

EXPLANATORY MEMORANDUM TO
THE DATA PROTECTION ACT 2018 (AMENDMENT OF SCHEDULE 2
EXEMPTIONS) REGULATIONS 2022

2022 No. 76

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Home Office and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

- 2.1 On 26 May 2021, the Court of Appeal held that paragraph 4 of Schedule 2 to the Data Protection Act 2018 (“the Immigration Exemption”) does not comply with the requirements of Article 23(2) of the UK General Data Protection Regulation which sets out specific provisions which must be included in the exemption, where relevant (for example, to prevent abuse or safeguard against risks to individuals)¹. To address the Court’s findings, this instrument amends the Immigration Exemption to include all of the relevant safeguards set out in Article 23(2) of the UK GDPR (listed below under 6.4).

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is the United Kingdom.
4.2 The territorial application of this instrument is the United Kingdom.

5. European Convention on Human Rights

- 5.1 Kevin Foster MP, The Minister for Future Borders and Immigration, has made the following statement regarding Human Rights:

“In my view the provisions of the Data Protection Act 2018 (Amendment of Schedule 2 Exemptions) Regulations 2022 are compatible with the Convention rights.”

6. Legislative Context

- 6.1 Regulation 2016/679 of the European Parliament and of the Council, the General Data Protection Regulation (“GDPR”), came into force on 24 May 2016 and applied with effect from 25 May 2018. Following the UK's withdrawal from the EU, and the Implementation Period completion day (11.00pm on 31 December 2020), the GDPR became incorporated into domestic law, subject to certain amendments introduced by

¹ R(on the application of The Open Rights Group and another) v the Secretary of State for the Home Department and another [2021] EWCA Civ 800

the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019 (SI 2019/419).

- 6.2 Regulation 2 of the 2019 Regulations introduced a new defined term, the “UK GDPR”, to describe the GDPR as retained. Among other things, Article 23 of the GDPR is amended by the 2019 Regulations to ensure it operates correctly in a domestic context, but Article 23(2) retains the same meaning and effect as Article 23(2) of the GDPR.
- 6.3 The Data Protection Act 2018 (“DPA 2018”), which amended the UK domestic data protection regime in line with the GDPR, gained Royal Assent on 23 May 2018. Paragraph 4 of Schedule 2 to the DPA 2018 sets out an exemption (the Immigration Exemption) for matters relating to immigration, disapplying some data protection rights and obligations (listed in paragraph 4(2), Schedule 2, of the DPA 2018) where their application is likely to have a prejudicial effect on maintaining effective immigration controls or the investigation or detection of activities that would undermine the maintenance of effective immigration control.
- 6.4 Article 23(2) of the UK GDPR states that a provision restricting obligations and data rights must contain specific provisions at least, where relevant, as to the purposes of the processing or categories of processing 23(2)(a); the categories of personal data 23(2)(b); the scope of the restrictions introduced 23(2)(c); the safeguards to prevent abuse or unlawful access or transfer 23(2)(d); the specification of the controller or categories of controllers 23(2)(e); the storage periods and the applicable safeguards taking into account the nature, scope and purposes of the processing or categories of processing 23(2)(f); the risks to the rights and freedoms of data subjects 23(2)(g) and the right of data subjects to be informed about the restriction unless that may be prejudicial to the purpose of the restriction 23(2)(h).
- 6.5 The Court of Appeal held, in the case of *R (on the application of The Open Rights Group and another) v the Secretary of State for the Home Department and another* [2021] EWCA Civ 800², that the Immigration Exemption does not comply with the requirements of Article 23(2) of the UK General Data Protection Regulation. Following a remedy hearing on 8th October 2021, it was ordered that the Immigration Exemption was incompatible with retained EU law in that it does not satisfy all of the requirements of Article 23(2) UK GDPR. However, the court’s order was suspended until 31st January 2022 in order to provide reasonable time for the DPA 2018 to be amended to remedy the incompatibility.

7. Policy background

What is being done and why?

- 7.1 The Court held that the restrictions on data protection rights and obligations included within the Immigration Exemption did not fully satisfy Article 23(2) of the UK GDPR. The Court did not specify any further, in terms of the specific limbs (a-h) of 23(2). It said; ‘It may be open to the legislature to conclude that one or more of the matters listed in Article 23(2) is not relevant to this particular exemption. It may even be entitled to conclude that although a particular matter is relevant it is unnecessary to set limits any narrower than those contained in the GDPR itself’. To address the

² [Open Rights Group & Anor. R \(On the Application Of\) v Secretary of State for the Home Department & Anor \[2021\] EWCA Civ 1573 \(29 October 2021\) \(bailii.org\)](https://www.bailii.org/uk/ew/cas/civ/2021/800.html)

Court's concerns, this instrument will amend the Immigration Exemption, primarily to include all the relevant safeguards listed in [Article 23\(2\)](#) of the UK GDPR. This Explanatory Memorandum lays out which safeguards are not relevant or are already covered in the DPA 2018 so for those particular safeguards no amendments are necessary to the legislation. This will give decision makers confidence that they are complying with the UK GDPR and DPA 2018, when relying on this exemption.

Explanations

What did the law do before the changes to be made by this instrument?

- 7.2 The Immigration Exemption is set out in paragraph 4 of Schedule 2 to the DPA 2018. It outlines specific provisions in the UK GDPR which do not apply to personal data processed for, firstly, the maintenance of effective immigration control or, secondly, the investigation or detection of activities that would undermine the maintenance of effective immigration control. This applies where the application of those provisions would be likely to prejudice these two matters.

Why is it being changed?

- 7.3 It is being changed as a result of the Order of the Court of Appeal referred to in paragraph 6.5 above. Regulation 2 of this instrument will amend the Immigration Exemption to ensure that the requirements of Article 23(2) are, where relevant, met. The Court's judgment made clear (at paragraph 54) that not all limbs may be relevant and this is the case in respect of Article 23(2)(f) (see further below). In respect of all the limbs of Article 23(2)(a) to (h), paragraphs 7.4 to 7.11 of this Explanatory Memorandum detail how each is already or will be met as a result of the amendments made by this instrument. The paragraphs also explain where no amendments are necessary as the limb is not relevant or has already been addressed in the DPA 2018.
- 7.4 Article 23(2)(a) states that where relevant, any legislative measure shall contain specific provisions as to the purposes of the processing or categories of processing. The Immigration Exemption in the DPA 2018 already meets Article 23(2)(a) requirements as it sets out that the processing in question is that done for the purposes of maintaining effective immigration control or the investigation or detection of activities that would undermine the maintenance of such control. As a result, no changes will be made by the instrument in this regard.
- 7.5 Article 23(2)(b) states that where relevant, there shall be provisions to limit the categories of personal data. The Immigration Exemption already meets Article 23(2)(b) as it specifies that it applies to personal data, which is defined in section 3(2) of the DPA 2018. It would not be appropriate to limit the Immigration Exemption to certain categories of personal data. The nature of the data held by the Secretary of State is wide-ranging, and the disclosure or erasure (for example) of any of it could potentially prejudice effective immigration control or the investigation or detection of activities that would undermine the maintenance of effective immigration control. The exemption may therefore be applied to all categories of personal data as defined by Article 4(1) UK GDPR including special categories of personal data.
- 7.6 Article 23(2)(c) states that where relevant, there shall be provisions for the scope of the restrictions introduced. The Immigration Exemption already meets 23(2)(c) as it specifies limitations on the scope of the restrictions and so no changes will be made in this regard. It applies only to specific UK GDPR rights. The specific rights are Article 13(1) to (3), Article 14(1) to (4), Article 15(1) to (3), Article 17(1) and (2); Article

18(1); Article 21(1) and Article 5, so far as its provisions correspond to the rights and obligations provided for in the provisions mentioned in sub-paragraphs (a) to (f) of paragraph 4(2) Schedule 2 to the DPA 2018. The Immigration Exemption is also limited to where there is likely to be prejudice to the maintenance of effective immigration control and/or the investigation/detection of matters that would undermine the effective maintenance of immigration control.

- 7.7 Article 23(2)(d) states that where relevant, there shall be provisions for safeguards to prevent abuse or unlawful access or transfer. This instrument will introduce additional safeguards to address A23(2)(d). Regulations 2(2)(b) and 3 of this instrument will mandate an additional safeguard that the Secretary of State must have an Immigration Exemption Policy Document (“IEPD”) in place prior to the exemption being relied upon and that the Secretary of State must have regard to their IEPD when applying the exemption. These regulations also include a requirement for a record to be kept of the application of the Immigration Exemption and for the data subject to be informed of its application (save in certain circumstances, see further re Article 23(2)(h) below). The IEPD will be published and any subsequent updates to it, in a manner that the Secretary of State considers appropriate. Publication will allow stakeholders including the ICO to comment and suggest where it could be improved. This will also promote high standards of safeguards in applying the Immigration Exemption, consistent with those in relation to personal data relating to criminal convictions and offences. In other parts of the DPA 2018 and the UK GDPR there are requirements for policy documents to be in place. This instrument will provide similar requirements for the Immigration Exemption. The IEPD will be designed to provide similar safeguards and as such meet the same high standards that protect the rights of the individual, whilst balancing it with the needs of society to be protected in respect of immigration and other offences.
- 7.8 Article 23(2)(e) states that where relevant, there shall be provisions as to the specification of the controller or categories of controllers. The current drafting of the Immigration Exemption does not expressly specify the controller or categories of controllers who can use it, but provides that it may only be used for the purposes set out in paragraph 4(1) of Schedule 2. Therefore, it is unlikely that anyone outside the workings of the immigration system, such as a private landlord, would meet the legislative requirements to rely on the Immigration Exemption. To provide greater clarity on this point, regulation 2(2)(a) of the instrument will amend paragraph 4(1) to specify that only the Secretary of State may rely on the Immigration Exemption. Regulation 2(2)(d) will remove existing paragraphs 4(3) and 4(4) which currently envisage more than one potential controller.
- 7.9 Article 23(2)(f) states that where relevant, there shall be provisions as to the storage periods and the applicable safeguards taking into account the nature, scope and purposes of the processing or categories of processing. We do not consider that Article 23(2)(f) is relevant and the instrument will not make amendments to the Immigration Exemption in this regard. The Immigration Exemption does not purport to extend storage periods. Storage periods will be in line with general Departmental guidance and kept for no longer than is necessary for the purposes for which it is being processed and are usually set to support operational or policy needs such as being able to confirm a person’s immigration status. A link to this Departmental guidance will be published in the IEPD.

- 7.10 Article 23(2)(g) states that where relevant, there shall be provisions as to the risks to the rights and freedoms of data subjects. Paragraph 4(1) makes it clear that the Immigration Exemption can only be relied upon when the usual application of the relevant data provisions would prejudice the maintenance of effective immigration control. If there is no prejudice, the immigration authorities must comply with the request. Further, the specific risks to the rights and freedoms of data subjects have been properly taken into account when formulating this provision. The particular rights that can be restricted are set out in paragraph 4(2) and are consistent with the requirements of Article 23(1). Accordingly, Article 23(2)(g) is already addressed and this instrument will not make amendments to the Immigration Exemption in this regard.
- 7.11 Article 23(2)(h) states that where relevant, there shall be provisions for the right of data subjects to be informed about the restriction, unless that may be prejudicial to the purpose of the restriction. Regulation 3 of the instrument will amend the Immigration Exemption to insert new paragraph 4B, which provides that the controller will have to inform the data subject that the exemption has been relied upon unless to do so would be prejudicial to the purpose of the restriction in compliance with Article 23(2)(h).

8. European Union Withdrawal and Future Relationship

- 8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

- 9.1 Not applicable. Consolidation does not apply to any aspect of this Statutory Instrument.

10. Consultation outcome

- 10.1 The Secretary of State consulted the Information Commissioner's Office ("ICO") in line with the DPA 2018 and the applicants in the litigation referred to above (the 3 Million and the Open Rights Group). In response to the consultation responses, the Home Office made minor amendments to the draft instrument.

11. Guidance

- 11.1 The additional safeguards in this Statutory Instrument include an obligation to have regard to an IEPD which will set out the Secretary of State's policies and processes for how we apply the Immigration Exemption and where the Immigration Exemption does apply, preventing the abuse of that personal data, and any access to, or transfer of, it otherwise than in accordance with the UK GDPR. A draft IEPD will be published when the SI is laid in parliament to allow scrutiny from the parliamentary process and stakeholders. The final IEPD will then be published on GOV.UK as soon as is practically possible.

12. Impact

- 12.1 There is no, or no significant, impact on business, charities or voluntary bodies.
- 12.2 There is no, or no significant, impact on the public sector.

12.3 An Equalities Impact Assessment (EIA) is submitted with this memorandum and will be published alongside the Explanatory Memorandum on the [legislation.gov.uk](https://www.legislation.gov.uk) website. This supplements an EIA that was completed for the DPA 2018.

13. Regulating small business

13.1 The legislation does not apply to activities that are undertaken by small businesses. As such a Regulatory Impact Assessment is not necessary.

14. Monitoring & review

14.1 This section is not applicable as we are only regulating the public sector.

15. Contact

15.1 Tom Dooley at the Home Office (email: Tom.Dooley@homeoffice.gov.uk) can be contacted with any queries regarding the instrument.

15.2 Krisztina Katona, Deputy Director for Data and Identity Directorate, at the Home Office can confirm that this Explanatory Memorandum meets the required standard.

15.3 The Minister for Future Borders and Immigration at the Home Office can confirm that this Explanatory Memorandum meets the required standard.