Safety of Rwanda (Asylum and Immigration) Bill, Bill 38 (as introduced)

1. This Bill shares various characteristics with its immediate predecessor – the Illegal Migration Act 2023 ("the 2023 Act"). Key aspects of its basic structure and design replicate that of the 2023 Act.[1] As with that Act, the general purpose is to exclude the basic judicial function of ensuring legality of executive action. The means to achieve this are very similar. They include the device of requiring the Home Secretary to act in a specific way so as to exclude any effective judicial review of the way in which he then acts;[2] and the wider device of judicial ouster (i.e., specifying circumstances in which a court or tribunal is barred from considering the legality of the Home Secretary's action).[3]

2. The Bill also borrows from the Nationality and Borders Act 2022 ("the 2022 Act"), albeit in less direct form. As the 2022 Act, this Bill attempts to re-write international law as the executive would prefer that law to be for the purpose of pursing the policy it has adopted.[4] However, it does so in a more circuitous fashion – by requiring a particular course of action (treating Rwanda as safe) and purporting to declare that as compliant with all relevant international law. This device is essentially the substitution of a fictional veneer of compliance with international law in place of actual compliance.

SUMMARY

3. The Bill's primary purpose (elaborated below) is to impose upon the courts an 'opinion'[5] about whether Rwanda is or is not in fact safe. This is intended to prevent anyone, who is not a Rwandan national, resisting any attempt by the Home Secretary to expel them to Rwanda (and thereby wash his hands of any responsibility for them, including any asylum claim they may have made here). The Bill contains various ousters or restrictions on courts to prevent any impediment to that primary purpose. However, it permits limited scope for someone to challenge their expulsion to Rwanda on grounds that are individual to them, albeit they may not – if the Bill is effective – bring any challenge on the basis that their expulsion would lead to their *refoulement* (i.e., to their being returned or sent to another country where their life and liberty are at risk).

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[1] Amnesty UK's analysis of that Act is available here: https://www.amnesty.org.uk/resources/illegal-migration-act-2023-analysis-acts-structure-purpose-and-key-working-parts

[2] Sections 2, 5 and 30 of the Illegal Migration Act 2023 provide example of this.

[3] Sections 54 and 55 are but two of the examples provided by the Illegal Migration Act 2023. They are each specifically to be extended by this Bill (see below).

[4] The Nationality and Borders Act 2022, for example, rewrote various provisions of the Refugee Convention as the Government preferred them to be, see sections 30ff of that Act.

[5] The Bill refers to the 'judgment' of Parliament at Clause 1(2)(b).

CLAUSE 2: PRIMARY PURPOSE AND EFFECT

4. The primary purpose and effect of this Bill is to require officials and ministers – but most importantly, courts and tribunals – to ignore evidence and facts in favour of a fixed opinion as to what the facts are (or are preferred to be). The preferred opinion is that of the Government. By attempting to require the courts to accede to that opinion, this Government Bill is an attempt to not merely fix the facts but to fix them in the favour of one party to proceedings (that party being the Government). The Government asserts that its new Treaty significantly changes the evidential position concerning Rwanda's safety, but by this Bill it seeks to prevent that ever being tested.[6]

5. Clause 2(1) is the primary provision. It states:

> "*Every decision-maker must conclusively treat the Republic of Rwanda as a safe country.*"

6. Clause 1(2)(b) seeks to bolster the legitimacy of that extraordinary measure by the assertion:

> "*…this Act gives effect to the judgment of Parliament that the Republic of Rwanda is a safe country.*"

7. The decision-makers affected by the obligation in Clause 2(1) are expressly intended to be all relevant ministers and officials ("*the Secretary of State or an immigration officer…*") and any domestic "*court or tribunal*": see Clause 2(2). The requirement that ministers and officials ignore all evidence and treat Rwanda as safe is intended to secure their decision-making against challenge to the legality of how it was arrived it – the answer given to the court will be that Parliament has required the minister or official to ignore the evidence (however conclusively it may show Rwanda to be unsafe). This is essentially the Nuremburg defence of 'I was only following orders' (where those orders come from Parliament). The requirement that courts and tribunals ignore all evidence and treat Rwanda as safe is intended to ensure that conclusion of safety, which is required of ministers and officials, can never be contradicted by the judiciary.

8. Clause 1(5) defines what is meant by safety. The definition (see further below) would mean – if the fixed opinion stated in Clause 1(2)(b) were in fact true – there was no impediment to expelling to Rwanda a person seeking asylum in the UK based on any human rights violation in that country or by its authorities.[7] However, the impact of this is to some limited extent moderated by Clause 4 (see below).

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[6] In the legal position it has published, the Government states, "*the treaty, bill and evidence together demonstrate Rwanda is safe*". But the Bill cannot demonstrate anything; and any assertion about what the Treaty and evidence do or do not demonstrate is a matter to be tested. That legal position is here: 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

[7] The Bill applies to a wider group of people than this. Clause 2(2) extends its reach to any person who is or is to be removed to Rwanda under immigration powers (whether or not the person is seeking asylum and however they may have arrived); and Clause 9(2) ensures that it can be applied to such a person regardless of when they may have arrived to the UK.

9. In summary, therefore, the primary purpose of this Bill is twofold:

    - First, to overturn the assessment of evidence by the Supreme Court (and the Court of Appeal before it) concerning the safety of Rwanda.[8]

    - Second, to exclude any assessment of the evidence – whether available today or in the future – that would contradict the preferred opinion of the Government, which is to be fixed for all time (subject to Parliament legislating to repeal or amend the Act).

WHAT IS MEANT BY 'SAFE'

10. Clause 1(5) defines "safe country" for the purposes of this Bill. The relevant part of the definition is:

    > "*(a) …a country to which persons may be removed from the United Kingdom in compliance with all of the United Kingdom's obligations under international law that are relevant to the treatment in that country of persons who are removed there…*"

11. Clause 1(5)(b) is belt and braces. It specifically states that, for the purposes of this Bill, safety includes (but is not limited to) that the country is (i) a place from which the person will not be sent on to another country in breach of international law (this encompasses, but is not restricted to the matter of *non-refoulement*); and (ii) a place in which a person who seeks asylum will have that claim determined in accordance with international law and their rights accordingly respected (this encompasses refugee status determination and Refugee Convention compliance).[9]

12. Clause 1(6) defines "international law". This relates directly to the definition of "safe country", which is based on compliance with international law (see above). The list in Clause 1(6) is made comprehensive by the inclusion of (g), but nonetheless the Bill expressly includes the European Convention on Human Rights, the Refugee Convention, the International Covenant on Civil and Political Rights, the Torture Convention, the Council of Europe Trafficking Convention and customary international law.[10] The purpose of expressly including these specific sources of international law is to avoid any suggestion that Parliament may not have intended Rwanda be conclusively treated (see Clause 2(1)) as a place in which compliance with these was assured.

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[8] The Supreme Court's judgment was handed down on 15 November 2023: https://www.supremecourt.uk/cases/uksc-2023-0093.html

[9] It was on each of these bases that the Court of Appeal and then Supreme Court concluded that Rwanda was not safe.

[10] The various sources of international law specified here were specifically identified by the UK Supreme Court in identifying the various matters of law that would be breached by any expulsion to Rwanda under the previous memorandum of understanding between the two governments (of April 2022).

JUDICIAL OUSTERS

13. As explained above, the primary purpose is to oust a basic judicial function. The function to be ousted is that of assessing the evidence to determine the facts to which law is applied. The primary means to achieve this ouster is Clause 2(1). Whereas Clause 4 provides limited exception to this ouster, the exception it provides is itself subject to severe limitations. Clause 4 is, therefore, addressed separately below under the heading '*Clause 4: Real Safeguard or Figleaf*'.

14. Clause 2(3), (4) and (5) are each essentially belts and braces:

    - Clause 2(3) states that a consequence of Clause 2(1) is that no court or tribunal is permitted to consider any claim or appeal brought by someone against a decision to expel them if that is brought on grounds that Rwanda is not safe.

    - Clause 2(4)(a) states that no court or tribunal is permitted to consider whether Rwanda would remove the person to another country in violation of any international obligations (this covers but is not limited to the principle of *non-refoulement*).

    - Clause 2(4)(b) states that no court or tribunal is permitted to consider whether a person would receive a fair and proper consideration of their asylum (or any similar) claim in Rwanda.

    - Clause 2(4)(c) states that no court or tribunal is permitted to consider whether Rwanda will abide by the agreement made between the UK and Rwandan Governments on 5 December 2023 ("the Rwanda Treaty").

    - Clause 2(5) states that these provisions – i.e., Clause 2(3) and (4) – are to apply notwithstanding any domestic law provision or any interpretation of international law by the court or tribunal.

15. Clause 2(5) and Clause 3 each disapply specific provisions of the Human Rights Act 1998 ("the 1998 Act") in relation to the Bill. In particular, these exclude:

    - taking into account relevant rulings of the European Court of Human Rights (section 2, 1998 Act). This is to be disapplied whenever a court or tribunal is determining any question relating to whether Rwanda is safe. That appears to be a complete ouster for the purposes of the Bill;

    - interpreting legislation, so far as is possible, in compliance with the European Convention on Human Rights as incorporated by the 1998 Act (section 3, 1998 Act). This is expressly stated as disapplied in relation to the entire Bill;

    The following exclusions are made in four specific – nonetheless wide-ranging circumstances:

- the obligation upon public authorities (including the Home Secretary, officials, courts and tribunals) to abide by the European Convention on Human Rights as incorporated by the 1998 Act (section 6, 1998 Act);

- the right of individuals, who are victims of violations of that Convention as incorporated, to bring proceedings (sections 7 and 9, 1998 Act);

- the power of the court to grant a remedy for any violation of that Convention as incorporated (section 8, 1998 Act); and

- *the limitation on proceedings against the Ministry of Defence and/or Secretary of State for Defence in respect of overseas operations (section 7A, 1998 Act). This latter exclusion seems to provide more of a comment on the lack of care in drafting as opposed to having any effect of real substance.*

Clause 3(5) sets out the circumstances in which the above four exclusions (three if the last is discounted as irrelevant) are to apply:

- any decision taken on the basis of Clause 2(1);

- any decision of a court or tribunal concerning whether to grant interim relief in the highly constrained circumstances that are to remain permitted by Clause 4(4); and

- any decision taken on the basis of Clause 4(1) in a serious harm suspensive claim or appeal under the Illegal Migration Act 2023.

16. Clause 5 essentially reproduces and extends the ouster introduced by section 55 of the Illegal Migration Act 2023 to prevent UK courts or tribunals having regard to any interim measure of the European Court of Human Rights. The extension is to apply that ouster to any person facing expulsion to Rwanda (other than a national of that country),[11] however or whenever they may have arrived in the UK.[12]

CLAUSE 4: REAL SAFEGUARD OR FIGLEAF?

17. Clause 4(1) is the sole constraint upon the exclusion of any consideration of Rwanda's safety. It applies to both ministers and officials (Clause 4(1)(a)), and to courts and tribunals (Clause 4(1)(b)). On its face, it permits consideration of whether Rwanda is:

> "*…a safe country for the person in question, based on compelling evidence relating to the person's particular individual circumstances (rather than on the grounds that the Republic of Rwanda is not a safe country in general).*"

18. However, Clause 4 does not permit any consideration – whether on an individual or general basis – of whether the person may be at risk of being sent from Rwanda to

[11] Clause 7(2) excludes nationals of Rwanda from this Bill.

[12] Section 55 of the Illegal Migration Act 2023 only applies to matters relating to the provisions of that Act, which is for relevant purposes here restricted to people who arrived to the UK on or after its passing on 20 July 2023. Clause 5 and the Bill more generally are not restricted to people who arrived on or after that date

any other country in breach of international law (including, but not limited to *non-refoulement*). That is prohibited by Clause 4(2).

19. Clause 4 is also caught by Clause 3. The drafting and structure of the Bill as it affects Clause 4 is especially tortuous. Since the definition of "safe country" is expressly defined by the Bill as including compliance with the European Convention on Human Rights as incorporated by the Human Rights Act 1998,[13] it is at the very least challenging to understand how a provision intended to permit *some* consideration of Rwanda's safety can operate in the face of various exclusions of that Act by Clause 3.

20. Additionally, Clause 4(4) extends the ouster of the power of domestic courts or tribunals to grant an injunction preventing the person's expulsion to Rwanda that was introduced by section 54 of the Illegal Migration Act 2023. The extension is to anyone (other than a national of Rwanda) facing expulsion to that country, whenever or however they may have arrived in the UK.[14] The only circumstances in which such an injunction may ever be granted are (taken from the 'serious harm suspensive claim' provisions of that Act):[15]

> "*…if the court or tribunal is satisfied that the person would, before the review or appeal is determined, face a real, imminent and foreseeable risk of serious and irreversible harm if removed to the Republic of Rwanda.*"

21. Even putting aside the difficulties that may arise from the tortuous drafting, it is not resolved how consideration of any particular risk to a person (not including *refoulement* etc, which is not permitted to be considered at all) may rationally be distinguished from the question of whether that risk may be shown by evidence so compelling as to demonstrate a risk extending to all or near all other persons to whom it could reasonably be imagined the question of Rwanda's safety might ever apply.

22. Nonetheless, Clause 4 is clearly the basket into which the Government seeks to place all the eggs relating to its claim this Bill will maintain its compliance with international law. This claim is made notwithstanding that, as was the case with its immediate and recent predecessor, the Home Secretary has been compelled to accompany this Bill with a declaration that he cannot state it to be in compliance with the UK's obligations under the Convention rights as domesticated by the Human Rights Act 1998.[16]

CONCLUSIONS

23. The primary purpose of this analysis is to set out how the Bill is constructed and is to operate. Commentary has been kept to a minimum. Nonetheless, the following observations seem especially necessary in present circumstances:

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[13] Clause 1(5) and (6).

[14] Section 54 of the Illegal Migration Act 2023 only applies to matters relating to the provisions of that Act, which is for relevant purposes here restricted to people who arrived to the UK on or after its passing on 20 July 2023. Clause 4(3) and the Bill more generally are not restricted to people who arrived on or after that date.

[15] The wording of Clause 4(3) is taken from section 39(3) of the Illegal Migration Act 2023.

[16] This was also the case with the Illegal Migration Act 2023.

- It is vital to recall that the Bill is a direct result of the Government's policy of near 3 years seeking to refuse all responsibility for the asylum claims of near anyone who may ever claim asylum here.[17] While ministers emphasise 'small boats', their policy applies to almost any type of journey anyone could make to seek asylum in the UK.[18] The policy has already proved ruinous, as well as being immoral and plainly incompatible with the UK's asylum responsibilities.[19] But the Government has come so far that it refuses to let it go. Instead, it is determined to expel somebody to Rwanda in the hope that this may give some appearance that this miserable policy is at all workable.

- The determination to expel people and give that appearance concerning workability of policy is now to be extended by this Bill to inviting Parliament to exercise its authority to require the facts to be conclusively treated as contrary to the recent ruling of the UK Supreme Court and regardless of any and all evidence that contradicts the position the Government would prefer. It is a basic principle that courts apply the law according to the facts as shown by the evidence before them. This Bill subverts that principle, even destroys it. Whether Parliament has authority to do this may be questioned. That it should never attempt to do so ought to be unquestionable.

- The relevant facts that are to be treated in this way are vital to any proper application of international and domestic law relating to the most serious matter of life and liberty. It is entirely uncontroversial that what is being attempted is an affront to the rule of law, the UK's legal system (and its highest court in particular), and several international agreements to which the UK is a party, including the European Convention on Human Rights. That would be so even if the Supreme Court had reached the exact opposite conclusion to the one it did because fixing the facts regardless of the evidence now or into the future is fatal to the prospect of any effective remedy for violation of the human rights that are at stake. The various provisions in this Bill that seek to exclude consideration or application of human rights only serve to emphasis this.

- The message sent abroad is dreadful. The UK Government is currently determined – and is asking (demanding when Government Whips get to work) that Parliament be equally determined – on subverting or destroying

[17] The policy begins with the inadmissibility rules first introduced by the Statement of Changes in Immigration Rules (HC 1043), which took effect on 31 December 2020. Since then, the policy has been transferred into statute by section 16 of the Nationality and Borders Act 2022; and then made mandatory and inflexible by section 5 of the Illegal Migration Act 2023 whenever the Home Secretary may fully commence that Act. Through the intervening period, and these various developments, the underlying policy has remained essentially the same while being ever more greatly extended in its reach.

[18] As both the Bill and the previous Acts make clear, it is not merely anyone who arrives on a small boat who is caught by the policy or the Rwanda deal. It is anyone seeking asylum unless they have permission to come to do so (there are no visas to do this) or come without passing through any other country (travel direct from some places is impossible; and such travel has long been made well-nigh impossible by checks on who is ever permitted to board a plane).

[19] The asylum backlog has escalated at an alarming rate since the policy was first introduced. The human misery and the cost of it is manifest and extreme.

international agreements of the most serious nature to any individual under the pretence of constitutional and legal legitimacy. Among the miserable implications of this is sending a message to the UK Government's would-be partner that giving a pretence of meeting international agreements while thoroughly abusing them is all to the good – in which case, how can any Treaty signed by either Government promising to abide by such agreements be of any worth whatsoever?[20]

- The sole provision that purports to offer any mitigation of what is to be done by this Bill would, at very best, require courts to consider the relevant facts in every individual case notwithstanding that the evidence has and, at the very least, may continue to conclusively resolve any question of those facts as a matter of generality. If so, the Bill is inviting ruinous expense of administrative and court time, with all the risk of arbitrary and inconsistent decision-making, in going through the motions of considering what is already well-settled.

- Finally, Parliament – and Government – ought urgently reflect on the wisdom of the path along which ministers are travelling. This Bill is only the most recent point on that trajectory. It is in very much the same vein as the Illegal Migration Act 2023 in purpose, structure and content.[21] The question ought urgently to be confronted whether this way of drafting and making legislation can be at all safely encouraged. If the right to asylum from persecution and the right not to be tortured can be despatched in this manner, what right of anyone is safe from legislation of precisely the same kind?

24. The enormity of all that is going on here can easily be appreciated by considering the following. The courts are expected – and indeed any legitimate authority is expected – to apply the law on the basis of proper assessment of what the facts truly are according to the evidence rather than on the basis of what the Government or anybody simply wants them to be. If the Government truly believes its Treaty, or any 'new' evidence, can show the facts to be different in any material way to the courts' assessment of all the evidence placed before them – including all the evidence the Government placed before them – then it is free to test that *in the courts*. This Bill is an attempt to simply avoid any such proper consideration of fact and evidence. Ministers seek to achieve that avoidance under a pretence of compliance with international law. Others – including some of their predecessors – would prefer to achieve that avoidance without any pretence.

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[20] It appears to be a key part of the Government's case that the Treaty it has secured includes commitments of the Rwandan Government to abide by the international agreements the UK Supreme Court has found it cannot be relied upon to satisfy. Yet, as the Bill demonstrates, the UK Government is itself unconcerned with truly abiding by such agreements and believes it both possible and reasonable to make laws as a means to pretend compliance in the face of obvious violation.

[21] More on that Act is available here: https://www.amnesty.org.uk/resources/illegal-migration-act-2023-analysis-acts-structure-purpose-and-key-working-parts