# Judicial Independence, Rule 39 and the Safety of Rwanda Bill

Richard Ekins KC (Hon)


Constitutional Reform Act 2005

**2005 CHAPTER 4**

An Act to make provision for modifying the office of Lord Chancellor, and to make provision relating to the functions of that office; to establish a Supreme Court of the United Kingdom, and to abolish the appellate jurisdiction of the House of Lords; to make provision about the jurisdiction of the Judicial Committee of the Privy Council and the judicial functions of the President of the Council; to make other provision about the judiciary, their appointment and discipline; and for connected purposes. [24th March 2005]

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

# Judicial Independence, Rule 39 and the Safety of Rwanda Bill

Richard Ekins KC (Hon)

Policy Exchange

# About the Author

**Richard Ekins KC (Hon)** is Head of Policy Exchange's Judicial Power Project and Professor of Law and Constitutional Government in the University of Oxford.

Published by
Policy Exchange, 1 Old Queen Street, Westminster, London SW1H 9JA

www.policyexchange.org.uk

ISBN: 978-1-910812

# Contents

# Introduction

When the Safety of Rwanda Bill returns to the House of Lords on Monday 12 February 2024, it will face a wave of hostile amendments, seeking to wreck the Bill. One main focus of discussion will be clause 5, which concerns interim measures of the European Court of Human Rights. Like the Illegal Migration Act 2023, the Bill aims to make it possible for removals to continue even if the Strasbourg Court deploys Rule 39 of its Rules of Court and indicates interim measures that direct the UK not to remove a person from the UK to Rwanda. Without this provision, the policy of the Bill, and also of any similar scheme, is very likely to be frustrated by judicial fiat.

Policy Exchange has argued for some time that Parliament should anticipate and address the Rule 39 risk, authorising action despite interim measures.[1] Legislating in this way is constitutionally legitimate and does not involve placing the UK in breach of its international obligations. The European Convention on Human Rights (ECHR) does *not* authorise the Strasbourg Court to grant binding interim relief. Instead, the Court has asserted a power that the member states chose not to confer. The Court claims that member states have a legal obligation to comply with interim measures, which are standardly indicated by a single anonymous judge without hearing argument or providing reasons.[2] This asserted power – and that purported obligation – cannot possibly be reconciled with the text and structure of the ECHR, as I have argued at length elsewhere.[3]

In legislating to authorise Ministers to decide whether or not to comply with Rule 39 interim measures, Parliament will not be undermining the rule of law. On the contrary, it will be protecting the Government's policy, which enjoys parliamentary support (if the Safety of Rwanda Bill is enacted), from frustration by the Strasbourg Court's lawless assertion of a power to grant binding interim relief. Resisting this assertion vindicates rather than undercuts the rule of law.

It is possible that some peers may attempt to deploy a related, but even less plausible, argument against clause 5 – namely, that the clause compromises the principle of judicial independence or is incompatible with the duties to uphold that principle that are set out in the Constitutional Reform Act 2005. This note explains why this argument misunderstands judicial independence, as well as the express terms of the 2005 Act, and should be rejected. But before considering the merits of this argument, the paper explains the point of clause 5 and outlines three amendments that address Rule 39, which is the context in which judicial independence may well be raised.

1. R Ekins and S Laws, *How to legislate about small boats* (Policy Exchange, February 2023).
2. The plenary Court announced on 13 November 2023 that it would disclose the identity of the judges who render decisions on interim measure requests (and that it would maintain the practice of providing reasons on an ad hoc basis and issuing press releases where the circumstances so require). The date on which this change will be implemented has yet to be confirmed.
3. R Ekins, *Rule 39 and the Rule of Law* (Policy Exchange, June 2023)

# Clause 5 and the three amendments

Section 55 and clause 5 are quixotic provisions insofar as strictly they are not required to enable a Minister, and thus the Home Office, to remove a person from the UK notwithstanding a Rule 39 interim measure – for our law does not give domestic legal effect to such an interim measure. But misunderstandings about the legal position abound, with some civil servants apparently having been persuaded, or persuading themselves, that they cannot carry out an instruction given by a Minister which is clearly lawful as a matter of domestic law (perhaps even an instruction that is mandated by an Act of Parliament!) if a Rule 39 interim measure has been made to the contrary.[4] Relatedly, without express parliamentary authorisation, there is a strong risk that the Home Secretary will not be confident that he may remove a person in the face of a Rule 39 interim measure. Clause 5 thus has an important role to play in the architecture of the Bill.

However, it is obvious that many peers think that the UK has an obligation in international law to comply with Rule 39 interim measures and that clause 5 is an affront to the rule of law. Baroness Hale of Richmond would seem to be one such peer. Of the fourteen amendments that she has sponsored with Baroness Chakrabarti and the Archbishop of Canterbury, three concern Rule 39. This will be Lady Hale's first major foray into parliamentary deliberation since her retirement from the Supreme Court in 2020.[5] In view of her long and distinguished judicial and legal career as well as her high public profile, Lady Hale will be a very important voice in the parliamentary process.

The first of the three amendments (HoL22) inserts a new subsection into clause 5, which provides that the Secretary of State, in responding to any interim measure, must comply with international law. Strictly speaking, it is the UK that is subject to any relevant international legal obligations, rather than the Secretary of State (clause 5 as it stands is somewhat more sensitive to the difference insofar as it authorises the Minister "to decide whether the United Kingdom will comply with the interim measure"). However, the point of the amendment is clearly to limit the power not to comply with an interim measure so that the power cannot be used if this would place the UK in breach of international law. This new subsection would not strictly forbid the Home Secretary from failing to comply with an interim measure, but it would require him in good faith to think that non-compliance would not place the UK in

4. R Ekins, S Laws and C Casey, *Government Lawyers, the Civil Service Code and the Rule of Law* (Policy Exchange, December 2023)

5. Lady Hale was sworn in as a member of the House of Lords on 12 January 2004, as a Lord of Appeal in Ordinary, and gave her maiden speech on 23 November 2023.

breach of its international obligations and, in particular, would make the question of what international law requires justiciable by domestic courts. Thus, the Home Secretary's decision not to comply with a Rule 39 interim measure would be challenged by way of judicial review proceedings and our courts might hold that international law requires compliance with such measures, which would mean there was no power not to comply. Parliament should not outsource to domestic courts responsibility for deciding this point.

The second amendment (HoL23) reverses the meaning of clause 5(3) by *requiring* domestic courts to have regard to an interim measure in considering a person's removal to Rwanda (rather than *forbidding* them from having regard to an interim measure, which is what the subsection currently provides). The amended clause would be almost internally contradictory, for it would provide, first that it is for the Minister, and the Minister alone, to decide whether the UK would comply with the interim measure (subsection (2)), but would then say (in the amended subsection (3)) "Accordingly, a court or tribunal must have regard to the interim measure when considering any application or appeal…" This is clearly a wrecking amendment. The third and final amendment (HoL24) amends clause 5 by disapplying section 55 of the Illegal Migration Act, which would remove express parliamentary authorisation for non-compliance with an interim measure.

The intended effect of all three amendments, as well as several tabled by other peers, is to strip away parliamentary authorisation for the Minister to decide not to comply with a Rule 39 interim measure or, worse, effectively to impose a statutory duty on the Minister to comply with such a measure. This would turn the Bill on its head. But for section 55 of the 2023 Act, and clause 5 of the Bill, the Minister would be perfectly entitled, as a matter of domestic law, to remove a person from the UK notwithstanding a Rule 39 interim measure. It would be a different matter, of course, if a British court issued an interim injunction; the Minister should certainly comply with any such injunction. The moral ideal of the rule of law requires everyone in the UK to comply with domestic law – law that Parliament can always change and law that for good reason expressly authorises our judges to grant interim injunctions. However, no British court should issue an injunction in reliance on a Rule 39 interim measure. The Human Rights Act 1998 clearly does not give domestic legal effect to the Strasbourg Court's Rule 39 practice, which is nominally grounded on Article 34 of the ECHR, which is not one of the Convention rights set out in Schedule 1 of the 1998 Act. (In any case, the Court's Rule 39 practice cannot be reconciled with any defensible interpretation of Article 34 – or of Article 25, which is the provision that empowers the Court to make Rules of Court.)

# The argument from judicial independence

One argument that may well be raised in support of the amendments, in the course of next week's parliamentary deliberation, is that clause 5 is in tension (incompatible) with the principle of judicial independence, and in particular with section 3 of the Constitutional Reform Act 2005. The argument is likely to be that unless clause 5 is amended or removed, Parliament, in enacting the Safety of Rwanda Bill, would be acting unconstitutionally and would be complicit in breaching judicial independence – that is, in empowering Ministers to breach judicial independence. Alternatively, the argument may be that even if the Bill is enacted without amending clause 5, the resulting legislation may well be read subject to section 3 of the 2005 Act, which would frustrate it in practice. (One could imagine this second variation on the argument appealing to those critics of the Bill who argue that it does not go far enough in authorising the Minister to remove a person to Rwanda.) However, this argument from judicial independence in general, and section 3 in particular, is misconceived. It should not dissuade (a) peers from supporting clause 5 and resisting (wrecking) amendments or (b) the Home Secretary from deciding not to comply with a Rule 39 interim measure.

Section 3 of the Constitutional Reform Act is entitled "Guarantee of continued judicial independence". Section 3(1) provides that "The Lord Chancellor, other Ministers of the Crown and all with responsibility for matters relating to the judiciary or otherwise to the administration of justice must uphold the continued independence of the judiciary." Subsections (2) and (3) limit the section's application in Scotland and Northern Ireland. Subsection (4) provides that "The following particular duties are imposed for the purpose of upholding that independence." The particular duties are set out in subsections (5) and (6). Subsection (5) says that "The Lord Chancellor and other Ministers of the Crown must not seek to influence particular judicial decisions through any special access to the judiciary." Subsection (6) recognises that the Lord Chancellor has particular duties, including to have regard to the need to defend judicial independence and the need for the judiciary to have support in fulfilling their functions. Subsections (7) and (8) define "the judiciary" to include international courts, which must include the European Court of Human Rights. (Note that section 3 was intended to be declaratory only, rather than to create legal duties capable of judicial enforcement. This point is

not of central importance for peers in determining whether clause 5 is compatible with the guarantee of judicial independence, but it is very important in thinking about the risks of further litigation, which I address in the final section of this paper.)

An argument that clause 5 is incompatible with section 3 must establish, first, that section 3(1) forbids a Minister from interfering with or seeking to set aside any ruling of the judiciary, and, second, that in deciding not to comply with a Rule 39 interim measure a Minister would be acting in this way. The argument is not persuasive. Ministers have a general duty to uphold the "continued independence of the judiciary". The particular duty that is imposed upon them for this purpose is a duty not to seek to influence particular judicial decisions through special access to the judiciary. (The further particular duty imposed on the Lord Chancellor is not relevant here.) In authorising a Minister not to comply with a Rule 39 interim measure, Parliament is clearly not enabling the Minister to influence any particular judicial decision through special access to the judges in question. Neither is Parliament somehow authorising the Minister to question or challenge the independence of the European Court of Human Rights, or any judge of the Court.

Indeed, clause 5 does not authorise a Minister to interfere with any judicial ruling or even to set aside such a ruling. If the Home Secretary exercises his power under section 55, once it is brought into force, or clause 5 after enactment, he will not have interfered with – compromised – the reasoning or decision-making of the European Court of Human Rights, or any one of its judges. Neither will he somehow "set aside" a ruling of the Court, or of one of its judges, for the ruling will continue to have whatever status in international law it is otherwise entitled to have, which is a matter of controversy. One might say that in deciding that the UK will not comply with an interim measure, the Minister has "ignored" the Rule 39 interim ruling, and then argue that judicial independence requires the executive not to ignore judicial rulings. However, the Minister will not be ignoring the interim measure so much as deciding that the UK should not follow it, having first considered the procedural fairness (or unfairness) of the making of the measure, the merits of the individual case, and the wider policy implications of following the measure.

Judicial independence is fundamental to fair adjudication and thus to the rule of law. However, the importance of judges of international courts being free from political (or other) pressure in adjudicating disputes is logically and juridically distinct from a duty on the part of the UK to comply with the rulings of such courts. Section 3 imposes a domestic legal duty on Ministers to refrain from seeking to influence the Strasbourg Court in making any particular decision by way of special access to the Court or its judges. (Special access might include seeking a private meeting with the Court's judges outside the ordinary legal proceedings or writing privately to the judge or approaching the judge by way of third parties.) But this statutory duty does not entail a further statutory duty to comply with the Court's decisions, or with the rulings of any single judge.

# Clause 5, the Freedom of Information Act and executive override

It would be a mistake, likewise, to confuse clause 5 (or section 55) with a power like section 53 of the Freedom of Information Act 2000, which reserves to the Minister or the Attorney General the power to decide whether it is in the public interest to release information, even if the Upper Tribunal has ruled that the balance of public interest supports publication. The exercise of this power does involve setting aside the Tribunal's ruling in the sense that it cancels a legal duty, in our law, to which the Tribunal's ruling otherwise gives rise. The scheme of the 2000 Act is precisely for this staged approach, with relevant decisions of the Tribunal subject to such executive override. When the then Attorney General, Dominic Grieve QC MP, exercised his power to block public release of letters that the then Prince of Wales had sent to Ministers (the so-called "black spider" memos), he overrode the effect of the Tribunal's decision, in accordance with the scheme of the Act (and subject to the political discipline for which it made provision) but did not thereby compromise the independence of the Tribunal and it would be absurd to suggest otherwise.

The Attorney General's exercise of section 53 was challenged by way of judicial review proceedings,[6] with the Supreme Court ruling by majority that he had acted unlawfully in overriding the Tribunal. The Court's reasoning is very weak indeed.[7] Three judges (of the five who formed the majority; two others dissented) read section 53 so narrowly that it was practically impossible to exercise. They did so on the premise that to read section 53 to authorise executive override of a court would be incompatible with the constitutional principles of the separation of powers and the rule of law.

The Supreme Court's judgment in this case is certainly a warning that clear legislation may be undone by unprincipled statutory interpretation, so there is an outside risk that clause 5 will be misread by the Supreme Court in subsequent litigation. However, in deliberating about the merits of clause 5, parliamentarians should not accept that it is in any way incompatible with judicial independence. Prior to the Rwanda controversy, there was no suggestion that Rule 39 interim measures had effect in our domestic law, which means that Ministers have always been free, at least as a matter of domestic law, not to comply with such measures. In one important instance, the Government chose not to comply with a

6. *R (Evans) v Attorney General* [2015] UKSC 21
7. R Ekins and C Forsyth, *Judging the Public Interest: The rule of law vs. the rule of courts* (Policy Exchange, December 2015)

Rule 39 interim measure on the grounds that the UK was subject to an obligation in international law which made compliance with the interim measure impossible.[8] In deciding not to comply with the Rule 39 interim measure in that case, the Government clearly did not fail to uphold the independence of the European Court of Human Rights, which went on (wrongly) to hold that the UK had acted in breach of Article 34.[9]

The UK has an obligation, under the terms of the ECHR, to comply with final judgments of the Strasbourg Court. In deciding not to amend the Representation of the People Act 1983, to enfranchise serving prisoners, the UK failed to comply with the Court's prisoner voting judgment.[10] There were good reasons for the UK to fail to comply, namely that the Court's judgment is a flagrant misuse of its jurisdiction. But more to the point, there can be no plausible suggestion that in failing to comply with the judgment, the UK was questioning or challenging the Court's independence, still less that Ministers, in failing to bring forward legislative proposals to amend the 1983 Act were acting incompatibly with their duty under section 3(1) of the 2005 Act.

8. See further R Ekins, *Rule 39 and the Rule of Law* (Policy Exchange, June 2023), p40
9. See *Al-Saadoon and Mufdhi v UK* [2010] ECHR 279 (2 March 2010)
10. This analysis is not undermined by the decision of the Committee of Ministers in late 2017 to accept that the UK had after all complied with the judgment, a decision which was clearly a face-saving compromise.

# Rulings of the European Court of Human Rights and incorporation into domestic law

The Minister's section 3 duty is to uphold the independence of the judiciary, which includes the Strasbourg Court, and in particular to refrain from attempting to influence any particular judicial decision through any special access to the judiciary. Importantly, Rule 39 interim measures are not strictly speaking decisions of the Strasbourg Court. The ECHR makes express provision for the constitution of the Court and for its jurisdiction to adjudicate disputes about whether a member state has complied with its ECHR undertakings. The Court's Rule 39 practice is, as I have already noted, impossible to reconcile with the text and structure of the ECHR, including the specific reference it makes to the very limited role that any single judge of the Court may play, namely to consider questions about whether an application to the Court is admissible. The UK should not accept that any Chamber of the Court, even the Grand Chamber (or the plenary Court), has jurisdiction to grant binding interim relief. Still less should it accept that a single (anonymous) judge of the Court, acting in clear breach of the limits the ECHR places on the competence of single judges, has such authority. Thus, Rule 39 interim measures are not rulings of the Strasbourg Court at all. In failing to comply with a Rule 39 interim measure, the Minister does not fail to comply with a judicial ruling. But even if the contrary were true, there is an obvious and fundamental difference between failing to comply with a judicial ruling and failing to uphold the independence of the judiciary.

(I note that the text of clause 5, like section 55 of the 2023 Act, says that it applies "where the European Court of Human Rights indicates an interim measure", which takes for granted that it is the Court that has acted. This is imprecise and inaccurate for the reasons given above. However, it is also explicable in this context, which is not a statement of the UK's understanding of how the ECHR should be read or of the UK's obligations in international law, but is rather the creation of a power on the part of Ministers in relation to Rule 39 interim measures. In reasoning about the UK's international obligations and about the Strasbourg Court's Rule 39 practice, parliamentarians should recall that Articles 26 and 27 of the ECHR expressly limit the competence of a single judge, which means that interim measures indicated by a single judge are clearly not a decision of the European Court of Human Rights as such, still less an exercise of its

lawful jurisdiction.)

If section 3(1) of the 2005 Act is read to require compliance with rulings (judgments) of international courts, quite apart from legislation giving domestic effect to those rulings, then it collapses a fundamental rule of our constitutional law.[11] Reading section 3(1) in this way would be incompatible with the principle of legality, which requires one to presume, until the contrary intention is made out, that Parliament does not intend to qualify the existing constitution or settled legal rights. Not only would this reading compromise the fundamental rule that unincorporated treaty obligations (including the rulings of relevant international courts about those obligations) have no domestic legal effect without legislative incorporation, it would also compromise the terms of the Human Rights Act itself, which do not give direct legislative effect to the case law of the Strasbourg Court in this way. On the contrary, the Act anticipates that Parliament will enact, or maintain in force, legislation that is incompatible with the Strasbourg Court's case law. No one has ever thought, for good reason, that for this reason the Human Rights Act, or legislation that is (arguably) incompatible with Convention rights, somehow compromises judicial independence. The Constitutional Reform Act 2005 postdates the Human Rights Act 1998, and so could of course change the law that the 1998 Act established, but it would be outlandish to reason that Parliament intended any such thing in restating the importance of judicial independence, and then specifying that duty by way of section 3(5) and (6). No one before the present controversy has ever even entertained an argument to this effect, for very good reason.

In conclusion, in expressly authorising Ministers to decide whether the UK will comply with a Rule 39 interim measure, clause 5 does not compromise the section 3(1) duty to uphold judicial independence. In enacting the Safety of Rwanda Bill, Parliament would not be undermining any court's independence, including the European Court of Human Rights.

11. See for example *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418, 499 and *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; [2018] AC 61.

# Implied repeal and future litigation

Even if the clause was incompatible with the section 3(1) duty, the doctrine of implied repeal would require clause 5 to be given effect notwithstanding the terms of the earlier statute. One might argue that the 2005 Act is a constitutional statute, which is true enough, and thus is immune from implied repeal. But under our law, no statute is immune from implied repeal and the question is always what Parliament in enacting the later statute intended, and thus whether maintenance of an earlier constitutional enactment is consistent with Parliament's more recent legislative choice. This is clearly established in our law, not least in the Supreme Court's 2023 judgment *In Re Allister*.[12] Thus, even if clause 5 were incompatible with section 3 – which I do not for a moment concede – it could not rightly be read as subject to the proviso that the power it confers cannot be exercised because it is incompatible with the Minister's duty to uphold judicial independence.

The only plausible way in which clause 5 can be interpreted is as empowering the Minister alone to decide whether or not the UK will comply with a Rule 39 interim measure. Indeed, this way of putting the point should, and would if litigation eventuates, make clear to the domestic court that this is a question about foreign policy, about how the UK responds to an international court (or a judge of that court, bearing in mind my point above), when Parliament has chosen *not* to give domestic legal effect to that court's rulings. While it is of course always possible that under pressure our courts will misunderstand the relevant law or, worse, will change it in order to support political opposition to an unpopular government policy, the clear legal position is that (a) clause 5 is compatible with the statutory guarantee of judicial independence and (b) in the alternative, clause 5 nonetheless authorises Ministers to choose freely not to comply with Rule 39 interim measures.

In addition, any attempt to deploy section 3 in litigating challenging the lawfulness of the Minister's decision not to follow a Rule 39 interim measure should founder on the fact, noted in passing above, that Parliament did not intend section 3 to be justiciable. As Graham Gee has put it:

> *"This section is declaratory only – that is, Parliament's intent is that the section should not be enforceable in court, with several amendments rejected in the Lords that might have had the effect of giving rise to an enforceable guarantee. Instead, section 3 should be read as an attempt to reflect in statutory form the*

12. [2023] UKSC 5

> *conventional (and non-enforceable) rules that have traditional regulated the behaviour of ministers and the role of the Lord Chancellor in particular."*[13]

For this reason, no British court should entertain litigation attempting to enforce the general or particular duties that section 3 recognises.

If a Minister decides not to follow a Rule 39 interim measure, whether by exercising a power under section 55 of the 2023 Act or clause 5 of the Rwanda Bill (after enactment) or otherwise,[14] there is no plausible legal argument that the Minister acts unlawfully by reason of having breached section 3 of the 2005 Act. Parliamentarians considering the merits of clause 5 should not proceed on the false premise that such a legal risk is real.

13. G Gee, "Defending Judicial Independence in the British Constitution" in A Dodek and L Sossin (eds), *Judicial Independence in Context* (2010, Irwin Law) 381, 397

14. I say "or otherwise" because for the reasons already set out in this paper, and set out in more length in my *Rule 39 and the Rule of Law*, the Minister is entirely free not to follow a Rule 39 interim measure quite apart from section 55 or clause 5. Those provisions reinforce that freedom, providing express parliamentary authorisation for a course of action that is in any case clearly permitted as a matter of domestic law.

£10.00
ISBN: 978-1-910812

Policy Exchange
1 Old Queen Street
Westminster
London SW1H 9JA

www.policyexchange.org.uk