ILPA IMMIGRATION LAW PRACTITIONERS' ASSOCIATION
PRESIDENT: IAN MACDONALD QC

ILPA BRIEFING
House of Commons - Committee

June 2009

BORDERS, CITIZENSHIP AND IMMIGRATION BILL – Bill 86

Clause 52
Restriction on studies

At Second Reading, the Lord West of Spithead explained the intention behind this clause [then clause 47]:

> "[The] *Clause… introduces a change to the conditions for foreign students who come to the UK to study to allow their permission to be linked to the particular institution which sponsors them under the points-based system. At the moment students come here, go to an institution, move after a few months and then disappear. In future, we want to ensure that there is a responsibility on both the educational institution and the student to inform us that they will move to another course at another educational institution, which must be properly sponsored and registered.*"[1]

Amendments tabled in the House of Lords in the names of the Baroness Hanham, the Viscount Bridgeman, the Lord Wallace of Saltaire and the Baroness Falkner of Margravine [see Appendix to this Briefing] would not have impeded the Government in that intent. Rather, these amendments would have improved the clause by ensuring that the scope of the power provided by the clause properly matched its stated intention.

Undermining Parliament's constitutional role of scrutiny:
Many Members of Parliament who spoke at the Second Reading debate in the House of Commons on this Bill expressed fundamental concerns that the degree to which Government left detail and substance to secondary legislation was depriving Parliament of its constitutional role, especially where Parliament was not even informed as to what was intended to be included in later regulations[2]. Members also highlighted how this affect human rights[3].

It is to be noted that imposing restrictions on studies may interfere with a person's right to private life. The Court of Appeal has held that access to studies is a significant element of private life[4]. It is a stark omission from the human rights

[1] *Hansard*, HL Second Reading 11 Feb : Column 1132.
[2] see *Hansard*, HC 2 Jun 2009 : Columns 182 (*per* Chris Grayling MP and John Gummer MP), 192 (*per* Chris Huhne MP) and 231-232 (*per* Damian Green MP)
[3] see *Hansard*, HC 2 Jun 2009 : Column 182 (*per* John Gummer MP and Chris Grayling MP)
[4] see *GOO & Ors c Secretary of State for the Home Department* [2008] EWCA Civ 747; and *OA (Nigeria) v Secretary of State for the Home Department* [2008] EWCA Civ 82

impact assessment in the Explanatory Notes that no assessment has made upon this clause.

Given the Government has stated a very specific intention, which applies to a specific class of migrant, for introducing this clause, it is clear that the clause ought, at the least, to be redrafted to do no more than that which it is said is intended or necessary.

The Lord West's response to these matters of fundamental concern was no more than – 'this is the way we normally do things'[5]. Members of Parliament should treat that response with considerable skepticism since it is a license for Government to continue in the vein that was decried at Second Reading. It should be noted that it was precisely the then Home Secretary's response to similar concerns then expressed about her out of the blue announcement of a points-based system for the citizenship regime to be introduced in this Bill[6]. It is an approach that has necessitated substantial litigation – e.g. over successive changes the Government made to the Highly Skilled Migrant Programme[7]. It is an approach that generally provides even less opportunity for parliamentary scrutiny than secondary legislation. It is an approach that is already very much used, arguably overused. In 2003, the Immigration Rules were changed on 4 occasions. From 2004, however, the average number of changes to the Rules each year has been just over 8. In 2008, these were so rushed that twice corrections to the changes had to be announced immediately after changes were introduced; and in recent years the nature and degree of change has led to prayers against changes to the Rules' in both Houses[8].

The Clause and the Amendments tabled in the Lords

The clause would allow for any condition to be imposed that restricted the studies of anyone with limited leave to enter or remain in the United Kingdom. This could include restrictions beyond the requirement that a foreign student is tied to a particular institution, and required to inform the UK Border Agency of any change of institution for the purposes of sponsorship and regulation of the points-based system. It could also include restrictions on any migrant with limited leave to enter or remain, including those who are undertaking or wish to undertake studies in the UK (e.g. to learn English), who are not here as foreign students under the points-based system (e.g. migrant workers, those joining partners or other family members and refugees).

At Second Reading, the Baroness Warwick of Undercliffe expressed qualified support for the clause. She said:

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[5] see *Hansard*, HL Report 4 Mar 2009 : Column 777 ('*However, it is usual practice for the overall architecture of the immigration system to be set out in primary legislation, with the Immigration Rules containing the detail of how the power will be applied…*')

[6] see *Hansard*, HC 2 Jun 2009 : Column 177 (*per* Jacqui Smith MP: '*…using, incidentally, immigration rules, not primary legislation…*')

[7] see the *HSMP Forum Ltd* cases, [2009] EWHC 711 (Admin) and [2008] EWHC 664 (Admin)

[8] Changes to the Immigration Rules (HC 321) in February 2008 led to prayers against in both Houses, and the Government agreement to concessions and ultimately agreement to make further changes to mitigate the initial changes; and Changes to the Immigration Rules (HC 1113) in November 2008 led to a prayer against in the House of Lords: *Hansard*, HL 17 Mar 2008; *Hansard*, HC 13 May 2008; *Hansard*, HL 25 Nov 2008.

> "*Higher education institutions support the new provision that student visas will be linked to particular institutions.*"[9]

Her statement was wholly compatible with the amendments tabled in the House of Lords, which would have limited the clause:

- to enabling restrictions on the place of study; and
- to those migrants who are on student visas.

The Baroness Warwick continued:

> "*I hope the Minister will note that I do not support the provisions of this clause being applied retrospectively to any students already studying in the UK under the current immigration arrangements.*"[10]

The amendments would have removed the retrospective power in the clause. Retrospective powers are often by their nature offensive, and these would allow interference with the studies and private lives of migrants who had come to the UK on the understanding that they were free to change their place of study if that proved necessary or advantageous.

The Baroness Warwick added:

> "*…for the new provision to work effectively, it is necessary for* [the] *Clause to be accompanied by a quick, low-cost mechanism to enable students to move institutions, if they decide that they have made the wrong choice… or if their circumstances change – for example, if their PhD supervisor moves institution.*"[11]

The amendments sought to address the need for a quick mechanism to enable students to move institutions by requiring that the mechanism is operated immediately. However, peers may note that under articles 16(1) and 17(3) of the Immigration (European Economic Area) Regulations[12] the Home Office is required to "*immediately*" issue certain residence documentation[13]. Despite the more modest requirement in the domestic regulations that only a certification of application need be issued immediately, rather than the card itself, there are delays in issuing the certificate and complaints have been made to the European Commission about this.

The need for the mechanism to be low-cost must also be impressed upon the Government. The Baroness Warwick highlighted these points:

> "*At the moment, the Home Office has not set out the process for how students can move institution quickly. Any delays in the Home Office paperwork will mean that such students will not be able to join their new programme or to continue their studies. There is also a cost issue in relation to this. The only information on costs*

[9] *Hansard*, HL Second Reading 11 Feb 2009 : Column 1154
[10] *Hansard*, HL Second Reading 11 Feb 2009 : Column 1154
[11] *Hansard*, HL Second Reading 11 Feb 2009 : Column 1154-1155
[12] SI 2006/1003
[13] Article 16(1) relates to a registration certificate for an EEA national exercising his or her free movement rights or his or her EEA national family member; and Article 17(3) to a certificate of application for a residence card for the non-EEA national family member of an EEA national exercising his or her free movement rights.

suggests that it would cost either £295 for a postal application or £500, in person, for a new visa application to change institution."[14]

In responding to the Second Reading debate, the Lord West offered no answers to the Baroness Warwick's concerns, who was supported by several other peers who spoke during the debate[15]. He did, however, emphasise that:

> "*The provision in the Bill is a relatively limited measure. It ensures that a student who has been sponsored by one institution when they enter to study must seek permission if they wish to change their institution and sponsor.*"

While this may be an accurate description of what the Government intends, it is not an accurate description of the clause. These amendments would address this by limiting the clause to match the Government's stated intention.

As the Baroness Warwick noted at Second Reading, the importance of international students to the UK's educational institutions is substantial. She noted the "*cultural exchange and… diversity*"[16] from which these institutions benefit; and the substantial economic benefit these students bring. By way of example, the Baroness Warwick highlighted that "*There are over 3,000 international medical students in England alone, paying over £100 million in fees*"[17].

In advancing the transfer of judicial reviews by what is now New Clause 4 on the Amendments paper (see separate ILPA briefings on what was clause 48 and then clause 50 during debates in the Lords), the Government has said that it is concerned at the immigration workload of the courts[18]. That concern should be addressed by ensuring that powers given to the Executive do not exceed what is necessary or can be justified. To do otherwise risks increasing the workload of the courts as powers are exercised in situations and for reasons, for which they were not intended and are not necessary but appear convenient to the Executive. This is especially so where the exercise of powers may interfere with people's human rights, including their right to a private life free from unnecessary or disproportionate interference by the State.

During the passage of the UK Borders Bill, the Government said of the power introduced through that Bill to impose residence and reporting conditions on migrants with limited leave to enter or remain:

> "*There is no need to amend the clause by including finer details that can be left to the policy guidance that is to be published later.*"[19]

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[14] *Hansard*, HL Second Reading 11 Feb 2009 : Column 1155
[15] see *Hansard*, HL Second Reading 11 Feb 2009 : Columns 1152 (Earl of Sandwich), 1161 (Lord Wallace of Saltaire), 1173 (Baroness Butler-Sloss), 1186 (Lord Tomlinson) 1193 (Lord Clinton-Davis) and 1203 (Viscount Bridgeman)
[16] *Hansard*, HL Second Reading 11 Feb 2009 : Column 1154
[17] *Hansard*, HL Second Reading 11 Feb 2009 : Column 1155
[18] e.g. see the *Immigration Appeals: fair decisions, faster justice* consultation, p3 (which first proposed the change that clause 50 would introduce at p10) available at: http://www.ind.homeoffice.gov.uk/sitecontent/documents/aboutus/consultations/closedconsultations/immigrationappeals/immigrationappealsconsultation?view=Binary
[19] *Hansard*, HC UK Borders Bill Committee, Ninth Sitting 13 Mar 2007 : Column 304 *per* Joan Ryan MP, Parliamentary Under-Secretary of State for the Home Department

The relevant section of the UK Borders Act 2007 was commenced on 31 January 2008[20]. Almost 18 months after the relevant provision was brought into force (significantly longer since the Bill received Royal Assent), there remains no published guidance on the exercise of this power.

For further information please get in touch with:
Steve Symonds, Legal Officer, steve.symonds@ilpa.org.uk, 020-7490 1553
Alison Harvey, General Secretary, Alison.Harvey@ilpa.org.uk, 020-7251 8383

APPENDIX
Amendments moved in the House of Lords

108E Page 39, line 32, at beginning insert "where leave is granted for the purpose of studies in the United Kingdom"

109 Page 39, line 32, after "restricting" insert "the choice of institution at which he pursues"

110 Page 39, line 33, at end insert -

"( ) Any application to vary the condition imposed by subsection (1) must be considered by the Secretary of State immediately."

110E Page 39, line 34, leave out lines 34 to 36

Purpose

Amendment 108E: This would restrict the power to impose a condition regarding studies so that the condition could only be imposed upon migrants who have been given leave for the purposes of studies, rather than on anyone with limited leave to enter or remain.

Amendment 109: This would limit the condition regarding studies that could be imposed on someone with limited leave to enter or remain so as to only allow for the imposition of a condition that tied the person to studying at a particular institution.

Amendment 110: This would require the Secretary of State to immediately consider any application to vary a condition regarding studies, and will allow peers to probe the Government about how it is envisaged such applications will be handled.

Amendment 110E: This would remove the power to impose conditions regarding studies retrospectively.

[20] SI 2008/99