



Submission from Open Rights Group on the operation of the UK's Immigration Exemption in the Data Protection Act 2018 and its effect on the standards of data protection in the United Kingdom

3 March 2021

This submission to the European Commission and European Data Protection Board seeks to assist your respective duties in relation to the assessment of the United Kingdom to determine whether it provides adequate protection under Article 45 of the General Data Protection Regulation.

The focus of this submission will be on the United Kingdom's operation of exemptions in the Data Protection Act 2018. Specifically Schedule 2 Part 1 Para 4 that disapplies certain GDPR provisions for the purposes of "the maintenance of effective immigration control" or "the investigation or detection of activities that would undermine the maintenance of effective immigration control." (the Immigration Exemption).

This submission is made by the Open Rights Group¹, a not for profit organisation operating in the United Kingdom that works to ensure the right to privacy in the United Kingdom is respected, protected, and fulfilled. We have been closely involved in the debate over the Immigration Exemption since its inclusion in the

¹ Open Rights Group, <https://www.openrightsgroup.org/>.

Data Protection Bill², including a currently ongoing judicial review against the exemption in the Data Protection Act 2018³ with the3million, the largest campaign organisation for EU citizens in the UK⁴.

We write to provide you with a summary of the operation of the exemption in the United Kingdom, including a recent freedom of information request from the Home Office that reveals that in 2020, the exemption had been exercised by the Home Office in 70% of requests for personal data received.

The UK's immigration system needs proper accountability. It has been shown to regularly produce errors from poor data quality leading to actions taken against people legitimately living in the UK, through to data sharing between institutions that are found to break the law. This system now applies to EU citizens, and EU nationals that have settled in the UK even those who have lived here for many years. This is a system that undertakes large scale data processing of a highly sensitive nature, deciding people's right to remain in a country. The Immigration Exemption could have a direct effect on the decisions made, their quality, and their legitimacy. Its scope is so broad, and safeguards so piecemeal, that it reduces the level of data protection in the United Kingdom below what is required for essential equivalence. It must be amended before adequacy can be granted to the United Kingdom.

This submission's focus is on the operation of the immigration exemption. It should not be interpreted as an endorsement of areas not mentioned, such as national security laws, international commitments arising from legally binding conventions, or the existence and effective function of independent supervisory authorities in the United Kingdom.

² The "Immigration Exemption" undermines everyone's data rights, Open Rights Group, <https://www.openrightsgroup.org/campaign/immigration-exemption-campaign-page/>.

³ Immigration exemption in data protection law faces further legal challenge, 21 January 2021, Computer Weekly, <https://www.computerweekly.com/news/252495177/Immigration-exemption-in-data-protection-law-faces-further-legal-challenge>. original judgment from the High Court is available here, <https://www.bailii.org/ew/cases/EWHC/Admin/2019/2562.html>.

⁴ the3million, <https://www.the3million.org.uk/>.

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ANNEX 1

Executive Summary

The paper begins with a chronology of the Immigration Exemption and how it came to enter UK law, summarising the debates when it was part of the Data Protection Bill. It then moves on to discuss the construction of the Exemption and the data subject rights it sets aside.

We then turn to the information available on the practical application of the Immigration Exemption that have been revealed by Open Rights Group through litigation and research. The most pertinent information we have is that the Immigration Exemption has been applied in over 70% of subject access requests to the Home Office in between January 2020 and December 2020. However, there is no recorded information on the number of appeals made against the application of the Exemption and the number of appeals made to the Information Commissioner's Office against the use of the exemption by the Home Office between 2018 and 2020 were of a miniscule number (3) in comparison to the number of requests made (close to 20,000 in 2020). There is clearly something amiss in the monitoring and compliance of this Exemption, whether that be notification of its operation, or the safeguards of the Bill. **We ask the Commission and the Board to carefully consider what these numbers relating to its application mean for standards of data protection, and the practice of compliance in the United Kingdom.**

This briefing then sets out the principles making up an adequacy assessment, with a particular focus on principles relevant to the Exemption. We then assess the Exemption, and the information on its application, against the principles of note in an adequacy assessment. We conclude that there are particular concerns about the Exemption's effect on rights, standards of compliance, accountability, and appropriate redress mechanisms. **We ask for the Commission and the Board to seek removal of the Exemption or to ensure reforms that the Exemption and its use does not breach the standards expected of a third country. Failing that the Commission must withhold approval of the United Kingdom's status.**

We briefly touch on the concerns raised by European institutions regarding the Exemption throughout the existence of the Exemption, from 2017 through to recent comments in 2021.

We then turn to assess the United Kingdom's Explanatory Framework for Adequacy Discussions, specifically Section E3 that provides an explanation for the Immigration Exemption's operation and its safeguards. **We conclude that some of the statements made by the United Kingdom in seeking to explain how the Exemption is applied are misleading given the facts available. We in turn make comment on the Commission's Draft Adequacy Framework decision.**

We finally conclude the paper seeking to ensure that the Commission and the Board call on the UK Government to remove the Immigration Exemption from data protection law, or reform the Immigration Exemption to bring it into line with necessary standards for adequacy. Action must be taken before a final decision is taken on the adequacy of the United Kingdom with regards to the protection of personal data. If the United Kingdom fails to implement the recommendations, the Board and Commission must reserve the right to not grant adequacy at this stage.

Chronology

The Data Protection Bill was introduced into the House of Lords by the UK Government in September 2017. The Bill as introduced contained exemptions from the GDPR at Schedule 2 under Part 1 Adaptations and Restrictions Based on Articles 6(3) and 23(1)⁵. At paragraph 4 of this schedule was an exemption that would restrict applications of 'listed GDPR provisions' to personal data processed for the purposes of effective maintenance of effective immigration control, or the investigation or detention of activities that would undermine the maintenance of effective immigration control".⁶ An exemption of this type had never previously

⁵ Data Protection Bill (as introduced by UK Government), Schedule 2, Part 1, https://publications.parliament.uk/pa/bills/bill/2017-2019/0066/bill_2017-20190066_en_14.htm#sch2-pt1.

⁶ *ibid* at paragraph 4, line 40.

been in UK law and as a result it was met with scepticism by Parliamentarians, commentators, and concern by civil liberties groups working on digital rights and organisations representing migrants rights.

The Government justified the inclusion of the exemption by reference to examples, including that of a suspected overstayer receiving disclosure via a subject access request that the Government are preparing an administrative removal and would be able to evade enforcement action.⁷ This example was consistently returned to despite it being pointed out that the example clearly relates to a criminal offence⁸, under which pre-existing and standard exemptions would have been available.

Throughout these debates the Government failed to articulate actual evidence of the problem that the proposed exemption sought to address. There were no facts about an individual absconding from immigration enforcement after a subject access request revealed a forthcoming administrative removal. In fact the most pertinent examples in the debate were the corrections that a subject access request had made for an individual's right to remain in the United Kingdom while they were facing deportation.⁹ Other important facts given were the number of appeals allowed against decisions of the Home Office immigration decisions- over ten years to 2015 was at a high of 250,000¹⁰ and the number of errors made by the

⁷ Minister of State, Home Office, Baroness Williams of Trafford, 13 November 2017, Committee Stage Data Protection Bill,

[https://hansard.parliament.uk/Lords/2017-11-13/debates/EC101CF2-FA1C-4397-9A29-7F07333B396B/DataProtectionBill\(HL\)#contribution-AFC34D06-124E-48B4-AE3C-65CF7D0EBAC8](https://hansard.parliament.uk/Lords/2017-11-13/debates/EC101CF2-FA1C-4397-9A29-7F07333B396B/DataProtectionBill(HL)#contribution-AFC34D06-124E-48B4-AE3C-65CF7D0EBAC8).

⁸ Baroness Hamwee, 13 November 2017, Committee Stage Data Protection Bill, [https://hansard.parliament.uk/Lords/2017-11-13/debates/EC101CF2-FA1C-4397-9A29-7F07333B396B/DataProtectionBill\(HL\)#contribution-293527CC-7CC4-4641-AF77-6674A76E3F57](https://hansard.parliament.uk/Lords/2017-11-13/debates/EC101CF2-FA1C-4397-9A29-7F07333B396B/DataProtectionBill(HL)#contribution-293527CC-7CC4-4641-AF77-6674A76E3F57) see also Liam Byrne MP, 9 May

2018, Committee Stage Data Protection Bill (Commons), [https://hansard.parliament.uk/Commons/2018-05-09/debates/CE43B0ED-87D3-4F63-B8A4-2A66964790C2/DataProtectionBill\(Lords\)#contribution-F3DA1580-9620-4C82-912C-CCDB13ACD99B](https://hansard.parliament.uk/Commons/2018-05-09/debates/CE43B0ED-87D3-4F63-B8A4-2A66964790C2/DataProtectionBill(Lords)#contribution-F3DA1580-9620-4C82-912C-CCDB13ACD99B)

⁹ See for example briefing from the Immigration Law Practitioner's Association for the Data Protection Bill 2017 for the Committee Stage <https://publications.parliament.uk/pa/cm201719/cmpublic/DataProtection/memo/dpb16.pdf> raised by Baroness Hamwee, 13 December 2017, Report Stage (Lords) [https://hansard.parliament.uk/Commons/2018-05-09/debates/CE43B0ED-87D3-4F63-B8A4-2A66964790C2/DataProtectionBill\(Lords\)#contribution-F3DA1580-9620-4C82-912C-CCDB13ACD99B](https://hansard.parliament.uk/Commons/2018-05-09/debates/CE43B0ED-87D3-4F63-B8A4-2A66964790C2/DataProtectionBill(Lords)#contribution-F3DA1580-9620-4C82-912C-CCDB13ACD99B).

¹⁰ Joanna Cherry MP, 5 March 2018, Second Reading (Commons), [https://hansard.parliament.uk/Commons/2018-03-05/debates/0343F7DB-6456-4448-B9B8-BA7A1FFCD01D/DataProtectionBill\(Lords\)#contribution-D59F8F0E-CA89-4B43-93A6-DBC888B611C8](https://hansard.parliament.uk/Commons/2018-03-05/debates/0343F7DB-6456-4448-B9B8-BA7A1FFCD01D/DataProtectionBill(Lords)#contribution-D59F8F0E-CA89-4B43-93A6-DBC888B611C8)

Home Office on immigration status checks, which was revealed to be 10% in a sample of 169 cases.¹¹

The Government maintained that the systems of accountability would remain available to individuals such as appeals against the exemption, including to the UK's Data Protection Authority, to ensure that the exemption is applied fairly.¹² This commitment from the UK Government will be an important one to recall.

The exemption was eventually amended, but only in a small way. The 'listed provisions' were amended and narrowed:

The GDPR provisions referred to in sub-paragraph (1) are the following provisions of the GDPR (the rights and obligations in which may be restricted by virtue of Article 23(1) of the GDPR)–

(a) Article 13(1) to (3) (personal data collected from data subject: information to be provided);

(b) Article 14(1) to (4) (personal data collected other than from data subject: information to be provided);

(c) Article 15(1) to (3) (confirmation of processing, access to data and safeguards for third country transfers);

(d) Article 17(1) and (2) (right to erasure);

(e) Article 18(1) (restriction of processing);

(f) Article 21(1) (objections to processing);

¹¹ Home Office wrong denying people ban accounts in 10% of cases, 22 September 2017, *The Guardian*, <https://www.theguardian.com/uk-news/2017/sep/22/home-office-errors-already-leading-to-people-being-denied-bank-accounts>

¹² "... it is open to any data subject affected by the provisions in paragraph 4 of Schedule 2 to lodge a complaint with the Information Commissioner..." Baroness Williams of Trafford, Minister of State, Home Office, 13 November 2017, [https://hansard.parliament.uk/Lords/2017-11-13/debates/EC101CF2-FA1C-4397-9A29-7F07333B396B/DataProtectionBill\(HL\)#contribution-AFC34D06-124E-48B4-AE3C-65CF7D0EBAC8](https://hansard.parliament.uk/Lords/2017-11-13/debates/EC101CF2-FA1C-4397-9A29-7F07333B396B/DataProtectionBill(HL)#contribution-AFC34D06-124E-48B4-AE3C-65CF7D0EBAC8) and also "the rights of appeal required by the GDPR remain in place", Margot James MP (Minister for Digital), 5 March 2018, [https://hansard.parliament.uk/Commons/2018-03-05/debates/0343F7DB-6456-4448-B9B8-BA7A1FFCD01D/DataProtectionBill\(Lords\)#contribution-59B91AA8-E647-403E-AD68-7B4B4B0385D0](https://hansard.parliament.uk/Commons/2018-03-05/debates/0343F7DB-6456-4448-B9B8-BA7A1FFCD01D/DataProtectionBill(Lords)#contribution-59B91AA8-E647-403E-AD68-7B4B4B0385D0).

(g) Article 5 (general principles) so far as its provisions correspond to the rights and obligations provided for in the provisions mentioned in subparagraphs (a) to (f).

(That is, the listed GDPR provisions other than Article 16 (right to rectification), Article 19 (notification obligation regarding rectification or erasure of personal data or restriction of processing) and Article 20(1) and (2) (right to data portability) and, subject to subparagraph (2)(g) of this paragraph, the provisions of Article 5 listed in paragraph 1(b).)

The amendments meant that the immigration exemption could not be applied to Article 16 right to rectification, and the connected Article 19 notification of rectification obligation, Article 20 right to data portability, or Article 22 the right not to be subject to decision based solely on automated processing. An assessment later in this submission will discuss how the right to rectification could still be practically restricted and that ultimately setting aside these amendments does not make a difference on the overall status of the exemption as a source of concern for the UK's respect for data protection principles. This construction of the exemption was eventually passed and become law on 23 May 2018.

Construction of the exemption

The Immigration Exemption is included in paragraph 4 of Part 1 of Schedule 2 of the 2018 Act, in full it provides

“(1) The GDPR provisions listed in sub-paragraph (2) do not apply to personal data processed for any of the following purposes—

- (a) the maintenance of effective immigration control, or
- (b) the investigation or detection of activities that would undermine the maintenance of effective immigration control, to the extent that

the application of those provisions would be likely to prejudice any of the matters mentioned in paragraphs (a) and (b).

(2) The GDPR provisions referred to in sub-paragraph (1) are the following provisions of the GDPR (the rights and obligations in which may be restricted by virtue of Article 23(1) of the GDPR)–

(a) Article 13(1) to (3) (personal data collected from data subject: information to be provided);

(b) Article 14(1) to (4) (personal data collected other than from data subject: information to be provided);

(c) Article 15(1) to (3) (confirmation of processing, access to data and safeguards for third country transfers);

(d) Article 17(1) and (2) (right to erasure);

(e) Article 18(1) (restriction of processing);

(f) Article 21(1) (objections to processing);

(g) Article 5 (general principles) so far as its provisions correspond to the rights and obligations provided for in the provisions mentioned in sub-paragraphs (a) to (f).

(That is, the listed GDPR provisions other than Article 16 (right to rectification), Article 19 (notification obligation regarding rectification or erasure of personal data or restriction of processing) and Article 20(1) and (2) (right to data portability) and, subject to sub-paragraph (2)(g) of this paragraph, the provisions of Article 5 listed in paragraph 1(b).)

(3) Sub-paragraph (4) applies where

(a) personal data is processed by a person ('Controller 1'), and

(b) another person ('Controller 2') obtains the data from Controller 1 for any of the purposes mentioned in sub- paragraph (1)(a) and (b) and processes it for any of those purposes.

(4) Controller 1 is exempt from the obligations in the following provisions of the GDPR—

(a) Article 13(1) to (3) (personal data collected from data subject: information to be provided),

(b) Article 14(1) to (4) (personal data collected other than from data subject: information to be provided),

(c) Article 15(1) to (3) (confirmation of processing, access to data and safeguards for third country transfers), and

(d) Article 5 (general principles) so far as its provisions correspond to the rights and obligations provided for in the provisions mentioned in paragraphs (a) to (c), to the same extent that Controller 2 is exempt from those obligations by virtue of sub-paragraph (1).”

There is no definition of 'effective immigration control' in the Data Protection Act 2018. This issue was raised during the Bill debates and the Government contend that the phrase 'effective immigration control', was adopted as a “wraparound term”¹³ to avoid the need for amendment and updating. Thus, the Immigration Exemption was deliberately open-ended. Rather than seek to justify and evidence the need for a wide Exemption as enacted, the Government only attempted to identify the “sorts of situations” in which the Immigration Exemption may apply.

The “prejudice test” does not consider whether it is strictly necessary and proportionate for that prejudice to be treated as overriding the rights and interests of the individual on the facts of the particular case. No further public

¹³ Victoria Atkins MP, Committee Stage, 13 March 2018, [https://hansard.parliament.uk/Commons/2018-03-13/debates/0714412b-9b1d-4c1c-b0c5-c6aee4c48612/DataProtectionBill\(Lords\)\(SecondSitting\)#contribution-AFDAA582-260A-4E08-B905-110617724AA8](https://hansard.parliament.uk/Commons/2018-03-13/debates/0714412b-9b1d-4c1c-b0c5-c6aee4c48612/DataProtectionBill(Lords)(SecondSitting)#contribution-AFDAA582-260A-4E08-B905-110617724AA8)

guidance is provided by the Government for how this test should be applied. This is important to note given that the Immigration Exemption is available to all data controllers.

The restrictions are in practice far reaching, including capturing the rights the Government had said are not covered by the Exemption. We find it hard to understand how an individual would be able to exercise their right to rectification if their core right of access to their personal data is restricted, you must first be able to see that there is an error in your personal data before you can correct that error. Also the right to data portability is not of significance in an immigration context.

Immigration enforcement in the United Kingdom

As a consequence of UK Government policies, including the hostile environment policy, the immigration system involves an array of actors. The Government has enacted measures which, for example, limit access to work, housing, healthcare, and bank accounts and revoke driving licenses in an effort to make. To achieve this policy, immigration enforcement reaches into various aspects of everyday life and includes data controllers from public bodies through to the private sector. These powers and operations are regularly found to be of poor standard, with high levels of mistakes occurring. The system needs accountability and strong safeguards to ensure a fair and accountable process. The Immigration Exemption removes key modes of accountability at a time when it is needed the most.

An inspection by the Independent Chief Inspector of Borders and Immigration of data provided by the Home Office to banks found that 10% of the 169 cases inspected had incorrectly been included on the list of 'disqualified persons'. The Chief Inspector raised concerns that "the Home Office did not appear to appreciate the seriousness of such errors for the individuals affected, and its proposed avenue of redress for individuals who had left the UK with valid leave outstanding, and had subsequently had their licence revoked, was inadequate."

In January 2018, the House of Commons Home Affairs Committee report explained that, “In addition to Government-led activity, employers, landlords and others providing a service to migrants are increasingly expected to help enforce immigration rules.”¹⁴ That same report identified the scale of errors and delays in the immigration system. It recorded that the Home Office has the highest uphold rate in relation to complaints made to the Parliamentary and Health Service Ombudsman. In the second quarter of 2017, 47% of the 14,170 determined appeals against Home Office immigration decisions were successful. The Committee made clear that:

“...mistakes particularly those based on inaccurate data, are highly unlikely ever to be eradicated complete. However, the impact of errors can be deeply damaging and traumatic for individuals... The Home Office needs to do much more to reduce errors and to speed up accurate decision-making.”¹⁵

The report also touched upon the mistaken practice of the UK Government in 2017 of sending deportation letters to EU nationals. In 2017 up to 100 EU nationals, some of whom had been resident in the UK for a decade, received letters information them that if they did not leave the court, the Home Office would give “directions for [her] removal”, adding that they were “liable to be detained under the Immigration Act. The Government apologies for this “unfortunate error”¹⁶ but the fact remains of serious failings in the Home Office occur.

The UK Government often involves other actors in the delivery of their immigration policy. This includes private contractors that operate detention sites, public bodies such as the data sharing between the Home Office National Health Service and the Home Office and Schools, or even private individuals such as

¹⁴ para 62, Immigration policy: basis for building consensus, January 2018, <https://urbis.secure.europarl.europa.eu/urbis/sites/default/files/generated/document/en/500.pdf>

¹⁵ *ibid* at para 44.

¹⁶ EU nationals deportation letters an ‘unfortunate error’, says May, *The Guardian*, 23 August 2017, <https://www.theguardian.com/politics/2017/aug/23/home-office-apologises-for-letters-threatening-to-deport-eu-nationals>.

landlords to create a legal obligation that their proposed tenants have a right to live in the country. adopts data sharing provisions

Immigration enforcement is a sprawling system of hostile policies, data sharing and enforcement actions that reaches into the everyday life of people living in the United Kingdom. It is this system that millions of EU citizens have recently become subject to. It is a system that is fallible, and often found failing on the quality of data that it collects, and the subsequent use of that data. It is this system that the Immigration Exemption removes transparency, accountability and key rights-based safeguards.

Application of the exemption in practice

Open Rights Group and the3million challenged the Government's inclusion of the Immigration Exemption through a judicial review initiated in March 2018. During the case the Government disclosed two important facts:

- The exemption had been applied in 60% of all subject access requests made to the Home Office.
- Up until the court case the Government were not informing individuals that the exemption was being applied.¹⁷

These two facts speak directly to the Government's rebuttals to concerns: that the exemption would only be applied in exceptional circumstances, and that the forms of accountability will be available to data subjects. We fail to understand how an application rate of the Exemption this high corresponds to a narrow exemption, applied in exceptional circumstances when it is applied more often than not. Further, the fact that the Government had failed to notify individuals that the exemption was engaged removed the ability to exercise any accountability that are a necessary part of an adequate data protection framework.

¹⁷ para 48, Open Rights Group and Anor, R (On the Application Of) v. Secretary of State for Home Department and Anor, [2020] WLR 811, <https://www.bailii.org/ew/cases/EWHC/Admin/2019/2562.html>

On 6 May 2020 the Information Commissioner's Office responded to a freedom of information request from Open Rights Group regarding the number of complaints the Information Commissioner's Office had received challenging a data controller's use of the Immigration Exemption, and the category of that controller. The Information Commissioner's Office was only in a position to provide statistics relating to complaints made against the Home Office. It was revealed that since 25 May 2018 only 3 complaints were received about the Home Office's use of the Immigration Exemption.¹⁸

At the end of 2020 a further request for information was made to the Home Office to understand the application of the Immigration Exemption between 1 January 2020 and December 2020, and also whether the accountability mechanisms are operating in a fair and transparent manner. Two key developments were given in that response:

- The Immigration Exemption had been used in 72.6% of Subject Access Requests between 1 January 2020 and December 2020.
- The Home Office holds no information on the number of appeals against the exemptions operation.¹⁹

These developments continue to concern us. The rate of application is the highest that has ever been seen since the introduction of the Data Protection Act 2018 and it remains unclear whether the accountability mechanisms that the Government relied on as justification for the Exemption are not been adequately administered or monitored. There was no clear answer given to the question regarding notification given to individuals that the exemption was being exercised.

A series of freedom of information requests to public bodies in the United Kingdom revealed that the exemption had been used by another data controller,

¹⁸ AVAILABLE AT [Annex](#).

¹⁹ AVAILABLE AT [Annex](#). Also available remotely at this address: https://www.whatdotheyknow.com/request/713230/response/1703632/attach/3/FOI%20Response%2061709.pdf?cookie_passthrough=1%20

the Glasgow social work department²⁰. Although the specific information was not recorded in a way that could be accurately responded to it was confirmed anecdotally that the exemption had been used “less than 5 times”. Although the specific facts were unavailable to us it does point to the scenario in which a data controller, beyond one involved immediately with immigration enforcement could rely on this exemption.

Principles for an adequacy assessment

Article 45(2) of the General Data Protection Regulation sets out the main matters that the Commission must take into account in its assessment of the adequacy of the law in a third country:

When assessing the adequacy of the level of protection, the Commission shall, in particular, take account of the following elements:

- a) the rule of law, respect for human rights and fundamental freedoms, relevant legislation, both general and sectoral, including concerning public security, defence, national security and criminal law and the access of public authorities to personal data, as well as the implementation of such legislation, data protection rules, professional rules and security measures, including rules for the onward transfer of personal data to another third country or international organisation which are complied with in that country or international organisation, case-law, as well as effective and enforceable data subject rights and effective administrative and judicial redress for the data subjects whose personal data are being transferred;

- b) the existence and effective functioning of one or more independent supervisory authorities in the third country or to which an international

²⁰ Available at [Annex](#)

organisation is subject, with responsibility for ensuring and enforcing compliance with the data protection rules, including adequate enforcement powers, for assisting and advising the data subjects in exercising their rights and for cooperation with the supervisory authorities of the Member States; and

- c) the international commitments the third country or international organisation concerned has entered into, or other obligations arising from legally binding conventions or instruments as well as from its participation in multilateral or regional systems, in particular in relation to the protection of personal data

The Working Party 29 expanded on the requirements for an adequacy decision in its “Adequacy Referential”, the final version of which was adopted in November 2017 and endorsed by the European Data Protection Board. On the concept of adequacy, it states:

“data protection rules are only effective if they are enforceable and followed in practice. It is therefore necessary to consider not only the content of the rules applicable to personal data transferred to a third country...but also the system in place to ensure the effectiveness of such rules.”

This document makes clear that it is not just the rules as they are written that matters, but the practice in compliance of those rules, the consistency of their application by data controllers, the procedures for accountability.

The Referential sets out that a third country’s systems must contain basic content and procedural/enforcement data protection principles and mechanisms, including (**emphasis added**):

- The right of access, rectification, erasure and objection

The data subject should have the right to obtain confirmation about whether or not data processing concerning him / her is taking place as well as access his/her data, including obtaining a copy of all data relating to him/her that are processed.

The data subject should have the right to obtain rectification of his/her data as appropriate, for specified reasons, for example, where they are shown to be inaccurate or incomplete and erasure of his/her personal data when for example their processing is no longer necessary or unlawful.

The data subject should also have the right to object on compelling legitimate grounds relating to his/her particular situation, at any time, to the processing of his/her data under specific conditions established in the third country legal framework. In the GDPR, for example, such conditions include when the processing is necessary for the performance of a task carried out in the public interest or when it is necessary for the exercise of official authority vested in the controller or when the processing is necessary for the purposes of the legitimate interests pursued by the data controller or a third party.

The exercise of those rights should not be excessively cumbersome for the data subject. Possible restrictions to these rights could exist for example to safeguard criminal investigations, national security, judicial independence and judicial proceedings or **other important objectives of general public interest as is the case with Article 23 of the GDPR.**

.....

- The data protection system must ensure a good level of compliance

A third country system should ensure **a high degree of accountability and of awareness among data controllers and those processing personal data on their behalf of their obligations, tasks and responsibilities, and among data subjects of their rights and the means of exercising them.** The existence of effective and dissuasive sanctions can play an important role in ensuring respect for rules, as of course can systems of direct verification by authorities, auditors, or independent data protection officials.

- Accountability

A third country data protection framework should oblige data controllers and/or those processing personal data on their behalf to comply with it **and to be able to demonstrate such compliance in particular to the competent supervisory authority.** Such measures may include for example data protection impact assessments, **the keeping of records or log files of data processing activities for an appropriate period of time,** the designation of a data protection officer or data protection by design and by default.

- The data protection system must provide support and help to individual subjects in the exercise of their rights and appropriate redress mechanisms.

The individual **should be able to pursue legal remedies to enforce his/her rights rapidly and effectively, and without prohibitive cost, as well as to ensure compliance.** To do so there must be in place supervision mechanisms allowing for

independent investigation of complaints and enabling any infringements of the right to data protection and respect for private life to be identified and punished in practice. Where rules are not complied with, the data subject should be provided as well with effective administrative and judicial redress, including for compensation for damages as a result of the unlawful processing of his/her personal data. This is a key element which must involve a system of independent adjudication or arbitration which allows compensation to be paid and sanctions imposed where appropriate.

It is important to also include in this assessment the requirement of Article 23 of the General Data Protection Regulation which allow for restriction by legislative measure the scope of obligations and rights provided for in Articles 12 to 22 and Article 34, as well as Article 5. In particular it is vital to highlight that these restrictions are permissions when they “respect the essence of the fundamental rights and freedoms and is a necessary and proportionate measure in a democratic society”. Article 23(2) sets out the specific provisions that such a restriction will contain, where relevant, as to (emphasis added):

- (a) the purposes of the processing or categories of processing;**
- (b) the categories of personal data;
- (c) the scope of the restrictions introduced;
- (d) the safeguards to prevent abuse or unlawful access or transfer;
- (e) the specification of the controller or categories of controllers;**

(f) the storage periods and the applicable safeguards taking into account the nature, scope and purposes of the processing or categories of processing;

(g) the risks to the rights and freedoms of data subjects; and

(h) the right of data subjects to be informed about the restriction, unless that may be prejudicial to the purpose of the restriction.

The accompanying recitals should also be considered relevant, including recital 41 which sets out that references to a legal basis or legislative measure do not “necessarily require a legislative act adopted by Parliament” but it is clear that “such a legal basis or legislative measure should be clear and precise and its application should be foreseeable to persons subject to it, in accordance with the case-law of the Court of Justice of the European Union and the European Court of Human Rights”.²¹ Recital 73 also sets out that restrictions under Article 23 “should be in accordance with the requirements set out in the Charter and in the European Convention for the Protection of Human Rights and Fundamental Freedoms.”²²

In referring back to the need to “respect the essence of fundamental rights and freedoms” we consider it also necessary to include rights contained in the Charter of Fundamental Rights, in particular Article 8, the right to the protection of personal data which grants everyone the right to protection of personal data concerning him or her, and requires that:

“Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.”

²¹ Recital 41, General Data Protection Regulation, GDPR recitals and articles, Information Commissioner’s Office, pg. 24, <https://ico.org.uk/media/about-the-ico/disclosure-log/2014536/irq0680151-disclosure.pdf>

²² *ibid* at pg. 53.

We will now turn to analyse the Immigration Exemption, considering both the Exemption as it is written and also the information relating to the practice that we have identified against these various principles.

Guidelines 10/2020 on restrictions under Article 23 GDPR

On 15 December 2020, the EDPB adopted Guidelines on restrictions under Article 23 GDPR. These Guidelines seek to provide the criteria to apply restrictions, the assessments that need to be observed, how data subjects can exercise their rights once the restriction is lifted and the consequences for infringements of Article 23 GDPR.²³

Given these Guidelines were drafted by the European Data Protection Board to which this submission is addressed, we will not spend a significant amount of time setting out these areas. However we do seek to highlight prior to the analysis section a few key areas, including section 3.5 setting out the requirements of the “Necessity and proportionality test”, in particular the the relevant standard for derogations and limitations to be “strict necessity”, and that the measure should be “supported by evidence describing the problem to be addressed by that measure, how it will be addressed by it, and why existing or less intrusive measures cannot sufficiently address it”.²⁴

Separately we also draw attention to the Guidelines explanation that Article 23(2) (a) and reflecting Recital 8 GDPR that the reason for the restriction should be comprehensible to persons to whom it applies, involving a “clear understanding of how and when the restriction may apply”.²⁵ Finally, the Guidelines explanation of the accountability principle and the requirement that the controller “document

²³ Guidelines 10/2020 on restrictions under Article 23 GDPR, European Data Protection Board, https://edpb.europa.eu/our-work-tools/public-consultations-art-704/2020/guidelines-102020-restrictions-under-article-23_en.

²⁴ *ibid* para 39 - 42.

²⁵ footnote 23 at para 47.

the application of restrictions on concrete cases by keeping a record of their application.”²⁶

Analysis against the principles

Respect for rights of access, rectification, etc.

The exemption restricts rights under Article 15(1) to (3) (confirmation of processing, access to data and safeguards for third country transfers) including setting aside Article 5 (general principles) so far as its provisions correspond to those rights if their exercise would prejudice effective immigration control. The right of access and rectification is a core right mentioned explicitly in Article 8 of the Charter for Fundamental Rights. The right of access is of great importance as the gateway to being able to exercise other rights provided to data subjects. For example the case of *YS v Minister voor Immigratie* (EU:C:2014:2018) [2015] WLR 409 at para. 44 referring to the previous Directive:

“As regards those rights of the data subject, referred to in Directive 95/46, it must be noted that the protection of the fundamental right to respect for private life means, *inter alia*, that that person may be certain that the personal data concerning him are correct and that they are processed in a lawful manner. As is apparent from recital 41 in the preamble to that directive, it is in order to carry out the necessary checks that the data subject has, under Article 12(a) of the directive, a right of access to the data relating to him which are being processed. That right of access is necessary, *inter alia*, to enable the data subject to obtain, depending on the circumstances, the rectification, erasure or blocking of his data by the controller and consequently to exercise the right set out in Article 12(b) of that directive.”

²⁶ footnote 23 at para 66.

By restricting the right of access, the exemption is restricting the right to rectification, one that it explicitly seeks to allow. There is no clear way that an individual, making a request for their personal data that has the Exemption applied, would be able to exercise their right to rectification for inaccurate data that they cannot see. For this reason we remain concerned that the Exemption sets aside more rights than it intends to and breaches the essence of fundamental rights and key principles found in the Adequacy Referential of the right of access, rectification, erasure and objection.

Further, where those restrictions do apply, they may also restrict general principles of data protection such as lawfulness, fairness and transparency. Considering the Exemption has been applied to over 70% of subject access requests made to the Home Office in 2020 we believe that core content principles are at a high risk of failing to be respected and encourage the Commission and European Data Protection Board to seek to understand how these rights and principles are being respected in practice.

Scope of Article 23

Article 23 of the General Data Protection Regulation allows for Member States to make restriction the scope of obligations and rights through a legislative measure “when such a restriction respects the essence of the fundamental rights and freedoms and is a necessary and proportionate measure in a democratic society”. We struggle to see how the Immigration Exemption respects the essence of the fundamental rights, the restriction on access cascades down to other rights like rectification rendering it a blunt instrument in its operation.

Necessity and proportionality

The Immigration Exemption is a derogation from the rights provided in Chapter III of the GDPR. The consistent jurisprudence of the Court of Justice of the European Union requires a derogation to be justified by reference to the standard of “strict necessity”. As the CJEU explained in *Digital Rights Ireland* “in view of the important role played by the protection of personal data in the light of the fundamental right to respect for private life and the extent and seriousness of the interference with that right caused by Directive 2006/24, the EU legislature’s discretion is reduced, with the result that review of that description should be strict.”²⁷.

This standard was reinforced by the CJEU in *Opinion 1/15* that “as regards the observance of the principle of proportionality, the protection of the fundamental right to respect for private life at EU level requires... that derogations from and limitations on the protection of personal data should apply only in so far as is strictly necessary”²⁸.

The standard of strict necessity, the European Data Protection Board’s Guidelines sets out, states that the restriction should be “supported by evidence” of its necessity. Throughout the debate on the Immigration Exemption the UK Government were pressed to provide evidence for their concerns they laid out, including tipping off over-stayers of impending enforcement action, detection of sham marriages, or avoiding the wholesale deletion of immigration history. The Government failed to come forward with any evidence that these scenarios they described were occurring in the United Kingdom at all, let alone enough to require a broad, widely drawn exemption of the type the Immigration Exemption provides.

²⁷ *Digital Rights Ireland* (EU:C:2014:238) [2015] 1 QB 127, at para 48, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62012CJ0293&from=EN>

²⁸ para 140 at *Opinion 1/15*, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62015CV0001%2801%29>

Article 23(2) lays out a series of requirements for legislative measures restricting rights that the construction of the Immigration Exemption fails to meet:

(a)the purposes of the processing ... and ...(d) specification of controllers

“immigration control” is not defined in the Data Protection Act 2018, nor does it have any clear definition in UK law. This was a deliberate choice from the Government to create a “wraparound” term to avoid the need for amendment and updating. As a result there is only a vague descriptions given of the “sorts of situations” that the Exemption can be relied upon. Considering the Exemption is open to any and all controllers, to decide upon a wraparound definition without any specific definition, we are concerned that the exemption’s practice is particularly wide-ranging in practice to not give sufficient clarity as to the purposes of the processing.

In other Restrictions in Schedule 2 the UK Government had introduced categories and functions that create clearer prescriptions on the types of processing that Restrictions would apply. For example, Schedule 2 Paragraph 7 on Functions designed to protect the public has a limited range of functions listed in a table under paragraph 7. Paragraph 8 on Audit functions limits it to certain controllers such as the Auditor offices. The Exemption fails to specify across either of processes or categories creating a very wide derogation indeed.

The Guidelines for restrictions under Article 23, reflecting on Recital 8 GDPR requires the restrictions to be comprehensible to individuals to whom it applies. Considering there is no definition of “immigration control” in the Data Protection Act 2018, and the Government’s clear intention to not provide any clear definition, instead relying on the “sorts of situations” in which it might apply, we consider the Immigration Exemption distinctly lacking in this area and failing to meet the standards required for an adequacy decision.

(g) the risks to the rights and freedoms of data subjects...and.... (h) the right of data subjects to be informed about the restriction, unless that may be prejudicial to the purpose of the restriction

The Government deemed it necessary to provide guidance on how to use this restriction, which is a mitigation to the risks of the rights and freedoms of data subjects²⁹. However the guidance referred to is only for Home Office, not the wider set of all data controllers. This is a poor response to the rights and freedoms of data subjects.

Further there is an ongoing concern about the failure to notify individuals about the restrictions in place. This connects back to the risks to the rights and freedoms of data subjects. If an individual is not informed of the restriction then they cannot challenge it to uphold their rights and freedoms.

These areas should be followed up by the Board and Commission to ensure that proper processes and compliance practices are in place. At this stage we cannot see how the exemption can operate in a way compatible with the requirements of Article 23 as the Referential requires.

Procedural and Enforcement Mechanisms

Our litigation and research has shown that the procedural and enforcement mechanisms accompanying the operation of the Immigration Exemption are of concern. Firstly, the Home Office admitted that individual's were not being informed of the exercise of this exemption when their subject access requests were being returned to them. Without notification there is no opportunity for accountability to challenge the decision. While the Home Office had committed to inform individuals that the exemption was being exercised, they hold no publicly

²⁹ Explanatory Framework for Adequacy Discussions, Section E3: Schedule 2 Restrictions, pg. 4, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/872235/E3_-_Schedule_2_Restrictions.pdf

available records of the number of appeals against the exemption. It may be there are no records of appeals kept at all. This leaves us concerned that the commitment from the Home Office to inform has not been followed through.

Add this concern to the rate of application, where a subject access request to the Home Office is more likely than not to have the exemption applied to some part of it, we feel it would be reasonable to expect that a legal representative would have challenged the operation of the exemption. But the number of appeals against the exemption that the Information Commissioner's Office had heard between May 2018 and May 2020 was 3 in total. This adds to the concern that individuals are not being notified in a transparent and meaningful way and thus it is restricting individuals from pursuing remedies and to enforce their rights. Mechanisms are not in place to allow for infringements of the right to data protection to be identified and punished in practice, as required by the Adequacy Referential under Procedural Guarantees.

The failure of data controllers to keep logs of data processing activities also adds to this concern about procedural mechanisms. The Home Office are not recording appeals, potentially not informing individuals of the exemption, other data controllers are applying the exemption (albeit a very small number from what our research has shown) but are not recording it to assess compliance in any meaningful way. There is no clear means of understanding whether a good level of compliance is being followed when the Exemption is being engaged. This should be a concern for the standards of protection of personal data of European citizens who are now subject to the immigration controls of the United Kingdom.

Reflecting on the requirements of the Accountability principle, while the Home Office made the number of times the Exemption was applied, where the high occurrence rate of 72% was recorded, it did not have available the number of times the Exemption was appealed. This is only a very light record of application and a full accountability principle should include an understanding of the consistency and quality of the application, evidenced by the number of appeals and its

upholding. Additionally, the lack of a number for appeals obfuscates any understanding of the transparency of the application of the Exemption. We do not know whether representatives are told about the Exemption's application.

We call on the Commission and the Board to demand removal of the Immigration Exemption in the Data Protection Act 2019. Failing that it must require reforms of the Exemption to bring it in line with the standards required for an adequate third country.

Concerns Expressed by European Institutions

Since its introduction into the Bill, the Exemption has attracted concern from European institutions.

In July 2018 the European Parliament Brexit Coordinator Guy Verhofstadt³⁰ wrote to Sajid Javid, at the time the Home Secretary for the Home Department, raising concerns about the UK implementation of the General Data Protection Regulation, in particular the immigration exemption which “provides for the non-application of essential data protection principles and rights of data subjects to the processing of personal data carried out for immigration purposes.”

Mr. Verhofstadt went on to say:

The wording of this exception is made in a broad and general manner that it implies de facto that the processing of personal data of non-UK citizens will not be subject to the provisions of UK Data Protection law for this matter. The European Parliament has already expressed its doubts about the compatibility of this broad and general exception with EU data protection and of the Charter. Any derogation must be applied in

³⁰ Available in Annex

exceptional individual cases where it is necessary and proportionate to safeguard a genuinely[sic] objective of general interest in a democratic society. Non legally-binding reassurances of the UK authorities would not address the concerns of the European Parliament as long as this exemption remains in the Data Protection Act.

European Parliamentarians at the time continued to speak out against the exemption including the European parliament's civil liberties, justice and home affairs committee chair at the time, Claude Moraes.³¹

On 7 February 2020 the European Parliament passed a resolution on the proposed mandate for a new partnership with the United Kingdom of Great Britain and Northern Ireland. In that resolution the European Parliament expressed concern regarding the "general and broad exemption from the data protection principles and data subjects rights for the processing of personal data for immigration purposes", it went on to elaborate on those concerns: "when non-UK citizens' data are processed under this exemption, they are not protected in the same manner as UK citizens" The resolution expressed the view that the exemption would be in conflict with Regulation (EU) 2016/79.³² On the 18 June 2020 the European Parliament reiterated those concerns with a further resolution providing recommendations on the negotiations for a new partnership with the United Kingdom of Great Britain and Northern Ireland³³

On 5 February 2021 the Committee on Civil Liberties, Justice and Home Affairs adopted an opinion on the United Kingdom's protection of personal data. That opinion stated that "the general and broad exemption for the processing of

³¹ 'New UK data protection rules are a cynical attack on immigrants', The Guardian, 5 February 2018, Claude Moraes, <https://www.theguardian.com/commentisfree/2018/feb/05/brexit-data-protection-rules-immigrants>.

³² On the proposed mandate for negotiations for a new partnership with the United Kingdom of Great Britain and Northern Ireland, 7 February 2020, at para 32 <https://www.theguardian.com/commentisfree/2018/feb/05/brexit-data-protection-rules-immigrants>

³³ Recommendations on the negotiations for a new partnership with the United Kingdom of Great Britain and Northern Ireland, 18 June 2020, P9_TA(2020)0152, https://www.europarl.europa.eu/doceo/document/TA-9-2020-0152_EN.html

personal data for immigration purposes of the UK Data Protection Act....need to be amended before a valid adequacy decision can be granted.”³⁴

Civil society groups have raised concerns about the exemption with the Commission. In July 2019 a group lead by the Platform on International Cooperation for Undocumented Migrants (PICUM). PICUM raised a direct complaint with the Commission that the Exemption was a measure by a country of the European Union that was against European Union law.³⁵ It is unclear what the progress made in relation to this complaint. It is important to note that there was a great deal of awareness generated by European institutions regarding the Exemption.

Response to UK’s adequacy framework explanation on the immigration exemption.

The United Kingdom produced an Explanatory Framework for Adequacy Discussions in March 2020. The documents provided an overview of the UK’s legal framework underpinning data protection standards.³⁶ The aim was to provide an explanation for the key legislative elements in UK data protection law, to show how the UK meets the standard of “essential equivalence”. Section E3: Schedule 2 Restrictions provided an explanation for, among other things, the Immigration Exemption.³⁷

³⁴ Opinion of the Committee on Civil Liberties, Justice and Home Affairs on the conclusion, on behalf of the Union, of the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part and the United Kingdom of Great Britain and Northern Ireland, of the other part, and of the Agreement between the European Union and United Kingdom of Great Britain and Northern Ireland concerning security procedures for exchanging and protecting classified information (2020/0382(NLE)), 5 February 2021, https://www.europarl.europa.eu/doceo/document/LIBE-AL-680848_EN.pdf

³⁵ Press Release - Advocates bring first GDPR complaint to EU against UK Data Protection law for violating data rights of foreigners, 1 July 2019, Platform for International Cooperation on Undocumented Migrants, <https://picum.org/press-release-advocates-bring-first-gdpr-complaint-to-eu-against-uk-data-protection-law-for-violating-data-rights-of-foreigners/>

³⁶ Explanatory framework for adequacy discussions, 13 March 2020, <https://www.gov.uk/government/publications/explanatory-framework-for-adequacy-discussions>

³⁷ Explanatory Framework for Adequacy Discussions, Section E3: Schedule 2 Restrictions, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/872235/E3_-_Schedule_2_Restrictions.pdf

In the introductory note explaining the exemption the Government explained the need for the exemption: “The Government must be able to restrict obligations on a case by case basis in the relatively limited number of circumstances where complying with those obligations would result in a prejudice to the maintenance of effective immigration control”.³⁸

The limitations and safeguards that were used to explain how this restriction was operated to ensure the restriction is necessary and proportionate include:

“There are enforcement mechanisms available under the DPA2018 and the wider UK legislative framework to deal with any 'abuse' of this restriction. Individuals can lodge a complaint with the Information Commissioner's Office ,or pursue action through the courts, as well as making a direct request to the data controller to review a decision

In addition,the Home Office has developed guidance for its staff on how to use this restriction.This includes guidance on the prejudice test and that the restriction should not be applied in a blanket manner, as well as the need to apply a proportionality and necessity test.”³⁹

Each of these justifications have been shown to be false or misleading. The “relatively limited circumstances”, is in fact a lot more frequent. In 2020, 70% of subject access requests to UK Visas and Immigration section of the Home Office had the immigration exemption applied. 19,305 subject access requests were dispatched between January 2020 and 1 December 2020, and of those 14,027 had the exemption applied. These are not “relatively limited circumstances”.

The enforcement mechanisms mentioned only operate when individuals are informed of the exemption and are capable of challenging it . The Home Office has admitted that previously they were not informing individuals of the Exemption when it was applied, and despite the commitment to do so, there is no clear

³⁸ *ibid* at pg. 3

³⁹ Footnote 37 at pg. 4.

evidence that they had because they do not retain logs of such appeals. On the other hand there is evidence that the number of appeals against this exemption are relatively low, by May 2020 the Information Commissioner's Office had only received 3 complaints since May 2018 regarding the use of the Exemption by the Home Office.

Finally, the assurance that the "Home Office has developed guidance for its staff" only speaks to one institution when the Exemption is available to all Data Controllers, something the Government was adamant needed to be the case. We know the exemption has been used by other Data Controllers, albeit a small number. Internal Home Office guidance does not speak to the scope of the exemption or the various controllers that need to demonstrate compliance against this Exemption.

These explanations and statements from the Government in the Explanatory Framework do not paint a full picture of the Exemption's use. In practice it is relied on by institutions operating in immigration policy more often than not, there is a potential failure in compliance standards and transparency to the data subject, and the scope of who requires guidance on the exemption is misleadingly narrow.

The European Commission and European Data Protection Board should seek clarification from the UK Government about this explanation of the Immigration Exemption against the facts now available. From this they should require removal of the exemption or spell out reforms necessary to bring it into the standards required of a third country.

Comments on the Draft Adequacy Decision from the European Commission

On 19 February 2021, the European Commission produced a draft adequacy decision on the transfer of personal data to the United Kingdom.⁴⁰ The draft adequacy decision refers to the decision in the High Court of Justice, in our judicial challenge to the Immigration Exemption from 2019.⁴¹ In that case, the judge, we argue, erred by concluding that the legal requirements for a lawful derogation differ depending on whether the legislation itself creates or requires interference with the data rights of individuals, or instead permits or authorises the use of an exemption. That conclusion was contrary to the CJEU's judgment in *Tele2 Sverige AB v. Post Och Telestyrelsen* [2017] 2 CMLR 30. Further, the judge agreed that there is "no requirement for the state to justify the enactment of the provision by evidence as being "strictly necessary"". ⁴² The judge goes on to assert that the CJEU authorities relied upon by our representatives to argue that the state must justify the enactment of the provision as being "strictly necessary" are "cases where the legislation itself constituted or required an interference with individual rights... The Immigration Exemption itself involves no interference with any individual rights". With respect to the judge, this conclusion did not accurately reflect the reasoning of the Grand Chamber in *Tele2 Sverige*. The Grand Chamber made clear that it was applying the same legal test to the two pieces of domestic legislation at issue. The UK regime, created a regime under which the Secretary of State could grant authorisations for communications data retention. The Court found that the legislation had to meet the test of strict necessity and include relevant safeguards because it involved a derogation from the confidentiality of communications even though a further authorisation would be required.

⁴⁰ Data protection: European Commission launches process on personal data flows to UK, 19 February 2021, https://ec.europa.eu/commission/presscorner/detail/en/ip_21_661

⁴¹ *Open Rights Group and Anor, R (On the Application Of) v. Secretary of State for Home Department and Anor*, [2020] 1 WLR 811, <https://www.bailii.org/ew/cases/EWHC/Admin/2019/2562.html>

⁴² *ibid* at para 44

As a result of applying this distinction, the Judge failed to apply the relevant principles laid down by Article 23 GDPR and the consistent case-law of the Grand Chamber of the CJEU. The exemption is analysed against those standards above and the European Data Protection Board's Guidelines are clear in their explicit requirement for a derogation to satisfy a test of "strict necessity". We invite the Commission to reconsider its reliance on the earlier case in its draft decision and we ask the Board to apply the correct standards to the Immigration Exemption.

We find other aspects of the Commission's draft decision wanting. In particular it does not seek to find any evidence for the necessity for the Immigration Exemption in the first place. It accepts that the Exemption is formulated rather broadly but does not follow the Guidelines requirements of support for the derogation to be supported by evidence. Nor does it ask or answer whether the reason for the restriction is comprehensible to whom it applies or provides a clear understanding of how and when the Immigration Exemption may apply. Given the vague pronouncements by the UK Government in the Bill debate and its stated aim of a "wraparound" term, we ask that the Commission reconsider its assessment's and apply the EDPB Guideline standards instead. We trust the Board to follow its clear standards for restrictions under Article 23 GDPR.

Conclusion

The standards required for an adequacy decision by the European Commission are clear. There must be respect for basic content principles such as right of access and rectification, with principles supported like transparency. There needs to be procedural and enforcement mechanisms in place such as a good level of compliance for the data protection system and accountability and support for data subject in the exercise of their rights and appropriate redress mechanisms.

In each of these areas we feel there is sufficient evidence to demonstrate that the Immigration Exemption as it is drafted and as it operates, fails to meet these standards. The fundamental right of data protection is a cornerstone of the European Union. It cannot be set aside unless in strictly necessary circumstances and as we have shown, the exemption presents an interference with that right, and the structures of accountability around it do not seem to be responding sufficiently to ensure it is done in a manner required by standards set out in GDPR and the jurisprudence of the Court of Justice of the European Union. It needs to be removed or at the very least significantly amended to bring it into the necessary standards for a third country. The Commission and the European Data Protection Board should spell out explicitly what those amendments would be, with reference to the body of case law and guidance available to it.

We hope this submission proves useful in the deliberations by the Commission and the European Data Protection Board and would be happy to provide further information if necessary.

ANNEX

- Information Commissioner's Office response to request under Freedom of Information Act 2000 - 6 May 2020
- UK Visas and Immigration response to request under Freedom of Information 2000 - 12 January 2021
- Glasgow City Health and Social Care Partnership response to request under Freedom of Information (Scotland) Act 2002- 26.October 2020
- Guy Verhofstadt letter to Sajid Javid - 3 July 2018.

6 May 2020

Case Reference: IC-37982-T7R5

Dear Matthew Rice

We are now in a position to respond to your information request sent to us via the WhatDoTheyKnow.com website on 6 April.

Your Request

"I'm writing to make a request under the Freedom of Information Act 1998. I would like to know:

- How many complaints have been received by the Information Commissioner's Office challenging a data controller's use of Schedule 2 Part 1 Paragraph 4 on Immigration.*
- The data controller complained of.*

In relation to the second question, if you could specify the type of controller by institution e.g. Home Office, UK Border Agency, local authority, or by sector e.g. a Doctor, Landlord etc. that would be greatly appreciated".

Our Response

You have asked for the number of complaints brought to us challenging an organisations use of the 'exemption' at Schedule 2 Part 1 Paragraph 4 on immigration, and the data controller concerned.

Schedule 2 Part 1 Paragraph 4 of the Data Protection Act 2018 outlines specific rights in the General Data Protection Regulation (GDPR) which can be restricted if those rights would be likely to prejudice immigration matters. It applies to controllers who process data for the purposes of the maintenance of effective immigration control, the investigation or detection of activities that would undermine the maintenance of effective immigration control, and the sharing of data with a controller who is responsible for this type of processing.

Complaints about the Home Office

I have consulted with the relevant team within the ICO who have confirmed that we hold 3 complaint cases since 25 May 2018 where we have received a complaint about the Home Office regarding their use of Schedule 2 Part 1 Paragraph 4. This information was extracted from data held by that ICO team on data protection complaint cases about the Home Office.

Complaints for all data controllers

To provide the information you are seeking for all data controllers would exceed the 'appropriate limit' as set out in section 12 of the FOIA. Section 12 of the FOIA makes clear that a public authority is not obliged to comply with an FOIA request if the authority estimates that the cost of complying with the request would exceed the 'appropriate limit'. The 'appropriate limit' for the ICO, as determined in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 is £450. We have determined that £450 would equate to 18 hours work.

Whilst the information you have requested is likely to sit within our casework management system, this system is not set up to easily provide us with the information you have requested. We do not have a reportable field within our casework management system that identifies complaints brought to us about this exemption. The only way we could identify this would be to manually review the details we hold on each complaint case. The ICO receives a large number of data protection complaints each year. For example, in the financial year 2018/19 this number was 41,661. To manually inspect these records for 2018 to 2020 would therefore exceed the 'appropriate limit' as set out in section 12 of the FOIA.

If we decide to take regulatory action against an organisation it will be published on our website [here](#). This is informed by our regulatory action policy which you read online [here](#).

I hope you found this information helpful.

Next Steps

If you are dissatisfied with our response under the FOIA or wish to complain about how your request has been handled please write to the Information Access Team at the address below or email accessicoinformation@ico.org.uk.

A request for internal review should be submitted to us within 40 working days of receipt by you of this response. Any such request received after this time will only be considered at the discretion of the Commissioner.

If having exhausted the review process you are not content that your request or review has been dealt with correctly, you have a further right of appeal to this office in our capacity as the statutory complaint handler under the legislation. To make such an application, please write to our FOI Complaints & Appeals Department at the address below or visit our website if you wish to make a complaint under the Freedom of

Information Act.

A copy of our review procedure can be accessed from our website [here](#).

Your Rights

Our [privacy notice](#) explains what we do with the personal data you provide to us and what your rights are, with a specific entry, for example, for [an information requester](#). Our retention policy can be found [here](#).

Yours sincerely

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FOI Reference: 61709

12 January 2021

Dear Mr Rice

Thank you for your enquiry of 16 December 2020, in which you requested information regarding requests for personal information (Subject Access Request – SAR). Your enquiries have been handled as a request for information under the Freedom of Information Act 2000.

Information Requested

I would like to request information relating to the use of Schedule 2 Part 1 Para 4 (Immigration) of the Data Protection Act 2018 in relation to requests for personal data.

Specifically, I would like to know:

1 - How many times the exemption has been used by the Home Office between January 2020 and 1 December 2020?

2 - The number of times the use of this exemption has been appealed by the requester in the same timeline?

3 - The number of times those appeals have been resulted in overturning the exercise of the exemption?

4 - Confirmation of the content of the letter received by individuals accompanying any request for personal data when Schedule 2 Part 1 Para 4.

Response

Specifically, I would like to know:

1 - How many times the exemption has been used by the Home Office between January 2020 and 1 December 2020.

19305 SARs were dispatched between January 20 and 1 December 20, and of those 14027 (72.6%) had Immigration Exemption applied.

2 - The number of times the use of this exemption has been appealed by the requester in the same timeline.

We do not keep specific MI relating to the number of times the use of the immigration exemption is appealed.

3 - The number of times those appeals have been resulted in overturning the exercise of the exemption?

As above;

4 - Confirmation of the content of the letter received by individuals accompanying any request for personal data when Schedule 2 Part 1 Para 4.

UKVI find this question confusing. Could you please provide clarification of exactly what information you seek?

If you are dissatisfied with this response you may request an independent internal review of our handling of your request by submitting a complaint within two months to foirequests@homeoffice.gov.uk, quoting reference **61709**. If you ask for an internal review, it would be helpful if you could say why you are dissatisfied with the response.

As part of any internal review the Department's handling of your information request would be reassessed by staff who were not involved in providing you with this response. If you were to remain dissatisfied after an internal review, you would have a right of complaint to the Information Commissioner as established by section 50 of the FOI Act.

Yours sincerely

Central Operations Team

We value your feedback, please use the link below to access a brief anonymous survey to help us improve our service to you:

<http://www.homeofficesurveys.homeoffice.gov.uk/s/108105TAZNG>

Interim Chief Officer
Susanne Millar
MA (Hons) CQSW

Glasgow City Health and Social Care
Partnership
Commonwealth House
32 Albion Street
Glasgow
G1 1LH

www.glasgow.gov.uk
www.nhsggc.org.uk

Our ref: FOI/RQST00007348571
Your ref: ----

26th October 2020

Matthew Rice

XX@XXXXXXXXXXXXXXXXXXXX.XXX

Dear Mr Rice

Request under the Freedom of Information (Scotland) Act 2002

I refer to your correspondence received on **19th October 2020** in which you requested the following information be provided to you:-

I would like to request statistics relating to the number of subject access requests received by your social work department in:

2019

2020

If feasible, the number of these requests that were immigration-related presented in the same timeline

2. The number of times information was redacted from the response to a subject access request on the basis of Schedule 2 Part 1 Para 4 of the Data Protection Act 2018 (the immigration exemption) in

2019

2020

3. The number of times appeals were made against the restriction in

2019

2020

4. The number of times those appeals were overturned in

2019

2020

The Council is treating your request as a request under the Freedom of Information (Scotland) Act 2002.

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I can confirm that the Council holds some of the information you have requested, our response is as follows:-

1. Glasgow City Council Social Work Services (SWS) received 573 subject access requests (SARs) in 2019 and have received 315 in 2020, to the date of your request. In terms of how many of these requests were immigration related, Glasgow City Council does not hold this information. SWS do not categorise SARs in relation to the reason for the request, due to the fact that requesters do not need to provide a reason for requesting their personal information. Although many individuals such as refugees may make SARs, this may be in relation to child protection issues, criminal justice or homelessness (to name only some services which are provided by SWS). SARs made by those who are, or have previously been, subject to immigration control does not necessarily mean that the SAR is immigration-related.
2. Under section 17 of the Act, Glasgow City Council does not hold this information nor does anyone hold it on our behalf. Glasgow City Council does not centrally record the number of times that specific exemptions (such as the immigration exemption) are used in SARs. In order to provide advice and assistance under the Act, I can inform you that the team who complete SARs on behalf of SWS are a small team. Anecdotal feedback from the team suggests that this exemption has been used infrequently and likely on fewer than 5 occasions in the time period covered by your request. Please note that this is anecdotal information and given only to provide advice and assistance to you.
3. and 4. Under section 17 of the Act I can advise that Glasgow City Council does not hold this information, nor does anyone hold it on our behalf. There is no specific appeals process in relation to exemptions made in a SAR. If individuals are unhappy with the information which they have received via a SAR they can make a complaint to SWS under the Social Work complaints policy.

Complaints which are made to SWS are not categorised in a way which would allow us to provide you with the number of complaints made about information which has been redacted in a SAR due to the 'immigration exemption'. However anecdotal information provided by the team who deal with SWS complaints suggests that no complaints have been received in relation to the redactions made under the 'immigration exemption' to their knowledge.

I hope the information provided is helpful.

Right of Review

If you are dissatisfied with the way Glasgow City Council has dealt with your request under the Freedom of Information Act (Scotland) 2002 you are entitled to require the Council to review its decision. Please note that for a review to take place you must:

- Lodge a written requirement for a review within 40 working days of the date of this letter

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- Include a correspondence address and a description of the original request and the reason why you are dissatisfied
- Address your request to the Director of Governance and Solicitor to the Council:

Director of Governance and Solicitor to the Council
Glasgow City Council
City Chambers
George Square
Glasgow G2 1DU

Email: xxxxxxxxxx@xxxxxxxx.xxx.xx

You will receive notice of the results of the review within 20 working days of receipt of your request. The notice will state the decision reached by the reviewing officer as well as details of how to appeal to the Scottish Information Commissioner if you are still dissatisfied with the Council's response. You must request an internal review by the Council before a complaint can be directed to the Scottish Information Commissioner. For your information at this stage, an appeal can be made to the Scottish Information Commissioner by contacting her office as follows if you do remain dissatisfied with the outcome of the Council's review decision -

Address: Kinburn Castle, Doubledykes Road, St Andrews, KY16 9DS.
Email: xxxxxxxxxx@xxxxxxxxxxxxxxxxxxxxxxxxxxxx.xxx
Telephone: 01334 464610

You can also use the Scottish Information Commissioner's online appeal service to make an application for a decision:
www.itspublicknowledge.info/appeal

Please note that you cannot make an appeal to the Scottish Information Commissioner until you have first requested an internal review by the Council.

If you wish to submit a complaint to the Council in relation to the manner in which it has handled your request for information then you can do by requesting that the Council review its decision. Details of how to request a review are set out in the above paragraph "Right of Review".

Yours sincerely

Senior Officer, Complaints, FOI and Investigations Team
Glasgow City Health and Social Care Partnership

OFFICIAL



Member of the European Parliament
European Parliament Brexit Coordinator
Group of the Alliance of Liberals and Democrats for Europe
The Chair

D 201444 03.07.2018

Rt Hon Sajid Javid MP
Secretary of State for the Home Department
Home Office
2 Marsham Street
London SW1P 4DF
United Kingdom

Dear Sajid,

It was a pleasure to meet you again on 19 June. Thank you also for your letter of 21 June 2018 which accompanied the proposed EU Settlement Scheme: Statement of Intent published the same day.

As I indicated during our meeting, I agree with you that progress has been made on the Registration Scheme and the natural anxiety of EU citizens, to whom the Scheme is intended, will have been eased by developments in the past two months. The publication of the Statement of Intent should also help a great deal in this regard.

There are, nevertheless, still a number of issues of concern to EU citizens. The purpose of this letter, which I am sending to you on behalf of the European Parliament's Brexit Steering Group and the Chair of the Civil Liberties Committee, is to communicate those remaining concerns to you. We would urge that you take these on board during the consultation and testing phase of the Scheme and before its official launch. Addressing them would also instil confidence on our side that the Registration Scheme will work in the streamlined and user-friendly way that we all want.

The first issue relates to the Independent Monitoring Authority (IMA). In your letter you indicate that the Independent Chief Inspector for Borders and Immigration (ICIBI) will temporarily take on the IMA's responsibilities. We assume that refers to the period between the Scheme's launch in late 2018 and the entry into force of the Withdrawal Agreement expected on 30 March 2019. It is crucial that as of the latter date, the IMA is up and running. Otherwise, it would potentially constitute a breach of Article 152, as the ICIBI would not have the powers and responsibilities outlined in the draft Withdrawal Agreement, which go beyond carrying out inspections. In fact they include conducting inquiries, receiving complaints and, crucially, bringing, on the basis of a complaint, legal actions before a UK court or tribunal. As you say in your letter, and in point 1.9 of the Statement of Intent, establishing the IMA requires primary legislation. We take it that this would be by means of the Withdrawal Agreement Implementation Bill (WAIB). If this is the case it would be important that you provided, in advance of the tabling of that draft legislation, exact details on the powers and

responsibilities of the IMA. We would also be grateful if you could give us a clearer idea of how you propose to establish a right of appeal (Article 19 of the draft Withdrawal Agreement) which is also for us a very crucial and sensitive issue.

Second, many of our concerns with respect to vulnerable citizens, defined as broadly as possible, can be dispelled, in addition to other policies and flanking measures, by having an extensive network of contact points across the country. In the Statement of Intent you indicate that you have established a new user group which focuses particularly on the needs of vulnerable users. This is very much to be welcomed. But more details on the network of contact points should be provided as quickly as possible. This should include details of their physical locations and the services they will provide, to include help with registrations, with digital ID checks and scanning of documents. As regards other flanking measures it is crucial that all eligible citizens are made aware of their right to apply for the Settlement Scheme. In particular, we insist that special attention is given to elderly EU citizens who arrived in the UK a long time ago (especially ILR holders) who may have lost or simply do not retain the relevant documentation to prove residence, as it was never requested from them until now. It is fundamental to ensure that these citizens are not discriminated against or refused residence status for lack of documentation. Further details on how these cases will be dealt with would be very much appreciated.

Third, while we appreciate the assurances in your letter with regard to the processing of registrations, the registration process should not create unnecessary anxiety. Ideally, a short cut-off date should be defined after which the absence of response should be taken as acceptance of the registration. However, if this is not possible and recognising the potential practical challenges of having to deal with many thousands of submissions at the same time, we would ask you to establish a minimum deadline by which the Home Office would notify and justify to the registrant any delays with the registration process and, where appropriate, indicate any further steps the registrant should take. We would also be grateful to learn whether there have been any developments in the talks with Apple to ensure that the ID check on the online Application can be also completed on Apple devices. Additionally, we would reiterate the importance of offering the possibility for all EU citizens to apply 'offline' by means of a paper application and ideally for all registrants to receive a hard copy of their status. Those who will have to submit hard copy identity documents must have these returned to them immediately.

Fourth, concerning the immigration rules which will govern the registration scheme, we welcome the first draft provided in the Statement of Intent document. Nevertheless, we note that these will be enacted as secondary legislation. We would need guarantees that these rules will not be subject to amendment in the future.

One final point on the registration scheme is that while it is good to see that you have reduced the fee for adults and children we still believe that as a matter of principle the process should be cost free. As a very minimum it should, as I said to you, be free for those who were in the UK before the date of the notification. I note that the Mayor of London, where more than 1 million EU citizens reside, is of a similar opinion.

On a related issue we reiterate our deep concerns with regard to legal requirements applicable to the processing of personal data in this context. The new UK Data Protection Act 2018, which implements the General Data Protection Regulation, expressly provides the non-application of essential data protection principles and rights of data subjects to the processing of personal data carried out for immigration purposes. The wording of this exception is made in a broad and general manner that it implies de facto that the processing of personal data of non-UK citizens will not be subject to the provisions of UK Data Protection law for this matter. The European Parliament has already expressed its doubts about the compatibility of this broad and general exception with EU data protection and of the Charter. Any derogation must be applied in exceptional individual cases where it is necessary and proportionate to safeguard a genuinely objective of general interest in a democratic society. Non legally-binding reassurances of the UK authorities would not address the concerns of the European Parliament as long as this exemption remains in the Data Protection Act.

I would be happy to take up your offer of further discussions on the registration scheme at the European Parliament. This could also be the occasion on which to speak on preparations in the other Member States. Your concerns on this are shared by the Brexit Steering Group. While preparations have started, a lot of work still needs to be done and we will scrutinise developments. In this context I have asked Member States to inform the Brexit Steering Group in detail as to where those preparations have got to. You can rest assured that the European Parliament attaches equal importance to guaranteeing the rights of UK citizens in the other Member States.

I am copying this letter to David Davis, Secretary of State for Exiting the EU, Michel Barnier, the EU's Chief Negotiator and Yvette Cooper, chair of the House of Commons Home Affairs Select Committee.

Yours sincerely,



Guy Verhofstadt

c.c.: Mr. David Davis
Mr. Michel Barnier
Ms. Yvette Cooper

