

What is in the prime minister's 'emergency' asylum legislation?

Examining the Safety of Rwanda Bill and Rwanda Treaty



Introduction

Just three weeks after the Supreme Court handed down its judgment finding that it is not safe for the UK to send asylum seekers to Rwanda,^{*} the government has introduced the Safety of Rwanda (Asylum and Immigration) Bill to parliament. The bill states that it

“gives effect to the judgement of Parliament that the Republic of Rwanda is a safe country.” (clause 1(1)(b))

Parliament is therefore being asked to substitute its judgment for that of the Supreme Court on whether Rwanda is safe for UK asylum seekers. At the same time as introducing the bill, the government has laid a treaty with the Rwandan government before parliament. This short briefing note considers the implications for constitutional and international law of the government’s latest Rwanda roll of the dice.

It finds that the bill puts parliamentarians in an invidious position, because it is not asking them to ‘overrule’ a recent Supreme Court judgment by changing the law, but to depart from the Supreme Court’s assessment of the facts. Parliament is asked to declare that the treaty with Rwanda has sufficiently changed the circumstances that the reasoning and findings of the Supreme Court no longer apply. It is suggested that respecting the principle of the separation of powers means that parliament should leave it to the courts to decide whether Rwanda is safe or not.

Indeed, one of the more puzzling features of the government’s approach is that the bill appears to be intended to allow asylum seekers to challenge parliament’s judgment that Rwanda is safe, if the bill is enacted, by seeking a declaration of incompatibility under the Human Rights Act 1998 (HRA). A declaration would be sought that by requiring courts and officials to treat Rwanda as safe, parliament has exposed asylum seekers being sent to Rwanda to a real risk of refoulement to their home countries and thus torture or serious mistreatment, contrary to Article 3 of the European Convention on Human Rights (ECHR).

Therefore the courts will reconsider whether Rwanda is safe in the light of the treaty if the bill is passed. Given that the safety of Rwanda is destined to return to domestic courts again anyway, it seems even less appropriate for parliament now to try to determine the issue of fact for itself, on which it is ill-suited to pronounce and which involves it appearing to contradict the ruling of the Supreme Court. If the government has confidence enough to ask parliament to say that Rwanda is now safe, it could make the argument in court. Since it will ultimately be the courts that decide this issue, it is surely better that they get on with it.

Given that the bill does not exclude the ability of domestic courts to decide whether Rwanda is safe, the legal effect of the bill if enacted would be limited to preventing domestic courts from granting interim relief – should they consider it appropriate to do – to prevent transfers to Rwanda starting, pending determination in court of the government’s arguments that the circumstances have changed since the Supreme Court ruled. This gives rise to two issues, one practical and one more fundamental.

^{*} *R (AAA (Syria & Ors) v Secretary of State for the Home Department* [2023] UKSC 42, 15 December 2023.

The practical issue is whether this objective is worth parliament pursuing in circumstances in which it remains open to the European Court of Human Rights (“Strasbourg Court”) to grant an interim measure preventing flights from starting. The government remains bound under international law to abide by such measures and the bill does not depart from the UK’s international obligations in this respect.

The more fundamental issue is that the government has an obligation under Article 13 of the ECHR to provide individuals with effective remedies for breach or threatened breach of their rights. Whilst the ability to seek a declaration that primary legislation is incompatible with ECHR rights might satisfy this obligation in some contexts, this is not the case in relation to removals where there is an arguable case of a real risk of torture or serious mistreatment. In this context, Article 13 requires that individuals can obtain a remedy in domestic law with suspensive effect.

Therefore the principal legal effect of the bill – namely, preventing domestic courts from suspending transfers to Rwanda – is itself inconsistent with international law.

What did the Supreme Court decide in November 2023?

The Supreme Court held that UK asylum seekers transferred to Rwanda face a real risk of being returned to their countries of origin even if they are genuine refugees, which would contravene the principle of ‘non-refoulement’ and expose such persons to a risk of torture, cruel, inhuman or degrading treatment or punishment.

This would breach not only Article 3 of the ECHR but, as Lord Reed and Lord Lloyd-Jones explained in the court’s judgment, also other international obligations, in particular the UN Convention against Torture, the International Covenant on Civil and Political Rights and the Refugee Convention. It is therefore not the case, as some have suggested, that the Rwanda policy has been thwarted by the ECHR or by the Strasbourg Court. The policy has been found to be unlawful by the UK’s own domestic courts applying a principle of international law that is very widely accepted.

The Supreme Court accepted the good faith of the Rwandan government in entering into a memorandum of understanding (MoU) with the UK to govern transfer of asylum seekers. The issue, the court explained, was not the good faith intention of the Rwandan government but “its practical ability to fulfil its assurances at least in the short term”. (at 102).

The court found that “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*” (at 93, emphasis added). By “the short term” the court was clearly referring to months rather than days or weeks.

The court referred to several categories of evidence. First, it pointed to serious concerns with the general human rights situation in Rwanda. It noted that at the United Nations Human Rights Council’s Universal Periodic Review of Rwanda in Geneva in January 2021, the UK government criticised Rwanda for “extrajudicial killings, deaths in custody, enforced disappearances and torture”. The UK government therefore chose to do its

asylum deal with a country it had itself criticised for failing to comply with international law. The court pointed out that advice to ministers in 2021 during the process of choosing a partner country for the asylum policy, that “Rwanda had a poor human rights record” (at 76).

Second, the court identified serious failings in the operation in practice of the Rwandan asylum processing system: “significant changes need to be made to Rwanda’s asylum procedures, *as they operate in practice*, before there can be confidence that it will deal with asylum seekers sent to it by the United Kingdom in accordance with the principle of non-refoulement” (at 104, emphasis added).

Third, the court referred to a number of examples of arbitrary expulsions contrary to international law. Perhaps most striking was that under an agreement with Israel in place until 2018, Rwanda agreed to receive and process asylum seekers. The court stated that there was “no dispute that persons who were relocated under the agreement suffered serious breaches of their rights under the Refugee Convention” and that many asylum seekers were “routinely moved clandestinely” out of Rwanda (at 96).

The court concluded that there is a culture within Rwanda – across various agencies – of “at best, inadequate understanding of Rwanda’s obligations under the Refugee Convention”. The court explained that in order to remove a real risk of refoulement, there would need to be both “structural change” and “capacity building”. This “may not be straightforward” as it requires “an appreciation that the current approach is inadequate, a change of attitudes, and effective training and monitoring”. (at 104).

The court also cautioned that increased monetary investment and monitoring are not themselves sufficient to remove the risk: “over time”, it stated, this “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” (at 93).

It accepted the government’s argument that the capacity of the Rwandan system can and will be built up. The “structural and capacity-building needed to eliminate that risk may be delivered in the future, but they were not shown to be in place at the time when the lawfulness of the policy had to be considered in these proceedings”.

What does the new treaty change?

On 5 December the government signed a new treaty with the Rwandan government and laid it before parliament. The treaty, it claims, directly addresses the Supreme Court's judgment. Much of what is contained in the treaty is, however, also found in the MoU that was considered by courts. The two main changes are as follows.

Article 10.3 provides that no person shall be removed from Rwanda even if their asylum claim is rejected. This is intended to meet the concern that asylum claims are wrongly rejected by Rwanda and thus genuine refugees sent back to their home countries. The treaty provides that such persons should instead be permanently settled in Rwanda.

The treaty sets out a new structure for the determination of asylum claims by UK transferred asylum seekers. Claims will be considered by a First Instance Body, with an appeal to an Appeal Body made up of judges from a mix of nationalities (given in the document's annex).

The Safety of Rwanda Bill refers to these elements of the treaty, in clause 1(3), confirming that these are the elements that the government will rely upon as having moved the dial.

Does the treaty mean Rwanda is safe?

The fundamental difficulty with the government's position that the treaty has rendered Rwanda safe is that the treaty – in itself – is not capable of addressing the issues that the Supreme Court identified as giving rise to a real risk of refoulement from Rwanda.

The core finding of the Supreme Court was not that the terms of the previous MoU were not binding in law, or were insufficiently protective, but that the Rwandan government does not possess the practical ability to fulfil its assurances to the UK government, at least in the short term. The court anticipated that structural changes might be made to the Rwandan asylum system, but as these had not been implemented and as this would need to be accompanied by effective training and capacity building, it found Rwanda to be unsafe. The treaty changes set out a framework for structural change, but this is dependent on effective implementation, training and cultural change to be effective.

The most salient elements of the treaty are now briefly considered.

Right of settlement in Rwanda

The obligation in Article 10.3 not to return persons whose asylum claims are not upheld may be a key part of the government's case in parliament. The government argued before the Supreme Court that the deficiencies in the Rwandan asylum system did not matter because Rwanda would not remove any persons transferred from the UK even if their asylum claims were refused. The government argued, presumably on the basis of its discussions with the Rwandan government, that the Rwandan government does not send persons to countries unless it has an agreement with the governments of those countries to receive such persons, and it does not have such agreements with countries from which UK asylum seekers emanate.

Therefore such persons would remain in Rwanda. The Supreme Court made two points in response: (i) it is unnecessary for Rwanda to have agreements in order to return persons to their home state, where they have a right to reside; and (ii) the “absence of such agreements has not prevented refoulement, direct or indirect, from occurring in practice as we have explained” (at 94).

Article 10.3 is intended to shore up the argument that the government lost in the Supreme Court, by allowing it to say that there is now a promise by the Rwandan government, enforceable by the UK, that unsuccessful asylum seekers will be settled in Rwanda. But the argument faces formidable objections.

The second reason given by the Supreme Court (above) for rejecting the argument first time around remains highly salient: if the Rwandan government previously considered that it could not return persons to their home countries without an agreement with such countries, but officials nonetheless expelled such persons from Rwanda, there is reason for thinking that officials might likewise expel UK-transferred persons contrary to the commitment of the Rwandan government in Article 10.3.

Indeed, the Supreme Court’s finding that UK asylum seekers face a real risk of refoulement is by no means predicated solely on the fact that the Rwandan asylum system fails to correctly establish refugee status in many cases (and that persons wrongly refused asylum are thus at risk of return). The Supreme Court also referred to examples of arbitrary expulsion contrary to international law, such as the clandestine removal of numerous persons in breach of the agreement with Israel and evidence of recent cases of persons being “peremptorily rejected”, “forcibly expelled” and “threatened with refoulement” outside the asylum system (at 86 and 89). The lack of understanding and observance of international law norms by officials identified by the Supreme Court goes beyond persons assessing asylum applications.

Revealingly, Article 10.3 itself expressly recognises the problem that it might not be observed on the ground. It states: “The Parties shall cooperate to agree an effective system for ensuring that removal contrary to this obligation does not occur... which includes systems... for... regularly monitoring the location of the Relocated Individuals”. This implicitly recognises the existence of a real risk of non-compliance, but the “effective system” and other “systems” recognised as necessary are yet to be agreed, let alone in place, operational and demonstrably effective.

New structure for determining asylum claims

Much of the focus of argument before the courts was on deficiencies in the Rwandan asylum system. This is therefore also the main, but by no means the exclusive, focus of the Supreme Court’s judgment. Structural change to the Rwandan asylum processing system was recognised as a necessary part of what would need to be put in place to render Rwanda safe for UK asylum seekers. The treaty seeks to achieve this by providing for the creation of a new First Instance Body and Appeal Body. These might prove to be effective, or the system might continue to operate much as it has operated in the past.

The First Instance Body might, for instance, be staffed by the same government officials who currently make asylum determinations. While the treaty specifies they must be “appropriately trained” (Annex B, 3.3), the Court of Appeal explained that it had not been shown that “officials would be trained adequately to make sound, reasoned, decisions” and the training “is not sufficient to equip [officials] *to perform their functions properly*”.^{*} A requirement for the provision of legal assistance (Annex B, Pt 5) is welcome, but again dependent on the effectiveness of its implementation in practice. Similarly, a requirement in the first three months for the body to take into account the opinion of a seconded expert is welcome, but it is unclear what if any contribution it will make.

The Appeal Body must be co-chaired by a Rwandan judge and a judge drawn from another Commonwealth country. They must select other judges with a “mix of nationalities”. However, the body could be drawn predominantly from the Rwandan judiciary and individual appeal panels could be constituted in whole or with a majority of Rwandan judges. It also remains subject to the ordinary Rwandan courts.

The points made by the Supreme Court about the current right of appeal to the Rwandan courts therefore seem equally applicable to the Appeal Body: “the system is... untested” and there is “a risk of a lack of independence in politically sensitive *cases*” (at 83–84).

Other matters

The treaty provisions concerning a Monitoring Committee of independent persons and Joint Committee of senior officials largely (albeit not entirely) replicate those that were proposed under the MoU and the courts did not consider that they removed the real risk of refoulement. The key point made by the courts is that such arrangements cannot stop refoulement happening in the first place, but at best can detect failings and contribute to improvements. The government of Rwanda also appears to have been unwilling to give these bodies enforcement powers. The Joint Committee can make “non-binding recommendations” (Article 16.2), while the Monitoring Committee can “advise” and “suggest improvements” (Article 15.3). It is for the Rwandan government to decide whether or not to accept their views.

Article 11 includes an obligation for Rwanda to facilitate the return of persons transferred by the UK at the request of the UK government. A similar provision was contained in Article 11 of the MoU by which the Rwandan government promised to facilitate returns should the UK government be legally obliged to repatriate individuals. The fact that this is now legally binding may be of some significance to whether interim measures are necessary pending any further court decision.

One of the main differences between the domestic courts in refusing interim relief and the Strasbourg Court in granting it was a difference as to their level of confidence in Article 11 of the MoU. However, things have now moved on. In the light of the Supreme Court’s judgment finding that UK asylum seekers face a real risk if returned to Rwanda, the ability to repatriate individuals is unlikely to be so important, given that individuals can only be repatriated if they remain in Rwanda and the Supreme Court has found that there is a real risk some will not be.

* [2023] EWCA Civ 745 at 99 and 259.

Should parliament designate Rwanda safe?

Clause 2 of the Safety of Rwanda Bill provides that the secretary of state, immigration officers and the courts must “conclusively treat Rwanda as a safe country”. The term “safe” is defined to mean a country to which a person may be removed in compliance with all of the UK’s international obligations (clause 1(5)).

The effect of this clause is to require domestic authorities to treat Rwanda as a country to which asylum seekers can be transferred without facing a real risk that they will be returned to their country of origin to face mistreatment or death, even if such a risk does in fact exist. It requires officials and courts to ignore the judgment of the Supreme Court.

There is nothing wrong in principle with parliament designating certain countries as safe for the purpose of international non-refoulement obligations. European countries were deemed to be safe by the Asylum and Immigration (Treatment of Claimants, etc) Act 2004.*

There is, however, a critical difference between the designation of such countries and the case of Rwanda. The Supreme Court has found that Rwanda is not a safe country to send asylum seekers.

For parliament to contradict that finding would infringe the constitutional principle of the separation of powers, which requires parliament to “respect” the “proceedings and decisions of the Courts”.** This is a principle of the highest importance. Parliament is not being asked – as it often is – to “overrule” a judicial decision by changing the law. It is being asked to say that the facts are not as that court found them to be.

Even if there is an argument that there has been a material change of circumstances, the proper place for that to be determined is in the courts, not parliament. If the government has confidence that the situation has changed, it should be going back to court as quickly as possible, not asking parliament to perform a judicial function as a short cut.

Furthermore, if parliament designates Rwanda as safe, thus allowing transfers to Rwanda begin, it will likely place the UK in breach of international law given that, as explained above, the risks and problems identified by the Supreme Court cannot be cured by the treaty alone.

It is, of course, possible that the government will produce other arrangements or evidence to parliament, in addition to the new treaty, on which it will seek to rely. If such material is produced, it will have to be considered on its merits, but such an iterative process of adducing material would simply underscore how deeply unsatisfactory it is for the government to ask parliament to depart from rulings of the courts on the facts. Parliament cannot sensibly set itself up as if it were a further court of appeal considering fresh evidence. Nor can it sensibly make laws, particularly laws purporting to proclaim facts, if the material and evidence is evolving.

* See Hickman T, ‘Rwanda Redux’, *London Review of Books*, 6 December 2023.

** *R (Wheeler) v Office of the Prime Minister* [2008] EWHC 1409 (Admin) at 46.

Parliament should therefore decline to declare Rwanda safe. If the government truly considers circumstances have changed, it can decide to commence transfers to Rwanda and defend fresh proceedings in court on the basis that the treaty has eliminated the real risk of refoulement identified by the Supreme Court.

What would be the powers of domestic courts if the bill becomes law?

The Safety of Rwanda Bill would, however, allow the government to start transfers to Rwanda without having to go back to the domestic courts. Clause 2(1) of the Safety of Rwanda Bill would, if enacted, require the secretary of state and the courts to conclusively treat Rwanda as safe. Subclauses (3) and (4) of clause 2 provide belts and braces to this legislatively imposed fiction. The effect would be that courts would not be competent to prevent transfers to Rwanda from starting and the government would not need to establish that the treaty has eliminated the risk of refoulement.

The bill nonetheless would preserve two roles for the domestic courts. By clause 4, courts would be allowed to consider whether individuals transferred to Rwanda would face a real risk of harm in Rwanda due to their individual circumstances. This addresses a different question, namely individuals who might face a risk in Rwanda itself due to their individual circumstances; it does not concern the risk of individuals being subject to onward return to their home country from Rwanda. The preservation of this role for the courts therefore doesn't compensate for stripping the courts of the ability to prevent transfers to Rwanda on the basis that it is not in general a safe country for asylum seekers because of the risk of return to their home countries.

Secondly, the bill appears intended to preserve the ability of domestic courts to make a declaration of incompatibility under section 4 of the Human Rights Act (HRA) to the effect that the Safety of Rwanda Act is contrary to Article 3 of the ECHR. Clause 3 of the bill would disapply parts of the HRA. However, it does not disapply section 4. The effect of this is nonetheless not without ambiguity,^{*} and government should be required to confirm that it is, indeed, its intention to preserve the ability of individuals to seek a declaration of incompatibility.

The purpose of preserving the ability to challenge the legislation under section 4 of the HRA is presumably to ensure that the UK does not breach Article 13 of the ECHR, in the light of the creditable insistence of the Rwandan government that the bill must not breach international law.^{**} Article 13 requires signatory states of the ECHR to ensure that individuals have an effective remedy for the breach of their ECHR rights.

^{*} Section 4(1) of the HRA requires that a declaration can be made in proceedings in which the court determines whether a provision of primary legislation is compatible with a convention right; however, proceedings under sections 6 and 7 of the Act would be excluded by the bill. The point therefore should be clarified in a *Pepper v Hart* statement or by amendment.

^{**} Letter from the prime minister to former minister Robert Jenrick MP (Hymas C, Riley-Smith B and Gutteridge N, 'Robert Jenrick quits over Sunak's 'fatally flawed' Rwanda Bill', *The Telegraph*, 6 December 2023.

While declarations of incompatibility do not affect the continuing operation of legislation, in practice legislation is always amended to comply with such declarations and the government relies upon section 4 of the HRA as satisfying its obligation under Article 13 where primary legislation is said to contravene the ECHR.

The preservation of the ability of domestic courts to consider whether the Safety of Rwanda Bill, if passed, is compatible with the ECHR is welcome. It will allow the courts to consider the treaty and the argument that it moves the dial. But this is not adequate to comply with international law.

What is required to satisfy Article 13, ECHR depends upon the substantive right that is engaged. The present context concerns the risk of exposure to torture or serious mistreatment, and in the light of the Supreme Court's judgment it is obviously strongly arguable that sending people to Rwanda even gives rise to a real risk of a breach of Article 3 notwithstanding the new treaty. Article 13 in this context requires that individuals must be able to bring challenges that have a suspensive effect on the measure in question.

As the Grand Chamber of the Strasbourg Court stated in *De Souza Ribeiro v France*, App. No. 22687/07 at 82:

in view of the importance the Court attaches to [Article 3] and given the irreversible nature of the harm that might occur if the risk of torture or ill-treatment alleged materialised, the effectiveness of the remedy for the purposes of Article 13 requires... *that the person concerned should have access to a remedy with automatic suspensive effect (emphasis supplied).*

In *A.M. v The Netherlands*, App. No. 29094/09, at 66, the principle that individuals alleging violations of Article 3 arising from removal must be able to access a remedy with automatic suspensive effect was described as "a firmly embedded principle" in the court's case law.

Since the ability to ask the courts to declare the Act, if passed, incompatible with Article 3 does not have any suspensive effect on transfers, and since clause 2 of the bill would prevent domestic courts from granting injunctions in challenges to individual deportation decisions, the bill appears not to be compatible with Article 13 of the ECHR. If there is an answer to this point, it is not presently clear what it would be.

What role would the Strasbourg Court have?

Clause 5 of the Safety of Rwanda Bill concerns the granting of interim measures in proceedings relating to the intended removal of a person to Rwanda. It states: "It is for a Minister of the Crown (and only a Minister of the Crown) to decide whether the United Kingdom will comply with the interim measure." Since interim measures are not binding in domestic law, this clause simply codifies the current position. It does not involve parliament breaching international law because it does not require the minister not to comply with the interim measure. If, however, the minister does not comply with an interim measure, he or she will have placed the UK in breach of international law.

The clause is nonetheless puzzling and concerning because if the government is intending to comply with an interim measures ruling, then it is difficult to understand why parliament is being asked to go to such lengths to prevent the domestic courts from issuing injunctions stopping removals. Surely it is better if the government is to have its argument that the treaty has eliminated the risk of refoulement that this argument should be advanced, at least initially, before the domestic courts which have so far considered and resolved the case, than before the Strasbourg Court.

There is nothing in the bill relating to final rulings of the Strasbourg Court. They remain binding on the UK in international law and the bill does not purport to change the need for the UK government to comply with them.

Conclusion

And so we return to the point with which we started: the Supreme Court held that Rwanda is not a safe country for UK asylum seekers, at least in the short term, and parliament is being invited to say the opposite three weeks later.

While the new treaty with Rwanda allows tenable arguments to be advanced that parliament is not being asked to contradict the Supreme Court, a more exacting examination of the reasoning of the Supreme Court and the terms of the treaty reveals that there remains an inconsistency between the court's judgment and the position parliament is being asked to endorse by the government's bill.

If the government considers that the treaty has eliminated the real risk of refoulement then it should seek to persuade the courts of this, not parliament. The treaty does not address core parts of the findings and reasoning of the Supreme Court concerning deficiencies in terms of capacity, culture and training. Like the MoU, it is dependent on further steps and agreements to implement it and the willingness and ability of Rwandan officials on the ground to observe it.

Moreover, by deeming Rwanda safe, parliament would prevent domestic courts from granting, if they consider it appropriate, interim relief to suspend transfers to Rwanda whilst the compatibility of the legislation with international law is determined by the courts. The inability for individuals to obtain a suspensive remedy is likely to be inconsistent with Article 13 of the ECHR and thus the principal purpose and legal effect of the bill is likely to be contrary to the UK's international obligations.

Tom Hickman KC is Professor of Public Law at UCL and practising barrister at Blackstone Chambers. He is writing in a personal capacity.

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-  instituteforgovernment.org.uk
-  enquiries@instituteforgovernment.org.uk
-  +44 (0) 20 7747 0400  +44 (0) 20 7766 0700
-  [@instituteforgov](https://twitter.com/instituteforgov)

**Institute for Government, 2 Carlton Gardens
London SW1Y 5AA, United Kingdom**

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