Claim No: CO/3386/2018

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION (ADMINISTRATIVE COURT)

THE QUEEN
(ON THE APPLICATION OF
(1) OPEN RIGHTS GROUP
(2) THE 3 MILLION)

Claimants

-and-

(1) SECRETARY OF STATE FOR THE HOME DEPARTMENT
(2) SECRETARY OF STATE FOR DIGITAL, CULTURE, MEDIA AND SPORT

Defendants

-and-

(1) LIBERTY
(2) THE INFORMATION COMMISSIONER

Interveners

SKELETON ARGUMENT ON BEHALF OF LIBERTY

References to the hearing bundles are as follows [HB/tab/page number]*

INTRODUCTION

1. Liberty's intervention is in support of the Claimants' application for judicial review of the immigration exemption contained in paragraph 4 of Schedule 2 to the Data Protection Act 2018 ("**DPA 2018**") – "**the Immigration Exemption**". Liberty applied for permission to intervene in these proceedings by way of oral and written submissions on 15 May 2019 [HB1/A/136-142]. Supperstone J granted permission on 28 June 2019.

2. Liberty's submissions concern the question as to whether the interferences with privacy and data rights resulting from the operation of the Immigration Exemption are in accordance with the law for the purposes of privacy and data protection rights contained in the European

Convention on Human Rights ("**the Convention**") and the Charter of Fundamental Rights of the European Union ("**the Charter**").

LEGAL PRINCIPLES

Article 8 of the Convention and data protection rights

3. It is common ground that personal data is an aspect of an individual's rights under Article 8 of the Convention (see Detailed Grounds, para 21, HB1/127) and Article 7 of the Charter. The operation of the Immigration Exemption engages rights under those two provisions, as well as the right to protection of personal data under Article 8 of the Charter. The personal data in question will often be special category data within the meaning of Article 9 of the General Data Protection Regulation ("**GDPR**") or offences and convictions data as defined in Article 10 of the GDPR, taken with section 11(2) of the DPA 2018.

4. The European Court of Human Rights ("**the ECtHR**") has emphasised the close connection between the protection of personal data and the right to privacy. In *S v United Kingdom* (2009) 48 EHRR 50 the Grand Chamber stated that

> "[t]he protection of personal data is of fundamental importance to a person's enjoyment of his or her right to respect for private and family life, as guaranteed by art.8 of the Convention" (at [103]).[1]

It is submitted that this is especially true in relation to migrants. They are disproportionately more likely to be vulnerable persons and/or persons who have significant fears for their safety (making the control of their personal data especially important) and/or persons who have fled situations in which their personal data has been misused in the context of their being oppressed.

5. Article 8 of the Convention is engaged not only by the processing of personal data but also by the placing of restrictions on access to such data (e.g., *Yonchev v Bulgaria* (2017) application no. 12504/09 at [46]) and refusals to erase / anonymise data (e.g., *ML & WW v Germany*

[11] See also *Satakunnan Markkinaporssi Oy v Finland* (2018) 66 EHRR 8 at [137])

(2018) applications no. 60798/10 and 65599/10 at [97] and [115]). Article 8 also encompasses the right to verify the accuracy of one's data (*Guriev v Community Safety Development (UK) Ltd* [2016] EWHC 643 (QB) at [45]).

6. The Court of Justice of the European Union (**"the CJEU"**) has made similar statements to the ECtHR regarding the relationship between the right to privacy and family life and the right to data protection (e.g., C-468/10 and C-469/10 *ASNEF v Administración del Estado* [2012] 1 CMLR 48 at [41] – [42]).

7. The GDPR expressly recognises the relevance of jurisprudence of the ECtHR when assessing measures that limit rights under the GDPR. Recital 42 provides that:

> Where this Regulation refers to a legal basis or a legislative measure, this does not necessarily require a legislative act adopted by a parliament, without prejudice to requirements pursuant to the constitutional order of the Member State concerned. However, 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 (the 'Court of Justice') and the European Court of Human Rights.

8. Article 21 of the GDPR, on which basis the Immigration Exemption was adopted, makes reference to such a legal basis. The GDPR also stipulates that restrictions on the rights of information, access to and rectification or erasure of personal data, the right to data portability, the right to object

> "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" (Recital 73).

The application of the Immigration Exemption is an example of a restriction on such rights.

9. While Article 8 of the Convention has the "in accordance with law" requirement built into it, Articles 7 and 8 of the Charter fall to be read

with Article 52(1) of the Charter. There is no material difference between the Convention and the Charter in terms of what is required for an interference with qualified rights to be in accordance with the law.[2]

10. In short, regardless of whether this case is approached by assessing compliance with Article 23 of the GDPR, Articles 7 and 8 of the Charter or Article 8 of the Convention, the Convention and domestic case law concerning what is required for an interference rights under Article 8 of the Convention to be in accordance with the law is relevant to the assessment of the lawfulness of the Immigration Exemption. This appears to be accepted by the Defendants.[3]

Principles from the Article 8 Convention case law

11. The Immigration Exemption confers upon data controllers a broad discretionary power to limit (in part or entirely) the fundamental rights of data subjects rights. In order for such an interference to be lawful it must be in (i) accordance with the law, (ii) in pursuit of a legitimate aim and (iii) necessary in a democratic society. These submissions are concerned only with the first of these requirements.

12. The case law in relation to the "in accordance with law" required was analysed by Lord Sumption in the recent case of *Re Gallagher* ([2019] 2 WLR 509 at [16] – [24]). A measure which interferes with rights under Article 8 of the Convention shall only be in accordance with the law if three broad requirements are satisfied:

    (a) It has some basis in domestic law.

    (b) It is accessible to the person(s) affected or who may be affected by it.

    (c) It is foreseeable.

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[2] Article 52(3) of the Charter specifically provides that: [i]n so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. See further C-92/09 and C-93/09 *Volker und Markus Schecke GbR & anor v Land Hessen* at [52]; and *Christian Institute v Lord Advocate* 2017 SC (UKSC) 29 at [104].

[33] See Detailed Grounds, para 24, HB1/127.

13. We are concerned only with the third requirement: foreseeability. Foreseeability, which is a key component of the rule of law, encompasses several requirements:

(a) The law must afford adequate protection against arbitrariness.

(b) This requires that the law indicate with "sufficient clarity" the scope or manner of the exercise of the discretion conferred on competent authorities, so as to (i) "provide adequate protection against abuse of power" and, where relevant, (ii) to enable individuals to regulate their conduct accordingly.

(c) There must be safeguards to constrain the exercise of discretion, to ensure the certainty of application of the measure in question, and to guard against overbroad discretion resulting in arbitrary, and thus disproportionate, interference with Convention rights.

(See *Gallagher* at [17] – [24], [31] and [33] – [41]; *Beghal v Director of Public Prosecutions* [2016] AC 88 at [32] per Lord Hughes; *S v United Kingdom* at [95]).

14. In *Gallagher*[4] Lord Sumption said the following in respect of discretionary powers:

> "The measure must not therefore confer a discretion so broad that its scope is in practice dependent on the will of those who apply it, rather than on the law itself. Nor should it be couched in terms so vague or so general as to produce substantially the same effect in practice. The breadth of a measure and the absence of safeguards for the rights of individuals are relevant to its quality as law where the measure confers discretions, in terms or in practice, which make its effects insufficiently foreseeable. Thus a power whose exercise is dependent on the judgment of an official as to when, in what circumstances or against whom to apply it, must be sufficiently constrained by some legal rule governing the principles on which that decision is to be made" (at [17]).
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> "an excessively broad discretion in the application of a measure infringing the right of privacy is likely to amount to an exercise of power unconstrained by law. It cannot therefore be in accordance with law unless there are sufficient safeguards, exercised on known legal principles,

[4] A case concerning the disclosure of information on (enhanced) criminal records certificates.

> against the arbitrary exercise of that discretion, so as to make its application reasonably foreseeable" (at [31]).

15. In *S v United Kingdom* (a case concerning the retention by police of biometric data of persons charged with but not convicted of criminal offences) the Grand Chamber held that:

> "[t]he domestic law must afford appropriate safeguards to prevent any … use of personal data as may be inconsistent with the guarantees of [Article 8]. The need for such safeguards is all the greater where the protection of personal data undergoing automatic processing is concerned…" (at [103]).

This statement applies equally to personal data processing in the immigration context in which, the evidence before the Court suggests, there is an increasing amount of automatic processing.[5] Evidence before the Court also suggests that the government is moving towards real time immigration checks to prove eligibility for, inter alia, public services.[6] In these circumstances, it is particularly important that a discretionary power which may be used to prevent data subjects from obtaining information about the processing of their personal data is properly circumscribed.

16. When assessing whether a measure is accordance with the law it is relevant to look not only at legislative provisions but also any accompanying guidance and codes of practice (e.g., *Christian Institute v Lord Advocate* 2017 SC (UKSC) 29 at [81]; *Beghal* at [43]). In the *Christian Institute* case the Supreme Court took the view that, in order to have the character of "law" for the purposes of Article 8(2) of the Convention, the guidance, which the Court regarded as being necessary, needed to be more than guidance to which the holder of the information must have regard (at [101]). In order words, the guidance in question had to be binding.

17. When assessing whether a particular power is in accordance with the law, it is not necessary to demonstrate that the measure in question was

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5 See for example paragraphs 10 and 11 of the second statement of Luke Piper.

6 Paragraph 15 of the first witness statement of Luke Piper.

exercised arbitrarily in respect of a specific instance in which it was used. As Lord Kerr observed in *Beghal* (dissenting, albeit not in respect of this uncontroversial proposition):

> "A power on which there are insufficient legal constraints does not become legal simply because those who may have resort to it, exercise self-restraint. It is the potential reach of the power rather than its actual use by which its legality must be judged" (at [102]).

SUBMISSIONS

18. Reliance on the Immigration Exemption by a data controller may give rise to serious interferences with privacy and data protection rights. It may be relied on to, among other things,

    (1) to prevent an individual from finding out (i) what personal information is held about them; (ii) whether information about them has been shared with other entities in the public or private sector; and (iii) how or why that information is being used (including whether their data is included particular databases and/or the subject of automated processing and/or profiling) and

    (2) to prevent an individual from getting information erased or limitations placed on its use.[7]

    Restrictions on the exercise of these data subject rights may, in turn, limit a person's rights to exercise other rights and fundamental freedoms. In many cases, the data subject is likely to be a vulnerable person and the data controller in question an emanation of the state.

19. It is submitted that the inferences with privacy and data protection rights arising from the application of the Immigration Exemption are not in accordance with the law. These interferences are not "foreseeable" because there are insufficient safeguards to constrain the exercise of a very broad discretion. This means that there is a clear risk of arbitrary and/or disproportionate interferences.

[7] Liberty notes that the immigration exemption has been relied on widely by the Defendants: in approximately 60 % of all subject access requests (second statement of Luke Piper at para 5, analysing the data provided by the Defendants in the second statement of Alison Samedi). These figures relate only to the use of the exemption by the Home Office and not to its use by other controllers; its use likely to be greater in practice (second statement of Luke Piper at paragraph 7).

20. Whether or not interferences with qualified rights (under Article 8 of the Convention and Articles 7 and 8 of the Charter) arising from the operation of the Immigration Exemption are in accordance with the law cannot depend on the way that the exemption is applied in each individual case. The fact that, according to the Defendants, the Immigration Exemption will only be applied when this is "necessary and proportionate" is not in point. As Lord Sumption explained in *Re Gallagher* (at [14]) a measure or legislative provision which interferes with qualified rights is either in accordance with the law or it is not.

21. The Immigration Exemption gives data controllers a very broad discretion to interfere with privacy and data protection rights. This is because it may be invoked for two extremely broad 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,

    Whenever it is "likely" that privacy or data protection rights will prejudice either of these matters. The Defendants accept that, of itself, a discretion to interfere with fundamental rights for these purposes would be unjustified but contend that it is limited by "necessity" and "proportionality" in each individual case. But the lack of safeguards means that the interferences are not foreseeable: the actions of the data controllers in individual cases are not governed by any specific rules or guidance. The discretion is, in practice, substantially unfettered.

22. The "maintenance of effective immigration control" and the investigation or detection of activities which would undermine it cover almost any kind of activity directed towards the surveillance and monitoring of individuals who are, or may be, evading immigration controls, assisting such individuals, or attempting to access public services.[8] It would, for example, extend to surveillance and monitoring of all employers and

[8] See for example paragraph 15 of the first witness statement of Luke Piper which refers to the government's goal of introducing a Status Checking Project, " …a system that obtains and shares immigrations status in real time with authorised users, providing proof of entitlement to a range of uses of public and private services such as… health and benefits."

landlords. There is no document which sets out to define the limits of "the maintenance of effective immigration control". This means (i) that data controllers are left to define the limits for themselves and (ii) data subjects are given no indication as to when their privacy and data protection rights might be interfered with for these purposes. Furthermore, the class of data controllers that may apply the exemption is limited only by the purpose for which they are processing the data. This is a very broad class of controllers, and extends to private companies, as well as public authorities.[9]

23. The requirement that the Immigration Exemption can only be relied on when exercises of privacy and data protection rights would be "likely to prejudice" one of the two specified purposes provides no effective safeguard. In the absence of any guidance or policy on the meaning of prejudice and the circumstances in which prejudice is likely to arise, the data controller clearly has an extremely broad discretion when interpreting this term and deciding whether to apply the exemption. Similarly it is very difficult for a data subject to foresee when the exercise of particular data subject rights is likely to give rise to such prejudice and cannot therefore be exercised fully or at all.

24. As both the Claimants (paragraph 72 of their skeleton argument) and the ICO (paragraph 30 of its skeleton argument) have noted, the Immigration Exemption contains no requirement that a data controller assess the proportionality of restricting the data subject right in question. This is a significant omission. Data subject rights may only be restricted where it is strictly necessary and yet the provision on the basis of which such restrictions may be applied contains no such requirement. Even if the Defendants are correct in their assertion (at paragraph 30 of their Detailed Grounds) that "the proportionality requirement is included by dint of the expression provisions of the DPA 2018 and/or ordinary

[9] This concern is also highlighted in the skeleton argument lodged on behalf of the ICO (paragraph 14(1) and also at paragraph 24), in which it is noted that "[t]he scope for the application of the Immigration Exemption undoubtedly, and deliberately, extends well beyond the Home Office."

principles of statutory interpretation", that is an insufficient constraint on the exercise of discretion. There is no guidance as to how a proportionality exercise is to be undertaken.[10] In the *Christian Institute* case the Supreme Court held that information sharing provisions in Part 4 of the Children and Young People (Scotland) Act 2014 were not in accordance with the law for the purposes of Article 8 of the Convention (at [84]). Among the Court's reasons for this conclusion were: the lack of safeguards which would enable the proportionality of an interference with Article 8 rights to be adequately examined and there was no requirement to follow the draft statutory guidance (at [82] and [84]). The Court went on to hold (albeit when considering the proportionality of the provision in question) that

> "[i]n order to reduce the risk of disproportionate interferences, there is a need for guidance to the information holder on the assessment of proportionality when considering whether information should be provided" (at [101]).

It is submitted that the same reasoning applies in respect of the Immigration Exemption.

25. The Defendants' position appears to be that the Immigration Exemption is not in breach of privacy and data protection rights because there is a requirement (albeit not written in to the exemption) that necessity and proportionality be considered in each case (see paragraphs 22(a) and 30 of the Detailed Grounds). This position is not sustainable. If it were correct, any public authority using a measure that interferes with privacy rights (or indeed any other qualified right) would have a complete answer to an "in accordance with the law" argument by relying on section 6 of the Human Rights Act 1998 and the requirement to act compatibly with, for example, Article 8. Because Article 8 of the Convention encompasses a requirement that interferences must be necessary and proportionate the public authority could argue that there

[10] See, by contrast, the statutory codes of practice produced in other contexts in which privacy and data protection rights are engaged*: Statutory Disclosure Guidance* (2015) concerning the inclusion information on enhanced criminal records certificates; *Interception of Communications Code of Practice* (2018); *Surveillance Camera Code of Practice* (2013).

was further need for a requirement that its discretion be exercised "in accordance with law". This is wrong.

26. The Defendant has not identified any guidance or policy, with the quality of law, which constrains the exercise of a data controller's discretion under the Immigration Exemption. The absence of such guidance or policy means that the decision maker's exercise of discretion is not subject to any safeguards in relation to, *inter alia,* the following:

(a) The meaning of "maintenance of effective immigration control".

(b) The meaning of "prejudice" and/or different types of prejudice which may be relevant the application of the exemption.

(c) The interpretation of "likely to" in the context of possible prejudice.

(d) How the exercise of specific data subject rights under the GDPR may affect the "maintenance of effective immigration control".

(e) Information on matters to be considered when conducting a proportionality assessment.

(f) How the exemption can be applied so as to limit the interference with data subject rights only to the extent that is strictly necessary.

(g) Information which must be provided to data subjects where the exercise of one or more of the data subject rights is restricted (fully or in part).

27. The absence of such guidance is particularly problematic in respect of private sector data controllers, which may have limited experience of and expertise in handling requests concerning the exercise of data subject rights. The risk of arbitrariness is arguably even greater in relation to such controllers.

28. Liberty respectfully agrees with the position of the Information Commissioner (as set out in paragraph 21 of her application to intervene [A/154] and developed in paragraph 40 of her skeleton argument) that a statutory code of practice or guidance is necessary. It is submitted that

such guidance is a minimum requirement for ensuring that the operation of the Immigration Exemption is in accordance with the law.

29. The Defendants have relied on the fact that individuals can raise complaints with the Information Commissioner and/or bringing civil claims as safeguards (see paragraphs 20 and 34 of the Detailed Grounds). In Liberty's submission these are not safeguards which are capable of providing for meaningful constraints on the exercise of a data controller's discretion under the Immigration Exemption. First, the availability of an *ex post facto* remedy makes no difference in respect of lack of foreseeability that is inherent in the provision under challenge. Second, it is reasonable to infer that timing is likely to be highly relevant in the context in which data subjects seek to exercise their rights regarding immigration-related information. Neither a complaint to the ICO, nor County Court proceedings are likely to yield expeditious outcomes. Third, bringing County Court proceedings to enforce data subject rights is highly unlikely to be a viable option for many people whose rights are limited by reliance on the Immigration Exemption. Data protection law is a technical area that is unlikely to be readily accessible to most data subjects (and particularly those who do not have a command of English) in the immigration context, and legal aid is highly unlikely to be available.

30. The Information Commissioner is right to point out (as a matter of fact) that data controllers *may* not make a data subject exercising one or more data subject rights aware of the fact that they have relied on the Immigration Exemption or provides why they have done so (see paragraph 20 of the Commissioner's skeleton argument). It is Liberty's position that any such failure would be unlawful. This is because, where the Immigration Exemption is relied on in response to an attempt to exercise one of the relevant data subject rights, the data controller is required to provide in response to such a request is contained in Article 12(4) of the GDPR:

> If the controller does not take action on the request of the data subject, the controller shall inform the data subject

> without delay and at the latest within one month of receipt of the request of the reasons for not taking action and on the possibility of lodging a complaint with a supervisory authority and seeking a judicial remedy.

31. If Liberty is incorrect in asserting that Article 12(4) should be interpreted as requiring a data controller to refer to its reliance on the Immigration Exemption to give reasons for doing so, this reinforces the argument that there are insufficient safeguards. In any event, however, the expression "the reasons for not taking action" lacks clarity and is undoubtedly subject to many interpretations. Data controllers are not specifically required to identify the Immigration Exemption as their basis for not "taking action". For these reasons it is submitted that the requirement to provide information under Article 12(4) of the GDPR is not a meaningful safeguard even if it is to be interpreted as requiring data controllers to at least identify the Immigration Exemption as a basis for refusing to take action.

32. Finally, it is well established that when assessing whether there are sufficient safeguards on the exercise of a discretionary power, it is relevant to consider the statistics of the usage of the measure in question (e.g., assessment of whether there are sufficient safeguards to render that measure in accordance with the law (see e.g. *Iordachi v Moldova* (2012) 54 EHRR 5 at [51] – [52], in the context of authorisations for targeted surveillance and *Gillan & Quinton v United Kingdom* (2010) 50 EHRR 45 at [84] – [85] regarding the use of stop and search powers). Ms Samedi's evidence [HB1/B/102 and 190] on the use of the Immigration Exemption by the Home Office in respect of subject access requests alone shows that it has been relied on in an alarmingly high number and proportion of cases. It is submitted that this is supportive of the contention that the discretion to restrict rights through the use of the Immigration Exemption is not sufficiently circumscribed.

CONCLUSION

33. The Court is invited to hold that the Immigration Exemption is not in accordance with the law for the purposes of Article 8 of the Convention and Articles 7 and 8 of the Charter.

HUGH TOMLINSON QC

AIDAN WILLS

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10 July 2019