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With a particular focus on the digitalisation of UK border management systems and Electronic Travel Authorisations (ETAs)

Introduction

Laura Devine Immigration (LDI) is a London and New York based law firm which specialises in UK and US immigration and nationality law, advising a wide range of corporate clients, families and individuals. Following the submission of oral evidence by Senior Partner & Head of UK Practice, Sophie Barrett-Brown, and Partner & Head of US Practice, Christi Hufford Jackson, we now provide written evidence in support of the points raised at the Justice and Home Affairs Committee hearing on border management systems on Tuesday 12 March 2024, for your review.

Summary

As a dual-practice law firm, specialising in both UK and US immigration law, we are able to present our concerns regarding the UK's new Electronic Travel Authorisation (ETA) in the context of the US' Electronic System for Travel Authorisation (ESTA), which has been operational for over 15 years.

The ESTA system provides a framework for understanding how automated processing systems are used for pre-travel authorisation applications to the US under the Visa Waiver Programme (VWP). Whilst the ESTA system is fully automated, in that there is no human involvement in the processing of the applications, the ETA is automated 'insofar as possible', as any rejections/refusals must be decided by a human decision maker. Our clients' experiences with ESTA, provide insights into the inflexibility of automated decision-making and the consequences for applicants should they receive a refusal decision. The ETA scheme is equally unyielding in that: there is no right to amend (or even withdraw) an ETA application form once submitted; no right to review if an application has been refused; no right of appeal or administrative review. If an ETA is refused, the only option is to apply for a Visitor visa, an immigration route/process which can be problematic, as discussed below.

In addition, we address the liability of carriers (airlines and other international transport operators) to check if individuals have an ETA or valid immigration permission prior to boarding the aircraft/ ship. We also address the significance of the ETA scheme and the Common Travel Area (CTA) in regard to Republic of Ireland/ Northern Ireland border concerns. Separately, we consider the roll out of the digitalisation of all individuals' immigration status in the UK at the same time as the introduction of the ETA scheme 'worldwide'. This is a colossal task, notwithstanding the additional technical issues likely to arise as a result, as experienced by individuals granted status under the EU Settlement Scheme (noting however that an ETA does not confer immigration permission). These considerations ultimately call into question whether the UK government is sufficiently equipped to deal with a fully digitalised border management system.

ESTA

In this section we set out a summary of the ESTA system, its legal framework and the ESTA application procedure.

The ESTA system was implemented by the Department for Homeland of Security (DHS) on 1 August 2008.¹ The Secure Travel and Counterterrorism Partnership Act of 2007 (part of the Implementing Recommendations of the 9/11 Commission Act of 2007, also known as the "9/11 Act") amended Section 217 of the Immigration and Nationality Act, requiring that the DHS implement an electronic travel authorisation system to increase the security of the VWP.² The aim is to conduct security checks of VWP travellers prior to boarding an aircraft/ship to the US.³ Currently, the VWP permits citizens of 41 countries.⁴ It is a reciprocal agreement, meaning US citizens and nationals can travel to the same 41 countries for a similar amount of time/for the same purposes.⁵

An ESTA is an automated system determining the eligibility of visitors to travel to the US under the VWP. It does not determine whether an individual is admissible to the US which is determined by US Customs and Borders Protection officers upon arrival.⁶ An ESTA allows travellers to enter the US for business or tourism, or in transit for less than 90 days, provided they meet the eligibility requirements.⁷ Individuals who require an ESTA include UK citizens or citizens from other VWP countries visiting the US.⁸ It is important to reiterate that an ESTA is a pre-travel authorisation system which allows entry to and transit through the US, akin to an ETA; it is not immigration permission in its own right. With the exception of a pilot program that began in November 2023 (limited to one visa category and only for travellers travelling from Ireland), an ESTA is the only digitalised part of the US border management system which, if approved, is connected to an individual's passport. All other types of US immigration permission can be evidenced physically.

Nationals of VWP countries who have travelled or been present in Iran, Iraq, North Korea, Sudan, Syria, Libya, Somalia and Yemen on or after 1 March 2011 are not eligible to travel or be admitted to the US.⁹ VWP nationals who have travelled to Cuba on or after 12 January 2021 are also not eligible to travel or be admitted to the US (with limited exceptions).¹⁰ Nationals of VWP countries who

¹ U.S. Customs and Border Protection, 'Strengthening Security of the VWP through Enhancements to ESTA' <<https://www.cbp.gov/travel/international-visitors/esta/enhancements-to-esta-faqs>> accessed 16 March 2024.

² *ibid.*

³ *ibid.*

⁴ Homeland Security, 'Visa Waiver Program Requirements' <<https://www.dhs.gov/visa-waiver-program>> accessed 16 March 2024.

⁵ *ibid.*

⁶ U.S. Customs and Border Protection, 'Electronic System for Travel Authorization' (*Official Website of the Department of Homeland Security*) <<https://www.cbp.gov/travel/international-visitors/esta>> accessed 16 March 2024.

⁷ US. Embassy & Consulates in the United Kingdom, 'Visa Waiver Program and ESTA' <<https://uk.usembassy.gov/visas/non-immigrant-visa-faqs/visa-waiver-program-and-esta/>> accessed 16 March 2024.

⁸ U.S. Embassy & Consulates in the United Kingdom, 'Who is Eligible' <<https://uk.usembassy.gov/visas/visa-waiver-program/non-immigrant-visa-waiver-program-vwp/>> accessed 16 March 2024.

⁹ *ibid.*

are also nationals of Cuba, Democratic People's Republic of Korea, Iran, Iraq, Sudan or Syria are also not eligible.¹¹ VWP travellers who have visited any of the countries listed above prior to the requisite dates may also be held for questioning by the US Customs and Border Protection (CBP), as discussed at the committee hearing.

Application procedure

An application can be made online via CBP's website for one person or for a group of two or more people (up to a maximum of 50). Applicants are advised to submit an application no less than 72 hours prior to travel and the form takes on average 23 minutes to complete.¹² Applicants are required to provide their biographic information including their personal details such as name (as it appears in the machine-readable zone (MRZ) of the passport), passport number, country of nationality, date of birth, city and country of birth. Their personal information including contact information, social media provider and identifier (optional), parents' information, employment information, travel information, their intended address while in the US and their emergency contact in or out of the US. Applicants must complete all non-optional fields, and must subsequently answer 9 questions relating to their eligibility under the VWP system, including:

Question 3) Have you ever been arrested or convicted for a crime that resulted in serious damage to property, or serious harm to another person or government authority?;

Question 4) Do you seek to engage in or have you ever engaged in terrorist activities, espionage, sabotage or genocide?;

Question 7) Have you ever been denied a U.S. visa you applied for with your current or previous passport, or have you ever been refused admission to the United States or withdrawn your application for admission at a U.S. port of entry? If yes, must detail 'when' and 'where';

Question 9) Have you travelled to, or been present in Cuba, Iran, Iraq, Libya, North Korea, Somalia, Sudan, Syria or Yemen on or after March 1, 2011? Answer 'Yes' or 'No'. If yes, you are provided the opportunity to say which country, when and the primary reason for travel (for which there is a drop-down menu of options).

Once an ESTA application is submitted the only information which can be amended is the applicant's email address, address of residence in the US and postal address. As previously stated, an ESTA is based on an automated determination meaning that there is no human involvement in the decision making process; an application is either approved or refused on an automated basis. Therefore, if for example, an applicant has inadvertently selected 'No' to question 3 when in fact the applicant received a criminal conviction over 20 years ago, their application will be denied (the concept of spent convictions does not exist in the US). If a client accidentally selects 'Yes' to question 4, when in fact

¹⁰ *ibid.*

¹¹ *ibid.*

¹² U.S. Customs and Border Protection, 'How do I apply?' <<https://esta.cbp.dhs.gov/>> accessed 16 March 2024.

they are evidentially not a terrorist, their application will be denied. If an application is refused, whether the decision is correct or not, any subsequent ESTA applications will be denied.

An approved ESTA is typically valid for 2 years from date of authorisation or until the applicant's passport expires, whichever comes first.¹³ If an applicant's answer changes in relation to any of eligibility questions, they must apply for new travel authorisation. An applicant who does not receive an ESTA (whether their application was denied or permission revoked) must apply for a visa in order to travel. For example, an applicant would need to apply for a B-2 visa for travel to the US temporarily for tourism, pleasure or visiting¹⁴, or they would need to apply for B-1 visa for persons travelling to the US temporarily to engage in business activities.¹⁵ As part of the visa process, an applicant must attend an interview at a US Embassy or Consulate General. Hence, if an individual has applied for an ESTA and received a refusal decision, whether inadvertently or not, an applicant may not travel to the US until they have attended their appointment and received the requisite visa. Once an individual attends an appointment, their eligibility will be decided by the interviewing consular officer on the day of the appointment. However, the wait times to book an appointment are extensive. Currently, the earliest available appointment in London is in August/September 2024. As individuals are advised to apply for an ESTA at least 72 hours before their date of travel, if they do receive a refusal and are required to attend an appointment, individuals' will no doubt have to change or cancel their travel plans. It can be especially difficult for individuals' who require an ESTA for the purpose of business travel, and are expected to visit the US to attend a conference or meeting etc. The inflexibility of the ESTA system means there is however no other option.

UK ETA Scheme

Background

The ETA scheme was announced by the UK Government in March 2023 as part of the transformation and digitalisation of UK borders with the aim of 'cementing the UK as a world leader in border security'.¹⁶ The scheme was opened for Qatari nationals on 25 October 2023, and as of 22 February 2024 was opened for Bahrain, Kuwait, Oman, United Arab Emirates, Saudi Arabia and Jordanian nationals¹⁷. Between October and December 2023, there were 12,190 applications for ETAs, of which 12,076 were grants.¹⁸ All applications in this

¹³ U.S. Customs and Border Protection, 'ESTA – How long is my ESTA approved for?' <<https://help.cbp.gov/s/article/Article-1126>> accessed 16 March 2024.

¹⁴ U.S. Embassy & Consulates in the United Kingdom, 'Tourism & Visitor' <<https://uk.usembassy.gov/visas/tourism-visitor/>> accessed 16 March 2024.

¹⁵ U.S. Embassy & Consulates in the United Kingdom, 'Business Visa' <<https://uk.usembassy.gov/visas/business-visa/>> accessed 16 March 2024.

¹⁶ GOV.UK, 'Electronic Travel Authorisation (ETA) scheme factsheet – February 2024' (*Home Office*, 1 February 2024) <<https://homeofficemedia.blog.gov.uk/2024/02/01/electronic-travel-authorisation-eta-scheme-factsheet-february-2024/>> accessed 16 March 2024.

¹⁷ GOV.UK, 'UK opens electronic travel authorisation scheme' (*Home Office and UK Visas and Immigration*, 15 November 2023) <<https://www.gov.uk/government/news/uk-opens-electronic-travel-authorisation-scheme>> accessed 16 March 2024.

¹⁸ GOV.UK 'How many people to the UK each year (including visitors)?' (*Home Office*, 29 February 2024) <<https://www.gov.uk/government/statistics/immigration-system-statistics-year-ending-december-2023/how-many-people-come-to-the-uk-each-year-including-visitors>> accessed 17 March 2024.

period were made by Qatari nationals. As reported by the government almost 800,000 Gulf visitors spent two billion pounds during their stays in the UK in 2022.¹⁹ The ETA now makes it easier for such nationals to visit the UK.

By way of overview, an ETA is an advance travel permission required by specified non-visa nationals (NVNs – individuals who do not need to apply for a UK Visitor visa before travelling to the UK) who wish to come to the UK as a visitor, transit through the UK, work as a Creative Worker seeking entry to the UK for up to 3 months, or come to the UK for a permitted paid engagement.²⁰ Each traveller must have their own ETA, including babies and children.²¹ An ETA provides an individual with pre-authorisation to enter and transit the UK, it is **not** immigration permission in its own right.²² An ETA permits multiple journeys and is valid for two years or until the holder's passport expires, whichever is sooner. An applicant can submit an application based on prospective travel to the UK, even if the dates of travel have not been confirmed. The Home Office have proposed that the ETA Scheme will be fully in place and introduced worldwide by the end of 2024 for all NVNs entering the UK, including European nationals.²³ A deliberate failure to apply for an ETA where one is required, and to knowingly arrive to the UK without one, will be a criminal offence.²⁴ Applicants must apply for an ETA before travelling to the UK but they can travel to while they are waiting for a decision on their application.²⁵

Typically, NVNs would provide their Advanced Passenger Information (API) which the airlines would then be required to provide to the relevant government prior to travel. However, as addressed in the additional written evidence we submit to the committee on the ETA and data protection rights, API is historically inaccurate and unusable for the most part. The government promotes ETA as a way to complete the gaps in API information, as ETA applicants are required to provide their biographic, biometric and contact details, whilst answering suitability questions (as below), all of which is meant to increase the government's 'knowledge about those seeking to come to the UK and prevent the arrival of those who present a [security] threat'.²⁶

¹⁹ GOV.UK, 'Travel to the UK now cheaper for Gulf and Jordanian visitors' (*Home Office, Tom Pursglove MP and The Rt Hon James Cleverly MP*, 1 February 2024) <<https://www.gov.uk/government/news/travel-to-the-uk-now-cheaper-for-gulf-and-jordanian-visitors>> accessed 17 March 2024.

²⁰ GOV.UK, 'Apply for an electronic travel authorisation (ETA)' (*UK Visas and Immigration Guidance*, 25 October 2023) <<https://www.gov.uk/guidance/apply-for-an-electronic-travel-authorisation-eta>> accessed 18 March 2024.

²¹ *ibid.*

²² NB: The Home Office have said the requirement for transit passengers to obtain an ETA stops people who may use connecting flights to avoid gaining permission to travel to the UK is being kept under review as they roll out the scheme (ETA scheme factsheet – 2024).

²³ GOV.UK, Nationality and Borders Bill: Electronic Travel Authorisation factsheet (*Home Office*, 13 October 2023) <<https://www.gov.uk/government/publications/nationality-and-borders-bill-electronic-travel-authorisation-factsheet/nationality-and-borders-bill-electronic-travel-authorisation-factsheet>> accessed 16 March 2024; UK Parliament, 'Electronic travel authorisations: what's the ETA?' (*House of Commons Library*, 24 April 2023) <<https://commonslibrary.parliament.uk/electronic-travel-authorisations-whats-the-eta/>> accessed 16 March 2024.

²⁴ UK Parliament, 'Electronic travel authorisations: what's the ETA?'; Nationality and Borders Act 2022, Part 3, s.40.

²⁵ GOV.UK, 'Ask a question about Electronic Travel Authorisation (ETA)' <<https://www.ask-question-about-electronic-travel-authorisation.homeoffice.gov.uk/start>> accessed 17 March 2024.

²⁶ GOV.UK, 'Electronic Travel Authorisation (ETA) scheme factsheet – February 2024'.

ETA Application procedure

An applicant will be able to apply for an ETA via an app using their smartphone or via the GOV.UK website. The Home Office have advertised the application process and 'simple and fast'.²⁷ The application process is, as follows:

- applicant must use the ETA app or GOV.UK website;
- applicant must take a photograph of their passport details page;
- must confirm the details drawn from the passport are accurate;
- take a scan of their face to 'confirm they are a real person' (provided the applicant is applying for themselves, otherwise they may skip this step);
- upload a recent photograph (no more than 3 months olds), and provided the automated checks confirm that the photo meets the requirements', provide additional information, including:
 - complete questions clarifying their nationality and if they have more than one;
 - confirm whether they currently have a job;
 - by selecting 'Yes', the applicant must insert details of their job which can be provided by way of a free textbox. Interestingly, it does not ask the country where the individual works;
 - by selecting 'No', no further information is required, and there is no free textbox to provide additional information; and
- select confirm to submit their application.

Once an ETA application has been submitted, as previously stated, there is no right to amend the application.²⁸ Applicants should receive a decision within 3 working days of submission but they may receive a quicker decision as a result of automated decision making process.²⁹

Automated decision making

The Government states that 'the decision to issue an ETA will be automated, but complex or adverse decisions will always be taken by a trained officer or caseworker'. Automated decision making involves the use of artificial intelligence (AI). In short, AI tools are designed on the basis of the end users' instructions (in this instance the government ((UK Visas and Immigration – the relevant arm of the Home Office)) to the developer (the government uses third parties), who then creates an algorithm using a sequence of instructions which are input to produce a predictable outcome, in order to meet the objectives of the end user.

The AI tool is trained on masses of past decisions (data sets) from which, using machine learning (ML), the tool modifies itself to achieve a 'better' result when creating future decisions. The quality of the training (data input) impacts the output decision. Hence, if the AI tool is trained on past UK Visas and Immigration decisions which may have been subject to inherent bias and prejudice, the AI tool will learn to incorporate this bias and prejudice in future decision making, known as the feedback loop.³⁰ The inability to see the internal

²⁷ GOV.UK, 'Electronic Travel Authorisation (ETA) scheme factsheet – February 2024'.

²⁸ Home Office, 'Electronic Travel Authorisation Version 3.0' (Published for Home Office staff on 1 February 2024)
<https://assets.publishing.service.gov.uk/media/65b24ca71702b10013cb12b6/Electronic+Travel+Authorisation+Guidance_7.pdf> accessed 2 February 2024.

²⁹ GOV.UK, 'Apply for an electronic travel authorisation (ETA)'.

workings of the AI tool and understand how it produced the output decision is known as the 'black box'.³¹

In relation to ETA, the AI tool will be used to categorise applications into those which may be issued on an automated basis, and those which require further consideration by a human decision maker, noting that a decision maker will 'only' need to consider an ETA application where either 'an applicant's identity cannot be satisfactorily established automatically, if potentially adverse information has been identified, or an applicant has self-declared criminality, involved in war crimes, terrorism or extremism' as stated in guidance.³² Hence, the AI tool will be programmed in line with the above and referred to a human decision maker on identity and suitability grounds.

Serious concerns have previously been raised relating to accountability and transparency in using AI for governmental decision making: '[the] black box nature means that the output of such processes is not intuitively explainable and cannot support casual explanations of the kind that underlie the reasons traditionally offered to justify governmental action'.³³ This is also why a refusal decision must be made by a human decision maker. However, there is a lack of transparency regarding the algorithm used for ETA applications. It is therefore difficult to ascertain on what basis an application will be sent to a human decision maker for further consideration, and whether it may exceed the scope of the reasons identified above. It is also impossible to know how the AI tool using ML will develop in consideration of the bias and prejudicial nature of the past decisions from which it learns and may result in the discriminatory allocation of applications on this basis. For instance, applications may be forwarded to human decision makers for further review on the basis of generic markers in the application.

In 2020, Foxglove and Joint Council for the Welfare of Immigrants challenged the Home Office algorithm which used a traffic light method to sift through visit visa applications to reach quick decisions.³⁴ Generic markers including nationality, country of birth, age and travel history were used to indicate whether the application should be considered red ('high risk'), amber ('medium risk') or green ('low risk').³⁵ Applications flagged as red were treated with suspicion and allegedly were automatically rejected, an application flagged as amber required further review and an application flagged as green were approved automatically.³⁶ The Home Office had a nationality list at the time

³⁰ Borgesius, Frederik Zuderveen, 'Discrimination, Artificial Intelligence, and Algorithmic' (*Council of Europe*, 2018) <<https://rm.coe.int/discrimination-artificial-intelligence-and-algorithmic-decision-making/1680925d73>> accessed 18 March 2024.

³¹ *ibid.*

³² Home Office, *Electronic Travel Authorisation Version 3.0.*, p.7.

³³ Finck, Michèle. "Automated Decision-Making and Administrative Law." Forthcoming, P. Cane et al.(eds), *Oxford Handbook of Comparative Administrative Law*, Oxford, Oxford University Press 2020 (2019): 19-10. Max Planck Institute for Innovation & Competition Research Paper No. 19-10.

³⁴ Foxglove, 'Home Office says it will abandon its racist visa algorithm – after we sued them' (4 August 2020) <<https://www.foxglove.org.uk/2020/08/04/home-office-says-it-will-abandon-its-racist-visa-algorithm-after-we-sued-them/>> accessed 17 June 2022.

³⁵ Independent Chief Inspector of Borders and Immigration: *An inspection of the Home Office's Network consolidation Programme and the "onshoring" of visa processing and decision making to the UK* (September 2018 – August 2019) <https://assets.publishing.service.gov.uk/media/5e3aa6df40f0b6090defbc29/ICIBI_An_inspection_of_the_Home_Office_s_Network_Consolidation_Programme.pdf> accessed 18 March 2024.

resulting in the supposedly immediate refusal of applications from the listed countries.³⁷ This was a highly discriminatory practice and created a 'digital hostile environment' as stated by the JCWI legal director at the time, Chai Patel.³⁸ The Home Office withdrew the use of the AI tool in this case and as a result, the challenge was settled.³⁹ Nonetheless, the significance of this case in relation to the automated processing of ETA application is pertinent.

Aside from this, problems arising from potential technological malfunction must also be considered. If the technology fails, there is a possibility that all ETA applications be sent to a human decision maker for review, which may result in significant delays of the processing of ETA applications, and may have a knock-on effect to other UK immigration routes, if the reallocation of Home Office caseworkers is required.

Right to review

The right to review an application is necessary to comply with individuals' data protection rights. As stated in the ETA caseworker guidance, article 22(3) of the Regulation (EU) 2016/679 (GDPR) of the European Parliament and of the Council provides applicants with the right to human intervention to review a decision that has been made through a fully automated process.⁴⁰ This provision is supplemented by section 14 of the Data Protection Act 2018.⁴¹ The right to review applies exclusively to applicants who have received an automated decision. Applicants who have been granted an ETA via a solely automated process will have one calendar month from the date of grant to request a review of the decision by the decision maker, provided the Home Office confirms the decision was made by a fully automated process. However, as a decision to reject or refuse an ETA application will not be automated and must be made by a human decision maker, Article 22(3) does not apply.⁴² The right to review is only available to applicants who have received an approval on their applications. In practice, an applicant who has received an approval is unlikely to need to request a right to review on their approved ETA application, unless for instance there was a technical issue and the applicant was not granted the allotted two years. The right to review has no doubt been added to comply with data protection standards, yet it is evident that the right in this instance is a redundant one.

Visit visa applications

There is no right of appeal or administrative review against refusal of an ETA application. If an ETA application is refused and the individual wishes to visit the

³⁶ *ibid.*

³⁷ Foxglove, 'Home Office says it will abandon its racist visa algorithm – after we sued them' (4 August 2020).

³⁸ The Guardian, 'Home Office to face legal challenge over 'digital hostile environment' (18 June 2020) <<https://www.theguardian.com/uk-news/2020/jun/18/home-office-legal-challenge-digital-hostile-environment>> accessed 18 March 2024.

³⁹ Foxglove, 'Home Office says it will abandon its racist visa algorithm – after we sued them' (4 August 2020).

⁴⁰ EU General Data Protection Regulation (GDPR): Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ 2016 L 119/1, article 22(3).

⁴¹ Data Protection Act 2018, Chapter 2, Section 14.

⁴² Regulation (EU) 2016/679 (GDPR), article 22(3).

UK, they will need to submit an application for 'entry clearance' as a visitor (for simplicity, referred to here as a 'Visit visa').

Summary of visitor visas

An applicant may apply for a standard visit visa of 6 months, 2, 5 or 10 years' duration, although the maximum permitted period of stay in the UK is 6 months per visit (with certain exceptions).

The standard processing time for a Visit visa application is 3 weeks, however applications can take much longer if there are any complications. Priority services (up to 5 days) may be available for an additional charge, but again if there are any complications the priority service standard will not usually apply.

The applicant must satisfy validity, suitability and eligibility requirements (with additional eligibility requirements depending on the type of visitor visa applied for). The suitability and eligibility requirements of the visitor route are the same, regardless of whether the individual is a NVN able to seek entry as a visitor on arrival to the UK or whether they are applying for a visit visa prior to travel. In our experience however outcomes vary, with the 'genuine' visitor requirement in particular causing issues in visit visa applications.

To meet the genuineness requirement the applicant must satisfy the decision maker that they:

- (a) will leave the UK at the end of their visit (and will not live in the UK for extended periods through frequent or successive visits, or make the UK their main home);
- (b) are genuinely seeking entry or stay for a purpose that is permitted under the Visitor route (and will not undertake any of the prohibited activities); and
- (c) have sufficient funds to cover all reasonable costs in relation to their visit without working or accessing public funds.

The application form is lengthy and requires the applicant to provide significant detail including: their intended date of travel to the UK; the address at which they will be staying in the UK during their visit; how much they think the trip will cost; current home address and how long they have lived there; parents' names and dates of birth (if known); how much they earn per year (if they have an income) and details of any criminal convictions, civil judgments or adverse immigration history. A caseworker shall use the information provided in the form, supporting documents and any other information about the applicant (for example from previous applications) to determine an applicant's genuineness and credibility. A caseworker shall assess: the applicant's genuine intention to visit the UK; the applicant's personal circumstances including their personal and economic ties to their country of residence, and the applicant's travel and immigration history amongst other factors to determine whether they are a 'genuine visitor'.

A visitor application can be rejected or refused if the applicant has not provided sufficient evidence that they satisfy, on the balance of probabilities, that they meet the requirements. An application can be rejected on the basis of the validity requirement concerning the applicant's identity or can be refused on the basis of

the suitability requirements when they do not satisfy the general grounds of refusal, as stated in part 9 of the immigration rules.

Issues with visit visas

The visitor route has received criticism because broad discretion is afforded to Home Office caseworkers in determining such applications, resulting in a high refusal rate. Decisions often appear subjective (particularly in relation to genuineness), and can appear to be based on ill-founded suspicion, often citing failure to submit evidence that the applicant was not directed to submit, and differ depending on the caseworker (or decision-making centre) who reviews the application. Applicants with certain nationalities that the Home Office considers 'high risk' are far more likely to receive refusal decisions, often with the reason for refusal being unclear. Crucially, there is no right to appeal or administratively review for a refused visitor application. There is the ability to judicially review the decision, although this is a costly and time consuming process with applications taking on average 6 months plus to be scheduled for a hearing. In practice, the method of recourse is to submit a fresh visitor application. The fact that there is no option to challenge refusal decisions means that the relevant caseworkers cannot be held accountable in cases of unsatisfactory decision making. Equally, caseworkers are not directed to provide a full explanation of the basis on which they made their decision. Hence, there is very little clarity with regard to the decision making process. To some extent, applicants and their solicitors, if applicable, must infer the basis on which the refusal decision was made, and consider how this may impact a subsequent application. This therefore causes great uncertainty as to why some applications may be refused over others, as it is very dependent upon the specific caseworker assessing the case. We often assist applicants with this process and provide legal representations explaining why they satisfy the visitor requirements to improve the chance of success, although there is no guarantee of success. There are however cases whereby applicants may receive multiple refusal decisions at great expense, before coming to us for assistance. Notably, not every applicant has access to legal representation.

When applying for a visitor application, any previous refusal decisions must be disclosed. There is however currently little clarity as to whether a refusal decision for an ETA application will need to be disclosed in a visitor application, nor whether such a refusal decision is likely to significantly impact an application under this route.

ETA and the Republic of Ireland/Northern Ireland border

The Common Travel Area (CTA) facilitates the free movement of people between the United Kingdom, the Crown dependencies and the Republic of Ireland.⁴³ As such, the UK does not operate immigration controls for journeys within the CTA, with no immigration controls at the Northern Ireland border with the Republic of Ireland. People legally resident in the Republic of Ireland and from a nationality that does not usually require a visa to visit the UK (such as EEA and US nationals) do not require an ETA when travelling within the CTA, provided they hold evidence of their residence status.⁴⁴ Irish residents traveling to the UK from

⁴³ GOV.UK, 'Electronic Travel Authorisation (ETA) scheme factsheet – February 2024'.

⁴⁴ GOV.UK, 'Electronic Travel Authorisation (ETA) scheme factsheet – February 2024'; GOV.UK, 'Electronic travel authorization (ETA): residents of Ireland' (UK Visas and Immigration, 25 October

outside the CTA, as well as visitors entering the UK from within the CTA, will require an ETA to enter the UK.⁴⁵ . Once the ETA scheme is fully in place, it will be a criminal offence to knowingly enter the UK without an ETA when one is required. Hence, individuals risk committing a criminal offence even if the ETA, in line with the above, is not checked at the Irish border.

ETA 'loophole' concerns

One major concern with regard to ETA and the Irish border is whether it presents a loophole for entry to the UK for individuals without an ETA. In practice, NVNs (excluding those who are resident in the Republic of Ireland) could board an aircraft to the Republic of Ireland, travel by land to Northern Ireland, and board an aircraft/ship to Great Britain, without the need to evidence an ETA. The House of Lords Secondary Legislation Scrutiny Committee have questioned 'the usefulness of a requirement to have an ETA for a journey that will be subject to no checks.'⁴⁶ Hence, as the Northern Ireland border is mostly unmarked, visitors entering the United Kingdom without an ETA at the Irish/Northern Irish border may unknowingly be committing a criminal offence, whilst individuals may knowingly use the loophole as a way to enter the UK with little ramification.

Additionally, border agents at the border will not necessarily be in a position to confirm whether an NVN has applied for an ETA or if that application has been refused. This therefore impacts the provision that NVNs can travel to the United Kingdom and can in turn travel to Great Britain via Northern Ireland while they wait for a decision on their ETA application. There is the concern that this will deter tourism in Northern Ireland for those who first arrive in the Republic.⁴⁷ The Northern Ireland Alliance has called on the government to provide an exemption on criminal sanctions for NVNs crossing the Republic of Ireland/Northern Ireland border to alleviate the legal complexities, but it does not remove the loophole. Depending on how the government acts, there is the concern that the ETA scheme (and the accompanying issue of criminal liability for failure to comply with ETA application requirements) may cause the border between Northern Ireland and the Republic to harden, contrary to the Common Travel Area Agreement, and the EU-UK Withdrawal Agreement and the Northern Ireland Protocol.

Liability of carriers

The purpose of the ETA scheme is to ensure individuals have permission to travel earlier in the passenger journey, a strategy which is meant to provide greater security at the UK border against those who may pose a potential threat. Section 76 of the Nationality and Borders Act 2022 amended s.40 Immigration and Asylum Act 1999 to impose a liability on carriers who bring individuals who

2023) <<https://www.gov.uk/guidance/electronic-travel-authorisation-eta-residents-of-ireland>> accessed 17 March 2024.

⁴⁵ *ibid.*

⁴⁶ www.parliament.uk, 'Statement of Changes to the Immigration Rules (HC 1160) and Immigration (Electronic Travel Authorisations) (Consequential Amendment) Regulations 2023 (SI 2023/305) (linked): oral evidence, Oral evidence session with Lord Murray of Blidworth, Parliamentary Under Secretary of State for Migration and Borders Home Office, Thursday 11 May 2023 < <https://publications.parliament.uk/pa/ld5803/ldselect/ldsecleg/197/19703.htm>> accessed 4 March 2024.

⁴⁷ *ibid.*

would not, upon their arrival to the UK, be entitled to enter without leave, and at least one of the following applies:

(1A) on being required to do so by an immigration officer, the individual fails to produce an immigration document which is valid and which satisfactorily establishes the individual's identity and nationality or citizenship; or/and

(1B) the individual requires entry clearance, an entry clearance in electronic form of the required form has not been granted, and if required to do so by the immigration officer, the individual fails to produce an entry clearance in documentary form of the required kind; or/and

(1C) the individual was not required to travel to the UK unless the individual had a valid ETA and the individual did not have such an ETA.⁴⁸

In which case, the Secretary of State may charge the owner of a ship or aircraft the sum of £2,000 if the carriers fail to ascertain whether an individual possesses the required permission, either in electronic or physical form.⁴⁹ Owners, agents or employees of the carriers can avoid liability if they can establish that they 'reasonably believed' an ETA was not required or if they were unable to establish if an individual had an ETA, along with a reasonable excuse for being unable to do so.⁵⁰ The government refers to this as a way of 'incentivising' carriers ie employees of the carriers, to check that passengers have the correct documentation prior to boarding the aircraft/ship.⁵¹ It is also meant to reduce the costs of detaining individuals who arrive at port, and the costs associated with the removal of individuals who have been refused entry at port.⁵² Instead of using 'turn-around tactics', as it is commonly referred to, this system will deter carriers from boarding individuals in the first place whose ETA or immigration permission is not obvious or clear for fear of receiving a financial penalty.

While carriers can avoid liability, there is the question of whether individuals who are refused permission to board the aircraft/ship should receive compensation for the disruption this would cause to their journey, if for example, the NVN did have an ETA but the carrier was unable to access this, due to technical issues (discussed in relation to EUSS below) or the individual did have immigration permission which perhaps the carrier did not recognise or fully understand to no fault of their own, as they are not trained immigration border officers. As the ETA scheme is intended to be rolled out worldwide, there is likely to be significant disparity in the application of the aforesaid strategy in ensuring individuals have valid immigration permission prior to boarding the aircraft/ship. We expect this to vary between different carriers as some may be more fearful

⁴⁸ Nationality and Borders Act 2022, Part 6, s. 76(2) (1A)-(1C); Immigration and Asylum Act 1999, s.40.

⁴⁹ NABA 2022, Part 6, s.76(2)(1).

⁵⁰ NABA 2022, Part 6, s.76 (4A) – (4B).

⁵¹ Home Office, Impact Assessment, 'Introduction of an Electronic Travel Authorisation (ETA) Scheme' (May 2023)

<https://assets.publishing.service.gov.uk/media/6489e74f5f7bb700127faa5d/ETA_impact_assessment.pdf> accessed 17 March 2024, p.5.

⁵² *ibid.*

of their potential liability than others and may refuse a greater amount of individuals who cannot clearly present their immigration status from boarding. The repercussions of this will be significant.

Digitalisation of all immigration status in the UK

The digitalisation of all immigration status in the UK is to be rolled at the end of this year, with a hard deadline of 31 December 2024. All individuals' physical Biometric Residence Permits (BRPs) – issued under the current regime of physical document evidence of immigration permission – are due to expire on this date.⁵³ In the run up to the deadline, individuals will be required to create an online UK Visa and Immigration (UKVI) account if they do not already have one, to attach their digital immigration status to their currently valid passport(s).

Within the past few weeks, the Home Office has commenced providing instructions to individuals who have received an approval of an immigration application (for individuals issued with a physical BRP) to set up their UKVI accounts, provided they do not already have one. It is worth noting that from January 2025, individuals' immigration status will be exclusively digital and there will be no option to pay for a physical BRP.

Currently, applicants under the EU Settlement Scheme (EUSS) are one of the principal cohorts who have been issued with fully digitalised immigration permission and have experienced the issues that come with this. At the Committee's oral evidence hearing on 12 March 2024, Monique Hawkins from the 3million concisely addressed the issues EU nationals with status issued under the EUSS face. Additionally, JUSTICE has recently published a report 'Reforming the EU Settlement Scheme' which addresses issues are regards the digitalisation of EUSS' immigration permission.⁵⁴ We would encourage the committee to review this report, provided it has not already been submitted as written evidence.

There are serious concerns regarding the government's use and handling of individuals' data and significant technical faults which appear to be widespread in the Home Office's databases. Holders of digital status have reported (including as referred to by Monique Hawkins) serious issues as reports of incorrect information and photos of totally unrelated individuals appear when checking their digital immigration status, meaning their status is invalid and cannot be use for right to work or right to rent checks, in addition to the issues experienced when travelling as a result of this. These issues exist at the 'back end' of the digital system, requiring significant time and resources to rectify and providing little in the way of recourse for those digital status holders affected. This is of course highly disconcerting to those status holders and can result in significant adverse impacts, such as refusal of entry to the UK, and inability to access work, accommodation, healthcare and public services. The Guardian recently published an article titled 'Home Office immigration database errors hit more than 76,000 people' which encapsulates the gravity of existing technical issues and the number of people it is currently affecting.⁵⁵

⁵³ UK Parliament, 'Electronic travel authorisations: what's the ETA?'

⁵⁴ JUSTICE, 'Reforming the EU Settlement Scheme: The Way Forward for the EUSS' (March 2024) <<https://files.justice.org.uk/wp-content/uploads/2024/03/12150659/Reforming-the-EU-Settlement-Scheme-JUSTICE-Report-March-2024.pdf>> accessed 19 March 2024.

⁵⁵ Henry Dyer, Diane Taylo and Rajeev Syal, 'Home Office immigration database errors hit more

These issues are all the more concerning in light of the fact that UKVI have updated their terms and conditions concerning the Home Office's exclusion of any liability for any loss of damage that arises from use of the UKVI account, as follows:

The Home Office is not liable for any loss or damage that arises from the use of the UKVI account. This includes:

- *any direct, indirect, or consequential loss*
- *any inability to use the UKVI account*
- *any disruption to access to the UKVI account any information that is lost or corrupted while data is being transmitted, processed or downloaded from the UKVI account.*⁵⁶

This exclusion of liability indicates a lack of accountability on the part of the Home Office and an unwillingness to engage with the above-detailed technical issues. By preventing individuals from proving their immigration status, these technical issues will result in serious consequences for those digital status holders involved.

Another prominent concern is that carriers in recognition of their potential liability may not allow individuals with digital immigration permission to board if they cannot present their digital status easily. To share their digital immigration permission, an individual must use a GOV.UK website and enter their passport number (to which their status is linked) and their date of birth to generate a share code, valid for 90 days. The share code can be shared with the employer, landlord or any other individual who wishes to check their immigration status. Using a different GOV.UK website, the person checking their immigration permission must enter the individual's share code and date of birth and will be required to provide who they are and which company they work for when requesting evidence of the individual's digital immigration permission. The timely process to check an individual's immigration permission including the need for a share code, and requirement to insert the details of their role and employer, to then cross-reference the photo of the individual with the person at the immigration desk, is not a simple procedure by any means, which employees of the carriers may be reluctant to complete.

We urge for the delay of the digitalisation process until such technical issues are sorted. The only way to mitigate the considerable damage and risk to individuals' ability to access their rights is to the delay the rolling out of this process, until such time as the existing technical issues, as experienced with the European Union Settlement Scheme, are resolved.

25 March 2024

than 76,000 people' (The Guardian, 14 March 2024) < Home Office immigration database errors hit more than 76,000 people'> accessed 14 March 2024.

⁵⁶ GOV.UK, 'UKVI account: terms and conditions (UK Visas and Immigration, 19 February 2024) <<https://www.gov.uk/government/publications/ukvi-account-terms-and-conditions/ukvi-account-terms-and-conditions>> accessed 20 February 2024.