Law Society of Scotland Second Reading Briefing

Safety of Rwanda (Asylum and Immigration) Bill House of Lords Second Reading Briefing

24 January 2024

Introduction

The Law Society of Scotland is the professional body for over 13,000 Scottish solicitors.
We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Immigration and Asylum Subcommittee welcome the opportunity to consider and comment on the Safety of Rwanda (Asylum and Immigration) Bill. The Committee and Group have the following comments to put forward for consideration.

General Comments

Preface

We are very concerned about a number of aspects of this bill.
There are resonances of the Ministerial Statement on the Illegal Migration Bill in the approach to the Safety of Rwanda (Asylum and Immigration) Bill. In particular the Ministerial Statement under The Human Rights Act 1998 (HRA) section 19(1), the terms of the introductory clause 1 and aspects of other clauses in the bill

The Ministerial Statement under The Human Rights Act 1998 (HRA) section 19(1)

The HRA section 19(1) provides that a Minister of the Crown “I charge of a Bill…must, before Second Reading of the Bill— (a) make a statement to the effect that in the Minister’s view the provisions of the Bill are compatible with the Convention rights (“a statement of compatibility”); or (b) make a statement to the effect that although the Minister is unable to make a statement of compatibility the Government nevertheless wishes the House to proceed with the Bill. (2) The statement must be in writing and be published in such manner as the Minister making it considers appropriate”.

On introduction of the Bill in the House of Commons, the Home Secretary, the Rt Hon James Cleverly MP made a statement under section 19(1)(b) of the Human Rights Act 1998 (“HRA”) that he is unable to make a statement that, in his view, the provisions of the Bill are compatible with Convention rights, but the Government nevertheless wishes the House to proceed with the Bill”.

Such a statement may invite a challenge under section 4 of the HRA and will allow a court to declare that the Bill is incompatible with the ECHR. Section 4 of HRA is not disapplied by clause 3 of the Bill. However, it may be difficult to invoke section 4 because the courts are required by clause 2(1) to accept that Rwanda is a safe country. But, even if such a declaration was to be made, this will not affect the validity of the Bill. This is underlined by clause 1(4)(b) of the Bill.

The memorandum acknowledges that the “Convention rights raised by the Bill are right to life (Article 2); prohibition of inhuman or degrading treatment (Article 3); right to respect for private and family life (Article 8); and right to an effective remedy (Article 13).”.

The compatibility statement has been in force since 24 November 1998. It was used for the first time in immigration law in the Illegal Migration Bill. In a letter to MPs, Suella Braverman the then Home Secretary said this acknowledgement in the Bill under section 19 (1)(b) of the Human Rights Act 1998 - did not mean it was incompatible with the convention but that there was more than a 50 per cent chance that it may not be. This means government lawyers have assessed its chances of withstanding a legal challenge as more likely to fail than succeed.

As Professor Aileen Kavanagh stated in, 'Is the Illegal Migration Act itself illegal? The Meaning and Methods of Section 19 HRA': https://ukconstitutionallaw.org/ “a negative Statement under section 19(1)(b) embodies a conclusion that the courts are more likely than not to find a violation with rights, but that the government nevertheless wishes to proceed with the Bill.”

Why is the Government pursuing legislation which may not be compatible with Convention rights and which may invite challenge by those affected by the legislation? We accept that a Minister of the Crown may choose to issue a statement under section 19(1)(b). However, bringing forward a bill which is not stated to be compatible with Convention rights risks non-compliance with the Convention. The UK is obliged to comply with its international obligations, one of Lord Bingham’s eight principles of the rule of law – to do otherwise is to act contrary to the rule of law.

Recent developments

On 17 January 2024 the bill passed its Third Reading in the House of Commons without amendment. On the same day the Cabinet Office issued draft guidance which will apply if the bill remains in its current form after Royal Assent: 2024-01-17_-_Letter_from_the_Cabinet_Office_to_the_Home_Office.pdf (publishing.service.gov.uk). The draft guidance states:

“As a matter of UK law, the decision as to whether to comply with a Rule 39 indication is a decision for a Minister of the Crown. Parliament has legislated to grant Ministers this discretion. The implications of such a decision in respect of the UK's international obligations are a matter for Ministers. In the event that the Minister, having received policy, operational and legal advice on the specific facts of that case, decides not to comply with a Rule 39 indication, it is the responsibility of civil servants - operating under the Civil Service Code - to implement that decision. This applies to all civil servants.”

Also on 17 January, the House of Lords International Agreements Committee published its Report on the UK-Rwanda Agreement on an Asylum Partnership: https://publications.parliament.uk/pa/ld5804/ldselect/ldintagr/43/43.pdf.

The Report notes that in *R (on the application of AAA (Syria) and others) v Secretary of State for the Home Department* [2023] UKSC 42 at paragraphs 102–104, the Supreme Court upheld the Court of Appeal's finding that the Rwanda policy was unlawful. The Supreme Court did not question the principle of sending asylum seekers overseas for the processing of their claims but considered that on the facts Rwanda was not a safe third country (paragraph 9).

The Committee concluded that the arrangements the treaty provides for are incomplete and accordingly it is not ready for ratification. The Committee notes that the Government has provided no indication of the timescale for the completion of the necessary steps, but the evidence suggests it will take some time. Steps which are required include: a new asylum law in Rwanda; a system for ensuring that non-refoulement does not take place; a process for submitting individual complaints to the Monitoring Committee; training for international judges in Rwandan law and practice; and training for Rwandan officials dealing with asylum applicants: Rwanda treaty should not be ratified until its safeguards have been implemented, says Lords committee - Committees - UK Parliament.

We note that, on 15 January 2024, the UNHCR provided an update to its 2022 analysis but concludes that it "maintains its position that the arrangement, as now articulated in the UK-Rwanda Partnership Treaty and the accompanying legislative scheme *[including the Bill]* does not meet the required standards relating to the legality and appropriateness of the transfer of asylum seekers and is not compatible with international refugee law.": Refworld | UNHCR Analysis of the Legality and Appropriateness of the Transfer of Asylum-Seekers under the UK-Rwanda arrangement: an update

We note that the Rwanda policy was not in the 2019 manifesto and that the Salisbury Convention does not apply. In our view, the Parliament Acts cannot be used to ensure passage of the Bill in this Parliament because there is insufficient time in this session.

Furthermore, on 22 January the House of Lords resolved that "in accordance with section 20 of the Constitutional Reform and Governance Act 2010, that His Majesty's Government should not ratify the UK-Rwanda Agreement on an Asylum Partnership until the protections it provides have been fully implemented, since Parliament is being asked to make a judgement, based on the Agreement, about whether Rwanda is safe."

If the bill receives a Second Reading in the House of Lords on 29 January, it is expected that Committee stage will take place later in February. This is an important bill and it is appropriate that it receives adequate scrutiny in Committee.

1. Introduction

Clause 1 is declaratory in nature. It states the statutory purpose of the Bill in clause 1(1) "The purpose of this Act is to prevent and deter unlawful migration, and in particular migration by unsafe and illegal routes, by enabling the removal of persons to the Republic of Rwanda under provision made by or under the Immigration Acts.".

The International Agreements Committee report noted that clause 1(2)(a) confirms that the Rwanda Treaty has been laid in accordance with the Constitutional Reform and Governance Act 2010. Section 20 of the Act provides that the House of Commons has the power to delay the ratification of a treaty. The House of Lords can also resolve that a treaty should not be ratified but the Government can override this if it lays a statement before the House (paragraph 46).

What is the purpose of the declaratory provision in clause 1(4)(a) which provides "It is recognised that— (a) the Parliament of the United Kingdom is sovereign…". Is there a need for this reminder of a constitutional doctrine which has already been declared in earlier statutes e.g. Section 38(1) of the European Union (Withdrawal Agreement) Act 2020? Perhaps this declaration is made to pave the way to the further declaration that that the validity of Acts of Parliament is not affected by international law. This relationship between domestic and international law is highlighted in the House of Commons Library Research Briefing, *Safety of Rwanda (Asylum and Immigration) Bill: legal commentary:* "A key point is that parliamentary sovereignty has no bearing on the legal effect of the UK's international obligations. This is because, in international law, no rule of a state's internal law can be used to justify a breach of an international obligation. This principle is set out in Article 27 of the Vienna Convention on the Law of Treaties." CBP-9931.pdf (parliament.uk) paragraph 2.1.

International law is a key element in the definition of what is a "safe country" under the bill.

The definition of "international law" occurs in clause 1(6) refers to many international instruments and a catch-all provision at clause 1(4)(b)(g):

(a) the Human Rights Convention,
(b) the Refugee Convention,
(c) the International Covenant on Civil and Political Rights of 1966,
(d) the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984,
(e) the Council of Europe Convention on Action against Trafficking in Human Beings done at Warsaw on 16 May 2005,
(f) customary international law, and
(g) any other international law, or convention or rule of international law, whatsoever, including any order, judgment, decision or measure of the European Court of Human Rights.

The catch-all provision would include the UK/EU Withdrawal Agreement: Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (legislation.gov.uk), the UK/EU Trade and Co-operation agreement Article 524 Publications Office (europa.eu) and the The Belfast Agreement - GOV.UK (www.gov.uk) .

2. Safety of the Republic of Rwanda

Clause 2 of the bill states that “Every decision-maker must conclusively treat the Republic of Rwanda as a safe country.” How then would changes in Rwanda’s internal safety or security or a failure to comply with the UK-Rwanda Treaty be coped with?

If Rwanda is acknowledged in the future as being unsafe the obligation on decision-makers can only be changed by primary legislation. The Government should give an undertaking to review this provision in those circumstances. Better still the Government should amend the bill to provide for change to this provision by delegated legislation in such an eventuality.
Should the decision-maker not be allowed to consider the findings of the Joint Monitoring Body under Article 16 of the UK-Rwanda Treaty when exercising the decision-making power?

3. Disapplication of Human Rights Act 1998

This is a concerning provision. We note the Human Rights memorandum acknowledges that the bill disapplies elements of the HRA in the following ways.

i) Disapplication of section 2 HRA when a Court is deciding if Rwanda is a safe country for a person to be removed to under the Immigration Acts.
ii) Disapplication of section 3 HRA to the entire Bill.
iii) Disapplication of sections 6 - 9 HRA as they relate to a decision on the basis of 2(1) of the Bill; and
iv) Disapplication of sections 6 - 9 HRA where there is already a serious and irreversible harm test in place.

Paragraphs 17-21 of the memorandum narrate the impact of the disapplication of these HRA provisions but does not explain the implications of these provisions. Only section 4 HRA remains applicable and will be difficult to invoke given that the routes to raise the argument of non-compatibility are removed and because the domestic courts are required to accept Rwanda as a safe country.

4. Decisions based on particular individual circumstances

This is a provision which may be helpful to the individual facing removal to Rwanda, but it is narrow in scope and as a partial ouster clause has more chance of being upheld than a total ouster.

We acknowledge that it allows a decision maker, or a court or tribunal considering a review or appeal of a decision, to decide whether Rwanda is a safe country for a person, based on “compelling evidence relating specifically to the person’s particular individual circumstances.”. It is noteworthy, however, that this provision does not allow for consideration of any assertion that Rwanda is not a safe country in general.

5. Interim measures of the European Court of Human Rights

Clause 5(2) confers on a Minister of the Crown the exclusive right to decide whether the UK will comply with an interim measure indicated by the European Court of Human Rights. Some of its key provisions replicate the corresponding subsections of section 55 of the Illegal Migration Act 2023, which may generate confusion about the law which applies. This too is an ouster provision which contradicts the doctrine of the separation of powers between the Executive and the Judiciary.

6. Consequential provision

We have no comments to make.

7. Interpretation

We have no comments to make.

8. Extent

We have no comments to make.

9. Commencement and transitional provision

Clause 9(2) applies the Bill to any decision by a decision-maker relating to the removal of a person to the Republic of Rwanda that is made on or after the day on which the Rwanda Treaty enters into force, irrespective of when the person arrived in the United Kingdom. For those who entered the UK prior to this bill being passed, and were potentially liable for removal under the Illegal Migration Act, this provision would allow for decision makers who issued notices of intent under the previous policy and immigration rules 345A-345C (which have now been deleted), to issue decisions applying the provisions of the treaty. In our view it is concerning that this clause appears to give the treaty retroactive effect.

10. Short title

We have no comments to make.

For further information, please contact:
Michael P Clancy
Director, Law Reform
Law Society of Scotland
DD: 07785 578333
michaelclancy@lawscot.org.uk