

The Safety of Rwanda (Asylum and Immigration) Act 2024 and The Rule of Law

**Unwritten Constitutional Norms and Principles: A
Comparative Study**

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Introduction¹

This report considers the ways in which the UK Government, Parliament and the Courts have approached the rule of law (and other related constitutional principles), in the context of the **Safety of Rwanda (Asylum and Immigration) Act 2024** (the ‘Rwanda Act’).

This report first sets out the context behind the Rwanda Act, looking at the original Migration and Economic Development Partnership (the ‘Rwanda Policy’), summarising the legal challenges which arose from this policy, culminating in the UK Government’s defeat in the UK Supreme Court (the ‘Rwanda Judgment’), and finally the Act itself and the accompanying ‘Rwanda Treaty’ (*Section I*).

Then, this report sets out why the rule of law is the chief constitutional principle invoked by the Rwanda Act, looking at the Act’s key provisions which trigger rule of law concerns (*Section II*).

Following this, the report considers the findings of two key committees which both address the Act’s compatibility with the rule of law, as well as the Government’s response to each committee report (*Sections III-IV*). The report also sets out how key constitutional principles were invoked in both Parliamentary chambers (*Sections V-VI*).

Given the 2024 General Election and new Labour government, this report also briefly considers the new UK Government’s approach to (and reversal of) the Rwanda Policy, before outlining Labour’s upcoming Border Security, Asylum and Immigration Bill, their approach to immigration in general, and what this potentially says about their views of constitutional principles such as the rule of law (*Part 2*).

The report will finally seek to appraise the Conservative Government’s position on the Act’s compatibility with the rule of law, as well considering what this might reveal about its approach to unwritten constitutional principles more generally. It will offer some reflections, finding that the Government have redefined the rule of law in order to avoid conceding the Rwanda Act’s incompatibility with that principle. It will also argue that the Government overstated the rule of law’s ‘flexibility’, and as a result went *too far* in narrowing its scope for the purposes of their Rwanda Policy (*Part 3*).

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PART 1

The Safety of Rwanda (Asylum and Immigration) Act 2024

*Introducing the Rwanda Policy; the Act's engagement of the rule of law;
Committee findings and Government response; Parliamentary debates*

I. The Safety of Rwanda (Asylum and Immigration) Act 2024

Introducing the Rwanda Policy

On the 14th of April 2022, then Prime Minister Boris Johnson announced his Government's new 'Rwanda Policy'.

So from today, our new Migration and Economic Development Partnership will mean that anyone entering the UK illegally – as well as those who have arrived illegally since January 1st – may now be relocated to Rwanda.

This innovative approach – driven by our shared humanitarian impulse and made possible by Brexit freedoms – will provide safe and legal routes for asylum, while disrupting the business model of the gangs, because it means that economic migrants taking advantage of the asylum system will not get to stay in the UK, while those in genuine need will be properly protected, including with access to legal services on arrival in Rwanda, and given the opportunity to build a new life in that dynamic country, supported by the funding we are providing.²

The Conservative Government introduced this policy as an attempt to stop the dangerous Channel crossings made by asylum seekers and to stop people-smuggling, the Government employing the slogan 'stop the boats' to refer to their policy.³ Under section 2 of the Illegal Migration Act 2023, the Secretary of State has a duty to remove illegal migrants to a "safe third country" – the Rwanda Policy would deem Rwanda to be a safe country for the purposes of this duty.

The policy first took shape in a Memorandum of Understanding ('MoU'), signed between the UK and Rwanda. The MoU laid out the commitments of both States, and MoUs are not legally binding in international law.

The MoU provided that all who enter the UK illegally would be relocated to Rwanda, to have their asylum claims heard there. If that claim was successful, Rwanda was required to

² Boris Johnson, 'PM Speech on Action to Tackle Illegal Migration' (14 April 2022).
<<https://www.gov.uk/government/speeches/pm-speech-on-action-to-tackle-illegal-migration-14-april-2022>>
accessed 18 July 2024.

³ Home Office, 'Safety of Rwanda (Asylum and Immigration) Bill: Government Response to the Committee's Second Report' (Cm 647, 2024) 9.

assign the individual refugee status, allowing them to settle in the country.⁴ If an individual was refused asylum, they would (in most circumstances) be removed from Rwanda. However, Rwanda was required to consider whether the individual had another “humanitarian protection need, such that return to their country of origin would result in a real risk of their being subject to inhuman, degrading treatment or torture or a real risk to their life.”⁵

The first flight to Rwanda was scheduled for the 14th of June 2022. However, this flight was cancelled last-minute due to an injunction from the European Court of Human Rights (‘ECtHR’).⁶

‘N.S.K.’, an Iraqi national who unsuccessfully sought asylum in the UK, was subject to removal to Rwanda. He requested interim relief from the High Court, but this was refused. Both the Court of Appeal and the Supreme Court upheld the High Court’s refusal to grant interim relief. On the evening of the 14th of June, the ECtHR granted an urgent interim measure, preventing Rwanda flights leaving until three weeks after the final domestic court decision in the applicant’s judicial review proceedings was released.⁷

The Rwanda Policy was subsequently challenged in the Divisional Court.⁸ Eight claimants challenged both the lawfulness of the policy, as well as the individual decisions to send each of them to Rwanda. On the 19th of December 2022, Lewis LJ and Swift J handed down judgment finding that the Rwanda policy was **lawful in principle**.⁹ Nevertheless, the decisions relating to the eight claimants were quashed and remitted to the Home Secretary, but only because of the *way* in which the Home Secretary had implemented the policy.

⁴ ‘Memorandum of Understanding 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 Arrangement’ (2023) para 10.1.

⁵ *ibid* 10.2.

⁶ Specifically, the ECtHR issued a ‘Rule 39 order.’ These are emergency measures, issued only when applicants would otherwise face an “imminent risk of irreversible harm.” (Dr Alice Donald and Dr Joelle Grogan, ‘The UK’s ECHR record: how common are Rule 39 orders and how often is the UK found to have violated rights? (UK in a Changing Europe, 2024) <[⁷ *NSK v the United Kingdom* App no 28773/22 \(ECtHR, 14 June 2022\).](https://ukandeu.ac.uk/explainers/the-uks-echr-record-how-common-are-rule-39-orders-and-how-often-is-the-uk-found-to-have-violated-rights/#:~:text=’Rule%2039%20orders’%20(known,rarely%20issued%20against%20the%20UK.>” accessed 18 July 2024).</p></div><div data-bbox=)

⁸ *R (on the application of AAA and others) v Secretary of State for the Home Department* [2022] EWHC 3230, [2023] HRLR 4.

⁹ *ibid* [71], [84], [89].

This decision, regarding the *lawfulness* of the policy, was appealed to the Court of Appeal.¹⁰ Sir Geoffrey Vos MR and Underhill LJ held on the 29th of June 2023, primarily on the basis of evidence provided by The United Nations High Commissioner for Refugees (‘UNCHR’), that the policy was **unlawful**. The Supreme Court, on the 15th of November 2023, **unanimously upheld** the Court of Appeal’s decision.

‘The Rwanda Judgment’¹¹ – decided 15 November 2023

In its judgment, the Supreme Court considered at length the principle of non-refoulement – a principle of international law which prohibits States from returning asylum-seekers to a country where they are at risk of harm, torture or prosecution.¹² The key question before the Court was whether Rwanda was a safe country, or whether asylum-seekers sent there were at risk of being refouled. The Supreme Court confirmed that this was a question for the **courts** to determine.¹³ The Divisional Court had taken a different approach, instead deciding whether the Secretary of State was *entitled to determine* Rwanda as a safe country.¹⁴

The Supreme Court confirmed that:

34. [...] The correct test, derived from *Soering*, requires the court to decide for itself whether there are substantial grounds for believing that the removal of asylum seekers to Rwanda would expose them to a real risk of ill treatment, as a consequence of refoulement to another country. The assessment is one which must be made by the court. The majority of the Court of Appeal

¹⁰ *R (on the application of AAA and others) v Secretary of State for the Home Department* [2023] EWCA Civ 745, [2023] 1 WLR 3103.

¹¹ *R (on the application of AAA and others) v Secretary of State for the Home Department* [2023] UKSC 42, [2023] 1 WLR 4433.

¹² This principle is protected by multiple international conventions, such as United Nations Refugee Convention, and the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

¹³ *R(AAA)* (n 11) [56]-[58].

¹⁴ The Supreme Court set out the approach of the Divisional Court in its judgment, [71]: “...we note that the Divisional Court considered that it had to decide whether, on the totality of the evidence, the Secretary of State’s opinion was undermined to the extent that it could be said to be legally flawed [...]. However, the focus of the *Soering* test, which the Divisional Court had to apply, is not on whether there were legal flaws in the Secretary of State’s decision, but on whether there were, as a matter of fact, substantial grounds for believing that the removal of asylum seekers to Rwanda would expose them to a real risk of ill-treatment by reason of refoulement. That was an issue on which UNHCR’s evidence about defects in Rwanda’s asylum procedures had a material bearing.”

considered that the Divisional Court had mistakenly dealt with the issue on the basis that the court's role was confined to deciding whether the Secretary of State had been entitled to form the view that there was no such risk.¹⁵

Basing its decision largely on the evidence provided by The United Nations High Commissioner for Refugees ('UNCHR'), the Supreme Court found that Rwanda was not a safe country for the purposes of the Government's policy.¹⁶ There was substantial evidence that individuals would be subject to refoulement. The Court considered:

- Rwanda's poor human rights record – the Court considered extensive evidence provided by the UNCHR, showing recent instances of killings, torture and restrictions of expression.¹⁷
- Systemic defects in Rwanda's procedures for processing asylum claims – the UNCHR provided evidence that Rwanda would not be able to deal with asylum claims resulting from the Government's policy.¹⁸
- Rwanda's failures in complying with the principle of non-refoulement when entering a similar agreement with Israel in 2013 – the UNCHR provided evidence of Rwanda refouling asylum-seekers, despite having entered an agreement with Israel. Although the Home Secretary asserted that this previous agreement was irrelevant to the proceedings, the Supreme Court disagreed.¹⁹

The Government's Response to the Rwanda Judgment

The UK Government responded to the Supreme Court's judgment by introducing a new treaty with Rwanda to replace the Memorandum of Understanding, as well as an emergency Bill declaring Rwanda to be safe.

¹⁵ *ibid* [34].

¹⁶ *ibid* [149].

¹⁷ *R (AAA) (n 11)* [76].

¹⁸ *ibid* [77]-[78].

¹⁹ *ibid* [96]-[100].

The 'UK-Rwanda Treaty'²⁰ – Signed 5 December 2023, Ratified 25 April 2024

The UK-Rwanda (Rwanda) Treaty maintains many of the provisions set out in the MoU, but unlike the MoU, the provisions under the Treaty are legally binding upon both States under international law.

The new Treaty also amends provisions under paragraph 10(4) of the MoU, which allowed Rwanda to remove unsuccessful applicants from the country. Article 10 of the Rwanda Treaty entirely rules out the possibility of an individual being removed from Rwanda to anywhere other than the UK, regardless of their asylum application outcome. Individuals can only be removed—if they are to be removed—back to the UK:

ARTICLE 10

Assurances as to treatment

[...]

3. No Relocated Individual (even if they do not make an application for asylum or humanitarian protection or whatever the outcome of their applications) shall be removed from Rwanda except to the United Kingdom in accordance with Article 11(1). The Parties shall cooperate to agree an effective system for ensuring that removal contrary to this obligation does not occur, which includes systems (with the consent of the Relocated Individual as appropriate) for returns to the United Kingdom and locating, and regularly monitoring the location of, the Relocated Individual.²¹

The Government introduced this new Treaty (and Bill) as a **response** to the courts. James Cleverly, the Home Secretary, stated on the day of the Supreme Court's judgment that:

Our intention is to upgrade our agreement to a treaty as soon as possible.

²⁰ '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' (2023).

²¹ *ibid* art 10 (emphasis added).

That will make it absolutely clear to our courts and to Strasbourg that the risks laid out by the Court today have been responded to, will be consistent with international law, and ensure that Parliament is able to scrutinise it.²²

It is notable that, as well as the issue of international law, Cleverly appears here to be invoking the principle of accountability.

The ‘Rwanda Bill’²³ – introduced 7 December 2023, Royal Assent 25 April 2024

The Rwanda Bill was introduced in the Commons on the 7th of December 2023. It suffered several defeats in the House of Lords during ping-pong: 10 amendments were passed, all with significant majorities. A key amendment by the Labour party, requiring removals decisions to be made “while maintaining full compliance with domestic and international law”, was agreed by the Lords, with a majority of 102 votes.²⁴

Nevertheless, the Commons rejected all of the Lords’ amendments (see section V). The Bill (unamended) eventually received Royal Assent on the 25th of April 2024. The Act’s key provisions are set out below.

The Safety of Rwanda (Asylum and Immigration) Act’: Key Provisions

Section 2 of the Rwanda Act contains a **deeming provision and an ouster clause**: it declares that Rwanda is a safe country, and precludes any ‘decision-maker’ from hearing any challenges to a removal decision, brought on the grounds that Rwanda is not a safe country:

2 Safety of the Republic of Rwanda

(1) Every decision-maker must conclusively treat the Republic of Rwanda as a safe country.

²² Home Office, ‘Update to government’s plan for illegal immigration’ (2023)

<<https://www.gov.uk/government/speeches/update-on-governments-plan-for-illegal-immigration>> accessed 18 July 2024.

²³ Safety of Rwanda (Asylum and Immigration) HC Bill (2023-24) [38].

²⁴ HL Deb 4 March 2024, vol 836, cols 1346-8.

(2) A decision-maker means—

- (a) the Secretary of State or an immigration officer when making a decision relating to the removal of a person to the Republic of Rwanda under any provision of, or made under, the Immigration Act;
- (b) a court or tribunal when considering the decision of the Secretary of State or an immigration officer mentioned in paragraph (a).

(3) As a result of subsection (1), a court or tribunal must not consider a review of, or an appeal against, a decision of the Secretary of State or an immigration officer relating to the removal of a person to the Republic of Rwanda to the extent that the review or appeal is brought on the grounds that the Republic of Rwanda is not a safe country.

(4) In particular, a court or tribunal must not consider—

- (a) any claim or complaint that the Republic of 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,
- (b) any claim or complaint that a person will not receive fair and proper consideration of an asylum, or other similar, claim in the Republic of Rwanda, or
- (c) any claim or complaint that the Republic of Rwanda will not act in accordance with the Rwanda Treaty.

Section 3 **disapplies sections of the Human Rights Act 1998 ('HRA')**. Specifically, it disapplies:

- Section 2 HRA (interpretation of Convention rights) – this means that the courts are no longer required to take into account ECtHR case law when determining questions relating to the safety of Rwanda;
- Section 3 HRA (interpretation of legislation) – this means that the courts do not have to read and give effect to the Act in a way which is “compatible with the Convention rights”; and

- Sections 6-9 HRA (acts of public authorities) – this means that decision-makers are not required to comply with the requirements for public authorities set out in the HRA.

Section 3 **does not disapply** section 4 HRA (declarations of incompatibility). This means that the courts are still able to declare provisions of the Rwanda Act incompatible with Convention rights. Section 4(6) HRA provides that declarations of incompatibility **do not** impact the legal validity of primary legislation. As the Policy Exchange state, declarations of incompatibility impart more “political pressure” on the Government, rather than legal pressure.²⁵

Section 4 allows decision makers to **decide whether Rwanda is a safe country for an individual, on the basis of *their particular individual circumstances*** (as opposed to determining whether Rwanda is a safe country *in general*). It leaves a route to challenge open for a limited class of individuals, whose circumstances would make Rwanda a dangerous country for them to be sent to:

4 Decisions based on particular individual circumstances

(1) Section 2 does not prevent—

(a) the Secretary of State or an immigration officer from deciding (under any applicable provision of, or made under, the Immigration Acts) whether the Republic of 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 the Republic of Rwanda is not a safe country in general)**, or

(b) a court or tribunal considering a review of, or an appeal against, a relevant decision to the extent that the review or appeal is brought on the grounds that the Republic of Rwanda is not a safe country for the person in question, based on compelling evidence relating specifically to the person’s particular individual circumstances [...]

²⁵ Richard Ekins KC (Hon), Sir Stephen Laws KCB, KC (Hon) and Dr Conor Casey, ‘Safety of Rwanda (Asylum and Immigration) Bill: Policy Exchange Briefing Paper’ (Policy Exchange, 2023) 15.

Section 5 gives Ministers discretion in determining whether to comply with interim measures indicated by the ECtHR (also referred to as Rule 39 orders). **In international law**, Rule 39 orders are legally binding upon member states.²⁶

Overall, the Rwanda Act represents a novel and bold response to the problems arising from illegal immigration and asylum. Its key provisions engage issues that go beyond, for example, the cost of the scheme, or its practicality. Wider constitutional principles, such as the rule of law, are invoked, and form the basis for much discussion and debate of the Rwanda Policy.

²⁶ However, given the dualist nature of the UK constitution, such orders are not necessarily binding in domestic law. For more information on this, see the recent High Court judgment, *R(FDA) v Minister for the Cabinet Office* [2024] EWHC 1729 (Admin): Chamberlain J held that the Home Secretary's guidance for civil servants, instructing them to go ahead with Rwanda removals despite a Rule 39 order, was lawful. This was because, as Chamberlain J held, domestic law takes precedence over unincorporated international law, such as Article 34 ECHR.

II. How is the rule of law engaged by the Act?

A considerable amount of analysis of the Rwanda Act has been concerned with the policy's compliance with constitutional principles. Much of this analysis took place whilst the Act was still a Bill, and making its way through Parliament.

In particular, this analysis has focused on the Act's consistency with the rule of law. Critics have largely looked at the Act's potential breach of international law, as well as the Act's deeming/ouster provision which potentially "usurps" the judiciary's role and limits access to the courts.²⁷ The rule of law is not a principle whose definition is concrete or subject to consensus, but ensuring access to the courts and respecting institutional boundaries are both values which can readily, and perhaps uncontroversially, fall within its scope. It remains disputed whether compliance with international law is a core component of the rule of law; however, compelling arguments are presented by jurists and judges (such as Bingham) that such compliance is vital to remaining compliant with the rule of law at large.²⁸ Bingham's justifications for this are discussed below.

1. Contravention of International Law and Obligations

There is a key relationship between the obligations arising from international law, and the requirements arising from the rule of law. Certain conceptions of the rule of law view adherence to international law as one of its key aspects. Bingham, for example, states that "[t]he rule of law requires compliance by the state with its obligations in international law as in national law";²⁹ "the rule of law in the international order is, to a considerable extent at least, the domestic rule of law writ large."³⁰ On this view, for the Act to be compliant with the rule of law, it must also be consistent with international law.

Furthermore, the relationship between the rule of law and international law is somewhat reciprocal. Much like how the domestic rule of law requires ministers to act in compliance

²⁷ For instance, in their report on the Rwanda Bill, the Bingham Centre for the Rule of Law described it as "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".

²⁸ Tom Bingham, *The Rule of Law* (Penguin 2011) 110.

²⁹ *ibid.*

³⁰ *ibid* 111.

with international law, international law requires (or at least encourages) ministers to act in compliance with norms that might typically be understood as forming part of the domestic rule of law. For example, as acknowledged by the Government, section 2 of the Rwanda Act engages Article 3 ECHR (prohibition of inhumane or degrading treatment).³¹ Article 3 ECHR is incorporated into domestic law, through the HRA. Section 2 of the Rwanda Act – which deems Rwanda to be safe, when in reality the risk of refoulement may persist – potentially puts the UK in breach of its obligations under Article 3 ECHR. Section 2, therefore, is in tension with the rule of law as it applies within domestic law, but is also in tension with augmentations *to* the domestic application of the rule of law provided in the ECHR. Furthermore, on Bingham’s account, section 2 also falls foul of the rule of law because of its incompatibility with a *general* principle of international law (non-refoulement).

Article 13 ECHR (effective remedy) is another example of international law engaged by the Rwanda Act. Although Article 13 ECHR is not incorporated into domestic law via the HRA, the ECHR has been ratified by the UK Parliament. Section 2 of the Rwanda Act – in limiting access to the courts – potentially puts the UK in breach of Article 13.

The rule of law is also engaged by Section 5 of the Act, which allows ministers to ignore interim measures of the ECtHR. This, again, puts the UK at risk of breaching international law. This is particularly significant, as the Cabinet Manual sets out that Ministers are “under an overarching duty to comply with the law, *including international law* and treaty obligations.”³²

2. The Deeming Provision

Deeming provisions are not entirely novel in the UK. The Asylum and Immigration (Treatment of Claimants etc) Act 2004, for instance, deems certain countries as ‘safe countries’ for the purposes of the Act.

Yet, the deeming provision in the Rwanda Act is unique because it gives effect to a potential falsehood. Arguably, the UK Government have legislated for a ‘legal fiction’: the UK

³¹ In their ECHR Memorandum, para 5, the UK Government recognised that the ECHR Articles engaged by the Rwanda Act were Article 2 (right to life), Article 3 (prohibition of inhumane or degrading treatment), Article 8 (right to respect for private family life) and Article 13 (right to an effective remedy).

³² Cabinet Office, ‘Cabinet Manual’ (2011) para 3.46.

Supreme Court held, on the basis of evidence, that Rwanda was unsafe for the purposes of the Government's policy. The Government, by writing into statute that Rwanda is safe, is legislating for a falsehood. Furthermore, such a falsehood is a "dangerous"³³ one to legislate for; as Adam Tucker argues, the deeming provision is "designed to permit the government to evade its legal responsibilities", and "straightforwardly undermines the rule of law."³⁴

The rule of law is also engaged by the deeming provision because the courts are traditionally seen as the institution responsible for determining factual matters on the basis of evidence. Section 2 of the Act represents a removal of the court's ability to carry out this factfinding exercise, instead allocating this responsibility to Parliament.

The House of Lords Select Committee on the Constitution, as well as the Joint Committee on Human Rights, both address these dimensions of the rule of law (as discussed in sections III and IV). In defending their policy, the Government have attempted to present the Bill as being compliant with the rule of law, despite strong views to the contrary, primarily on the basis that the state of affairs provided by the Act is in fact true and *not* a legal fiction.

3. (Partial) Ouster

Ouster clauses seek to 'oust' the jurisdiction of the courts, limiting or precluding the judicial review of certain decisions. Ouster clauses are in clear tension with the rule of law principles that individuals have access to the courts, and that decisions made by the executive can be challenged and questioned in the courts. Perhaps more importantly, ouster clauses represent a conflict between two key constitutional principles:

"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."³⁵

³³ Adam Tucker, 'The Rwanda Policy, Legal Fiction(s), and Parliament's Legislative Authority' (UK Constitutional Law Association, 2023) <<https://ukconstitutionallaw.org/2023/11/22/adam-tucker-the-rwanda-policy-legal-fictions-and-parliaments-legislative-authority/>>. accessed 18 July 2024

³⁴ *ibid.*

³⁵ Patrick Butchard, Joanna Dawson and CJ McKinney, 'Safety of Rwanda (Asylum and Immigration) Bill: Legal Commentary (House of Commons Library Research Briefing, number 9931, 2024) 9.

Generally, the courts will give effect to an ouster clause, if it is written with sufficiently clear, express language, and only impacts the rule of law in a minor way. As Lord Bingham puts it:

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.³⁶

Bingham’s position was reflected in *Oceana*³⁷ and *AL*,³⁸ two judgments which considered (and ultimately gave effect to) the ouster in section 11A of the Tribunals, Courts and Enforcement Act 2007. In *Oceana*, the court held that:

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.³⁹

In the Rwanda Act, section 2(1) contains a deeming provision (discussed above), which deems Rwanda as safe. Sections 2(3)-(5) contain an ouster clause, precluding courts and tribunals from reviewing removal decisions on the basis of the safety of Rwanda. These sections have generally been described as “belt and braces”,⁴⁰ as they reaffirm that the position in section 2(1) – that Rwanda is safe – is conclusive and immune to challenge.

The Government’s approach is that the ouster clause is perfectly legitimate, and the courts must respect it. This is partly because section 4 of the Act retains the ability for individuals to challenge their removal decision, if their personal circumstances would make Rwanda a dangerous place for them. The Government relies on the ‘partial’ nature of the ouster in

³⁶ Bingham (n 28) 168.

³⁷ *R (on the application of Oceana) v Upper Tribunal (Immigration and Asylum Chamber)* [2023] EWHC 791 (Admin), [2023] Imm AR 1030.

³⁸ *AL (Albania) v Secretary of State for the Home Department* [2019] EWCA Civ 950, [2019] Imm AR 1257.

³⁹ *Oceana* (n 37) [52].

⁴⁰ Amnesty International, ‘Safety of Rwanda (Asylum and Immigration) Bill, Bill 38’ (2023) para 14.

defending it. The Government says that a *total* ouster (in contrast to the partial ouster in section 2) *would* “be a breach of international law and alien to the UK’s constitutional tradition of liberty and justice, where even in wartime the UK has maintained access to the courts in order that individuals can uphold their rights and freedoms.”⁴¹

Critics have, nonetheless, viewed the ouster as inconsistent with the rule of law. Amnesty International found that it is “entirely uncontroversial that what is being attempted is an **affront to the rule of law**, the UK’s legal system (and its highest court in particular), and several international agreements to which the UK is a party, including the European Convention on Human Rights.”⁴²

The Bingham Centre for the Rule of Law focused more on the Bill’s potential affront to the separation of powers – particularly the idea that the legislature must respect and defer to the judiciary, and avoid overstepping the responsibilities or duties which fall solely within the judiciary’s jurisdiction. The link between the separation of powers and the rule of law is discussed in more detail in section III below.

In the context of the Rwanda Bill, the Bingham Centre found that the Bill would be in contravention of the separation of powers (as well as the rule of law in general), because assessing the safety of Rwanda post-Treaty is a “**factual question for judicial not legislative determination**.”⁴³ The Joint Committee on Human Rights (‘JCHR’) also found that the courts “remain the most appropriate branch of the state to resolve contested issues of fact.”⁴⁴

The Government’s position is that there is no contravention of the rule of law, given that section 2 is worded with “clear and express words.”⁴⁵ Elliott, on the other hand, has suggested that the courts may read the provisions of the Act in a way which makes it compatible with constitutional principles and international law – they would “seek to

⁴¹ Home Office, ‘HMG Legal Position in Respect of the Safety of Rwanda (Asylum and Immigration) Bill’ (2023) 3.

⁴² Amnesty International (n 40) para 23.

⁴³ Murray Hunt, ‘Safety of Rwanda (Asylum and Immigration) Bill: A Preliminary Rule of Law Analysis for House of Commons Second Reading’ (Bingham Centre for the Rule of Law, 2023) 6.

⁴⁴ Joint Committee on Human Rights, *Safety of Rwanda (Asylum and Immigration) Bill: Second Report of Session* (2023–24, HL 62, HC 435) para 58.

⁴⁵ Home Office (n 40) 3.

triangulate through statutory interpretation rather than risking a constitutional crisis through explicit repudiation.”⁴⁶

The Act raises questions about the extent to which the courts *could* have interpreted its provisions consistently with the rule of law and, if that were impossible, in what way the courts might respond. The Government relied on the clear wording of the Act’s provisions, the route to judicial review under section 4 of the Act, and the courts’ retained ability to issue declarations of incompatibility, to present it as rule-of-law-compliant, and hence guarantee the effectiveness of the ouster. Yet, as found by the key committees (alongside many other critics), the Act arguably still cannot be read in a way which renders it consistent with the rule of law.

The courts might have taken a dramatic course, either giving effect to these provisions *regardless* of their incompatibility with the rule of law, or outright failing to give effect to them for reason of that incompatibility. This course, however, seems unlikely, and Elliott’s suggestion seems more likely: to avoid invoking the so-called “unorthodox”⁴⁷ dicta from *Jackson*⁴⁸ and *Privacy International*⁴⁹ the courts might have read the provisions of the Act so as to make them consistent with the rule of law, as well as relying on other provisions of the Act (such as section 4) to give as much effect to the rule of law as possible. Even if such statutory interpretation would have strained the language of the statute, provisions such as section 4 provide an avenue for reconciling the statute’s wording with compliance with broader constitutional principles.

The Rwanda Bill received significant scrutiny in Parliamentary committees. Both the House of Lords Select Committee on the Constitution, as well as the Joint Committee on Human Rights appraised the Bill in light of key constitutional principles like those discussed here. This report next focusses on the reports of each committee in turn, summarising each report’s findings, as well as the Government’s response.

⁴⁶ Mark Elliott, ‘Could the Supreme Court Reject the Rwanda Bill as Unconstitutional?’ (Public Law for Everyone, 2023) < <https://publiclawforeveryone.com/2023/12/11/could-the-supreme-court-reject-the-rwanda-bill-as-unconstitutional/> > accessed 14 June 2024.

⁴⁷ Home Office (n 41) 3.

⁴⁸ *R (Jackson) v Attorney General* [2005] UKHL 56, [2006] 1 AC 262.

⁴⁹ *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22, [2019] 2 WLR 1219.

III. House of Lords Select Committee on the Constitution

The House of Lords Select Committee on the Constitution published its report on the Rwanda Bill on the 9th of February 2024.⁵⁰ The Committee's general view was that the Bill's provisions were inconsistent with the rule of law, as well as the separation of powers. The Rwanda Bill invokes the separation of powers because, in the Committee's view, the Bill involves "replacing a factual assessment of the court with a deemed factual assessment expressed in the judgement of Parliament."⁵¹ This is potentially contrary to the separation of powers, because "[c]ourts have long-established procedures to evaluate evidence to determine the facts", which are "not replicated in the legislative process."⁵²

The separation of powers and the rule of law are related, and a respect for the separation of powers can potentially fall within the requirements of the principle of the rule of law. Bingham, for instance, says that one of the key aspects of the rule of law is that ministers and public officers must respect the institutional limits placed on their power.⁵³ Usurpation of a judicial function is, specifically, an affront to the separation of powers, and perhaps more widely, therefore inconsistent with the rule of law.⁵⁴ Furthermore, it might also be said that allocating a specific responsibility (such as making factual assessments based on evidence) to an institution *poorly*-suited to exercising that function is also a potential contravention of the separation of powers.

Summary of the Select Committee's Report

The deeming provision (section 2 of the Act)

The Committee found that the deeming provision could be interpreted as a usurpation of the judicial role, hence contravening the rule of law and separation of powers:

⁵⁰ Constitution Committee, *Safety of Rwanda (Asylum and Immigration) Bill* (HL 2023-24, 63).

⁵¹ *ibid* 11.

⁵² *ibid*.

⁵³ Bingham (n 28) 60.

⁵⁴ This distinction of specific/general contravention with constitutional principles, was used by Baroness Chakrabarti in the House of Lords' second reading of the Bill (see section V below).

13. The sovereignty of the UK Parliament is a long-established principle of the UK constitution. Nevertheless, there are constitutional consequences when legislation is enacted that significantly impacts the separation of powers. This is constitutionally inappropriate because it provides **a potential precedent in which legislation could be used to effectively reverse factual conclusions, jeopardising the rule of law as well as the separation of powers.**⁵⁵

The deeming provision would also limit the number of individuals who could challenge their removal decision. Limited access to the courts was viewed by the Committee as a contravention of the rule of law:

22. Clause 2 has implications for the rule of law because it significantly limits the ability of individuals to appeal decisions to remove them to the Republic of Rwanda. In doing so it reduces access to justice and the protection of rights.⁵⁶

Undermining human rights protections

The committee also focused on the disapplication of provisions of the HRA (section 3 of the Rwanda Act), and its implications for human rights protections in the UK.

31. The extent of the disapplication of provisions of the Human Rights Act in legislation concerned with specific policy areas undermines the universal nature and application of human rights and risks further such disapplication in future legislation. This is of considerable constitutional concern. Whilst individuals normally have access to the courts to ensure that a public authority does not act unlawfully by breaching their Convention rights, this will not be possible for an individual wishing to argue that the decision to remove them to the Republic of Rwanda breaches their Convention rights. We invite the House to consider the potential consequences of undermining the universal application of human rights.⁵⁷

The potential breach of international law and obligations

⁵⁵ *Constitution Committee* (n 50) para 13.

⁵⁶ *ibid* para 22.

⁵⁷ *ibid* para 31

The Committee considered rule of law arguments relating to the Act's incompatibility with the ECHR, as well as evidence that interim measures of the ECtHR are binding upon the UK, considering that compliance with international law is a core aspect of the rule of law:

57. We reiterate that respect for the rule of law requires respect for international law. Legislation that undermines the UK's international law obligations threatens the rule of law. We invite the House to consider the consequences should the enactment of this Bill in its current form breach the UK's international obligations.⁵⁸

[...]

63. We reiterate that where domestic and international law diverge, the duty reflected in the Ministerial Code to comply with international law remains. There would be significant consequences for the rule of law were ministers to determine that the UK was not to abide by an interim measure of the European Court of Human Rights in circumstances which placed them in breach of international law. We consider that clause 5 raises serious constitutional concerns.⁵⁹

The UK Government's Response

The UK Government published their response to the Lords Committee findings on the 12th of March 2024.⁶⁰ In summary, the Government insisted that the Bill was *not* in contravention of the rule of law or the UK's international obligations.

One of the Government's core arguments to this effect was that, rather than diverging from the Supreme Court's findings of fact, the Bill (and Treaty) *responded* to the Supreme Court. Indeed, the Government insisted that they had introduced the Bill and Treaty to address the concerns of the Court *by rendering Rwanda safe*:

We do not accept that this Bill is being used to reverse factual conclusions made by the Supreme Court. It simply **responds** to the key concerns of the Court to ensure the policy can go ahead.

⁵⁸ *ibid* para 57.

⁵⁹ *ibid* para 63.

⁶⁰ Home Office, 'Government Response to Safety Of Rwanda (Asylum And Immigration) Bill Report' (2024).

The Bill reflects the strength of the Government of Rwanda's protections and commitments given in the treaty to people transferred to Rwanda in accordance with the treaty. The treaty, alongside the evidence of changes in Rwanda since summer 2022, will enable Parliament to conclude that Rwanda is safe, and the new Bill provides Parliament with the opportunity to do so.⁶¹

In response to concerns regarding access to the courts, the Government's contention was that clause 4 of the Bill "explicitly protects access to justice by ensuring that courts can continue to consider the safety of Rwanda based on compelling evidence relating specifically to a person's particular individual circumstances."⁶²

The Government also insisted that despite the universal nature of human rights, it is perfectly legitimate to deal with different individuals' rights in different ways:

It is legitimate to treat people differently in different circumstances: to take just two examples, a citizen may legitimately be treated differently, and have different legal rights, from a non-national; and a person in detention may have certain rights restricted when compared to a person at liberty. The European Convention on Human Rights, as interpreted by the case law of the ECHR, fully recognises this principle. Rights are therefore universal, but what rights may mean for different people may legitimately differ depending on the circumstances, so long as any difference in treatment is justifiable within the framework of the relevant right. Therefore, everybody holds their rights without distinction on any ground; but the extent to which those rights may be limited, restricted, interfered with, or indeed vindicated, depends on each individual's circumstances, and the legitimacy of the limitation, restriction, interference, etc.⁶³

Finally, the Government replied to the Committee's concerns about potential breaches of international law, stating that it is "satisfied and has made it clear that this legislation is compliant with our international obligations, including the ECHR."⁶⁴

⁶¹ *ibid* 3.

⁶² *ibid*.

⁶³ *ibid* 5.

⁶⁴ *ibid* 8.

We are not repealing the Human Rights Act: we are disappling section 2 Human Rights Act [which] ensures that considerations about the Rwanda treaty and the safety of Rwanda are firmly located with Parliament, and taken together with the rest of clause 3 and the Bill as a whole, makes clear that appropriate deference should be given to Parliament's sovereign and final determination on the matter; section 3 in relation to the whole Bill; and sections 6-9 where the Courts are considering whether Rwanda is safe and where the test that must be met before removal is whether it will result in serious and irreversible harm.

Through this legislation we are not seeking to disapply any of the Convention rights. The Bill permits a route for direct access to the courts, which ensures that the Bill is consistent with the requirements of the European Court on Human Rights.⁶⁵

In response to the Lords' Committee's concern surrounding interim measures, the Government simply reiterated that clause 5 of the Bill

makes clear that it is only for a Minister of the Crown to determine whether to comply with an interim measure of the European Court of Human Rights. It also makes clear that domestic courts may not have regard to the existence of any interim measure when considering any domestic application flowing from a decision to remove a person to Rwanda in accordance with the treaty. Consideration will be on a case-by-case basis depending on the facts.⁶⁶

The Government also stated that this discretion given to Ministers reflects "the orthodox position that international obligations act on the Government rather than having effect on the domestic plane".⁶⁷

Arguably, the Government's position is difficult to defend. Although the Bill retains a route for certain individuals to challenge their removal decisions, the Government itself has described this as an "extremely limited route".⁶⁸ For many asylum-seekers, the Rwanda Bill precludes *all* routes to challenge; this is hard to reconcile with the Government's recognition that human rights are 'universal'.

Furthermore, before second reading, James Cleverly issued a s.19(1)(b) HRA statement:

⁶⁵ *ibid* 6.

⁶⁶ *ibid* 8.

⁶⁷ *ibid* 9.

⁶⁸ Home Office (n 41) 4.

I am unable to make a statement that, in my view, the provisions the Safety of Rwanda (Asylum and Immigration) Bill are compatible with the Convention rights, but the Government nevertheless wishes the House to proceed with the Bill.⁶⁹

Such a statement is difficult to reconcile with the Government's insistence that the Bill is compliant with international law. Although Alex Chalk, Lord Chancellor at the time, said that such a statement was issued out of "an abundance of caution",⁷⁰ it appears that the Government recognised the high possibility of breach of the ECHR. This is discussed in more detail in section VII below.

⁶⁹ Safety of Rwanda (Asylum and Immigration) HC Bill [38] (n 20).

⁷⁰ Joint Committee on Human Rights, *Safety of Rwanda (Asylum and Immigration) Bill: Second Report of Session* (2023–24, HL 62, HC 435) Oral Evidence from Alex Chalk.

IV. Joint Committee on Human Rights

The Joint Committee on Human Rights ('JCHR') published its report on the Rwanda Bill on the 12th of February 2024.⁷¹ The main Government spokesperson for the Bill in the JCHR proceedings was Alex Chalk, Lord Chancellor at the time.

Overall, The JCHR reached similar conclusions to the Lords' Select Committee on the Constitution. They found that the Bill undermines the UK's reputation for respecting the rule of law, given that it disapplied/disregarded international law, and interfered with human rights.

120. The UK has a reputation for respect for human rights and the rule of law, of which we should be proud. Legislation that seeks to disapply or fails to respect international law risks damaging that reputation and encouraging other states who are less respectful of the international legal order.⁷²

Summary of the Joint Committee's Report

The Deeming Provision (section 2 of the Act)

The JCHR concluded that it should be up to the courts to determine the safety of Rwanda, even after the Treaty was signed. The Bill, in the JCHR's view, overstepped into this judicial function.

58. We have considered the Government's evidence that Rwanda is now safe, but have also heard from witnesses and bodies including the UNHCR that Rwanda remains unsafe, or at least that there is not enough evidence available at this point to be sure of its safety. Overall, we cannot be clear that the position reached on Rwanda's safety by the country's most senior court is no longer correct. In any event, the courts remain the most appropriate branch of the state to resolve contested issues of fact, so the question of Rwanda's safety would best be determined not by

⁷¹ Joint Committee on Human Rights (n 44).

⁷² *ibid* para 120.

legislation but by allowing the courts to consider the new treaty and the latest developments on the ground.⁷³

(In)compatibility with Article 13 ECHR (right to an effective remedy)

Much like the Lords' Select Committee's findings on the Bill's limitation of the accessibility of the courts, the JCHR found that the Bill was not compatible with the UK's Article 13 obligations. As well as overstepping the judiciary's function by resolving contested issues of fact, the deeming provision also represents a (partial, though significant) ouster of judicial review:

4. The overwhelming majority of the evidence we received supported the view that by denying access to a court to challenge the safety of Rwanda the Bill is not compatible with the UK's international obligations, most obviously Article 13 ECHR – the right to an effective remedy.

5. Given that a declaration of incompatibility cannot affect an individual's removal to Rwanda, we do not consider that it can meet the requirement of Article 13 ECHR that asylum seekers have access to an effective remedy with automatic suspensive effect.

6. Clause 4 of the Bill would mitigate the Bill's impact by allowing for claims based on individual circumstances. It would not, however, make the Bill compliant with the Refugee Convention or with Article 13 ECHR because it would continue to deny access to court for individuals with arguable claims that they face persecution or a violation of fundamental human rights as a result of Rwanda being unsafe generally or because there is a risk of refoulement. Neither would clause 4 provide for a suspensive process, as required by Article 13 ECHR, in all but the rarest of circumstances.⁷⁴

Undermining human rights protections

The JCHR - again, like the Lords Committee – found that the disapplication of the HRA put the Bill at risk of undermining human rights protections in the UK.

95. The Human Rights Act 1998 is the cornerstone of human rights protection in domestic law. The Joint Committee on Human Rights has previously been critical of disapplication of parts

⁷³ *ibid* para 58.

⁷⁴ *ibid* paras 4-6.

of the HRA because it weakens human rights protections for particular groups, and thereby undermines the fundamental principle of the universality of human rights. The Bill would go further than ever before, disapplying almost all of the key provisions of the HRA in respect of removals to Rwanda. This is inconsistent with respect for universal human rights and for the UK's obligations under the ECHR. By expressly legislating to allow public authorities to act incompatibly with Convention rights the Bill also risks undermining the rights-compliant culture that should exist in all public bodies. This risk is exacerbated by issuing guidance requiring civil servants to act incompatibly with interim measures from the European Court of Human Rights.⁷⁵

Breach of international law and obligations

The JCHR noted that the Rwanda Bill represented a “disappointing” increase in potentially incompatible legislation being passed:

36. [...] The Committee welcomes the Government's continued recognition of the binding nature of its international obligations and its commitment to respecting them. It is nevertheless disappointing to see, for the second time in the past year, the introduction of a Bill that the Government cannot say is more likely than not to comply with its international obligations under the ECHR.⁷⁶

The JCHR, like the House of Lords Select Committee, also found Clause 5 of the Bill to be in violation of the UK's ECHR obligations:

110. Clause 5 of the Bill contemplates a Minister choosing not to comply with an interim measure and thus violating the UK's international human rights obligations. It also prevents the domestic courts taking into account what may be a relevant factor for any decision whether or not an individual should be removed to Rwanda. This is not consistent with a commitment to complying with the UK's obligations under the ECHR.⁷⁷

⁷⁵ *ibid* para 95.

⁷⁶ *ibid* para 36.

⁷⁷ *ibid* para 110.

The UK Government's Response

The Government published their response to the JCHR on the 19th of March 2024.⁷⁸ In defending the Bill, the Government reiterated the main objective of the Rwanda policy: to tackle illegal immigration.

We are responding to a global crisis of increased levels of illegal migration and it requires bold novel solutions to tackle it. The legislation and treaty deliver on the Prime Minister's priority to stop the boats. These measures are fair and necessary and are compatible with the UK's international legal obligations.⁷⁹

It is striking to see that the Government have invoked *policy*-based justifications, in a possible attempt to overcome the issues of constitutional *principle* and compliance with international law. Perhaps concerningly, this suggests that the Government views constitutional principles (and their own compliance with them) as being secondary to their achievement of policy ambitions. As will be discussed in Part 3 of the report, the Government have appeared to have presented the Act as being compatible with the rule of law and international obligations, but the JCHR have flagged questions about the substance of that compatibility: the UK Government appears to be utilising the relevant principles' flexibility *in order to* attain these policy ambitions.

In response to concerns regarding the deeming provision, and actual safety of Rwanda, the Government insisted that the new Treaty provisions would ensure that Parliament could “properly conclude that Rwanda is safe.” The Government disagreed that the deeming provision represented a contravention of their constitutional limits, and invoked Parliamentary sovereignty as well as *R (LA (Albania)) v Upper Tribunal* [2023] EWCA Civ 1337 as authority for partially limiting access to the courts:

⁷⁸ Home Office, 'Safety of Rwanda (Asylum and Immigration) Bill: Government Response to the Committee's Second Report' (HC 647, 19 March 2024).

⁷⁹ *ibid* 9.

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.

The Bill reflects the strength of the Government of Rwanda's protections and commitments given in the treaty to people transferred to Rwanda in accordance with the treaty. The treaty, alongside the evidence of changes in Rwanda since summer 2022, enables Parliament to properly conclude that Rwanda is safe.

It is our view that Parliament and the Government are well placed to address the sensitive policy issues involved in this legislation and ultimately tackling the major global challenge we are facing of illegal migration.

Parliament is able, with clear and express words, to limit access to the domestic courts and, has done so in the recent past in ways that have been upheld in the courts[.] The judgement [sic] of the Court of Appeal in the most recent case of *R (LA (Albania)) v Upper Tribunal* [2023] EWCA Civ 1337 is instructive.⁸⁰

In response to concerns surrounding a lack of human rights protections, the Government employed the same defence as they used in response to the House of Lords Select Committee. Namely, the Government insisted that it was properly within their power to *differentiate* the treatment of different individuals' rights, and that there was no deprivation of rights caused by the Bill, but merely tolerable *interference* with those rights:

There is nothing in the Bill that deprives any person of any of their human rights: in accordance with Article 1 of the ECHR, we shall continue to secure to everyone within our jurisdiction the rights and freedoms defined in the Convention. What we can legitimately do, and what we are doing, is to draw legal distinctions between those with a legitimate right to be in this country, and those who have come to this country illegally.⁸¹

Regarding interim measures and clause 5 of the Bill, the Government reiterated their position that it is up to Ministers, not Strasbourg, to determine whether interim relief should be granted:

⁸⁰ *ibid* 5.

⁸¹ *ibid* 8.

Where there is an equivalent domestic remedy—as we have provided for in clause 4 of the Bill—there should be no need for the Strasbourg Court to intervene. The decision of the UK’s domestic courts to issue interim relief should be made only where they have reached their own conclusion about whether a person is at risk of serious and irreversible harm and not on the basis that the European Court of Human Rights has indicated an interim measure.⁸²

Again, much like the arguments employed in response to the House of Lords Select Committee report, the Government’s arguments hold little weight. The JCHR heard plentiful evidence from the UNCHR that Rwanda *remains* unsafe for asylum-seekers, even after the Government’s response to the UK Supreme Court’s findings.⁸³ Hence, it remains disputable whether the deeming provision accurately represents the reality of the situation in Rwanda. The question of whether Rwanda is safe appears, at best, undetermined, so the deeming provision remains inappropriate. Yet, the Government insisted that the Treaty’s provisions mitigate the risks facing asylum-seekers in Rwanda – so much so, that they painted the Bill as a ‘response’ to the Court, even though section 2 reverses the Court’s conclusions of fact and (partially) ousts judicial review.

Beyond the committees, the Bill also received much scrutiny in both the Lords and the Commons: peers and MPs were more likely to appraise the Bill in light of its cost or practicality, but Parliamentary debate still grounded itself in constitutional principles, and the issue of international obligations.

⁸² *ibid.*

⁸³ Joint Committee on Human Rights (n 44) para 58.

V. House of Lords Debates

In the second reading of the Bill, the Lords made many references to the rule of law and the Bill's compatibility with this principle. Lord German, a Liberal Democrat Peer, said that the Bill “undermines the rule of law and, further, ousts the jurisdiction of our courts.”⁸⁴

Lord Clarke of Nottingham, a Conservative Peer, described section 2 as “a very dangerous constitutional provision.”⁸⁵ He hoped for the provision to be “challenged properly in the courts, because we have an unwritten constitution, but it gets more and more important that we make sure that the powers in this country are controlled by some constitutional limits and are subject to the rule of law.”⁸⁶

Baroness Chakrabarti, a Labour Peer, gave a crushing account of the Bill, describing it as “repugnant to the rule of law in general and the separation of powers in particular.”⁸⁷ She went on to describe the rule of law as the “bedrock of any civilised society.”⁸⁸ In an arguably admonishing account, Baroness Bennet of Manor Castle, a Green Peer, said that the UK's constitutional system is “unable ... to defend the basics of the rule of law.”⁸⁹

Such serious concerns led to the Bill suffering several defeats in the House of Lords - 10 amendments were successfully tabled, each with a large majority in favour.

In general, these amendments sought to:

Make the Bill compatible with the rule of law.⁹⁰

- Amendment 1 would require decision makers to have “due regard for domestic and international law”.
- Amendments 2 and 3 would bar Parliament from deeming Rwanda to be ‘safe’ until the Treaty was fully implemented, and its implementation monitored.
- Amendments 4 and 5 would allow decision makers to rebut the presumption that Rwanda is safe.

⁸⁴ HL Deb 29 January 2024, vol 835, col 1012.

⁸⁵ *ibid* col 1033.

⁸⁶ *ibid*.

⁸⁷ *ibid* col 1037.

⁸⁸ *ibid*.

⁸⁹ *ibid* col 1041.

⁹⁰ Stephen Kinnock (Labour MP) described amendments 1-6 as all relating to the Rule of Law.

- Amendment 6 would allow decision makers to consider whether Rwanda is safe, as well as restore the courts' the ability to grant interim relief.

Protect unaccompanied children from being removed to Rwanda

- Amendment 7 disapplies s 57 of the Illegal Migration Act 2023, which allows the courts to consider suspensive judicial review claims regarding removal decisions based on age assessments of unaccompanied children.

Monitor the number of asylum-seekers subject to removal under the Treaty

- Amendment 8 would require the Home Secretary to present to Parliament a statement, listing all individuals whose asylum claims were deemed inadmissible since the Illegal Migration Act 2023 became law, and the number of these individuals who will be removed to Rwanda.

Ensure that victims of modern slavery and human trafficking are identified and protected

- Amendment 9 prevents individuals with a positive reasonable grounds decision from the National Referral Mechanism from being removed to Rwanda.

Exempt individuals who supported the UK's armed forces or the UK Government

- Amendment 10 exempts “agents or allies who have supported His Majesty’s armed forces overseas in an exposed or meaningful manner that now affects their claim for protection”, as well as individuals who have provided services to the UK Government in an “exposed or meaningful manner”. The proposed amendment also includes the partners and family members of these individuals, and specifically lists individuals eligible for entry to the UK under the Afghan Relocations and Assistance Policy, and the Afghan Citizens Resettlement Scheme, as exempt.

Ultimately, the Government rejected all of these amendments when the Bill returned to the Commons, and the Bill passed unamended.

VI. House of Commons Debates

In the Commons, debates appeared to centre on the Bill's compliance (or contravention) of the UK's obligations under international law. MPs appeared to belong to one of three 'camps' in relation to this question:

1. Adherence to international law is important for the rule of law, and the Bill's provisions **respect** the UK's international obligations: there are no issues of compliance.
2. International law might be important, but remains **secondary** to Parliament's will, operating on a completely different 'plane'; effect must be given to Parliament's will, due to its sovereignty.
3. Adherence to international law is crucial (for the rule of law), and the Bill represents a dangerous **contravention** of the UK's international obligations.

Cleverly, reflecting the Government's position generally, can be said to belong to the first 'camp'. He recognised that the Government's actions were "novel and very much pushing at the edge of the envelope".⁹¹ Nevertheless, he maintained that the Bill was "within the framework of international law", and that the UK "demonstrates to the whole world the importance of international law",⁹² and continues to do so. When responding to the Lords' amendments, Michael Tomlinson (the Minister for Illegal Migration at the time), echoed Cleverly's views, concluding that he does not accept that "the Bill undermines the rule of law, and the Government take our responsibilities and international obligations incredibly seriously. There is nothing in the Bill that requires any act or omission that conflicts with our international obligations."⁹³

Yet, Danny Kruger, another Conservative MP, clearly belongs to the second 'camp'. He criticised the UK Supreme Court's judgment, accusing the court of having "inserted itself into foreign policy", and giving itself "special investigatory powers to make judgments about another country." Kruger went on to define the rule of law as "the supremacy of

⁹¹ HC Deb 12 December 2023, vol 742, col 748.

⁹² *ibid.*

⁹³ HC Deb 18 March 2024, vol 747, col 659.

Parliament and operation of the common law—case law made by our courts”,⁹⁴ concluding that international law, despite being “important”, applies only to the “international plane”.⁹⁵ William Cash, a Conservative MP, agreed with Kruger’s view. He described Lords amendment 1 (which would require Ministers to act in “full compliance with domestic and international law”) as “one of the most serious and dangerous clauses I have seen in recent statutory history.” He described the wording of the amendment as a contradiction of “one of the most fundamental principles of our constitutional law”⁹⁶ —Parliamentary Sovereignty—arguing that Parliament’s clear and unambiguous words trump the provisions of international law.

On the other hand, Yvette Cooper (shadow Home Secretary at the time) reflected Labour’s position, which firmly stood in the third ‘camp.’ She warned that “as the Bill stands, it risks breaking international law”.⁹⁷ She described the Bill as a “total mess” (a point which is returned to in Part 2), condemning some Conservative MPs for wanting “the UK to pull out of the European convention on human rights, no matter the consequences for the Good Friday agreement, the Windsor framework or the prospect of any future security or returns agreements with other countries.”⁹⁸

Labour appeared united in their criticism of the Bill: in the run-up to the 2024 General Election, they made it a key manifesto commitment to do away with the Rwanda Policy. The next part of this report will summarise Labour’s position before and after the General Election, looking at their criticisms of the Rwanda Policy, and summarising the new Labour Government’s approach to illegal immigration.

⁹⁴ This reflects what Lord Sumption said in *Privacy International*: “The rule of law applies as much to the courts as it does to anyone else, and under our constitution, that requires that effect must be given to Parliamentary legislation” [209].

⁹⁵ ‘Second Reading of Rwanda Bill’ (n 91) col 800.

⁹⁶ ‘Response to Lords’ Amendments’ (n 93) cols 685–6.

⁹⁷ ‘Second Reading of Rwanda Bill’ (n 91) col 762.

⁹⁸ *ibid* col 761.

PART 2

A New Labour Government and the End of the Rwanda Policy

Labour's position before the election; the Rwanda policy as 'dead and buried'; new immigration policies

Labour’s position on the Rwanda Policy and Act

During the Rwanda Bill’s progression through Parliament, Labour MPs found the Rwanda policy to be in contravention of the rule of law, and objected to it partly on that basis. Yvette Cooper MP, the shadow Home Secretary at the time, described the Bill as a

... **total mess**, which is why all sides of the Conservative party do not like it, even though most of them will still vote for it because they are in such a mess. Some of them want to stop all court challenges. Actually, I think some of them probably want to stop all courts, **because they have long ripped up being the party of law and order or of the rule of law.**⁹⁹

Chris Bryant MP said that the Bill would establish a “completely new doctrine of the separation of powers ... [which] put Ministers above the law.” Maria Eagle MP described Section 2 as “tantamount to undermining the rule of law”,¹⁰⁰ and Kevan Jones MP described the Conservative party as viewing lawyers as the “enemy of the people, lefty lawyers and do-gooders”, with the Bill representing a “façade of democracy”.¹⁰¹

Jones’ comment in particular shows that Labour MPs went beyond analysing the compatibility of the Bill with the rule of law, also looking at the Conservative party’s approach to constitutional principles, like the rule of law and separation of powers, as well as international obligations more generally.¹⁰²

The new Labour government’s approach to illegal immigration

Following the General Election on the 4th of July 2024, Labour won by a landslide, securing a 174-seat majority. In a press conference on the 6th of July, Keir Starmer (now Prime Minister) confirmed that the Rwanda Policy is “dead and buried”.

At the State Opening of Parliament (King’s Speech) on the 17th of July 2024, the King announced that his Government will

⁹⁹ *ibid.*

¹⁰⁰ *ibid* col 786.

¹⁰¹ *ibid* col 813.

¹⁰² See, for example, Yvette Cooper’s comments in section VI, which focus on the broader discontent that some Conservative MPs held towards the UK’s international obligations.

... seek to strengthen the border and make streets safer. A Bill will be introduced to modernise the asylum and immigration system, establishing a new Border Security Command and delivering enhanced counter terror powers to tackle organised immigration crime [Border Security, Asylum and Immigration Bill]. [...]¹⁰³

The Border Security, Asylum and Immigration Bill has similar policy objectives to the Rwanda Policy: to stop small boat crossings and the crime of people smuggling. The Bill will introduce a new Border Security Command to “bring criminal people smugglers to justice, tackling criminal gangs who exploit migrants and fuel the small boats crisis, and clearing the asylum backlog to end hotel use and increase returns.”¹⁰⁴ The Border Security Command was first announced by Yvette Cooper on the 7th of July 2024.¹⁰⁵

The Bill also seeks to increase penalties for ‘Organised Immigration Crime’, ultimately deterring criminal gangs from people smuggling. Finally, the Bill will fix the “broken asylum system”, by clearing the asylum backlog, introducing fast-track returns for individuals from safe countries and ending the Rwanda Policy.¹⁰⁶

Although Labour appears to be committed to the rule of law and the continued compliance with the UK’s obligations under international law (as demonstrated during the second reading of the Rwanda Bill), it should be noted that *any* immigration policy may still bring about potential tensions with international law, and perhaps the rule of law in general. As Katie Newbury, a partner at Kingsley Napley, suggested, Labour’s “reference to ‘fast track’ return schemes does raise concerns and any schemes must comply with our commitments under the Refugee Convention....”¹⁰⁷ Although we now have an insight into how the previous Conservative government viewed unwritten constitutional principles in

¹⁰³ ‘The King’s Speech’ (17 July 2024) <<https://www.gov.uk/government/speeches/the-kings-speech-2024>>.

¹⁰⁴ Prime Minister’s Office 10 Downing Street, ‘King’s Speech 2024: Background Briefing Notes’ (17 July 2024) 54.

¹⁰⁵ Home Office, ‘Home Secretary Launches New Border Security Command’ (7 July 2024) <<https://www.gov.uk/government/news/home-secretary-launches-new-border-security-command>> accessed 18 July 2024.

¹⁰⁶ Prime Minister’s Office, 10 Downing Street (n 104) 54.

¹⁰⁷ Katie Newbury, ‘Our Response to the Border Security, Asylum and Immigration Bill Announced in the King’s Speech’ (Kingsley Napley, 17 July 2024) <<https://www.kingsleynapley.co.uk/insights/blogs/immigration-law-blog/our-response-to-the-border-security-asylum-and-immigration-bill-announced-in-the-kings-speech>> accessed 18 July 2024.

the context of immigration policy, the new Labour Government are yet to showcase their position. The upcoming Border Security, Asylum and Immigration Bill will hopefully be appraised in light of such principles as it goes through Parliament.

Furthermore, on the 23rd of July 2024, the Home Secretary signed a Statutory Instrument to remove the retrospective effect of the Illegal Migration Act 2023 (IMA). Subject to sections 30-37 of the IMA, asylum seekers arriving in the UK after the 7th of March 2023 would be banned from ever obtaining legal migration status, despite the IMA only receiving Royal Assent on the 20th of July 2023 (four months later). Yvette Cooper, in the explanatory memorandum to the statutory instrument, stated that:

The use of primary legislation to amend the dates was considered as an alternative approach. However, it was not considered to be an appropriate use of Parliamentary time, given the existing powers available in the Act.¹⁰⁸

Although the retrospective effect of the IMA was in itself problematic and potentially inconsistent with the rule of law, the manner in which the Labour government has attempted to reverse this effect is also problematic. Statutory instruments receive little to no Parliamentary scrutiny, and therefore are enacted absent from what might be considered adequate accountability. Labour's response to the IMA's provisions raises questions as to their commitment to *procedural* compliance with the rule of law – in other words, their commitment to enacting significant constitutional changes in *ways* which reflect rule of law norms, even if those constitutional changes themselves are substantively compliant with the rule of law.

¹⁰⁸ Explanatory Memorandum to the Illegal Migration Act 2023 (Amendment) Regulations 2024, SI 2024/815.

PART 3

Explaining the 2022 - 2024 Government's Approach to the Rule of Law

Redefinition of the rule of law; a façade of compatibility; “pushing at the edge of the envelope”

It is worth at this juncture considering some reflections on the Government's approach to the Rwanda Policy and Act. Two such reflections can be offered here.

First, it is strongly arguable that the Act's provisions are clearly incompatible with the rule of law. However, the previous UK Government did not accept this. Instead, the Government narrowed the scope of the rule of law, utilising the inherent flexibility the Government perceived it to possess in doing so. This enabled the Government to give effect to policy ambitions (i.e., to 'Stop The Boats'), while presenting the Rwanda Act as compliant with the rule of law.

For instance, despite recognising that the Act would leave an "extremely limited route"¹⁰⁹ to judicial review for most individuals, the Government's position was that section 4 of the Act, as well as the ability to seek declarations of incompatibility under the HRA, were sufficient provisions to keep the Act within the scope of the rule of law (and more specifically, international law). It is notable that this claim was rejected in strong terms by the JCHR.¹¹⁰

Similarly, despite claiming to "respect"¹¹¹ the findings of the UK Supreme Court, the Government in fact reversed the Supreme Court's judgment—at least because the actual safety of Rwanda is still a matter of dispute—stating that Parliament could "change domestic law as it sees fit including, if that is Parliament's judgment, requiring a state of affairs or facts to be recognised",¹¹² and precluding the courts from ever making future considerations of the safety of Rwanda.

The key rule of law requirements engaged in these examples (access to the courts and respect for the function – and judgment – of the courts), were both undermined by the Government, suggesting that they engaged in an instrumental narrowing of the principle's scope, only in order to make the Act appear compatible with the rule of law. The Government did not accept the Act's provisions were, in fact, incompliant with the rule of law.

Hence, the Government's redefinition of the rule of law is evidence of their attempt to avoid conceding the Act's incompliance with this principle. It appears that the Government engaged in a balancing exercise, finding the most optimal way to redefine the rule of law,

¹⁰⁹ Home Office (n 41) 4.

¹¹⁰ For instance, as outlined in para 36 of the JCHR report.

¹¹¹ Home Office (n 41) 1.

¹¹² *ibid* 2.

so as to respect the principle while achieving their policy ambitions. However, in doing so, the Government have gone too far in narrowing the scope of the rule of law, merely dressing the Act in the clothes of this principle, and employing a “façade”¹¹³ of compatibility to cover substantive contravention of this principle.

Second, the UK Government overstated the flexibility of the rule of law, despite recognising that there *was* a limit to how far they could ‘redefine’ and narrow the scope of the rule of law, before the Act would be considered in clear contravention of this principle. Given that Cleverly recognised the Act was “pushing at the edge of the envelope”,¹¹⁴ the Government appear to have—at least implicitly—recognised that the rule of law has inflexible limits. Nevertheless, many critics found that the Rwanda Act went too far in “pushing the edge of the envelope”, with the Government narrowing the scope of the rule of law to such an extent that *meaningful* compliance with this principle was impossible.

Interestingly, the Government faced criticism both that the Act *did not go far enough* in ensuring the Government’s policy ambitions were achieved, and that it went *too far*, as a result contravening international law and the rule of law in general. Critics who argued that the Bill did not go far enough called for the Government to legislate for a *full* ouster, and disapply *all* provisions of the HRA.¹¹⁵ In response, the Government argued that going this far would leave “no respectable argument”¹¹⁶ on which to defend the Bill. Accordingly, it appears that the Government *did* view the rule of law as an important constitutional principle, and one which could not be disregarded entirely. Indeed, during the JCHR inquiry, Alex Chalk described the UK as a “rule of law nation”.¹¹⁷ Cleverly, in second reading, conceded that Parliament was to “listen to ... [and] respect”¹¹⁸ the judges’ views. Hence, the Government recognised that there was a limit to how far they could manipulate the rule of law – they could not, for instance, merely cite the sovereignty of Parliament as a justification for legislating in direct contravention of the rule of law.¹¹⁹

¹¹³ Language borrowed from the second reading of the Rwanda Bill (n 91).

¹¹⁴ *ibid*

¹¹⁵ For instance, in their report, the Policy Exchange advised that the Government disapply section 4 HRA, and remove clause 4 from the Bill.

¹¹⁶ Home Office (n 41) 4.

¹¹⁷ Joint Committee on Human Rights, *Safety of Rwanda (Asylum and Immigration) Bill: Second Report of Session* (2023–24, HL 62, HC 435) Oral Evidence from Alex Chalk.

¹¹⁸ Second Reading of the Bill (n 91).

¹¹⁹ Although some in the House of Commons did advocate for such a course, such as Danny Kruger and William Cash (as noted in section VI above).

Yet, many critics argued that the Rwanda Act went *too far* in pursuit of the Government's policy ambitions, leading to the Act's provisions contravening the rule of law. As outlined in Part 1 of this report, both of the key Parliamentary committees found the Act to be in clear contravention of international law, the rule of law and the separation of powers.¹²⁰ The Government framed the deeming provision as a *response*¹²¹ to the UK Supreme Court yet, rather than respecting the boundaries of the judicial function, both committees found that the Act's provisions allowed ministers to overstep the judiciary's function. The Government also emphasised that certain individuals still retained the right to challenge removal decisions under section 4 of the Act. Nevertheless, both committees found that the Act significantly reduced access to the courts, so much so as to amount to a contravention of the rule of law.

It is perhaps important to note that the JCHR usually provides suggested amendments to the Bills they scrutinise, but was unable to provide any for the Rwanda Bill. This was because, as the Committee stated, any amendments "designed to render the Bill compatible" with the rule of law would "inevitably be inconsistent with the Bill's central purpose."¹²² Hence, the JCHR recognised that in attempting to simultaneously achieve key policy ambitions, *and* present the Act as rule-of-law-compliant, the Government arguably redefined the rule of law in such a way that it could no longer be recognised as the rule of law. In other words, *meaningful* compliance with the rule of law would have precluded the Government from 'stopping the boats'.

Overall, it appears that the Government not only failed to concede that the Rwanda Act was incompliant with the rule of law: they also overstated the flexibility of this principle, in their attempts to redefine and narrow its scope. This raises several final questions as to the Government's view of constitutional principles.

The first question is, in light of their Rwanda Policy, how did the Government view the relationship between the rule of law and **Parliamentary sovereignty**? Several Conservative MPs appeared to view that Parliamentary sovereignty as so absolute that adherence to international law, as well as other rule of law requirements, was of secondary importance. (See, for example, William Cash's view, outlined in Section VI above). Yet, the Government

¹²⁰ Other organisations have also expressed similar views, such as the Bingham Centre for the Rule of Law and Amnesty International.

¹²¹ Home Office (n 61).

¹²² Joint Committee on Human Rights (n 44) para 121.

certainly **did not hold this view**: they appeared to be committed to the rule of law, and attempted to establish the Act as compliant with it.

The second question, which follows from this, is why did the Government still legislate for a policy which was clearly incompatible with key aspects of the rule of law? In other words, does their attempt to redefine and narrow the rule of law tell us more about their views on these constitutional principles and their own role in shaping their meaning? Is it that they viewed the rule of law as a mere legislative ‘threshold’ which they *had* to meet, without actually being concerned with the Act’s *substantive* compatibility with this principle?

Although it may not be possible to provide clear answers to each of these questions here, it remains to be seen—and will be instructive to consider—the new Labour Government’s approaches to these issues as it comes to terms, as the Conservative Government did, with governing a constitutional order replete with its own unwritten principles.

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