individual elements to suggested amendments that are worth considering, the Bill remains a well-drafted piece of legislation that represents the best chance for success of the scheme.

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