Towards a reformed policy for immigrant DNA tests, a commentary

Aaron Opoku Amankwaa [a]

Email: aaron.amankwaa@northumbria.ac.uk

ORCID ID: https://orcid.org/0000-0002-4501-7274

[a] *Science and Justice Research Interest Group, School of Law, Northumbria University, Newcastle Upon Tyne, UK, NE1 8ST*

Abstract

DNA can be useful corroborative evidence in establishing familial relationship in immigration cases. Presently, there is no specific law in the UK regulating the use of DNA in this domain. This has led to inconsistencies in policy guidance and the rejection of some immigrant applications solely or partly due to a lack of DNA evidence. This commentary draws on the DNA regulatory regime in law enforcement to make a case for a specific DNA immigration law to protect individual rights, assure fairness and trust in the treatment of applicants. In addition to a specific law, consistency in operations should be ensured by developing a central point of contact for guidance including a central IT system, and a custodian of the DNA application process. Further, a single code of practice and conduct is proposed to ensure that guidance products are in line with the law and practice. An independent multi-stakeholder board is also recommended to ensure that policies are representative of the views of applicants and their relatives; policy officers and operational staff; and policymakers and the public.

Keywords: immigration, DNA evidence, law, regulation

Introduction

The first application of DNA evidence in resolving an immigration case occurred in 1985. The legal issue was a claim of biological parenthood involving a boy who resided in Ghana and a woman of Ghanaian descent who lived in London. The case marked the beginning of the use of DNA in the UK legal system. Jeffreys *et al.*[1] demonstrated that the two were biologically related (i.e. mother and son) through DNA evidence.

In October 2018, the Secretary of State, Sajid Javid, made a statement about the current regime governing DNA evidence in immigration cases.[2] He explained that DNA evidence may be used in applications where there is a claim of a biological relationship with a UK resident. However, this practice is on a voluntary basis. The statement revealed that there have been instances where applications have been refused due to noncompliance with DNA requests. Among those affected were cases pertaining to the Gurkha policy.

The Home Secretary's statement noted that a review of the current policy has shown discordances in guidance and practice. He mentioned that mandatory DNA requests had been issued in about 398 cases as part of an intelligence operation called Operation Fugal.[3] The operation was focused on suspected paternity fraud cases. About 20.9% of these cases were refused. Seven cases (1.8%) were rejected due to noncompliance with DNA requests. Six other cases (1.5%) were declined based on inadequate supporting evidence including failure to

provide DNA information. These cases are currently under review. However, the scale of the issue is currently unknown due to the limitations of case management systems.

Apart from the Operation Fugal cases, it has been found that some 51 cases under the Gurkha policy requested DNA from applicants. These applicants were responsible for the cost of DNA analysis. About 7.8% of the cases were refused due to noncompliance with DNA requests. These cases have also been subject to review. The statement also highlighted immigration cases involving Afghans where DNA evidence was part of the application requirements. The Home Secretary emphasised that since the findings of the review, steps have been taken or are being taken to bring law, policy and practice in line.

Current law

The law governing biometric data in the UK can be categorised as general and specific legislation. The general statutes include the Data Protection Act 2018 (DPA)[4] and the Human Rights Act 1998 (HRA).[5] Section 205(1) of the DPA defines biometric information as "personal data resulting from specific technical processing relating to the physical, physiological or behavioural characteristics of an individual, which allows or confirms the unique identification of that individual, such as facial images or dactyloscopic data".[4] Biometric data is described as sensitive information that requires strict regulation for its collection, processing, retention and use. The HRA specifies the rights of individuals and circumstances under which these rights may be limited. The principal right with respect to biometrics is the right to privacy (Article 8).[5] Two principles upheld by the general laws, with respect to the limitation of rights, are the principles of proportionality and necessity in the processing of biometric information.

The specific legislation for the use of biometrics in immigration cases includes the Nationality, Immigration and Asylum Act 2002 (NIAA) and the UK Borders Act 2007 (UKBA).[6] Amendments by the Immigration Act 2014 redefined the meaning of biometric information within the context of immigration.[7] Section 15 of the UKBA excludes the use of DNA information and limits biometric data to the external physical characteristics of a person such as fingerprints and the iris. Section 126 of the NIAA provides that biometric data may be required as part of immigration applications, but this excludes DNA data. Hence, under the current immigration law, DNA information is not required supporting evidence for applications.

Current policy and practice

In the absence of a statutory provision for the use of DNA information, the existing Home Office policy allows immigration officers to request DNA data from applicants.[3] However, the failure to provide this information cannot be used as the basis of an application outcome. The internal review of current guidance was conducted by Alcock[3] from July to September 2018. This revealed that guidance on the use of DNA is inconsistent and conflicting. This is partly due to: 1) the lack of a single "code of practice" for officers; and 2) absence of central guidance IT system.

The review identified about 40,000 documents held on seven IT systems. Guidance on specific aspects of immigration either lacked clarity or was incorrect. Directives that inferred voluntary DNA request but lacked clarity covered aspects such as UKVI asylum, family reunion, European route, nationality and false paternity cases. Those that suggested mandatory DNA evidence were UKVI Gurkha and Afghan cases.[2,3] Additionally, some letter templates used in casework were found to include statements suggesting compulsory DNA evidence. Guidance for casework related to overseas passport applications was consistent with Home Office policy.

The Alcock [3] review provided 16 recommendations for change in the use of DNA evidence in immigration cases. This covers six key areas: a review of cases; development of consistent guidance; establishment of a single point of contact (SPOC); implementation of evaluation programmes; training and assurance; and independent governance of the regime. At the operational level, policy, guidance, immigration officers and IT SPOCs will ensure uniformity in UKVI and other immigration activities and the treatment of immigration applicants. Evaluation programmes will ensure that the regime operates efficiently as well as identifying risks and opportunities for improvement. To assure compliance to data protection and human rights laws, independent governance is considered to be an essential element.

Reforms needed

Compared to the use of DNA records in law enforcement, the immigration domain lacks several safeguards and regulatory structures. The law enforcement domain is characterised by specific legislation covering the entire process from sampling to the destruction of DNA records.[8] In addition to safeguarding the security of the public, the law provides for the respect of private life and promotes the principles of proportionality and necessity. Secondly, there are instituted independent governance and regulatory arrangements (such as the Strategy Board, Ethics

Group, Biometrics Commissioner and Forensic Science Regulator) that scrutinise the operational, quality assurance, ethical and legal aspects of the system. These arrangements have allowed a significant level of transparency and accountability in the use of DNA for policing purposes. Further, the independent oversight bodies serve as SPOCs for guidance in relation to the use and acquisition of DNA. Although the overall effectiveness of DNA in law enforcement is yet to be demonstrated, some evaluative assessments have been initiated. These have ensured that operational challenges in the system are identified to inform policy and legislative reforms.

Contemporary developments show that DNA evidence provides adequate proof of biological relationships, and their potential usefulness in immigration cases is indispensable. This means that specific legislation for the use of DNA in immigration cases is necessary. Elements of the law enforcement domain may be adopted and developed to govern the use of DNA in immigration cases. Firstly, there should be a specific immigration DNA law. The legislative framework should reflect: 1) existing general legislation and case law; 2) nature of immigration cases; 3) views of operational and policy officers; 4) opinions of policymakers and the public; 5) views of applicants and their families; and 6) evidence of best practice. This is important because the use of DNA in immigration cases (i.e. establishing familial relationship) present complex legal and ethical issues.

Unlike the law enforcement domain where compulsory DNA request may be necessary for public security reasons, immigration cases are usually within the context of the provision of service to clients. This means that DNA request and subsequent use should be voluntary and based on informed consent. This principle should be upheld in a specific DNA immigration law. The only exception to voluntary requests may be instances where there is a justified suspicion of crime and DNA evidence is necessary and proportionate to the specific case.[3] However, in any case, the consent process should be elaborate, detailing why DNA is necessary in the specific case; how data will be stored, used and destroyed; data retention timescales; benefits that may be derived; impact on final outcome; potential risks; and opportunity to withdraw consent at any stage of the process.

Informed consent is crucial in immigration cases because the analysis of DNA may discover incidental findings (IFs) such as maternal, paternal and kinship discrepancies unknown to the applicants. The law should provide for how such IFs may be regulated and its impact on application outcomes. Parker *et al.*[9] propose a policy of nondisclosure of IFs in relation to the identification of human remains. However, living individuals are entitled to the knowledge of

their true biological relationship and a ‘paternalistic or protective approach’ may not be appropriate. A more suitable framework could be the inclusion of applicants in decisions about the disclosure of IFs, with a supportive counselling service for applicants. This policy could be adopted into immigration DNA law. Further, the law should provide quality assurance, legal and ethical compliance schemes for home and overseas organisations that may be involved in DNA analysis casework.

Another important point to note is that familial relationship is not only determined by DNA. Established and legitimate social family relationships may differ from genetic relatedness. This means that DNA evidence should not be used in isolation when dealing with immigration cases. The law should thus provide that decisions of application outcomes are based on a body of evidence, with DNA as corroborative evidence.

In addition to a specified immigration DNA law, SPOCs for the different aspects of immigration cases should be created. A single code of practice and conduct, subject to annual or regular revision, should be established as a reference point for guidance. The code may offer flexibility in developing policies to deal with any emerging implementation challenges whilst legal reforms are being contemplated. An independent immigration biometrics board may be established to oversee all aspects of the regime and assume responsibility for the code of practice and conduct. Such a board should include all relevant stakeholders such as the Home Office, the Forensic Science Regulator, geneticists, operation and policy officers, legal advisors, family rights agencies and individuals or representatives of individuals who have experienced the system. The scope, role and responsibilities of the board should be provided in law, including a duty to report to parliament on a regular basis.

In summary, DNA evidence will continue to be relevant in establishing familial relationship in immigration cases. This calls for a dedicated DNA immigration law to protect the rights of individuals and assure fairness and trust in the treatment of applicants. Further, consistency in operations should be managed by developing appropriate single points of contacts as noted in the Alcock review.[3] This includes a central data management system, IT system for guidance products and appointment of an official responsible for the entire DNA request process. Additionally, the regime may benefit from a single code of practice and conduct, and the establishment of an independent multi-stakeholder board.

Conflict of interest statement

None

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