LIBERTY

LIBERTY'S BRIEFING FOR SECOND READING OF THE SAFETY OF RWANDA (ASYLUM AND IMMIGRATION) BILL IN THE HOUSE OF LORDS, JANUARY 2024

The Safety of Rwanda (Asylum and Immigration) Bill is a constitutionally extraordinary and deeply provocative piece of legislation. Its cover states that the Government cannot say that it complies with the UK's obligations under the European Convention on Human Rights (ECHR). This sets the stage for legislation that undermines the principle of the universality of human rights and sets the UK up to turn its back on international law. The Bill must be rejected for four key reasons:

- It asks Peers to turn a blind eye to the Supreme Court's recent judgment and to disregard international law.
- It seeks to oust the jurisdiction of our domestic courts, by prohibiting them from making assessments of fact and disapplying our Human Rights Act.
- It abandons the UK's place on the international stage with a cavalier attitude to the rule of law and the separation of powers.

This Rwanda Bill was not a manifesto commitment – to the contrary, it will hinder the UK's ability to "continue to grant asylum and support to refugees fleeing persecution" – the only mention of asylum in that document. For its insult to Parliament and to our constitution, **Liberty urges Peers to oppose the Bill in its entirety.**

NEITHER A TREATY NOR LEGISLATION CAN 'MAKE RWANDA SAFE'

The Rwanda Bill – alongside the UK-Rwanda Agreement on an Asylum Partnership ('the Rwanda Treaty') – is the Government's response to the Supreme Court's recent judgment in which it held that the Rwanda policy was unlawful, on the basis of a finding of fact and law that Rwanda is not a safe country. **What this Bill will do in practice is tie the hands of every court in the UK while also abandoning the UK's international commitments.**

For the Government to be legislating to overturn the Supreme Court's finding of fact and to create the legal fiction that Rwanda is safe is constitutionally extraordinary. In its judgment, the Supreme Court did not merely express "concerns" that can be addressed through legislation or indeed a treaty – it made an authoritative, unanimous ruling that removing people from the UK to Rwanda could breach the principle of non-refoulement – which the Supreme Court affirmed has been given effect by multiple international treaties to which the UK is a party (including the prohibition against torture and inhuman and degrading treatment under Article 3 ECHR) as well as domestic legislation. In doing so, the Court relied on the expert evidence of the United Nations High Commissioner for Refugees (UNHCR) as well as advice given to Government officials to Ministers in 2021 that Rwanda has a "poor human rights record", including that there are "constraints on media freedom and political activities" and details about one serious incident in 2018 where the Rwandan police fired live ammunition at refugees protesting over cuts to food rations, killing at least 12 people.[1]

Writing in legislation that the "judgement of Parliament" is that Rwanda is safe – as the Bill does in clause 2 – does not make it so. Indeed, one only needs to consider UNHCR's updated opinion stating that the Rwanda Treaty and Bill "are not compatible with international refugee law,"[2] Human Rights Watch's October 2023 report on extraterritorial repression by the Rwandan government,[3] or even the Government's own Policy

[1] Paragraph 76, R (on the application of AAA (Syria) and others) v Secretary of State for the Home Department, [2023] UKSC 42
[2] UNHCR Analysis of the Legality and Appropriateness of the Transfer of Asylum-Seekers under the UK-Rwanda arrangement: an update, 15 January 2024: https://www.refworld.org/pdfid/65a55d994.pdf
[3] Human Rights Watch, 'Join us or Die: Rwanda's extraterritorial repression', 10 October 2023: https://www.hrw.org/report/2023/10/10/join-us-or-die/rwandas-extraterritorial-repression

Statement published on 18 January 2024 noting "issues with Rwanda's human rights record around political opposition to the current regime, dissent and free speech"[4] to understand the problems with this Bill.

The Government has repeatedly claimed that the measures in the Rwanda Treaty *"address all of the concerns identified by the Supreme Court and make Rwanda a safe country to send migrants and meet our respective international obligations."*[5] The House of Lords International Agreements Committee (IAC), however, has concluded otherwise – stating that while the Treaty may arguably improve protections on paper, *"there are a significant number of legal and practical steps which need to be taken before the protections could be deemed operational such that they might make a difference to the assessment reached by the Supreme Court*".[6] The House of Lords has since passed an unprecedented motion agreeing with the recommendation of the IAC that ratification of the Treaty be delayed until all of its provisions and safeguards have been implemented. This would have the effect of delaying the implementation of the Bill, given that under clause 9(1) the Bill will not come into force until the Treaty does. A spokesperson for the Government has reportedly indicated that it will be ignoring the motion.[7]

The Government cannot have it both ways. Either Rwanda is made safe (especially as it relates to the principle of non-refoulement) by the full implementation of the Rwanda Treaty – in which case the Government should wait to ratify the Treaty until the proper systems, procedures, and safeguards are in place – or the Government is simply willing to ride roughshod over the issue of safety altogether – and in doing so, the constitutional function of domestic courts and international law – in order to achieve its political aims.

UNDERMINING THE ROLE OF DOMESTIC COURTS

The doctrine of the separation of powers exists to ensure an effective system of checks and balances to enable scrutiny of the actions of each arm of the State and to prevent abuses of power. In the UK political system, it requires both the courts and Parliament to exercise restraint and to respect the proceedings and rulings of the other. It is fundamental to the rule of law.

The Rwanda Bill undermines the separation of powers by eroding the ability of our domestic courts to scrutinise the legality of Government decisions and to take measures to remedy potential violations of people's rights. First, clause 2 operates as a judicial blindfold. It dictates that courts must "conclusively" treat Rwanda as a safe country, prohibiting them from considering any claim or appeal insofar as it is based on the argument that Rwanda is unsafe.[8] In practice, this would mean that courts must ignore the facts in front of them, and in particular not consider whether a person may face refoulement or not have their asylum claim fairly considered, or whether Rwanda may not act in accordance with the treaty that has been signed.[9] Even if a court heard overwhelming evidence that Rwanda was unsafe, it would have to stick its fingers into its ears, and pretend that it was. This applies notwithstanding previous domestic legislation, the Human Rights Act, any other provision or rule of domestic law, as well as any interpretation of international law by the court/tribunal.[10]

In particular, the Bill explicitly disapplies section 2, section 3, and sections 6 to 9 of the Human Rights Act (HRA) to clause 2. Section 2 HRA requires courts to take into account the case law of the European Court of Human Rights (ECtHR) in making their decisions. Section 3 HRA requires courts and other public bodies, as

[4] Safety of Rwanda (Asylum and Immigration) Bill: policy statement (accessible), 18 January 2024: https://www.gov.uk/government/publications/safety-of-rwanda-asylum-and-immigration-bill-policy-statement/safety-of-rwanda-asylum-and-immigration-bill-policy-statement-accessible
[5] Safety of Rwanda (Asylum and Immigration) Bill 2023: legal position (accessible), 11 December 2023: https://www.gov.uk/government/publications/safety-of-rwanda-asylum-and-immigration-bill-2023-legal-position/safety-of-rwanda-asylum-and-immigration-act-2023-legal-position-accessible
[6] House of Lords International Agreements Committee, Scrutiny of international agreements: UK-Rwanda Agreement on an Asylum Partnership, 17 January 2024: https://committees.parliament.uk/publications/42927/documents/213461/default/
[7] Syal, R., *Sunak's plan to deport asylum seekers to Rwanda receives first parliamentary defeat,* 22 January 2024: https://www.theguardian.com/uk-news/2024/jan/22/sunaks-plan-to-deport-asylum-seekers-to-rwanda-receives-first-parliamentary-defeat
[8] Clause 2(3).
[9] Clause 2(4).
[10] Clause 2(5).

far as possible, to interpret legislation in line with the ECHR. Sections 6 to 9 HRA require public bodies to act in compliance with the ECHR and set out the relevant proceedings, remedies, and judicial acts that may arise from a claim made on the basis of the HRA. These are basic, minimum standards that protect us all. Peers should be deeply wary of the potential precedent set should these protections be jettisoned.

Second, the Bill leaves scarce room for judicial scrutiny. It limits the courts' jurisdiction to assessing whether, in exceptional cases, an individual has "compelling evidence" that Rwanda is not a safe country for them.[11] In considering such a claim, the courts are prohibited from considering if removal of an individual to Rwanda would violate the principle of non-refoulement, for example if deficiencies in the asylum system resulted in them being removed to a country where they would face torture, inhuman or degrading treatment.[12] Again, courts are directed to ignore what is placed in front of them. It is also left open to courts to make a declaration that Rwanda is not a safe country under section 4 HRA – however, as is explained below, this is unlikely to be an effective remedy for the purposes of Article 13 ECHR.

Finally, clause 4(3) limits the ability of a court or tribunal to grant an interim remedy (such as an injunction), so that it may only do so if it is satisfied that the person would face a real, imminent, and foreseeable risk of serious and irreversible harm if removed to Rwanda.[13] Eroding access to domestic interim remedies – which are orders granted by a judge based on principles of fairness – is contrary to equality under the law, a key component of the rule of law, and also puts people at risk of significant harm.

ABANDONING INTERNATIONAL COMMITMENTS

The Rwanda Bill puts the UK on a direct collision course with the European Court of Human Rights (ECtHR) in three key ways. First, it turns the UK's back on the principle of non-refoulement by stripping the courts' ability to prevent transfer to Rwanda on the basis that Rwanda is not a safe country.

Second, the Bill is also incompatible with Article 13 ECHR. Under Article 13 ECHR, the Government has an obligation to provide individuals with effective remedies for breach or threatened breach of their rights. Where a breach or threatened breach relates Article 3 ECHR, the European Court has confirmed that individuals are entitled to a remedy with automatic suspensive effect (that is, a legal remedy that suspends the enforceability of a challenged decision).[14]

The Government claims that retaining section 4 HRA – which enables courts to make a declaration that legislation is incompatible with Convention rights – is sufficient to provide an Article 13 ECHR remedy for challenges to the assessment of Rwanda as a safe country.[15] However, a declaration of incompatibility under section 4 HRA is not automatically suspensive. Additionally, whereas the ECtHR has previously considered that "evidence of a long-standing and established practice of ministers giving effect to the courts' declarations of incompatibility might be sufficient to persuade the Court of the effectiveness of the procedure" for the purposes of Article 13,[16] it appears almost certain that the Government will take the opposite approach in relation to the Rwanda Bill. Not only does the Government not accept there is a basis for such a declaration in the first place, it has said that the making of any such declaration "would simply mean that Parliament and the government would be able to review the issue as it saw fit, with flights able to continue to embark for

[11] Clause 4(1).
[12] Clause 4(2). The ECHR memorandum provides: "It is considered that it is consistent with the Convention rights and with Article 13 to prevent such an individualised claim to the extent it is brought on the ground that 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)." See para 26(b): https://publications.parliament.uk/pa/bills/cbill/58-04/0038/ECHRmemo.pdf
[13] This does not apply to people who are to be removed under the Illegal Migration Act 2023, as section 54 of that Act (which has not yet been commenced) expressly prohibits the granting of such a remedy to this group.
[14] MSS v Belgium and Greece (Application no. 30696/09) (ECtHR, 21 January 2011)
[15] Paragraph 21, Safety of Rwanda (Asylum and Immigration) Bill European Convention on Human Rights Memorandum: https://publications.parliament.uk/pa/bills/cbill/58-04/0038/ECHRmemo.pdf
[16] Burden and Burden v UK (Application No. 13378/05) (ECtHR, 29 April 2008)

Rwanda as Parliament considered the issue."[17] The implication here is that notwithstanding a court's making of a declaration of incompatibility on the basis that the Bill is incompatible with the prohibition against torture and inhuman and degrading treatment, the Government would continue operating removals to Rwanda – effectively allowing human rights violations to continue taking place until it allotted time for Parliament to reconsider the Bill (if ever).

Finally, the Bill enables a Minister to decide whether to comply with an interim measure and prohibits courts from having regard to any such measure. Interim measures are issued only "on an exceptional basis, when applicants would otherwise face a real risk of serious and irreversible harm". They are a vital tool that allows the Court in extreme circumstances to place a temporary stop on an action likely to produce a significant breach of human rights to allow time for a full judgment to take place. Applications for interim measures are most often rejected. When they are granted, it is on the basis of serious need, and contracting states are under an obligation to comply with them. To do otherwise would be a breach of our Article 34 ECHR responsibility not to hinder the effective exercise of individual application to the Court.[18] The President of the European Court of Human Rights, Siofra O'Leary, has reaffirmed the fact that states have "a clear legal obligation" to follow interim measures – noting that "where states have in the past failed to comply with Rule 39 indications, [ECtHR] judges have found that the states have violated their obligations."[19]

In and of itself, giving legislative validation to a Minister (who is part of the Executive) to unilaterally decide whether the UK should comply with an interim measure – failure of which would be a violation of international law – is a deeply concerning green light to the breaking of international law. However, the Rwanda Bill takes this a step further, by prohibiting courts in the UK from having regard to an interim measure when considering any application/appeal that relates to a removal decision to Rwanda at all. The ECHR memorandum to the Bill states that "the Government considers that the provisions is *capable* of being operated compatibly with Convention rights, in the sense that it will *not necessarily* give rise to an unjustified interference of those rights" (emphasis added).[20] This is an extraordinarily weak justification for ignoring an exceptional order granted to save a person from serious and irreversible harm.

Abandoning the UK's international obligations in this way is as reckless as it is dangerous. Respect for the ECHR is integral to the Good Friday Agreement (GFA) – which underpins peace in Northern Ireland. The Prime Minister himself has said that the GFA left us an "extraordinary and precious legacy."[21] Leaving the power to decide whether to comply with the ECHR in the hands of a Minister is a direct threat to this legacy. Indeed, according to senior White House officials, Joe Biden's administration have raised concerns that changes to Britain's Rwanda policy could undermine the Northern Ireland peace process.[22]

We are concerned that the Government is willing to put at risk the rule of law and the constitution in order to make vague and performative statements like "the Parliament of the UK is sovereign" and that "the validity of an Act is unaffected by international law"[23] – with the Bill defining "international law" as the ECHR, the Refugee Convention, the International Covenant on Civil and Political Rights (ICCPR), and the Council of Europe Convention on Action Against Trafficking (ECAT), as well as customary international law and "any other

[17] Safety of Rwanda (Asylum and Immigration) Bill 2023: legal position, 11 December 2023: https://www.gov.uk/government/publications/safety-of-rwanda-asylum-and-immigration-bill-2023-legal-position/safety-of-rwanda-asylum-and-immigration-act-2023-legal-position-accessible#:~:text=4%20declaration%20of%20incompatibility.,or%20application%20of%20the%20legislation.
[18] See Mamatkulov and Askarov v Turkey (46827/99, 46951/99) 2005.
[19] Casciani, D., *European court president warns over Rwanda rulings,* 25 January 2024: https://www.bbc.co.uk/news/uk-politics-68093940
[20] Home Office, Safety of Rwanda (Asylum and Immigration) Bill, ECHR memorandum, 6 December 2023, [29] https://publications.parliament.uk/pa/bills/cbill/58-04/0038/ECHRmemo.pdf.
[21] PM: I will give everything to fulfil the promise of the Belfast (Good Friday) Agreement, 19 April 2023: https://www.gov.uk/government/news/pm-i-will-give-everything-to-fulfil-the-promise-of-the-belfast-good-friday-agreement
[22] Sabur, R., *Biden 'concerned' UK's Rwanda policy could hurt Northern Ireland peace process,* The Telegraph, 27 Nov 2023: https://www.telegraph.co.uk/world-news/2023/11/27/biden-fears-uk-rwanda-plan-threatens-northern-ireland-peace/
[23] Clause 1(4).

international law."[24] But none of this is new. The purpose of this statement appears to be to sound a warning: that the UK Government is ready to ignore all its international commitments. In doing so, the UK will abandon its role on the international stage and fundamentally undermine its reputation as a member of the rules-based international order.

CONCLUSION

For those who believe in the rule of law and the separation of powers, the Rwanda Bill should be a source of grave concern. Faced with a comprehensive, well-reasoned and unanimous Supreme Court decision, the Government's response has been to instruct the Court not to do its job in future. It proposes to trample over our international obligations and slice through our domestic human rights protections in the pursuit of a legal fiction, and all in the service of potentially removing a few hundred people to Rwanda, at the cost of several hundred million pounds. It is extraordinary that this is a proposition being put to Parliament. Peers should be clear about what they are being asked to endorse in this Bill, and should let it go no further.

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[24] Clause 1(6).