House of Lords Regret Motion:
Statement of Changes in immigration rules HC367
6 April 2010
Immigration Law Practitioners Association
Briefing

Introduction

The Immigration Law Practitioners' Association (ILPA) is a professional association with some 900 members, who are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-government organisations and others working in this field are also members. ILPA exists to promote and improve the giving of advice on immigration and asylum through training, disseminating information, research and analysis. ILPA is represented on numerous government and other stakeholder and advisory groups.

Introduction

HC 367 concerns changes to eligibility to come to the UK under Tier 4 of the Points-Based System, which is concerned with students. On 18 March 2010, the Government laid before parliament HC 439, which, *inter alia*, makes changes to the regime for Tier 4 sponsors, and is part of the same package of measures. We are aware that HC 439 may be the subject of a separate motion/prayer but touch upon it here it is part of the context for HC 367.

The House of Lords Merits of Statutory Instruments Committee in its 11th report of session 2009-2010[1] stated of HC 367

> **"This instrument is drawn to the special attention of the House on the ground that it may imperfectly achieve its policy objectives.** "

That part of the Committee's report dealing with HC 367 is appended to this briefing. The Committee also summarise the effect of the instrument clearly and succinctly in that part of their report that is appended and we do not repeat their summary here.

In this briefing we highlight

- Concerns that changes to Tier 4 reveal more fundamental weaknesses in the Points-Based System
- Concerns at the detail of HC 367 and in particular the risk that it will entail discrimination on the grounds of sex and race.
- The history of HC 367's being presented to parliament and in particular its prior release to the media

[1] 23 February 2010, HL Paper 62.

History of HC 367's being presented to parliament

These changes were first mooted in November 2009 when there was there was an extremely truncated consultation. ILPA first received the questions that formed the basis of the review on 30 November and put in its observations on 4 December 2009. Other organisations had a little longer, but not much. In its response to that review, Universities UK stated:

> *"…it appears that the reasons for this review stem from the provision of visa letters by a certain type of private provider to prospective students from certain countries seeking to undertake low level qualifications who lack apparent suitability for study in the UK.*
>
> *However, no evidence is publicly available to support this and it would be very useful if one of the outcomes of the review was the provision of an analysis of the information UKBA/BIS has gathered that prompted the review and which indicates what type of institutions are involved and what qualifications are being offered."*

UKCISA wrote:

> *"…it has been extremely difficult to develop any considered responses to areas which might be tightened without seeing any assessment or evidence of where perceived abuse might lie – such as specific countries or courses or colleges. You gave a few examples when we met but we would still wish to see a breakdown of those applications which are causing concern, by type of course (both subject area and awarding body).*
>
> *Without that it is difficult to know what specific problem areas are to be addressed. The only information in the public domain appears to be a number of anecdotes from several anonymous immigration officers broadcast on Five Live. This does not appear to be a firm or reliable basis for an enquiry of this importance."*

As detailed, and lamented, by the House of Lords Merits Committee (see below), responses to the consultation have not been published. We urge the House to press for these. Nothing more was heard until 31 January 2010 when a press release on the UK Border Agency website[2] announced that from the following day, 1 February 2010, the would no longer accept new applications under the Tier 4 student route of the points-based system from visa application centres: in North India (New Delhi, Jalandhar and Chandigarh), Bangladesh (Dhaka, Sylhet and Chittagong) and Nepal (Kathmandu). The press release states:

> *"The head of the points-based system at the UK Border Agency, Jeremy Oppenheim, said:*
> *[…]*
> *'We continually check and monitor all student applications and education providers to ensure that they meet the required standards set by the points-based system. As a result of this routine monitoring and an increase in applications, we have temporarily stopped accepting new applications from North India, Nepal and Bangladesh while we carry out an investigation to ensure they are all genuine. "*

That suspension remains in force and nothing further has been heard. ILPA considers that the suspension necessitates Ministerial Authorisation under s.19D of the Race Relations Act 1976 as amended. That there has been illegal immigration from a country gives no indication as to whether those coming to study from that country have broken the rules. That one student has broken the rules is not an indicator of whether another student will do so. Guilt by association can be no part of an

[2] http://www.ukba.homeoffice.gov.uk/sitecontent/newsarticles/2010/January/46-tier4-suspension

equitable system. ILPA normally receives notification of Ministerial Authorisations but it has received none in respect of this change and has no reason to think that any authorisation has been issued.

Then, on Sunday 8 February 2010, the Home Secretary, speaking on the Andrew Marr programme on the BBC announced the changes 'with immediate effect'. Parliament was subsequently told of them on 10 February 2010 in a written Ministerial Statement[3] and on that date HC 367 was laid before parliament and information appeared on the UK Border Agency website.[4] Given that the changes required changes to the Immigration Rules, and that these have to go through the negative resolution procedure in parliament, the changes could not be made with immediate effect.

On 22 February 2010 a UK Border Agency press release stated 'We have now implemented the final phase of Tier 4 of the Points-Based System', although HC 367 had yet to come into force. Then, on 18 March 2009, there was a further written Ministerial Statement which was relayed to the House of Lords by the Lord West of Spithead[5] announcing another Statement of Changes in Immigration Rules HC 439, which makes further changes to the Tier 4 system for students and universities and colleges, changes heralded in the 10 February Written Ministerial Statement.

ILPA suggests that the whole process has been unsatisfactory, from start to finish and deplores the making of statements to the media before making them to Parliament and the provision of inaccurate information as to the timing of implementation in the media. We are reminded of the comments of Lord Justice Ward, in *MA (Nigeria) v Secretary of State for the Home Department* [2009] EWCA Civ 1229 commenting on the UK Border Agency *"I ask, rhetorically, is this the way to run a whelk store?"*

HC 367 and implications for the wider Points-Based System

There is a mismatch between the concerns that Ministers say they wish to address and the changes effected by HC 367. The concerns are about enforcement and compliance. But HC 367 does not address enforcement; it addresses eligibility for Tier 4 and the conditions of leave for those coming to the UK under Tier 4.

Tier 4 places obligations on UK-based educational institutions as 'sponsors' of students. Tiers 2 and 5 of the Points-Based System also place obligations on UK-based sponsors. Thus responsibility for immigration control is devolved upon third parties. The incentive for compliance is the ability to bring in students or workers at all. The penalty for non-compliance is a loss of the ability to bring in students or workers, and potential financial penalties or even criminal prosecution. This 'outsourcing' of immigration control begs the question: *quis custodiet ipsos custodies?*

Audits of sponsors are, as ILPA understands it, intended to be a key part of enforcement. HC 367 appears to be predicated on the idea that a person could use

[3] *Hansard* HL WS 10 February 2010, Cols 56 to 58
[4] http://www.ukba.homeoffice.gov.uk/sitecontent/newsarticles/2010/February/tougher-rules-for-foreign-stud
[5] *Hansard* HL Vol 718, Part 59

the Tier 4 route improperly without the connivance of the sponsor or without the sponsor failing to comply with the requirements imposed upon it by the UK Border Agency. HC 367 appears to suggest that the UK Border Agency has so little confidence in its ability to enforce the system that its only recourse is to change who is entitled to come to the UK at all.

Behind this sits the wider question of whether it is appropriate to devolve responsibilities for immigration control to third parties who have other concerns, including competing concerns, and whose primary reason for being is not the enforcement of immigration control. For those employers and educational institutions, the responsibilities are onerous and may interfere with their primary business. Moreover, that immigration is only one of their many concerns may have implications for the extent to which they carry out their obligations and for the fairness of the way in which they carry out those obligations, including implications for the treatment of the migrants they sponsor. In a recent case, a student coming straight off a flight was given a language test at the port of entry. The UK Border Agency was not satisfied that the student had the level of English required. The Agency phoned the college. In the course of the exchange of 'phone calls, the college became concerned that its sponsor licence might be under threat. There and then, it withdrew the offer of the place to the student.

We invite the House to press the Minister on whether the sponsorship systems put in place are considered to be ineffective and whether this has implications for other parts of the Points-Based System.

We concur with UKCISA's comments in response to the review that:

> *"…if the concern, therefore, is that students are not registering to study as required, all the ingredients are now therefore in place to ensure this happens or to sanction sponsor institutions if this does not take place."*

The Written Ministerial Statement announcing HC 367 also made mention of 'Highly Trusted Sponsors', and effect has now been given to this in HC 439. Only those education providers that qualify under the new Highly Trusted Sponsor category will be able to offer courses to Tier 4 (General) students that are at level 3 on the National Qualifications Framework, or at level 6 on the Scottish Credit and Qualifications Framework. Only Highly Trusted Sponsors will be able to offer courses which contain work placements and which are below degree level (excluding foundation degrees). The criteria for highly trusted sponsors include: monitoring the percentage of students ceasing their course before they have completed a third of it (not to exceed 1%, excluding those who have changed institution, left the UK or applied to switch to a different immigration category); ceasing their studies before they have completed 2/3 of them (not to exceed 2%, same exceptions); failing to complete their course (not to exceed 3%, same exceptions); failing to enrol once in the UK (not to exceed 5%) and not having had 'serious concerns raised' (not defined) on a UK Border Agency inspection within the last year. It will quickly be seen that it is very difficult for an educational institution to know whether a student who has left the institution has left the UK or changed course, whereas these are matters within the knowledge of the UK Border Agency. It is not easy for a sponsor to be satisfied that it meets the criteria to be 'highly trusted' and inclusion in this category may turn out to be a poisoned chalice.

HC 367: a discriminatory regime?

Dependants of students

Students are required to satisfy the UK authorities of their ability to support and maintain themselves as a condition of obtaining permission to come to the UK to study. For an initial entry clearance application, a student must demonstrate that the full cost of the fees of the course (first year only if the course is longer) must be available to the applicant, together with £800 for each month of the course in London, £600 outside of London is available to the student (to a maximum of 9 months). There are also rules for subsequent applications.[6] For each dependant in London the applicant must demonstrate that s/he holds £533 (out of London the sum is £400) for each month for which the applicant would, if successful, be granted leave up to a maximum of £ 4,797 (£3,600 out of London).[7] Thus a student must be able to demonstrate self-sufficiency to qualify to come to the UK in the first place. Under HC 367 a family member of a Tier 4 Migrant who is following a course of study of six months or less in duration, will not be permitted to accompany the Tier 4 Migrant to the UK. In addition, where a Tier 4 Migrant is following a course of study that is below degree level (except for those on a foundation degree course), family members will not be permitted to take employment, unless they qualify in their own right to come to the UK to work.

We are unable to identify any sound policy reason why a spouse/partner or child should be unable to accompany a student studying on a short course. Not all spouses and partners will qualify in their own right. For example, people may take advantage of the birth of a child to take 'time out' to study, thus ensuring that they can spend more time with their children. The spouse or partner may be at home as the primary carer of the young child. In other cases, the opportunity to study is just one part of the couple's decision to spend a period of time in another country. Whether a spouse or partner can come as well, and whether they can spend their time productively and meaningfully in the country of destination is, in ILPA members' experience, a factor in clients' decisions to choose the UK as a destination.

As to the prohibition on spouses and partners working, the Migration Advisory Committee reports on access to work for dependants of Tier 1 and 2 workers holders[8] highlight the wider policy concerns around the placing of restrictions on spouses and partners. The Committee noted that it had not been provided with any data on dependants of Tier 4 migrants, although it had been told by the UK Border Agency that the numbers were very small.[9] In the case of workers, where it did have data, it identified that more dependants were women than men.[10] The Migration Advisory Committee report cites ILPA's evidence:

> *"The attitudes taken to dependants working have repercussions across government, including in areas quite other than migration, because they involve grappling with questions of division of labour within the family and of the potential of different family members to*

[6] Statement of Changes in Immigration Rules HC 395 as amended, Appendix C
[7] Statement of Changes in Immigration Rules HC 395 as amended, Appendix E
[8] *Analysis of the Points-Based System: Tier 2 and Dependants*, Migration Advisory Committee, August 2009.
[9] Op.cit, paragraph 3.32
[10] *Analysis of the Points-Based System: Tier 2 and Dependants*, Migration Advisory Committee, August 2009, para 7.62

make economic contributions. Where a government policy affects women's access to the labour market in particular, this has implications for all government policy addressing women's access to the labour market."

The Committee stated:

"7.91 We are also aware of the argument that allowing the spouse to work is a desirable end in itself, in terms of preserving the dignity of the spouse. Working spouses have wider social benefits than the purely economic ones we have focused on.
[…]
7.93 In Chapter 2 we explained that the Government has the power to vary the Immigration Rules to restrict the ability of dependants to work in the UK. Alternatively, it may choose to completely limit access to the UK for dependants. We are aware of the relevant legislation in this area, including Articles 8 and 12 of the European Convention on Human Rights, as well as the relevant legal judgments setting out what signatories to the Convention are able to do in this regard. But we have not looked at this in detail – partly because we think the Government will want to take account of other factors (such as the social impact) and partly because such consideration would be beyond our remit….
[…]
7.95 …On the basis of the limited information we have, there is not sufficient reason to conclude that greater restrictions on working rights for dependants would lead to improved outcomes – either for UK workers or for the UK economy. It is notable that the stakeholder evidence we received on this issue almost universally supported the ability of dependants to work…
.[…]
8.16 We have not been asked to make policy recommendations on the economic contribution of dependants. But, on the basis of the limited information we have, there is not sufficient reason to conclude that greater restrictions on working rights for dependants would lead to improved outcomes – either for UK workers or for the UK economy….

The Migration Advisory Committee report runs to some 173 detailed pages. Yet where dependants of students are concerned, the Government does not appear to have undertaken any equality impact assessment, as noted by the House of Lords Merits Committee, nor to have an evidential base for its decision to restrict the rights of dependants of students to work. The only impact assessment that we have seen is that originally issued for Tier 4 of the Points-Based System; we have seen no separate impact assessment on these changes.

Students and work

As to students themselves, under HC 367, those studying courses below degree level (except for those on a foundation degree course), are permitted to work a maximum of 10 hours a week in term time, a reduction from the previous 20 hours per week they were previously able to work, and that other students are permitted to work. They continue to be allowed to work full-time in vacations. The change appears arbitrary. As indicated above, the student must have funds to be able to support and maintain him/herself without working.

English language

It was indicated in the Written Ministerial Statement announcing HC 367 that to accompany that Statement of Changes, the level of English required of a student would be raised to close to GCSE level. It is unclear to us is why demanding a minimum level of English should be thought to address any concerns about students not studying in accordance with their visa. One reason to come to the UK is to study English. Those who have very basic English may wish to improve it in an

English language environment. Student visitor visas are only suitable for those wishing to study for six months or less and will not therefore meet the needs of all including those who need to achieve a higher level of English within the shortest possible space of time for professional purposes.

It should be for the educational institution to assess whether the student has the linguistic competence/aptitude necessary to study for a particular course. Further tests not based on this criterion, and not assessed by experts, risk introducing discrimination on the grounds of national or ethnic origin into the system.

At the time (July 2008) when ILPA produced its comments on the Equality Impact Assessment for Tier 4 there were approximately 1.5 million students in full time higher education in the United Kingdom of which approximately 240,000 were from non-EU countries[11]. Of the top 10 countries highlighted by HESA in their 2006/7 eight were countries where the principal language is not English. Requirements that students should be able to demonstrate proficiency in English over and above that required for their course amounts to direct discrimination against students from non-English speaking countries.

At that time we wrote

> *"There are 193 member nations of the United Nations. The British Council currently provides English teaching facilities to only 47 of them[12]. There are many students from countries where there is little or no facility for them to learn English before they come to the United Kingdom. This is why the British Council actively promotes English language courses offered by UK educational establishments."*

We drew attention to the judgment in *GOO & Ors [*2008] EWCA Civ 747 (per Sedley LJ):

> *"…Before we turn in detail to our reasons, it is relevant to recall that the admission of foreign nationals to study here is not an act of grace…Not only does it help to maintain English as the world's principal language of commerce, law and science; it furnishes a source of revenue… We therefore find it unsurprising that the legislation and rules, correctly construed, do not place arbitrary or unnecessary restrictions on what foreign students can study here."*[13]

Immigration Law Practitioners' Association
30 March 2010

ANNEXE

Extract from the House of Lords Merits of Statutory Instruments Committee 11th Report of Session 2009-10 HL Paper 62, 23 February 2010

B. Statement of Changes in Immigration Rules (HC 367)

[11] HESA Press release 120. HESA Students in Higher Education Institutions 2006/07
[12] British Council website at: www.britishcouncil.org
[13] Para 4, *GOO & Ors* [2008] EWCA Civ 747

Summary: The purpose of this Statement of Changes in Immigration Rules ("the Statement") is to implement changes to Tier 4 of the Points Based System (PBS). Tier 4 of the PBS caters for international students who wish to study in the United Kingdom. The changes being made by the Statement follow a joint UK Border Agency (UKBA) and Department for Business, Innovation and Skills (BIS) review of Tier 4. The changes include: a new restriction on the amount of work that can be carried out by students below degree level and further restrictions on family members of some students. A linked change to be made in guidance (not in this Statement) will require all students below degree level to demonstrate an existing level of English language at just below GCSE standard. There are some concerns with these changes in some parts of the education sector. As UKBA have provided only limited information on the consultation outcome, and have not yet completed an Impact Assessment, the Committee has been unable to take an informed view of the policy development processes behind this statement.

This instrument is drawn to the special attention of the House on the ground that it may imperfectly achieve its policy objectives.

8. The purpose of this Statement of Changes to the Immigration Rules ("the Statement") is to implement changes to Tier 4 of the Points Based System (PBS). Tier 4 of the PBS caters for international students who wish to study in the United Kingdom and has two categories: Tier 4 (General) Student and Tier 4 (Child) Student. The changes being made by the Statement follow a joint UK Border Agency (UKBA) and Department for Business, Innovation and Skills (BIS) review of Tier 4. The aim of the review was to assess whether Tier 4 policy strikes the right balance between facilitating the access of genuine students to education in the UK, and preventing abuse by economic migrants (see paragraph 7.2 of the Explanatory Memorandum (EM)). The changes were announced in a Written Statement on 10 February [HL WS 10 February 2010, Cols 56 to 58].

9. The specific changes to the Immigration Rules being made by this Statement are:

- a new restriction in the Tier 4 (General) category on students studying courses below degree level (except for those on a foundation course), so that such students may only work up to 10 hours per week during term-time. These students will still be permitted to take full-time employment during their vacation periods as at present;
- the Tier 4 (Child) Student category is being amended in the same way, so a Tier 4 (Child) Student, aged 16 or over, will be permitted to work 10 hours per week during term-time, and full-time during vacations;
- family members of a Tier 4 Migrant who is following a course of study which is six months or less in duration, will not be permitted to accompany the Tier 4 Migrant to the UK; and where a Tier 4 Migrant is following a course of study which is below degree level (except for those on a foundation degree course), family members will not be permitted to take employment, unless they qualify in their own right under other specified parts of the PBS.

10. The Government is also raising the minimum level of English Language course which can be studied under Tier 4 (General). They also intend to require all students on courses below degree level (except those on foundation degree courses) to demonstrate an existing level of English language at B1 level on the Common

European Framework of Reference (see Appendix 1). However, these amendments will be set out in Tier 4 guidance as they do not require a Rules change.

11. In further information submitted to the Committee (Appendix 1) UKBA say that 17 sector representative organisations submitted written evidence to the review of Tier 4, and over 300 representations were received from individuals and individual education providers and related businesses. Meetings were also held with key representative bodies. However, UKBA say that they are not planning to publish an analysis of consultation responses (Appendix 1). This is disappointing and could be considered a missed opportunity to help the House understand the full range of opinions on the changes.

12. In response to questioning from the Committee, UKBA say (Appendix 1) that there is significant support for the introduction of the new Highly Trusted Sponsor (HTS) scheme and also for the introduction of formal English language testing. But they are also aware of some dissatisfaction in the education sector with some of the changes. This includes: English UK (a national association of accredited English language centres) being unhappy about raising the bar for English language students; and English UK and Study UK (which represents both the private higher education and further education sector) being concerned that publicly funded bodies are likely to have HTS status by default whilst their sectors will have to apply. The Committee is also aware that the Independent Schools Council (ISC) believes the changes may have a number of unintended effects for independent schools stemming from the lack of a clear distinction in Tier 4 between adult students and school pupils. ISC are pursuing their concerns with UKBA.

13. English UK and UK Council for International Student Affairs (UKCISA) have also written to the Committee to raise a number of concerns about the Statement (see Appendix 1). UKCISA make a number of procedural and policy points, including that the new prohibition on bringing family members if a student's course is six months or under in duration will have a disproportionate effect on female students and students from the Middle East. The English UK letter focuses mainly on the proposal to raise the requirement for English language competence for students coming to learn English.

14. The Explanatory Memorandum (EM) says that an Impact Assessment (IA) of all the changes stemming from the Tier 4 review will be published on the UKBA website in March 2010. In response to questioning from the Committee, UKBA have said that the IA is being prepared and will be published when the changes take effect. The Committee questions the policy development merit of completing an IA after an instrument has already been laid, let alone having come into effect. The House may wish to satisfy itself that UKBA has followed the Government's own policy on the use of IAs in this respect.

15. The parliamentary scrutiny process for this type of instrument is unusual. The Statement is laid before the House under Section 3(2) of the Immigration Act 1971 ("the 1971 Act"). As set out in the Statement, the changes to the Immigration Rules will come into force on 3 March 2010. Within a period of forty days beginning with the date of laying (and exclusive of any period during which Parliament is dissolved or prorogued or during which both Houses are adjourned for more than four days), either House may pass a resolution disapproving the statement. (In this case the 40

day period is expected to expire on 1 April, subject to any adjournments.) The 1971 Act provides that in the event of such a disapproval, the Secretary of State shall, as soon as may be practical, make such changes or further changes in the rules as appear to him to be required in the circumstances, so that the statement of those changes be laid before Parliament, at latest, by the end of the period of forty days beginning with the date of the resolution (but with the exclusions as above).

16. In neglecting to provide an IA or full information on the consultation responses, UKBA has failed to provide the information necessary to allow the Committee to take an informed view of the policy development processes behind these changes. The lack of this contextual information in particular has impeded the Committee's ability to gauge the significance of the concerns with the changes that has been expressed in some parts of the education sector. Taking this into account, the Committee cannot be satisfied that this Statement will achieve its policy objectives.