

# The 'Next Generation' Visa Belt and braces or the emperor's new clothes?

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## Abstract

National, state-based visa waivers are 'blunt instruments' for border, immigration, and mobility management. A symbol of the tension between the norms of reciprocity and unilateralism: the unilateral imposition of a Canadian visa on Czech nationals caused diplomatic turbulence between the Czech and Canadian governments, and posed a policy problem for the EU. Should all EU member states impose a reciprocal visa on Canadians or undermine the norm of reciprocity and admit that certain member states and bilateral relations are more important than others?

The proposed long-term policy solution is a 'next generation' visa that is capable of targeting individuals rather than entire state populations. We argue that i) there is no evidence in current profiling or risk assessment systems that any programme can provide a compelling, efficient, and secure target list and ii) individualised visa restrictions targeting would violate international legal obligations under the Convention Relating to the Status of Refugees.



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# The 'Next Generation' Visa Belt and braces or the emperor's new clothes?

Mark B. Salter and Can E. Mutlu\*

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## Introduction

Visa policy represents a nexus of conflicting imperatives for contemporary, developed, liberal states. There are commercial and social pressures in favour of integration and movement; a security impetus to protect the population; international human rights obligations; procedural and substantive justice concerns for the recognition and the settlement of refugees; and efficiency concerns about border management. Canada and European Union (EU) member states, for example, manage these complex pressures through visas, visa-waiver programmes and multilateral or bilateral visa agreements. The recent Canada-Czech Republic visa issue illustrates the degree to which there is tension between the EU's norm of visa reciprocity and Canada's independent assessment of visa exemption on a country-by-country basis. Canada, the EU, and EU member states are discussing a 'next generation' visa that would not be based on country of origin or nationality, but capable of being targeted at individuals.

One of the primary markers of state sovereignty is the authority to control population, and specifically to delimit and police international borders. To manage the large volume of border-crossings states have adopted the practice of rendering decisions at a distance, off-shore, before the migrant, traveller, or asylum seeker arrives at the physical border crossing. While passports are used to identify nationals that have a right to re-enter their country of citizenship, visas are used to represent a *prima facie* case for travel to a particular country. Visa approval does not however imply entry to the destination country, as border police retain a clear sovereign right to admit or refuse entry to any traveller. Admission is based on domestic law and regulations, but is also informed by the structure of international law, in particular citizenship rights and the rights of refugees.

## State of play

Home affairs, foreign relations, and immigration ministries manage this consulate work through national-level decisions about visa waivers. Defining visa waivers on a country-by-country basis, or on a bi- or multilateral basis is, in the words of the former Canadian Minister of Citizenship, Immigration and Multiculturalism Jason Kenny, at best

a very blunt instrument. It undermines Canada's commercial and diplomatic interests. It's a necessary tool to use in a managed immigration system but you want to [use it] only as your last resort (sic) (2010).

Between the EU and Canada, we see an example of two prevailing norms for visa waivers: policy and political turbulence can arise when these norms conflict.

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In the EU, member state (MS) visa policies are part of the Schengen *acquis*, and so all member state visa policies are coordinated through a so-called ‘white’ and ‘black’ list. The EU adheres to the norm of reciprocity, in that visa-waivers are granted for states that grant visa-waivers to EU nationals. In this way, although visa policy is part of Directorate General Home Affairs, it becomes an important diplomatic tool for the European External Action Service, particularly in the negotiation of framework or trade agreements (Brazil and Canada, for example). Alongside the treaties and agreements governing the management of migration is the system for refugee adjudication. Two tools dominate the integration of the refugee adjudication system in Europe: safe-third country agreements and the Aznar Protocol. In the former, the EU has negotiated agreements with neighbouring countries, so that irregular migrants or asylum seekers must claim refugee status in the first ‘safe’ country in which they are physically present: an asylum seeker who enters the EU from Ukraine (either from Ukraine itself or if Ukraine is simply a transit state) must thus make their asylum claim in Ukraine, as part of the EU-Ukraine Association Agenda. The Aznar Protocol on Asylum (Protocol 24 of the Amsterdam Treaty (1999) on Asylum for Nationals of Member States of the European Union) on the other hand asserts that all member states of the European Union will regard other member states as safe countries of origin. This makes it extraordinarily difficult for EU citizens to make asylum claims in another EU member state (although a small number of such cases do exist; perhaps 25 in the last five years).

In the Canadian case, visas are viewed as a natural exercise of the sovereign right to control borders, and a visa waiver is seen as an exception and a privilege. Visa waivers are considered on a case-by-case basis, weighted by objective standards. Canada has a unilateral visa waiver programme that is based on Canadian investigations of specific countries – not reciprocity (Robbins-Wright, 2011). Visa policy is the responsibility of the Citizenship and Immigration Canada (CIC). While Canada follows a ‘whole-of-government’ approach, the legislation that governs visa and refugee determination policy is the Balanced Refugee Reform Act, or Bill C-11 that speaks directly to CIC. One of the most hotly debated innovations in C-11 was the introduction of a category of “designated countries of origin.” Following a similar logic to the Aznar Protocol, asylum seekers from designated countries of origin still enjoy the same legal process of investigation and appeal upon arriving in Canada. Under C-11, however, both the adjudication and appeals processes for those from designated countries of origin are expedited and their claims are adjudicated by the Immigration and Refugee Board (IRB), a quasi-independent board that reaches its decisions independent of visa or immigration policy.

In terms of multilateral relations, we can see the problems that can arise in this complex environment. The EU wants reciprocity, but Canada does not accept any such *prima facie* obligation.

### **The Canada-Czech-EU visa dispute**

To take a clear example: in March 2009, Canada imposed a visa restriction on the Czech Republic, having recently granted a visa waiver to Czech nationals in 2007. The then-Minister of Citizenship and Immigration, Jason Kenney invoked several arguments for this re-imposition of the visa: one argument, in keeping with the logic of the Aznar Protocol, suggested that “it is hard to believe that the Czech Republic is an island of persecution in Europe”;<sup>1</sup> the second argument was one of efficiency and fraud, the large number of claimants originating from the Czech Republic – and the large proportion of cases that were abandoned – suggested to the government that there was widespread abuse, and that these applications were a way to ‘jump

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<sup>1</sup> Statement made in Paris, April 2009.

the queue' to get into Canada. This claim was supported anecdotally by reports of transnational organised networks and a Czech television programme extolling the ease of the Canadian refugee system. The government presented two aspects of this argument: the large number of claims was themselves an issue, despite the proportion of claims that were accepted, and the large number of abandoned claims was interpreted as indicating fraud (and not frustration, fear, or a loss of trust in the adjudication/appeals process). The IRB, however, did grant a number of asylum seekers refugee status during this period of increased flows, although the individualised structure of the IRB process makes it impossible to prove with certainty that the claimants were Czech Roma in particular, and neither the CIC nor the IRB collect data on ethnicity. We can infer that the Roma were well-represented in that claimant population because in March 2009, the Research Directorate of the IRB researched an issue paper, which was published in July 2009: "Fact-finding mission report on the situation and treatment of Roma and potential for internal relocation" (IRB, 2009).

Currently, a visa is still required for Czech nationals, and asylum claimants have dropped to pre-waiver levels. Both Canada and the Czech Republic officials claim publicly that the visa issue is minor and does not have a negative impact on a rich and profitable bilateral relationship. Both states have agreed that their aim is visa-free travel, and there are high-level groups working towards this goal. However, it remains an issue that preoccupies both states.

The Czech Republic is restricted in its options because of their commitment to the Schengen zone; under the Schengen *acquis*, the Czech Republic is unable to impose a retaliatory visa on all Canadian nationals, although it has imposed a visa restriction on government and diplomatic passports. The Czech Republic might wish to invoke the norm of reciprocity, but it is unclear whether the EU and its member states are willing to impose visas on the 2 million annual Canadian visitors to the European Union for the sake of 12 thousand annual Czech visits to Canada. However, as the EU is unwilling to impose a reciprocal visa, does it lose credibility with member states – particularly since Canada still requires visas on Bulgarian and Romanian nationals? The EU is also in the process of negotiating a general framework agreement with Canada, which will allow free trade in goods and services. Because this 'mixed' agreement will need to be ratified by each individual member state legislature under existing EU rules, there is a danger that the relatively minor issue of visa policy could derail a more major multilateral treaty.

Because visas are national, they are a blunt instrument. Consequently, states – and in particular Canada and CIC – are seeking a 'next generation visa' that will allow the instrument to become more refined.

### **The 'next generation' visa**

Effective policy choice in this area is exceptionally difficult to assess. Traditional standards of efficiency, effectiveness, and risk management are insufficient (Papademetriou & Collett, 2011). On the one hand, the cost of failure of these border management systems, if the result is catastrophic, is difficult to calculate in terms of impact on GDP, foreign relations, or national security. On the other hand, the cost of success is an ongoing drag on border processing and an increased economic cost to international travel. There are also hidden costs, in terms of both public diplomacy (the global perception of Canadian or EU values) and in terms of the state's obligations under international law, in particular obligations under the United Nations refugee regime. If we accept that states must manage irregular migration through visa policies while respecting domestic obligations under international law, policies need to balance the standards of procedural and substantive justice: visa policies must treat each individual request for entry and each claim for asylum fairly and efficiently.

Government agencies seek to manage this border problem by both facilitating the smooth travel of those travellers who are ‘low-risk’ or ‘trusted’ and by implementing multiple pre-border checks on ‘high-risk’ travellers: within the industry and government field, this is often expressed as the merging of facilitation and security concerns (Koslowski, 2011).

In several recent meetings, EU and Canadian officials have intimated that plans are being developed for a ‘next generation’ visa that would be able to refine the blunt instrument of visa waivers and allow for more precise targeting. The new instrument would allow for a personalisation or individualisation of the visa. There are three models for targeted visas: the now-defunct US National Security Entry-Exit Registration System (NSEERS) programme, Australia’s Electronic Travel Authority (ETA) programme, and the new US Electronic System for Travel Authorization (ESTA) system.

In this paper, we do not cover the refugee or asylum systems of these states, although Australia in particular has tightened restrictions on asylum seekers, going so far as to exclude territory (such as Christmas Island) and seek extra-territorial interdiction and processing (the so-called Pacific Solution) (Wilson, 2008). The United States has also recently concluded a Safe Third Country Agreement with Canada, modelled on the European example (Macklin, 2005). It should be noted that both the United States and Australia seek reciprocal visa waivers, but also reserve the absolute right to grant or refuse visa waiver status. For the US, consequently, there are three EU members that are not members of the Visa Waiver Program (VWP), because of objective criteria (similar to Canada’s assessment) in rates of over-stays, rejected applications, and fraud (Wilson, 2007).

The NSEERS programme, which was in place between 2002-2011, was implemented in response to security concerns identified by the 9/11 Commission Report (Shora, 2003). Thus, its concern is a more narrow focus on homeland security and counter-terrorism. Nationals from 25 identified countries which were thought to be more likely sources of terrorists were required to register at ports-of-entry, regardless of current nationality or nationality of passport. NSEERS is an example of negative profiling, and was roundly criticised in terms of efficacy and fairness. While not a visa programme, it was specifically implemented as a necessary supplement to the visa application process, which was seen as being insecure. In 2004, a wider system was implemented that captured biometric (fingerprint and digital photograph) and ‘tombstone’ data (name, date of birth, gender, address) of all visitors that did not hold an American passport (although the majority of Canadian visitors are exempt, as are Mexican holders of the Border Crossing Card or ‘laser visa’). This biometric data is captured at the initial application site and again at the border, to deter fraud by comparing the data. The US Visitor and Immigrant Status Indicator Technology (US-VISIT) Program is required of all non-US passport holders, including those applying for admission on immigration visas or as refugees.

The Australian Electronic Travel Authority is an entirely electronic authority to travel that provides a “go/no go” message to travel agents, airline personnel, and border agents based on an examination of tombstone data that is entered online or through an agent (Weber, 2007). The initial aim was the facilitation of travel, particularly because of the expense of repatriation of refused immigrants, but as the Australian government has become sensitised to the issue of asylum seekers it also comes to play a role in screening. A special subset of the ETA called the e-Visitor is specifically for European states. The screening of potential asylum seekers is, like Canada, done at the national level rather than the individual level, and the ETA process does not include a risk score for asylum.

The recent ESTA system in the United States adds a new security screening system to those nationals from Visa Waiver Program countries, undoing some of the facilitation benefits of the VWP itself. The US VWP is administered through the Department of Homeland Security, and

while one of the key components for eligibility is a visa refusal rate of less than 10% and a biometric, machine-readable travel document, not all countries that meet these criteria are admitted (GAO, 2008). As with the Canada-Czech Republic dispute, the question of visa waivers for Bulgaria, Cyprus, Poland, Romania and Slovenia undermine the EU’s practice of reciprocity: there is no European discussion of imposing a visa on US citizens. Like Australia, the online application ESTA procedure allows for the pre-clearance of travellers to the US, particularly in comparison to no-fly, criminal and terrorism watch lists. At present, there is no evidence to suggest that the ESTA system is used for refugee risk scoring.

There is no evidence either that any of these states are able to marshal data or provide risk scores for asylum seeking at the individual level. But there is evidence of informal knowledge production and sharing between border agents (Pratt, 2008; Heyman, 2001), although these risk profiles are not official, and little data exists about the efficacy or fairness of these profiles.

*Comparison of next generation visa models*

	NSEERS (USA)	e-Visitor (Australia)	ESTA (USA)
Eligibility	Selected States <sup>2</sup> (25)	ETA Selected states <sup>3</sup> (42) e-Visitor (27)	Visa Waiver Program <sup>4</sup> (36)
Dates	2002-2011	ESTA: 1996-present eVisitor: 2008-present	2009-present
Goal	Screening	Facilitation/Screening	Screening
EU Countries eligible	0	27	22
		Austria Belgium Denmark Finland France Germany Greece Ireland Italy Luxembourg Netherlands Portugal Spain Sweden United Kingdom	Austria Belgium Czech Republic Denmark Estonia Finland France Germany Greece Hungary Ireland Italy Latvia Lithuania Luxembourg Malta Netherlands

<sup>2</sup> Iran, Iraq, Libya, Sudan, Syria, Afghanistan, Algeria, Bahrain, Eritrea, Lebanon, Morocco, North Korea, Oman, Qatar, Somalia, Tunisia, United Arab Emirates, Yemen, Pakistan, Saudi Arabia, Bangladesh, Egypt, Indonesia, Jordan, Kuwait.

<sup>3</sup> Apply directly online: Brunei, Canada, Hong Kong SAR, Japan, Malaysia, Singapore, South Korea, United States of America. Apply through service providers: Andorra, Austria, Belgium, Brunei, Canada, Denmark, Finland, France, Germany, Greece, Hong Kong (SAR), Iceland, Ireland, Italy, Japan, Liechtenstein, Luxembourg, Malaysia, Malta, Monaco, the Netherlands, Norway, Portugal, Republic of San Marino, Singapore, South Korea, Spain, Sweden, Switzerland, Taiwan, United Kingdom – British Citizens and British Nationals (Overseas), United States of America, and Vatican City.

<sup>4</sup> Andorra, Australia, Austria, Belgium, Brunei, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Republic of Korea, Latvia, Liechtenstein, Lithuania, Luxemborg, Malta, Monaco, The Netherlands, New Zealand, Norway, Portugal, San Marino, Singapore, Slovakia, Slovenia, Spain, Sweden, Switzerland, United Kingdom.

			Portugal Slovakia Spain Sweden United Kingdom
EU Countries excluded	27	12 (all eligible under e-Visitor)	5
	Austria Belgium Bulgaria Cyprus Czech Republic Denmark Estonia Finland France Germany Greece Hungary Ireland Italy Latvia Lithuania Luxembourg Malta Netherlands Poland Portugal Slovakia Spain Sweden United Kingdom	Bulgaria Cyprus Czech Republic Estonia Hungary Latvia Lithuania Malta Poland Slovakia Slovenia	Bulgaria Cyprus Poland Romania Slovenia

Source: Authors' compilation.

In each case, we can identify two policy behaviours: cross-checking of tombstone and biometric data with current watch-lists, and profiling. Watch-lists might have forensic utility in catching repeat offenders of immigration fraud, but have no utility in the adjudication of refugee claims. Profiling is the practice of assembling patterns of origin or behaviour that are used to predict risk, for homeland security or immigration fraud or fraudulent asylum seeking (Amoore, 2006). Informally, for example, border guards might be suspicious of a particular air route or claimant narrative. But this kind of profiling cannot be applied to refugee claimants, as there is no available historical pattern of data (either successful or unsuccessful applications) that could be aggregated to create reliable and legitimate profiles. This is not to say that aggregate data has not been used and is effective in making national-level profiles – and indeed forms one of the objective bases of the decisions for visa waiver status – but rather that the tool of the profile is not only ineffective at making individualised judgments about the *prima facie* case for an asylum claim, but also that it runs counter to due process obligations to treat each application independently (Macklin, 2009, p. 137). In short, watch-lists or profiling cannot achieve the goals of individualised screening with relation to security or fraud risk.

In sum, **none** of these programmes meets the needs of a 'next generation visa': while there is individual risk-scoring based on passenger-name data and other kinds of profiling, the only sustainable, efficient, and fair go/no-go decisions that are based on individual data are comparisons to watch-lists, or specifically named individuals. There is no successful example of



an individualised screening process that can assess the risk of fraudulent asylum seeking populations based on profiles or predictive modelling, which meets states' obligations under international law to treat each asylum case individually.

*Effectiveness:* there is no evidence that individualised risk profiling is effective. In the case of the Czech asylum claimants, there is no way of identifying if a particular individual was a) Roma or b) more likely to be making a fraudulent claim without an investigation into the individual claim by IRB. Because asylum seekers must demonstrate a reasonable fear of persecution by the very government they flee, it is impossible to determine their potential status using government documents. Also, given what we know about the surveillance of the internet in authoritarian regimes, requiring an electronic application that might set out the grounds for persecution could endanger the applicant. If the visa application process becomes a more forensic investigation of grounds for asylum, then it becomes a less independent process than the process guaranteed by the institutional separation of the CIC and IRB.

*Efficiency:* though a blunt instrument, state-level visa waiver decisions can be made using aggregate data and particular investigations, as the Czech case demonstrates. If the purpose of a Canadian or EU next generation visa were an additional system that filtered regular and irregular migrants, on top of the existing visa waiver programme, then the case for efficiency is difficult to make. There is already a no-fly list, and visa system and visa waiver programme; a 'belt and braces' approach – like the ETA or ESTA – would have to make a clear case in terms of security or in terms of reduction in false asylum claims, and there is no such evidence from the Australian or American cases that their secondary system has that effect.

*Rights:* at the moment, individual claims for asylum are processes when nationals arrive on Canadian soil, as is their right guaranteed under Canadian law and Canada's international legal obligations. The visa waiver for Czech nationals clearly provided an avenue for asylum seekers to claim refugee status in Canada in much higher numbers during the short period of time it was in effect. But, if the proportion of asylum claims granted remained the same (not counting abandonments as inherently fraudulent), then it is unclear what the justification might be for prohibiting those individuals from making that claim without any investigation.

## Conclusion

National-level visa requirements and visa waivers are no doubt blunt instruments, and when all you have is a hammer, every problem tends to look like a nail. However, tombstone data and biometric information cannot provide enough evidence to gauge the likelihood of security threats or intention to seek asylum (genuinely or fraudulently), and there is no secure way to provide enough personal data about persecution that does not endanger the lives of those in genuine fear of the state. The existing models of 'next generation visas' do not provide added security, do not add value in terms of risk mitigation or migration management, do not demonstrate gains in efficiency, and do not protect fundamental rights. In other words, scaling the focus of visa-waiver process down to the individual has proven to be neither efficient nor effective in deterring an influx of asylum seekers or increasing security. Similarly, scaling the focus of the visa-waiver process down to the individual level will inevitably create privacy concerns and raise issues of profiling. Given the different laws and regulations surrounding privacy as well as the differing legal bases of rights in the EU, Canada and the US, such an approach to border management will inevitably prove to be problematic.

In the particular case of the Canada-Czech-EU visa issue, from the perspective of Canada, there is no policy tool that will manage the question of Roma asylum seekers: no reliable profile is possible that meets the IRB standards or Canada's obligations under international law, and furthermore, there is no way to define or measure the Roma either as individual applicants or as

a population because that data is not collected and cannot be inferred. Canada may revisit the Czech visa waiver, particularly in light of the upcoming ratification of the Canada-EU framework agreement, but any such reconsideration would have to be based on new reporting and research from the IRB. There is no clear existing policy that would allow for a new visa waiver that could pre-judge asylum cases in a way that is efficient or fair.

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