

SAFETY OF RWANDA (ASYLUM AND IMMIGRATION) BILL EUROPEAN CONVENTION ON HUMAN RIGHTS MEMORANDUM

Summary of the Bill

1. This memorandum addresses issues arising under the European Convention on Human Rights (“ECHR”) in relation to the Safety of Rwanda (Asylum and Immigration) Bill 2023. It has been prepared by the Home Office. On introduction of the Bill in the House of Commons, the Home Secretary (the Rt Hon James Cleverly MP) made a statement under section 19(1)(b) of the Human Rights Act 1998 (“HRA”) that he is unable to make a statement that, in his view, the provisions of the Bill are compatible with Convention rights, but the Government nevertheless wishes the House to proceed with the Bill.
2. The purpose of the Bill is to deter illegal entry into the United Kingdom; break the business model of the people smugglers and save lives; and promptly remove those with no legal right to remain in the UK under the Immigration Acts by deeming the Republic of Rwanda (Rwanda) to be a safe country for the purpose of such removal.
3. The Bill includes measures to:
 - a) Recognise the UK Parliament as sovereign.
 - b) Define a safe country.
 - c) Require the Secretary of State and immigration officers, to conclusively treat Rwanda as a safe country when making a decision relating to the removal of a person to Rwanda under any provision of, or made under, the Immigration Acts, and for courts and tribunals to conclusively treat Rwanda as a safe country when considering a review of, or appeal against, such a decision; and to make clear that this means that courts and tribunals cannot consider a review or appeal of such a decision, to the extent that to the extent that the review or appeal is brought on the grounds that Rwanda is not a safe country.
 - d) Make clear that the above prohibition on courts and tribunals applies notwithstanding the Human Rights Act 1998 (to the extent it is disapplied), domestic law (including the common law) and any interpretation of international law by the court or tribunal.
 - e) Disapply elements of the Human Rights Act 1998 (“HRA”) in the following ways.
 - i) Disapplication of section 2 HRA when a Court is deciding if Rwanda is a safe country for a person to be removed to under the Immigration Acts.
 - ii) Disapplication of section 3 HRA to the entire Bill.
 - iii) Disapplication of sections 6 - 9 HRA as they relate to: a decision on the basis of 2(1) of the Bill; and
 - iv) Disapplication of sections 6 - 9 HRA where there is already a serious and irreversible harm test in place.
 - f) Provide that the conclusive treatment of Rwanda as a safe country does not prevent decision-makers (the Secretary of State and immigration officers) from deciding whether Rwanda is a safe country for the person in question, based on compelling evidence relating specifically to the person’s particular individual

circumstances (rather than on the grounds that Rwanda is not a safe country in general); and that, similarly, courts and tribunals are not prevented from considering a review or appeal against such a decision to the extent that the review or appeal is brought on the grounds that Rwanda is not a safe country for the person in question based on compelling evidence relating specifically to the person's particular individual circumstances (rather than on the grounds that the Republic of Rwanda is not a safe country in general).

- g) Provide, however, that in an individualised case, the Secretary of State or immigration officer or court or tribunal must not consider any matter, claim or complaint, to the extent the claim or complaint is based on grounds that Rwanda will or may remove or send a person to another State in contravention of any of its international obligations, including in particular its obligations under the Refugee Convention.
 - h) Prevent domestic courts and tribunals, when considering reviews or appeals against decisions based on individual circumstances as described above, from making interim remedies (injunctions etc) that delay, or have the effect of delaying, removal, unless the court or tribunal is satisfied that the person would, before the review or appeal is determined, face a real, imminent and foreseeable risk of serious and irreversible harm if removed to the Rwanda.
 - i) State that it is for a Minister of the Crown, and a Minister of the Crown only, to decide whether the United Kingdom will comply with a Rule 39 interim measure from the European Court of Human Rights; and to provide that a court or tribunal must not have regard to an interim measure when considering any application or appeal which relates to a decision to remove the person to the Republic of Rwanda under a provision of, or made under, the Immigration Acts.
4. The Government considers that clauses of the Bill which are not mentioned in this memorandum do not give rise to any human rights issues.
5. The Convention rights raised by provisions in the Bill are: right to life (Article 2); prohibition of inhuman or degrading treatment (Article 3); right to respect for private and family life (Article 8); and right to an effective remedy (Article 13).
6. Articles 2 and 3 of the ECHR mean there is an obligation not to transfer someone where there are substantial grounds to believe it would expose them to a real risk of treatment contrary to Article 2 or 3. A state must be able to show it has satisfied itself that any third country is safe, and an individual needs to be given a sufficient opportunity to say it is not a safe third country in their particular case. In cases concerning expulsion or extradition ECtHR case-law means that that Articles 2, 3 and 13 require independent and rigorous scrutiny of any arguable claim that there exist substantial grounds for believing that there is a real risk of treatment contrary to Article 2 or 3; and a remedy with automatic suspensive effect.

Clause 1 - Introduction

7. Clause 1 sets out the purpose of the Bill, which is to prevent unlawful migration by enabling the removal of persons to the Republic of Rwanda ("Rwanda"). Clause 1 states that to advance such a purpose a treaty between Rwanda and the UK has been before laid before Parliament under section 20 of the Constitutional Reform and Governance Act 2010. In addition to the treaty, Clause 1 states that the Bill will

give effect to the judgement of Parliament that Rwanda is a safe country. The relevant ECHR articles to clause 1 are 2 and 3.

8. Clause 1 sets out the headlines of relevant obligations on the Government of Rwanda as per the treaty between Rwanda and the UK, once ratified by both States. Having concluded the treaty with Rwanda, the UK Government is satisfied Rwanda is a safe country.
9. Clause 1 defines the terms “safe country” and “international law”.
 - a) A safe country is defined in clause 1(5) as being a place to which a person may be removed in compliance with all of the UK’s international obligations that are relevant to the treatment of persons removed there, and in particular where a removed individual will not be removed or sent to another country in contravention of any international law, and in which any person who is seeking asylum or who has had an asylum determination will both have their claim determined and be treated in accordance with that country’s obligations under international law.
 - b) International law is defined as a non-exhaustive list including various international conventions such as the Human Rights Convention, Refugee Convention, UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984, etc., as well as customary international law and any other international law, or convention or rule of international law, whatsoever, including any order, judgment, decision or measure of the European Court of Human Rights.
10. Clause 1 may engage Articles 2 and 3 ECHR in relation to the definition of a “safe country”. The Government considers that Article 2 will not be infringed because clause 1 must be read in the context of the Government having concluded a Treaty with Rwanda, as described in clauses 1(2) and 1(3), and in conjunction with clauses 2 and 4 which provide that notwithstanding the deeming of Rwanda to be safe for the purposes of removal, a person can raise an individual claim about their safety if removed to Rwanda, which can be considered by decision makers, the courts and tribunals.
11. Article 3 establishes the right not to be subjected to torture, inhuman or degrading treatment or punishment. For the same reasons as for Article 2, the Government considers that there will be no infringement of Article 3 since a person will not be removed to Rwanda where that person has compelling grounds for believing that, if removed, would face a real risk of being subjected to treatment contrary to Articles 2 or 3 in Rwanda the destination country. Where a person believes that there are such compelling grounds in relation to removal to Rwanda, the provisions in clause 4 apply (which include reference to section 39(4)-(8) of the Illegal Migration Act 2023 (serious harm suspensive claims: interpretation), which therein complies with the Article 13 ECHR consideration. Furthermore, this is all supported by and in the context of the UK Government’s Treaty with Rwanda as described in clause 1 and the consequent requirement in clause 2(1) that Rwanda be treated as safe.

Clause 2: Safety of the Republic of Rwanda

12. **Clause 2** requires decision-makers (Secretary of State, immigration officers, courts and tribunals) to conclusively treat Rwanda as a safe country for the purpose of removing a person (not of Rwandan nationality or in possession of a Rwandan identity document, see Clause 7 for the definition) under the Immigration Acts. The ECHR rights engaged by clause 2 are those in Articles 2, 3, 8 and 13.
13. The deeming of Rwanda to be a safe country cannot be reviewed by a court or tribunal (or considered in an appeal) on the grounds that Rwanda is not a safe country. Furthermore, a court or tribunal cannot consider a decision relating to removal to the extent a challenge is brought on the basis that Rwanda is not safe. This deeming of safety applies notwithstanding the Human Rights Act (to the extent disapplied by clause 3 of the Bill), any interpretation of international law by the court or tribunal, and domestic immigration law (including common law). In particular, the courts and tribunals are prevented from considering that Rwanda will remove a person in breach of its international obligations (including the Refugee Convention), a person will not receive a fair consideration of their asylum claim (or similar claim) in Rwanda and that Rwanda will not act in accordance with the Rwanda treaty.
14. Articles 2 and 3 ECHR are engaged since clause 2 provides that Rwanda is a safe country for removal. However, the Government's view is that Articles 2 and 3 will not be infringed because clause 2 must be read with clause 4(1), pursuant to which a person can put forward evidence to decision-makers that their individual circumstances will mean that it is foreseeable that they would face a real risk of being subjected to treatment contrary to Articles 2 or 3, and if decision-makers agree, then the individuals will not be removed to Rwanda, and with clause 4(2) to (6), pursuant to which a court may grant interim relief in such an individual case, but only if the court or tribunal is satisfied that the person would, before the review or appeal is determined, face a real, imminent and foreseeable risk of serious and irreversible harm if removed to the Republic of Rwanda.
15. It is accepted that decisions on removal to Rwanda will prima facie interfere with a person's rights under Article 8, when exercised. However, the Government considers that the interference is justified under Article 8(2) for being in accordance with the law and necessary in a democratic society. The safeguards within the Bill, such as interim remedies relating to suspensive claims and judicial scrutiny will ensure that the decision to remove a person to Rwanda is exercised properly, going no further than necessary to achieve the legitimate aim. Accordingly, the Government considers that the provisions in clause 2 are compatible with Article 8 ECHR.
16. Article 13 ECHR is engaged but will not be infringed because a person can challenge (based on personal circumstances) a decision that Rwanda is a safe country to be removed to.

Clause 3: Disapplication of Human Rights Act 1998 (HRA)

17. Clause 3 disapplies s2 of the HRA (Interpretation of Convention Rights) from the Bill where a court or tribunal is determining a question relating to whether the Republic of Rwanda is a safe country for a person to be removed.

18. Clause 3 disapplies s 3 of the HRA (Interpretation of Legislation) from the Bill.
19. Clause 3 disapplies ss 6 to 9 of the HRA (Public authorities) in relation to a decision taken on the basis of the duty of decision-makers to treat Rwanda as safe.
20. Sections 6 to 9 of the HRA are also disapplied from claims that a person should not be removed while their underlying claim is heard - where a court will apply the serious and irreversible harm test. This test is defined in section 39 Illegal Migration Act 2023.
21. Clause 3 engages the right to an effective remedy (Article 13); in conjunction with (for example) the right to life (Article 2) and prohibition of inhuman or degrading treatment (Article 3) since the disapplication of sections 2,3 and, in particular sections 6-9 HRA, go to the question of whether the UK will still provide an "effective remedy". However, the Government is satisfied that Clause 3 is compatible with Article 13 on the basis that:
- a) The disapplication of Sections 2 and 3 does not mean the Bill will not be capable of being read compatibly with the rights protected under the Convention.
 - b) The Government considers that a Declaration of Incompatibility is sufficient to provide an Article 13 effective remedy for challenges to decisions under the presumption of safety in clause 2 to treat Rwanda as safe.
 - c) The serious and irreversible harm test is designed, by its very definition, to be a test which is compatible with Convention rights. It mirrors the test applied by the ECtHR when considering whether to grant interim relief.

Clause 4: Decisions based on particular individual circumstances

22. Clause 4(1) means that the deeming of Rwanda as safe (see clause 2) does not prevent the Secretary of State or an immigration officer, when deciding under any provision of or made under the Immigration Acts whether Rwanda is a safe country for the person in question, or a court or tribunal from considering a review or appeal against such a decision, based on compelling evidence relating specifically to the person's particular individual circumstances (rather than on the grounds that the Rwanda is not a safe country in general).
23. This ability to consider the question of whether Rwanda is safe for a particular person based on compelling evidence relating specifically the person's particular individual circumstances is restricted by clause 4(2) as follows. The Secretary of State, immigration officer, court or tribunal must not consider any matter, claim or complaint to the extent that it is brought on the ground that the Republic of Rwanda will or may remove or send the person in question to another State in contravention of any of its international obligations (including in particular its obligations under the Refugee Convention).
24. Clause 4 provides that where a court or tribunal is considering a review or an appeal in relation to the safety of Rwanda on the basis of particular individual circumstances (permitted to the extent as described above), any power of the court or tribunal to grant in interim remedy is restricted. An interim remedy is defined as

any interim remedy or relief however described, including, in particular, an interim injunction or interdict. The court or tribunal may not grant an interim remedy unless it is satisfied that the person would, before the review or appeal is determined, face a real, imminent and foreseeable risk of serious and irreversible harm if removed to Rwanda (the meaning of which is aligned with that in section 39(4) to (8) of the Illegal Migration Act 2023). The provisions on interim remedies do not apply to any review or appeal relating to a decision to remove under the Illegal Migration Act 2023 (see instead section 54 of that Act).

25. Clause 4 engages Article 13 ECHR in conjunction with, for example, Articles 2, 3, and 8.

26. The Bill will preserve a suspensive remedy where that is needed to ensure compliance with the Convention rights and with Article 13 ECHR. This is because:

- a) An individualised claim will be able to be brought where there is compelling evidence that Rwanda is not a safe country for the person in question, based on compelling evidence relating specifically to the person's particular individual circumstances (rather than on the grounds that the Rwanda is not a safe country in general).
- b) It is considered that it is consistent with the Convention rights and with Article 13 to prevent such an individualised claim to the extent it is brought on the ground that Rwanda will or may remove or send the person in question to another State in contravention of any of its international obligations (including in particular its obligations under the Refugee Convention). This is because the Government considers that, because of the legally binding nature of the commitments given by Rwanda in the Treaty and the substance of those commitments in particular regarding onward refoulement, there is no real risk of onward refoulement in breach of Articles 2 and 3 ECHR arising in practice in relation to any person removed from the UK to Rwanda under the Treaty.
- c) The restriction on a court or tribunal's ability to grant interim relief, as described above, is considered consistent with the Convention rights and with Article 13, because the serious and irreversible harm "test" is designed to reflect the circumstances where a suspensive remedy is required under the ECHR.

27. It is therefore the Government's view that clause 4 complies with the Convention rights and with Article 13.

Clause 5: Interim measures of the European Court of Human Rights

28. Clause 3 provides that where the European Court of Human Rights indicates an interim measure in proceedings relating to the intended removal of a person to the Republic of Rwanda under the Immigration Acts - it is only for a Minister of the Crown to decide whether the United Kingdom will comply with the interim measure.

29. The Government considers that the provision is capable of being operated compatibly with Convention rights, in the sense that it will not necessarily give rise

to an unjustified interference of those rights, meaning that the legislation itself will not be incompatible.

Home Office
6 December 2023