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Safety of Rwanda (Asylum and Immigration) Bill: legal commentary

1 Introduction

The Safety of Rwanda (Asylum and Immigration) Bill returns to the House of Commons on 16 and 17 January 2024.[1]

The Government argues that the approach taken by the bill is "justified as a matter of parliamentary sovereignty, constitutional propriety, UK law, and the UK's international obligations".[2] External legal experts have issued their own analyses supporting or contesting this view. This note attempts to summarise some of the competing legal arguments.

1.1 Legal analysis in scope

This briefing considers or cites the following documents:

- HM Government, Safety of Rwanda (Asylum and Immigration) Bill 2023: legal position, 11 December 2023

1 HC Deb 9 January 2024 c157
2 HM Government, Safety of Rwanda (Asylum and Immigration) Bill 2023: legal position, 11 December 2023, p1

- Bar Council, Safety of Rwanda (Asylum and Immigration) Bill - Briefing for MPs - second reading (PDF), December 2023
- Bingham Centre for the Rule of Law, Safety of Rwanda (Asylum and Immigration) Bill: A Preliminary Rule of Law Analysis for House of Commons Second Reading, 11 December 2023
- European Research Group of Conservative Parliamentarians, Opinion of the Legal Committee on the Safety of Rwanda (Asylum and Immigration) Bill, 10 December 2023
- Garden Court Chambers, Blog: Irena Sabic KC and Alex Grigg Reflect on the Rwanda Bill, 22 December 2023
- ILPA, JUSTICE and Freedom from Torture, Safety of Rwanda (Asylum and Immigration) Bill: Joint Briefing for Second Reading in the House of Commons, 8 December 2023
- Institute for Government, What is in the prime minister's 'emergency' asylum legislation?, 8 December 2023
- Joint Committee on Human Rights, Chair's Briefing Paper: Safety of Rwanda (Asylum and Immigration) Bill (PDF), 11 December 2023
- Liberty, Liberty's briefing for second reading of the Safety of Rwanda (Asylum and Immigration) Bill (PDF), December 2023
- Policy Exchange, Safety of Rwanda (Asylum and Migration) Bill, 11 December 2023
- Public Law for Everyone, The Rwanda Bill and its constitutional implications, 6 December 2023 and Could the Supreme Court reject the Rwanda Bill as unconstitutional?, 11 December 2023
- Society of Conservative Lawyers, Safety of Rwanda (Asylum and Immigration) Bill – constitutional and effective? (PDF), December 2023
- UK Constitutional Law Association, Ouster Clause Redux: The Court of Appeal's decision in LA (Albania), 21 November 2023

The list is not intended to be exhaustive. Other legal assessments may be available.

2 Compliance with international obligations

2.1 The UK's dualist approach to international law

In the UK, provisions of an international treaty can only have direct effect in domestic law if they are written into or incorporated by domestic legislation. Provisions of treaties that are not made part of UK law (ie have not been incorporated) are not usually recognised by UK courts.[3] This is known as a dualist approach to international law. It has been confirmed in many domestic cases.[4]

It has also been considered following the introduction of a number of bills to Parliament in recent years. For example, the Internal Market Bill, when originally introduced in September 2020, contained provisions that would have purposefully breached the UK's international obligations. These provisions were later removed. When justifying the legality of those (later omitted) provisions, the Attorney General at the time said that this dualist approach to international law allows the domestic principle of parliamentary sovereignty to have effect. The then Attorney General wrote:

> Parliament is sovereign as a matter of domestic law and can pass legislation which is in breach of the UK's Treaty obligations. Parliament would not be acting unconstitutionally in enacting such legislation.[5]

Similar arguments were also made in commentary at that time.[6]

The issue arose again in the *Miller* case. In discussing the dualist approach to international law and the role of Parliamentary sovereignty, the Supreme Court stated:

> … international law and domestic law operate in independent spheres. … [T]reaties between sovereign states have effect in international law and are not governed by the domestic law of any state.[7]

This approach was further discussed by the Supreme Court in 2021. It stated that:

> … the dualist system, based on the proposition that international law and domestic law operate in independent spheres, is a necessary corollary of Parliamentary sovereignty. It is only because "treaties are not part of UK law

3 See, for example, Anthony Aust, Modern Treaty Law and Practice, 3rd edition, pp168-171

4 For example, *R (Miller & Anor) v Secretary of State for Exiting the European Union* [2017] UKSC 5

5 Cabinet Office, HMG legal position, UKIM Bill and Northern Ireland Protocol, 10 September 2019

6 "Forget the foaming indignation, this Brexit bill is perfectly justifiable", The Telegraph, 10 September 2020

7 *R (Miller & Anor) v Secretary of State for Exiting the European Union* [2017] UKSC 5, para 55

> and give rise to no legal rights or obligations in domestic law" (para 55) that the prerogative power to make and unmake treaties is consistent with the rule that ministers cannot alter the law of the land. [8]

And so, a bill, if enacted, could be compatible with the UK's domestic law, but the UK's internal principle of parliamentary sovereignty has no bearing on the legal effect of the UK's international obligations. This is because, in international law, no rule of a state's internal law can be used to justify a breach of an international obligation. This principle is set out in Article 27 of the Vienna Convention on the Law of Treaties (pdf).

Similarly, the House of Lords Constitution Committee concluded in a January 2023 report that "Parliamentary sovereignty means that Parliament can legislate contrary to the UK's obligations under international law". But the Committee also cautioned that inviting Parliament to legislate in this way could undermine constitutional principle of the rule of law.[9]

Whether or not the proposed Safety of Rwanda (Asylum and Immigration) Bill 2023 is incompatible with the UK's international obligations has been discussed in commentary and legal positions set out below.

2.2 Government legal position

The UK Government published its legal position on the bill on 11 December 2023.[10]

On the issue of whether the bill is compatible with the UK's international obligations, the Government's position paper makes a number of relevant statements. First, referring to the December 2023 treaty between the UK and Rwanda,[11] the UK government suggests that the bill itself 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."[12]

The paper also acknowledges the Rwandan government's position that "it would withdraw from involvement in the scheme if the UK were to breach its

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8 *R (on the application of SC, CB and 8 children) v Secretary of State for Work and Pensions and others* [2021] UKSC 26, para 78

9 Select Committee on the Constitution, The Roles of the Lord Chancellor and the Law Officers, 18 January 2023, HL 118 2022-23, p3

10 HM Government, Safety of Rwanda (Asylum and Immigration) Bill 2023: legal position, 11 December 2023

11 Home Office, 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 to strengthen shared international commitments on the protection of refugees and migrants, 5 December 2023. At the time of writing, the UK-Rwanda treaty had not yet been ratified.

12 HM Government, Safety of Rwanda (Asylum and Immigration) Bill 2023: legal position, 11 December 2023, p1

international obligations", suggesting that this would render the bill unable to work in achieving the policy intention of deterrence because Rwanda's withdrawal would mean there would be no safe country for the purposes of removal.[13]

Further, in an updated policy statement on the bill dated 11 January 2024, the UK Government reiterated its position that the obligations placed on Rwanda under the UK-Rwanda treaty not to remove any relocated persons from Rwanda, "confirms that no individual relocated under the scheme is at risk of refoulement from Rwanda".[14]

More generally, the UK Government argues that:

> 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.[15]

And so, the Government's position on the bill is that, because it considers Rwanda to be a safe country, and the bill requires this to be recognised as fact, the bill is compatible with any international rules preventing a person from being removed to an unsafe country.

2.3 Commentary supporting compatibility with international law

Commentary from Policy Exchange support's the Government's position that "because a person's removal to Rwanda will not result in wrongful return to a refugee's country of origin – refoulement – the Government is on firm ground in saying that the Bill is compatible with international law, in particular with the Refugee Convention 1950". The paper goes on to argue that, even if the Government did take the view that provisions of the bill were contrary to international law, "it would not follow that the legislation was for that reason alone illegitimate". The report cites the UK's dualist system in support of this position, but does not argue that this would render the bill compatible with international obligations. It argues:

> The integrity of our constitution is put in jeopardy when civil servants and Ministers assume that legislation that is, or risks being found to be,

13 As above

14 Home Office, Safety of Rwanda (Asylum and Immigration) Bill: policy statement, 11 January 2024, para 18

15 HM Government, Safety of Rwanda (Asylum and Immigration) Bill 2023: legal position, 11 December 2023, p2

> incompatible with the UK's international obligations cannot legitimately be put before Parliament or enacted.[16]

On the other hand, the Policy Exchange report does note that:

> … the Bill leaves it open to the UK courts to review and contradict Parliament's judgement and to declare that removing asylum seekers to Rwanda breaches Convention rights and so would place the UK in breach of its international obligations under the European Convention on Human Rights (ECHR). The Bill should be amended to prevent courts from second-guessing Parliament's legislative choices.[17]

As noted in section 4.4 below, the paper also makes a number of recommendations for amendments to "strengthen the Bill", by further restricting the ability of courts to make a declaration of incompatibility with human rights protections, which they argue "can be adopted without placing the UK in breach of its international obligations".[18] However, the paper also warns that:

> … there is of course a risk that the Strasbourg Court will conclude that removals carried out under the legislation (or possibly even the very act of enacting the legislation in response to the Supreme Court's judgment) is incompatible with Convention rights.[19]

Lord Sandhurst KC and Harry Gillow, writing for the Society of Conservative Lawyers (PDF), argue that there must be at least a properly arguable case that the bill is compliant with the UK's international obligations, in order for the bill to be effective in its aims. On parliamentary sovereignty, while not commenting on the desirability of legislating in a way that is incompatible with international law in any given case, these authors also comment that "the ability of Parliament to legislate including contrary to international law is an important constitutional constraint in extremis on the Executive's prerogative powers to conduct the UK's foreign affairs".[20]

2.4 Commentary warning of incompatibility with international law

Most commentary disagreeing with the bill's compatibility with international law argues that Parliament's recognition of Rwanda as a safe country does not matter when it comes to an international or objective assessment as to

16 Policy Exchange, Safety of Rwanda (Asylum and Migration) Bill, 11 December 2023, p13
17 As above, p7
18 As above, p22-23
19 As above, p23
20 Society of Conservative Lawyers, The Safety of Rwanda (Asylum and Immigration) Bill: Constitutional and Effective? (PDF), pp2-3

whether Rwanda is safe in reality, or in determining whether there is a breach of international legal obligations.

For example, the Bar Council raises doubts (PDF) as to whether domestic legislation should use 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).[21]

The Bar Council also criticises the bill's disapplication of international treaties relating to the question of whether or not Rwanda is a safe country, noting that the UK "will remain bound on the plane of international law". They argue that, "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".[22]

The Bingham Centre for the Rule of Law has also published a report on the bill. On the general prospect of legislating notwithstanding the UK's international obligations, the report argues:

> Legislating notwithstanding the UK's international obligations on this scale is unprecedented and represents a new departure in the UK's recent disregard for international law. The Rule of Law, as Tom Bingham made clear in his authoritative account of the concept, includes the requirement that States act compatibly with their obligations in international law.[23]

The report points out that that the bill's "notwithstanding clauses" also seek to exclude "any interpretation of international law" by a court or tribunal to include all possible relevant sources of "the core international law principle of non-refoulement".[24] In doing so, the report argues,

> Parliament should be in no doubt about the enormity, from a Rule of Law perspective, of what it is being asked to approve in the "notwithstanding clauses" in the Bill. The endorsement of such wide ranging notwithstanding clauses, overriding the UK's international legal obligation, will indicate to international partners that the UK can no longer be relied upon to uphold its side of international treaties, or to promote the rules-based international order which has been at the heart of UK foreign policy since 1945.[25]

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21 Bar Council, Safety of Rwanda (Asylum and Immigration) Bill - Briefing for MPs - second reading (PDF), December 2023, para 8.

22 As above, para 15

23 Bingham Centre for the Rule of Law, Safety of Rwanda (Asylum and Immigration) Bill: A Preliminary Rule of Law Analysis for House of Commons Second Reading, 11 December 2023, p3

24 As above, p7

25 As above

The report also suggests that disapplying the Human Rights Act in the manner proposed in the bill "is likely to be incompatible with the right to an effective remedy in Article 13 ECHR".[26]

Professor Mark Elliott, Professor of Public Law at the University of Cambridge, argues that even if parliamentary sovereignty meant that the Safety of Rwanda Bill, if enacted, was immune from challenge in domestic law, he suggests "that is only half of the story." He argues that:

> Unless the UK ceases to be a party to, or otherwise repudiates, the ECHR and other relevant treaties, it will remain bound as a matter of international law by the obligations set out in them. It follows that, to the extent that the Rwanda policy is inconsistent with the non-refoulement principle, that policy will be unlawful in international law even if domestic courts are forced by the Bill to turn a blind eye to that legal fact.[27]

Similarly, Irena Sabic KC and Alex Grigg of Garden Court Chambers comment on the UK Government's position that the new UK-Rwanda treaty secures Rwanda's compliance with international law. They suggest that the government's position "depends on the treaty to sufficiently conclude there is no risk of Rwanda deviating from its terms".[28] They go on to point out that any obligations which Rwanda has previously breached were already contained in binding international law. They argue that "there is no obvious reason to suppose that the obligations in this treaty will fare any better than the others which have in the past been breached by Rwanda".[29]

In considering the possibility that the UK-Rwanda does not resolve the safety issues identified by the Supreme Court, the authors warn that removals to Rwanda would remain incompatible with international law and, further that the new bill "by preventing any legal challenge to those refusals, will be integral in its operation in placing the UK in breach of its obligations".[30]

3 Ouster clauses

3.1 Ouster clauses: background

Readers already familiar with this background should skip to section 3.2 below.

26 As above; see also p8
27 Public Law for Everyone, The Rwanda Bill and its constitutional implications, 6 December 2023
28 Garden Court Chambers, Blog: Irena Sabic KC and Alex Grigg Reflect on the Rwanda Bill, 22 December 2023
29 As above
30 As above

What are ouster clauses?

Ouster clauses are clauses in primary legislation which seek to preclude the court's jurisdiction on specific issues, placing certain powers and decisions beyond the reach of judicial review.

The courts have tended not to give effect to ouster clauses which purport to oust their jurisdiction entirely. Instead, they have found that decisions based on errors of law are still capable of being reviewed, on the basis that they involve the exercise of powers that Parliament did not intend to give to the decision-maker.

Ouster clauses have been seen to reflect tension between the competing constitutional principles of the sovereignty of parliament to legislate, and the rule of law requirement that state action falls within the terms of the relevant law, as enforced by the courts.[31]

Leading cases

Anisminic

Anisminic concerned an ouster clause in the Foreign Compensation Act 1950, which provided that 'determinations' by the Foreign Compensation Commissioners could not be called into question in any court.[32] The House of Lords found that by misconstruing the legislation that governed their powers, the Commissioners had asked themselves a question they were not authorised to and therefore exceeded their jurisdiction. As a result their decision was a 'purported determination', rather than a determination, thus not protected by the ouster clause from judicial review.

Jackson

Jackson was a challenge to the legal validity of the Hunting Act 2004, which was passed using the Parliament Act 1949.[33] In his judgment, Lord Steyn expressed views which were not part of the core reasoning (non-binding comments known as 'dicta'), but have nonetheless influenced subsequent

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31 In Lord Bingham's influential book *The Rule of Law,* he expressed the position as follows: "We live in a society dedicated to the rule of law; in which Parliament has power, subject to limited, self-imposed restraints, to legislate as it wishes; in which Parliament may therefore legislate in a way which infringes the rule of law; and in which the judges, consistently with their constitutional duty to administer justice according to the laws of the realm, cannot fail to give effect to such legislation if it is clearly and unambiguously expressed." Lord Bingham suggested that the constitutional position may have become unbalanced. Given the weakening over time of constraints on the Commons, Parliament can no longer be relied upon not to pass legislation which would infringe the rule of law. This could lead to undesirable conflict between Parliament and the judges, and to constitutional uncertainty. 2010, Penguin Books, pp168-7

32 *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147

33 *Jackson v Attorney General* [2005] UKHL 56

debate on the approach the courts take to parliamentary sovereignty and the rule of law:

> The classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom. Nevertheless, the supremacy of Parliament is still the *general* principle of our constitution. It is a construct of the common law. The judges created this principle. If that is so, it is not unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism. In exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts, the Appellate Committee of the House of Lords or a new Supreme Court may have to consider whether this is a constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish.[34]

Cart

Under section 13(8)(c) of the Tribunals, Court and Enforcement Act 2007, a decision by the Upper Tribunal to refuse to grant permission to appeal against a decision of the First-tier Tribunal is not capable of being appealed. However in the case of *Cart*, the Supreme Court held that if the decision of the First-tier Tribunal was based on an error of law, then the Upper Tribunal's decision to refuse permission to appeal would also be affected by that error, and should thus be amenable to review.[35]

Privacy International

In 2019, the Supreme Court ruled that decisions made by the Investigatory Powers Tribunal (the IPT) are subject to review by the High Court in England and Wales. This was despite apparently clear wording in the Regulation of Investigatory Powers Act 2000, which established the IPT, that "determinations … and other decisions of the Tribunal (including decisions as to whether they have jurisdiction) shall not be subject to appeal or be liable to be questioned in any court".[36]

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34 As above, para 102

35 *R (Cart) v Upper Tribunal* [2011] UKSC 28; *Eba v Advocate General for Scotland* [2011] UKSC 29. In the Court of Appeal, Laws LJ provided an explanation of the relationship between judicial review and parliamentary sovereignty which has proved to be influential: "If the meaning of statutory text is not controlled by such a judicial authority, it would at length be degraded to nothing more than a matter of opinion. Its scope and content would become muddied and unclear. Public bodies would not, by means of the judicial review jurisdiction, be kept within the confines of their powers prescribed by statute. The very effectiveness of statute law, Parliament's law, requires that none of these things happen. Accordingly, as it seems to me, the need for such an authoritative judicial source cannot be dispensed with by Parliament. This is not a denial of legislative sovereignty, but an affirmation of it: as is the old rule that Parliament cannot bind itself. The old rule means that successive Parliaments are always free to make what laws they choose; that is one condition of Parliament's sovereignty. The requirement of an authoritative judicial source for the interpretation of law means that Parliament's statutes are always effective; that is another" (para 38).

36 Regulation of Investigatory Powers Act 2000, s67(8)

Giving the lead judgment, Lord Carnwath concluded that any decision by the IPT based on an error of law would not be legally valid. Further, the wording of an ouster clause has to be interpreted in the context of a common law presumption against interpreting legislation so as to exclude the possibility of judicial review by the High Court.

In light of this presumption, an ouster clause can only exclude the possibility of judicial review by using the most clear and explicit words. The wording was not clear enough to exclude the possibility of judicial review of a decision by the IPT that was based on an error of law and therefore legally invalid. This conclusion was necessary to ensure the consistent application of the rule of law, because the legal issues decided by the IPT are of general public importance, and have implications for legal rights and remedies going beyond the IPT's remit.

The Supreme Court did not reach a firm conclusion on a second more general question as to the circumstances in which Parliament could oust the High Court's jurisdiction. However, Lord Carnwath concluded (again, in non-binding dicta) that there was:

> … a strong case for holding that, consistently with the rule of law, binding effect cannot be given to a clause which purports wholly to exclude the supervisory jurisdiction of the High Court to review a decision of an inferior court or tribunal … . In all cases, regardless of the words used, it should remain ultimately a matter for the court to determine the extent to which such a clause should be upheld… .[37]

Oceana

Oceana was the first case to consider the ouster contained in section 11A of the Tribunals, Courts and Enforcement Act 2007, introduced by the Judicial Review and Courts Act 2022 (discussed further below). The claimant sought to argue that the court had a common law power to ignore what was a clear statutory exclusion of judicial review. The court rejected this argument, finding that the legal position was clear and well-established, meaning that effect must be given to Parliament's will expressed in legislation:

> In the absence of a written constitution capable of serving as some form of "higher" law, the status of legislation as the ultimate source of law is the foundation of democracy in the United Kingdom. The most fundamental rule of our constitutional law is that the Crown in Parliament is sovereign and that legislation enacted by the Crown with the consent of both Houses of Parliament is supreme. The common law supervisory jurisdiction of the High Court enjoys no immunity from those principles when clear legislative language is used, and Parliament has expressly confronted the issue of exclusion of judicial review, as was the case with section 11A.[38]

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37 *R (Privacy International) v Investigatory Powers Tribunal & Ors* [2019] UKSC 22, para 144

38 *R (Oceana) v Upper Tribunal* [2023] EWHC 791 (Admin), para 52

AL

In *AL* the Court of Appeal considered the same provision.[39] The applicant sought to rely on Lord Carnwath's comments in *Privacy International*. The Court of Appeal rejected this argument, finding that section 11A was effective in ousting judicial review and that *Oceana* was correctly decided.

Recent reforms

The Independent Review of Administrative Law (IRAL) panel, appointed by the Government in 2020 and chaired by Lord Faulks, considered the use of statutory ouster clauses. It concluded that "no conclusive answer can be given as to whether and when there can be a statutory abrogation of judicial review",[40] noting that the case law is generally inconsistent, and that there were strong dissenting judgments in both *Anisminic* and *Privacy International*.

Considering the question of the justiciability of certain prerogative powers, the IRAL panel said

> While acknowledging the potency of the debate, the Panel approaches the issue on the assumption that the doctrine of Parliamentary sovereignty means that Parliament has the power to legislate in such way as to limit or exclude judicial review. The wisdom of taking such a course and the risk in doing so are different matters. Indeed, the Panel considers that there should be highly cogent reasons for taking such an exceptional course.[41]

In its 2021 response to IRAL, the Government issued a consultation on judicial review reform, explaining its view that the courts' approach to ouster clauses is:

> … detrimental to the effective conduct of public affairs as it makes the law as set out by Parliament far less predictable, especially when the courts have not been reluctant to use some stretching logic and hypothetical scenarios to reduce or eliminate the effect of ouster clauses … .The danger of an approach to interpreting clauses in a way that does not respect Parliamentary sovereignty is, we believe, a real one.[42]

It also suggested that ouster clauses are not a way of avoiding scrutiny, but rather "are a reassertion of Parliamentary Sovereignty, acting as a tool for Parliament to determine areas which are better for political rather than legal accountability".[43]

The Judicial Review and Courts Act 2022 implemented some of the consultation's proposals, including by introducing a limited ouster clause which sought to clarify that some decisions of the Upper Tribunal cannot be

39 *R (LA (Albania)) v Upper Tribunal* [2023] EWCA Civ 1337

40 Independent Review of Administrative Law report (PDF), CP 407, March 2021, para 1.39

41 As above, para 2.89

42 Ministry of Justice, Judicial Review Reform: The Government response to the Independent Review of Administrative Law (PDF), CP 408, March 2021, para 39

43 As above, para 86

judicially reviewed along the lines permitted by the Supreme Court judgments in *Cart.*[44]

The press release which accompanied the bill's publication stated that, although the bill would not address ouster clauses in the way set out in the consultation (which had proposed a general framework),

> ... it is expected that the legal text that removes the Cart judgment will serve as a framework that can be replicated in other legislation. This will draw a line under decades of uncertainty and confusion as to their proper use.

Another recent piece of legislation, the Dissolution and Calling of Parliament Act 2002, took a different approach. It restricted the courts from questioning any exercise or purported exercise of powers, any decision or purported decision relating to those powers, or their limit or extent. This has not been subject to any consideration by the courts.

3.2 How would the courts respond to the ousters in the bill?

Clause 2 of the bill would require the courts to conclusively treat Rwanda as a safe country and prevent them from hearing challenges on that basis. It sets out further specific grounds for a claim which may not be considered by the courts. Clause 4 would allow individual challenges in limited circumstances, excluding the question of whether Rwanda might remove a person to a third country.

Legal experts and parliamentarians have produced analyses of the provisions to limit judicial oversight in the bill as drafted, and in relation to proposed amendments which might seek to further limit individual challenges. These reveal a lack of consensus as to the likely approach of the courts in responding to these provisions, in part reflecting differences in emphasis placed on the rule of law and parliamentary sovereignty.

The Government's legal position

The Government states that Parliament is able to limit access to the domestic courts with clear and express words.[45] It acknowledges that the courts have not always upheld ouster clauses, but notes that recently enacted limited ousters have been upheld.

It argues that the clause deeming Rwanda a safe country allows Parliament to confirm that it considers it has sufficient evidence to judge that Rwanda is

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44 For further information see Commons Library briefing CBP-9253, Judicial Review and Courts Bill.

45 HM Government, Safety of Rwanda (Asylum and Immigration) Bill 2023: legal position, 11 December 2023

generally safe and that this conclusion should not be disturbed by the courts. However it would not be possible for Parliament to reasonably conclude that Rwanda will always be safe for everyone, and it is therefore necessary to allow access to the courts for individual appeals in "exceptionally narrow" circumstances.

The Government argues that completely ousting all challenges would mean that there would be no respectable argument that the bill is compatible with international law. It concludes that a bill which sought to oust all individual claims would not provide a clear lawful basis on which a responsible government could proceed.

It notes that completely blocking any court challenges would be a breach of international law and "alien to the UK's constitutional tradition of liberty and justice", which has maintained access to the courts even during wartime.

It also suggests that a wider ouster "would have to confront unorthodox obiter dictum" from cases such as *Jackson* and *Privacy International*.

Other commentary

The Legal Committee of the European Research Group (ERG)[46] describes the bill as a "partial and incomplete solution" on the basis that it retains the possibility of individual legal challenges.[47]

It proposes a number of ways that the bill could be strengthened, including preventing any challenge to a decision to remove a person to Rwanda, except for bad faith, and "explicit ousters of jurisdiction for injunctions based on decisions which led to an individual being chosen for a Rwanda flight".

Like the Government, it claims that the courts will uphold such ousters provided they are clear and unambiguous, citing *Oceana* and *LA*. It also states that judicial oversight will be maintained given the availability of non-suspensive claims under the Illegal Migration Act 2023, which could be conducted remotely from Rwanda.

The Society of Conservative Lawyers suggests that the bill in its current form might produce a negative reaction from the courts when applying case law concerning ouster clauses, but that the removal of the right of individual challenge would substantially increase that risk.[48]

It acknowledges recent judgments upholding ouster clauses, but notes that they relate to judicial bodies rather than executive decisions. It suggests that the courts may attempt to "creatively" interpret any provision seeking to oust

46 Consisting of Sir William Cash MP, David Jones MP, Martin Howe KC and Barnabas Reynolds

47 European Research Group of Conservative Parliamentarians, Opinion of the Legal Committee on the Safety of Rwanda (Asylum and Immigration) Bill, 10 December 2023

48 Society of Conservative Lawyers, Safety of Rwanda (Asylum and Immigration) Bill – constitutional and effective? (PDF), December 2023

jurisdiction in such a way that its intended effect was in practice defeated. Sufficiently clear drafting would reduce this possibility. However, in agreement with the Government, it suggests that this would give rise to the risk that the courts would adopt the obiter suggestions in *Jackson* and *Privacy International* that there may be limits on Parliament's constitutional authority to legislate without constraint.

The Society of Conservative Lawyers notes that the question of the proper approach to ouster clauses has not been resolved by the Supreme Court. It suggests that if the right of individual challenge currently provided for by clause 4 was removed, the circumstances would not be favourable territory on which to resolve the issue. The total ouster of judicial oversight, where the rights engaged include those intended to protect against threats to life or of torture, would give rise to "considerable risk that the courts would endorse the hard-line approach in *Privacy International*" suggested by Lord Carnwath. This could have the consequence of emboldening the courts to take a more activist approach in the future, according to the briefing.

It concludes that it would be prudent of Parliament to avoid legislating in a manner which might provoke such a reaction from the courts unless it has a very good reason, and that the bill as drafted represents the best approach to resolving the various tensions.

Policy Exchange describes the invocation of the minority views in *Jackson* and *Privacy International* in the context of the bill as "startling".[49] It further suggests that it is "wildly irresponsible for lawyers to invite the Supreme Court to overthrow the fundamental rule of our constitution" describing it as a "constitutional revolution".

Policy Exchange say the law is "crystal clear" and that the courts have no authority to question the validity of an Act of Parliament, noting that Lord Bingham denounced the "constitutional heresy" of the *Jackson* case. Further, Lord Reed and Lord Sales (both currently on the Supreme Court) did not follow the approach of Lord Carnwath in *Privacy International*.

It predicts that the Supreme Court would be very unlikely to entertain such a challenge, and that it would lead to intense political criticism and parliamentary action to reverse the Court's action if it did.

The Joint Committee on Human Rights (JCHR) suggest that requiring the courts to conclude that Rwanda is safe, despite the Supreme Court's finding to the contrary, would be a "remarkable thing to do".[50]

It notes differing views among constitutional lawyers as to whether this would be constitutionally sound, on the basis of the principle of Parliamentary sovereignty, or whether it would offend the separation of powers and the rule

49 Policy Exchange, Safety of Rwanda (Asylum and Migration) Bill, 11 December 2023

50 Joint Committee on Human Rights, Chair's Briefing Paper: Safety of Rwanda (Asylum and Immigration) Bill (PDF), 11 December 2023

of law. It suggests that Parliament is not equipped to assess evidence in the same way as the courts, and that reversing a judgment on the facts by statute, preventing the courts from considering the legality of Government actions, and requiring the courts to come to a particular conclusion undermines the constitutional role of the judiciary.

According to the JCHR this would arguably jeopardise the rule of law and the separation of powers, but in the absence of a written constitution, there are no definite answers to these questions.

The JCHR also suggest that it is conceivable, though unprecedented, that a claim could be brought before the courts arguing that the bill should not be complied with on the grounds that it is unconstitutional. It predicts that the possibility of such a claim being heard is unlikely, and of success even less so. The JCHR thinks a more likely outcome would be the courts attempting to read the legislation in a way that would be consistent with the UK's international obligations if faced with a stark example of the true situation in Rwanda being inconsistent with the requirement to deem it safe.

Professor Mark Elliott has produced a second analysis of the bill (separate from the discussion cited in section 2.4 above).[51] It was prompted in part by a letter to the Telegraph by four senior barristers, including the former Attorney General Sir Geoffrey Cox[52], which said:

> … the assumption that Parliament is entirely sovereign is only that – an assumption, which the courts have indicated could be revisited in the event that Parliament did the unthinkable. Legislation which mandated the removal of someone, without the right of appeal, despite clear evidence that this would result in them suffering death or serious and irreversible inhumane treatment, would test that assumption. And if the Supreme Court were to quash or disapply an Act of Parliament on domestic constitutional grounds for the first time, it will be impossible to put the constitutional genie back in the bottle.[53]

Professor Elliott argues that both the authors of the letter, and Lord Frost, who responded describing parliamentary sovereignty as "the most fundamental doctrine of our constitution", are guilty of oversimplification.[54]

Citing the non-binding views expressed in *Jackson* and *Evans*,[55] Professor Elliott suggests that although it was not a universally held view that other

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51 Public Law for Everyone, Could the Supreme Court reject the Rwanda Bill as unconstitutional?, 11 December 2023

52 The other authors were Lord Speight KC, Lord Sandhurst KC (also the co-author of the Society of Conservative Lawyers legal opinion), and Charles Banner KC

53 "Back the Rwanda Bill or risk the sovereignty of Parliament, says KCs", The Telegraph, 11 December 2023

54 Lord Frost of Allenton (@DavidGHFrost), X (Twitter), 10 December 2023 [accessed 12 January 2024)

55 *R (Evans) v Attorney General* [2015] UKSC 21 concerned the use by the Attorney General of a veto to prevent disclosure of letters to Ministers from Prince Charles under the Freedom of Information Act 2000, overriding a decision of the Upper Tribunal. The Supreme Court ruled that the Attorney

constitutional principles could limit absolute parliamentary sovereignty, there are clear examples of it in the judicial discourse.

He adds that *Privacy International* represented a "further strand to this sort of thinking". This suggests that Parliament may be unable to disturb basic constitutional principles, including undermining the constitutional role of the courts, not despite but because they are necessary to preserve parliamentary sovereignty.

He points to the views of the Supreme Court Justices in *Privacy International*, who though unwilling to go as far as Lord Carnwath, did accept that there is a symbiotic relationship between parliamentary sovereignty and the courts' jurisdiction to determine legal questions. As a result, the courts' jurisdiction cannot be undermined consistently with the sovereignty of Parliament.

Professor Elliott notes the dissenting judgment of Lord Wilson, who he said "tentatively expressed the view that in circumstances in which a statutory decision-maker has limited powers that it is said to have exceeded, it may be impossible for Parliament to preclude courts from determining whether such an excess of jurisdiction has in fact occurred".[56]

This demonstrates that it is at the least simplistic to suggest parliamentary sovereignty is absolute, according to Professor Elliott, given that it presupposes and relies on other constitutional principles.

> Parliament can be meaningfully sovereign only within a functional legal and constitutional system – and such a system can only exist if its other component elements are permitted to play their proper part.

Professor Elliott concludes that the courts would and should be very cautious of rejecting legislation as unconstitutional, and predicts that it is far more likely that a court would attempt to find an interpretation that would avoid this outcome and the risk of a constitutional crisis. But he suggests that the possibility cannot be dismissed.

General's veto was invalid, on the basis that a statutory provision allowing a member of the executive to overrule a decision of the judiciary merely because they did not agree with it would be incompatible with rule of law principles. However, Lord Wilson disagreed: "How tempting it must have been for the Court of Appeal (indeed how tempting it has proved even for the majority in this court) to seek to maintain the supremacy of the astonishingly detailed, and inevitably unappealed, decision of the Upper Tribunal in favour of disclosure of the Prince's correspondence! But the Court of Appeal ought (as, with respect, ought this court) to have resisted the temptation. For, in reaching its decision, the Court of Appeal did not in my view interpret section 53 of FOIA. It re-wrote it. It invoked precious constitutional principles but among the most precious is that of parliamentary sovereignty, emblematic of our democracy" (paragraph 168).

[56] In doing so Lord Wilson endorsed the paragraph from the judgment of Laws LJ in *Cart* (quoted in section 3.1 above)

How have the courts responded to recent ousters?

Dr Philip Murray, also of Cambridge, wrote an article in November 2023 on the UK Constitutional Law Association blog considering the potential limits of Parliament's legislative sovereignty in light of *Oceana* and *LA*.[57] He notes that in both *Oceana* and *LA* the court accepted that the wording of the ouster was sufficiently clear to be upheld, and that in *LA* the court had rejected the approach suggested in *Privacy International*, stating it was bound to apply it.

Dr Murray makes a number of observations about the court's reasoning and its implications for the tension between the rule of law and parliamentary sovereignty to which ouster clauses are seen to give rise.

Firstly, the broader legislative and constitutional context will be decisive in determining how the courts respond. The fact that the provision in question allows for some judicial review, and that it only restricts review of decisions by an expert judicial body reduces the threat to the rule of law. He suggests the outcome may have been different if it had sought to exclude review entirely, or if it had sought to exclude review of "a more squarely 'executive' decision-maker".

Secondly, the Court of Appeal judges expressly questioned the significance of Lord Carnwath's comments in *Privacy International*, and the possibility as a matter of constitutional law of the courts choosing not to apply an express provision of an Act.

Thirdly, the courts are also bound by the rule of law, and that requires respect for formally promulgated law, even where it may lead to a tension with other rule of law requirements.

Dr Murray concludes that, until the Supreme Court has the opportunity to determine the matter conclusively, the position appears to be that "the bolder assertions of some of the Supreme Court Justices in *Privacy International* cannot be taken as reflective of established constitutional law".

He goes on to consider a more comprehensive ouster clause in the Illegal Migration Act 2023, which would apply to decisions of immigration officers and the Home Secretary, preserving the possibility of judicial review on much more limited grounds. He suggested that it is questionable whether this would satisfy the rule of law's demands for independent judicial oversight. Particularly given that it is not excluding review of decisions made by independent expert decision-makers, "the imperative to read down or otherwise refuse to apply the ouster clause might be felt more powerfully than in *Oceana* and *LA*". He suggests the 2023 act may put the constitutional orthodoxy under new strain.

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[57] UK Constitutional Law Association, Ouster Clause Redux: The Court of Appeal's decision in LA (Albania), 21 November 2023

Analysis

As noted, there is little consensus in these analyses as to the current legal position, or how the courts might interpret a new ouster in the context of the Rwanda bill.

However, a few themes emerge. The legal position, reflected in the case law and in non-binding views expressed by senior members of the judiciary, is unclear. But in recent years the courts have been willing to apply a limited and clearly worded ouster without questioning its constitutional propriety. The Supreme Court has not yet had the opportunity to consider the issue.

The ouster proposed in the bill is not directly comparable to that in the Tribunals, Courts and Enforcement Act 2007, which has been subjected to judicial scrutiny. The status of the decision-maker may be significant in determining the approach the courts take. In particular, it is suggested that the courts would be likely to view an ouster clause that sought to put the decisions of an executive decision-maker beyond review differently to an ouster applied to decisions of an independent judicial body. In *Privacy International,* Lords Sumption and Reed argued that restricting review or appeal from an independent and specialist judicial body evidently posed a lesser threat to the rule of law than would have been the case with an executive body:

> There is nothing inconsistent with the rule of law about allocating a conclusive jurisdiction by way of review to a judicial body other than the High Court. The presumption against ouster clauses is concerned to protect the rule of law, which depends on the availability of judicial review. It is not concerned to protect the jurisdiction of the High Court in some putative turf war with other judicial bodies on whom Parliament has conferred an equivalent review jurisdiction.[58]

Tension between the sovereignty of Parliament to legislate, and the role of the courts in enforcing the rule of law principle that executive bodies must exercise their powers within their statutory limits, may be tempered by restraint on both sides. If either the courts or Parliament ceased to exercise such restraint, significant constitutional uncertainty could result.

[58] *R (Privacy International) v Investigatory Powers Tribunal & Ors* [2019] UKSC 22, para 199

4 Remaining grounds for legal challenge

4.1 Restrictions building on the Illegal Migration Act

The Government argues that the bill, combined with the Illegal Migration Act 2023, will "preclude almost all grounds for individual challenge that could be used to suspend or frustrate removal" to Rwanda.[59] Its legal position paper identifies four types of challenge that are captured by the two pieces of legislation:

- Claims for asylum
- Referrals as a potential victim of human trafficking
- Claims that removal to Rwanda would amount to refoulement
- Claims that removal to Rwanda would otherwise breach human rights law

Many of the restrictions on these challenges are achieved by the relevant provisions of the 2023 act.[60] It not only requires the Home Office to declare claims/referrals inadmissible, but stipulates that removals are to take place even if the person applies for judicial review.

It also instructs courts and tribunals not to grant any injunction that "prevents or delays" removal from the UK.[61] The intention is that, if people do manage to challenge their removal in court, any proceedings will take place while the person is already in Rwanda. These provisions are not yet in force, but presumably would be commenced to support removals to Rwanda under the new treaty.

The 2023 act does, however, create an exception. A limited category of 'suspensive claims' will allow people to challenge removal on certain grounds, with their removal suspended while the challenge proceeds (to an accelerated timetable). The two grounds on which this would be allowed are:

- That the person has been mistakenly identified as eligible for removal (a 'removal conditions suspensive claim')

59 HM Government, Safety of Rwanda (Asylum and Immigration) Bill 2023: legal position, 11 December 2023, p2

60 Illegal Migration Act 2023, s5

61 Illegal Migration Act 2023, s54

- That the person would suffer serious harm if removed (a 'serious harm suspensive claim')

The definition of "serious harm" includes onward refoulement.[62] It is therefore possible that, following the Supreme Court's decision about the risks of onward refoulement from Rwanda, that people being relocated from the UK to that country could lodge a serious harm suspensive claim. The Safety of Rwanda Bill is intended to close down this possibility by prohibiting the argument that people sent to Rwanda might face onward refoulement.[63]

But the bill, in turn, explicitly carves out an exception whereby challenges based on Rwanda being unsafe in the person's "particular individual circumstances" can be considered. There is competing analysis of whether this undermines the broad thrust of the Government's policy (which is that people arriving in the UK illegally can be removed "swiftly" as a deterrent[64]).

4.2 Claims not within the scope of the bill

The ERG Legal Committee notes that:

> Individual claims against removal which are based on grounds other than an allegation that Rwanda is unsafe are outside the scope of the Bill and are not restricted. Therefore it is to be expected that such claims will be raised and pursued in large numbers.[65]

It is true that the Safety of Rwanda Bill itself does not restrict challenges to removal other than those based on the general safety of Rwanda. But the Illegal Migration Act 2023 does restrict such claims, although it does not eliminate them entirely.

Section 5(1) of the 2023 act will, once in force, render claims for asylum automatically inadmissible. It also seeks to bar applications for judicial review that relate to removal under the Act.

The 2023 act does permit human rights claims in relation to removal to a third country. such as Rwanda (as opposed to the person's country of origin).[66] But the Home Secretary will still be under a legal duty to remove that person from the UK, and the Home Office says it intends to process any such claim after the person has been removed to the third country in question.[67]

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62 Illegal Migration Act, s39(4)(e)

63 Safety of Rwanda (Asylum and Immigration) Bill 2023-24 [as introduced], cl 2(4)(a) and 4(2)

64 HC Deb 13 December 2022 cc885-889

65 European Research Group of Conservative Parliamentarians, Opinion of the Legal Committee on the Safety of Rwanda (Asylum and Immigration) Bill, 10 December 2023, p4

66 Illegal Migration Act 2023, ss 5(5) and 41(3)

67 Home Office, Illegal Migration Bill Explanatory Notes (PDF), 7 March 2023, para 50

Section 54 support this objective. It bars courts from issuing injunctions to prevent or delay removal. JUSTICE, Freedom from Torture and the Immigration Law Practitioners' Association describe this as a "complete prohibition".[68]

Overall, the intention of the 2023 act is that only a 'suspensive claim', described in section 4.1 above, will hinder the process of removal to Rwanda.

However, it is not necessarily possible to anticipate all possible avenues of legal challenge. Sir James Eadie KC, First Treasury Counsel, is reported to have advised that there are "myriad ways" in which challenge could be brought in spite of the 2023 act.[69] Similarly, lawyers representing asylum seekers have suggested that the additional barriers put in place by the Safety of Rwanda Bill would make it more difficult, but not impossible, to identify a suitable challenge.[70]

4.3 Individual claims expressly permitted under the bill

The ERG Legal Committee argues that the "express countenancing" of claims based on personal circumstances, under clause 4 of the bill, represents a "significant risk to the delivery of the scheme". That is because "the line between personal and 'general' factors is undefined and untested".

Policy Exchange agrees. Its paper says the "difference between particular circumstances and general arguments… may break down in practice". It identifies a risk that general arguments about safety could be "repackaged to be specific in relation to the individual" and potentially entertained by courts and tribunals.[71]

The Policy Exchange report recommends that clause 4 be amended to say precisely what individual circumstances would qualify: persecution by the government of Rwanda itself, or medical conditions untreatable in that country, for example.[72] The Government has set its face against this approach, saying it is impossible to predict all possible scenarios in which individual safety might be compromised.[73]

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68 ILPA, JUSTICE and Freedom from Torture, Safety of Rwanda (Asylum and Immigration) Bill: Joint Briefing for Second Reading in the House of Commons, 8 December 2023, para 21

69 "'Intensely problematic': how Sunak's lawyers warned him on Rwanda", The Times, 1 January 2024

70 "UK court battles still lie ahead over revamped Rwanda removal scheme", Financial Times, 6 December 2023

71 Policy Exchange, Safety of Rwanda (Asylum and Migration) Bill, 11 December 2023, pp20-21

72 As above, pp 21-22

73 HM Government, Safety of Rwanda (Asylum and Immigration) Bill 2023: legal position, 11 December 2023, pp3-5

The Society of Conservative Lawyers accepts that clause 4 represents a "potential weakness". It argues, however, that it is necessary on pragmatic grounds. The paper takes the view that to "straightforwardly exclude the right to challenge a removal decision on the basis of risk of… circumstances specific to the individual… would represent a breach of… international law".[74] It further argues that the Rwandan Government would, in light of such a breach, resile from the asylum agreement altogether. [75] The latter is a political or diplomatic, rather than a legal, assessment.

The Bingham Centre describes the provision for personal circumstances claims as "very limited". It does not go into further detail.[76] Liberty, likewise, says without elaboration that it leaves "scarce room for judicial scrutiny".[77]

4.4 Declarations of incompatibility with human rights convention

The bill permits domestic courts to issue a declaration that it is incompatible with the European Convention on Human Rights, under section 4 of the Human Rights Act 1998.[78] The Government's legal position acknowledges as much.[79] There are different views about the significance of this.

The Society of Conservative Lawyers emphasises the formal legal position: that a declaration of incompatibility is not binding and does not affect the validity of the legislation in question.[80] It merely invites the Government and Parliament to remedy the incompatibility by amending the legislation. Therefore it has "little practical significance".[81]

The Bingham Centre says that the Government clearly intends to "rely on the fact that such a declaration does not affect the legal validity of the legislative provision, and would proceed to treat [the provision] as valid and of legal

74 Society of Conservative Lawyers, Safety of Rwanda (Asylum and Immigration) Bill – constitutional and effective? (PDF), December 2023, p4

75 See "Rwanda says it would have quit deportation deal if UK shunned human rights laws", The Telegraph, 6 December 2023

76 Bingham Centre for the Rule of Law, Safety of Rwanda (Asylum and Immigration) Bill: A Preliminary Rule of Law Analysis for House of Commons Second Reading, 11 December 2023, p6

77 Liberty, Liberty's briefing for second reading of the Safety of Rwanda (Asylum and Immigration) Bill (PDF), December 2023

78 Although Tom Hickman KC, for the Institute for Government, says the position is "not without ambiguity".

79 HM Government, Safety of Rwanda (Asylum and Immigration) Bill 2023: legal position, 11 December 2023, p4

80 Human Rights Act 1998, s4(6)

81 Society of Conservative Lawyers, Safety of Rwanda (Asylum and Immigration) Bill – constitutional and effective? (PDF), December 2023, p5

effect".[82] This assessment is based on the Government's own explanatory materials; the legal position document does indeed say "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… flights [would be] able to continue to embark for Rwanda as Parliament considered the issue".[83]

By contrast, Policy Exchange and the ERG Legal Committee believe such an outcome would cause political problems. The former says "in practice, it would be very difficult to maintain the policy in the face of a declaration of incompatibility – especially one issued by the Supreme Court". This is because such an outcome would indict the Rwanda scheme as a breach of Convention rights, leading to "very significant" political pressure to comply with what would be a seen as an authoritative judicial pronouncement.[84] According, it recommends disapplying section 4 of the 1998 act to prevent declarations of incompatibility.

The ERG Legal Committee similarly that notes "declarations of incompatibility would make it increasingly difficult for the Government to maintain its posture that the Bill's provisions are compatible with the UK's international obligations".[85]

82 Bingham Centre for the Rule of Law, Safety of Rwanda (Asylum and Immigration) Bill: A Preliminary Rule of Law Analysis for House of Commons Second Reading, 11 December 2023, p8

83 HM Government, Safety of Rwanda (Asylum and Immigration) Bill 2023: legal position, 11 December 2023, p4

84 Policy Exchange, Safety of Rwanda (Asylum and Migration) Bill, 11 December 2023, pp14-15

85 European Research Group of Conservative Parliamentarians, Opinion of the Legal Committee on the Safety of Rwanda (Asylum and Immigration) Bill, 10 December 2023, p5

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