

**ILPA briefing on the *Data Protection Bill 2017* for the Report Stage in the House of Commons**

*The Immigration Law Practitioners' Association (ILPA) is a registered charity and a professional membership association. The majority of members are barristers, solicitors and advocates practising in all areas of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with an interest in the law are also members. Founded in 1984, ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law through an extensive programme of training and disseminating information and by providing evidence-based research and opinion. ILPA is represented on advisory and consultative groups convened by Government departments, public bodies and non-governmental organisations.*

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ILPA submits that the 'immigration control exception' under Schedule 2, Part 1, Paragraph 4 of the *Data Protection Bill 2017* ('the Bill') should be removed. Through this briefing, ILPA will demonstrate the detrimental effect the exemption will have on the right of individuals to access their personal data through Subject Access Requests (SARs) and the very serious consequences that will follow.

**Amongst other issues, the plight of undocumented Commonwealth nationals, the so-called 'Windrush generation' shines a particular light on the continued importance of SARs to both legal representatives and individuals. SARs frequently provide crucial information about clients' immigration histories. Many of those affected by the Windrush cases will have had no dealings with the Home Office at all, as they came in for settlement and the only record would have been their landing card, if that had been kept; but other may have records in connection with other family members coming to join them later, vital to show their status at that time. ILPA submits that this shows the ongoing necessity of being able to make SARs, and the very serious, and avoidable, consequences that follow from not being able to make SARs.**

**The inclusion of this exemption in the Bill is of extreme concern to ILPA and its members. Legal representatives make SARs to the Home Office for the release of their clients' files because these files frequently provide crucial information about their clients' immigration histories. The Home Office cannot be relied upon to provide this information without a SAR, and the Home Office frequently does not act in accordance with its own records when making life-changing decisions. This exemption will reduce legal representatives' ability to best represent their clients, and remove an important tool in holding the Home Office to account when they ignore or misrepresent facts.**

**Pages 4 to 12 of this briefing contains a list of ways in which SARs are used and real examples of when SARs have proved crucial for justice. Those examples are essential reading for**

**anyone who wants to understand why the removal of access to personal data will fundamentally undermine access to justice and the effective operation of the rule of law in the UK.**

## **PROPOSED AMENDMENT**

Under the exemption, ‘data controllers, including the Home Office, would not be obliged to respond to subject access requests from people wishing to know what data about them is retained, if the Home Office determines that responding would engage the exemption’.<sup>1</sup> SARs are frequently essential to individuals and their legal representatives when preparing applications to the Home Office, appealing against negative decisions, and mounting legal challenges against removal, detention and deprivation of citizenship.

The Information Commissioner, the UK’s independent authority set up to uphold information rights in the public interest, has stated its concerns as follows:

*“20. The majority of data protection complaints to the Information Commissioner about the Home Office relate to requests for access to personal data to UK Visas and Immigration, mostly by solicitors acting on behalf of those seeking asylum. This exemption could potentially render personal data unobtainable to the data subject and this could be detrimental to individuals who are appealing asylum decisions for example. **If the exemption is applied, individuals will not be able to access their personal data to identify any factual inaccuracies and it will mean that the system lacks transparency and is fundamentally unfair.**”<sup>2</sup>*

To this end, **ILPA supports the proposed amendment** put forward by human rights organisation *Liberty*, which provides for removal of the Schedule 2, page 136, line 30, paragraph 4 of the Bill - the exemption to data subjects’ rights where personal data is being processed for the maintenance of effective immigration control, or for the investigation or detention of activities that would undermine it.

## **KEY RECOMMENDATIONS**

- Uphold the amendment to **remove the immigration control exemption in Schedule 2, Part 1, Paragraph 4 of the Data Protection Bill 2017**; and thereby
- **Maintain the right to subject access** for individuals and their legal representatives;

## **BACKGROUND**

The EU General Data Protection Regulation (‘the GDPR’) enters into force on 25 May 2018. The GDPR replaces the Data Protection Directive 95/46/EC and was drafted to harmonize data privacy laws across Europe, to protect and empower all EU citizens data privacy and to reshape the way organisations across

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<sup>1</sup> Liberty’s briefing on the Data Protection Bill 2017 for Report Stage in the House of Lords, December 2017, page 20.

<sup>2</sup> Data Protection Bill, House of Lords Report Stage – Information Commissioner’s briefing, accessed at <https://ico.org.uk/media/about-the-ico/documents/2172865/dp-bill-lords-ico-briefing-report-stage-annex-ii-20171207.pdf>

the region approach data privacy. Following the UK's departure from the EU, the GDPR provisions will be retained in UK law by clause 3 of the *European Union (Withdrawal) Bill*, which incorporates EU law into domestic law. To give effect to the GDPR, the Government introduced the *Data Protection Bill 2017* ('the Bill') into the House of Lords on 13 September 2017. Domestically, this legislation will replace the *Data Protection Act 1998*.

Article 23(1) of the GDPR establishes a number of permissible restrictions Member States may implement legislative measures to limit the certain rights and obligations established under the Regulation. Specifically, Article 23(1) allows member states to limit individuals' rights under Article 12 to 22, and Article 34, as well as Article 5 in some circumstances. Under the GDPR, the curtailment of these rights is permitted on limited grounds, including: national security; defence; and public security.

Article 23(1)(e) also allows Member States to restrict subjects' rights to safeguard:

*'other important objectives of general interest of the Union or Member State, in particular an important economic or financial interest of the Union or Member State, including monetary, budgetary and taxation matters, public health and social security.'*

The *Data Protection Bill 2017*, however, imposes restrictions on individuals' rights which go beyond the limitations explicitly permitted under the GDPR. Schedule 2, Part 1, paragraph 4 of the Bill creates an exemption from certain provisions for the purpose of immigration control. The so-called 'immigration control exemption' allows for an individual to lose the right to have their personal data protected from distribution, as well the right to access data personal data, if necessary 'for the maintenance of effective immigration control'.

*4 (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).*

The construction of the immigration control exemption, and the way it may consequently be applied, is problematic in a number of respects.

Of paramount significance, the legality of the exemption is far from clear as the text of Schedule 2, Part 1, Paragraph 4 is not reflective of the stated permissible exemptions under Article 23 of the GDPR. Further, if the case was made to uphold the exemption under 23(1)(e), the scope of the clause does not meet the thresholds of necessity or proportionality, and does not reflect the essence of fundamental rights and freedoms. ILPA submits that the exemption is problematically broad. Significantly, the Bill contains no definition of the phrase 'maintenance of effective immigration control'. The phrase could therefore be

used to cover an innumerable number of matters. Moreover, third-party agencies to whom the Home office delegates immigration control functions may also benefit from the exemption.

The way in which the exemption may be applied also remains unclear. During the passage of the Bill in the House of Lords, Baroness Williams explained that the exemption is intended to be applied on a 'case by case basis'.<sup>3</sup> Commenting on the issue of SARs specifically, Baroness Williams reasoned that each application 'would need to be considered on its merits' and that 'the restrictions would only bite where there is a real likelihood of prejudice to immigration controls in disclosing the information concerned'. It is apparent, however, that the Bill lacks the safeguards necessary to adequately ensure that the exemption is not widely invoked. To this end, in the absence of a statutory definition of 'prejudice to immigration controls', ILPA echoes the concerns of other organisations that it is far from guaranteed that the 'use of the exemption would in fact be an exception rather than the norm'.<sup>4</sup>

On the issue of necessity, the immigration control exemption appears to fall short of achieving the requisite threshold. Many of the examples put forward in debates during the passage of the Bill through the Lords drew on situations which would in fact be dealt with under existing restrictions on access to personal data for the furtherance of criminal activity. Baroness Williams highlighted examples of where the immigration control exemption might be necessary. Under section 29 of the current *Data Protection Act 1998*, however, several activities associated with undocumented individuals are already offences and would therefore apply to the situation described. As per Chapter 3 of the Bill, the Government will retain this power to limit individuals' data protection rights in circumstances where they are suspected of committing a breach of criminal law. Due to the continued availability of this power, the stand alone immigration control exemption under Schedule 2, Part 1, Paragraph 4 is therefore unnecessary.

**In light of the seemingly unfettered ability for decision makers to invoke the immigration control exception, ILPA is particularly concerned about the impact on individuals' and legal representatives' ability to reliably access data held by the Home Office. Information obtained through SARs is vital to protecting the rights of individuals in immigration cases. The curtailment of the right to subject access therefore goes to the very heart of access to justice and the preservation of the rule of law.**

## **USES OF SUBJECT ACCESS REQUESTS IN AN IMMIGRATION AND NATIONALITY LAW CONTEXT**

The immigration control exemption and the power it affords to refuse SARs will have a devastating impact on a system already *"very much weighted in favour of the SSHD in terms of the resources available to her, the ever increasingly strictly applied and constantly changing immigration rules and legal framework. Claimant advisors face increased legal aid cuts and pressures, and clients face an ever more unfathomable immigration system to*

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<sup>3</sup>Liberty's briefing on the Data Protection Bill 2017 for Report Stage in the House of Lords, December 2017, page 12.

<sup>4</sup>Liberty's briefing on the Data Protection Bill 2017 for Report Stage in the House of Lords, December 2017, page 8.

*understand and navigate. Against that background, the unqualified provision of requesting and obtaining SAR information is all the more essential to preserve and protect.* “<sup>5</sup>

As explained by an ILPA member<sup>6</sup>, ‘Solicitors need the facts in order to best represent their clients. This exemption will allow the Home Office to make incorrect decisions without us having the means to hold them to account. Those of us who have a great deal experience in this field know that the Home Office will frequently not check their own records and often misrepresent an immigration history, be it through error or wilfully. To expect the Home Office to always produce accurate records, and act in accordance with those records, is to expect a fundamental change of practice by the Home Office of which there is simply no prospect.’

Immigration practitioners have explained that SARs are crucial for the following reasons:

- SARs allow legal representatives to understand complicated immigration histories. They are often the only way to get copies of clients’ historic immigration papers, because clients may not have retained (or ever had) copies of their documents because they were unrepresented; because legal representatives will destroy files after six years; or because inefficient or unscrupulous representatives may not have kept copies. SARs allow legal representatives to assess the merits of a case.
- Internal notes disclosed in SARs often show that the true position is at odds with that presented by the Home Office.
- SARs reveal fundamental mistakes made by the Home Office, such as those relating to mistaken identity or when an individual has immigration status when the Home Office assert they do not.
- SARs reveal if an individual has continuous lawful residence (which is frequently not apparent from previous passports alone because they do not record lawful residence when an application is outstanding with the Home Office and because immigration status is now mainly given on separate biometric residence permits which are retained by the Home Office when expired).
- SARs are commonly the only route for **victims of domestic violence** to access information that was previously entirely under the control of an abusive partner. Many victims have no knowledge of their status or immigration history. Control over immigration status is a form of abuse recognised by the Home Office.
- **Undocumented children** who are separated from their families, or the people who brought them into the UK are particularly likely to need to make to find out information about themselves, their immigration status, and how they entered the UK. This is more acute for child victims of trafficking who may have been brought into the UK following false entry clearance claims, and children who have experienced abuse from their caregiver in the UK, as leaving the abusive setting is frequently a trigger for any sponsoring adult to withdraw an outstanding application or remove that child from it as ‘punishment’. See report on precarious citizenship.<sup>7</sup>
- SARs are routinely used for **refugee** family reunion applications.

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<sup>5</sup>Nicola Braganza of Garden Court Chambers.

<sup>6</sup>Barry O’Leary of Wesley Gryk Solicitors LLP.

<sup>7</sup>Migrant and Refugee Children’s Legal Unit (MiCLU) report, *Precairous Citizenship*, accessed at <https://miclu.org/assets/uploads/2017/12/Precairous-citizenship-report.pdf>

- For **asylum seekers**, SARs are frequently required to understand previous submissions to the Home Office and are often vital to determining whether an individual is in a position to submit a “fresh claim”, (submissions which are significantly different from ones raised before).
- For **vulnerable individuals** with high support needs as a result of their alcohol/drug/mental health/homelessness who have lost all of their documents and cannot remember their immigration histories, SARs are frequently crucial to a case. Without them, it is not possible to properly advise and resolve their cases.
- In **applications on the basis of long residence or private life**, applicants cannot rely on the Home Office reading their own records and SARs are crucial in piecing together immigration histories. SARs can reveal that an applicant, unbeknownst to him or her, had a long outstanding application or appeal which the Home Office had just forgotten about and where the client as a result continued to be legally in the UK and ultimately had a long residence application to make for indefinite leave.
- For **immigration detainees**, a SAR will almost without fail disclose relevant material, as to what steps, if any at all, have been taken to remove a person who may have been detained unlawfully on that basis.
- SARs are critical to running **Judicial Reviews**. It is very difficult to obtain disclosure from the Home Office before having permission from a judge to run a Judicial Review. In judicial review litigation where disclosure is requested at the pre action stage, if the Home Office responds to the Pre-Action Letter, when it comes to disclosure they will refuse to provide this and will instead direct lawyers to make a SAR. This is inappropriate from a litigation perspective and reiterates the importance of SARs as often the only way that legal representatives can obtain disclosure relevant to litigation.
- SARs are crucial in the event that the SSHD relies on witness evidence which is not borne out by what has been previously disclosed on an SAR
- If a refused application carries a **right of appeal**, in theory the Home Office is required by the First-Tier Tribunal Procedure Rules 2014 to include all of the evidence on which they rely in their Reasons for Refusal letter in their “respondent’s bundle”. However, they frequently give only a small part of the evidence. SARs are essential to obtain all background information on which the refusal and any allegations are based.
- In **nationality deprivation** cases, the Secretary of State for the Home Department (SSHD) has to determine if it is ‘reasonable/balanced’, taking into account “what information was available to UKBA at the time of consideration”<sup>8</sup>The SAR is the main way to know what information was available at the time.

These situations provide just a snapshot of the invaluable information which can be revealed through SARs.

By way of further illustration, Appendix A presents a collection of anonymised case studies from legal representatives highlighting the crucial role of SARs in the work they do. As is demonstrated through these case studies, SARs have been vital to legal representatives’ work with vulnerable groups, including

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<sup>8</sup>UK Visas and Immigration Guidance – Deprivation and nullity of British citizenship: nationality policy guidance, accessed at <https://www.gov.uk/government/publications/deprivation-and-nullity-of-british-citizenship-nationality-policy-guidance>

individuals with mental health issues, domestic violence victims, children, and persons in immigration detention. Curtailing the right of these individuals and their legal representatives to access this information therefore fundamentally undermines access to justice.

Perhaps even more concerning, SARs are also the primary means through which legal representatives can identify mistakes and mismanagement on the part of the Home Office. The case studies in Appendix A highlight a swathe of instances where information revealed through SARs has identified misleading and inaccurate assertions from the Home Office, as well as records revealing Home Office inconsistencies. Other errors revealed through SARs in this connection include: the Home Office's failure to act or implement orders; the mixing up of applications and misidentification of individuals; poor Home Office conduct in litigation; and the incorrect, and therefore unlawful, detention of individuals.

In light of this pattern of failure, it is essential to the maintenance of the rule of law in the UK that legal representatives be able to access information which reveals such miscarriages of process and, ultimately, justice. It is therefore of paramount importance that the immigration control exemption be removed from the *Data Protection Bill 2017*.

Immigration Law Practitioners' Association  
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## **APPENDIX A: RIGHT TO SUBJECT ACCESS -CASE STUDIES**

This compilation of case studies has been produced by **immigration practitioners**. Drawing on the breadth and depth of our practitioners' experience, this collection illustrates the critical nature of SARs to upholding access to justice and the rule of law in the UK.

### ***1. Stopping the deportation of British Citizens and recognized refugees***

- (a) X was facing deportation to Somalia. He protested that he was British by birth but could not prove it. The Home Office officials denied that he was, and his appeal against deportation was dismissed. A lawyer then obtained his Home Office file, which contained a copy of his father's British Citizenship naturalisation application and associated documents, which had been sent to the Home Office by X a few years earlier, when he'd applied for a passport (the application had not been processed, and had been forgotten about when he was imprisoned). These documents which were held by the Home Office showed that X was in fact a British Citizen and there was therefore no power to detain him in immigration detention. He was detained for 17 months before lawyers discovered his citizenship (thanks to the SAR). He received substantial damages.
- (b) X is a young man from Eritrea, who was in immigration detention pending deportation, despite protesting that he was British. In detention it became clear that he had severe mental health problems. He spent prolonged periods in segregation, and on the health wing. He was found chewing glass, naked, and rambled incoherently about gods and snakes. He appealed against deportation unsuccessfully, and sought bail unsuccessfully. Unable to articulate his case or provide any evidence, he was treated as an undocumented migrant. A lawyer became involved and obtained a psychiatric report which confirmed that he lacked capacity, so the Official Lawyer stepped in to act as his litigation friend. Through a SAR, the lawyer found a mental health discharge plan dating back several years, with contact details for his father. The lawyer contacted his father on that number, and he brought evidence that he and his son (who had arrived here as a young child) had been recognised by the Home Office as refugees. His son was released, and placed in psychiatric hospital for treatment. In total he had been detained 19 months, during which time his mental health had deteriorated badly. The Home Office paid substantial damages.

### ***2. Home Office mistakes on identity***

- (a) Y was a nurse with the NHS who had lived lawfully in the UK for many years, but her application to naturalise as a British Citizen was denied because of her alleged poor immigration history. A SAR was made and it became clear the Home Office had mixed her up with another Nigerian woman with a slightly similar name and a poor immigration history. Following the SAR, she was able to challenge the Home Office.
- (b) X was applying for the right to remain on the basis of the human right to family life. He was in a relationship with a woman from his home country who had Refugee status, and they had a child together. X's application was refused on the basis that previous information he had provided to the Home Office showed that at the time of the child's conception he was in a relationship with



another woman and therefore paternity was not accepted. X was destitute and could not afford a paternity test but his lawyers made a SAR and the Home Office records showed that the Home Office had clearly mixed up his details with someone else's and they suddenly started referring to the applicant under a different name and date of birth. The lawyers challenged this by way of judicial review, and the Home Office conceded they had made an error and granted the right to remain.

- (c) J applied for entry clearance in a West African country in 2009 to rejoin her husband in the UK. She was refused on the ground of an undisclosed criminal conviction. She has no criminal convictions. Her representatives made a SAR to the Home Office. When the results came, it was clear that her Home Office file had been conflated with that of another person, of the same name and nationality but a different date of birth, who did have that conviction. The judge accepted that there were two different people, allowed the appeal and directed the Home Office to sort out the files. When J applied for naturalisation several years later, she was refused on the ground of the same alleged conviction. Her representatives applied for a review of that refusal, and made a strong complaint about the Home Office double failure. Eighteen months later, the refusal was reversed and J was awarded compensation for the mistakes.
- (d) A applied for naturalisation and was refused in early 2017 on the grounds that he had entered the UK illegally and then remained here before leaving and applying for entry clearance as a Tier 2 migrant in 2007. He had not done this. He had never been in the UK before applying to come to work. He was particularly outraged as this had been alleged against him before, and he had explained to the Home Office, with evidence, that he was in India at the time they claimed he was here. His name is a common one in India but the file, when he made a SAR, showed clearly that the confusion of identity had been addressed, and resolved, on four previous occasions. But the files on the two different people had never been separated, so the mistake was repeated.
- (e) X and Y were two men from Sierra Leone with the same name, but different immigration histories and different dates of birth, and very different appearances. X was told that he could not make a fresh asylum claim because he already had a residence card under EU law. It was only with a SAR file that his lawyers could discover that the Home Office had combined the two men into one in a single file.

### 3. ***Misleading/inaccurate assertions from the Home Office***

- (a) Z submitted an application to naturalise as a British Citizen (at a fee in excess of £1000). The Home Office refused the application on the basis that Z had been declared an illegal entrant less than 10 years before his application. His lawyer made a SAR and found on the records that the Home Office had in fact previously accepted that they had wrongly declared him an illegal entrant. This enabled the lawyer to submit a successful request for a reconsideration of the decision to refuse to allow him to be British.

- (b) M was refused naturalisation in 2016 on the grounds that she had failed to report to the Immigration Service as required, between 2006 and 2008, when she was applying for asylum. She was then extremely vulnerable, had just given birth to a baby as the result of forced prostitution and did not speak any English. She told her present advisers that she had not been asked to report in 2006 and they helped her to make a SAR. The results eventually revealed, along with a lot of other information, that the reporting conditions that had been imposed on her in May 2006 were cancelled before they came into effect, because she and her baby were not dispersed from Liverpool as planned. No new reporting conditions were imposed until April 2008, and she complied with them. She had not broken any conditions of stay. The naturalisation refusal was based on a failure to consider the records that the Home Office had about her. Her naturalisation review was eventually successful, but could not have been made without the SAR evidence.
- (c) Y is Nigerian migrant who arrived in the UK as a minor fleeing her abusive father along with her step mother and siblings. Her case became separated from that of her family. Through making a SAR, her Solicitors were able to prove that earlier negative decisions in her case had been fundamentally flawed as the Home Office internal case notes recorded her a single mother with a child in the UK as opposed to a minor in her own right at the key time who had been a victim of physical abuse from her father. This led to the case being reopened and lawyers securing status for Y.
- (d) V claimed asylum on basis of her sexual orientation and was interviewed. The interviewing officer made a note on the Home Office file to the effect "this is a grant". The note showed the interviewing officer was due to leave her post and wanted to ensure that whoever took the case on knew her views. It was also noted that V had given a photo of herself and a former partner to the immigration officer after the interview. They lost the photo. The asylum claim was refused on the basis that the Home Office didn't believe she was gay. The SAR disclosed the very significant issues above and which ultimately won her appeal against deportation.
- (e) W's application for an extension of her right to remain was refused on the grounds that she was originally only give the right to remain so that she could be with partner and they had now broken up. In making a SAR, the lawyer discovered a Home Office note on the reasons why the right to remain was originally granted and they were far more extensive than the refusal stated. The case was won on appeal.
- (f) X was lawfully resident in the UK from 2005. He had an application refused in 2007 as the Home Office said he had failed to notify them of a change of sponsor. The Home Office maintained this at an appeal which he lost on that point only. He subsequently secured a further visa. A SAR proved that the Home Office had misled the tribunal about not receiving the change of sponsor letter as there were contemporaneous electronic records of the letter being received.
- (g) Y is a Vietnamese national. The Home Office refused to extend her right to remain as they alleged the original grant had just been to enable her to finish her studies and that as she had now graduated the situation had changed. A SAR proved that the original caseowner had intended for her to be on a route to permanent residence and it was not just a temporary

status. This was recorded on the electronic casenote and it appears that the caseworker who refused the extension was dishonest about what the records said.

#### **4. Home Office bad conduct in litigation**

- (a) X made an unlawful detention claim where it was argued that removal could not take place within a reasonable period due to inability to secure a Travel Document for X. The Home Office asserted that X was not co-operating with the removal process, and that X was responsible for a failed removal attempt where he had been flown to Sierra Leone but then returned on the same day as the authorities refused to admit him. During the course of proceedings, X's lawyers were disclosed certain documents by Home Office's lawyers. X's lawyers compared these against documents that were provided to them through a SAR and they noted a significant discrepancy on a particular document which was the record of the escorting officer when the client was returned after the aborted removal attempt. In the documents provided by the Home Office lawyers, there was a section of this document which was blank (not redacted, but actually blank). However, the same document disclosed through the SAR showed the words 'Another Freetown return'. It was clear, as a result of the document obtained through the SAR, that the document that had been provided to them by the Home Office had been tampered with (the relevant words tippexed out). The Home Office settled offering a significant sum to X.
- (b) During Judicial Review proceedings, lawyers made a SAR and found that the Home Office had made a decision to grant the right to remain but then the next day made a decision to refuse leave - notwithstanding the decision the day before. The Home Office were the subject of a damning permission decision from a High Court judge regarding the handling of the case. The Home Office then conceded.
- (c) In an ongoing case in the Court of Appeal, the Home Office has asserted that they could not have reached a decision upon the Appellant's asylum claim any sooner, because they had to wait for evidence from overseas regarding the circumstances in which the Appellant's older brother was previously granted asylum in the UK. Through a SAR, it was discovered that, in fact, the enquiries regarding the brother's asylum claim were still ongoing at the time the decision to refuse the the Appellant's asylum claim was made. Even more crucially, the SAR documents revealed that the UNHCR had advised the Home Office in the strongest possible terms, that there was no valid legal basis for revoking the Appellant's brother's refugee status. During the course of over 2 years of litigation, the Home Office had never disclosed this information.

#### **5. Proof of immigration status and dates of applications**

- (a) X made an application for settlement as a result of domestic violence. She had to show that the relationship with her spouse was subsisting at the time of the domestic violence, and that she had valid leave before she had been abandoned by her spouse overseas. Both were confirmed by making a SAR.
- (b) Y insisted that she had indefinite leave to remain (permanent residence) but could not find her passport. She had arrived over 20 years ago and had initially been granted leave as a spouse then

applied for indefinite leave. She applied with one lawyer for (1) naturalisation which was refused and (2) for a Biometric Residence Permit to prove her indefinite leave but this was also refused. Her next lawyers made a SAR. The file was incomplete but eventually full information was disclosed - with the evidence of the indefinite leave. Without a SAR Y would have had nothing to prove her settled status here.

- (c) In Z's appeal against a decision to refuse indefinite leave, the Home Office stated that Z submitted a historic application beyond the (what used to be) 28 days grace period, following the refusal by the High Court to entertain a review of the Tribunal's determination. It was only through SARs to the Ministry of Justice and the Home Office that it became possible to ascertain the precise date on which the decision of the High Court was served and thereby establishing that Z's date of application was within 28 days.

## **6. Home Office failure to act**

- (a) Z believed he had no status and wanted a decision on his long outstanding matter with the Home Office. His lawyer made a SAR and when the lawyer received the Home Office records, they discovered that the Home Office had made a decision to grant Z indefinite leave to remain (permanent residence) a couple of years previously, but had never implemented the decision or told client.
- (b) W is an asylum seeker, whose fresh claim had been pending for years without any answer, because it had simply never been actioned at the Home Office. Lawyers were only able to prove its existence through the SAR.
- (c) X is a Ugandan refugee who was, through making a SAR, able to prove that no decision had been made on his asylum claim for over ten years and commence judicial review proceedings which secured the decision and then got him refugee status.
- (d) Y's SAR revealed that the applicant, unbeknownst to them, had a long outstanding matter which the Home Office had just forgotten about. As a result, Y had continued to be legally in the UK and ultimately had an application for indefinite leave on the basis of 10 years lawful residence to make.

## **7. Unlawful detention**

X was detained (just 1 week after being granted bail by an Immigration Judge) so the Home Office could transport him to attend an interview with the Moroccan authorities (to try to document him). His lawyers issued Judicial Review and sought damages. The Home Office stated that X's lawyers claim that X was detained to make him attend the interview (and thus unlawful) was not true. Through a SAR, X's lawyers found unequivocal evidence that the attendance at the interview was the sole intended purpose (and that they intended to re-release him after 3 days – but that didn't happen). Judicial Review succeeded (client released, liability for unlawful detention accepted by the Home Office), and X was awarded damages.

## APPENDIX B: ADDITIONAL EVIDENCE SUPPLIED 6 MARCH 2018

### Impact on Interview Records

It is important to note that in addition to subject access requests (SARs) submitted in the standard way, given the potentially broad remit of the clause, it may also affect the right of individuals and their legal representatives to request interview records directly from port, which can be critical in respect of individuals challenging the basis of a refused entry or a visa application refused on the basis of the interview records.

### Additional reasons why SARs and related requests are crucial

- SARs allow individuals to review the context behind the decision making to sufficiently address any potential issues in a fresh claim or challenge. This can make all the difference on obtaining fresh immigration status and regularising one's status following a refusal, curtailment or cancellation of leave.
- In respect of **discretionary leave** which is granted outside of the Rules, SARs allow the individual to understand the particular basis and circumstances on which a previous application was granted. Applications for an extension where leave was initially granted on a discretionary basis are generally dependent upon there being no significant changes to the individual's circumstances. In decision letters, the specific reasons for the grant of leave are not always sufficiently set out. Additionally, individuals, which can include children and other vulnerable categories, do not have records of these decision letters.
- The ramifications of **not being able to effectively challenge refusals** based on alleged deception, which can lead to a 10-year entry ban, can be severe and far-reaching. This not only impacts an individual's ability to enter the UK and, for example, conduct business, or visit friends and family, but can also impact on his or her ability to enter other countries, such as the US, thereby restricting their movement, as well as the individual's reputation, and that of his or her overseas employer or UK sponsor.

### Examples of when SARs proved crucial for justice

In a number of cases, records obtained via SARs following alleged deception attracting a 10-year entry ban for the client. In certain cases, clients had received numerous refusals on the same basis, ie deception being used in a previous application, before requesting assistance. On obtaining the relevant records, our clients were able to understand the basis of the allegation, raise a comprehensive challenge resulting in the ban being overturned in each case. Case studies:

- A was a minor who held **discretionary leave outside the Immigration Rules**. He was removed from his mother's care and placed in local authority and there was little information as to the basis on which he was granted discretionary leave. A SAR provided context for the previous grant of leave and assisted in assessing the evidence required to support an application for further leave.
- B was appealing against a **refusal of leave to remain**. Due to the nature of the allegations leading to the refusal, an appeal was the only way of redressing the Secretary of State's

concerns. The SAR records showed that there was no credible weighted evidence supporting the Secretary of State's position on record. This assisted in successfully challenging the refusal by appeal.

- C was applying for **indefinite leave to remain** on the basis of 10 years' long residence. The SAR records showed that the Home Office had previously made an incorrect decision that an application was invalid on the basis of non-payment of fees, as records showed that the fees had in fact been received. The SAR was therefore crucial in identifying a Home Office error which would have otherwise affected C's eligibility for indefinite leave to remain, resulting in him having no basis to stay in the UK.
- X applied to visit the UK. This was refused on the basis of her previous length of stay in the UK. X applied again, addressing the issues raised in the first refusal but inadvertently failing to disclose her previous refusal. This attracted a 10 year ban and a further application submitted by X was also refused on the basis that she had used deception in an application submitted in the last 10 years. The SAR both evidenced her good immigration history and provided insight as to the previous refusal and the procedure followed by the caseworker. This **allowed the individual to challenge the disproportionate ban**.
- Y needed to travel overseas due to his father's ill health and his leave would expire whilst he was outside the UK. Y's employer had received **incorrect advice from the Home Office**, confirming it would be fine to travel. This incorrect advice led to Y's subsequent application for indefinite leave to remain three years later being refused as his continuous residence had been broken. We obtained interview notes from the airport which corroborated Y's account of incorrect advice received by Home Office helpline. This was important when he re-applied for indefinite leave to remain, which was granted.
- Z was required to visit the UK. The visit was critical to his company's development of key relationships and services provided by the company's intermediaries in the UK. His visit visa application was refused for failing to disclose a previous conviction. Z submitted a second visit visa application, explaining the omission was an innocent mistake. This was refused on the basis that deception was used in an application submitted in the last 10 years. The **data provided via the SAR was pivotal in challenging the ban**. Records identified that the Home Office failed to follow the relevant procedures regarding assessing whether Z employed deception. If we had relied upon the Home Office following the policy and procedure, Z would still be faced with this ban. This would have had far-reaching consequences for Z, casting doubt on his character, restricting his travel, putting his business at risk and raising human rights concerns.