

# **Safety of Rwanda (Asylum and Immigration) Bill: A Preliminary Rule of Law Analysis for House of Commons Second Reading**



## About the Bingham Centre for the Rule of Law

The Bingham Centre is an independent, non-partisan organisation that exists to advance the Rule of Law worldwide. Established in 2010 as part of the British Institute of International and Comparative Law (BIICL), the Centre was brought into being to pursue Tom Bingham's inspiring vision: a world in which every society is governed by the Rule of Law "in the interests of good government and peace at home and in the world at large." The Rt Hon Lord Bingham of Cornhill KG was the pre-eminent UK judge of his generation, who crowned his judicial career by leaving us arguably the best account of what the Rule of Law means in practice and why it is so important in any civilised society -too important to remain the exclusive preserve of courts and lawyers. One of our strategic aims is to increase discussion about the meaning and importance of the Rule of Law in the political process.

- We carry out independent, rigorous and high quality research and analysis of the most significant Rule of Law issues of the day, both in the UK and internationally, including highlighting threats to the Rule of Law.
- We make strategic, impartial contributions to policy-making, law making or decision-making in order to defend and advance the Rule of Law, making practical recommendations and proposals based on our research.
- We hold events such as lectures, conferences, roundtables, seminars and webinars, to stimulate, inform and shape debate about the Rule of Law as a practical concept amongst law makers, policy makers, decision-makers and the wider public.
- We build Rule of Law capacity in a variety of ways, including by providing training, guidance, expert technical assistance, and cultivating Rule of Law leadership.
- We contribute to the building and sustaining of a Rule of Law community, both in the UK and internationally.

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## About the Rule of Law Monitoring of Legislation Project

This Report is part of the Bingham Centre's Rule of Law Monitoring of Legislation Project. Rule of Law Monitoring of Legislation Reports subject provisions in Government Bills which have significant Rule of Law implications to robust independent scrutiny. They aim to explain relevant legal concepts and terms and describe the effect of provisions with significant implications for the Rule of Law. They test the Government's assertions about why the relevant provisions are necessary against the evidence base. They also examine the legal compatibility of the relevant provisions with the European Convention on Human Rights, the UK's other international legal obligations, and internationally recognised Rule of Law standards. They seek to explain these evidential and legal issues as accessibly as possible for a non-legal audience. The goal is to provide independent, high quality



expert analysis to assist both Houses of Parliament with its Rule of Law scrutiny of legislation.

### About the author

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# Table of Contents

Executive Summary .....	3
Analysis .....	5
(1) Conclusively deeming Rwanda to be safe .....	5
(2) Overriding the UK's international obligations .....	7
(3) Disapplying the Human Rights Act.....	8
(4) Restricting interim remedies .....	9
(5) Disregarding interim measures from the European Court of Human Rights.....	9



# Executive Summary

This Report summarises the Bingham Centre's preliminary Rule of Law analysis of the Government's Safety of Rwanda (Asylum and Immigration) Bill. The analysis is preliminary only because there has been little time to scrutinise the Bill and accompanying justificatory material since its publication only a few days ago.

The purpose of this short preliminary Report is to inform the House of Commons consideration of the Bill at its Second Reading on Tuesday 12<sup>th</sup> December.

The Report focuses on the most significant Rule of Law issues raised by the Bill. It applies a close legal analysis of the Bill's provisions, and considers the Government's explanation of the justification for them in the Explanatory Notes, and its explanation in the ECHR Memorandum of why the Bill's provisions are compatible with the Convention rights. It also considers the provisions of the Rwanda Treaty as explained in the Explanatory Memorandum prepared by the Home Office.

The Report's preliminary conclusion is that the central purpose of the Bill, to conclusively deem Rwanda to be a safe country in light of the recently concluded Rwanda Treaty, is contrary to the Rule of Law because it would amount to a legislative usurpation of the judicial function, contrary to the UK's constitutional understanding of the separation of powers, which requires the legislature to respect the essence of the judicial function.

It also reaches the preliminary conclusion that certain provisions in the Bill are contrary to the Rule of Law because they are manifestly incompatible with the UK's obligations under international law, including the European Convention on Human Rights (ECHR) and the international law principle of non-refoulement which is enshrined in many sources of international law by which the UK accepts it is bound, including the Refugee Convention, and which is arguably also a principle of customary international law.

Conclusively deeming Rwanda to be safe is incompatible with Articles 2 and 3 ECHR, and with the core international principle of non-refoulement because it precludes judicial determination of the safety question that the non-refoulement principle requires courts to decide.

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.

Disapplying the Human Rights Act is likely to be incompatible with the right to an effective remedy in Article 13 ECHR. This is unlikely to be prevented by the Bill's preservation of the possibility of a declaration of incompatibility under s. 4 of the Human Rights Act, given the Government's evident determination to proceed with removals to Rwanda even in the face of such a declaration, which does not affect the legal validity of the Act. Limiting suspensive remedies to cases in which the complaint is of the risk of ill treatment in Rwanda is also likely to be in breach of Article 13 ECHR. Conferring a ministerial power to choose not to comply with interim measures of the European Court of Human Rights is incompatible with the right of individual petition in Article 34 ECHR.

The House of Commons is being invited to approve legislation including provisions which appear on their face to be incompatible not only with well established understandings of the separation of powers between the legislature and the judiciary, but with a number of the UK's international obligations, including under the ECHR. The House of Commons should decline the invitation to put the UK in breach of its international, including ECHR, obligations.



# Analysis

## (1) Conclusively deeming Rwanda to be safe

Clause 2 of the Bill contains the central provision, deeming Rwanda to be a safe country. It requires every decision-maker, including a court or tribunal<sup>1</sup> when considering a decision to remove a person to Rwanda, to “conclusively treat the Republic of Rwanda as a safe country.”<sup>2</sup>

The Bill spells out explicitly that this deeming provision means that a court or tribunal must not consider a review of, or an appeal against, such a decision to the extent that the review or appeal is on the grounds that Rwanda is not a safe country.<sup>3</sup>

In particular, a court or tribunal “must not consider” whether Rwanda will or may remove a person to another State in contravention of any of its international obligations (including under the Refugee Convention); whether a person will not receive fair and proper consideration of an asylum or other similar claim in Rwanda; or whether Rwanda will not act in accordance with the Rwanda Treaty.<sup>4</sup> These are the very questions considered by the UK Supreme Court when determining the lawfulness of the Government’s Rwanda policy.

These prohibitions on a court or tribunal apply notwithstanding any provision of domestic immigration law or any other provision of domestic law, the Human Rights Act (to the extent disapplied – see further below) or “any interpretation of international law by the court or tribunal.”<sup>5</sup>

The Government’s explanation for this conclusive deeming provision is that, having concluded the new treaty with Rwanda, the Government is satisfied that Rwanda is a safe country. It acknowledges, in its ECHR Memorandum, that the right to life in Article 2 ECHR and the prohibition on inhuman or degrading treatment in Article 3 ECHR are engaged by this deeming provision. However, it argues that Articles 2 and 3 ECHR will not be infringed because the deeming provision in clause 2 of the Bill must be read alongside the exceptions provided for in clause 4 of the Bill, whereby an individual is still able to claim that Rwanda would not be a safe country for them, based on their particular individual circumstances, and a court or tribunal can also consider that claim.<sup>6</sup>

The Government is of course entitled to invoke the provisions in its recent Rwanda Treaty as evidence that the concerns of the Supreme Court about Rwanda being a safe country have now been effectively addressed. What it cannot do, however, compatibly with the UK’s well established understanding of the separation of powers, is to turn the factual question of Rwanda’s safety into a matter for the legislature to conclusively determine, rather than for the courts to consider in any future challenges to the application of the policy.

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<sup>1</sup> Clause 2(2)(b).

<sup>2</sup> Clause 2(1).

<sup>3</sup> Clause 2(3).

<sup>4</sup> Clause 2(4)(a)-(c).

<sup>5</sup> Clause 2(5).

<sup>6</sup> ECHR Memorandum, para. 14.

As the Supreme Court’s judgment made clear, the principle of non-refoulement, which it described as a “core principle of international law”, requires that asylum seekers who face removal to another country have an opportunity to ask a court whether there are substantial grounds for believing that such removal would expose them to a real risk of ill treatment as a result of refoulement to another country, and the “the court must answer this question for itself, based on its assessment of the evidence before it.”<sup>7</sup> The case-law on the non-refoulement principle is clear that the court is required to conduct a forensic examination of all the evidence, involving many different types of consideration, to reach an assessment of whether there is a real risk of refoulement. In the words of the Supreme Court:<sup>8</sup>

“In deciding that question, the court has to form its own view in the light of the evidence as a whole. In doing so, the court brings to bear its own expertise and experience: weighing competing bodies of evidence, and assessing whether there are grounds for apprehending a risk, are familiar judicial functions.”

The principal mischief of the Bill, therefore, is not so much that it seeks to ignore or overturn the Supreme Court’s very clear recent finding about the safety of Rwanda, but that it seeks to pre-empt any future consideration of that question by the courts in the light of the Rwanda Treaty. **Whether the Supreme Court’s concerns about the safety of Rwanda have been adequately addressed by the Rwanda Treaty is a factual question for judicial not legislative determination.**

Clause 2 is therefore incompatible with Articles 2 and 3 ECHR, in so far as it requires a court or tribunal to “conclusively treat the Republic of Rwanda as a safe country” and requires them not to consider whether Rwanda will or may remove a person to another State in contravention of any of its international obligations (including under the Refugee Convention); whether a person will not receive fair and proper consideration of an asylum or other similar claim in Rwanda; or whether Rwanda will not act in accordance with the Rwanda Treaty.

Articles 2 and 3 ECHR require a judicial determination of the question of safety where an individual claims that there is a substantial risk of refoulement by the country to which they are being sent. Safety is a factual question which cannot be conclusively determined in advance, for all cases, by the legislature. **Enacting a conclusive deeming of Rwanda as a safe country is a legislative usurpation of the judicial function.**

The very limited exceptions provided for in clause 4(1) of the Bill, where an individual claims that Rwanda is not a safe country for them because of their particular individual circumstances, are not sufficient to prevent the incompatibility with Articles 2 and 3 ECHR. Clause 4(2) expressly precludes decision-makers, including courts or tribunals, from considering whether Rwanda will or may remove the person to another State in contravention of its international obligations, including the Refugee Convention – the very question which the non-refoulement principle requires to be judicially determined.

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<sup>7</sup> UK Supreme Court judgment paras 44-49.

<sup>8</sup> Ibid at para. 55.



A statutory provision deeming factual questions to have been conclusively established, notwithstanding the principle of non-refoulement, is incompatible with that principle, in whatever source of law it is acknowledged.

## (2) Overriding the UK's international obligations

When a Government minister admitted to Parliament in 2020 that a provision in the UK Internal Market Bill breached international law “in a specific and limited way”, the full strength of the UK’s commitment to the Rule of Law principle that the UK abides by its international obligations was revealed. There was significant political and public reaction to the Government deliberately breaching international law. The Government published a [“Statement on notwithstanding clauses”](#), explaining the very limited circumstances in which the relevant clauses in the UK Internal Market Bill would be used. In amendments to the Bill led by the former Lord Chief Justice, the late Lord Judge, the House of Lords removed the offending provisions from the Bill.

The “notwithstanding clauses” in the current Bill are of a completely different order of magnitude. They assert that the provisions of the Bill override not only provisions of domestic law, but “any interpretation of international law” by a court or tribunal. “International law” is defined expansively in the Bill to include all possible relevant sources of what the Supreme Court called “the core international law principle of non-refoulement”.<sup>9</sup>

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.

During the House of Lords debates on the UK Internal Market Bill, the late Lord Judge commented wryly on the Alice in Wonderland-like quality of the Government’s position in relation to complying with international law, simultaneously claiming to comply with the UK’s international legal obligations at the same time as taking powers to breach them. There is a similar dissonance between the contents of this Bill and the UK’s expressions of its commitments to international legal obligations, including in refugee law and human rights law, in the Rwanda Treaty and its accompanying Explanatory Memorandum.

The Preamble to the Rwanda Treaty includes the following reference to both the UK’s and Rwanda’s commitments:

**HAVING** regard to the Parties’ commitment to upholding fundamental human rights and freedoms without discrimination, as guaranteed by the Parties’ national legislation, by their strong histories of implementing the 1951

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<sup>9</sup> Clause 1(6).

Convention Relating to the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees and by their other respective international legal obligations,

The objectives of the Treaty are described in Article 2(3)(a) as being secured by:

creating a mechanism for the relocation to Rwanda of asylum seekers whose claims are not being considered by the United Kingdom, and by providing a mechanism for an asylum seeker's claim for protection to be determined in Rwanda in accordance with the Refugee Convention and current international standards, including in accordance with international human rights law;

The Explanatory Memorandum accompanying the Treaty states that the "primary purpose" of the Agreement is to ensure that the UK's international human rights obligations are met, with the aim of ensuring compliance in particular with the Refugee Convention and Article 3 ECHR:

### **Human Rights**

8.1 The purpose of the Agreement is to ensure that protection claims of Relocated Individuals which are being determined outside the United Kingdom, will receive full protection from risk of persecution or serious harm and refoulement. The primary purpose of the Agreement is therefore to ensure that the United Kingdom's international human rights obligations are met by ensuring ECHR compatible treatment of relocated individuals within Rwanda. This is with the aim of ensuring compliance, in particular, with the Refugee Convention and Article 3 ECHR (prohibition of ill-treatment).

**In the UK's case, all of the commitments referred to in these provisions in the Treaty and the Explanatory Memorandum are covered by the notwithstanding clause in clause 2(5) of the Bill which expressly overrides them.**

### **(3) Disapplying the Human Rights Act**

Clause 3 of the Bill, which disappplies the most relevant provisions of the Human Rights Act apart from the power in s. 4 to make a declaration of incompatibility, risks incompatibility with the right to an effective remedy in Article 13 ECHR.

A declaration of incompatibility under the HRA has only been recognised as an "effective remedy" by the European Court of Human Rights in light of the strong convention that the Government responds to such declarations by bringing forward remedial measures to remedy the declared incompatibility.

It is clear from the Government's own explanatory material accompanying this Bill that were a declaration of incompatibility to be made in respect of any part of the legislation the Government would rely on the fact that such a declaration does not affect the legal validity of the legislative provision, and would proceed to treat it as valid and of legal effect. **Disapplying all the relevant provisions of the HRA but for s. 4 is therefore unlikely to ensure compatibility with the right to an effective remedy under Article 13.**

#### **(4) Restricting interim remedies**

The Bill significantly restricts the power of a UK court or tribunal to grant interim remedies to prevent a person from being removed to Rwanda.

Such interim remedies are only available under the Bill in cases where an individual is claiming that Rwanda is not a safe country for them in their particular individual circumstances, rather than claiming that their removal exposes them to a substantial risk of refoulement. In such cases, interim remedies can only be granted if the court or tribunal is satisfied that the person would otherwise face a real, imminent and foreseeable risk of serious and irreversible harm if removed to Rwanda.

The ECHR Memorandum argues that such restricted interim remedies are still compatible with the right to an effective remedy in Article 13 ECHR because the legally binding commitments given by Rwanda in the Rwanda Treaty, not to remove any person received from the UK to a third country, mean that there is no real risk of onward refoulement.<sup>10</sup>

The effect of the Bill's restrictions on interim remedies is that UK courts would have no power to suspend removals to Rwanda pending determination of a legal challenge to the compatibility of the new legislation with the Convention rights, seeking a declaration of incompatibility under s. 4 of the Human Rights Act which is not disapplied, or a legal challenge to the legislation in Strasbourg.

**The lack of a suspensive remedy pending the determination of such legal challenges is therefore manifestly incompatible with Article 13 ECHR.**

#### **(5) Disregarding interim measures from the European Court of Human Rights**

Clause 5 of the Bill provides that where the European Court of Human Rights indicates interim measures in proceedings related to the intended removal of a person to Rwanda, it is for a Minister of the Crown exclusively to decide whether the UK will comply with the interim measure.<sup>11</sup> A court or tribunal "must not have regard to the interim measure" when considering any application or appeal relating to a decision to remove a person to Rwanda.<sup>12</sup>

The Government's ECHR Memorandum states that "the provision is capable of being operated compatibly with Convention rights, in the sense that it will no necessarily give rise to an unjustified interference of those rights, meaning that the legislation itself will not be incompatible."<sup>13</sup>

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<sup>10</sup> ECHR Memorandum, para. 26.

<sup>11</sup> Clause 5(1) and (2).

<sup>12</sup> Clause 5(3).

<sup>13</sup> ECHR Memorandum, para. 29.

For the reasons explained in detail in this earlier [Bingham Centre Report](#) on the relevant provision in what is now the Illegal Migration Act, failure to comply with interim measures of the European Court of Human Rights is automatically a breach of the right of individual petition in Article 34 ECHR.

At the time of the passage of the Illegal Migration Bill, the Government argued that it might not be unlawful to refuse to comply with interim measures if they had been granted following a process which fell short of certain minimum standards of procedural fairness. The Bingham Centre report did not accept that procedural flaws could justify a refusal to comply with interim measures, but even if that were ever arguable the European Court has recently announced [a package of procedural improvements](#) to the granting of interim measures which address the UK's concerns about the process.

*Any ministerial decision not to comply with interim measures from the European Court of Human Rights will therefore clearly be in breach of the Convention. It follows that **Clause 5 of the Bill is incompatible with Article 34 ECHR in so far as it confers a discretion on the Government to decide whether the UK will comply with interim measures of the European Court of Human Rights.***

Conferring a power on a minister to decide not to comply, rather than requiring them to decide not to comply, does not prevent the clause from being incompatible on its face with the right of individual petition, just because the Minister might choose not to exercise the power. The conferral of a power which will always breach the Convention if exercised is a facial incompatibility.

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