ILPA IMMIGRATION LAW PRACTITIONERS' ASSOCIATION
PRESIDENT: IAN MACDONALD QC

ILPA BRIEFING
House of Lords - Committee

March 2009

BORDERS, CITIZENSHIP AND IMMIGRATION BILL – HL 15

Clause 47
Restriction on studies

ILPA supports the Baroness Hanham, the Viscount Bridgeman, the Lord Wallace of Saltarie and the Baroness Falkner of Margravine in their opposition to Clause 47's standing part of the Bill.

ILPA supports amendments 108E, 109, 110, 110E the Baroness Hanham and the Viscount Bridgeman

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.

Briefing:
At Second Reading, Lord West of Spithead explained the intention behind clause 47:

> "*Clause 47… 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]

These amendments would not impede the Government in that intent. Rather, if the intention is one to which Parliament is persuaded, these amendments would improve the clause and assist with the intention by ensuring that the scope of the power properly matches its stated intention.

As currently drafted, clause 47 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, Baroness Warwick of Undercliffe expressed qualified support for clause 47. She said:

> "*Higher education institutions support the new provision that student visas will be linked to particular institutions.*"[2]

These amendments would continue to achieve that. Amendment Nos. 109 and 108E are designed to do so by limiting the clause:

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

Baroness Warwick continued:

---

[1] *Hansard*, HL Second Reading 11 Feb : Column 1132.
[2] *Hansard*, HL Second Reading 11 Feb 2009 : Column 1154

> "*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.*"[3]

Amendment No. 110A would remove 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 ot advantageous.

Baroness Warwick added:

> "…*for the new provision to work effectively, it is necessary for Clause 47 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.*"[4]

Amendment No. 110 seeks 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[5] the Home Office is required to "*immediately*" issue certain residence documentation[6]. 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. 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 suggests that it would cost either £295 for a postal application or £500, in person, for a new visa application to change institution.*"[7]

In responding to the Second Reading debate, Lord West offered no answers to Baroness Warwick's concerns, who was supported by several other peers who spoke during the debate[8]. He did, however, emphasise that:

---

[3] *Hansard*, HL Second Reading 11 Feb 2009 : Column 1154
[4] *Hansard*, HL Second Reading 11 Feb 2009 : Column 1154-1155
[5] SI 2006/1003
[6] 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.
[7] *Hansard*, HL Second Reading 11 Feb 2009 : Column 1155
[8] 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)

> "*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 clause 47. 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*"[9] from which these institutions benefit; and the substantial economic benefit these students bring. By way of example, Baroness Warwick highlighted that "*There are over 3,000 international medical students in England alone, paying over £100 million in fees*"[10].

In advancing the transfer of judicial reviews under clause 50 of this Bill (see separate ILPA briefings), the Government has said that it is concerned at the immigration workload of the courts[11]. 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.

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.*"[12]

The relevant section of the UK Borders Act 2007 was commenced on 31 January 2008[13]. More than 12 months after the relevant provision was brought into force (and nearly 18 months after the enactment of the statute), there is no published guidance on the exercise of this power.

The Government said that the power was needed in order to maintain contact with separated children in the asylum system and foreign nationals who had served sentences in the UK but could not be deported[14]. It also said that where reporting

---

[9] *Hansard*, HL Second Reading 11 Feb 2009 : Column 1154
[10] *Hansard*, HL Second Reading 11 Feb 2009 : Column 1155
[11] 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
[12] *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
[13] SI 2008/99
[14] *Hansard*, HL Third Reading 23 Oct 2007 : Column 985 (Lord Bassam of Brighton); *Hansard*, HC Second Reading 5 Feb 2007 : Column 600 (Liam Byrne MP); *Hansard*, HC UK Borders Bill Committee, Tenth Sitting 13 Mar 2007 : Column 311 (Joan Ryan MP)

or residence conditions were imposed, the individual would be notified in writing of the general principles that had been applied in deciding to impose these conditions[15].

ILPA has recently been made aware of an example where reporting and residence conditions have been imposed upon someone who does not fall within either of the groups for whom the power was said to be needed; and where no explanation in writing of any reasons or principles behind the decision has been provided. It is possible that this case results in litigation.

This shows how powers that are too broadly drafted may be imposed upon people, whom Parliament had not intended to be subjected to such powers. The prospect of litigation shows why any concern for the workload of the courts needs to be matched by a commitment to restrain the temptation to grant unnecessarily wide powers to the Executive. The example also shows that Ministerial assurances as to how powers will be exercised and constrained by guidance may not be fulfilled.

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[16]. It is a stark omission from the human rights 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 these amendments ought to be accepted since they do no more than constrain the power in a way that is entirely consistent with the Government's aims.

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

[15] *Hansard*, HL Third Reading 23 Oct 2007 : Column 985 *per* Lord Bassam of Brighton, Mnister of State
[16] 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