The UK's Rwanda Asylum Policy and the Courts: reflections on the Constitutional Consequences?[1*]

by Peter Leyland

Abstract: *Il piano britannico sull'asilo in Rwanda e le corti: riflessioni sulle conseguenze costituzionali?* - This article is divided into four linked parts. The first provides an evaluation of the Supreme Court judgment in the so called Rwanda case which undermined the Conservative government's policy to send asylum seekers to Rwanda, rather than process their applications in the UK. The second section gives a critical assessment of the government's response by discussing the treaty negotiated with Rwanda and the controversial nature of the follow-up legislation. In light of the recent NIHRC case the third section speculates on possible legal challenges to the Act assuming the measures included within it were to be subject to legal challenge. In light of the political and constitutional debates over the Brexit period the final section draws attention to a deliberate strategy by populists to discredit the ECHR and rights protection, and, at the same time undermine the constitutional role of the courts.

Keywords: Rwanda Asylum Policy; Immigration; ECHR; Populism; UK.

1. Introduction

European governments need to develop a policy response to the global migration crisis as there are many millions of forcibly displaced people worldwide. Tens of thousands of these displaced people are willing to risk perilous sea voyages arranged by criminal gangs to reach safe shores whether across the Mediterranean Sea to Sicily or the English Channel to the South coast of the UK. Recent judicial review (JR) and human rights (HR) decisions have been taken against a backdrop of a divisive polarisation in domestic politics, particularly during the course of UK withdrawal from the EU but also a sustained hostility in some quarters to the courts and to human rights protection in particular. As will be apparent in the discussion later, this viewpoint has been increasingly politically motivated by some groups and politicians within the Conservative Part, Reform UK (previously UKIP) and by right wing lobby groups such as Policy Exchange.[2]

[1*] I would like to thank Professor Andrew Harding, Professor Gordon Anthony, Professor Nicola Lupo and Michael Bartlet for their helpful comments and insights on earlier drafts of this paper.

[2] The deep hostility to HR protection under current laws and the HRA is articulated by a new right brand of Conservative supported by right wing lobbying groups. See e.g. R Ekins, *The Strasbourg Court's Disgraceful Rwanda Intervention*, in *Law Society's*

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The Supreme Court in the Rwanda case made it clear that it was being called upon to decide whether the policy of the Conservative Government was lawful, in other words upholding the rule of law as it perceived it to be. The judgment was not presented as a contribution to the wider political debate in and beyond Parliament on the issues it raised. However, it is argued in the final part of this article that the Rwanda case, and the fall out which has resulted from it, needs to be assessed against a backdrop of orchestrated attacks by populists on the courts and senior judges which, in turn, potentially impacts, at the heart of the democratic process, on the balance between Parliament, the executive and the courts.

At a conceptual level for generations there have been strong tensions discernible between the sometimes polarised positions of legal academics (and judges) reviewing the administrative state. In general this has been reflected in what has come to be termed as Red and Green Light Theory[3], and more specifically in relation to judicial policy as a contestation between what is termed 'legal constitutionalism' versus 'political constitutionalism'.[4] Further, it is argued that that the populist dimension, discernible most vividly since Brexit, has meant that the tenor of this debate has changed quite radically. Basic assumptions about constitutional limits have been called into question to such an extent that the role of the courts in providing constitutional accountability as a counter weight to the executive is in danger of being compromised.

This article is divided into four linked parts. The first provides an evaluation of the Supreme Court judgment in the so called Rwanda case which undermined the Conservative government's policy to send asylum seekers to Rwanda, rather than process their applications in the UK. The second section gives a critical assessment of the government's response by discussing the treaty negotiated with Rwanda and the controversial nature of the follow-up legislation. In light of the recent NIHRC case the third section speculates on possible legal challenges to the Act, assuming that the measures included within it were to be subject to legal challenge. In light of the political and constitutional debates over the Brexit period the final section draws attention to a deliberate strategy by populists to discredit the ECHR and rights protection, and, at the same time undermine the constitutional role of the courts.

2. The Supreme Court Judgment

This Rwanda case itself[5] was a final appeal before the UK Supreme Court challenging aspects of the government's so called 'Rwanda' policy[6] which

Gazette, 15 June 2022. Contrasting view within the Party: D. Grieve, *Why Human Rights Should Matter to Conservatives*, in 86(1) *The Political Quarterly* (January-March 2015).

[3] See C. Harlow, R. Rawlings, *Law and Administration*, London, 1984, chapters 1 and 2.

[4] For an overview see T. Allan, *Accountability to Law*, in N. Bamforth, P. Leyland, *Accountability in the Contemporary Constitution*, Oxford, 2013.

[5] *R (on the application of AAA (Syria) and others) v SS for the Home Department* [2023] UKSC 42.

[6] Migration and Development Partnership (MEDP) was the agreement between UK and Rwanda that would have allowed certain asylum seekers to be removed to Rwanda. Memorandum of Understanding between UK and Rwanda governments April 2022

would have required asylum seekers to have their claims considered in Rwanda rather than the UK. The Country Policy Information Notes (CPIN) rules used by the immigration service advised that there are no substantial grounds for believing that a person, if relocated to Rwanda, would face a real risk of treatment that is likely to be contrary to Article 3 ECHR by virtue of refoulement shortcomings in the asylum process.[7]

The principle of non-refoulement was established under the 1951 UN convention and its protocol. This requires that asylum seekers are not returned to a country where their life or freedom will be threatened on account of race, religion, nationality, membership of a particular social group or political opinion. The Supreme Court affirms that it is core principle of international law. Moreover, the Strasbourg decision in *Soering v United Kingdom* (1989) 11 EHRR 439 – not only recognises that it is the duty of the contracting parties under Article 3 not to subject persons to torture or to inhuman or degrading treatment, but also imports an obligation not to remove persons to other states where there are substantial grounds for believing that they would be at risk of such treatment. Non-refoulement also forms part of customary international law[8] and the Human Rights Act 1998 (HRA) gives domestic effect to the ECHR. For example, under HRA section 6 it is unlawful for a public authority to act in a way which is incompatible with a convention right. Domestic law also recognises non-refoulement. For instance, s.2 of the Immigration Appeals Act 1993 states that: Nothing in the immigration rules shall lay down any practice which would be contrary to the Convention.[9] Finally, the Nationality, Immigration and Asylum Act 2002 confers a right of appeal against the refusal of a protection claim (for removal). It will be pointed out below that the Rwanda (Asylum and Immigration) Act 2024 seeks to dis-apply the Human Rights Act in order to circumnavigate the UK's obligations under the ECHR.[10]

Several asylum seekers were challenging inadmissibility and removal decisions which would be determined in Rwanda and not in the UK. The UK Supreme Court found the application of the policy was defective because the evidence relating to the prospect of ill treatment had not been correctly assessed.[11] It was not a question of whether the SS was entitled to reach a particular conclusion, but whether the court assesses that there are, in fact, substantial grounds that there is a real risk of refoulement.

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under which Rwanda is committed to treat each individual and process claims in accordance with the Refugee Convention, Rwandan immigration laws and international and Rwandan standards/human rights laws granting certain guarantees and protections. Further, a monitoring committee is to be established to monitor implementation. (In international law the MEDP is a non-binding agreement).

[7] *R (on the application of AAA (Syria) and others) v SS for the Home Department* [2023] UKSC 42, para 6.

[8] See e.g. R.B. Baker, *Customary International Law in the 21st Century: Old Challenges and New Debates*, 21(1) *European Journal of International Law* 173 (2010); J.L. Goldsmith, E.A. Posner, *The Limits of International Law*, Oxford, 2005. This involves international HR obligations deriving from established and consistent state practices.

[9] This is given further effect by HRA s.6.

[10] See Section 3.

[11] *R (on the application of AAA (Syria) and others) v SS for the Home Department* [2023] UKSC 42, para 38.

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It is relevant to the subsequent legislation to note that on the issue of non-refoulement the Secretary of State had relied on assurances from the Rwandan government in the MEDP.[12] In considering the actual risk the Israel/Rwanda agreement of 2013 had supplied evidence of Rwanda's inability to provide meaningful guarantees. Persons relocated under the agreement suffered serious breaches of their rights under the Refugee Convention (moved clandestinely to Uganda). Ministers were briefed about these breaches, but did not investigate further and chose to overlook this evidence.[13]

Further, the Supreme Court cites authority for judicial determination of the question of whether there are substantial grounds for a risk of refoulement. For example, Lord Hoffman had stated: 'Whether a sufficient risk exists is a question of evaluation and prediction based on evidence. In answering such a question, the executive enjoys no constitutional prerogative'.[14] More recently, Lord Reed had stressed that 'if a question arises as to whether the Secretary of State has acted compatibly with the appellant's Convention rights, contrary to section 6 (HRA) the court has to determine the matter objectively on the basis of its own assessment'.[15]

The Court accepted that the agreements has been entered into in good faith but it needed to be convinced over the practical ability of the Rwandan asylum system to deliver the policy as intended. The evidence presented established substantial grounds for believing that there is a real risk that asylum claims will not be determined properly, and that asylum seekers will, in consequence, be at risk of being returned directly or indirectly to their country of origin. It was thus held '…the court is itself required by law to form a view as to whether there are substantial grounds for believing that asylum seekers who are removed to Rwanda are at risk of refoulement, in the light of all the evidence bearing on that issue…'.[16] The appeals succeeded on the basis that there was a real risk that their claims would not be properly determined.

3. The Continuation of the Rwanda Policy Narrative

The outcome of the case was something of a political humiliation for PM Sunak's increasingly unpopular Conservative government that had already invested £200 million on the project. For the purposes of this article the response by the UK government comprised two pertinent elements: a new treaty with Rwanda and the introduction of legislation before Parliament (finally approved in April 2024) to facilitate the application of the policy.

3.1 The New Treaty

[12] above note 5. The SC stated that serious and systemic defects were overlooked by the Divisional Court when the case was first heard. See para 39.
[13] *R (on the application of AAA (Syria) and others) v SS for the Home Department* [2023] UKSC 42, Para 96.
[14] Ibid para 56.
[15] ibid.
[16] Ibid, para 24.

The UN Convention Relating to the Status of Refugees continues to provide the legal framework for the granting of asylum. It guarantees rights to a person who falls into the definition of being a refugee. With this in mind a new treaty[17] has been negotiated between the UK government and the government of Rwanda (which was ratified in April 2024). This has the declared overarching objective of deterring dangerous and illegal journeys to the United Kingdom which are putting people's lives at risk, and, at the same time, to disrupt the business model of people smugglers who are exploiting vulnerable people. It is intended as a commitment to specific, clear and binding obligations for the creation, maintenance and enforcement of a partnership for dealing with the relocated individuals.[18] The agreement seeks to strengthen the oversight arrangements by creating an independent monitoring committee. A Rwandan asylum system will be established to assess claims and this is linked to an appellate body. Further, the Treaty commits the signatories to ensure that their obligations can both in practice be complied with, and are in fact complied with.' Although the agreement sets out in some detail the conditions under which the scheme will operate, it has not dispelled continued concerns over compliance with international refugee law.

In particular, the decision of the Supreme Court regarding non-refoulement and the resulting bill was critically reviewed by the parliamentary Joint Committee on Human Rights (JCHR) in the light of the treaty.[19] For instance, expert evidence was presented by Immigration Law Practitioners Association pointing out that the New Treaty: 'does not erase Rwanda poor HR record'. The Public Law Project stated that 'the Bill nor the treaty alter the reality that Rwanda is not a safe country'. Perhaps most persuasively the United Nations High Commissioner for Refugees (UNHCR) noted that it had not observed changes in the practice of asylum adjudication that would overcome the concerns set out in 2022.[20] The treaty only sets out the basis for improvement. Notwithstanding the Government's evidence that Rwanda is now safe, the JCHR considered 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 committee concluded that 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

[17] UK-Rwanda Treaty https://www.gov.uk/government/publications/uk-rwanda-treaty-provision-of-an-asylum-partnership.
[18] Ibid., Article 2.
[19] Safety of Rwanda (Asylum and Immigration) Bill' Second Report of Session 2023-24, Joint Committee on Human Rights, HC 435, HL 62, 14-16
[20] Further evidence questioning such schemes includes the unsuccessful attempt by the Australian government to implement an arguably comparable policy to divert refugees to Papua New Guinea and then resettle them in Cambodia. Many (over 1000) ended up back in Australia as transitory persons. 'In practice, while Australia (like the UK) originally intended that people found to be in need of international protection would settle in the place where they were processed, over time this intention proved unworkable … Given the extraordinary human toll of Australia's processing policies, they should not be replicated without a full and accurate consideration of their risks and consequences'. M. Gleeson, T. Konstadinides, *The UK's Rwanda policy and lessons from Australia*, in *UK Const L Blog*, 14 March 2024.

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determined not by legislation but by allowing the courts to consider the new treaty and the latest developments on the ground.'[21]

3.2 The Safety of Rwanda (Asylum and Immigration) Act: Ousting the courts

The follow up legislation attempts to prevent legal challenges to the Rwanda scheme based on human rights and international law, and it was drafted as a deliberate exercise in removing the jurisdiction of the courts. As a result, it has been regarded by many academic commentators and parliamentarians as amounting to not only an attack on the rule of law, but also as potentially shifting the balance between the role of Parliament, the executive (in the form of government) and the courts.[22]

3.3 Ouster clauses

Given that judicial review is about determining questions of legality (e.g. legal requirements under HRA, international treaties etc) rather than fact (e.g. determining the merits of each individual case), the judicial interpretation of ouster clauses has long been recognised as crucial. For instance, would a statutory clause such as *Shall not be called into question in any court of law* exclude the jurisdiction of the courts? In the famous *Anisminic* case[23] even such a provision did not oust judicial review, because [it was held that] a 'determination' made outside the Foreign Compensation Commission's jurisdiction was not truly a determination'.[24] Henceforth, this meant that such determinations (or any equivalent constructions) must be read so as to exclude *ultra vires* determinations.[25] As Professor Peter Cane observes the result is to reduce the application of the 'ouster clause' almost to vanishing point'.[26] More recently, in *Privacy International*[27] Lord Carnwath in the Supreme Court applied and restated the *Anisminic* principle in some detail, confirming that excess of jurisdiction cannot be ousted. [28] He stated that: '… it is ultimately for the courts, not the legislature, to

[21] Safety of Rwanda (Asylum and Immigration) Bill' Second Report of Session 2023-24, *Joint Committee on Human Rights*, HC 435, HL 62, 18.
[22] 'Safety of Rwanda (Asylum and Immigration) Bill' *House of Lords Select Committee on the Constitution*, 3rd Report of Session 2023-24, HL Paper 63. See e.g. para 56: '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.'
[23] *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 223. See P. Leyland, G. Anthony, *Textbook on Administrative Law*, 8th edn., Oxford, 2016, 246 ff.
[24] D. Feldman, *Anisminic Ltd v Foreign Compensation Commission [1968]: In Perspective*, in S. Juss, M. Sunkin (eds.), *Landmark Cases in Public Law*, London, 2017.
[25] S. Sedley, *Lions under the Throne: Essays on the History of English Public Law*, Cambridge, 2015, 42.
[26] P. Cane, *Administrative Law*, 5th edn, Oxford, 2011, 38.
[27] *R (On the application of Privacy International) v Investigatory Powers Tribunal (IPT)* [2019] UKSC 22. Lord Sumption's dissenting judgment takes a different view to the majority.
[28] B.J. Ong, *The Ouster of Parliamentary sovereignty?*, *PL* 41 (2020).

determine the limits set by the rule of law to the power to exclude judicial review'.[29]

3.4 The Legislation

Returning to the Rwanda Bill, the UKs international treaty obligations which featured in the Rwanda case are specifically ruled out as grounds for legal challenges. For this reason it was not possible for the Home Secretary to declare in Parliament that the Bill as proposed was compatible with UK international treaty obligations.[30] The new legislation requires Rwanda to be treated as a safe country even if from an objective stand point (according to international law and domestic law) the procedure fails to meet the criteria. Section 2 states that: 'Every decision-maker must conclusively treat the Republic of Rwanda as a safe country'. A decision-maker for this purpose means the Home Secretary or immigration officers when deciding on the removal of a person to Rwanda, or any court or tribunal when considering such decisions. This rule applies notwithstanding other provisions of domestic or international law. In effect, the measure is intended to expressly dis-apply the HRA/ECHR and disregard international treaty obligations which had been recognised in previous litigation. In particular, by restricting access to a court if the Act breaches Article 13 - the Right to an Effective Remedy.

Moreover, the Safety of Rwanda (Asylum and Immigration) Act (SRA) allows government ministers instead of the courts to determine compliance with its provisions using draft guidance and the civil service code, rather than allowing the courts to deal with what would otherwise be judicial questions. Indeed, the Act goes further than ever before, dis-applying almost all of the key provisions of the HRA in respect of removals to Rwanda.[31] The Joint Committee notes further that '… [T]his 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 SRA also risks undermining the rights compliant culture that should exist in all public bodies.'[32]

Some Conservative MPs and Reform UK supporters argued that the legislation should override the Human Rights Act, ECHR and the Refugee

[29] *R (On the application of Privacy International) v Investigatory Powers Tribunal (IPT)* [2019] UKSC 22, Para 116.

[30] Rather than affirming compatibility under HRA section 19(1)(b) the Home Secretary stated 'I am unable to make a statement that, in my view, the provisions of 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'. See UK in a Changing Europe, https://ukandeu.ac.uk/explainers/what-are-the-rwanda-treaty-and-the-safety-of-rwanda-asylum-and-immigration-bill/.

[31] Many detailed legal concerns set out e.g. regarded as a potentially breaching rule of law and separation of powers by the HL Constitution Committee. See 'Safety of Rwanda (Asylum and Immigration) Bill, House of Lords, *Select Committee on the Constitution*, 3rd Report of Session 2023-24, HL 63, 9 February 2024, 4, 6.

[32] 'Safety of Rwanda (Asylum and Immigration) Bill' Joint Committee on Human Rights, Second Report of Session 202-24 Published 12 February 2024, HC 435/HL 62, 36.

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Convention altogether. While others regard the issue as providing an opportunity to leave the ECHR altogether. As mentioned at the outset, from the standpoint Conservative Party fringe groups, Reform UK and other anti-European campaigning groups there is an ideological resistance to the imposition of normative values emanating from Europe. This reflects an extreme scepticism over the role of the ECHR and much of the jurisprudence decided by the Strasbourg Court.[33]

At another level, the passage of the Rwanda bill exposed the virtual inability of Parliament to resist measures by a majority government which might undermine fundamental human rights and breach the UK's treaty obligations. The bill proceeded through the House of Commons virtually intact. The House of Lords passed a series of amendments, virtually all of which were later rejected, in the *ping pong* between Commons and Lords. Probably the most far reaching modification proposed by in the Lords was designed to ensure that the Bill would comply fully with the UKs obligations under domestic and international law. In other words, if accepted, the safeguards under the HRA and international treaty obligations would have been respected. Other amendments included a requirement for ministers to publish a timetable for removal. This change for example would allow courts to grant interim relief to prevent removal. Also, to provide protection for unaccompanied children seeking asylum. Other important amendments would have excluded from the Rwanda deportation scheme victims of modern slavery and human trafficking.

In sum, the Safety of Rwanda (Asylum and Immigration) Act 2024 oversteps the mark in terms of its constitutional impact on the fundamental principle of the rule of law. It is not only clearly intended to prevent judicial scrutiny in a field where judicial oversight would be expected, but it takes the ouster strategy up a notch. This is achieved by seeking to prevent judges from deciding the type of jurisdictional questions relating to legality and rights protection which other judgments including *Anisminic* and *Privacy International* regarded as falling squarely within the province of the courts.[34] As will be apparent in the next section the judgment in a recent Northern Ireland case suggests that the legislation would nevertheless be susceptible to legal challenge because of the residual effect of EU law in the United Kingdom.

4. Challenging the Legislation in the Courts

4.1 Asylum Law and the Influence of EU Law Post Brexit

The complexity of the underlying legal issues in this field have been further highlighted in the *Northern Ireland Human Rights Commission case*

[33] One such example concerns challenges to blanket ban on prisoners voting rights at elections. See *Hirst v UK (No 2)* [2005] ECHR 681. N. Johnston, *Prisoners' voting rights*, House of Common Library Research Briefing, 9 August 2023.
[34] S. Wheatle, *Access to Justice: From Judicial Empowerment to Public Empowerment*, in M. Elliott, K. Hughes, *Common Law Constitutional Rights*, London, 2020, 55.

(NIHRC)[35]. This is a decision by the High Court of Northern Ireland, also concerning asylum but relating to the Illegal Migration Act 2023. Many of the points arose because post Brexit Northern Ireland retains a special status within the single market and the EU, and EU law continues to apply in this part of the UK. The details were negotiated separately under the Northern Ireland Protocol, which has since been refined under the Windsor framework.[36] Under the European Union (Withdrawal) Act 2020 the NIHRC monitors the implementation of the Protocol on Ireland/Northern Ireland.[37] The agreement provides that the UK shall ensure no diminution of rights, safeguards or equality of opportunity, as set out in the Belfast Agreement 1998.[38] This agreement has been recognised as being of fundamental importance and it contains a clear commitment to uphold the civil rights of everyone in the community.[39] Persons seeking asylum and refugees are expressly included within the protection afforded by chapter 6 of the Belfast (Good) Friday Agreement.[40]

The judgment in the NIHRC case was delivered just after the Safety of Rwanda (Asylum and Immigration) Act 2024 (RSA) received its Royal Assent. [41] This decision by Mr Justice Humphreys draws attention to some crucial legal issues which might have arisen if the RSA were to be challenged in the courts. The Northern Ireland Human Rights Commission (NIHRC) case was brought by the Commission and by a 16 year old asylum seeker from Iran who arrived in the UK by way of a small boat from France but ended up residing in Northern Ireland. The asylum seeker faced the prospect of detention and deportation under the Illegal Migration Act 2023 (IMA). The IMA applies to all parts of the United Kingdom. The judge ruled in favour of the claimants, holding *inter alia* that the declaration of inadmissibility requirement by the Secretary of State under section 5(2) of the IMA was unlawful. There was a failure to provide an effective remedy, and the IMA conferred a wide duty to remove persons without adequate judicial oversight. As a result, the provisions in the IMA overlook the fact that EU Member States are required to respect the right of non-refoulement[42], it leads to a diminution of rights under EU directives,[43] and it is incompatible with European Convention of Human Rights in several

[35] *Re NIHRC and JR 295 (Illegal Migration Act 2023)* [2024] NIKB 35.
[36] *The Windsor Framework: A new way forward*, CP 806, HM Government, February 2023.
[37] See P. Leyland, *Brexit, the Belfast Agreement and Citizen Rights*, in V. Barbé, C. Koumpli (eds.), *Brexit, droits et liberté*, Bruxelles, 2022, 313.
[38] The interpretation of Article 4 of the withdrawal agreement means that the provisions under Article 4 should produce the same effects as within member states.
[39] See Windsor Framework above at 6, 'This new approach … restores the balance needed to uphold the Belfast (Good Friday) Agreement in all its dimensions.'
[40] 'The Belfast Agreement: An Agreement Reached at the Multi-Party Talks on Northern Ireland', April 1998, Command Paper, Cm 3883.
[41] R. Cormacin, *Seeking asylum on the outgoing tide of EU law – Supremacy of EU law in Northern Ireland under the Windsor Framework*, in *Constitutional Law Association Blog*, May 22, 2024.
[42] Article 33 of the Refugee Convention.
[43] See e.g. Article 7(1) of the procedural directive, article 39 of the Procedures Directive and article 47 of the CFR.

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respects[44]. The court ruled that the relevant provisions of the IMA were to be dis-applied in Northern Ireland, and it issued a declaration of incompatibility under Section 4 of the Human Rights Act 1998 in respect to the contested provisions in the IMA. The declaration of incompatibility invites Parliament to respond by amending the IMA to render it ECHR compatible.[45]

It is worth keeping in mind that the approach in this judgment could have a range of far reaching implications if the Safety of Rwanda (Asylum and Immigration) Act were to be activated. A court when considering a case from England, Scotland or Wales outside the EU might be inclined to accept the ouster effect of the RSA, but the NIHRC case suggests the implications relating to rights protection and the UK's international treaty obligations would remain highly problematic. Any claimant from Northern Ireland challenging a decision on deportation to Rwanda on comparable grounds to the NIHRC case might expect the ouster provisions not to apply at all. This is because the provisions of the RSA would result in a diminution of his or her EU rights.[46] The requirement to dis-apply domestic legislation reverts back to the established precedent set in the *Factortame* case[47] and the imposition of a duty on the courts in the UK to construe and give effect to all domestic legislation subject to the provisions of directly effective European Union Law.[48] Further, it is clear that provisions of the Good Friday Agreement[49] taken together with the Withdrawal Agreement and NI protocol are intended to have prospective effect in Northern Ireland in protecting rights.[50] This is in the sense that any statutory provisions in breach of the Agreement, including measures under the 2024 Act, will be considered invalid. Another legal puzzle to solve would be that an approach dis-applying the legislation in NI would result in an outcome which discriminated between individuals seeking asylum in NI, enjoying the benefits of EU law, and those from the remainder of the UK facing the consequences of the Act without an adequate legal remedy.

4.2 Contesting the Ouster Provisions of the Safety of Rwanda (Asylum and Immigration) Act 2024

The legality of the 2024 Act is unlikely to be tested because the recently elected Labour government of PM Starmer will ditch the Rwanda policy. However, the extreme form of the legislation, alluded to above, seems almost to have been calculated to prompt a robust response from the judges because it bars the right of access to the courts. Lord Steyn's obiter statement in

[44] Articles, 3, 4, 5, 6 and 8 of the European Convention on Human Rights.
[45] Human Rights Act 1998, Section 4.
[46] See Cormacin (above).
[47] *R v Secretary of State for Transport ex parte Factortame Ltd* (No 2) [1991] 1 AC 603.
[48] A.L. Young, *Parliamentary Sovereignty and the Human Rights Act*, Oxford, 2009, 51. This is expressly written into the agreement.
[49] Many of these provisions are contained in the Northern Ireland Act 1998.
[50] 'The provisions of this Agreement referring to Union law or concepts or provisions thereof shall be interpreted in conformity with the relevant case law of the Court of Justice of the European Union …'

Jackson v AG[51] echoed by Lord Hope and Lady Hale which envisages the abolition of judicial review[52] as justification for overriding a sovereign act of Parliament might be used to provide authority for dis-applying the statute on the grounds that it is therefore unconstitutional.[53] The parliamentary Joint Committee on Human Rights did in fact argue that the Rwanda Bill should not be complied with for precisely this reason. In constitutional terms defiant disapplication should be regarded as the 'nuclear option'. It might be welcomed as something like a *Marberry v Madison* moment[54] of delight for legal constitutionalists, but such an outcome would have run the risk of prompting a legislative backlash under the previous Conservative government aimed at severely nullifying judicial power.

A less controversial response in such a case would have been to read down the legislation and use the common law principle of legality.[55]Professor Alison Young observes that 'Parliamentary sovereignty means that courts cannot strike down legislation. However, courts can interpret legislation to guard human rights protected by the ECHR and common law rights, including constitutional principles. … The courts are best able to provide this form of constitutional backstop in exceptional circumstances'.[56] There seems little doubt that the threshold of exceptional circumstances would be reached here. In the words of Professor Jeff King echoing the HL Constitutional Committee: 'The Bill reverses a recent Supreme Court judgment on the facts and then enacts a legal fiction whose purpose is to exclude JR of factual questions. This makes it a notoriously plain example of an affront to the rule of law and of the separation of powers.'[57]

If all else failed an individual could take their case to the Strasbourg Court for breach of the claimant's ECHR rights.[58] This Court would not be

[51] *Jackson v Attorney General* [2005] UKHL 56; [2006] 1 AC 262.
[52] For example, if a court treats section 2 of the RSA as an ouster clause it could well decide to follow Lord Carnwath's approach in Privacy International. He stated: ' … I see a strong case for holding that, consistently with the rule of law, binding effect cannot be given to a clause which purports wholly to excluded the supervisory jurisdiction of the High Court to review a decision of an inferior court or tribunal, whether for excess or abuse of jurisdiction, or error for law.'
[53] Ibid para 102: 'The classic account give by Dicey of the doctrine of the supremacy of Parliament … can now be seen to be out of place in the modern United Kingdom … it is not unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism. In exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts … a new Supreme Court may have to consider whether this is a constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish.'
[54] Comparable to when the US Supreme Court in *Marbury v. Madision*, 1 Cranch 137 (1803) assumed authority to have the last word on determining issues of constitutionality.
[55] M. Elliott, *The Fundamentality of Rights at Common Law*, in M. Elliott, K. Hughes (eds.), *Common Law Constitutional Rights*, London, 2020, 221 ff.
[56] A.L. Young, *Unchecked Power: How Recent Constitutional Reforms Are Threatening UK Democracy*, Bristol, 2024, 213.
[57] J. King, *The House of Lords, Constitutional Propriety and the Safety of Rwanda Bill*, in *UK Const L Blog*, 26 January 2024.
[58] Section 3 of the RSA disapplies the HRA and domestic access to a remedy under the

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bound by the RSA and there would not be a presumption that Rwanda is safe country. If the judges were to conclude that removal to Rwanda exposes a person to an imminent risk of irreparable harm the Strasbourg court could intervene by issuing a rule 39 order to prevent the removal of any individuals under the scheme. It would then be for the Home Secretary, as the relevant government minister, to decide whether to comply or to breach the UK's obligations under international law.[59]

5. Assessing the wider constitutional consequences

This section considers how the Rwanda narrative relates to the wider picture. The focus is on the assault by populists on the Human Rights Act and ECHR, the courts and the judiciary alluded to earlier and how this episode relates to other constitutional developments which tend to undermine the kind of self-correcting accountability which has provided relative stability to the UK constitution.[60] Many populists celebrate what they view as a return of sovereignty post Brexit. It should be noted by them, however, that the constitutional profile of the courts has been greatly extended by the elected UK Parliament not by the judges themselves. In particular, we have witnessed the introduction of statutes of pivotal constitutional significance. The most obvious examples are the Human Rights Act 1998 which incorporated the European Convention on Human Right and granted additional powers to the courts to protect convention rights,[61] the devolution legislation provides for devolution issues to be brought before the courts to determine inter alia legislative competence of the devolved bodies[62] and the Constitutional Reform Act 2005 established a Supreme Court for the UK and recognises the principle of judicial independence.[63] In Professor Martin Loughlin's words: 'The formation of the Supreme Court has bolstered the judiciary's confidence in articulating newly discovered fundamental principles of the constitution. He observes that the constitutional significance of the *Miller II* case[64] arises from the court's finding that the boundaries of a prerogative power (relating to prorogation of Parliament) are provided by recognising the fundamental principles of our constitutional law.[65]

The adulation of the 'general will' by populists is particularly problematic, given the uncodified nature of the UK constitution. The core principle of sovereignty has prevented even constitutional fundamentals

ECHR.

[59] https://www.instituteforgovernment.org.uk/comment/supreme-court-rwanda-rishi-sunak-response.

[60] A.L. Young, *Unchecked Power: How Recent Constitutional Reforms Are Threatening UK Democracy*, Bristol, 2024.

[61] Human Rights Act 1998, Section 3 (power of purposive interpretation), Section 4 (power to issue a declaration of incompatibility).

[62] See e.g. Scotland Act 1998, section 98 and Schedule 6.

[63] Constitutional Reform Act 2005, Part 3.

[64] *R (On the application of Miller) v The Prime Minister* [2019] UKSC 41.

[65] M. Loughlin, *The British Constitution: A Very Short Introduction*, 2nd edn, Oxford, 2023, 111 and 112.

from being battened down.[66] The obvious difficulty in protecting and reconciling minority rights with what is claimed to be the popular will is a perennial challenge.[67] Nearly all other constitutions provide judicial safeguards in order to protect citizen rights at a constitutional level (effectiveness dependent on the political regime).

It should be remembered that the constitution was explained by Dicey in relation to the principles of the sovereignty of Parliament and the rule of law.[68] This discussion should not ignore pre-existing important scholarly debates, reflected in judicial policy, concerning the relative virtues of what is conveniently termed as 'political' constitutionalism as opposed to 'legal' constitutionalism.[69] For instance, crudely summarised at its polarities, Professor JAG Griffith *believed in the political resolution of competing claims through parliament*[70] *and that* individual rights or human rights are no more and no less than political claims made by individuals on those in authority *'any society is endemically in a state of conflict between warring interest groups, ...'*[71] While, by way of contrast, legal constitutionalists, such as Professor Trevor Allan (Ronald Dworkin) maintain that the values of individual autonomy and human dignity are *internal* to law.[72] The rule of law is not merely a safeguard against the abuse of law itself, but also a shield against political oppression. Therefore, it follows that basic protection should lie in the hands of the courts against the exercise of arbitrary power from whatever quarter it appears.[73] However, this debate, though often abrasive, left room for consensus over the need for a core legality principle of some kind. So that Griffith as an arch advocate of 'political constitutionalism' was able to concede that: 'If the Rule of Law means that there should be proper and adequate machinery for dealing with criminal offences and for ensuring that public authorities do not exceed their legal powers, and for insisting that official penalties may not be inflicted save on those who have broken the law, then only an outlaw would dispute its desirability.'[74]

The need to undermine the role of the courts has evidently become part of the agenda for these brands of populism.[75] As Harlow and Rawlings

[66] Sir John Laws floated the idea in the *Thorburn* Case of constitutional statutes but this designation will not immunize any legislation from amendment or repeal. See Sir John Laws, *The Constitutional Balance*, London, 2021, 112-114. The Brown Report produced by Labour also recognizes the need for the entrenchment of constitutional fundamentals (Protecting the Constitution). *A New Britain: Renewing our Democracy and Rebuilding our Economy, Report of the Commission on the UK's Future*, Labour, 2022, 140.
[67] P. Leyland, *Referendums, Sovereignty and the Territorial Constitution*, in R. Rawlings, P. Leyland, A.L. Young (eds.), *Sovereignty and the Law*, Oxford, 2013, 147.
[68] A. Dicey, *An Introduction to the Study of the Law of the Constitution*, 10th edn., London, 1959, 188.
[69] For a detailed up-to-date overview see P. Craig, *UK, EU and Global Administrative Law: Foundations and Challenges*, Cambridge, 2015, 166 ff.
[70] It encompasses the idea of the law serving the people.
[71] J. Griffith, *The Political Constitution*, in 42(1) *Modern Law Review* 19 (1979).
[72] See also Sir John Laws, op. cit., 86 ff on judicial deference.
[73] T. Allan, *Accountability to Law*, in N. Bamforth, P. Leyland (eds.), *Accountability in the Contemporary Constitution*, Oxford, 2013, 78.
[74] J. Griffith, *The Political Constitution*, in 42(1) *Modern Law Review* 15 (1979).
[75] P. Leyland, *The Constitution of the United Kingdom: A Contextual Analysis*, London, 2021, 275.

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observe: '… [I]nherently elite forms of judicial review, perhaps increasingly substantive in form and rights focused, perhaps avowedly constitutionalist in character, may jar, to put it mildly, with governments featuring populist ideology, especially where matters of high policy are involved or in high-profile cases involving unpopular minority interests'.[76] The response [of some populists] has been to seek to re-order the judicial process in restrictive or more government friendly fashion.[77]

As part of this anti-judicial offensive the response by some EU Remainers to the outcome of the Brexit referendum has been characterised by pro Brexit campaigners as 'The Elite Cry of Rage' leading to accusations of an invented narrative of constitutional crisis. The leaders of society are accused of having sought to delegitimise the referendum in order to reverse its outcome. [78] The *Miller* litigation is attributed merely to 'lawyerly hyperactivity' framed around focused and technical questions of constitutional law.[79] The Supreme Court ruling in the *Miller* I[80] is summarily dismissed as part of an ambition to 'superintend constitutional practice' rather than recognising its importance in providing constitutional oversight, and as being legally unsound on the basis of a single contentious alternative legal view.[81] In fact the populist lobby seem to miss the key point as this *Miller* I judgment actually safeguards legal sovereignty in the face of a challenge under the prerogative.

Many populists associated with factions within the Conservative Party and Reform UK (formerly UKIP), and encouraged by elements in the popular press, insisted that the voice of the people or general will had been represented by the Brexit referendum. The result should not be obscured by the ruling elite, the judiciary or by any court centred challenge. An attack on the credibility of the judiciary was initiated, and is still being pursued in the legislative fall out from the *Rwanda* case, as part of the neutralising of alternative sources of authority and influence, as this might interfere with what for them constitutes the will of the people.[82]

In *Miller I* the judges[83] had to make a ruling one way or another on the limits to the prerogative power at a challenging moment in the nation's

[76] C. Harlow, R. Rawlings, *Populism and Administrative Law*, in E. Carolan, J. Varuhus, S. Fulham McQuillan (eds.), *The Making and Remaking of Public Law*, London, 2023, LSE, 10.
[77] For example, attempts to amend or repeal the Human Rights Act. Conservative Party Manifesto 2019 (Independent Human Rights Act Review).
[78] R. Ekins, G. Gee, *Miller and the Politics of Brexit*, in *The UK Constitution after Miller: Brexit and Beyond*, London, 2018, 251.
[79] ibid.
[80] *R (On the application of Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5.
[81] J. Finnis, *Terminating Treaty-Based UK Rights, Judicial Power Protect*, 26 October 2016.
[82] C. Harlow, R. Rawlings, op. cit., 2023, 6.
[83] Most senior judges in the UK do not overtly reveal their political views and their political affiliation is not taken into account on appointment or promotion. A partial exception was (Lord) Jonathan Sumption who controversially delivered the Mann lecture 2011 almost coincidentally with his appointment to the UK Supreme Court (2012-18) in which he set out his views about the role of judges. See J. Sumption, *The Limits of the Law*, in N. Barber, R. Ekins, P. Yowell (eds.), *Lord Sumption and the Limits*

history. The Supreme Court unanimously stated as a preface to their legal findings: 'It is worth emphasising that nobody has suggested that this is an inappropriate issue for the courts to determine. … [T]his case has nothing to do with issues such as the wisdom of the decision to withdraw from the European Union, the terms of withdrawal, the timetable or arrangements for withdrawal, or the details of any future relationship with the European Union. Those are all political issues which are matters for ministers and Parliament to resolve.'[84]

The court in *Miller I*[85] had to take account of the fact that the referendum itself was deliberately made non legally binding. The referendum only addressed a single issue (whether UK should remain within the EU) not the consequences of a leave decision (including the method for triggering Article 50). A majority of voters favoured Brexit but this was not a majority of those citizens entitled to vote.

Moreover, the UK is a liberal democracy that continues to be characterised by having a particular form of indirect representative democracy which channels the details of decision-making down to elected politicians and other agencies of the state. In the words of JS Mill 'The sovereignty of the people is a delegated sovereignty' [86] It is assumed such an institutionally based (parliamentary) procedure is better able to take certain decisions on behalf of the people. Furthermore, the UK is a dualist state in which treaties creating formal rights require incorporation by Act of Parliament.[87] The European Communities Act 1972 had been necessary to validate UK membership. It was held for legal reasons that in order to trigger the removal of rights, such as the right to vote at Euro elections, parliamentary approval would be necessary.

Admittedly, the catalogue of points raised were of some complexity, and included the extent of the prerogative power exercised by the PM to trigger Brexit, which was considered in the light of established legal authority.[88] But the court in *Miller I* was deliberately circumspect and had

of the Law, Oxford, 2016, and for a critical rebuke S. Sedley, *Lord Sumption and Public Law*, in *Law and the Whirligig of Time*, London, 2018.

[84] *R (On the application of Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, para 3. See M. Elliott, J. Williams, A.L. Young, *The Miller Tale: An Introduction*, in *The UK Constitution after Miller: Brexit and Beyond*, London, 2018, 17 ff.

[85] See P. Craig, *Epilogue: Miller, the Legislature and the Executive*, in S. Juss, M. Sunkin (eds.), *Landmark Cases in Public Law*, Oxford, 2017).

[86] 'The true idea of popular representation is not that the people govern in their own persons, but that they chose their governors. In a good government public questions are not referred to the suffrage of the people themselves, but to those of the most judicious persons whom the people can find. The sovereignty of the people is a delegated sovereignty. Government must be performed by the few, for the benefit of the many …' from J.S. Mill, *Considerations on Representative Government*. J.H. Burns, *JS Mill and Democracy*, in J.B. Schneewind (ed.), *Mill: A Collection of Critical Essays*, London, 1968, 284.

[87] A. Lang, *How Parliament treats treaties*, Briefing paper 9247, 1 June 2021, *House of Commons Library*, 18.

[88] Much of the reasoning is related to the limits placed on the prerogative power and the fact that the Crown cannot act incompatibly with a statute. This is based on a line of authority stemming from the Bill of Rights, including the De Keyser principle, amounting to frustrating the purpose of the ECA 1972. (Earlier judges reasoned what

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refused to be drawn into recognising the status of the Sewel convention included into the Scotland Act 2016 and the Wales Act 2017. There is no doubt that the two *Miller* cases set a new constitutional benchmark by making exceptionally high profile judicial interventions at important moments during the Brexit process but this was because of the evolution of the constitutional status of the Supreme Court.[89]

6. Conclusion

The Labour government under PM Keir Starmer elected in July 2024 has pledged to restore order to the UK Asylum system and it is also committed to ending the partnership between the UK and Rwanda under the recent treaty and so the policy will not be activated. In consequence, there is no prospect of any asylum seekers being sent to Rwanda during the new government's term of office.[90] In retrospect, the Conservative government's response to the Rwanda Case in 2023 might be regarded in constitutional terms as a reckless over reaction to a successful legal challenge to their flagship policy that was at least part driven by emerging populism. The reaction in the form of the legislation neglected the UK's obligations to provide rights protection under domestic law and under international law. The determination to force through the bill with draconian implications for rights protection in defiance of logic has drawn attention to the fragility of constitutional safeguards. Concerns were voiced in Parliament by prominent committees and there were numerous attempts to amend the bill in the House of Lords, but the unelected second chamber was reluctant to exercise its one year delaying power under the Parliament Acts of 1911 and 1949 to prevent the Act reaching the statute book. Any attempt to use the Safety of Rwanda (Asylum and Immigration) Act would have resulted in challenges before the courts. The NIHRC case has drawn attention to the complex legal minefield surrounding asylum law which has been further complicated by the Brexit deal relating to Northern Ireland. Finally, it has only been possible to speculate on whether, if called upon to determine any legal issues arising from Safety of Rwanda (Asylum and Immigration) Act, the courts, and ultimately the UK Supreme Court, would have disregarded the statutory ouster provisions in the act in order to meet the UK's human rights obligations domestically under the Human Rights Act and under international treaty obligations.

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is the point of statute law if the will of Parliament could later be ignored by the Crown and thus also related to parliamentary sovereignty). See *R (On the application of Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

[89] M. Elliott, J. Williams, A.L. Young, *The UK Constitution after Miller: Brexit and Beyond*, London, 2018.

[90] *Change*, Labour Party Manifesto 2024, 15ff.