EXPLANATORY MEMORANDUM TO

THE DATA PROTECTION ACT 2018 (AMENDMENT OF SCHEDULE 2 EXEMPTIONS) REGULATIONS 2024

2024 No. XXXX

1. Introduction

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

2. Declaration

2.1 Tom Pursglove MP, the Minister for Legal Migration and the Border at the Home Office can confirm that this Explanatory Memorandum meets the required standard.

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

3. Contact

3.1 Daniel Lucas at the Home Office (Email: Daniel.Lucas@Homeoffice.gov.uk) can be contacted with any queries regarding the instrument.

Part One: Explanation, and context, of the Instrument

4. Overview of the Instrument

What does the legislation do?

4.1 On 11 December 2023 the Court of Appeal ruled in the case of R (on the application of the 3Million and Open Rights Group) v. the Secretary of State for the Home Department and Secretary of State for Science, Innovation and Technology [2023] EWCA Civ 1474 that paragraph 4 of Schedule 2 to the Data Protection Act 2018 (the Immigration Exemption) does not comply with requirements of Article 23(2) of the UK General Data Protection Regulation. This instrument addresses the Court's findings by ensuring safeguards are set out on the face of the Data Protection Act 2018 in more detail.

Where does the legislation extend to, and apply?

4.2 The extent of this instrument (that is, the jurisdiction(s) which the instrument forms part of the law of) is the United Kingdom.

4.3 The territorial application of this instrument (that is, where the instrument produces a practical effect) is the United Kingdom.

5. Policy Context

What is being done and why?

5.1 The Court of Appeal held that the revised Immigration Exemption did not comply with Article 23(2) and was unlawful. The judgment concluded remedial action to satisfy the requirements of Article 23(2) must ensure that safeguards are set out in legislation and specified two key issues which required legislative amendments:

(i) The existence of the 'Immigration Exemption Policy Document'(IEPD) did not satisfy requirements of Article 23(2)(d), which the court held required safeguards relevant to the exercise of the immigration exemption to be included on the face of the legislation.

(ii) The existing provisions do not satisfy Article 23(2)(g), as the court held that 'there needs to be express reference to the existence of risks not only to the rights in the UK General Data Protection Regulation ("UK GDPR") itself but to other rights… and the potential vulnerability of the data subject' on the face of legislation.

5.2 The previous judgment of the High Court on 29 March 2023 also held that the balancing test between the rights of individuals and the maintenance of effective immigration control should be set out more explicitly in the legislation. Whilst the Court of Appeal declined to pass judgment on this issue, the Home Office is choosing to make changes to ensure compliance with Article 23(2) of the UK GDPR and reduce the risk of future uncertainty.

5.3 This Explanatory Memorandum sets out the necessary amendments made to Part 1 of Schedule 2 to the Data Protection Act 2018 ("DPA") to address the court judgment and to ensure the legislation complies with Article 23(2) of the UK GDPR. This will give decision makers confidence that they are complying with the UK GDPR and DPA 2018 when relying on this exemption.

What was the previous policy, how is this different?

5.4 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 either of these two matters. The Immigration Exemption was amended by SI 2022/76, which added safeguards to the exemption that were intended to ensure requirements of Article 23(2) were met.

5.5 The Court of Appeal judgment of 11 December 2023 ruled that paragraph 4 of Schedule 2 to the DPA 2018 (the Immigration Exemption) does not comply with requirements of Article 23(2) of the UK GDPR. This instrument addresses the Court's findings by ensuring safeguards are set out on the face of the DPA 2018 in more detail. Paragraphs 6.7 to 6.12 set out in more detail the changes which this instrument will make to the Immigration Exemption.

6. Legislative and Legal Context

How has the law changed?

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 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) UK GDPR retains the same meaning and effect as Article 23(2) of the GDPR. The Retained EU Law (Revocation and Reform) Act 2023 abolished the supremacy of retained EU Law, including the UK GDPR, from the beginning of 2024.

6.3 The DPA 2018 amended the UK domestic data protection regime in line with the GDPR. 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) of Schedule 2 to the DPA 2018) where their application is likely to have a prejudicial effect on maintaining effective immigration control, or on the investigation or detection of activities that would undermine the maintenance of effective immigration control.

6.4 On 26 May 2021 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 800, that the Immigration Exemption did not comply with the requirements of Article 23(2) of the UK General Data Protection Regulation. The Immigration Exemption was amended by SI 2022/76 in consequence of this judgment, with effect from 31 January 2022.

6.5 On 11 December 2023, following a further judicial review, the Court of Appeal held that the revised Immigration Exemption did not comply with the requirements of Article 23(2) UK GDPR. The effect of the declaration was suspended until 11 March 2024 to allow time for remedial action to be taken to amend the DPA 2018.

Why was this approach taken to change the law?

6.6 The Immigration Exemption is being changed as a result of the Court of Appeal judgment referred to in paragraph 6.5. This instrument will further amend paragraph 4 of Schedule 2 to the DPA 2018, to ensure the safeguards added to the Immigration Exemption by SI 2022/76, meet the relevant requirements of Article 23(2) of the UK GDPR. The judgment clearly identified two key legislative concerns which require amendments, and the Home Office is choosing to make additional changes following review of the judgment. Paragraphs 6.7 to 6.12 detail how this instrument will address each of these key issues.

6.7 Paragraph 4 of Schedule 2 to the DPA 2018 is amended to remove detail relating to the IEPD as this is no longer required following the court's judgment.

6.8 Paragraph 4(1) of Schedule 2 to the DPA 2018 is amended to provide safeguards to ensure that the Immigration Exemption is only applied in accordance with conditions in new paragraph 4A. Regulation 3 substitutes new paragraph 4A into Schedule 2 to the DPA 2018 to provide additional provisions when applying the Immigration Exemption.

6.9 New paragraph 4A(2) sets out the safeguards for the exercise of the immigration exemption in the legislation, in accordance with the court's judgment regarding Article 23(2)(d) of the UK GDPR. These provisions require a decision to apply the immigration exemption be made on a case-by-case basis; separately in respect of each of the relevant UK GDPR provisions (i.e. those found in paragraph 4(2)(a) to (f)) which relates to the data subject; and afresh each time the Secretary of State considers disapplying or restricting the relevant UK GDPR provisions in relation to the data subject. In accordance with the court's judgment on the issue, specific storage or retention periods have not been included on the face of the legislation. As the court

noted, the ordinary storage principle in Article 5(1)(e) of the UK GDPR applies, which requires personal data to be stored for no longer than is necessary.

6.10 New paragraph 4A(3) sets out in the legislation the rights, freedoms and vulnerabilities of the data subject which the Secretary of State must take into account when making a decision to apply the Immigration Exemption provisions. This is in accordance with the court's judgment regarding Article 23(2)(g) and (d) of the UK GDPR. Having considered the risks to rights and freedoms of data subjects arising from the use of the exemption, paragraph 4A(3) explicitly sets out the relevant rights that must be taken into account when conducting the balancing test (paragraph 6.11 below) as part of a decision to apply the Immigration Exemption provisions. In addition, 4A(3) explicitly requires the Secretary of State to also take into account all the individual circumstances and the potential vulnerability of data subjects when making such a decision. These provisions also ensure all rights and freedoms of the data subject are taken into account, including the data subject's ECHR rights, the UK's obligations under the Refugee Convention and Trafficking Convention, the need to safeguard and promote the welfare of children in the United Kingdom and the need to comply with the UK GDPR. New paragraph 4A(5) clarifies the references to the rights and obligations contained in 4A(3)(b) and (c).

6.11 New paragraph 4A(4) is inserted to safeguard data subjects' rights by requiring that any decision to apply the Immigration Exemption must only be taken if the application of the relevant UK GDPR provisions would be likely to give rise to a substantial risk of prejudice to any of the matters stated in paragraph 4(1)(a) and (b). A 'substantial risk' in this provision means more than a *de minimis* risk, i.e. a risk too trivial or minor to merit consideration. This paragraph also states that any decision must balance the risk of prejudice in relation to effective immigration controls against the risk of prejudice to the interests of the data subject, thereby ensuring that a decision to apply the Immigration Exemption provisions is necessary and proportionate in each case.

6.12 Regulation 3 also substitutes new paragraph 4B into Schedule 2 to the DPA 2018. These provisions are primarily clarificatory in nature, continuing the previous position that a decision to apply the Immigration Exemption provisions should be recorded along with the reasons for its application. They also maintain the presumption that the data subject is informed of the use of Immigration Exemption, whilst clarifying that it is the Secretary of State who should decide whether such disclosure would prejudice the matters contained in 4(1)(a) and (b).

7. Consultation

Summary of consultation outcome and methodology

7.1 The Secretary of State consulted the Information Commissioner's Office ("ICO") in line with obligations under the DPA 2018, as well as the applicants in the litigation referred to above (the 3Million and the Open Rights Group) on a draft of this instrument. The ICO will publish their response to the draft instrument on their website. Having considered the responses to the consultation, the Secretary of State did not make any further changes to the draft instrument. However, minor changes were made to this memorandum to clarify why storage and retention periods were not included on the face of the legislation.

8. Applicable Guidance

8.1 No guidance is being provided alongside this instrument.

Part Two: Impact and the Better Regulation Framework

9. Impact Assessment

9.1 A full Impact Assessment has not been prepared for this instrument as it does not substantively alter the safeguards and considerations for applying the Immigration Exemption by making more explicit how the exemption should be used on the face of the legislation. Following the Equalities Impact Assessment (EIA) published for the DPA 2018 and supplementary EIA published for the previous Immigration Exemption (SI 2022/76)[1], we have no reason to believe the provisions in this instrument will lead to any direct or indirect discrimination.

Impact on businesses, charities and voluntary bodies

9.2 There is no, or no significant, impact on business, charities or voluntary bodies.

9.3 The legislation does not impact small or micro businesses.

9.4 There is no, or no significant, impact on the public sector.

10. Monitoring and review

What is the approach to monitoring and reviewing this legislation?

10.1 Tom Pursglove MP, Minister for Legal Migration and the Border has made the following statement:

"This instrument does not include a statutory review clause as it is only regulating the public sector."

[1] https://www.legislation.gov.uk/uksi/2022/76/memorandum/contents

Part Three: Statements and Matters of Particular Interest to Parliament

11. Matters of special interest to Parliament

11.1 None.

12. European Convention on Human Rights

12.1 Tom Pursglove MP, Minister for Legal Migration and the Border 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 2024 are compatible with the Convention rights."

13. The Relevant European Union Acts

13.1 This instrument is not made under the European Union (Withdrawal) Act 2018, the European Union (Future Relationship) Act 2020 or the Retained EU Law (Revocation and Reform) Act 2023 ("relevant European Union Acts").