HMG LEGAL POSITION

IN RESPECT OF THE SAFETY OF RWANDA (ASYLUM AND IMMIGRATION) BILL 2023

This is the Government's legal position on the Safety of Rwanda (Asylum and Immigration) Bill 2023 ("the Bill") and accompanying measures.

The issue of illegal migration into the United Kingdom by small boats is a matter of significant public concern. Illegal arrivals by unsafe routes put individuals in danger and place substantial additional burdens on to public services. These migrants are coming to the United Kingdom from safe countries. The Government estimates that if illegal immigration goes unaddressed, the costs of asylum accommodation alone could increase to £32 million per day by 2026 – equivalent to £11 billion per year.[1] The Government therefore needs to use all the powers at its disposal to prevent and deter unlawful migration.

The Government respects the decision of the Supreme Court in its judgment in *AAA v Secretary of State for the Home Department*. It is precisely to address the concerns of the Supreme Court that the Government has concluded a new Treaty with the Republic of Rwanda with additional safeguards and guarantees, as well as preparing an evidence pack on what has changed and how those concerns are being addressed.

The Government will invite Parliament to agree with its assessment that the Supreme Court's concerns have indeed been properly addressed; and to enact the measures in this Bill accordingly.

The Government's approach is justified as a matter of Parliamentary sovereignty, constitutional propriety, UK law, and the UK's international obligations.

The Treaty

The Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Rwanda for the provision of an asylum partnership ('the Treaty'), signed in Kigali on 5 December 2023, will be scrutinised in Parliament and ratified in both countries in accordance with their laws.

The Treaty addresses and deals with the factual concerns identified by the Supreme Court regarding the policy of relocating illegal migrants to Rwanda. It provides for clear, detailed, and binding obligations on both parties in international law. It introduces a complete bar on any onward removal of relocated individuals from Rwanda, other than in exceptional circumstances back to the UK (upon request). It introduces a new system for assessing and deciding asylum claims in Rwanda and includes new monitoring mechanisms to ensure practical compliance with the terms of the Treaty. It introduces binding dispute settlement and provides for the opportunity to suspend and terminate the Treaty if required.

The Bill is predicated on both Rwanda and the UK's compliance with international law in the form of the Treaty, which itself reflects the international legal obligations of the UK and Rwanda. The Government of the Republic of Rwanda has also been clear that it would withdraw from involvement in the scheme if the UK were to breach its international obligations, therefore rendering the Bill unable to work in achieving the policy intention of deterrence – as there would be no safe country for the purposes of removal.

[1] Home Office (2023), *Illegal Migration Act Impact Assessment HO 0438*

The package of measures will include an updated evidence pack, to be published on Tuesday 11 December 2023. The evidence pack will provide details to Parliament as to the present situation and represents a material update to the factual picture considered by the courts, where much of the evidence was generally "frozen" as at the time it was submitted to the Divisional Court in summer 2022.

The United Kingdom continues to be bound by and respects its international obligations. The Treaty, and the developments that will be set out in the evidence pack, thus provide for compliance with the Government's substantive obligations under international law. No one will be sent into a position where they would face a real risk of harm. The Supreme Court's judgment made explicitly clear that the changes needed to eliminate the risk of refoulement may be delivered in the future. The Government is satisfied that the measures do 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.

The Bill

Constitutional and domestic law

This Bill reflects that Parliament is sovereign and can change domestic law as it sees fit including, if that is Parliament's judgment, requiring a state of affairs or facts to be recognised. This is the central feature of the Bill and many of its other provisions are designed to ensure that Parliament's conclusion on the safety of Rwanda is accepted by the domestic courts. The key measures in the Bill are as follows:

- A clear statement of Parliament's view that Rwanda is safe, "notwithstanding" all specified domestic legislation and the common law, and any alternative interpretation of international law including customary international law;
- A clear statement that the validity of domestic legislation subsists "notwithstanding" international law, reflecting the dualist principle that domestic and international law exist on different planes and international law is not given effect domestically unless Parliament expressly chooses to do so;
- Very limited scope for individual challenges based on compelling evidence relating specifically to the person's particular individual circumstances, and limiting any suspensive relief to where a person can demonstrate a real risk of serious and irreversible harm if they are removed during that challenge;
- Specific clauses ousting the Human Rights Act, including s. 2 and s. 3 HRA, and for the first time in domestic legislation precluding the domestic courts from considering claims under s. 6 HRA;
- A clause making clear that it is for a Minister of the Crown (and they alone) to decide whether the United Kingdom will comply with an interim measure. Clause 5(3) makes clear that a court must not have regard to any rule 39 interim measures.

Effect of the Bill

The cumulative effect of these provisions, and those laid out in the Illegal Migration Act, is to preclude almost all grounds for individual challenge that could be used to suspend or frustrate removal. This means that illegal migrants will not be able to:

- make an asylum claim in the UK, which 90% of last year's small boat arrivals made.
- take advantage of modern slavery protections, as 71% of those detained for removal in 2021 did.

- argue that they face a risk of refoulement in Rwanda, as every single one of the claimants to the High Court from the original Rwanda flight did.
- make any other ill-founded human rights claim to frustrate removal, given the Bill disapplies the relevant sections of the Human Rights Act 1998.

In short, the domestic courts cannot accede to or consider claims which assert Rwanda is generally unsafe or that an individual will be refouled from Rwanda.

Ousters and deeming clauses

Parliament is able, with clear and express words, to limit access to the domestic courts and, while previous attempts have not always prevailed, has done so in the recent past in ways that have been upheld in the courts. Those recent successes have been clauses which, whilst they ousted most claims, did not oust all claims. As the judgment of the Court of Appeal in the most recent case of *R (LA (Albania)) v Upper Tribunal* [2023] EWCA Civ 1337 made clear, the fact the ouster was not a total one was an important consideration for the Court to give effect to it. The court decided that the ouster did not offend the rule of law and gave effect to it.

Deeming clauses are used frequently in domestic law and there is a rich case law on how they are to be interpreted. In *Fowler v Revenue and Customs* [2020] UKSC 22, Lord Briggs, writing in a unanimous Supreme Court judgment, endorsed the position that: "*A deeming provision should not be applied so far as to produce unjust, absurd or anomalous results, unless the court is compelled to do so by clear language. But the court should not shrink from applying the fiction created by the deeming provision to the consequences which would inevitably flow from the fiction being real*. *As Lord Asquith memorably put it in East End Dwellings Co Ltd v Finsbury Borough Council [1952] AC 109, at 133: 'The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs.'"*

The Bill will allow Parliament to confirm that it considers it has sufficient material before it to judge that Rwanda is in general safe and that this finding should not be disturbed by the courts.

It is not, however, possible for Parliament reasonably to conclude that Rwanda will always be safe for every potential individual liable to removal at any point in the future, irrespective of their specific personal circumstances. For that reason, the Bill does allow for an exceptionally narrow route to individual challenge to ensure that the courts will interpret the relevant provisions in accordance with the will of Parliament. Not to do so would mean ministers accepting that those unfit to fly, for example those in the late stages of pregnancy, or sufferers of very rare medical conditions that could not be cared for in Rwanda, could be removed with no right to judicial scrutiny.

In any case, completely blocking any court challenges would be a breach of international law and alien to the UK's constitutional tradition of liberty and justice, where even in wartime the UK has maintained access to the courts in order that individuals can uphold their rights and freedoms. Furthermore, such a wider ouster clause would have to confront unorthodox obiter dictum made in cases such as *Jackson v Attorney-General* [2005] UKHL 56 and *Privacy International* [2019] UKSC 22.

The Bill limits unnecessary challenges whilst maintaining the principle of access to the courts where an individual may be at a real risk of serious and irreversible harm. Taken as a whole, the limited availability of domestic remedies maintains the constitutional balance between Parliament being able to legislate as it sees necessary, and the powers of our Courts to hold the Government to account.

Requirement for Individual challenges

It is also that extremely limited route for individual challenge which ensures that the Bill is compatible with the UK's international obligations. Articles 2, 3 and 13 ECHR require the availability of domestic challenges to removal on the grounds of individual circumstances, and the availability of an automatic suspensive remedy. Two things are to be noted in that respect.

First, the Bill does not disapply s. 4 HRA. That means that the domestic courts may consider whether to make a s. 4 declaration of incompatibility. As set out in this statement, and the ECHR memorandum submitted to Parliament, the Government believes that there is no basis for such a declaration.

However, s. 4(6) HRA makes clear that a declaration of incompatibility does not affect the validity or application of the legislation. For that reason, if such a declaration were to be made, it could not be used to support challenges in individual cases or stop flights from taking off or alter domestic law. s. 4(6) is expressly clear in this regard. Rather, it 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 Rwanda as Parliament considered the issue. The principle that Parliament should be able to address any determination by the courts of incompatibility, rather than primary legislation being quashed by the courts, is part of the fundamental basis of Parliamentary sovereignty.

Second, the Bill does not entirely preclude the possibility of a person being able to rely on some exceptional, individual circumstance that is so rare that it could not have been predicted by Parliament. It is to be emphasised that, as the Bill makes quite clear, this exception cannot be used to undermine the core provisions deeming Rwanda to be a safe country to which to send people.

As noted above, the Bill (together with the IMA) has removed the ability for people to make an asylum claim in the UK, from exploiting modern slavery protections to prevent removal from the UK, or a judicial review on those grounds. This Bill goes even further to narrow the route to individual challenges that can prevent removal than the IMA did and also precludes claims under s. 6 HRA that removal would be a breach of human rights law, including the right to a family life, and a claim based on onward removal to another country.

The process for making such a claim is tightly drawn. For those who are not in scope of the Illegal Migration Act 2023, the individual will first need to present evidence of their protection claim to the Home Office, which can certify spurious claims as "manifestly unfounded". The only challenge to that is judicial review which will not prevent removal unless the high bar for obtaining interim relief set out in this Bill is met. If their claim is not certified, the claimant can only appeal against the refusal of their claim if they have compelling evidence that Rwanda is not safe in their particular individual circumstances. At each stage, if the claimant is unsuccessful, they will be removed. For those in scope of the Illegal Migration Act, the only legal challenge that will prevent removal is a successful claim that the individual will face a real, imminent and foreseeable risk of serious irreversible harm if removed to Rwanda. As a result, the majority of appeals under the scheme will be heard out of country.

Given the requirement to provide automatic suspensive remedies for arguable claims, completely ousting every court challenge or all individual challenges would demand complete confidence that all those individual claims are so unlikely that they could <u>never</u> meet the arguability threshold. That is not possible, and doing so would mean that there would be no respectable argument that the Bill is compatible with international law. It would remove the government's ability to defend the scheme in Strasbourg and it would undermine our commitment to the binding constraints of the international treaty just signed with Rwanda. It would also go against Rwanda's own explicit wishes that our partnership with

them remains compliant with international law, and likely collapse the scheme. As such, the Bill must allow for claims based on wholly exceptional individual circumstances. While it is not possible to predict what cases may arise, we do not think there will be many, if any. For any such claim a person would have to provide compelling and credible evidence that their specific circumstances put them at immediate risk of serious and irreversible harm if they were to be removed. That is a very high barrier to cross.

Conclusion

As set out above, the Treaty, Bill and evidence together demonstrate Rwanda is safe for relocated individuals, that the Government's approach is tough but fair and lawful, that it has a justification in the UK's constitution and domestic law, and it seeks to uphold our international obligations. This is a novel and contentious policy, and the UK and Rwanda are the first countries in the world to enact it together. There are risks inherent in such an innovative approach but there is a clear lawful basis on which a responsible government may proceed. For the reasons set out in this paper, a Bill that sought to oust all individual claims would not provide such a basis.