

ILPA briefing for the House of Lords debate on Wednesday 7 September 2011 on the regret motion in the name of the Lord Hunt of Kings Heath

“...that this House regrets that it is not clear from the Impact Assessment or Explanatory Memorandum of the Statement of Changes in Immigration Rules (HC 1148) how the findings from the consultation have fed into the development of the policy or the estimates of the costs and benefits of the changes.”

The wording of the motion draws upon the 35th Report of the Committee on the Merits of Statutory Instruments¹ drawing special attention to this instrument.

The Statement of Changes makes a number of different changes to the immigration rules, but the main one of these is to introduce the second tranche of changes to the immigration rules pertaining to students (Tier 4 of the Points-Based System). The first tranche of these changes had been made by HC 908, which was also drawn to the special attention of the House by the Merits Committee.² In its follow up report³ the Committee said

The Committee’s report highlighted that the Statement had been laid without an Impact Assessment (IA) in breach of the Government’s own guidance. The UK Border Agency

(“UKBA”) has now confirmed that they do not intend to publish the IA until June when they lay the next Statement of Changes in Immigration Rules (see Appendix 1). The Committee considers that this approach is highly regrettable.

The Committee was not alone and HC 908 was the subject of two regret motions, one in the name of the Lord Avebury and one in the name of the Lord Hunt of Kings Heath, debated on 16 May 2011.⁴ In its 35th report:

“...the Committee reiterates that it is unacceptable that the IA was not made available when the first tranche of changes were laid before Parliament (IA page 4).”⁵

We annex to this briefing what the Committee has said. The Committee cites the Impact Assessment as containing estimates over the four year appraisal period the UK Border Agency will receive around £160 million less in fee income and that over the four year period, tuition fee income will fall by approximately £170 million, with the total indirect costs of the proposals estimated as being around £3.2 billion over the four year period. The committee highlights all the caveats that surround these figures and doubts them. These are very large sums to sacrifice on the altar of reducing net migration.

¹ *Statement of changes in Immigration Rules*, 35th Report of Session 2011-2012, HL Paper 169 published 30 June 2011.

² *Statement of Changes in Immigration Rules*, 29th Report of Session 2011-2012 HL Paper 137.

³ Further Information: *Statement of Changes in Immigration Rules*, 30th Report of Session 2010-12, , 12 May 2011, HL Paper 144.

⁴ *Hansard* HL Report 16 May 2011, Col 1211ff see

<http://www.publications.parliament.uk/pa/ld201011/ldhansrd/text/110516-0002.htm#11051618000163>

⁵ HL Paper 169, Paragraph 6.

Students

In ILPA's January 2011 response to the consultation on the student immigration system⁶ ILPA highlighted both the loss of revenue for educational institutions and for the Border Agency itself, prefiguring the comments of the Merits' committee. ILPA also expressed 'serious reservations' about the way in which statistical evidence had been used in support of the propositions put forward in the consultation.

ILPA also highlighted that the previous Government's recasting of the student immigration rules, through the Points-Based System, had been in force for less than two years at the time of the consultation and that biometric student identity cards, the introduction of the sponsorship system and the Highly Trusted Sponsor status, as well as a higher level of language testing, were just some examples of the steps taken. It was unclear whether the effect of those measures has been examined for the purposes of the assertions made in the consultation paper.

The effects of lack of proper evidence, for the consultation or for the impact assessment, go beyond an unsound evidence base. They go to the question of fair and equal treatment of persons on the basis of their nationality. This is because, in the words of the Explanatory note to the Statement of Changes

"Students of designated low-risk nationalities attending courses at Highly Trusted Sponsors will not routinely have to present the specified documents at the application stage in respect of their maintenance funds or educational qualifications, although we reserve the right to ask to see those documents. These low risk countries are: Argentina; Australia; British National Overseas; Brunei; Canada; Chile; Croatia; Hong Kong; Japan; New Zealand; Singapore; South Korea; Taiwan (those who hold a passport issued by Taiwan that includes the number of the identification card issued by the competent authority in Taiwan); Trinidad and Tobago; United States of America."

My own immigration history may be lengthy and exemplary, but the way in which I am treated by the UK Border Agency will depend not on this, but on my national origins. That is something about which parliamentarians should be gravely concerned even before those concerns are heightened by the comments of the Merits Committee.

ILPA is concerned that the new rules make provision, in the words of the Explanatory Note, so that

"No points will be awarded for maintenance where the specified documents show that the funds are held in a financial institution with which the UK Border Agency is unable to make satisfactory verification checks. A list of financial institutions which do not satisfactorily verify financial statements will be published on the UK Border Agency website."

We have seen a number of examples of UK Border Agency documentation verification reports that suggest that officials are not over-zealous in attempting to verify documents and leads to concern as to how zealous they will be in attempting to verify finances ('maintenance'). The following are quotations from actual reports issued in 2011:

"Called the number and spoke to (name given) who asked us to scan the document to him and e mail the details.

Tried calling (Name given) since 2 working days however he did not answer the calls nor did he reply to the e mail.

⁶ Available at <http://www.ilpa.org.uk/resources.php/13001/uk-border-agency-consultation-the-student-immigration-system-ilpa-response-of-31-january-2011>

Hence unable to conduct checks.”

“Called the number and spoke to (name given) who confirmed that they will not give any information on the telephone.

He further confirmed that they would only be able to verify the document after they have received a verification fee of Rs 200/-.

Hence unable to conduct further checks.”

“... is listed with the local search engine (name of the website given)

Called the number and spoke to (name given) in the (name of the department given) who mentioned that the university charges a fee to verify documents- Rs.50/- for mark sheets and Rs.200 for degree certificates.

Hence unable to conduct checks.”

These are cases where an applicant, who has paid a substantial fee, is being refused, without any right of appeal, because their documents cannot be verified. They are not being given a chance to pay the fees. In the cases above, the fees are in Indian Rupees, on today's exchange rate they amount to some £2.69. It is not reasonable to refuse an applicant who has paid an application fee of hundreds of pounds, because £2.69 will be charged to certify a document. It is not reasonable to refuse such an applicant because no reply is received to a telephone call in two working days. These are not time limits the UK Border Agency would expect itself to be held to, nowhere near. They are not time limits that it should be imposing on others.

Net migration (those entering the UK for more than one year minus those leaving the UK) is affected by the number of British nationals/settled persons who leave the UK each year and also by the number of persons who migrate from within the EU. Both are outside the Government's control.⁷ Those who come to the UK seeking protection or to join family members are able to assert a right to stay on the basis of the UK's international obligations and thus the Government's ability to stop such migration is circumscribed. That leaves the Government the options of cutting migration for work, or cutting student numbers. Students are a numerically larger group of migrants than those migrating for work and thus cutting student migration can be perceived as central to the Government's aspiration to show any progress toward its aim of reducing net migration.

It is unclear how numerical caps will generate the 'confidence in the [immigration] system' that the Coalition Programme describes as the reason for introducing them if it is perceived that the caps are not having the effect of reducing net migration or if they are seen as being imposed on particular groups simply to meet the numerical target.

The contribution that cutting student migration from outside the European Union might make toward meeting the target is largely illusory. A student who enters the UK, stays for two years and then leaves, contributes to raising the net migration figure by one in the year they arrive, and to lowering it by one in the year that they leave. Years spent in the UK as a student do not count toward an individual's applying for settlement, save where a discretionary application under the long residence rule is made if a person has had continuous leave in the UK for 10 years or more.⁸ Such persons may in any event have powerful cases for being allowed to remain based on Article 8 of the European Convention

⁷ See *Estimating International Migration: An exploration of the definitional differences between the Labour Force Survey, Annual Population Survey, International Passenger Survey and Long-Term International Migration*, Office for National Statistics, undated, available at www.statistics.gov.uk/downloads/theme_population/International_migration_data_differences.pdf

⁸ See HC 395, Immigration Rules, as amended, paragraphs 276A to 276D

on Human Rights (the right to private and family life). Students who stay after their studies do so because they have met the requirements to switch into another category of the immigration rules altogether; for example they have married or formed a civil partnership, or have met the criteria to be allowed to remain in the UK to work.

Student visas are granted for a specific purpose, for a limited period. Students are not allowed, under the conditions of their stay, to have recourse to public funds and public housing while studying in the UK. They must prove that they can cover the full costs of maintaining themselves before they are allowed to come to the UK for to study. They pay fees to the institutions where they are studying and meet their own costs of living. Their hours of work are limited, with a prohibition on filling permanent vacancies. The benefits of the links forged by being able to study in the UK, both for the individuals concerned and others in the countries from which they come, can be examined as to their economical, social and political effects).⁹

The Committee highlights a number of aspects of the changes that parliament may wish to debate and ILPA addresses some of the others below.

- ***To bring into effect new provision for other family members of refugees and beneficiaries of humanitarian protection;***

Provision is made within Part 8 of the Immigration Rules for applications for family reunion with family members of refugees described by the Explanatory Note to the Statement of changes as “relatives who do not form part of the nuclear family but are nevertheless dependent (e.g. elderly parents, grandparents, aunts and uncles and children over the age of 18).”

Prior to this change, these applications were dealt with on a discretionary basis. Their inclusion within the immigration rules is welcome, but less welcome is that unlike the way in which the previous discretionary applications were dealt with, these applicants will have to pay application fees. That a child is over 18 may be the result of how long an application for asylum has taken to process. Refugees have been recognised by the UK as being in need of international protection. Very often they will have experienced persecution and ill-treatment and it is because the UK is satisfied that they would experience such persecution upon return that they have been allowed to remain in the UK. They cannot live with family members in the country of origin, because they would be persecuted there. One of the main needs for refugees must be to have relatives around them: what hope of healing when relatives remain in danger in the country of origin, or in need in a country of exile. ILPA has recently submitted copious evidence on family reunion cases to the Ministry of Justice, because in the Legal Aid, Sentencing and Prosecution of Offenders Bill it is intended to withdraw legal aid from these cases. They count as immigration cases and legal aid is proposed to be withdrawn from immigration cases. Examples of cases in which applicants would now have to pay a fee as well as, if the current proposals become law, meet the costs of legal representation and associated disbursements (such as DNA tests)

Case of S

S wished to sponsor her adult siblings who lived in a refugee camp in the Middle East. All are orphans and S had brought up the younger members of the family. She believed she was in the best position to care for them as both suffered from paranoid schizophrenia. Legal aid solicitors assisted S in making representations for a fee waiver and an application under the family reunion policy for her siblings to join her. They were able also to assist her ensure that the relevant documents from

⁹ See the British Council's 2007 study *Global Value* available at <http://www.britishcouncil.org/eumd-information-research-global-value.htm> and HC 595 *op. cit.*

UNHCR and Red Cross hospitals were translated. Her application was refused without reference to the policy.

Legal aid solicitors assisted her with an appeal which was allowed and she was reunited her siblings. It would have been difficult if not impossible for S to have conducted her case alone. Complex factual and legal matters were involved and S had continuing concern for her siblings, who did in fact attempt suicide before the case was successfully concluded.

It remains the case that UK law, while it recognises the rights of adult refugees to be reunited with their minor children, does not treat children who are recognised as refugees in the same way. They do not have an entitlement to free reunion with their parents. Under the proposals on legal aid they will also have to pay for legal representation. The provisions appear to ILPA wholly discriminatory. A child who is recognised as a refugee is not allowed to stay in the UK just because s/he is separated from family members; the basis of stay is that s/he would be persecuted on return. S/He cannot live with their parents in the country fled. What more important step to take to allow a child to rebuild their life than to allow them to have parents with them. But this does not happen and is getting harder and more costly by the day.

L

L arrived in the UK aged three in 2006 and was recognised as a refugee. He lived with his aunt. He applied for his father, who was living in poor conditions in the third country to which the father had fled to join him. The application was refused as it was not within the rules. He appealed against the decision and was again refused notwithstanding DNA evidence and a social worker report. The application was remitted to an Entry Clearance Officer to make a new decision on the basis of the DNA evidence which confirmed the father son relationship .A further refusal followed. After considerable work on the part of the legal aid solicitors establishing facts and dealing with a child, his absent father and guardian aunt, who knew little of the family's circumstances in the country of origin, the appeal was allowed.

The Home Office applied for and was granted reconsideration of the decision to allow the appeal but following a further hearing the decision allowing the appeal was upheld. This case was particularly difficult given the age and the prolonged procedure which ran to two applications and four tribunal hearings. It is unlikely that L's aunt would have been able to conduct the case on his behalf since the application engaged policies outside the rules .The complex case involved issues of the right to family life and required DNA evidence, an expert social work report and international phone calls.

Academic Technology Approval Scheme

Those concerned about falling standards in Universities and colleges might be interested to learn that the UK Border Agency does not share this view. Far from it. It is now the case that undergraduate courses, such as integrated Masters or other similar courses in the UK, with a postgraduate exit qualification will be subject to the same rules under the Academic Technology Approval Scheme as those affecting postgraduate study in the UK. The list of subjects which require a certificate under the Scheme can be seen in Appendix six to the Immigration Rules. The idea behind the scheme is that it requires a certificate to be obtained where the studies are said to "relate to the transfer of knowledge or skills that could be used in weapons of mass destruction or their means of delivery." ILA is extremely concerned at the way in which the scheme operates. We have seen cases where the combination of the nationality of the applicant and the word 'nuclear' somewhere in the description of the course appears to have been sufficient to produce a refusal of a visa,

although the course does not have, by any stretch of the imagination, any component that could be related to the production of weapons of mass destruction or of their means of delivery. Decisions on applications are frequently of poor quality and can take a long time to deliver, so that even where the refusal is not sensible and can be challenged, the student may be delayed in being able to start the course.

ILPA

7 September 2011

Annexe

Extract from HL Paper 169, 35th Report of the Merits Committee

Summary: This Statement of Changes in Immigration Rules ("the Statement") makes a number of changes to the immigration rules ("the Rules"). Most notably, it introduces the second tranche of changes to the student immigration system in Tier 4 of the Points Based System ("PBS") - this is the focus of the Committee's report. The earlier Statement of Changes in Immigration Rules ("HC 908") setting out the first set of changes to Tier 4 was drawn to the special attention of the House by the Committee. HC 908 had been laid without the Impact Assessment (IA) for the changes to Tier 4 and the Committee also identified significant gaps in the analysis of the responses to the recent consultation on the proposed changes. The Government has now laid the IA and this includes an estimate of the student immigration numbers baseline and an estimate of the impact of the proposed changes on non-EU student net migration. These are heavily caveated and the Committee notes that the current estimate of the impact of the changes on student numbers differs from the Government's earlier estimate. The overall costs of the changes appear significant. The IA estimates these as being over £2.4 billion, with the direct costs including an estimated drop in fee income for UK Border Agency of around £160 million, and a fall in tuition fee income of around £170 million. The Committee regrets that it is not clear from the IA or the Explanatory Memorandum how the findings from the consultation have fed into the development of the policy or the estimates of the costs and benefits of the changes.

This instrument is drawn to the special attention of the House on the ground that it gives rise to issues of public policy likely to be of interest to the House.

1. This Statement of Changes in Immigration Rules ("the Statement") makes a number of changes to the immigration rules ("the Rules"), including:

- To bring into effect changes to the courses for which Academic Technology Approval Scheme certificates will be required;
- To bring into effect new provision for other family members of refugees and beneficiaries of humanitarian protection;
- To make a correction to the Tier 2 (Intra-Company Transfer) provisions and clarify requirements of the Points Based System ("the PBS") Maintenance Rules; and
- To make technical changes to the Rules relating to the English language requirements for spouses.

The Statement also sets out the second set of changes to the Rules governing the student immigration system in Tier 4 of the PBS. The Government ran a public consultation on reform of the Tier 4 immigration system from 7 December 2010 to 31 January 2011. The earlier Statement of Changes in Immigration Rules setting out the first set of changes to the Tier 4 Rules ("HC 908") was drawn to the special attention of the House by the Committee on the grounds that it gave rise to issues of public policy likely to be of interest to the House and that it may imperfectly achieve its policy objectives (29th and 30th Reports of Session 2010-12; 5 May and 12 May 2011). The Tier 4 changes include: restricting permission to work during studies for students applying for entry clearance or leave to remain; restricting the entitlement to bring dependants (partners and children); and students of designated low-risk nationalities attending courses at Highly Trusted Sponsors will not routinely have to present the specified documents at the application stage in respect of their maintenance funds or educational qualifications, although the right to see those documents is reserved.

2. The Government announced the laying of the Statement in a written statement (HL Deb 13 June 2011, WS 56-57). The Committee has focussed on the changes to Tier 4 in the Statement. The House may recall that the Government earlier published a Statement of Intent [1] setting out the full planned changes for the student immigration system. However, HC 908 had been laid without the Impact Assessment (IA) for the changes, and the Committee also identified significant gaps in the analysis of the consultation responses. The Government has now laid the IA for the reform of Tier 4 of the PBS.

Policy objectives

3. The IA says that the Government intends to reduce abuse throughout the immigration system and to reduce net migration significantly; and in order that Tier 4 of the PBS contributes towards these aims, the Government intends to raise the qualifying criteria for students who come to the UK to study (IA page 9). The IA sets out the policy objectives as being to:

- Reduce the areas of the student route that are prone to abuse;
- Reduce net migration overall by the end of the current Parliament;
- Improve selectivity of students to the UK, to ensure they are the brightest and the best;
- Restore public confidence in the immigration system; and
- Ensure that the system is robust and practical to enforce.

The IA considers two options for achieving these policy objectives: to make no changes (the "do nothing option"); and the reform of the student immigration system by the proposed package of measures. The Committee regrets that it is not clear from the IA or the Explanatory Memorandum how the findings from the consultation have fed into the development of the policy.

Impact on student numbers

4. The Government has been clear[2] in its intention to reduce net migration to the UK and the impact of the Tier 4 changes on student numbers should therefore be given proper focus. However, the IA identifies the difficulties in measuring the impact in this regard. In the analysis of the do nothing option, the IA says there is a great deal of uncertainty around the expected path of student visa demand (IA page 13), and the analysis of the risks identifies that the estimation of the impact is not straightforward and is subject to error (IA page 29). Indeed, the IA acknowledges that without a limit on the volume of students allowed to qualify, it is possible that student visas issued will not significantly reduce (IA page 29).

5. The IA includes an estimate of the student immigration numbers baseline (IA page 14). This caveated baseline suggests that there will be between 108,000 and 114,000 non-EU students for each of the five years up to and including 2015. The IA also includes a caveated estimate of the impact of the proposed changes to the student immigration system on non-EU student net migration (IA page 17). This suggests that in 2011 the numbers will fall by 16,000, by 38,000 in 2012, by 61,000 in 2013, by 61,000 in 2014 and by 56,000 in 2015. This is a total estimated reduction of 232,000 over the five years against a total estimated baseline of 558,000. The Committee notes that the Government's earlier estimate[3] of impact on student numbers suggested a reduction in student visas of between 70,000 and 80,000. Furthermore, given the objective of reducing net migration, the Committee would

have expected to see a greater analysis in the IA of the numbers of students who leave the UK at the end of their studies and those who remain.

Costs and benefits

6. The IA estimates the total costs for the changes to student immigration system as being £3,558 million, with the total benefits being £1,119 million (IA page 4). At over £2.4 billion, the estimated overall cost of the package of changes is significant, and the Committee reiterates that it is unacceptable that the IA was not made available when the first tranche of changes were laid before Parliament (IA page 4).

7. The IA divides the costs and benefits into those which are direct and those which are indirect. The direct costs and benefits are those that are immediately related to the implementation of the new policy framework, and which affect the UK Border Agency ("UKBA"), educational institutions, sponsors and employers (IA page 17). The indirect costs and benefits are those which arise as a consequence of the policy, and tend to be more closely associated with changes to wider economic output and labour market activity (IA page 18).

8. In terms of direct costs and benefits, the IA estimates that over the four year appraisal period UKBA will receive around £160 million less in fee income compared to the do nothing option (IA page 19). This is a significant reduction in fee income at a time of budget cuts for UKBA. Although the IA also says that there will be a saving of around £150 million in processing costs, it is not clear whether this is actually a cashable benefit (IA page 20). The IA also estimates that over the four year period, tuition fee income will fall by approximately £170 million (IA page 19). However, this is based on the assumption that for every ten non-EU migrants no longer able to study at all affected institutions, eight of their places would be filled by either EU or British nationals. This is a significant assumption, and as the IA acknowledges, the estimate will be relatively uncertain (IA page 19).

9. The total indirect costs of the proposals are estimated as being around £3.2 billion over the four year period (IA page 23). This figure is based on a number of assumptions of average student expenditure which are explained in detail in Annex 7 of the IA. As indirect benefits, the IA estimates that compared to the do nothing case, healthcare costs will be around £340 million lower, education costs will be around £410 million lower, and the criminal justice system costs will be around £90 million lower (IA page 23).

10. The Committee recognises the difficulty in developing the estimations of the likely costs and benefits of the changes, particularly given some of the gaps in data and the potentially complex range of impacts. However, it is not clear from the IA how the findings from the consultation have fed into these estimations. For example, the estimation of costs to educational establishments would benefit from input from such bodies. This is regrettable as the Government presumably received some useful information given that the consultation specifically asked [4] about the main advantages/disadvantages of the changes, including any financial impacts.

1 'Student visas: Statement of intent and transitional measures' - March 2011. Available at: <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/news/sop4.pdf>

2 For example: 'The Student Immigration System: a consultation - December 2010' Ministerial Foreword page 3

3 'Student Visas' - Statement by Secretary of State for the Home Department (Mrs Theresa May) [HC Debates Column 855 to 871; 22 March 2011]. Available at:
<http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm110322/debtext/110322-0001.htm#11032282000003>

4 'The Student Immigration System - a consultation' - Question 19 (page 29)