

CAJ briefing note: Nationality and Borders Bill - Electronic Travel Authorisation December 2021

Clause 71 of the Nationality and Borders bill (as introduced to HL) amends the Immigration Act 1971 to introduce Electronic Travel Authorisations (ETA).¹ This provides for a pre-entry clearance system, which requires anyone who does not need a visa, entry clearance or other specified immigration status to obtain authorisation before travelling to the UK. This includes on journeys within the Common Travel Area (CTA). Indeed, the present clause 71(2) has been expressly formulated to ensure CTA journeys are captured:

Immigration Rules may require an individual of a description specified in the rules not to travel to the United Kingdom from any place (including a place in the common travel area), whether with a view to entering the United Kingdom or to passing through it without entering, unless the individual has an ETA that is valid for the individual's journey to the United Kingdom.”²

This system will not apply to British or Irish citizens or those who have already been granted leave to enter or remain in the UK. The system will mainly impact non-visa nationals, including EU nationals, who can presently enter the UK ‘visa free’ for set periods. Almost all such persons are presently automatically considered to have ‘deemed leave’ into the UK when crossing into Northern Ireland over the land border. Clause 71(4) has been drafted intentionally to ensure that persons who are traveling within the CTA and consequently would not need leave to enter the UK will still require an ETA.³

Kevin Foster MP gave evidence to the NI Affairs Committee on the 8th December 2021 which included answering detailed questions about the impact of ETA in Northern Ireland. It was evident that the UK government intends the scheme to apply on the land border, and they appear dismissive of concerns raised. Mr Foster even stated that people resident in ROI would “*probably get used to the idea that they need to apply for something in terms of the UK.*” It was also confirmed that ETA will involve payment of a fee and an online application.⁴

Impact in Northern Ireland

The present situation has been for some time that almost all EU/EEA and non-EEA citizens who are non-visa nationals present in the Republic of Ireland (ROI) can cross the land border freely on local journeys into NI without any requirement for prior immigration permission.⁵ For EU/EEA citizens since Brexit, as was already the case with other non-visa nationals, this

¹ Nationality and Borders bill as introduced HL

<https://bills.parliament.uk/publications/44307/documents/1132>

² Clause 71(2) https://publications.parliament.uk/pa/bills/lbill/58-02/082/5802082_en_1.html

³ Clause 71(4) “In relation to an individual travelling to the United Kingdom on a local journey from a place in the common travel area, subsection (3)(b) applies only if the individual would also be entitled to enter without leave if the journey were instead from a place outside the common travel area.”

⁴ Northern Ireland Affairs Committee, Oral evidence: UK immigration policy and the Common Travel Area, HC 795, Wednesday 8 December 2021 Q21, Q23-25 <https://committees.parliament.uk/oralevidence/3171/pdf/>

⁵ See s1(3) of the (UK) Immigration Act 1971, and The Immigration (Control of Entry through Republic of Ireland) Order 1972 (as amended).

permission in such circumstances is restricted to entry as a visitor and certain activities such as work are restricted when entering the UK this way.⁶ However, this system has allowed non-visa nationals resident in border areas in the RoI to enter NI freely for a range of activities. It has allowed many people to live fluid, cross border lives.

Under this new proposal, non-visa nationals resident in RoI will be required to apply in advance and pay for, ETA before crossing the border into NI. It is clear that this will have a unique detrimental impact on non-visa nationals who need to enter Northern Ireland for activities such as visiting family, accessing childcare, permitted work engagements and accessing services and goods. This system will also impact the ability of members of the migrant community to take part freely in cross border projects and programmes.

Concerns have also been raised about the impact of ETA on business and tourism, as it would require non-visa nationals in RoI to obtain ETA before a visit to NI.

In the context of an invisible land border that British and Irish citizens can freely cross, it is eminently foreseeable that many other persons who have hitherto been able to similarly cross the border without any prior permission will be largely unaware of the ETA requirement.

Legal Impacts

Clause 39 of the Nationality and Borders bill increases the maximum penalty for entering the UK without leave or arriving without a valid entry clearance from 6 months to 4 years. This includes knowingly arriving in the UK without a required ETA.⁷ There is a risk that people crossing the land border will not be aware of the ETA requirement and will enter NI without it, yet could still be subject to prosecution. For EU and other non-visa nationals in border counties who regularly cross the border as part of fluid daily lives, and do apply for a multiple entry ETA, there is also a risk of forgetting to renew it, and being held similarly liable.

The enforcement of this requirement in relation to land border crossings is also a serious area of concern. The Home Office has committed to no checks whatsoever on the land border, but from a rule of law and legal certainty in rights perspective clearly the position cannot just be to emphasise there are no routine border controls (i.e. implying that 'you won't get caught'.) This is not only not the case, and with the consequences of being detected so severe, it creates a climate of arbitrariness as to whether there is a requirement or not.

Testimony to the Northern Ireland Affairs Committee from Home Office Minister Kevin Foster MP indicate that checks for ETA will still occur through ad hoc and in country checks: *"We also would not be checking them normally, because we do not operate routine immigration controls through the CTA. However, it would be a similar position in Northern Ireland to if someone was in the rest of the UK, and we may look to see if they have that permission to be in the UK."*⁸

Such *ad hoc* type checks, in particular on NI-GB journeys or persons crossing the border to RoI, have already been a fertile ground for racial profiling and broader discrimination. In the

⁶ <https://www.gov.uk/standard-visitor>

⁷ See Part 3, Clause 39: <https://bills.parliament.uk/publications/44307/documents/1132>

⁸ As above, see response to Question 5 <https://committees.parliament.uk/oralevidence/3171/pdf/>

particular context of the land border an ETA requirement risks severely exacerbating these problems.

There is also the complexity of who is required to have an ETA. EU citizens who have retained EU rights under the Withdrawal Agreement (due to NI residence or as frontier workers) and hence have an immigration status will not be required to have an ETA, yet other EU citizens resident in border counties will be required to. It is unclear how such categories of person will be distinguished, unless there is an expectation migrants carry papers all the time. It is also not possible to distinguish migrants from British and Irish citizens. It is also eminently foreseeable that this requirement risks widespread racial discrimination, the avoidable placing of considerable numbers of persons in an irregular status, and a hardening of the land border in practice for persons who are not 'perceived' to be British or Irish.

Interaction with the NI Protocol

The application of the ETA scheme to the land border conflicts with commitments in the NI Protocol to the Withdrawal Agreement. Article 1 of the Protocol sets out its Objectives, expressly subsection 3 states:

*This Protocol sets out **arrangements necessary** to address the unique circumstances on the island of Ireland, to maintain the necessary conditions for continued North-South cooperation, **to avoid a hard border** and to protect the 1998 Agreement in all its dimensions. (emphasis added).*

The preamble to the Protocol also reiterates the commitment of the UK to avoiding a hard border. Article 3(2) provides:

The United Kingdom shall ensure that the Common Travel Area and the rights and privileges associated therewith can continue to apply without affecting the obligations of Ireland under Union law, in particular with respect to free movement to, from and within Ireland for Union citizens and their family members, irrespective of their nationality.

In conflict to the objectives of the Protocol, as set out in Article 1, the proposed ETA system far from ensuring the CTA arrangements 'can continue to apply', represents a diminution of the present CTA arrangements where entry into NI is presently permitted for EU/non visa nationals without any prior permission. The ETA proposals would create a hard border for such persons in conflict with the objectives of the Protocol, the necessary arrangements for which are to be made by the UK and Ireland under Article 3.

We believe that the proposed ETA system may also engage Article 2 of the Protocol as it is linked to the UK exiting the EU and engages and diminishes GFA rights set out in the 'Rights, Safeguards and Equality of Opportunity' section of the Agreement, including rights to non-discrimination and choosing residence.

Legislative process

An amendment to the bill was tabled at Report stage by Stephen Farry MP and supported by Claire Hannah MP, Colum Eastwood MP, Bell Ribeiro-Addy MP and Alistair Carmichael MP.⁹

⁹ Amendment 13: https://publications.parliament.uk/pa/bills/cbill/58-02/0187/amend/natbord_day_rep_1207.pdf

The amendment aimed to exempt local journeys over the land border from ETA requirements. The amendment was not selected for a vote.

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