Safety of Rwanda (Asylum and Immigration) Bill
Briefing for MPs – Second Reading

About Us

1. The Bar Council represents approximately 18,000 barristers in England and Wales. It is also the Approved Regulator for the Bar of England and Wales. A strong and independent Bar exists to serve the public and is crucial to the administration of justice and upholding the rule of law.

Summary

2. The Bar Council takes no position on the wisdom, desirability, or value-for-money, of the underlying policy: these are political issues. But the Bar Council has a series of concerns about how the *Safety of Rwanda (Asylum and Immigration)* Bill attempts to achieve its stated aims.
3. First the tension that the Bill is likely to place on the relationship between Parliament and the Courts.
4. Second, the lack of scrutiny permitted to the domestic courts both at the interim and final relief stages removes the ability of the courts to review individual cases save on the narrowest of grounds.
5. Third, there is a clear incompatibility with the European Convention of Human Rights: the potential for human rights challenges are so narrowly drawn that the Bar Council doubts that the Bill's provisions would survive challenge in the European Court of Human Rights. The Home Secretary was unable to say that there was a better than 50% chance that the Bill was ECHR compliant[1].

The Bill

6. The Rwanda Bill (the Bill) purports to decide that Rwanda is safe (Clause 2), notwithstanding the Supreme Court's recent judgment[2] to the contrary. Given that the Supreme Court has recently made *a judgment of fact* as to the existence of a risk of harm, the Bill sits uneasily with the constitutional principle of the separation of powers.
7. In passing the Bill, Parliament would not simply be altering a statute following a court judgment about the meaning of the statute and with it disagreed. Here Parliament would

[1] The Home Secretary (the Rt Hon James Cleverly MP) made a statement under section 19(1)(b) of the Human Rights Act 1998 ("HRA") that he is unable to make a statement that, in his view, the provisions of the Bill are compatible with Convention rights, but the Government nevertheless wishes the House to proceed with the Bill.

[2] *R(AAA and others) v Secretary of State for the Home Department* [2023] UKSC 42.

run the risk of failing to respect the court's proceedings and our highest court's recent judgment on a factual matter of grave importance: the risk of inhuman and degrading treatment. In creating the legal fiction that Rwanda is safe, the Bill does not directly address any of the concerns raised by the Supreme Court in its judgment: the fact that Rwanda may have taken on new treaty obligations does not necessarily mean that the risk will be removed, and certainly does not mean that those risks have already been removed.

8. The use of a deeming provision in this particular context, which engages international law obligations, is striking. The Bill deems Rwanda to be safe, whether or not it is in fact safe. Deeming provisions are often used, unproblematically, in purely domestic law contexts. So, for instance, if Parliament already had a (domestic) law that all dogs must be on leads, there would be no particular problem in passing another piece of (domestic) legislation to deem all cats to be dogs for the purposes of that law. But the present Bill would not operate in that way, because what is proposed here is domestic legislation which is using a deeming provision in conjunction with an *international* obligation. The Bar Council has serious doubts as to whether it is appropriate to deem Rwanda to be safe for the purposes of meeting the UK's *international* obligations under the European Convention on Human Rights and the Refugee Convention. There is an obvious difference between a country that is in fact safe, and one that is not safe but is deemed to be safe. The United Kingdom's obligation under international law is to ensure that asylum seekers are only ever sent to countries that are *actually* safe (both now and in the future).

9. If Rwanda is (either now or at some future time) safe, the deeming provision will at that point be otiose. If Rwanda is not in fact safe, the deeming provision is wrong in principle. The deeming provision is therefore either unnecessary, or wrong.

10. The Bill ousts the jurisdiction of UK courts to grant interim relief in any case where there is a generic or individual risk of onward removal/refoulement of asylum-seekers from Rwanda to their home country. The Bill straightforwardly seeks to remove almost all judicial scrutiny of the lawfulness of such UK action by our domestic courts thus removing the precautionary principles which would otherwise serve to prevent the risk of harm occurring.

11. The use of ouster clauses (e.g. ousting interim remedies: Clause 2, Clause 4) are always contentious: "Be ye never so high, the law is above you". Were Parliament to pass the Bill, it would be appearing to set itself up as an arbiter of factual matters and very difficult issues as to whether such ouster clauses are compatible with the rule of law. The Bill's approach seems to be attempting to break new ground. By restricting courts and tribunals from granting interim remedies, the Government seeks to say *not only* do we want Parliament to enact provisions to give effect to our policy, *but we also* want to remove judges from supervising the lawfulness of our conduct when we operate that policy. It is the latter ambition which appears to us to infringe one of the fundamental principles of the rule of law.

12. The common law of England and Wales operates by providing remedies for wrongs suffered. Injunctions (including interim injunctions) are remedies that are available against public authorities to restrain them from acting unlawfully. They are a cornerstone in ensuring that the Government acts within the law prescribed by Parliament in legislation. As a remedy, they function in particular to prevent intended and/or anticipated unlawful conduct, including the anticipated risk of harm. There is no warrant for the Home Secretary to escape being subject to the possibility of interim injunctions to restrain his intended and/or anticipated unlawful conduct. It is a fundamental aspect of the rule of law that such judge-granted remedies are available to all, and against all. There is no principle of our

constitutional law other than, *perhaps*, the simple sovereignty of Parliament to suggest that they can be withdrawn from a class of persons or from a broad area of policy. Accordingly, Parliament should exercise great caution before accepting the Government's invitation to legislate in this way.

13. The most orthodox statement of the nature of parliamentary sovereignty and legislative supremacy, is A.V. Dicey's *Introduction to the Study of the Law of the Constitution*, where Dicey states:

> *'We mean...when we speak of the "rule of law" as a characteristic of our country, not only that with us no man is above the law, but (what is a different thing) that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.' (8th edition, 1915, Chapter IV, p. 114).*

14. A modern restatement of that principle of the rule of law can be found in John Laws' (Lord Justice Laws when he was in the Court of Appeal) *The Constitutional Balance*:

> *'...judges must ensure, and have the power to ensure, that State action falls within the terms of the relevant published law.' (2021, p. 16)*

15. A further concern with the Bill's legal fiction that Rwanda is safe is that it disapplies domestically international human rights treaties by which the UK will remain bound on the plane of international law. Thus, at a stroke, the Refugee Convention and the European Convention of Human Rights are deprived of domestic effect. For a country such as the UK, committed to the promotion of the rule of law and human rights overseas, this sets a poor precedent.

16. Moreover, the Bill's legal fiction that Rwanda is safe, together with the disapplication of key provisions of the Human Rights Act 1998 (HRA), in effect amounts to a domestic derogation from the European Convention of Human Rights. That derogation risks disturbing aspects of the domestic constitutional settlement as regards Northern Ireland, where the protection of fundamental rights is baked into the Good Friday Agreement/Belfast Agreement.

17. The Bill does not seek to preclude its own ousting provisions from being made subject to a declaration of incompatibility with European Convention of Human Rights under section 4 of the HRA. Thus, the general safety of Rwanda as regards the question of onward removal/refoulement from Rwanda to asylum-seekers' home countries remains litigable domestically. A declaration of incompatibility does not provide a remedy to those affected, but is intended to promote Ministerial consideration as to whether to rectify the offending legislation. In the absence of any rectification, proceedings could be brought for a remedy at the European Court of Human Rights, giving largely foreign judges the role, the Bill seeks to remove from UK judges. There would be no effective remedy domestically, although article 13 of the European Convention of Human Rights requires one. Thus, the involvement of the European Court is inevitable.

18. It is a welcome feature of the Bill that it does not purport to exclude all human rights challenges. But the permitted individual (as opposed to general) challenges under Clause 4 are extremely tightly constrained and narrowly drawn and relate only to conditions in Rwanda, not to the risk of onward removal/refoulement to home countries.

Conclusion

19. The *Safety of Rwanda (Asylum and Immigration) Bill* requires very careful consideration by Parliament before it progresses. The Bill, on any view, sails very close to the wind in terms of what is acceptable from a rule of law and European Convention of Human Rights perspective. Legal challenges are therefore almost inevitable.

The Bar Council
December 2023