Public Law Project

Public Law Project briefing for the House of Lords' Second Reading of the Safety of Rwanda (Asylum and Immigration) Bill:

JANUARY 2024

Summary and recommendations

1. Public Law Project (PLP) is a national legal charity dedicated to advancing access to justice, the rule of law, government accountability, and better public sector decision-making. We engage in relation to the Safety of Rwanda (Asylum and Immigration) Bill because of our expertise in immigration, international law and human rights.

2. The Safety of Rwanda (Asylum and Immigration) Bill is the culmination of a policy that runs contrary to the British values of human dignity, the rule of law, judicial independence, and human rights. The Bill is a disproportionate response to the UK Supreme Court's conclusion that, after looking impartially at the evidence provided by all sides, the policy of sending asylum seekers to Rwanda was a violation of basic human rights. The Court determined that there is a real risk that Rwanda would "refoul" people sent by the UK – that is, return them to countries where they face death or inhuman treatment – whether through misunderstanding, neglect or wilful disobedience of its international obligations.[1] Contrary to the evidence used by the Supreme Court, the Bill requires decision-makers to act as if Rwanda is in fact a safe country and prohibits almost all legal challenges to decisions based on this problematic premise.

3. With this Bill, Parliament is being asked to endorse legislation which puts at risk the lives and safety of some of the world's most persecuted people and which breaches a number of the UK's most important international commitments. On top of this, since the Bill is – for no reason that is consistent with good governance or law making – being fast-tracked, parliamentarians are being given inadequate opportunity to consider the arguments and are being asked to implement an agreement that Parliament was in fact unable to debate before it was negotiated and signed. The Bill undermines the mutual respect and restraint required by the British constitution between the judiciary, Parliament, and the Executive.

4. Importantly, the Safety of Rwanda (Asylum and Immigration Bill) is not a manifesto commitment of the Government. Therefore, the Salisbury Convention does not require that peers support the Bill's Second Reading. Given the significant constitutional and human implications of the Bill, we urge the House of Lords to support Lord German's motion to decline a Second Reading to the Bill.

5. This briefing is organised around three arguments opposing the Bill:

    a. The evidence still indicates that Rwanda is not a safe country to forcibly remove people to and the Government's treaty has not changed this, putting people's lives and safety at real risk (Clause 2);

    b. Restricting legal challenges to particular individual circumstances is not enough to ensure people's safety (Clause 4); and

    c. The Bill disables important human rights safeguards by disapplying most of the Human Rights Act 1998 and requiring domestic judges to disregard international law and interim measures of the European Court of Human Rights (Clauses 1, 3, and 5).

[1] [2023] UKSC 42.

The evidence still indicates that Rwanda is not a safe country to forcibly remove people to and the Government's treaty has not changed this, putting people's lives and safety at real risk:

6. Clause 2(1) of the Bill requires all decision-makers, including the Home Office and the judiciary, to treat Rwanda as if it were safe. Clause 2(3)-(4) takes this further by expressly prohibiting the judiciary from questioning Rwanda's safety, including - directly contrary to the Supreme Court's evidence-based conclusions - requiring judges to presume that people will not be refouled by Rwanda. The Clause also states that this ouster of the court's jurisdiction applies irrespective of any domestic or international law which it violates (Clause 2(5)).

7. Clause 2 is a constitutionally inappropriate clause, one that seeks to undermine the fact-determining function of the courts and their authority to determine the legality of executive action. The result is an attempt to replace fact with a legally binding fiction, risking both the lives and safety of innocent people, and setting a dangerous precedent for future legislation.

8. For the Supreme Court, there were three concerns which created a real risk that the Rwandan Government would and - more importantly - *could* not comply with its obligations not to refoul people. Contrary to the assertions in the Government's latest policy statement,[2] these concerns are not adequately addressed. The Supreme Court's concerns about Rwanda are found at para. 74 of its judgment, and include:

    a. The general poor human rights situation, including assassinations by the Rwandan Government of its domestic critics and the killing of twelve refugees in a camp during protests about cuts to food rations, indicating a serious lack of commitment to international human rights obligations;

    b. The poor quality of Rwanda's asylum system from initial decisions to appeals and including its history of refoulement; and

    c. Rwanda's non-compliance with assurances given to Israel that it would not refoul people, under an arrangement agreed with that country.

9. The Government provides no evidence that the poor human rights situation in Rwanda has changed since the Supreme Court's decision less than three months ago. This is not a surprise. That a country could change so fundamentally in such a short space of time would be miraculous. Instead of demonstrating concrete changes in Rwanda's human rights record since the Supreme Court's decision, at paras. 43-45 of its policy statement the Government dismisses the Supreme Court's evidence as being based on isolated incidents or insists that harm will not occur to asylum seekers removed under this agreement because the Rwandan Government largely targets its domestic critics only.

[2] Home Office. Safety of Rwanda (Asylum and Immigration) Bill: Policy Statement. 12 December 2023. Available at https://assets.publishing.service.gov.uk/media/657850ff254aaa000d050b07/Policy_Statement_-_Safety_of_Rwanda__Asylum_and_Immigration__Bill.pdf

10. This is beside the point. That any of the events recognised by the Supreme Court occurred at all shows the potential for very serious – indeed, deadly – human rights violations by the Rwandan Government. This potential remains alive at the present time. Rwanda's human rights record in practice – as opposed to legal theory – remains poor.

11. Moreover, the UK Government shows no appreciation that, given the internationally contentious nature of this treaty, the amount of money paid to Rwanda, and Rwanda's insistence that the Supreme Court merely adopted the "lies" of the UN High Commissioner for Refugees,[3] asylum seekers removed under the UK's arrangement may well be politically exposed. The Rwandan Government would have good reason to wish to hide evidence of inadequate practice and even malpractice. The Government does not recognise this in its policy statement.

12. On the matter of Rwanda's poor asylum system, the Supreme Court identified several issues including: discriminatory decision-making in respect of asylum seekers from the Middle East; a history of practicing refoulement; lack of Rwandan judicial independence; lack of detailed consideration of asylum applications with decisions showing poor quality or no reasoning; and lack of understanding of international refugee law.

13. In response, the Government argues at para. 13 in its policy statement that it has provided training to Rwandan officials that address some of these concerns, focusing on consolidating understanding of refugee law and how to apply this in conducting interviews and making effective asylum decisions.

14. A four-day training programme does not begin to address the endemic problems identified by the Supreme Court. Indeed, at para. 93 in its judgment, the Supreme Court expressly noted that these problems were unlikely to be resolved in the short term:

> *"Having regard also to the Rwandan government's misunderstanding of its obligations under the Refugee Convention, there is reason to apprehend that there is a real risk that the practices described above will not change, at least in the short term. The Secretary of State points out that resources are provided under the MEDP [Migration and Economic Development Partnership with Rwanda]. However, the provision of resources does not mean that the problems which we have described can be resolved in the short term. The Secretary of State points to the monitoring arrangements under the MEDP as a safeguard. Such arrangements may be capable of detecting failures in the asylum system, and over time may result in the introduction of improvements, but that will come too late to eliminate the risk of refoulement currently faced by asylum seekers removed to Rwanda."*

[3] GB News. 15 November 2023. Available at https://www.youtube.com/watch?v=BLMFJxLve3Q

15. On the specific provisions in the treaty designed to prevent discrimination and refoulement – namely, that Rwanda has agreed not to discriminate (Article 3), or to remove any asylum seekers who are transferred to Rwanda to any country apart from the UK (Article 10(3))[4] – these safeguards rest on the assumption that Rwanda can be relied upon to fulfil these commitments in practice. In reality, the evidence indicates that Rwanda's reliability is patchy at best. The changes of wording and content between the previous MOU and the new treaty do not address whether Rwanda could be relied on to understand and uphold its obligations in practice. The Supreme Court decided after looking impartially at the evidence that it could not. With no evidence of structural and cultural changes in Rwanda, which the Supreme Court itself recognised would take considerable time, there remains a real risk that asylum seekers will be refouled and discriminated against in violation of this treaty and international law.

16. On the Supreme Court's third concern relating to Rwanda's violation of its agreement with Israel, at para. 62 of its policy statement the Government insists that its own agreement with Rwanda is different: "The lack of monitoring combined with the confidential nature of the agreement, which limited transparency and independent scrutiny, means HMG does not consider the agreement Israel had with Rwanda to be comparable to the MEDP."

17. Unfortunately, this is not an answer that addresses the fundamental problem outlined above about whether Rwanda can be relied on to adhere to this new agreement – either due to misunderstanding, neglect or wilful disregard. But what this does demonstrate is that Rwanda has a patchy history of adhering to its international human rights and asylum obligations – as confirmed by the Supreme Court – and that despite these risks the Government wishes to subject asylum seekers to the potential for serious harm.

Restricting legal challenges to particular individual circumstances is not enough to ensure people's safety:

18. The possibility of challenges based on particular individual circumstances in Clause 4 of the Bill does not meaningfully reduce the Bill's threat to human rights. In practice, the Bill provides only an illusion of protection and due process which does nothing to lessen its dangerous implications. This is for at least three reasons.

19. First, Clause 4(1) permits challenges on the very restricted basis that "Rwanda is not a safe country for the person…based on compelling evidence relating specifically to the person's particular individual circumstances (rather than on the grounds that the Republic of Rwanda is not a safe country in general)". Clause 4(2) makes clear that this "does not permit a decision-maker to consider…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)."

[4] Agreement between the Government of Great Britain and Northern Ireland and the Government of the Republic of Rwanda for the Provision of an Asylum Partnership to Strengthen Shared International Commitments on the Protection of Refugees and Migrants. 5 December 2023. Available at https://assets.publishing.service.gov.uk/media/656f51d30f12ef07a53e0295/UK-Rwanda_MEDP_-_English_-_Formatted__5_Dec_23__-_UK_VERSION.pdf

20. Indeed, the Government's 'legal position' on the Bill is that individual challenges will be confined to situations such as where people are unfit to fly due to late-stage pregnancy or very rare medical conditions.[5] As such, under Clause 4, a court still cannot consider the risk of refoulement in Rwanda; the Government's intention is that its very limited protection should cover only extremely rare circumstances which may never arise in practice.

21. Second, we are concerned by the requirement to provide compelling evidence that a person faces a particular individual "real, imminent and foreseeable risk of serious and irreversible harm" to succeed under Clause 4(1). This is an extremely high threshold. Where people have been forced to flee their homes due to ongoing or imminent persecution, they physically may not be able to collect any evidence prior to their departure. This is a special concern for groups with protected characteristics who may struggle to disclose the compelling grounds not to remove them to Rwanda. As charities such as Rainbow Migration have consistently demonstrated, this is a live risk for LGBT+ people, where shame, trauma, fear and social stigma may prevent full disclosure to officials.[6]

22. Similarly, the Bill confines a domestic judge's power to grant an interim remedy – a temporary injunction preventing a removal – to where the court is satisfied that the individual faces a "real, imminent and foreseeable risk of serious and irreversible harm" if removed to Rwanda (Clause 4(4)). This is again a very high threshold, difficult to surmount in practice, with the result that individuals who do in fact face this harm may be subject to removal with disastrous consequences.

23. Third, to effectively gather and present evidence to the Home Office, many people may need access to legal advice to help them understand what they need to do, why, and when. And yet, it is widely accepted that asylum and immigration law are so-called "legal aid deserts" where individuals face significant difficulty obtaining legal advice, either speedily or at all.[7] The likely result is that many people will not be able to access legal advice to pursue effective challenges, with the consequence that some may be removed in violation of even the thin Clause 4(1) safeguards.

The Bill disables important human rights safeguards by disapplying most of the Human Rights Act 1998 and requiring domestic judges to disregard international law and interim measures of the European Court of Human Rights:

24. This Bill is the most startling attempt since the Human Rights Act came into force to remove its protection from a group of people who particularly need its safeguards. This increases the risk that people will suffer serious harm, undermines equality before the law, and sets a precedent which could enable future governments to remove human rights safeguards for other politically vulnerable groups.

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[5] Home Office, 'Safety of Rwanda (Asylum and Immigration Bill): legal position' (11 December 2023). Available at 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] Rainbow Migration, 'Submission to the Independent Chief Inspector of Borders and Immigration Inspection of Casework, 1 June 2023). Available at https://www.rainbowmigration.org.uk/publications/rainbow-migrations-submission-to-the-independent-chief-inspector-of-borders-and-immigrations-inspection-of-asylum-casework/

[7] Refugee Council, 'No access to justice: How legal advice deserts fail refugees, migrants and our communities' (9 June 2022). Available at https://www.refugee-action.org.uk/no-access-to-justice-how-legal-advice-deserts-fail-refugees-migrants-and-our-communities/

25. The Bill undermines or eradicates human rights safeguards in the following ways:

- The Bill begins with an acknowledgement by the Home Secretary that there is a realistic – indeed, in our view, compelling – argument that the Bill is not compatible with the European Convention on Human Rights (ECHR);
- Clause 1(4)(b) states that the validity of an Act is unaffected by international law;
- Clause 3 disapplies much of the Human Rights Act 1998, a key mechanism for domestically enforcing ECHR rights; and
- Clause 5 states that it is for a Minister to decide whether the UK should follow an interim measure of the European Court of Human Rights and that a court must not have regard to an interim measure.

26. To take the specific example of Clause 3 of the Bill, this states in terms that sections 2 and 3 and 6 to 9 of the Human Rights Act 1998 do not apply to the Bill – including in respect of: decisions by the Home Office to remove people to Rwanda; decisions by the courts to grant interim remedies; and decisions by the courts on appeals:

- **Section 2** is the duty for judges to have regard to European Court of Human Rights cases when deciding British cases so that UK courts normally provide no less protection than the European Court of Human Rights;
- **Section 3** is the duty on judges to interpret all legislation as far as is possible to be compatible with human rights, so that British laws can be read and given effect compatibly with the ECHR;
- **Section 6** makes it unlawful for a public authority to act in a way which is incompatible with human rights;
- **Section 7** makes provision for victims of a human rights violation to bring legal proceedings a right granted to individuals to bring challenges when they are a victim of a human rights violation; and
- **Sections 8 and 9** set out the judicial remedies available where a court finds that there has been a violation of human rights.

27. We highlight the consequences of disapplying just one of these sections – section 3. Section 3 requires the judiciary to interpret legislation as far as possible so that it is compatible with human rights. The provision has proven critical in the defence of important human rights and, because it allows people to secure justice domestically, it has reduced the number of people needing to pursue litigation in the European Court of Human Rights.

28. In this context, the exclusion of section 3 means that even if a judge believed that, for example, Clause 4 was too narrow to provide adequate protections for the reasons we have highlighted, the court could still not read or give effect to the provision in a more protective way that respected human rights. The judge would be compelled to enforce the law in a way that violated human rights,[8] including subjecting people to risks of death or serious harm.

[8] Lee Marsons and Alice Stevens, 'Raab's new Bill weakens rights remedies' (9 December 2022, Law Society Gazette). Available at https://www.lawgazette.co.uk/practice-points/raabs-new-bill-weakens-rights-remedies-/5114536.article

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