CONSTITUTIONAL LAW

Legislation, human rights and the rule of law: what was wrong with the Northern Ireland Troubles Act 2023 and the Illegal Migrants Act 2023?

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Introduction

Conservative governments since 2016 were certainly no strangers to legal challenges to their policies, or indeed legislation they managed to get through the parliamentary process. The Supreme Court halted both their plans to trigger Brexit without parliamentary approval,[1] and the Prime Minister's efforts to suspend Parliament in his effort to 'get Brexit done'.[2] More recently, the Supreme Court declared the Sunak government's Rwanda deportation policy unlawful and in breach of rights contained in the European Convention,[3] and the its attempts to overrule that decision by getting the Safety of Rwanda (Asylum and Immigration) Act 2024 passed into law were met with significant challenges from Parliament and face further examination before the domestic courts, and possibly the European Court of Human Rights.[4]

On 28 February 2024, the Northern Ireland High Court (King's Bench) delivered its judgment in *Re Dillon's Application for Judicial Review,*[5] declaring, under s.4 of the Human Rights Act 1998, that provisions under the Northern Ireland (Legacy and Reconciliation) Act 2023 Act were incompatible with Article 2 (right to life). Article 3 (prohibiting torture and inhuman and degrading treatment and punishment), Article 6 (the right to a fair trial), and Article 1 of the First Protocol (peaceful enjoyment of possessions) of the European Convention. The Court also invoked the rights under the Windsor Framework, made pursuant to the European Union (Withdrawal) Act 2018, in order to disapply certain provisions of the Act.

Eleven weeks later on 13 May 2024, the High Court in Belfast delivered its decision in *Re NIHRC and JR 295.* This case followed applications brought by the Northern Ireland Human Rights Commission (NIHRC) and a 16-year-old Iranian asylum seeker (JR 295).[6] Their application concerned the lawfulness of provisions of the Illegal Migration Act 2023. The respondents were the Secretary of State for Northern Ireland and the Home Secretary (SSHD). As with *Re Dillon*, the court ruled that this Act was incompatible with Articles 3, 6 and 8 (right to respect for private and family life) of the European Convention and duly issued a declaration of incompatibility. It also ruled that several provisions led to a diminution of the enjoyment of rights protected under the Windsor Framework: all of which were duly disapplied in Northern Ireland.

This article will examine both decisions with a view of identifying how the government, and Parliament, challenged the fundamental principles of constitutionalism and human rights in initiating and passing both pieces of legislation; and how the courts responded to the legislation within their constitutional

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1 *R (Miller) v Secretary of State for existing the European Union* [2017] UKSC 5.
2 *R (Miller) v Prime Minister* [2019] UKSC 41.
3 *AAA v Secretary of State for the Home* Department [2023] UKSC 42.
4 The Bill passed through Parliament on April 22, and was granted Royal Assent on 23 April 2024. On 7 July 2024 the High Court decided that civil servants had to follow the Minister's order to expedite deportations to Rwanda, despite that order being inconsistent with a ruling from the European Court of Human Rights: *R. (on the application of FDA) v Minister for the Cabinet Office* [2024] EWHC 1729 (Admin).
5 [2024] NIKB 11.
6 JR295 arrived in the UK on 26 July 2023 as an unaccompanied child after crossing the Channel by small boat. Crucially, this was six days after the Illegal Migration Act became law.

boundaries. Once more, the separation of powers, the rule of law and parliamentary (executive) sovereignty run through the discussions.

The background and claims in *Re Dillon's Application*

The Northern Ireland (Legacy and Reconciliation) Act was implemented in order to end investigations into Troubles-related incidents by police, ombudsmen, civil claims and inquests, creating the Independent Commission for Reconciliation and Information Recovery to carry out and publish reviews of deaths or other harmful conduct arising out of the Troubles.

The applicants in this case - victims or family members of victims of Troubles-related incidents - challenged various provisions of the Act as incompatible with various Convention rights. They also claimed that some provisions were in breach of the Windsor Framework and thus sought disapplication of those and other provisions under s.7A of the European Union (Withdrawal) Act 2018. Convention rights are, of course, given effect to by the Human Rights Act 1998, and under s.4 courts can issue declarations of incompatibility with respect to legislation that contravenes such rights. Section 7A of the 2018 Act, on the other hand, makes it clear that certain rights – for example with respect to trade in goods - are retained, and will allow the courts to disapply any provision in conflict with those rights. Section 7A(2) provides that those rights, powers, liabilities, obligations, restrictions, remedies and procedures concerned are to be recognised and available in domestic law, and enforced, allowed and followed accordingly.

In particular, the court had to consider the following issues:

- Whether s.41, under which no criminal enforcement could be taken against anyone for Troubles-related offences which were not serious, was compatible with the above rights;
- Whether the five-year time limit for requests for reviews established under s.38 of the Act was lawful;
- Whether the Commission was sufficiently independent and possessed sufficient investigative powers;
- Whether s.43 of the Act, which halted Troubles-related civil proceedings brought after May 2022, and prevented new ones from being brought, was compatible with those rights;
- Whether s.7 of the Act, which limited the use of compelled material obtained from immunity applications in criminal proceedings and whether s.8, limiting the use of protected material in civil proceedings, was compatible with Article 6;
- Whether the Act was compatible with Article 14 of the Convention, which guarantees the enjoyment of Convention rights free from discrimination on protected grounds;
- Whether Convention-incompatible provisions should also be disapplied under the Windsor Framework, and whether the court could also strike down the Act as conflicting with fundamental constitutional principles;
- Whether ss.46-47 of the Act, which reversed the Supreme Court's decision in *R v Adams (Gerard*),[7] which found that interim custody orders not made by the secretary of state at the time had been invalid, and which prohibited claims based on the prior unlawfulness of such orders, was retrospective and unlawful.

The decision in *Re Dillon's Application*

Granting Immunity and restricting access to the courts

Dealing with the immunity provisions contained in s.19 of the Act the court noted that immunity was mandatory if the conditions were met, there being no contrition requirement. The judge then noted that

[7] [2020] UKSC 19.

the Strasbourg Court had voiced strong opposition to granting amnesties with respect to the right to life and freedom from torture and other ill treatment,[8] such prohibition being especially strong where there was evidence – as in the present case - of state agent complicity in the taking of life or torture. Further, victims who suffered from paramilitary actions were entitled to the benefit of the procedural obligations contained in Articles 2 and 3.[9] In the judge's opinion, those rights were clearly undermined by the prospect of immunity from prosecution, which clearly breached both Articles. Noting that they had not been introduced in the context of an armed conflict or the ending of a violent political regime, they did not provide for exceptions for grave human rights breaches, and there was no evidence that immunity would contribute to reconciliation.

Turning to s.41 of the Act – granting immunity for non-serious offences – the court noted that a limitation on prosecutions was not, of itself, unlawful under the Convention, but was so where the offences engaged Articles 2 and 3.[10] Accordingly, life-endangering offences should not go unpunished, yet s.41 would extend unconditional immunity to such offences if no defined harm had been caused. As the state had a responsibility to deter and punish such conduct, s.41 contravened those articles and was thus incompatible.

However, the court refused to grant a declaration in terms of the five year limit for reviewing cases, imposed by s.38 of the Act. The court noted that it was not dealing with a concrete scenario and that the provisions were unlikely to affect the applicants, whose cases were already live. Thus, relevant deaths would have occurred 30-60 years earlier, and the prospects of successful prosecutions at that stage would be low. Although the concept of a time-limited investigation into legacy deaths was not novel, the lack of flexibility to deal with new evidence was concerning. However, in the court's view, if the scenario arose in future the state would have to find a mechanism to deal with it.

The independence and powers of the Independent Commission

The Court noted the state's obligations under the ECHR and through the Human Rights Act to investigate events that came under Articles 2 and 3.[11] Although the Commission was bespoke and not part of the courts, the issue was whether it was practically independent of those implicated in events under investigation, as required by Strasbourg case law.[12] In the court's view, the fact that the Chief Commissioner was a former police officer did not mean that he lacked the necessary independence under the Convention, as he had lengthy judicial experience and in appropriate cases he would have to recuse himself. Further, the Commission's preparatory work focused on operational independence and its draft principles were designed to align with the principles and case law of the ECHR. Accordingly, it was sufficiently independent.

With respect to its investigative powers, the court noted that the state could determine the means for carrying out an investigation that was Article 2 compliant. Inquests were not mandatory and the Commission would have powers to compel evidence and lead to prosecutions. Although the Act made no provision for disclosure to victims or next of kin, a compliant investigation was not impossible and would depend on implementation, and if the Commission fell short of its obligations under the ECHR it would be subject to court scrutiny.

Turning to s.43, which prohibited new claims being brought after May 2022, the court's task was to consider whether this breached Article 13 of the Convention, which guaranteed an effective remedy for breach of Convention rights in domestic law. This right is not listed in the Human Rights Act 1998, but the state is still required (under the ECHR – *Jordan v UK*, above – and, by implication, under the 1998 Act) to establish mechanisms to redress breaches of ECHR rights, including, in appropriate cases, to grant compensation (just satisfaction under s.8 of the 1998 Act). Section 43 established a strict limitation

[8] *Margus v Croatia*, Application No. 4455/10 (2016 EHRR 17.
[9] *Jordan v United Kingdom* (2003) 37 EHRR 2.
[10] *Oneryildiz v Turkey* (No. 2) (2005) 41 EHRR 20, and *Da Silva v United Kingdom* (2016) 63 EHRR 12.
[11] *McQuillan's Application for Judicial Review* [2021] UKSC 55.
[12] *Nachova v Bulgaria* (2006) 42 EHRR 43.

period for civil litigation in such actions, and while the 2023 Act did not prohibit claims against public authorities under the Human Rights Act, that only applied to post-2000 claims and did not cover paramilitary actions. Accordingly, s.43 interfered with the right to a fair trial under Article 6 of the ECHR, albeit not, in the court's view, at the very essence of those rights. The court noted that victims had had 25-60 years to bring proceedings, and that criminal prosecutions could still occur, with the possibility of compensation orders.

The question, therefore, was whether the interference was justified and proportionate in accordance with the test laid down by the Supreme Court on *Bank Melllat v HM Treasury:*[13] whether the interference with Convention rights bore some rational and proportionate relationship to the relevant statutory purpose of restricting those rights and that the restriction was a reasonably practicable, and least restrictive, means of ensuring that purpose. In the court's view, s. 43 pursued the legitimate and important aim of reducing burdens on the court, but the interference applied indiscriminately, including to proceedings regarding grave wrongs such as torture and unlawful killing. Nevertheless, it was within the state's margin of appreciation, with the exception of the retrospective effect of the section to May 2022, which, in the court's view, was disproportionate.

With respect to s.7, which limited the use of compelled material obtained from immunity applications in criminal proceedings, the court held that s.7(3) was unlawful in light of the immunity decision, above. However, the remainder of s.7 was confined to using material in criminal proceedings against the defendant who provided it. That, in the court's view, went no further than the common law or inquest rules regarding self-incrimination, and therefore did not breach the right to a fair trial in Article 6. ECHR. Further, although the prohibition on using material in civil proceedings contained in s.8 might encourage people to give information to the Commission, civil proceedings were a way for victims to validate their rights under Article 2, and thus s.8 interfered with those rights. However, there was no prohibition on using inquest or ombudsman material in civil proceedings, and given that Article 2 was unqualified, the interference was unlawful and unjustified. In addition, Article 6 (fair trial) rights were also engaged, and the court found that there was no fair balance between individual and community rights. Accordingly, s. 8 of the Act significantly impacted on those with extant civil claims, and Article 6(1) of the ECHR was breached.

Finally under this ground, the court considered the Act's compliance with Article 14 of the Convention (prohibition on discrimination). The court found that applicants, as victims or relatives of victims of the Troubles, possessed the characteristic of 'other status' within Article 14, the analogous groups arguably being victims of state/paramilitary torture or killings after 1998, or those who had already had ECHR-compliant inquests or civil or criminal proceedings. The Act proposed to deny court access to victims, but those provisions were designed to promote reconciliation (a legitimate aim) and there was an objective and reasonable justification for the differences in treatment. In the court's view, there was a rational basis for the chosen dates, reflecting the period of the Troubles. Current investigative mechanisms were slow and used significant resources, and this Parliament was entitled to devise a bespoke mechanism insofar as the Act met the requirements of the Convention.

Breach of the Windsor Framework

The Windsor Framework was adopted at the Withdrawal Agreement Joint Committee on 24 March 2023. The UK and the EU agreed a framework restoring the smooth flow of trade within the UK internal market by removing burdens that have disrupted East-West trade; safeguarding Northern Ireland's place in the Union, and addressing the democratic deficit at the heart of the original Northern Ireland Protocol.

The court made it clear that provisions of the 2023 Act which breached the Framework should be disapplied.[14] Article 2 of the Framework ensured no diminution of rights resulting from EU withdrawal,

[13] [2013] UKSC 39.

[14] (*R (Miller) v Secretary of State for Exiting the European Union*, and *Allister's Application for Judicial Review* [2017] UKSC 5.

provided the right had been included in the Good Friday Agreement. Respect for fundamental human rights was a core objective of the Good Friday Agreement, especially those of Troubles victims, and its reference to 'civil rights' included Articles 11 and 16 of the Victims Directive, as well as the right to life, freedom from torture, the right to court access and the right to dignity. Convention rights had had effect in domestic law before 2020, as did the Victims Directive and the relevant articles of the EU Charter of Fundamental Rights, and those rights had been underpinned by EU law, which had been removed following EU withdrawal. While Convention rights still applied, they only entitled victims to a declaration of incompatibility under s.4 of the 1998 Act, whereas a breach of Article 2 of the Framework resulted in disapplication of any offending provisions. There had via this Act been a diminution in enjoyment of the EU Charter rights, and the Victims Directive presupposed prosecution for breaches; consequently, removal of that possibility diminished enjoyment of the rights, and the appropriate remedy in respect of the breaching provisions was disapplication.

The constitutional arguments for challenging the 2023 Act

Although this challenge and decision had much to tell us on the arrangements of the United Kingdom constitution, and the behaviour and powers of all three organs of the state, this aspect of the challenge took little of the court's time and reflection. This was due to the fact that what was being challenged in this case was a sovereign Act of Parliament, in normal circumstances an unchallengeable legal source. Thus, in the court's view, there was little authoritative support for the proposition that the courts could rule that an Act of Parliament was contrary to the rule of law and therefore unconstitutional. That, in the court's view, would be contrary to reaffirmations of the parliamentary sovereignty principle.[15]

Nonetheless, the court noted that the circumstances giving rise to this judgment showed that Parliament itself has provided the court with the tools to scrutinise the legality of the provisions of the 2003 Act. However, that was only in line with the scope prescribed by the legislature under s.4 of the Human Rights Act 1998, and s.7A 2018 Act, securing the retention of EU rights. Those latter rights, as previously discussed, confers the power on the courts to subjugate provisions of primary legislation which are incompatible with the Windsor Agreement. This approach, in the court's view, is entirely consistent with the core tenets of parliamentary sovereignty, as the relief sought by the applicants in respect of this element of their challenge may be obtained, if successful, on the constitutionally safe ground provided by s.7A of the 2018 Act, and s.4 of the 1998 Act - both passed by Parliament and suspending its sovereignty in particular circumstances. It was, therefore, unnecessary for the court to explore the general constitutional question further, and to comment on judicial views which have reflected, on the legal theory of the possibility of the courts striking down an unconstitutional statute.

Interim Custody Orders and the right to a fair trial

Finally, the court considered s.47 of the Act, which retrospectively prohibited claims based on the prior unlawfulness of such orders, before those orders were made 'lawful' by the overruling of a Supreme Court's decision via passing of the Act. The court noted that the s.47 prohibitions were founded on the retroactive validity of such orders, as established in s.46 of the 2023 Act. Thus, only compelling grounds of general interest were sufficient to justify retrospective/retroactive legislation influencing the judicial determination of a dispute (as established by the European Court of Human Rights in *Vegotex International SA v Belgium*.)[16] These sections of the Act clearly interfered with the relevant applicant's rights under Article 6 of the Convention. They had been added to the Act late and their retrospective/retroactive effect of prohibiting extant civil claims by an acquitted applicant had been unforeseeable. There were, therefore, no compelling grounds for their justification, and there had been a breach of Article 6 (right to fair trial), and Article 1 of the First Protocol to the Convention (peaceful enjoyment of possessions.

[15] After his own review of the authorities, Humphreys J reached exactly the same conclusion in *Re NIHRC and JR295*.
[16] (2023) 76 EHRR 15.

The background and claims in *Re NIHRC and JR 295*

The Illegal Migration Act 2023 is a high profile and highly controversial statute which aims to deter asylum seekers from entering the UK by irregular routes: principally small boat crossings of the English Channel. To this effect, it places duties on the SSHD to remove from the UK any person who meets four, qualifying conditions, whilst simultaneously either disapplying or reducing the scope and effect of protection and human rights claims.[17] In theory, irregular arrivals face the *inevitability* of either removal to their country of origin or a safe third country. Other notable provisions include: disregarding children's status as a protected category of asylum seeker, widening the SSHD's detention powers, and disapplying statutory protections available to potential victims of trafficking and modern slavery. It is also notable for the many ouster and partial ouster clauses denying access to the courts. These are especially relevant to those seeking to prevent or delay their removal, or challenge age assessments.

When considering the claim that the Act is incompatible with the European Convention, the court examined the following issues:

- Whether ss.2, 5 and 6 of the Act, which enable the SSHD to remove any asylum seeker who meets the four statutory conditions[18] *before* considering their protection or human rights claims, breached Article 3;
- Whether s.22, which disapplies protections available to victims of trafficking (modern slavery) under the Nationality and Borders Act 2022, breached Article 4 ECHR (prohibiting slavery and servitude), constructed in light of Articles 10, 12-14 ECAT;[19]
- Whether s.13, which significantly restricts the courts' ability to review the detention of asylum seekers, breached Article 5;
- Whether the SSHD's *duty* to remove accompanied child asylum seekers (s.6) and their *power* to do so where the child is unaccompanied (s.4),[20] breached Article 8, constructed in accordance with Article 3.1 of the CRC;[21]
- And whether s.57, which also restricts both the scope and effect of legal challenges of age assessments, breached Article 6 and/or Article 8.

These provisions also formed the substance of the second claim: diminution of rights protected by Article 2 of the Windsor Framework.

The Decision in *Re NIHRC and JR 295*

The Incompatibility Claim

This claim had five elements. The application for a declaration of incompatibility was approved in respect of the first (imposition of a duty to remove), the second (denial of protections previously available to potential victims of human trafficking and modern slavery), and the fourth (denial of protections previously available to children). It was not granted in respect of detention or age assessments, though for different reasons in each case.

The respondents had submitted that since so many of the Act's provisions had yet to commence, granting relief would be inappropriate: a submission also made in the diminution of rights claim. After considering the case law on *ab ante* (pre-emptive) challenges, the judge (Humphreys J) cited several

[17] For an account of the Bill, see Steve Foster,
[18] See s.2(2)-(5). These are that the claimant: entered the UK without the required permissions on or after 20 July 2023; did not come directly from a country in which their life and liberty were under threat; and, finally, did not have the required leave to enter or remain.
[19] See: *VCL and AN v United Kingdom* (2021) 73 EHRR. 'ECAT' is the acronym for the *Council of Europe Convention against Trafficking in Human Beings*. It was agreed in Warsaw on 16 May 2005 and entered into force in the United Kingdom on 1 April 2009.
[20] It should be noted that, once an unaccompanied child attains majority, the power to remove reverts *de facto* to a duty.
[21] The *United Nations Convention on the Rights of the Child,* signed by the UK on 19 April 1990 and ratified by it on 16 December 1991. The UNCRC was brought into force in the UK on 15 January 1992.

cases as authority for the rule that relief can be granted in such instances.[22] Here, he felt that it was significant that the government had vowed to proceed with bringing the Act into force.

Removals

In cases where the SSHD's removal duty applies, two options are available (s.6(3)): removal to the country-of-origin, or, if this is impractical or impossible,[23] removal to a 'safe' third country listed in Schedule 1 of the Act. Crucially, removal can take place regardless of whether a person has made a third country human rights claim under s.5(1), i.e. that their removal to that particular third country would risk breaching their rights under Article 3 of the Convention.

Of the ten specific observations included in the decision, the most important concerned the duty to remove prior to the determination of the third country claim without the rigorous assessments of the receiving country required under the *Ilias* principles.[24] In this respect, the court noted Lord Kerr's emphasis on the importance of examining the deportee's individual circumstances prior to removal, in order to ascertain the risk of a breach of Article 3.[25] Whilst other measures within the Act can prevent removal,[26] Humphreys J doubted they made it Convention-compatible. The outcome is inevitable: deportees will be removed even when they have valid claims to remain in the UK. Critically, the British authorities will not examine the risk of them suffering treatment contrary to Article 3, as they are legally obliged to do, despite the possible gravity of the consequences.

Trafficking (modern slavery)

In *VCL v UK*,[27] the Strasbourg Court clarified that duties arising from Article 4 of the Convention must be construed in light of ECAT. Adhering to this interpretation of the Convention, the court in *Re NIHRC and JR295* found that the Illegal Migration Act breached ECAT in several ways: removal following a favourable 'reasonable grounds' decision[28] yet before a final determination of status breached Article 10(2); disregard for a potential victim's entitlement to at least thirty days of 'recovery and reflection' breached Article 13(1); disregard for the 'basic level' of assistance requirement breached Article 12; and disregard for the requirement to grant victims leave to remain where this is necessary given their personal circumstances breached Article 14(1)(a).[29] Equally, the court duly noted Lord Reed PSC's warnings on the lack of domestic legal effect of unincorporated international treaties.[30] Citing *R (Ullah) v Special Adjudicator* as authority.[31] Nevertheless, Humphreys J still considered it legitimate to consider how the Strasbourg jurisprudence engages with international treaties (in this case ECAT) when interpreting Convention rights.

The court also considered the respondents' argument that any breaches of ECAT were justified by the need to maintain public order with reference to the exception in Article 13(3). The court disagreed strongly and ruled, firstly, that the exception applied only to the 'recovery and reflection' period. Crucially, it did not apply to protection against removals under Article 10. Secondly, he ruled that it was inconceivable that a threat to public order arose from the mere presence of an asylum seeker in the UK. As a result, the breaches of ECAT were both unjustified and rendered s.22 incompatible with Article 4.

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[22] Two of these were judgments of the Supreme Court: *Christian Institute v Lord Advocate* [2016] UKSC 51 and *Re Abortion Services (Safe Access Zones) (Northern Ireland) Bill* [2022] UKSC 32. Another judgment referred to was the Northern Ireland Court of Appeal's ruling in *Department of Justice v JR123* [2023] NICA 30.
[23] Most obviously, because it would breach Article 33 of the Refugee Convention.
[24] See: the Grand Chamber's judgment in *Ilias and Ahmed v Hungary* (2020) 71 EHRR 6.
[25] *R (EM(Eritrea)) v SSHD* [2014] UKSC 12.
[26] Most obviously, the suspensive claims at ss.42-43.
[27] Note19, above.
[28] This is the first stage of the process leading to the identification of a claimant as a victim.
[29] In *R (EOG) v SSHD* [2023] QB 351, the EWHC judged that the term 'personal circumstances' included pursuing a protection claim based on fear of being re-trafficked. Such claims cannot be made under s.5(2) of the Illegal Migration Act.
[30] *R(SC) v SSWP* [2021] UKSC 26.
[31] [2004] UKHL 26.

Children

In accordance with Article 3.1 of the CRC, in cases of alleged interference with Article 8 of the Convention a child's best interests must be a primary consideration. The NIHRC contested that the Act (at ss.6 and 4) failed to comply with this rule, as a result of which any resulting interference could not be 'in accordance with the law' as required by Article 8(2): questions of proportionality being immaterial.[32] The respondents countered by arguing that the 'best interests' requirement was in fact met by s.55 of the Borders, Citizenship and Immigration Act 2009, which places a duty on the SSHD to have regard to the need to safeguard and promote the welfare of children when discharging immigration and asylum functions.

The decision came in two parts. With regards to *accompanied* children, Humphreys J ruled that the duty to remove without first processing their protection or human rights claims overrode the safeguards put in place by s.55 of the 2009 Act. As such, removal could not be in the child's best interests and was not therefore in accordance with the law. His decision regarding *unaccompanied* children was more nuanced. On the one hand, government policy that the removal power remains subject to the s.55 safeguards meant that s.4 was at least capable of being Convention compatible. Equally, the duty to disapply an unaccompanied child's protection and human rights claims meant that it was inevitable that they would be removed on attaining majority; an outcome which also meant that their best interests could not be a primary consideration. For this reason, s.6 was additionally incapable of being compatible with the Convention.

Detention and age assessments

Here, the incompatibility claim was rejected. Under s.13(3)-(4) of the Act, decisions to detain asylum seekers meeting the four conditions are final and cannot be appealed. Whilst detainees can apply for judicial review, they cannot do so for 28 days. It was argued that these provisions violated Article 5(4) of the Convention.[33] However, the court ruled that it was still possible that they *could* operate in ways that were compatible. The decision arose from one of the limited exceptions provided by s.13: an application for a writ of habeas corpus. Citing Lord Brown in *R (Khadir) v SSHD*,[34] he accepted the respondents' argument that the 'Hardial Singh principles' applied to cases concerned with the *exercise* of the detention power, (the essence of judicial review) as well as its *existence* (the essence of habeas corpus).[35] Consequently, judges could choose to revive and extend habeas corpus as a remedy for unlawful detention decisions under s.13. Both the discretionary nature of s.4 of the Human Rights Act and the *ab ante* nature of the application influenced the court's reasoning on this point.

The age assessment application concerned s.57 of the Act. It was denied after Humphreys J revisited his initial ruling and held that JR295 lacked standing under s.18(4) of the Judicature (Northern Ireland) Act 1978. In this, as in a number of instances, he followed the judgment in *Re. Dillon.*[36] Even so, other aspects of the decision should be noted. Firstly, the court ruled that the rights affected by age assessments constituted civil as opposed to public law rights and, as such, were subject to Article 6 of the Convention. Secondly, the restrictions placed on challenges of age assessment when applying for judicial review were heavily criticised. Not only would successful challenges be prevented from having suspensive effect (i.e. removal will still take place); more importantly, the court is prevented from reviewing the assessment on its facts: relief being available only if the decision was wrong in law. Thirdly, neither internal Home Office safeguards nor the respondents' arguments regarding necessity

[32] The Commission relied on Lady Hale's judgment in *ZH (Tanzania) v SSHD* [2011] UKSC 4 that any decision taken without having regard to the child will not be in accordance with the law.
[33] These require that detainees can speedily challenge detention decisions before a court empowered to order their release.
[34] [2005] UKHL 39
[35] *R v Governor of Durham Prison ex p Hardial Singh* [1984] 1 WLR 704. The main principles are that: detention in immigration cases is only permissible where there is an intention to deport; detention can be used only for that purpose; and that the period of detention can be no longer than that is reasonable in all the circumstances. When it becomes apparent that deportation is not possible within that period, the power should be exercised no longer.
[36] His reasons were that JR295's age assessment had been now resolved in his favour. Whilst there was a risk it might be reviewed (and overturned), Humphreys J added that there was nothing to indicate that this would occur. In any event, s.57 had not yet commenced; as a result JR295 has not been denied a fact-finding remedy.

and legitimacy addressed the inevitable consequence that asylum seekers who are in fact children will be unable to effectively challenge inaccurate age assessments. Such interference will, in all cases where minors seek to challenge incorrect fact-based assessments, violate their Convention rights.

The Diminution of Rights Claim

This claim concerned alleged breaches of Article 2 of the Windsor Framework, as implemented by s.7A of the Withdrawal Act.[37] With express reference to *Re SPUC Pro Life Limited's Application*,[38] Humphreys J explained that his final determination boiled down to three issues: the rights created by and enjoyed under EU law; the relevant statutory provisions of the Act; and, most importantly, whether the latter have caused or will cause a diminution of the rights enjoyed under EU law.

The legal background

The first of three 'background' issues concerned the legal *status* of rights created by EU law. As noted above, this had been already considered in *Re Dillon*. Consequently, the principle of judicial comity applied: to depart from Colton J's analysis would oblige the court to conclude that his approach was either 'plainly wrong' or 'clearly incorrect', the conclusion urged upon him by the respondents. They argued that the decision in *Re Dillon* had failed to consider the qualitative difference between the rights safeguarded by Article 2 and those 'trade' laws made applicable by Article 5: the difference being that the former merely obligate the government to ensure that diminutions can be challenged in court and, where necessary, appropriate remedies made available. Accordingly, this interpretation of Article 2 relegates rights included in the Good Friday Agreement to the status of a legal 'benchmark'.

In his judgment, Humphreys J examined the wording of, one, the Withdrawal Agreement and the Withdrawal Act and, two, the latter and the European Communities Act 1972. Following Colton J in *Re Dillon*, he concluded that s.7A(2) of the Withdrawal Act mirrored the language of s.2 of the 1972 Act by providing that 'all rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Withdrawal Agreement' are given legal effect without further enactment. He described s.7A is the 'conduit pipe' via which the Withdrawal Agreement flows into domestic law. Further, Article 4(1) of the Agreement provides for two distinctive categories of rights: those made directly by the Agreement itself and those EU laws it also 'makes applicable'. The rights referred to in Article 2 of the Windsor Framework are part of the first category; those referred to in Article 5 being part of the second. However, their effect in domestic law is the same: both can be directly relied upon providing they meet the conditions for direct effect under EU law. Finally, Humphreys J ruled that the obligation placed on the UK government to ensure compliance with Article 4(1) includes the enactment of domestic legislation,[39] empowering judges to disapply inconsistent or incompatible provisions. *Factortame* reverberates still: rights and obligations under the Withdrawal Agreement must prevail over any inconsistent domestic law.

> 'The rights relied upon by the applicants arising from the EU Directives were clear and precise and therefore had direct effect on 31 December 2020. The Dublin III Regulation was directly applicable.'[40]

The second question proved to be even more significant, politically as well as legally: were rights relied on by JR295 the 'civil rights…of everyone in the community' and hence protected by the Good Friday Agreement? Humphreys J considered this question during JR295's grant of leave hearing, when he concurred with Colton J's rejection of the argument that the civil rights protected by the Good Friday Agreement were 'frozen in time and limited to the political context of 1998'.[41] Accordingly, he concluded that JR295 was entitled, via Article 2(1) of the Windsor Framework, to rely on rights enshrined in the several EU Directives and Regulations, together with the Charter, when challenging

[37] As with *Re. Dillon,* these provisions require UK governments to ensure that there will be no diminution of the rights set out in the 'Rights, Safeguards and Equality of Opportunity' section of the Good Friday Agreement.
[38] [2023] NICA 35
[39] In this case, s. 7A of the Withdrawal Act.
[40] [2024] NIKB 35, para. 60.
[41] [2024] NIKB 7. Colton J had articulated this view of the Good Friday Agreement in Re *Angerson's Application.*

the Act. This was especially important, since the respondents acknowledged that, in a category of cases, a diminution of rights *would* occur if Good Friday Agreement protections were recognised by the court: prominent examples included s.5(2) and s.5(4) on the examination and grant of asylum applications and the combined effect of ss.2, 5-6 on removals.

This aspect of the decision was subsequently criticised by the Minister for Legal Migration and the Border, Mr. Tom Pursglove. He objected that the Good Friday Agreement had been creatively interpreted in ways that the treaty never intended (and by necessary implication, Parliament never intended when it passed the Northern Ireland Act 1998). The first disregarded the fact that rights-protection under the Agreement sought only '…to address long-standing, specific issues relating to Northern Ireland's past'. The second was that the Agreement has been expanded to cover reserved matters, i.e. immigration, where relevant laws had always applied on a UK-wide basis.[42] Mr. Pursglove was joined in his criticism by former Justice Secretary, Sir Robert Buckland, who, given the seriousness of the constitutional issues raised by *Re NIHRC and JR295* (and *Re Dillon*, to which he also made express reference), urged the minister to refer both judgments to the Supreme Court at the earliest opportunity.

The third issue concerned a reiteration of the argument that relief ought not to granted in respect of uncommenced statutory provisions. Should it find against them, the respondents invited the court to either identify the areas of breach or make declaratory relief, whereby the government could consider rectification without having to comply with an order. Once again, Humphreys J was unimpressed: ministers intended to commence the Act as soon as possible, the NIHRC had an express statutory jurisdiction to seek to impugn future breaches of the Windsor Framework, and, finally, in *Re Dillon* Colton J had not distinguished the commenced and uncommenced provisions of the Legacy Act, ruling that *any* provisions breaching the Windsor Framework should be disapplied. He also explained that Article 4 of the Withdrawal Agreement and s.7A of the Withdrawal Act were 'juridically aligned' both to the 1972 European Communities Act and *Factortame*. In the event of inconsistency, it followed that domestic law must be disapplied. Following Colton J, he concluded that where the Windsor Framework is breached, s. 7A of the Withdrawal Act *mandates disapplication* of the offending provision (emphasis added).

The Nine 'Areas'

In each of the nine 'areas' into which the claim had been deconstructed, the court ruled that a diminution of rights had occurred: the relevant rules being contained in the Procedures, Qualification and Trafficking Directives,[43] together with the Charter of Fundamental Rights. Unaccompanied children had also suffered a diminution of rights under the Dublin III Regulation.[44] As a result, no fewer than eight provisions of the Act were disapplied.[45]

The disapplication decision broadly paralleled the declaration of incompatibility. This is especially so in the following areas: the examination and grant of asylum protection, denial of an effective remedy, removal, trafficking in human beings, and children and unaccompanied children. However, it also extended to areas lying beyond the declaration's scope. One such was the risk of indirect refoulement contrary to Article 21 of the Qualification Directive and Articles 25-27 of the Procedures Directive. This occurs when, owing to processing or other failures in the receiving country, an asylum seeker is relocated to another country where they are at risk of persecution.[46] Under the Directives, mitigating that risk requires appropriate assessments of the receiving country and the claimant's personal circumstances. Humphreys J agreed with the NIHRC that the Act failed to meet these requirements, a decision influenced by the weaknesses in the available remedies. Indirect refoulement is not listed in the s.6 exceptions to the removal duty, and while it can figure in a serious harm suspensive claim,[47] the

[42] See: House of Commons Hansard, 14 May 2024, 'Illegal Migration Act: Northern Ireland', vol. 750. col. 141, 142.
[43] Respectively: Council Directive 2005/85/EC, Council Directive 2004/83/EC and Council Directive 2011/36/EU.
[44] Regulation (EU) 604/2013.
[45] These were: s. 2(1), s. 5(1), s. 5(2), s. 6, s. 13(4), s. 22(2), s. 22(3) and s.5.7
[46] This was central to the Supreme Court's judgment in *AAA*, a point noted by the court.
[47] S. 42.

test - a 'real, imminent and foreseeable risk' of (specified) harm[48] - prevents the claim succeeding even where convincing evidence of processing failures had been presented.

The disapplication also included two areas – detention and age assessments - which had been expressly excluded from the incompatibility declaration. The court ruled that s.13 caused a diminution of the right to seek 'speedy judicial review' protected by Article 18 of the Procedures Directive. It also rejected the respondents' argument that, since Article 18 protections only applied to asylum seekers, they were not available to any person whose claim had been disapplied under s.5(2) of the Act.[49] Instead, it held the deprivation of the right to have an asylum claim processed both entailed a diminution and formed the legal context in which the inability to seek speedy judicial review should be viewed. The fact that the remedy sought - disapplication under s.7A of the Withdrawal Act – was non-discretionary was important in this instance.

Regarding age assessments, the court ruled that the denial of fact-based judicial review challenges represented a clear diminution of rights in a defined category of cases. Before the Act, age assessments could be challenged in UK courts, where determinations would be made on matters of fact,[50] and on the balance of probabilities.[51] Under s.57 this is no longer the case for any person meeting the four conditions. This breached rights recognised in the European Convention, especially Articles 6 and 8; rights that are also required for the purposes of analysis by the Windsor Framework.[52] Diminution of rights under Article 47 of the CFR - the guarantee of an effective remedy in respect of the violation of any EU law right – was also raised. Since JR295's standing was no longer relevant, Humphreys J duly added age assessments to the disapplication.

The effect of the decisions in *Re Dillon* and *Re NIHRC and JR 295* on the United Kingdom Constitution

It is incredible how many constitutional issues were raised in these cases, and indeed in the *Miller* cases, and the recent Supreme Court ruling in *AAA*, above, and how much they tell us about the United Kingdom constitution in respect of parliamentary sovereignty, the separation of powers, the constitutional role of the courts, the rule of law, and human rights' protection.

It is trite law that the UK constitution is based on the doctrine of parliamentary, rather than constitutional sovereignty, and that no court or body can question an Act of Parliament. However, Parliament itself, through statute, can limit that doctrine and provide the courts with greater powers of judicial review of legislation. This was done under s.2 of the European Communities Act 1972, giving the courts power to ignore domestic legislation that conflicted with European Community (later Union) law.[53] This was also achieved in the 2018 EU Withdrawal Act, which retained certain EU rights as sovereign over domestic law, or at least until Parliament expressly overruled that legislation. This is said not to conflict with parliamentary sovereignty, as it is Parliament itself that passed the legislation allowing its future legislative powers to be reviewed and disapplied by the domestic courts. That sovereignty can, of course, be regained by passing legislation expressly overruling the 1972 Act (achieved generally through the 2018 Act), or by expressly amending or repealing the 2018 Act. Indeed, following the decision in *Re Dillon*, the government may have wished to rush legislation through Parliament restoring sovereignty in this area.

Such indeed was the advice given to it by Conservative backbench MPs in the Urgent Question debate the day following the decision in *Re NIHRC and JR295.*[54] Noting the nature of s.2 of the Safety of

[48] S. 39(4)(c) read alongside s. 39(4)(a).
[49] S. 5(2)
[50] *R (A) v Croydon LBC* [2009] UKSC 8
[51] *Re JR147* [2023] NIKB 67
[52] This is in line with in line with the judgment of Colton J in *Re Dillon*
[53] *R v Secretary of State for Transport, ex parte Factortame* [1991] 1 AC 603.
[54] Tabled by Gavin Robinson, DUP Member for Belfast East.

Rwanda (Asylum and Immigration) Act 2024,[55] several Members demanded legislation expressly affirming the superiority of domestic over EU law in the broad area of immigration and asylum policy.[56] Sir Bill Cash also repeated his criticism made when seeking to amend the Safety of Rwanda Act, i.e. that the Illegal Migration Act, the Windsor Framework and the European Union (Withdrawal Agreement) Act should have been worded differently on the issue of sovereignty 'so as to remove the grounds for this judgment'.[57] Other Conservatives, joined by several Members of the Democratic Unionist Party, went further by advocating legislation that would, in their view, deal with the problem at source: in effect by rewriting the Windsor Framework and the Withdrawal Agreement.

A similar, but not different example of limiting sovereignty was achieved by the passing of the Human Rights Act 1998, s. 4 of which allows the High Court and above to declare primary and secondary legislation incompatible with rights contained in the European Convention of Human Rights. This power was used by the High Court in the present cases to declare certain sections of the Legacy Act and Illegal Migration Act incompatible with various Convention rights. Yet the 1998 Act makes it clear that the power under s.4 does not extend to ignoring, disapplying or striking down any offending legislation passed or authorised by Parliament. Once a declaration is made, the offending provision continues in force and must be amended by Parliament itself in line with the procedure laid down in s.18 of the 1998 Act.

The different methods of entrenchment or limitation adopted in relation to EU and ECHR law reflect the status of both treaties in terms of the predominance of treaty law over national law and sovereignty. EU membership was always intended to give predominance to treaty law over national law,[58] whilst Convention law and rights were intended to guide national human rights law to comply with the general principles laid down in the Convention; the Council of Europe, the Convention itself, and the Strasbourg Court always recognising their subsidiary roles in this area. Further, the entrenchment of certain EU rights in the 2018 Act reflected Parliament's intention to retain those rights despite the withdrawal from the European Union. That presumably was the government's intention at the time, and the 2023 Legacy Act is either a reversal of those promises, or a genuine misinterpretation on its part that it complied with the rights entrenched by the 2018 Act. Similarly, those provisions in the Legacy Act that have been declared incompatible might have been passed in the genuine belief that they *were* compatible with the ECHR and the Human Rights Act, and that the courts would find them compatible.

Alternatively, the Legacy Act could have been passed as a show of parliamentary (and governmental) might, with the clear intention of ignoring any challenge from the domestic courts, or indeed the Strasbourg Court. This possibility is peculiarly pertinent in the case of the Illegal Migration Act. During its parliamentary passage, ministers acknowledged that it had a novel even experimental quality designed, at least in part, to test human rights laws. It is a position they subsequently maintained.[59] Yet, whilst they asserted their confidence that the Act would comply with the Convention, this did not merit making a s.19(1)(a) statement: a point noted by Humphreys J.

The Act was heavily criticised on these points by the Joint Committee on Human Rights (JCHR). Whilst acknowledging that a s.19(1)(b) statement is not necessarily an admission that legislation is non-compliant with the Convention, the Committee was clear that the Act involved a 'piecemeal' dismantling of the Human Rights Act and, in particular, ran counter to the very principle of universal

[55] That all 'decision-makers' defined by s. 2(2) must treat the Republic of Rwanda as safe for the purposes of removal decisions. The courts, in particular, must not consider challenges to removal decisions brought on the grounds that Rwanda's asylum application processing arrangements could result in indirect refoulement or otherwise breach that country's obligations under the Refugee Convention (s. 2(3)-(4)).
[56] Sir John Redwood, Mr. David Jones and Sir Christopher Chope. See: House of Commons Hansard, 14 May 2024, 'Illegal Migration Act: Northern Ireland', vol. 750. col. 144, 148-149.
[57] Ibid., col. 142
[58] *Costa v Enel* Case 6/64 [1964] ECR 585.
[59] In the immediate aftermath of the judgment, the minister, Tom Pursglove, told the Commons that "As a government, we recognise and have consistently said that this (the Illegal Migration Act) is a novel approach to tackling the issues but such challenges require novel solutions". House of Commons Hansard, 14 May 2024, 'Illegal Migration Act: Northern Ireland', vol. 750. col. 150.

human rights. Further, the decision to include, at what became s.55, a provision enabling ministers to disregard interim measures made under Article 39 of the European Convention only added to the sense that the government was looking for a confrontation with Strasbourg: possibly one designed to prepare the ground for withdrawal from the Convention itself.

The extent and depth of the JCHR's concerns are indicated by the forty amendments it proposed, covering no fewer than twenty-nine of the original clauses.[60] The Committee was also unequivocal that the Act was highly vulnerable to defeat if challenged in the courts, a point which its Chair – the SNP Member for Edinburgh South West, Joanna Cherry – drew to the attention of the government in the aftermath of the decision in *Re NIHRC and JR295*.[61] There is no evidence that ministers paid any heed. Instead, the impression given – then as now - was that the Sunak government simply intended to 'plough on' with the Act regardless of the weight of political criticisms or the threat and later the actuality of legal defeat. It is an impression affirmed by the inclusion of a commitment to commence the Act in the Conservatives' 2024 general election manifesto.

In terms of the separation of powers and the constitutional role of the courts, many (mostly but not exclusively politicians) ask why a court, with unelected judges, should be able to disturb government policy, authorised by Parliament, by declaring such policies unlawful. Of course, much of that doubt has been answered in our above discussion, on parliamentary sovereignty: Parliament itself has set limits on its sovereignty by passing legislation that limits the scope of the government's powers, and the courts are simply carrying out that mandate. This was made clear by the court in *Re NIHRC and JR 295*.

> 'This outcome does not occur at the whim of the courts but represents the will of Parliament as articulated in the Withdrawal Act.'

However, not all aspects of the recent judgments can be explained on that basis alone; the High Court also passed judgment on the application and execution of potentially lawful actions. For example, in *Re Dillon* it concluded that interferences with ECHR and retained EU rights were not justified on the evidence presented to the court. The judge ruled that 'there was no justification for breaching Convention rights, as there was no evidence that the granting of immunity under the Act will in any way contribute to reconciliation in Northern Ireland; indeed, the evidence is to the contrary.' On a similar note, in *Re NIHRC and JR295*, the judge pointed out that attempts to justify beaches of Article 4 of the European Convention with reference to Article 13(3) of ECAT could not rely on the assertion that public order was threatened by the mere fact that asylum seekers were present on UK soil.

> '…it cannot conceivably be the case that mere presence in a state alone can trigger the public order exception. Something more must be required'.[62]

For some, this is evidence of courts overstepping their constitutional remit, and ruling on the merits of government policy; a task for an accountable executive. Such arguments invite a three-pronged response. First, reviewing actions on grounds of proportionality and necessity (the tools of both European Courts) was given to the courts by both the 1998 Act and the 1972 (and 2018) Acts. Thus, again, the domestic courts are merely carrying out the legislative mandate of Parliament and the government by ruling on those issues. Second, although review under both Acts should not extend to replacing the policy and judging the pure merits of such – that would be institutionally and

[60] Joint Committee on Human Rights, *Legislative Scrutiny: Illegal Migration Bill*, Twelfth Report of Session 2022-23 HC 1242, HL Paper 208, paras. 73 and 90, and para. 7 of 'Conclusions and Recommendations'.
[61] See: House of Commons Hansard, 14 May 2024, 'Illegal Migration Act: Northern Ireland', vol. 750. col. 148, where Ms. Cherry pointedly observes that: '…the Joint Committee on Human Rights has repeatedly warned that many aspects of the Government's asylum policy breach the Human Rights Act. That was not just our view, but the weight of the expert evidence that we heard; in fact, those with legal expertise who disagreed with our findings were decidedly thin on the ground. This judgment vindicates our position that on a number of fronts, the Government's asylum policy breaches the Human Rights Act, particularly as regards the duty to remove.'
[62] [2024] NIKB 35

democratically wrong – the decision in *Re Dillon* is not simply a case of the courts disagreeing on the evidence. Thus, there was *no evidence* that the granting of immunity will in any way contribute to reconciliation in Northern Ireland; indeed, *the evidence is to the contrary*.' That does not suggest simply a difference of opinion, but that the executive, being asked to provide the necessary evidence to justify prima facie breaches of fundamental rights, have failed to provide any relevant evidence, and have in fact added to the case that the breaches were unjustifiable. Review on the grounds of no evidence or taking into account irrelevant considerations has been part of judicial review well before the introduction of European law,[63] and failure to provide any cogent evidence to support a policy, albeit given effect to via an Act of Parliament, cannot excuse arbitrary and unreasoned policy and actions.

Third, we should recall that some of the claims made by the claimants were rejected; the court applying judicial deference and the margin of appreciation in deciding that some measures were within the law, including those that possessed the *capacity* of being developed to that effect by the courts.

Conclusions

Ultimately, these cases reveal the Sunak government's position on and approach to the protection of human rights, and its belief in the law and the rule of law.[64] Many Conservative politicians obviously have a distrust of European human rights law and European judges, and they may yet, if given the opportunity, reintroduce plans to scrap to Human Rights Act 1998, and to withdraw from the European Convention and the jurisdiction of the European Court of Human Rights. Yet these judgments, and many others alluded to in this article, are not simply repeating the ideas and judgments of a European Court; many of the decisions are based on common law principles of the right to life, freedom from cruel and unusual punishment, fairness, due process rights, freedom from retrospective law, and property rights – rights which have existed well before the incorporation of European rights and principles, and which have been upheld by our courts.

If our judges continue to rule against governments in these areas, then governments are running out of places to hide. You can pass legislation to say a country is safe, when the courts have told you that all evidence points to it being unsafe, and you can introduce a policy (on detention without trial or investigating deaths or refusing to process protection and human rights claims), believing that this is the most suitable and convenient way to deal with a situation. However, unless a government prohibits review of any kind, the judges will continue to come after it, and only legislation that prohibits any judicial intervention will restore a distinctly conservative idea of constitutionalism.

It is an idea rooted in a particular interpretation of the rule of law. This was apparent in the government's consultation document on the British Bill of Rights Bill, it appeared throughout the parliamentary passage of the Illegal Migration Act and again, more recently still, during the parliamentary debates on the Safety of Rwanda Act. In essence, it reduces the meaning of the rule to the implementation by the courts of any and all laws passed by Parliament, providing the latter's intention is clear in the wording: nothing more. In the process it detaches the rule from other legal principles, such as abiding by international law, maintaining equality before the law, respecting fundamental human rights and guaranteeing access to the courts,[65] which might give it substance and offer greater protection to individuals.

The rationale for this stance is based in part on constitutional tradition but increasingly on what amounts to a fetishisation of the House of Commons' status as an elected chamber.[66] The consequence is that those institutions which also possess meaningful constitutional claims to roles in the making and

[63] *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997.
[64] See Steve Foster, 'The Rule of Law in the UK Constitution: not a Pritti sight' (2022) 2 *Coventry Law Journal* 1.
[65] The articulation made by Baroness D'Souza during the first day of debating on the Report Stage of what was then the Safety of Rwanda Bill (House of Lords Hansard, 4 May 2024, vol. 836, col. 1328)
[66] Such, for example, is the interpretation of former Minister for Immigration, Robert Jenrick MP during the Committee Stage of the Bill: "…we are not a parish council…We are a sovereign Parliament. The power is in our hands. The law is our servant, not our master." (House of Commons Hansard, 16 January 2024, vol. 743 col. 717).

implementation of the law (most obviously the House of Lords and the senior courts) have been marginalised with increasing regularity, something evident again in the Safety of Rwanda Act. Interestingly, in this case had some Conservative backbenchers got their way, questions over the lawfulness of removal decisions would have been placed, to all intents and purposes, altogether beyond the courts' jurisdiction.[67] Further, when implementing the Act the courts would have been excluded from taking into consideration *all* international laws, including the European Convention.[68]

To their credit, on this occasion ministers stood their ground and faced down the rebels. Yet even so, their conduct, including their policies in *Re Dillon* and *Re NIHRC and JR295,* has raised serious questions about accountability in our Constitution. In particular, it reminds us of Lord Sumption's observation that, reduced to its essentials, the Constitution consists of the principle of parliamentary sovereignty and several conventions designed to influence its use. Should those conventions ever lose their hold on a party of government, this would naturally start the conversation about a new UK Constitution.

The Sunak government appealed the decision in *Re Dillon*, proceedings commencing in the Northern Ireland Court of Appeal on 11 June 2024.[69] An appeal against the ruling in *Re NIHRC and JR295* was also planned, leading to an application for a stay on the order of the court: rejected by Humphreys J on 31 May 2024. Therefore, it will be interesting to see if the Court of Appeal believe that the Northern Ireland High Court over-stepped its constitutional powers, or gave too little deference to the government. Whatever the outcome, the conflict between Parliament and the courts is unlikely to abate, with more calls for a reform of human rights law to restrict the influence of European human rights law, or, with the election of a Labour government on 4 July, a call to reform the constitution to increase control over parliamentary (executive) sovereignty. Further, before going to press, the new Labour government have announced its plans to repeal Conservative legislation and policies on immigration and asylum, including the Safety of Rwanda (Asylum and Immigration) Act 2024.[70] This, hopefully, will restore a rights-based approach in this area, ensuring that the law and practice is compliant with our international obligations under the European Convention and other treaties.

[67] An amendment proposed by Mr. Robert Jenrick. Its effect would have been to permit challenges only on the grounds that the decision-maker had acted in bad faith or that the deportee was medically unfit to travel.
[68] The proposal of veteran right-wing Conservative MP, Sir Bill Cash
[69] 'NI Troubles: government appeals High Court ruling on Troubles Act', BBC News: https://www.bbc.co.uk/news/uk-northern-ireland-68499113
[70] Tim Baker, Government to divert tens of millions from Rwanda plan to new Border Security Demand', Sky News, 7 July 2024