

# The Immigration Exemption

What is it and what to watch out for



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# UK GDPR Adequacy Status

## Immigration Exemption

- FTA provides a grace period for UK to receive ‘adequacy status’ from the EU
- The UK has an immigration exemption within GDPR framework which denies migrants access to their data ‘in the interest of immigration control’
- EU institutions need to scrutinise and examine the impact of the exemption on adequacy status
- The exemption is a barrier to adequacy
- We need help from practitioners to make the case



# What is the Immigration Exemption?

## An exemption to data rights for all data controllers

- Data Protection Act 2018 allows government to restrict access to personal information releasing it would “prejudice effective immigration control”.
- This includes the right of access to personal data, and the right to know who your data has been shared with.
- Specifically Schedule 2 Part 1 Para 4 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).



# What is the Immigration Exemption?

## An exemption to data rights for all data controllers

- 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” to avoid the need for amendment and updating. Thus, the Immigration Exemption was deliberately open-ended.
- 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 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.



# How is it being used to date?

## Widely but with minimal reports

- Data and management of it is central to immigration control in the UK
- We issued judicial review proceedings in 2018 (pending decision of CoA) and disclosed:
  - 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.
- The ICO has only received 3 complaints of its use (may 2020)
- Further FOI disclosed:
  - 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
  - Departments outside the Home Office? Contractors / Local Authorities?



# What should I look out for?

## Any replies to SARs that are redacted and come with notices

- We understand that letters are now sent when the exemption is applied.
- What data is being redacted and is it clear why?
- We are happy to talk to anyone who has seen its use and take anonymised case studies etc.
- Evidence base of this is really important to shaping data controlling in the future.
- Please let us know!

