Migration And Privacy Roundtable, 28-9-21

Case Study: Phone Seizure & Extraction

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Summary

Subject: litigation re. mobile phone seizure and extraction by the Home Office

Focusing on:

(1) The practice;
(2) Legal standards;
(3) the Litigation;
(4) Possible remedies; and
(5) The Wider Context

Photo: Jack Guez/AFP via Getty Images

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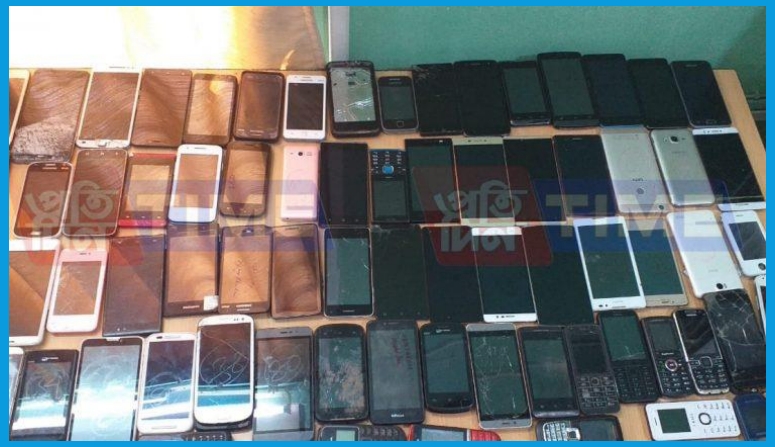
(1) The Practice



Widespread seizure of migrants' phones on arrival into UK, with focus on boat arrivals.

Reports started in early-mid 2020.

PIN codes required to be given.

Phones retained for prolonged periods: often >6 months.

Absence of legal warnings in many cases. Information given very limited. Enquiries not responded to.

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(1) The Practice (continued)

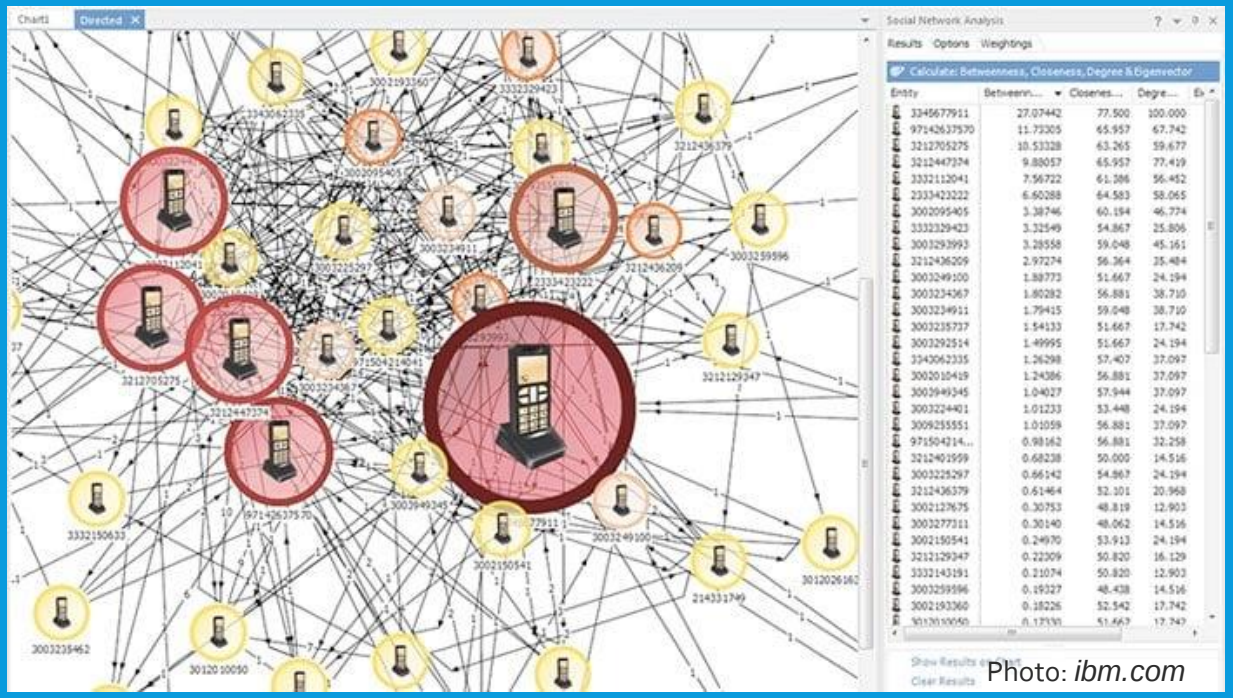

Photo: *ibm.com*

Data believed to have been extracted from phones and analysed.

Expert conclusion: device was investigated and facebook application was reviewed.

Cloud-based data likely to be affected.

Policy framework largely unpublished.

Concerns about subsequent use:

- Police/intelligence services use/entries on Police National Database?;
- Home office use? To rebut asylum claims etc.?

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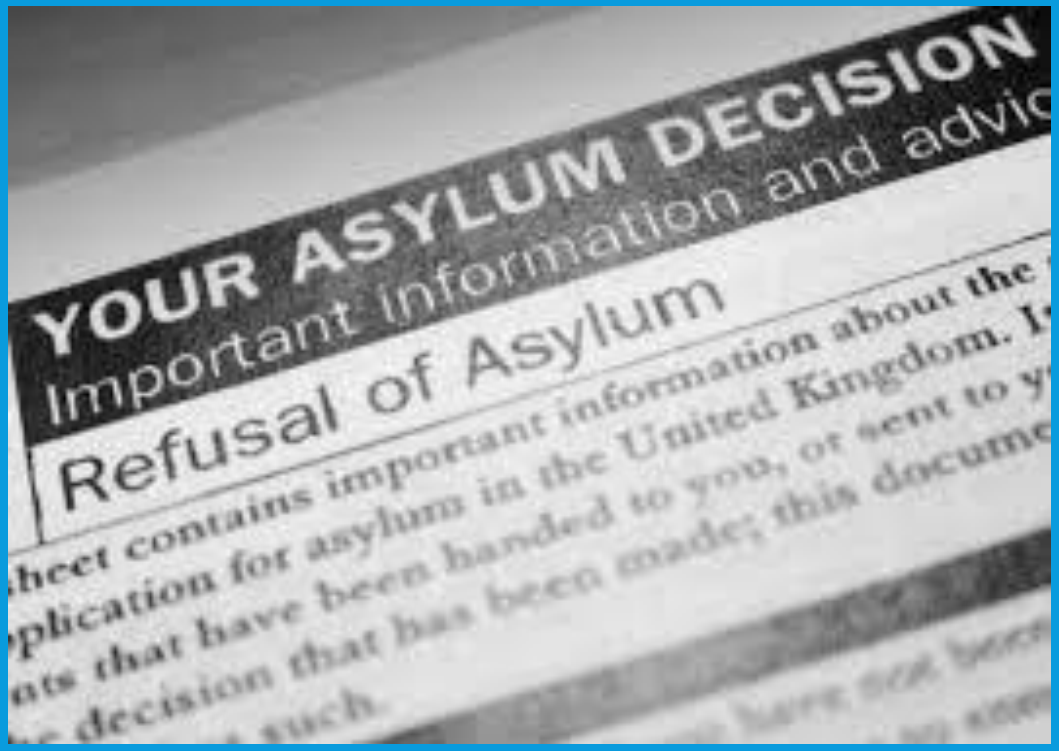
(1) The Practice (continued)



Serious impacts:

- lost contacts with family and friends;
- loss of asylum evidence stored on phones;
- access to legal assistance in the UK impeded;
- hindered in establishing support and social networks in the UK.

Numbers affected? Many hundreds +?

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(2) Legal Standards

48 Seizure and retention in relation to offences

(1) This section applies if an immigration officer is lawfully on any premises.

(2) The immigration officer may seize anything which the officer finds in the course of exercising a function under the Immigration Acts if the officer has reasonable grounds for believing –

(a) that it has been obtained in consequence of the commission of an offence, and

(b) that it is necessary to seize it in order to prevent it being concealed, lost, damaged, altered or destroyed.

(3) The immigration officer may seize anything which the officer finds in the

PART II *Seizure etc.*

General power of seizure etc.

19.—(1) The powers conferred by subsections (2), (3) and (4) below are exercisable by a constable who is lawfully on any premises.

(2) The constable may seize anything which is on the premises if he has reasonable grounds for believing—

(*a*) that it has been obtained in consequence of the commission of an offence ; and

(*b*) that it is necessary to seize it in order to prevent it being concealed, lost, damaged, altered or destroyed.

Powers relied on:

- s.48 Immigration Act 2016; &
- (occasionally) s.19 PACE 1984

Home Office claim this follows detention, arrest and search under Schedule 2 IA 1971 (paras 16 & 17)

Limitations on these powers:

(i) exercisable on "premises" (as defined), not a power to seize from persons;

(ii) require "reasonable grounds" the phone is evidence re.an offence;

(iii) require "necessity" to seize, for specified reasons;

(iv) electronic items should be copied and the originals returned;

(v) owner has a right to access and copies

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(2) Legal Standards (Grounds of Challenge)

1. Ultra vires s.48 Immigration Act 2016:
   - The power is being exercised in breach of the conditions outlined above.
   - Moreover, the power is one of seizure from premises, not persons. That already is provided for in Schedule 2 IA 1971 (the power the HO are using to arrest and search) and it is limited i.e. documents establishing identity or travel, in recognition that it is a power of administrative arrest only. Using s.48 IA 2016 bypasses these limitations.
   - There is no power to require the provision of PIN numbers outside s.49 RIPA 2000. s48(4) IA 2016 ("*the immigration officer may require any information which is stored in any electronic form*") lacks specificity and adequate protections.
   - Unlawfully blanket policy.

2. Breach of Art. 8 ECHR and Article 1, Protocol 1 ECHR (both incorporated in HRA 1998): necessity of seizure not established; prolonged seizure disproportionate; lack of published policy and procedural safeguards means practice is not "in accordance with the law".

3. Processing is in breach of DPA 2018/UK GDPR: in breach of first data protection principle (not "lawful and fair" or "necessary" as a blanket policy); second data protection principle (not "explicit and legitimate" law enforcement purpose); fifth data protection principle (retained longer than is necessary)

4. Common law (conversion, tortious misuse of private information)

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(3) The Litigation

- DPG assisted Jesuit Refugee Service and other orgs with sending PAPs to secure return of phones.
- Judicial review claims issued by individuals whose phones were still not returned.
- Two claims issued: our claim is currently stayed behind the first claim (Matthew Gold & Co. solicitors acting), directions hearing pending.
- Good example of coordination between two legal teams (Matthew Gold & Co. & DPG).
- Final hearing likely January 2022.

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(4) Possible Remedies

1. Declaration that (a) seizure; (b) extraction/analysis; and (c) retention was unlawful.

2. Declaration that the HO policy/practice is unlawful.

3. (If necessary) declaration of incompatibility re. s.48 IA 2016 and Art 8/A1P1 ECHR.

4. Compliance order under s.167 DPA 2018 to halt unlawful processing.

5. Damages at common law/under s.168-9 DPA 2018/just satisfaction.

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(5) The Wider Context

Immigration exemption in DPA 2018 Sch.2,Pt 1,para 4 (and CoA judgment)

Phone extraction powers in Police, Crime, Sentencing & Courts Bill

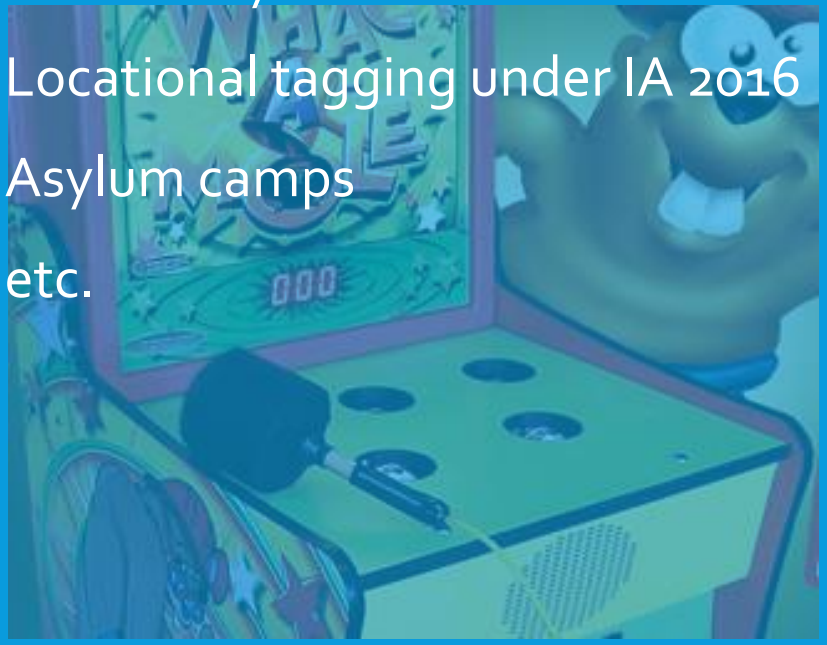
Nationality & Borders Bill

Illustration: Eva Bee/The Guardian

Locational tagging under IA 2016

Asylum camps

etc.



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Thank you

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Photo credits:

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