Opinion of the Legal Committee on the Safety of Rwanda (Asylum and Immigration) Bill (the Asylum Bill)

Sir William Cash CH MP, Rt Hon David Jones MP, Martin Howe KC and Barnabas Reynolds[1]

We have been asked to consider whether the Asylum Bill will be effective in achieving its political purpose, which is to ensure swift removals to Rwanda at scale, achieving the maximum deterrent effect for illegal migration into the United Kingdom.

The main question is whether the Bill closes out the possibility for lengthy challenges in the UK courts before the removals take place, allowing for proper challenges instead to be made from Rwanda, with a right of return or other remedies if claims are upheld.[2] The Bill sits alongside a UK-Rwanda Treaty on asylum, which underpins its provisions.

BACKGROUND

The Bill, in combination with the Treaty, seeks specifically to address the decision of the Supreme Court in *AAA v Secretary of State for the Home Department* [2023] UKSC 42 that there were substantial grounds for believing that asylum seekers removed from the UK to Rwanda would be subject to a real risk of "refoulement" from Rwanda to a place where they could be subjected to ill treatment, and that their removal would be in breach of the Human Rights Act 1998 because Rwanda is unsafe. The legal test applied by the Supreme Court arises from interpretations of Article 3 of the European Convention on Human Rights ("ECHR") in the case law of the ECHR Court which sits at Strasbourg ("the Strasbourg Court").[3] The Treaty is intended conclusively to address such concerns, through the making of extensive commitments and assurances[4] by Rwanda over the treatment of the refugees, which will become part of Rwandan law by virtue of article 3(6) of that Treaty.

The Bill addresses significant elements of the test for non-removal insofar as a challenge is based on general conditions in Rwanda or on risks to which persons removed to Rwanda will in general be subject. Clause 2(1) therefore overrides the ability for the courts to consider whether Rwanda is a "safe country" for removals. In support of this objective, the Treaty provides for protections on the treatment of people removed from the UK when they arrive in Rwanda. It also provides for various specific protections, including non-discrimination against those who have been removed (article 3(1)).

The Bill contains a requirement for the courts to reject arguments that persons will not receive a fair or proper consideration of their asylum case in Rwanda (clause 2(4)(b)), or that Rwanda will not act in accordance with the Treaty (clause 2(4)(c)) - although individualised claims on either basis are still permitted (clause 4(1)). There is also an attempt to prevent the possibility of legal proceedings stalling the process of removal. Thus, interim remedies such as injunctions, which would in practice prevent or delay the removal of the person to Rwanda, may only be granted if the court or tribunal "*is satisfied that the person would, before the review or appeal is determined, face a real,*

[1] The named authors are extremely grateful for the extensive assistance which has been provided to them by other lawyers, including those with day-to-day experience of the operation of immigration and asylum law, but are fully responsible for the conclusions set out in this paper.

[2] The mechanics for the return of individuals, as determined by the UK courts, are provided for in Article 11 of the UK-Rwanda Treaty referred to here.

[3] The Supreme Court's judgment also refers to other international instruments and to provisions of the Immigration Acts which give effect under UK law to the Geneva Refugees Convention, but these give rise to somewhat different legal issues from those arising under the ECHR as interpreted by Strasbourg case law.

[4] E.g. in articles 10 and 13 of the Treaty.

imminent and foreseeable risk of serious and irreversible harm if removed to the Republic of Rwanda" (clause 4(4)). This category of permissible injunctions builds upon the "serious harm suspensive claims" in section 39 of the Illegal Migration Act 2023. Where this "serious harm" test is not satisfied, the removal would occur and the proceedings would continue while the individual is in Rwanda.

OVERALL CONCLUSIONS

The Bill overall provides a partial and incomplete solution to the problem of legal challenges in the UK courts being used as stratagems to delay or defeat the removal of illegal migrants to Rwanda, for the following reasons.

- Most importantly, the Bill contains no restrictions on the bringing of legal challenges against removal to Rwanda based on grounds other than that Rwanda is not a safe country. Many such individual claims have already been brought on a variety of other grounds, and it is to be expected that if the Bill successfully blocks challenges based on contentions that Rwanda is not safe, then migrants and their advisers will focus more of their efforts on generating and pursuing challenges of other kinds.
- The restriction in the Bill is only against pursuing claims that Rwanda is unsafe for migrants removed there *in general*. Clause 4(1) expressly preserves the possibility of legal challenges to removal based on arguments that a person's *individual circumstances* may lead to them being subject to a risk of refoulement and ill-treatment.[5] The Treaty is intended to address such concerns. However, by allowing individual claims, appeals, and injunctions, the statutory scheme is open to significant levels of legal challenge. Experience to date in cases about attempted removal of illegal migrants to Rwanda demonstrates that individual challenges are likely to be numerous, and that they have had a high rate of success.
- The Bill's exclusions of the ECHR and of international instruments will be effective within their scope, but that scope is very narrow. The Bill remains vulnerable to international law arguments, because its "notwithstanding" clauses are unduly narrow.
- The Bill's threshold requirement for interim relief that there should be a risk of "serious and irreparable harm" is in practice much easier to surmount than the words might suggest, for example through the provision of medical statements of mental conditions which are not easy to prove or disprove (for example, suicidal ideation). There is a serious risk that there will be no, or very few, actual removals to Rwanda for months after the Bill comes into force.
- Clause 5 of the Bill deals with interim measures of the Strasbourg Court (so-called "Rule 39 indications") by stating that a Minister of the Crown may decide not to comply with them. In our view this does no more than restate the existing legal position, since (1) there are compelling arguments that Rule 39 indications do not give rise to an obligation in international law to comply with them, and (2) in any event Strasbourg Court rulings do not of themselves create obligations which are enforceable under domestic UK law.[6] Perversely, the inclusion of ministerial decisions relating to Rule 39 indications in clause 5(2) of the Bill might give rise to a possibility of bringing judicial reviews against such decisions which would not

[5] Clause 2(4)(a) only limits refoulement claims if these are part of a general claim that Rwanda is not a safe country – it does not rule out individualised claims: see clause 4(1).

[6] *R v Lyons*, House of Lords, [2002] UKHL 44.

otherwise arise. It would be preferable if the Bill were positively to require such interim indications to be disregarded when UK courts refuse interim relief.

- The Bill leaves unaddressed other serious impairments to the removal scheme which arise from the application of Strasbourg Court case law, most notably case law on Article 5 of the ECHR which restricts the ability of the Government to detain illegal migrants except when their removal is imminent.
- The Bill is not flexible or future-proofed: it does not allow the UK to spread the risk between offshoring and outsourcing, or with other removal destinations.

The Bill does contain some important statements of principle, in that it reasserts the sovereignty of Parliament and its right to legislate to cut through the morass of alleged international norms which currently frustrate the ability of the United Kingdom to control its own borders (clause 1(4)). The partial disapplication of aspects of the Human Rights Act 1998 ("the HRA") and international law elsewhere in the Bill are important demonstrations of parliamentary supremacy. Further, despite government statements that the Bill will be compatible with the UK's international obligations, it seems clear that by taking decisions on whether or not Rwanda is safe out of the hands of the courts, the Bill will conflict with the Strasbourg Court's ruling in the *Chahal* case that not allowing a court to decide such matters involved the UK in a breach of Article 3 in conjunction with Article 13 of the Convention.[7]

The Bill in effect crosses the Rubicon of overt defiance of Strasbourg Court jurisprudence. However, having taken that important step in principle, the cut-through is too narrow and limited for the Bill actually to lead with confidence to the delivery of the policy goal of making removals to Rwanda effective enough to provide a real deterrent to illegal arrivals into the UK.

[7] *Chahal v UK* [1996] 23 EHRR 413 paras 140-156 where the Strasbourg Court decided that it was necessary for the question of whether there was a risk of Article 3 mistreatment in a destination country to be decided by a court rather than by an administrative authority, and also that a State is not entitled to balance other factors such as risks to the safety of its citizens against the risk of harm to the individual being expelled.

ANALYSIS

In this section we consider the following factors:

A. detailed limitations of the Bill,
B. possible ways forward, and
C. an uncertainty arising from the Treaty.

A. DETAILED LIMITATIONS OF THE BILL

1. **Non-exclusion of personal claims.** Individual claims against removal which are based on grounds other than an allegation that Rwanda is unsafe are outside the scope of the Bill and are not restricted. Therefore it is to be expected that such claims will be raised and pursued in large numbers. The High Court judgment of 19 December 2022[8] which initially held the Government's Rwanda policy lawful in principle (a finding later reversed by the Court of Appeal and Supreme Court) also upheld a number of individual claims on a variety of grounds.[9]

2. **Express countenancing of personal claims about a person's safety in Rwanda.** Claims based on allegations that Rwanda is not safe for a particular individual, as distinct from claims that Rwanda is unsafe for persons sent there in general, are expressly preserved by clause 4(1)(b). This allows for claims, appeals, and injunctions, 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)*". The line between personal and "general" factors is undefined and untested. In short, clause 4 and the possibility of challenges on grounds other than safety in Rwanda represent a significant risk to the delivery of the scheme, and that risk could be determinative.

3. **Limited disapplication of the Human Rights Act 1998.** Clause 3 disapplies certain provisions of the HRA. We consider that these disapplications of the HRA will be effective within their scope, but this scope is limited, so careful consideration is needed as to whether it is adequate to achieve the purposes of the Bill.
   - Clause 3(2) disapplies HRA section 2 "*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 to under any provision of, or made under, the Immigration Acts*." This means that such a court or tribunal is not required to "take account of" case law of the Strasbourg Court when determining that question, so that notably the *Chahal* case would not bind the court (albeit only in the context of a generalised "safe country" challenge). However, by itself this sub-clause does not disapply the underlying Articles of the ECHR.[10] In interpreting them, the court would be free to depart from the Strasbourg case

[8] [2022] EWHC 3230 (Admin).
[9] See summary table at para 438 of the judgment.
[10] Clause 3(5) contains what appears to be a wider exclusion of section 6 to 9 of the HRA. These sections require public authorities to act in accordance with ECHR rights and enable individuals to bring proceedings against public authorities for breach or threatened breach of those rights. The exclusion is not limited to Article 3 or any other specific Articles of the ECHR, and so in that respect is general in scope. However, the exclusion is quite narrowly defined in clause 3(5) as applying only to decisions taken under clause 2(1) of the Bill (whether Rwanda in general is a safe country), and as to whether or not there is "serious and irreparable harm" in interim remedy decisions under clause 4(4) or in personal circumstance safety claims under clause 4(1). Therefore clause 3 does not amount to a wider or more general disapplication of human rights claims in legal challenges against removal to Rwanda.

law but not required to do so, so it is unclear what effect this exclusion would have in practice.[11]

- There is no disapplication of the requirement to take account of Strasbourg case law when a court or tribunal is considering any question other than the "safe country" question; so other grounds of challenge, including those based on health or other factors potentially engaging Article 3 ECHR, are not affected.
- The Bill fails to exclude sections 4 (declarations of incompatibility) and 10 (remedial measures) of the HRA. This invites the possibility that a UK court could declare the entire Bill, or parts of it, incompatible with the ECHR. Indeed, it appears that the Government Legal Service view this as at least possible and perhaps more likely than not, because the Secretary of State made a so-called "section 19(1)(b) statement". This means that, based on legal advice he must have received, he was not able to say the Bill is compatible with the ECHR. The risk of UK courts issuing declarations of incompatibility is heightened in two respects. First, judges may feel compelled to align themselves with the recent Supreme Court decision, which reached unequivocal conclusions on the question of ECHR incompatibility. Second, if the Strasbourg Court comes to a substantive decision on an ECHR breach, UK judges may feel strongly inclined to come to the same conclusion and issue declarations of incompatibility. (The same risk arises with each new public statement from UNHCR, which is opposed to the scheme.) Declarations of incompatibility would make it increasingly difficult for the Government to maintain its posture that the Bill's provisions are compatible with the UK's international obligations.

4. **Limited restrictions on interim injunctions in UK courts.** Sub-clauses 4(3) to 4(5) restrict the grant of interim relief by UK courts when they are considering claims that Rwanda is unsafe based on individual circumstances. Courts can only prevent or delay removal of a person to Rwanda if satisfied that the person will "*face a real, imminent and foreseeable risk of serious and irreversible harm if removed to the Republic of Rwanda*." This brings interim relief in such claims into line with "serious harm suspensive claims" under sections 38 *et seq* of the Illegal Migration Act 2023.

   In theory, these restrictions ought to mean that many people pursuing claims against removal to Rwanda on individual grounds (whether an alleged individual threat to safety under clause 4(1) of the Bill, or some other ground not restricted by the Bill) should in the first instance be removed to Rwanda and then left to pursue their claims after they arrive there, which the Treaty will specifically allow them to do. The provisions of the Treaty would provide protection for them whilst they are in Rwanda. Were this approach to succeed, it could materially reduce the ability to use claims and last minute appeals as delaying tactics to stay in the UK.

   However, it is very difficult to say with any degree of certainty that such an outcome will be achieved. For a start, it is difficult to foresee all the types of claim which could be advanced in order to prevent or delay removal to Rwanda. Foreseeable claims could include medical problems either to do with the flight to

[11] See fn 8 above.

Rwanda or with conditions after arrival; claims based on gender identity and sexuality and how this might lead to persecution in Rwanda; political views that could lead to persecution or discrimination by the Rwandan Government; or claims about personal vulnerabilities regarding housing or other social needs. The Treaty is intended to prevent concerns of this nature from arising, through legally binding obligations on Rwanda. Seen as an ideal, the hoped-for intention of the Government is that this means that the UK courts would defer to the Treaty itself, and to the Government's overall arrangements, when assessing the validity of individual claims, thereby allowing for the removal of the vast majority of claimants pending a full consideration of their cases. Despite this, however, the courts may find such claims time consuming and difficult to dismiss in practice, given that the evidence will be based on subjective assertions which e.g. medical professionals cannot second guess; or a case might be manufactured relatively easily (for example, by posting dissenting messages or joining protest groups). In other words, the Treaty posits an ideal which the courts may view as not being met in reality for a given individual. While general claims of this nature are precluded, claims in relation to a specific individual are allowed.

Given that these provisions are completely untested, it is unknown how many claims will be successful. Past experience would indicate the likelihood that many claims will be made. Experience of previous immigration legislation, including the Nationality and Borders Act 2022, suggests that litigants and those who advise and help them will use every avenue available to prevent or delay removal. The claimant lawyer/NGO sector has so far put significant effort and ingenuity into making such claims, developing templates and how-to guides. It must be assumed that this would continue. Whether the restrictions on interim injunctions are interpreted narrowly or broadly will depend on the Government winning early test cases, which will then influence the judges in later cases - and also relies on the hope that unhelpful precedents will not develop in individual cases. Judges will be making decisions in the context of the recent Supreme Court decision, which was delivered in very strong terms. They may therefore take a cautious approach in interpreting clause 4(1)(b) or in applying the concept of serious and foreseeable harm: in other words, bending over backwards to help apparently deserving and unfortunate claimants in the face of the Government's efforts to ensure genuine cases will be rare.

Even if only some of the claims succeed, the number of claims made (potentially hundreds per day, based on past arrivals) could put a strain on the court system, with the possibility of injunctions needing to be issued simply to give the courts time to work through what could be a significant backlog before a flight can take place.

The concern arises as to whether delays are inherent in this scheme, at least for a number of months and probably years, since it gives every migrant a right to contest their own removal, on grounds however limited. This could necessitate delay, in each case quite possibly for several months, thereby critically undermining the scheme's deterrent effect.

As we have already mentioned, in the First Instance decision in *AAA v SSHD*, there were multiple personal grounds cited to the courts to resist removal, and in many of them the claimants were successful.[12]

5. **No exclusion of applicability of indications of interim measures by Strasbourg Court.** The Strasbourg Court is empowered to indicate "interim measures" in proceedings brought by individuals subject to removal.[13] Clause 5(2) of the Bill, on interim measures, simply preserves the UK position, which is that a Minister of the Crown must decide whether to comply with any interim measure. The default position already provided for in the Illegal Migration Act 2023 (section 55(9) – which is not altered in this Bill) is that if no decision is made, then the "duty to remove" does not apply. In other words, the default is that the Rule 39 indication "bites" unless a Minister is willing to defy it. Given the recent decision of the Supreme Court, it is now significantly more likely that such indications will be made at scale by the Strasbourg Court. The result will be that the Strasbourg Court can still stop flights, subject to the Secretary of State deciding to ignore those indications. The Attorney General's view on the legalities of preventing flights will predominate. Thus, Parliament's will could be frustrated by the Attorney General's view of international law arguments. If the Attorney General's advice prefers the Strasbourg Court's view that they are always binding, over that of lawyers like Lords Sumption, Wolfson, and Sandhurst, [14] then the discretion in section 55 of the Illegal Migration Act can never be used and is effectively a dead letter.

   Failing to make this position clear in the Bill suggests that the Government is unwilling to state clearly that interim measures are not binding and cannot prevent or delay removal.

6. **Risks arising from the Strasbourg Court's interim measures based on personal factors.** Given that the Bill involves bypassing the requirement in the *Chahal* case (mentioned above), if the Strasbourg Court were to issue interim measures based on personal factors relevant to the individual, there could be said to be a conflict between:
   - the provision of the Bill which gives a Minister the sole ability to decide whether to comply with the interim measure (clause 5(2)), and
   - the provision of the Bill that disapplies the HRA, including section 2 which requires the UK courts to defer to the Strasbourg Court's interpretation of rights under the ECHR.

   The Bill only disapplies the HRA so far as this is inconsistent with the Bill, leaving open to judicial interpretation whether the Bill intends to provide that all reasoning of the Strasbourg Court on personal factors is capable of being rejected; in fact, because section 2 is disapplied only in relation to general claims, per clause 3(3), it would in principle still apply to all other claims. This issue is

[12] For examples of individualised claims that could be made, see the High Court decision in *AAA v SSHD* [2022] EWHC 3230 (Admin) [178]-[379].
[13] Rule 39 of the Rules of Court.
[14] As well as by the legal academic Professor Richard Ekins in "Rule 39 and the Rule of Law" (with forewords by Lords Sumption and Hoffmann), Policy Exchange 2023 https://policyexchange.org.uk/publication/rule-39-and-the-rule-of-law/

compounded further by the fact that the "serious harm suspensive claims" were expressly and openly designed to replicate Strasbourg jurisprudence. This invites two risks, as follows.

- The courts may feel obliged to interpret the position with reference to Strasbourg case law, since this might (on one interpretation) be seen to involve advancing Parliament's intention. The apparent narrowness of the serious harm provision may not therefore depend on UK judges, but upon Strasbourg judges known to take an expansive approach.
- The courts could take the view that the Minister's decision on such matters will be subject to judicial review, since the Bill does not oust their jurisdiction over personal factors. As such, the court could well decide that a Minister had to follow the decision of the Strasbourg Court as a matter of UK law – and may be required to do so by a court order.

7. **No exclusion of final decisions of Strasbourg Court.** There is nothing in the Bill which would prevent the UK courts from following or being influenced by a final ruling of the Strasbourg Court on a case where the Bill does not expressly preclude them from doing so, including where the ruling is based on personal factors. The Strasbourg Court could essentially undermine the entire purpose of the Bill by taking a broad view of what matters are personal.
Moreover, were the Strasbourg Court to decide that Rwanda is unsafe in general, it is unclear whether the Bill would be effective such that UK Courts would be required to ignore that judgment. The Bill does not expressly say so.

8. **Limited exclusion of international law.** There is no comprehensive exclusion of the rule of statutory interpretation that Parliament is presumed to legislate consistently with international law; indeed, the Bill's "compliance with international obligations" was repeated by the Secretary of State in the House recently, and may be raised in argument in court to limit its effectiveness (as a *Pepper v Hart*-type statement, used to support the interpretation of the Bill, when enacted). In this context, a further doubt which is not resolved is whether courts will look to the terms of the Treaty with Rwanda to interpret the Bill, which may lead to interpretations that were not intended.

9. **Limited exclusion of Treaties.** The Bill does not clearly preclude the (arguable) application of the human rights provisions of the Belfast (Good Friday) Agreement, the Trade and Cooperation Agreement 2020, and other Treaties to which the UK is party. The argument could be made that these Treaties are not clearly captured by the definition of international law in the Bill. There is also a possible argument that Article 2(1) of the Northern Ireland Protocol (which required the UK to continue to give effect in Northern Ireland to a number of EU anti-discrimination laws) might through section 7A[15] of the EU (Withdrawal) Act 2018 create obligations under UK domestic law which could interfere with the operation of

[15] Section 7A was inserted into the 2018 Act by the European Union (Withdrawal Agreement) Act 2020 in order to give effect under UK law to the Withdrawal Agreement which includes the Northern Ireland Protocol. Section 7A is modelled on section 2(1) of the European Communities Act 1972 and gives overriding effect in UK law to provisions of the Withdrawal Agreement which are intended to have direct effect. Although we have noted this as a possible argument, it is far from clear that Article 2(1) of the Protocol is intended to have direct effect, and it is in any event outside the parts of the Protocol over which the Luxembourg Court is given jurisdiction by Article 12(6) of the Protocol.

the Bill, so for safety it would be prudent to exclude this possibility.

10. **No curtailment of ability for reversal.** Once in Rwanda, individuals will be able to appeal any previous decisions based on new evidence. The UK has to bring them back if it is determined that Rwanda their personal rights are breached, or that there is now a serious risk of irreversible harm, since the possibility of such returns was not precluded in the Illegal Migration Act 2023, and has now been strengthened by the binding Treaty. This leaves open the possibility that someone deported then engages in dissent or protests against the Rwandan Government in order to be returned to the UK, by order of a UK court.

11. **No amendments to detention powers.** The Bill does not make any amendments to the powers of detention under the Illegal Migration Act 2023; this will remain another source of legal challenge. The longer that removals are delayed by injunctions under clause 4, and the more claims that can be made, the harder it will be to maintain detention under that Act. Nor does the Bill address matters of liability for damages and litigation costs.

We also note that the Bill is not flexible or future-proofed. It does not allow the UK to spread the risk between offshoring and outsourcing, or with other removal destinations.

In summary, we are of the view that the Bill takes some but not all of the steps necessary to achieve its political purpose. The Prime Minister may well be right when he claims that this is the "toughest piece of migration legislation ever put forward by a UK Government", but we do not believe that it goes far enough to deliver the policy as intended. Resolving, comprehensively, the issues raised by this analysis would require very significant amendments, some of which would potentially be outside the current title's scope, and the final Bill would look very different.

B. POSSIBLE WAYS FORWARD

The question at issue is how to remove migrants who have arrived illegally in the UK, by sending them to Rwanda or other acceptable territories, for processing there. The fact of removal is thought likely to have a sufficient deterrent effect that many illegal migrants would not seek to embark on their voyage. In order to achieve this, the Government wishes to remove the possibility for arguments solely over the flights and whether the Government's decision to enter into the Treaty is reasonable and effective.

It would be best to specify what is to be permitted. This would involve the placing of illegal migrants onto planes to Rwanda, based on a good faith decision by officials (unchallengeable except, perhaps, for obvious bad faith, strictly defined). The Bill would then specify all of the laws that are excluded in order for this to happen. The Bill could expressly exclude legal challenges that would improperly delay or block removal, and ensure that there are explicit ousters of jurisdiction for injunctions based on decisions which led to an individual being chosen for a Rwanda flight. Courts will uphold these provisions provided they are clear and unambiguous.[16] Judicial oversight would still be present given the availability of claims that would not suspend removal under the Illegal Migration Act, including judicial review. These would be conducted remotely from

[16] See, for example, R (on the application of Oceana) v Upper Tribunal (Immigration and Asylum Chamber) [2023] EWHC 791 (Admin), confirmed in R (on the application of LA (Albania)) v Upper Tribunal (Immigration and Asylum Chamber) [2023] EWCA Civ 1337.

Rwanda, although it may be prudent to place limitations on the available remedies for some of those claims, to restrict returns where the policy would otherwise be defeated.

In addition, Parliament is entitled to, and should, reverse the default position in the Illegal Migration Act (section 55(9)), to ensure that interim measures ("Rule 39 indications") are not binding by default, although recognising that a Minister may choose to pause specific removals in extreme cases. The Government is essentially already saying that its own view over the issue of the legitimacy of the flights and the Treaty arrangements with Rwanda should be prima facie determinative as a matter of international law; however, the Bill's provisions do not buttress that approach sufficiently.

The Bill could also contain a mechanism for the Secretary of State to enter into agreements, and designate as safe, other countries or territories in addition to Rwanda. It could also, quite easily, extend the same treatment to all Overseas Territories. It could make provision for countries to be removed from this special treatment if circumstances change.

Finally, a different legal architecture could be adopted from the current one, which begins with a definition that refers to international law. Clause 2(1) of the Bill requires every decision maker to "*conclusively treat the Republic of Rwanda as a safe country*." The application of that and other provisions of the Bill hangs off the definition of "safe country" in clause 1(5)(a), which is defined as a country to which persons may be removed "*in compliance with all of the [UK's] obligations under international law that are relevant …*" Ideally, the legislation should not focus on the application of international law. Rather, it should legislate for what should happen as a matter of UK law, and state that international law may not be referred to by judges or decision-makers in carrying out those ends.

It is probable that the combined effect of clauses 2(1) and 1(5) is that courts are required to treat Rwanda as if it is a country to which persons may be removed consistently with the UK's international obligations even if this is disputed, for example, if Strasbourg has ruled conclusively in the other direction. However, by approaching this question in an unusual way, the Bill sets up an interpretative argument that, even with clause 2, Parliament cannot have intended that the general safety of Rwanda should be ignored, especially given the criteria posited in the Bill itself.

We note that the Treaty provides in Article 19 that the UK must take Rwanda's most vulnerable refugees back to the UK. The question arises over the number of those refugees, who would otherwise remain where they sought to flee, i.e. Rwanda. A similar provision was contained in the previous Memorandum of Understanding with Rwanda (see 16.1); however, this has been upgraded to a much stronger "shall" obligation and is now legally binding on the UK as a Treaty obligation.

10 December 2023